

**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 2014 (the AIE  
Regulations)  
Case CEI/16/0043**

**Date of decision:** 27 September 2017

**Appellant:** Shell and Topaz Aviation Ireland Limited (the appellant)

**Public Authority:** daa, public limited company (daa)

**Issues:** Whether daa's status as an exempt agency under the Freedom of Information Act 2014 was relevant to its obligations under the AIE Regulations. Whether a commercial agreement for the development and operation of an airport fuel farm fell within the definition of "environmental information".

**Summary of Commissioner's Decision:** In accordance with article 12(5) of the Regulations, the Commissioner reviewed daa's internal review decision. He found that daa is a public authority subject to the AIE Regulations, notwithstanding the provisions of the Freedom of Information Act 2014. He found that daa was not justified in its decision that the agreement does not fall within the definition of "environmental information", as daa had incorrectly applied the provisions of article 3(1) of the AIE Regulations. The Commissioner annulled daa's decision in full and expressed his expectation that daa would make a new decision on the request, in accordance with the AIE Regulations.

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal this decision 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**

This appeal concerns an AIE request made to daa\*, a state owned company which owns and operates Cork Airport and Dublin Airport. In April 2016, following a public tender process, daa awarded CLH Aviación S.A. (CLH) a contract to develop and operate an aviation fuel storage facility at Dublin Airport. The appellant also participated in this tender process. On 5 August 2016, solicitors on behalf of the appellant made a request to daa under article 7 of the AIE Regulations for access to information on "the Service Concession Contract executed by the daa with CLH Aviación S.A."

In a decision of 1 September 2016, daa refused the appellant's AIE request in full on the basis that the information sought did not fall within the definition of "environmental information" set out in article 3(1) of the AIE Regulations. In its decision, daa stated "The thrust of **[the AIE Regime]** is to assist the public in accessing environmental information in order to enable the public to ensure the environment is being protected, to be aware if what is being done or is to be done to protect it. It is not clear to us, how the disclosure of a confidential and commercially sensitive contract, such as the Commercial Contract you are seeking, can possibly serve those environmental interests." Daa also stated that as it was exempt from the provisions of the Freedom of Information Act 2014 (the FOI Act), the appellant's AIE request amounted to an "abuse of process" and "a circumvention of the statutory exemption under the FOI Regime". Daa provided a number of alternative grounds for refusal on the basis of articles 8(a)(i), 8(a)(ii), 8(a)(iv), and 9(1)(c) of the AIE Regulations.

On 9 September 2016, Solicitors on behalf of the appellant requested an internal review of daa's decision pursuant to article 11 of the AIE Regulations. In an internal review decision of 7 October 2015, daa affirmed its earlier refusal on the basis that the contract "does not constitute environmental information". Daa contended that this decision was in line with the Supreme Court judgment in *NAMA v Commissioner for Environmental Information* [2015] IESC 51, and the High Court judgment in *Minch v Commissioner for Environmental Information* [2016] IEHC 91. Daa also cited previous decisions of my Office to justify refusal of the request.

## **Information held by daa**

In order to facilitate my review of this matter, daa supplied my Office with a copy of the "Concession Services Agreement" (the agreement) which was concluded between daa and CLH following the public tender process. The agreement is wide-ranging and regulates many different aspects of the fuel farm development. The appellant requested access to the agreement, and did not limit the scope of its AIE request by reference to any particular subject.

\*The State Airports (Shannon Group) Act 2014 renamed Dublin Airport Authority as "daa, public limited company", styled in the lower case.

## **Scope of review**

Under article 12(5) of the AIE Regulations, my role is to review daa's internal review decision and to affirm, annul or vary it. The scope of my review in this case concerned whether the AIE request made to daa was an abuse of process in circumstances where daa is exempt from the Freedom of Information Act 2014, and whether daa was justified in its decision that the agreement does not fall within the definition of "environmental information" set out in article 3(1) of the AIE Regulations.

The AIE Regulations transpose Directive 2003/4/EC into Irish law. This Directive implements the first pillar of the 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). In making this decision I have had regard to the *Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) published by the Minister for the Environment, Community and Local Government [the Minister's Guidance]; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide].

