Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Decision of the Commissioner for Environmental Information on an appeal made under article 12(5) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations) Case CEI/19/0014

Date of decision: 07 July 2020

Appellant: Lar McKenna

Public Authority: EirGrid PLC (EirGrid)

Third party: ESB

Issues: Whether information is environmental information and, if it is, whether EirGrid was justified in refusing access to it on the grounds of article 9(2)(d), 9(1)(c), and 8(a)(iv) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner affirmed EirGrid's decision, while varying its reasons. He found that the withheld information is environmental information within the meaning of article 3, but that refusal was not justified on the ground of internal communications (article 9(2)(d)). He found that refusal of access to some of the information was justified on the ground of commercial confidentiality (article 9(1)(c)) and refusal of access to the remaining information was justified because disclosure would adversely affect the confidentiality of the proceedings of public authorities (article 8 (a)(iv)).

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Background

The Department of Communications, Climate Action and Environment commissioned a study from external consultants which was entitled "International Practice in the Approach to and Levels of Compensation of Property Owners in Proximity to High-Voltage Transmission Lines". It is clear from details published on the Department's website that this study was one of two undertaken in the context of plans for the North South Interconnector project.

On Friday 7 December 2018 the appellant submitted an AIE request to EirGrid seeking:

1. A copy of submissions made by EirGrid to the Department and/or the consultants in relation to the study.
2. Records of correspondence, communications, consultations and/or minutes of meetings between EirGrid and the Department and/or the consultants in relation to the study, including, but not limited to, any drafts of the study received by EirGrid and any comments made to the draft study by EirGrid.
3. Records of any correspondence, communications and/or meetings between EirGrid and ESB and/or ESB Networks and/or ESB Networks DAC in relation to the study.
4. Records of analysis, discussion and/or meetings in relation to the study carried out by EirGrid following receipt of the final version of the study."

As the appellant did not receive a decision by 6 January 2019, the AIE Regulations deem that the request was refused on 6 January 2019.

On 7 January 2019, EirGrid issued a decision to grant the request in full and released 49 records to the appellant. The appellant asked EirGrid to review its decision, saying that the released information implied the existence of other relevant records which had not been released. On 14 February 2019, EirGrid notified the appellant that due to the complexity of the information involved, it was extending the timeframe of its review in accordance with the Regulations and would issue a decision by 15 March 2019.

The appellant appealed to my Office on 14 March 2019 saying that, because EirGrid's extension of time might not be legally valid, he was appealing against the deemed refusal of his review request. His concerns were well founded: The AIE Regulations do not empower

a review decision-maker to extend time. My investigator raised this with EirGrid and it accepted that it had erred in this regard. EirGrid said that it had extended time in good faith and I accept that. Nevertheless, the extension was invalid.

On 15 March 2019 EirGrid notified the appellant of its review decision. This explained that it had located a further 59 records, which brought the total number of records identified and considered to 108. EirGrid granted full access to a further 40 records, released redacted versions of seven records and refused access to 12 records. Its reasons for withholding information included reliance on articles 9(2)(d), 9(1)(c), and 8(a)(iv).

The appellant confirmed that his appeal challenged EirGrid's refusal to provide full access to the 15 records numbered 73, 77, 81, 82, 83, 85, 86, 87, 94, 95, 98, 101, 102, 103, and 104 in EirGrid's schedule of records.

The records at issue

EirGrid provided my Office with copies of the relevant records and explained why they had been produced:

> "The terms of reference for the study required that the … consultant identify the practice in Ireland for granting compensation to property owners in proximity to high-voltage overhead lines and then compare this with the practice in other European countries. In Ireland responsibility for high-voltage overhead lines rest jointly with EirGrid and ESB. The consultant contacted EirGrid requesting information on the practice in Ireland. EirGrid and ESB then agreed that they would make a joint presentation to the consultant. The two documents in question namely "Landowner Compensation and Approach to Community Gain" and "Statutory compensation summary" were drafted for presentation to the consultant and to inform the study. EirGrid was responsible for drafting the 'Landowner Compensation and Approach to Community Gain' with input and commentary from ESB, while ESB was responsible for drafting the 'Statutory compensation summary' with input and commentary from EirGrid."

The final product of this collaborative report was entitled "Landowner Compensation and Approach to Community Gain" and it included the Statutory Compensation Summary in

appendix 2. EirGrid's original decision maker released the report to the appellant as record 1 in its schedule of records.

The records that are the subject of this appeal fall into three groups:

- Group A: 73, 77, 82, 83, 86, 87, 95, 98, 102 and 104. These are draft versions of record 1 (minus its appendices/draft appendices). Records 82, 83 and 86 are exactly the same document. Record 104 contains the same information as record 102, except that record 104 includes a suggestion that some text should be highlighted.
- Group B: 81 and 85. These are identical drafts of appendix 2 to record 1.
- Group C: 94, 101 and 103. These are redacted emails. Record 94 contains two emails, one of which was released in full. Records 101 and 103 each contain one email.

Access was refused to the group A and B records on the grounds of articles 9(2)(d), 9(1)(c), and 8(a)(iv), and to the redacted information in the Group C emails on the ground of articles 9(2)(d).

My investigator invited ESB, as a relevant third party, to make a submission. The ESB submitted that the withheld information is not environmental information. EirGrid did not argue this point.

