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/16/0039

Date of decision: 15 February 2018

Appellant: Lar McKenna

Public Authority: EirGrid plc

Issue: Whether EirGrid was justified, when releasing information in response to an AIE request, in redacting information on the grounds of commercial or industrial confidentiality, as per article 9(1)(c) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that EirGrid was not justified in redacting the information. Accordingly, he varied EirGrid's decision and required it to make the withheld information available to the appellant.

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

Earlier case

On 4 April 2013 the appellant asked EirGrid for copies of all of its records relating to the upgrade of the Maynooth-Reybrook 110kV electricity transmission line. In its subsequent decision, EirGrid part-granted the request while refusing to provide access to certain information on the basis that it constituted commercially sensitive information or internal communications. The appellant sought an internal review of the decision to refuse access to commercially sensitive information. Subsequently, EirGrid affirmed its original decision but on different grounds: It said that the withheld information related to matters which were at issue in proceedings before the High Court and it expressed the view that disclosure would adversely affect the course of justice. The appellant appealed to my Office and the case was designated CEI/13/0015. On 23 May 2016 I gave my decision on the matter (which is available on my website at www.ocei.ie/decisions), as follows:

- I affirmed EirGrid's decision in relation to certain redactions.
- I annulled its decision in relation to certain documents and redactions, and required certain information to be released.
- I annulled EirGrid's decision in relation to: certain other records listed on a schedule of third party records; records which I referred to as the "new technical records"; and "any other existing records" that may have been relevant to the request. I said that "EirGrid should undertake a fresh decision-making process in relation to these records in accordance with the AIE Regulations".

The current case

EirGrid complied with my decision on the earlier case and notified the appellant on 25 July 2016 of its decision to part-grant the information in question. After conducting an extensive and resource-demanding fresh search for information, EirGrid had identified 96 additional relevant records. Following consultations with third parties, EirGrid gave the appellant redacted copies of those records.

EirGrid listed the grounds of justification for the redactions as articles 4(2)(d) (industrial confidentiality) and 4(2)(f) (personal information) in a schedule of records. These are articles from the AIE Directive. The corresponding provisions of the AIE Regulations are articles 9(1)(c) (commercial or industrial confidentiality) and 8(a)(i) (personal information). I therefore took it that refusal was grounded on these articles of the AIE Regulations.

On 8 August 2016 the appellant asked EirGrid to review its decision. EirGrid complied and, in due course, notified the appellant of its review decision. The review decision varied the original decision by releasing a number of additional records which had since been located. It also affirmed the original redactions and stated that no other relevant records were held. On 26 September 2016 the appellant appealed to my Office.

Scope of Appeal

This appeal arose from the appellant's continued dissatisfaction with how his AIE request of 4 April 2013 was dealt with by EirGrid. The appeal was worded as follows:

> This is an appeal following from a decision made by EirGrid which in turn was made following a decision of the OCEI, ref. CEI/13/0015. Following EirGrid's review of the request and the release of certain documents, EirGrid has redacted certain information from the released documents that I now wish to appeal.

My Office notified EirGrid of the appeal and its subject matter.
The appellant later made a submission which may be summarised as follows:

1. He submitted that EirGrid's original decision was flawed, since it was apparent that the person who made that decision had not personally conducted the search for relevant records.
2. He submitted that the release of "only circa 96 records in relation to a project of this scale suggested" that the search for records had been inadequate. He argued, for example, that EirGrid must have additional records of internal communications, records of meetings with Fingal and Kildare County Councils, and records of communications with a named company.
3. He argued that all information redacted for reasons of "personal information" and "industrial confidentiality" should be released.

This submission included matters outside of the earlier stated scope of the appeal. The stated scope of appeal, as received by my Office, related only to information which had been redacted in specific documents which had already been released, and EirGrid had been informed accordingly. I do not consider that an appellant can expand the scope of an appeal in this manner. I therefore regarded the scope of the appeal as being confined to the terms in which it had been made. Notwithstanding this, I wish to put on record my view on the first point made by the appellant in his submission: There is no obligation on a decision-maker to

personally conduct searches for records: A decision-maker's duty is to satisfy themselves that a fully adequate search for relevant information has been undertaken.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review that part of EirGrid's decision that relates to this appeal, and to affirm, annul or vary that part. If I find that redaction was not justified for the reasons given, my role would be to decide whether EirGrid should be required to make any or all of the redacted information available to the appellant.

In conducting my review I took account of EirGrid's submissions and those parts of the appellant's submission that relate to the information at issue. I 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).