### **Daa's position**

Daa made a submission to my Office through its solicitors. It contended that the appellant's AIE request amounted to an abuse of process in circumstances where daa is an exempt agency under Part 2 of Schedule 1 to the FOI Act 2014. Daa further stated that the AIE Request was made as an attempt to subvert a tender process, in pursuit of a private interest. It also submitted that the information requested did not fall within the definition of "environmental information" as the agreement "was not integral to the project in an environmental sense". Daa provided alternative grounds for refusal on the basis of the exceptions to disclosure under articles 8(a)(ii), 8(a)(iv), and 9(1)(c).

### **The appellant's position**

The appellant made a submission to my Office through its solicitors. It stated that it did not make the AIE request in an attempt to circumvent the FOI Act, and submitted that the tender process has no bearing on its rights under the AIE Regulations. The appellant contended that the information sought fell within paragraph (c) of the definition of "environmental information". The appellant disputed daa's submission that the agreement was essentially commercial in character. The appellant stated that it was provided with a draft agreement in the course of the tender process, and stated that certain clauses in this draft agreement related directly to the environment and emissions. The appellant sought to rely on a number of previous FOI and AIE appeal decisions relating to disclosure of tender information and contracts. The appellant submitted that the entire content of the agreement cannot be deemed confidential, and in order for article 9(1)(c) to apply a "line by line" analysis of the actual content was required. With respect to the application of article 8(a)(iv), the appellant stated that the agreement does not relate to the "proceedings" of daa. The appellant stated that the agreement was not an "informal or voluntary" communication for the purpose of article 8(a)(ii), and said that it was not seeking access to parts of the agreement which constituted the intellectual property of the parties.

### **Analysis and findings**

## **Consideration of whether exempt public bodies under the Freedom of Information Act 2014 are also outside the scope of the AIE regime**

Section 6(3) of the Freedom of Information Act 2014 (the FOI Act) provides that "an entity specified in Part 2 of Schedule 1...shall not be a public body for the purposes of this Act". Daa is a specified body under Part 2 under its previous name (Dublin Airport Authority plc), and accordingly the provisions of the FOI Act do not apply to daa. Daa did not make any submission on whether it is a public authority subject to the AIE Regulations. I am satisfied that daa, as a state owned company with responsibility for the operation of an airport, is (at a minimum) a public authority within the meaning of paragraph (c) of the definition of "public authority". Daa contended that the appellant's AIE request amounted to an "abuse of process" in circumstances where daa was an exempt body under the Freedom of Information Act. To support this position, daa referred to two previous OCEI appeal cases (CEI/12/0004 and CEI/13/0013) which comment generally on the relationship between the Freedom of Information regime and the AIE regime.

The AIE Regulations transpose obligations of EU law, as set out in Directive 2003/4/EC. The Freedom of Information Act is an Irish law governing access to documents. The mechanisms created by these laws are similar and overlapping to an extent, but are not identical in scope or application. Daa characterised an AIE request made to an FOI exempt body as an abuse of process, on the basis that this would undermine the FOI Act. Daa is correct in saying that a person may seek to access to information through AIE which may not otherwise be accessible under FOI. However, I do not agree with daa that such a request constitutes an abuse of process. Unlike the FOI Act, the AIE Regulations do not exempt specific entities from the definition of "public authority". The AIE Regulations are not subsidiary to FOI, and there is no obligation in law to interpret the AIE Regulations consistently with the provisions and objectives of the FOI Act. Accordingly, the fact that daa is exempt from the provisions of the FOI Act does not determine its obligations under the AIE Regulations. I am therefore satisfied that it was not an abuse of process to make an AIE request to daa on this occasion.

Daa also stated that the appellant made its AIE request following an unsuccessful tender bid, in an attempt to access commercial information. The access mechanism created under the AIE regime does not require an applicant to state its interest in the information sought. Accordingly, the fact that the appellant may have a private commercial interest in the environmental information requested (as has been suggested by daa) is incidental to this appeal and does not determine the scope of the right of access.

I am therefore satisfied that daa's exemption from the provisions of the Freedom of Information Act 2014, and the appellants involvement in a tender process prior to making an AIE request, do not change the scope of the AIE Regulations for the purpose of this appeal. I annul daa's decision to the extent that it found the appellant's AIE request to be an abuse of process.