I have now completed my review under article 12(5) of the Regulations. In carrying out my review I have had regard to the submissions made by the appellant, EirGrid and ESB. I examined the contents of the records at issue. In addition, I have had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance); Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and *the Aarhus Convention—An Implementation Guide* (Second edition, June 2014) ('the Aarhus Guide') and the jurisprudence of the courts.

What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of review

This case requires me to consider whether any or all of the withheld information is environmental information and, if it is, whether the refusal to provide access to that information is justified under articles 9(2)(d), 9(1)(c), or 8(a)(iv) of the AIE Regulations.

Whether the withheld information is environmental information

Article 3(1) of the AIE Regulations sets out six categories of environmental information, as follows:

> "environmental information" means any information in written, visual, aural, electronic or any other material form on—
>
> (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
>
> (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
>
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
>
> (d) reports on the implementation of environmental legislation,
>
> (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and
>
> (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

ESB's position

The following is a summary of ESB's detailed submission on this issue:

1. Landowner compensation does not have any impact on the environment.
2. Information on compensation is not information on, and does not in any way affect, the state of the elements of the environment or the interaction among these elements, nor does it affect factors affecting or likely to affect the elements of the environment. It therefore does not fall under paragraphs (a) and (b) of the definition.
3. The information at issue does not satisfy parts (d) or (f) of the definition.
4. The placement of an electric line can or is likely to have an effect on environmental elements or factors and that information on such activities can be considered environmental information under part (c) of the definition. However, *compensation* is not a measure or activity affecting or likely to affect the elements or factors.
5. The right of access to environmental information is wide but not unlimited. The requested information is simply too remote to be information 'on' an electric line development.
6. Paragraph 43 of the UK's Court of Appeal judgment in *The Department for Business, Energy and Industrial Strategy and The Information Commissioner & Alex* Henney [2017] EWCA Civ 844 (*Henney*) (available at bailii.org here) set out a "four-step test". ESB applied that test to the current case and submitted its results, as follows:
    a. Why was the information produced? It was provided to the consultants to inform its study on behalf of DCCAE.
    b. How important is the information to that purpose? It was part of the information gathered by the consultants in the course of its study.
    c. How is the information to be used? ESB submitted that it "does not appear that there are any environmental purposes for which [the appellant] could plausibly use this information. The information relates purely to compensation - monetary figures of compensation and negotiating processes" . ESB said it believed that it would be used solely for the appellant's business purposes.

d. Would access to this information enable the public to be informed about, or participate in, decision -making in a better way? ESB submitted that it would not and said that access would not enable the appellant to engage in any environmental decision-making process.

7. The information is not integral to building an electricity network because compensation is not necessary for such development. ESB is under no statutory obligation to pay compensation other than in circumstances where a compensation claim is advanced by a landowner. Compensation is therefore paid in respect of the placing of some, but not all, electricity lines.
8. Compensation "is integral to the process only in circumstances where a landowner claims such compensation in respect of his or her property"…. "This differentiates the *Henney* case where the Court held that you cannot have a smart metering programme without a communications and data component".
9. It added that "The Irish High Court has recently held (in *ESB and the Commissioner for Environmental Information* [2020] IEHC 190 (*ESB v CEI*) at para 50(5)—available at betacourts.ie here) that:

> "'it is not possible to come to a valid decision … without either… specifying how the information is environmental on the content … or how same is integral to the development of electricity infrastructure".

10. The payment of compensation relates to property rights and is not for any environmental purpose.
11. In relation to paragraph (e) of the definition, because compensation cannot be properly assessed until after an electric line has been placed, the requested information cannot be considered to be a cost-benefit or economic analysis or assumption used within the measure.

The appellant's position

The appellant made a lengthy submission on this point. In summary, he argued that compensation is a critical component of the process for evaluating the overall cost of electricity line development, in one case representing twice the cost of the actual physical construction of the line. He referred to page 77 of a document entitled "*CER Transmission and Distribution Price Review*" (*The Review*—published by the Commission for Energy

Utilities [CRU] here) as the source of that claim. He argued that this shows that information on compensation is "even more important to the process of calculating the cost-benefit analysis of the development of electricity infrastructure than the physical costs of construction or indeed any other cost or set of costs combined."

He argued that compensation serves to restrain ESB from causing unnecessary environmental damage because minimising damage minimises compensation.

In relation to ESB's 'four-stage test', he submitted that:

1. The information was produced to inform a study commissioned by a Government department to prepare studies into the North-South Interconnector project.
2. The study was commissioned to inform the Government on an important cost aspect of an activity to be conducted by a semi-state agency.
3. The information is critical to the purpose of the study: Without it there would be no national compensation information available to compare with international levels.
4. In relation to whether access to the information would enable the public to be informed about, or participate in, decision -making in a better way, he described a hypothetical electricity line development in which a choice has to be made about whether to build a line across the shortest route, through an economically inactive Special Area of Conservation (SAC,) or via a longer route, around the SAC, through economically active farmland. He said that the shorter route might have negative environmental impacts but lower construction and compensation costs, while the longer route might have less significant environmental effects but higher construction and compensation costs. He argued that, in order for the public to participate in the consideration of the options for the project, including the decision to place lines overhead or underground, they must have ready access to information on the costs of construction and compensation.

While the appellant explained how access to such information could assist individual affected landowners, I do not regard such private interests as a relevant consideration.