Identifying the information at issue

The appellant confirmed to my investigator that he had narrowed his appeal to the redactions made in 5 records which he identified "using EirGrid's numbering" as the following documents:

- Record 6 - Corduff-Ryebrook OHL Uprate Capital Approval.
- Record 22 - 2013-3-6 Maynooth - Ryebrook 110kV - Grant of Section 5 Exemptions by Kildare County Council (r).
- Record 23 - 2013-3-4 Maynooth Ryebrook Sections 5's (r).
- Record 29 - 2013-2-19 CP0747 Capital Approval for Maynooth 100Kv Uprate (r).
- Record 49 - 2012-10-3 CP0668 Corduff-Ryebrook 110kV line uprate draft Rev 5 (r).

EirGrid supplied my Office with unredacted copies of these documents. It is no secret that the redactions concealed three types of information: the name of a company which is an EirGrid customer; figures related to that company's 'Maximum Import Capacity' (or 'MIC') requirement; and the work-email addresses of several people who are not employed by EirGrid. Maximum Import Capacity or MIC is the upper limit on the total electrical demand

which a consumer of electricity can expect to receive from an electrical supply system. It is measured in 'Mega Volt Amps', which is abbreviated to 'MVA'.

My investigator engaged with EirGrid to explore a possible settlement. In response, EirGrid agreed to release the email addresses without accepting that the appellant was entitled to receive that information. This was a welcome development. While this kind of information would appear to be of doubtful usefulness to a member of the public, its disclosure meant that I did not have to consider the status of work email addresses as either environmental information or personal information. It also meant that I could eliminate record number 23 entirely from the scope of my review, as no information other than email addresses was redacted in this document.

The information that remained at issue consisted of the company name and the MIC data. My investigator put it to the appellant that:

> This review arises, as you know, from unfinished business following from the AIE request you made on 4 April 2013. It will not revisit matters which were fully-determined by the Commissioner in his decision CEI/13/0015. In the course of that review, our records show that you had agreed to accept the redaction of the company's name and its MIC increase figure: that information was therefore ruled out of scope of [that] review.

My investigator asked the appellant to explain why the same information should now be regarded as being within the scope of the current review.

The appellant argued that the current review concerns EirGrid's decision on:

> a set of records/information which was never made available to me in the [earlier] case…. I respectfully submit that I cannot be bound by any previous agreement to accept redactions in an earlier case which has long since concluded particularly in circumstances where I had not had sight of the records/information at the time. The records/information in this case were never released to me under the earlier case, and, having viewed the information/records for the first time in this case, I am of the view that the information you refer to i.e. the company's name and the MIC data, is fundamental to the full and proper understanding of the records/information.

In my published decision on case CEI/13/0015 I said:

> The appellant … accepted that the name of the particular demand customer concerned and the MIC increase figure may be redacted from the records at issue in order to

> ‘ensure that Eirgrid's commercial sensitivity obligations are secured’. Subsequently … the appellant accepted that he had "confirmed [his] willingness to accept redacted records", but he asked that this Office nevertheless make a determination on whether the name of the demand customer and the MIC figure should be released. However, once the scope of a review has been narrowed, I do not consider it reasonable to expect this Office to widen it again…. In this case, EirGrid was informed on 30 November 2015 that the appellant was willing to accept redacted records…. In the circumstances … I do not consider that it would be fair or appropriate to make a determination on information that the appellant agreed could be redacted from the records concerned.

I am satisfied that the appellant had no knowledge of the records that are now at issue when he agreed to accept redactions. Had these records been located in the course of EirGrid’s first decision-making process and provided to the appellant in redacted form, he would have had an opportunity to accept or to challenge those redactions. In light of this, and since EirGrid did not argue in the course of the current review that the appellant should be bound by having accepted redactions made to records that are no longer at issue, I conclude that I should regard the appellant’s earlier acceptance of certain redactions as applying only to the records with which he had been provided at that time. I believe, in all of the circumstances, that it would be unfair of me to find otherwise.

While EirGrid did not present any argument based on the appellant’s earlier acceptance of certain redactions, it did argue that I should not review its refusal to release the MIC figures for a different reason. It said:

> It is noted that the Commissioner already considered the issue of the commercial sensitivity of the MIC increase figure in the decision under CEI/13/0015 and determined that the said information was commercially sensitive and should not be released. EirGrid applied redactions to records 1- 41 and 50 - 80 in line with the Commissioner’s decision in terms of commercially sensitive information. It is suggested that the appellant’s appeal in this regard should be rejected *ab initio*, considering the recent decision of the Commissioner that such redactions are valid, permissible and appropriate under the terms of the AIE Regulations.

In my decision on that case I accepted that “having regard to the nature of the records concerned, details of the [electricity] load information and the infrastructure of the substation are correctly regarded as commercially sensitive”. I did not find that the redaction of the

MIC increase figure (in the records which were before me in that case) was justified under the AIE Regulations. I expressly found that such information was outside of the scope of my review. For this reason, I cannot accept EirGrid's argument. I am satisfied that the scope of my current review is confined to EirGrid's refusal to provide access to the company name and its MIC data in the 4 records which remain at issue.