## **Consideration of whether the agreement falls within the definition of "environmental information"**

The AIE Regulations provide a right of access to a defined category of information, referred to as "environmental information". The term "environmental information" has a specific technical meaning set out in the AIE Regulations. Article 3(1) of the Regulations defines "environmental information" as

"any information in...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..."

The Aarhus Guide states at page 50 that the definition was drafted to be "as broad in scope as possible, a fact that should be taken into account in its interpretation."

This appeal concerns whether the agreement contains information on measures and activities under paragraph (c) of the definition of "environmental information". Daa made no submission on whether the development and operation of the fuel farm constitutes a measure affecting or likely to effect the elements of the environment. I note that the meaning of "likely" in this context was recently addressed by the Court of Appeal in *Minch -v- Commissioner for Environmental Information & Anor* [2017] IECA 223. In its judgment the Court referred to the French language text of paragraph (c), and stated that "the reference to "likely to affect" the environment should really be understood in the sense of being "capable" of affecting the environment". I note that the fuel farm project involves significant construction of permanent infrastructure, and therefore qualifies as a measure and activity affecting and capable of affecting the elements of the environment for the purposes of paragraph (c).

The main dispute in this case is whether the agreement constitutes "information on" the planned fuel farm development, and therefore falls within the definition of environmental information. In this regard, daa referred to the judgment in *Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [C- 316/01]. In that case, the then European Court of Justice found that information on compliance measures relating to the labelling of genetically modified products did not fall within the definition of "environmental information" contained in Directive 1990/313/EEC on the freedom of access to information on the environment (subsequently repealed and replaced by Directive 2003/4/EC). The Court stated at paragraph 25:

"Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision."

In effect, the court was pointing out that information must "fall within" the specified categories in order for the right of access to apply.

In its submissions, daa quoted from my decision in *Raidió Telefís Éireann and the Department of Defence* (CEI/15/0007) where I stated:

"The judgment of the European Court of Justice in *Glawischnig* suggests that right of access is not unlimited, and only information which has more than a minimal connection with environmental factors falls within the definition of environmental information. I am satisfied that information which describes the integral parts of an activity affecting the environment, bearing in mind the aims of the Aarhus Convention, can be said to have a sufficient connection to environmental factors, even if such information does not directly reflect the state of the elements of the environment."

Daa submitted that the agreement "bears only a tenuous link to the environment in the very broadest sense of the word, insofar as it contains provisions that relate to the treatment of ground conditions at the Dublin Airport Fuel Farm". This statement appears to acknowledge that the agreement contains terms relating to compliance with environmental standards. Daa contended that, because the primary purpose of the agreement regulates a commercial relationship, the document in its entirety falls outside the definition of "environmental information". The AIE Regulations provide a right of access to "environmental information" in any material form, notwithstanding that environmental information may be held together with other information in a single document. Accordingly, if the agreement contains environmental information to any extent, daa should provide access to this information (unless one of the exceptions to disclosure otherwise applies). Daa stated that the agreement "does not constitute environmental information". This suggests an analysis of the purpose of the agreement in a general sense, as opposed to an analysis of the information actually contained in the agreement. The relevant test is not whether the agreement intrinsically or purposively relates to the environment, but whether it contains any information which falls within the technical definition of "environmental information". My Investigator contacted daa and asked it to clarify how it had considered the information contained in the agreement when making its decision. Daa declined to clarify how it assessed the information in the agreement.

Daa further submitted that "the environmental information in the Commercial Contract is not integral to the project in an environmental sense, in that, it is not information on the *state* of the elements of the environment or the *environmental impact* of the project". In my view, daa's interpretative approach to the definition of "environmental information" is not correct. Information does not have to be integral to a measure or activity "in an environmental sense" to fall within the definition - it is sufficient for the purposes of paragraph (c) that the information held is information **on** a measure or activity affecting (or likely to affect) the elements of the environment. There is no additional requirement that information must be intrinsically environmental in order to fall within paragraph (c), in the manner suggested by daa. I am therefore not satisfied that daa has correctly applied the definition of "environmental information" to the agreement.