The appellant submitted that if the overall cost of compensation for an overhead line is high enough, the option of placing the line underground becomes a real consideration for developers and the public.

He submitted that line development is funded entirely from public monies in the form of levies imposed though consumers' electricity bills and therefore, indirectly, the public has an interest in the manner in which compensation is paid for such development.

He denied ESB's assertion that the payment of compensation is not necessary for the development or operation of the electricity network. (I note that ESB did not deny that compensation claims *may* arise in any powerline project involving private land: its point was that compensation arises only *if* a claim is made.)

The appellant submitted that information on compensation may be considered to be a cost benefit or economic analysis or assumption used within a measure referred to in paragraph (c) i.e. electricity line development, and said this is borne out by submissions made by ESB to the CRU when requesting the approval of expenditure on transmission line projects. By way of an example, he quoted page 46 of *The Review*, which noted significant differences between estimated project costs and actual costs determined post-completion.

He argued that if ESB excluded compensation from the cost-benefit analysis or an economic analysis of electricity transmission line development, it would not be possible to predict the actual cost of any particular electricity line because the compensation element would be disregarded despite "making up the lion's share of the cost".

He submitted that "the contention by the ESB that when "an electricity network route is designed and built, the level of compensation is unknown and is therefore not used in any way when designing the network is not correct" and he cited a passage from page 76 of *The Review* as proof of this point. (I note that that passage does not say that where no agreement is reached and compensation is claimed, the amount of compensation is determined before the line is built.)

Assessment

I am satisfied, and ESB accepts, that the placement of an electric line is likely to have an effect on environmental elements or factors set out in parts (a) and (b) of the definition of environmental information, and that ,as a result, information on such measures or activities can be considered environmental information under part (c) of the definition.

The Court of Appeal in *Henney* stated that identifying the ”measure” that the relevant information is “on” may require consideration of the wider context. The study into which the EirGrid/ESB submissions fed was undertaken against the background of the proposed development of the North-South Interconnector between the transmission networks of Ireland and Northern Ireland. Bearing in mind this wider context, I am satisfied that this project is the relevant measure in this case. It was likely to affect elements of the environment e.g. by affecting landscape through the construction of electricity lines or other infrastructure. While the study states that it was not undertaken to provide recommendations in relation to how compensation should be provided in the course of that project, it is clear that the project envisaged that compensation would be provided in accordance with EirGrid and ESB’s standard practice. As the withheld information described that practice, it was relevant to the project at that point in time.

It is a matter of public record that Motions were passed in Dáil and Seanad Éireann in 2017 calling for an updated independent study into the North-South Interconnector. The study in relation to which EirGrid and ESB submitted record 1 to the Department was one of two studies, which, according to the Department’s website, were commissioned to address the main points of the motions as well as key concerns expressed by parties opposed to the development. I am satisfied that information “on” the North South Interconnector Project is environmental information in the ordinary meaning of the expression “information on”. The question now is whether the withheld information is “information on” that project within the meaning of the AIE legislation.

I do not see that there is anything in *Henney* as relied upon by the ESB that would undermine my conclusion above. While the questions posed in *Henney* do not, in my view, set out an exhaustive “four stage test”, they may be useful in assessing whether information is environmental information. I do not think it is necessary to consider this further here because I am satisfied that the information at issue is on a measure likely to affect the environment.

The Court in *Henney* rejected a literal reading of the words “any information on” and said that:

> "simply because a project has some environmental impact", it does not follow that all information concerned with that project must necessarily be environmental information… The question is how to draw the line between information that qualifies and information that does not".

The Court noted (at paragraph 47) that:

> "In my judgment, the way the line will be drawn is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information "on" the project for the purposes of [the definition] because it is not consistent with or does not advance the purpose of those instruments".
>
> "My starting point is the recitals to the Aarhus Convention and the Directive…They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as 'on' a given measure".

The Court in *Henney* approved of the Upper Tribunal's finding that information was 'on' a measure because it was 'integral' to the measure as a whole. The ESB argued that the payment of compensation is "not integral to building the electricity network because it is not necessary for such development and it is paid only in respect of some, but not all, electricity lines". It conceded, however, (see ESB's point 8 above) that compensation is integral to the process whenever a landowner claims compensation.

I consider that the ESB's focus on "compensation" is too narrow. ESB is obliged to respect landowners' rights and, as I understand it, there are two ways in which it does this: by paying compensation or by purchasing easements. Either way, it is clear to me that information on how landowners' concerns are addressed in the course of a project that

would erect powerlines over privately owned land (including any associated budget estimates) would be integral to the powerline project itself. The ESB quoted from the *Henney* judgment that "you cannot have a smart metering programme without a communications and data component". Similarly, it does not appear to be possible to have a powerline project which would erect infrastructure on privately-owned land in Ireland without having a 'compensation and/or easement-purchase component' for dealing with landowners' rights and concerns.

The High Court *in ESB v CEI* emphasised the need to consider both the context and the fact-specific contents of records. Paragraph 50 of that judgment indicates that in circumstances such as this I should seek to satisfy myself on whether the records contain environmental information on account of their specific content or whether they contain environmental information on account of being integral to the development of electricity infrastructure. Having examined the contents of the withheld records, I am satisfied that the information in them, consisting as it does of information on Ireland's practice for compensating landowners for electrical infrastructure placed on their land, is integral information 'on' the North-South Interconnector project and, as a result, is environmental information of type (c).

The High Court in *ESB v CEI* noted that the Court of Appeal in *Henney* found that the relevant information was "on" the programme as whole because it was integral to the success of the programme as whole". It seems to me that that expenditure both in monetary terms and in resources dedicated to arbitration etc. on addressing landowners' concerns is such a large part of the budget and resources allocated for any power line project such as the North-South Connector project that it is critical for the project's viability. Expenditure of this type also plays a role in the process of assessing and deciding whether the power lines ought to go to overhead or underground that it is integral to the project. It seems reasonable to conclude that one could not have such a project without a plan (and a budget) for addressing landowners' concerns.

As regards whether access to this information would enable the public (as opposed to the applicant as an individual) to be informed about or participate in a better way in environmental decision making, the factors discussed above are also pertinent in the

context of the necessary discussion by interested parties and the important decision as to whether the line should be placed overhead or underground.

It might be that some or all of the withheld information is also information on economic analyses and assumptions used by the ESB and/or EirGrid within the framework of the North-South Interconnector Project (and similar projects), so as to constitute environmental information of type (e). After all, it is notable that ESB and EirGrid proceed with such projects without necessarily knowing in advance exactly how much they will have to pay to landowners in compensation. It is reasonable to conclude that they do so by relying on the *assumption* that such costs will be similar to those arising from past experience and established practice. In the circumstances, it is not necessary for me to make a finding on this.

Finding: I find that the withheld information is environmental information within the meaning of paragraph (c) of the definition of environmental information set out in article 3(1) of the AIE Regulations.

I turn now to the reasons given by EirGrid for refusing to provide access to environmental information.

Article 9(2)(d) – the internal communications of public authorities

Article 9(2)(d) provides that:

> "a public authority may refuse to make environmental information available where the request concerns internal communications of public authorities, taking into account the public interest served by the disclosure".

The current request concerns communications between EirGrid and ESB. My investigator notified both bodies of his view that a "fundamental question is whether the 'internal communications' ground can ever justify the refusal of access to environmental information on the basis that it was communicated between two entities that are not government departments".

The appellant's position

The appellant argued that:

> "Any communication from one public authority to another, by the simple and plain meaning of the word 'internal', can never be an 'internal communication' because it is a communication to a separate public authority and is therefore an external communication".

He made a detailed submission supporting this view. I will not recite it all here, but I have considered it in full. He acknowledged that the Minister's Guidance says that internal communications "could include internal minutes or other communications between officials or different public authorities", but he noted that it goes on to say that:

> "the use of this exception is discretionary. It should not be resorted to as a simple expedient to protect all internal communications in circumstances where it would be unreasonable to do so. Normally, public authorities would not be expected to invoke this protection for information unless there are good and substantial reasons – not otherwise available in article 8 and 9 – for doing so".

He cited extracts from a guidance document published by the UK's Information Commissioner's Office (ICO) (available at ico.org.uk here) entitled: 'Internal Communications (regulation 12(4)(e)) – Environmental Information Regulations'. One extract says:

> "An internal communication is a communication within one public authority. All central government departments are deemed to be one public authority for these purposes. A communication sent by or to another public authority, a contractor or an external adviser will not generally constitute an internal communication. Essentially, an internal communication is a communication that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal. Communications between other public authorities (e.g. between central government and a local authority, or between two local authorities) will not constitute internal communications."

The appellant submitted that it is clear that EirGrid and ESB do not constitute a single entity.

He cited extracts *the Aarhus Guide*, which says at page 84:

> "Once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an 'internal communication'."

Finally, he referred to my decision in AIE appeal case CEI/17/0007 (available at www.ocei.ie here) in which I said:

> "I note that, if one were to adopt a literal interpretation of the term "internal communications", the majority of the records at issue may be regarded as potentially falling within the ambit of article 9(2)(d). However, in its recent judgment in the case of *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51, the Supreme Court explained that, in interpreting the AIE Regulations, it is not sufficient to have regard to national law and, in particular, the normal principles of statutory interpretation in Irish law. The Regulations must be understood as implementing the provisions of Directive 2003/4/EC (and indirectly the Aarhus Convention) and, as a matter of constitutional law, ought not to go further, but not fall short of, the terms of the Directive. Accordingly, the Court found that, in order to understand the Regulations, it is necessary to understand exactly what the Directive does and means, which may also mean interpreting the provisions of the Aarhus Convention".

EirGrid's position

In its review decision, EirGrid said that:

> "Having regard to [the Minister's Guidance] it is accurate to describe these records as an internal communication of Public Authorities since [it says] that internal communications 'could include internal minutes or other communications, between officials or different public authorities, or between officials and Ministers.'
> These records are internal communications of ESB and EirGrid in relation to matters of joint responsibility under the Infrastructure Agreement."

The Agreement referred to is the "Infrastructure Agreement" made between the ESB and EirGrid on 14 March 2006 (available on the website of the Commission for Regulation of Utilities here). This agreement came about in response to a requirement in regulation 18 of the European Communities (Internal Market in Electricity) Regulations, 2000 (statutory instrument No. 445 of 2000—available at www.irishstatutebook.ie here) for the Boards of EirGrid and ESB to enter into an agreement for the purpose of enabling the transmission system operator (i.e. EirGrid) to discharge its functions under those Regulations.