In my view, the correct approach in this case is to consider whether the agreement contains information on the fuel farm development. In conducting this assessment, it would be appropriate to assess whether information contained in the agreement was integral to the fuel farm development. When considering what is integral to a measure or activity, a public authority should have regard to the purposes of the Aarhus Convention and Directive 2003/4/EC, which include public access to information and greater participation in environmental decision-making. Conversely, where information has a minimal connection to

a measure or activity under paragraph (c), bearing in mind the purposes of the Aarhus Convention, it may be said to fall outside the definition of "environmental information".

Daa also submitted that the agreement does not fall within paragraph (c) as it is "not an assessment of what is integral to a measure". In my decision in appeal CEI/15/0007, I stated that public authorities should assess whether information held is integral to a measure or activity for the purpose of paragraph (c). However, I did not suggest that information held must, of itself, be an "assessment of what is integral" to a measure or activity in order to fall within paragraph (c).

Accordingly, I find that daa has incorrectly applied the definition of "environmental information", and as a consequence, I find that it was not justified in its decision that the agreement did not fall within the definition of "environmental information". I annul daa's decision to the extent that daa found that the agreement did not fall within the definition of environmental information.

### **Consideration of appropriate review actions**

The appellant drew my attention to a number of other decisions involving disclosure of contractual information. One case identified by the appellant was the decision of the United Kingdom Information Commissioner in appeal FER0099394. In that case, the UK Information Commissioner decided that the entire content of a waste management contract fell within the definition "environmental information" (as transposed in the equivalent UK Regulations). It is certainly possible, in principle, that the entire content of a commercial contract could be integral information on an underlying measure or activity. In this case, it appears that the agreement is a key document which describes and governs the obligations of the parties in developing and operating the fuel farm. On a preliminary analysis, it is clear that information in the agreement which addresses environmental management and the works to be carried out fall within paragraph (c) of the definition of environmental information.

That is not to say, however, that a commercial contact may not also contain information which has only a minimal connection to measures and activities under paragraph (c). For instance, in my decision in *Phillip Cantwell and Meath County Council* (CEI/15/0021) I found that certain financial records were not integral information on a road-realignment project.

It appears to me that daa has not yet carried out a full substantive assessment of the information contained in the agreement. In order to find that the entire agreement falls within the definition of "environmental information", it would be necessary for my Office to conduct a comprehensive first-instance review of the agreement. I note that the agreement is a lengthy document which covers a wide range of subjects relating to the development of the fuel farm and its future operation. It may have simplified matters considerably if daa had invited the appellant to make a more specific request at the outset, as permitted by article 7(8) of the AIE Regulations.

In the circumstances, I do not consider it appropriate that my Office should undertake a review of the entire agreement to identify environmental information. Daa has primary expertise relating to the agreement, and should make a new decision on the appellant's request which properly applies the AIE Regulations and the definition of "environmental information".

## **Consideration of the exceptions under articles 8 and 9**

Daa and the appellant both made submissions to my Office on the application of articles 8 and 9, and the public interest test under article 10(3). I concur with the appellant's submission that daa cannot refer generally to the nature of the agreement when asserting that exceptions to disclosure apply, and should instead provide specific examples. I note in this regard that article 10(4) states the "grounds for refusal...shall be interpreted on a restrictive basis". I also note that draft versions of the agreement were apparently disclosed to the appellant during the tender process, which may deprive certain information in the agreement of confidentiality (depending on the circumstances of disclosure).

Notwithstanding the above, I make no findings on the application of article 8 or 9 in this case, as consideration of such matters would be premature where it has not yet been established to what extent the agreement contains environmental information.

## **Decision**

In accordance with article 12(5) of the Regulations, I have reviewed daa's internal review decision. I find that daa is a public authority subject to the AIE Regulations, notwithstanding the provisions of the Freedom of Information Act 2014. I find that daa was not justified in its decision that the agreement does not fall within the definition of "environmental information", as its decision incorrectly applied the provisions of article 3(1) of the AIE Regulations. Accordingly I annul daa's decision in full and expect it to make a new decision on the appellant's request in accordance with the AIE Regulations.

## **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  
27 September 2017