EirGrid cited clause 2.2 of the Agreement:

> "Each Party is charged with its own statutory and licensed obligations under the TAO Licence [held by ESB] or the TSO Licence [held by EirGrid], as the case may be, which can best be discharged through a relationship which is mutually supportive within the context of this Agreement. This Agreement has been developed on the assumption of a co-operative, enduring and successful relationship while providing for reasonable dispute resolution mechanisms where appropriate; and the Parties will develop and support a co-operative relationship."

It said that clause 8.8.2 of the agreement requires ESB and EirGrid to share information and says:

> "The parties acknowledge that at all stages there will have to be significant day to day interaction between the Transmission System Operator [TSO i.e. EirGrid] and Board [i.e. ESB] personnel'."

EirGrid added:

> "Furthermore, clause 15.1 of the Agreement places an obligation on both parties to maintain the confidentiality of all confidential information shared between them. This fundamental provision is essential for effective communication between the parties required to ensure they fulfil their respective statutory duties".

EirGrid also submitted that:

> "The ability for public bodies to have open communications with each other is essential to efficient administration. The information contained in these records provides details of ESB's internal management of compensation claims from landowners and was shared with EirGrid for the benefit of EirGrid submitting it's report to the Department … on the understanding that this internal communication between ESB and EirGrid would not be disseminated and would be treated as confidential as per the provisions of the Infrastructure Agreement".

EirGrid submitted that it is clear from a literal interpretation of article 9(2)(d) and from the Minister's Guidance that article 9(2)(d) is capable of including communications between EirGrid and ESB.

ESB's position

ESB argued that "the withheld records are internal communications of ESB and EirGrid in relation to matters of joint responsibility under the Infrastructure Agreement.

It cited the Minister's Guidance and denied that the language in the AIE Regulations permit a conclusion that one or both of the public authorities must be a government department in order for the particular exemption to apply.

ESB cited the confidentiality clause in the Agreement and the acknowledgement therein that "at all stages there will have to be significant day to day interaction between TSO [EirGrid] and Board [ESB] personnel".

Assessment

While the part of the request that led to this appeal did not expressly seek internal communications, ESB and EirGrid both argue that the information captured by it and withheld should be regarded as the internal communications of public authorities, on account of the need for both bodies to work closely together on a matter of joint responsibility.

I accept that the records are records of communications between EirGrid and ESB and that each of those bodies is a public authority within the meaning of the AIE legislation.

Neither the Convention nor the AIE Directive define the scope of this exception. The Aarhus Guide expresses the following guidance (at page 85):

- The internal communications exception "does not usually apply to factual materials, even when they are still in preliminary of draft form", and
- "Once particular information has been disclosed by the public authority to a third party it cannot be claimed to be an internal communication".

While the Minister's Guidance states that internal communications *could* include "communication between officials or different public authorities", I note that it does not say that it may include communications between *any* two public authorities.

In my decision in June 2016 on case CEI/15/0002 (available at www.ocei.ie here), I accepted in the context of information shared between associates within the ESB Group that communications between different public authorities could be covered by article 9(2)(d) in

circumstances where the authorities work together on matters of mutual importance. In order to avoid a situation in which the public authorities in the current case might have simply relied on that earlier finding and not put forward their strongest arguments, my investigator notified EirGrid and ESB that I am not bound by the previous decisions of my Office.

The United Kingdom's Information Commissioner regards "all central government departments (including executive agencies)" as "one public authority for the purpose of this exception".

In Ireland, the High Court held in its judgment in *Right to Know CLG and an Taoiseach and the Minister for Communications, Climate Action and Environment* [2018] IEHC 371 (available at www.courts.ie here), (at para 97) that the Government is "undoubtedly" a public authority. That case concerned meetings of the Government and it is notable that even though each Minister present at such meetings is the head of an individual public authority, (i.e. a department) *collectively* as 'the Government' they also constitute a single public authority. I am not aware of any other case in which the courts have upheld a communication between two or more public authorities as the internal communications of public authorities. All in all, I am inclined to agree with the UK ICO's position in relation to Government Departments although, of course, I make no finding on the point since this case clearly does not involve that type of public authority.

I accept that ESB and EirGrid are required to work closely on matters relating to the electricity transmission network and that they worked closely on the records now at issue. However, having considered the scope of internal communications as set out above, I am not satisfied that the communications between ESB and EirGrid in this case constitute 'the internal communications of public authorities' within the meaning of article 9(2)(d) of the AIE Regulations.

Finding: I find that refusal was not justified on the ground of article 9(2)(d) of the AIE Regulations.

Article 9(1)(c) – commercial confidentiality

EirGrid gave this as its second reason for refusing access to the group A and B records. I consider it more appropriate to examine below EirGrid's claim that article 8 (a)(iv) applies to what it says is confidential legal advice in records 102, 104 and the redacted emails in records 94, 101 and 103. Consequently my analysis here under article 9(1)(c) is confined to the other group A and B records.

Article 9(1)(c) provides that:

> "a public authority may refuse to make environmental information available where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest".

In what follows references to "commercial" confidentiality should be understood as including "industrial" confidentiality.

EirGrid's position

EirGrid submitted that:

> "The records include details and comments on ESB's internal approach to negotiating with landowners seeking compensation and specifically in the case of records 81 and 85 the amounts of compensation paid. The release of the records would seriously affect ESB's legitimate economic interests on the basis that it would create a market for compensation payments amongst landowners and thereby prejudice ESB's negotiation position with landowners and with their individual or collective representatives in respect of any future projects".
>
> "In accordance with clause 15.1 [of the Agreement], EirGrid is obliged to maintain the confidentiality of information regarding the business and/or activities of the ESB provided to it by the ESB. Furthermore, clause 15.1.1 sets out that such information should be used exclusively for the purpose for which it was provided, namely for the purposes of the ESB fulfilling its transmission system obligations as transmission system owner".

EirGrid cited the European Communities (Internal Market in Electricity) Regulations 2000 and 2005 (the Internal Market Regulations) and, in particular, regulation 12 of the 2005 Regulations (available at www.irishstatutebook.ie here), which provides that:

> "(1) The transmission system operator shall preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its functions under these Regulations and the Act of 1999 unless required to disclose such information in accordance with law.
>
> (2) The transmission system operator shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.

EirGrid also cited sections 36(1) and 31(c) of the Freedom of Information Act 2014 (the FOIA) as other sources of legal protection.

ESB's position

ESB submitted that this ground justifies the withholding of the group A and B records and it cited section 36(1)(b) of the FOIA as the relevant source of legal protection.

Assessment of the engagement of article 9(1)(c)

It is clear from EirGrid's decision that its concerns about commercial confidentiality arose primarily from its fears about how disclosure would affect the ESB's interests rather than its own. The only argument which EirGrid made concerning the effects of disclosure on its own interests arose from its desire to avoid acting in breach of the confidentiality clause in the Infrastructure Agreement or its confidentiality obligations under the Internal Market Regulations.

I note that the Infrastructure Agreement lists 'compliance with any law' as a circumstance of 'Force Majeure'. Accordingly, while the 'confidentiality clause' establishes that EirGrid and ESB agreed to treat information confidentially, it must be understood as being subject to the caveat "unless disclosure is required by law". Similarly, disclosure would not constitute a breach of the Internal Market Regulations if it is required by law. It follows that if disclosure is required by the AIE Regulations, EirGrid could release the information without

breaching either the Agreement or the Internal Market Regulations. The real sub-issues, therefore, are:

- Whether information within the group A and B records is commercially confidential.
- Whether that confidentiality is protected in law in order to protect a legitimate economic interest.
- Whether disclosure would adversely affect that confidentiality.
- Whether the public interest in disclosure outweighs the interest served by refusal.

Commercially confidential information

I am satisfied that: the group A and B records were treated as confidential by both EirGrid and ESB; they remain confidential and the confidential information that they contain is commercial in nature.

The protection of commercial confidentiality in law

I am satisfied that regulation 12(1) of the 2005 Regulations provides legal protection for commercially confidential information obtained by EirGrid in the discharge of its functions and that this, in the current case, applies to the group A and B records, as they contain information given to EirGrid by ESB. I accept that the purpose of the protection is to protect the "legitimate economic interests" of the provider of the information and that this would include ESB's interest in minimising its costs.

In relation to the FOIA, I note that the focus on section 36 is on the effects of disclosure on 'the person to whom the information relates'. In light of EirGrid's submission, I understand that 'person' to be the ESB. Because of this, I conclude that if section 36 of the FOIA provides for the protection of commercially confidential information in this case, it would not provide protection beyond that which I have already found the 2005 Regulations to provide.

I am also satisfied that regulation 12(2) of the 2005 Regulations provides legal protection for the confidentiality of information about EirGrid's *own* activities which could be commercially advantageous to third parties by prohibiting its disclosure in a discriminatory manner. I understand that the 'legitimate economic interest' served by this protection is the legitimate economic interest of the person who would be commercially disadvantaged by such disclosure.

I accept that the commercial confidentiality of these records is provided for by regulation 12(1) of the 2005 Regulations and their disclosure would cause the loss of their associated commercial confidentiality. I therefore find that article 9(2)(c) applies to these records.

Whether the public interest in disclosure outweighs the interest served by refusal

Each of the parties made detailed submissions which I will not recite here although I have considered them in full. What follows reflects their key arguments.

EirGrid submitted that:

- "The release of the records would seriously affect ESB's legitimate economic interests on the basis that it would create a market for compensation payments amongst landowners and thereby prejudice ESB's negotiation position with landowners and with their individual or collective representatives in respect of any future projects".
- It could "artificially and unnecessarily inflate the rates of compensation that must be paid by ESB to landowners, ultimately affecting the payment of dividends by ESB to the State and/or the costs of electricity for the Irish electricity customers. The benefit to a small number of people should not outweigh the benefit to the entire Irish public…. The public interest is best served in avoiding protracted negotiations with landowners or their representatives which would divert essential resources in ESB and delay the construction or roll out of essential national electricity infrastructure."

ESB submitted that:

- "There is a strong public interest in not creating a 'market for compensation' which may artificially and unnecessarily inflate the rates of compensation that must be paid by ESB to landowners, ultimately affecting the payment of dividends by ESB to the State and/or the costs of electricity for the Irish electricity customers".
- "While the appellant claimed that there is no potential for an artificial or expanded 'market for compensation payments', ESB has never said how large or small such a potential market could be, only that it could exist".
- "If details of the amounts of individual compensation paid by ESB were to become public information, it could result in 'land speculation' along the route of a proposed

new line with prospective compensation payments from ESB motivating the transfer of that land, possibly at distorted prices, with a view to taking advantage of that compensation information".

ESB also submitted that:

- At the time of writing, it had "outstanding compensation claims and the release of sensitive information in relation to compensation and/or details of previously agreed compensation to the public would have a detrimental effect on this process".
- "Negotiations between ESB and landowners are private".
- "[The appellant] is the Director of a company set up to manage compensation claims against ESB. The simple fact that he requests sight of this information makes ESB believe it can and will be used detrimentally against ESB".
- "There is no reason why a market for compensation should be allowed to develop which will have a knock-on effect on the entire public, simply to facilitate the release of information to an individual to further his personal professional business".

The appellant argued that:

- No market for compensation payments amongst landowners exists or can ever exist because a claim against ESB may only be brought when a landowner is served with a Wayleave Notice and where ESB has carried out works on the landowner's lands.
- Any claim may only seek compensation for the loss and damage caused by ESB and that will vary from case to case.
- Where a claim is not settled by agreement, both the claimant and ESB can refer the claim to an independent Property Arbitrator. Any such claim is subject to assessment under the rules of the Acquisition of Land (Assessment of Compensation) Act 1919 Act. These rules are based on the Principle of Equivalence which require that the landowner is left in the same financial position after the Compulsory Purchase Order as they were prior to the process, no better, no worse. Spurious or artificially inflated claims are not possible.
- The ESB did not express any concerns when it provided information to EirGrid to feed into the study.

- While EirGrid has claimed that disclosure would prejudice ESB's negotiating position with landowners, it has not suggested how this might occur.
- The availability of independent assessment of the amount of compensation to ESB means that ESB is not prejudiced or 'cornered' in any negotiations it may wish to conduct with a landowner.

The appellant submitted that the public interest is best served by disclosure because the information relates to the expenditure of public monies for public infrastructure projects by public bodies and are funded by all electricity consumers.

I note that the subject matter does not involve Compulsory Purchase Orders. Also, while the appellant relies to a considerable extent on the availability of arbitration to ensure that ESB cannot be disadvantaged by disclosing information on compensation payments, that view does not take account of ESB's interest in avoiding arbitration and its associated time delays and costs.

Whatever a 'market for compensation payments' might be, I accept that compensation may involve negotiation and, in any negotiation, knowledge by one party of previous agreements made by the other party can strengthen the negotiation position of the first party and weaken that of the second.

In relation to the group B records, my investigator asked ESB to explain, in light of the disclosure of one example of claims and payments in appendix 2 of the released record 1, how the disclosure of further examples contained in group B records could be damaging to its interests. ESB said that EirGrid's release of one example is itself damaging to its interests and the release of the other examples would be equally and additionally damaging. I accept this.

I turn now to consider the public interest that would be served by the disclosure of the group A records. In essence, disclosure would give the public access to preparatory drafts of record 1, which was released. While record 1 provides ESB's and EirGrid's official, on the record, description of compensation practice in Ireland, the drafts do not. The drafts contain statements that were revised and corrected in record 1. I see no real danger that the public would be misled by access to what were clearly preparatory drafts. On the other hand, I do not see how, in this particular case, having sight of statements proposed by

officials in preparatory drafts and later corrected in, or dropped from, the final report merits much weighting in terms of how it would help the public to understand and to participate in environmental decision-making.

The appellant argues that the public interest would be best served by the release of the information since it relates to the expenditure of public money paid for by all electricity consumers in Ireland. I accept that there is a public interest in having openness and transparency in the expenditure of public funds. However, this must be weighed against the public interest in the amounts so paid being kept to a minimum and the real possibility that release of the information could adversely affect this interest.

In my view, the disclosure of certain information could strengthen the hand of individual landowners in negotiating compensation. However, I do not regard the *public* interest in access to such information as meriting weight, in light of the minimisation of ESB's costs being itself in the public interest. In light of the release of record 1, I do not consider that access to the group B records would aid the public in understanding compensation practice in Ireland.

On weighing the public interest in access to the relevant group A and B records against the interest served by refusal on the ground of article 9(1)(c), I find that the interest served by refusal outweighs the public interest in disclosure. In this case, a significant amount of information has already been disclosed, including the final version of the document entitled "Landowner Compensation and Approach to Community Gain" and the Statutory Compensation Summary that it contained in an appendix. I therefore consider that in the circumstances of this case the public interest in openness and transparency has been served to a large extent.

Article 10(5) provides that nothing in article 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 9 relates, may be separated from such information. In light of the release of record 1, I do not consider that any useful purpose would be served by my requiring the release of parts of the group A or B records.

Finding: I find that refusal of access to records 73, 77, 81, 82, 83, 85, 86, 87, 95, and 98 was justified on the ground of article 9(1)(c) of the AIE Regulations.

Article 8(a)(iv) – the confidentiality of the proceedings of public authorities

EirGrid gave this ground as its third reason for refusal and I will consider it in relation to records 102 and 104 and the three redacted emails, i.e. records 94, 101 and 103.

Article 8 (a)(iv) provides that:

> " a public authority shall not make available environmental information where disclosure of the information would adversely affect, without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts); or (b) to the extent that it would involve the disclosure of discussions at one or more meetings of the Government, is prohibited by Article 28 of the Constitution.

EirGrid's position

EirGrid's position is that it was engaged with ESB in a confidential process (i.e. the proceedings of public authorities) aimed at preparing a report for the Department and the withholding of the records is justified because they contain legal advice, the confidentiality of which is protected under the common law by legal advice privilege.

EirGrid said that it relied upon previous decisions made by my Office (including Case CEI/17/0053—available at www.ocei.ie here) which recognised that 'proceedings' under this article may be 'proceedings concerning the internal operations of a public authority'. It said that some of the records reflect the advice of its own solicitor and that the ESB's legal advice was also shared with EirGrid and is considered to have both Legal Advice Privilege and "Common Interest Privilege".

My investigator asked EirGrid to identify a copy of its initial request for legal advice from its own solicitor. EirGrid responded saying that, while it is satisfied that this request would have been sent by email, along with record 73, it cannot locate the email itself. EirGrid said that record 73 was prepared by EirGrid and sent for review by an ESB solicitor. Following that review, the revised document was sent to an EirGrid solicitor for review and legal advice. Revised versions were then passed back and forth between the two bodies and these reflected legal advice from ESB's and EirGrid's solicitors.

ESB's position

ESB made much the same claims as EirGrid in respect of these records.

Appellant's position

The appellant expressed doubt that the withheld information contains legal advice. He also expressed doubt that the exchanges of information and draft submissions between ESB and EirGrid could constitute part of the proceedings of public authorities. He submitted that it is a matter for me to review the information and ascertain if it constitutes legal advice.

Assessment

The CJEU indicated in Case C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany*, available here, that even a rule providing generally that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, may be sufficient for the purposes of Article 4(2)(a) of the AIE Directive, provided that the concept of "proceedings" is clearly defined under national law.

While the Aarhus Convention does not define 'proceedings of public authorities', the Aarhus Guide says that:

> "…one interpretation is that these may be proceedings concerning the internal operations of a public authority…."

Legal professional privilege is a common law rule that has been incorporated into section 31(1)(a) of the Freedom of Information Act 2014. It enables a client to maintain the confidentiality of communications made between the client and his/her professional legal adviser for the purpose of obtaining and/or giving legal advice.

As I have outlined in previous decisions on this provision, I accept that the types of communication protected by legal professional privilege may qualify for exception under article 8(1)(iv) of the Regulations. Essentially, Ireland has preserved the confidentiality of "proceedings" that are covered by the FOI exemptions or otherwise by law provided that the requirements for such protections are met.

I now turn to whether legal professional privilege attaches to the records at issue.

I accept that the EirGrid and ESB lawyers involved were acting in their professional legal capacities in a client-lawyer relationship.

Although I am not considering here if the withholding of record 73 was justified on this ground, that record is relevant since EirGrid identified it as the first document on which it requested legal advice. While there is nothing on the face of record 73 to indicate that it was sent with a request for legal advice, I am satisfied from all of the circumstances, including the information in the other records, that it was sent to an EirGrid solicitor, as a draft document along with a request for legal advice. Record 102 contains legal advice from an ESB solicitor. Record 104 contains the same legal advice. Record 94 contains a request for legal advice to an EirGrid solicitor. Records 101 and 103 cite legal advice received from an EirGrid solicitor. Accordingly, I am satisfied that these records constitute confidential communications, made between lawyers acting in a professional legal capacity and their clients, for the purpose of seeking or giving legal advice. I am therefore satisfied that the confidentiality of this aspect to the proceedings is protected in law. In the circumstances of the shared interests of EirGrid and ESB in this case, I do not regard the legal privilege attaching to these communications as having been waived or lost.

I now turn to weighing the public interest served by disclosure against the interest served by refusal. I note that the AIE regime recognises a very strong public interest in maximising openness in relation to environmental matters so that an informed public can participate more effectively in environmental decision-making. At the same time, I recognise the importance of legal professional privilege to the administration of justice and the need for clients and their legal advisers to maintain confidentiality in their communications. I note the High Court's statement in *Martin & Doorley v. Legal Aid Board* [2007] 2 IEHC 76 that "legal professional privilege exists and has been elevated beyond a mere rule of evidence to 'a fundamental condition on which the administration of justice as a whole rests'". As a consequence, I am of the view that exceptional public interest factors in favour of disclosure would have to be found before legal professional privilege could be set aside.

Having weighed up these factors with respect to the withheld information, I find that there are no such exceptional grounds at play here. In reaching this finding, I have considered the

information that is available to the public on this subject including the records released by EirGrid on foot of this request.

Finding: I find that the refusal of access to records 102,and 104 and to the redacted information in records 94, 101 and 103 was justified on the ground of article 8(a)(iv).

Article 10(5) provides that nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information. As I am satisfied that legal privilege applies to the entirety of the withheld information in these records, I do not see any scope for separating and releasing information.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I affirm EirGrid's decision while varying the reasons justifying refusal. The withheld information is environmental information within the meaning of paragraph (c) of the definition of environmental information set out in article 3(1) of the AIE Regulations. Refusal of access was not justified on the ground of article 9(2)(d) of the AIE Regulations. Refusal of access to records 73, 77, 81, 82, 83, 85, 86, 87, 95, and 98 was justified on the ground of article 9(1)(c). Refusal of access to the withheld information in records 94, 101, 102, 103 and 104 was justified on the ground of article 8 (a)(iv).

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Peter Tyndall
Commissioner for Environmental Information
07 July 2020