Arguments and Analysis

Information on Emissions

EirGrid refused to provide access to the redacted information on the grounds of commercial or industrial confidentiality, as per article 9(1)(c) of the AIE Regulations. However, article 10(1) provides that:

> Notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment.

In a clear reference to article 9(1)(c) in his request for an internal review, the appellant said:

> [The company's] increase in MIC is measured in MVA, which is Mega Volt Amps. This MVA figure directly influences and describes the strength of the electric and magnetic field emissions from the upgraded line and as such cannot be subject to redaction based on the AIE Regulations.

While EirGrid's internal review decision cited the appellant's reference to emissions, it did not address this issue. Moreover, EirGrid did not mention the issue in any of its dealings with my investigator.

Article10(1) of the AIE Regulations transposed that part of Article 4(2) of the AIE Directive which provides that "Member States may not, by virtue of paragraph 2(a), (d), (f) (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment". The Court of Justice of the European Union (CJEU) has clarified how that part of Article 4(2) of the AIE Directive is to be understood. In its judgment on case C-442/14 (which was delivered on 23 November 2016), the Court held that:

> Information on emissions into the environment within the meaning of … article 4(2) of the [AIE Directive] must be interpreted as covering not only information on emissions as such, but also data concerning the medium to long-term consequences of those emissions on the environment.

The Court also held that 'emissions into the environment' covers the release into the environment of products or substances to the extent that release is actual or foreseeable under normal or realistic conditions. It also held that where article 10(1) applies, "only relevant data which may be extracted from the source of information concerning emissions into the environment must be disclosed where it is possible to separate those data from the other information contained in that source".

Equipped with that clarification, I examined the redacted information. I did not find any information on emissions into the environment within the meaning of the AIE Regulations and the AIE Directive as clarified by the CJEU. The redacted information does not include information *on* emissions into the environment or on *the consequences* of such emissions for the environment. Accordingly, while EirGrid ought to have dealt with issue (even if the appellant had not raised it), I have considered it and I am satisfied that article 10(1) of the AIE Regulations does not apply to the withheld information in this case.

The company name

EirGrid refused to provide access to the company's name, in effect, on the ground of article 9(1)(c) of the AIE Regulations. That article provides that (subject to article 10) a public authority may refuse to make available environmental information 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.

The appellant submitted that EirGrid could not be justified in refusing access to the company name because it had already disclosed that name in the released records and in an application to Kildare County Council for a section 5 declaration (i.e. a declaration that certain development would be exempt from the need for planning permission).

In a submission to my Office, EirGrid noted that in my earlier decision (on case CEI/13/0015) I said that I did "not accept, as a general matter, that the identity of an existing demand or distribution customer, of itself, is commercially confidential". EirGrid said that it would accordingly "remove redactions to the [company's] name in the records and release them to the appellant". In a later submission, EirGrid said that:

> We previously indicated … that we would release [the company's] name. However, on further reflection and in the context of records 6, 29 and 49, and the position we will set out below, we believe the [company's] name should remain redacted.

EirGrid went on to say that it had redacted the company name in one record which was released containing an unredacted table of MIC data. It argued that to unredact the company's name now would link that company with future MIC values and "comprise the release of commercially sensitive information".

In my decision on case CEI/13/0015, while I expressed a view "as a general matter", I did not make a finding that a company's name, in itself, is commercially sensitive information. I therefore do not believe that I should hold EirGrid to its earlier undertaking to release that information.

I proceeded to consider the company's name, not as a general matter, in isolation, but in the context of the specific facts of this case. EirGrid argued that, as the Transmission System Operator, it is required to preserve the confidentiality of "commercially sensitive information". The expression "commercially sensitive information" is defined in article 2 of the European Communities (Internal Market in Electricity) Regulations 2000) (S.I. No. 445/2000) (the Electricity Regulations) as

> "any matter the disclosure of which would materially prejudice the interests of any person".

This raises the question as to whether the disclosure of the company's name in the 4 records at issue would materially prejudice the interest of any person. EirGrid has acknowledged that the appellant is fully aware of the name of the company. EirGrid's expressed concern is with the consequences of "release to the public at large, who would not be aware of [the company's] name being associated with the relevant MIC increases". EirGrid also argued that it is obliged by condition 22 of its Transmission System Operator licence to preserve the confidentiality of commercially sensitive information which it holds. It also argued that condition 34 of the same licence requires it to take all reasonable steps to protect persons and property from injury and damage that may be caused by EirGrid when carrying out its business.

To accept EirGrid's arguments I would first have to be satisfied that the company's name and the MIC figures constitute commercially sensitive information in the circumstances. To be satisfied, I would have to establish (a) that disclosure of the information would reveal to the interested public something they would not otherwise know and (b) that this revelation would materially prejudice the interests of some legal or natural person. I therefore first considered whether interested members of the public who had access to the information about the

relevant electricity works that was in the public domain in general and who also had access to the records that were already released by EirGrid to the appellant in this case (including the 4 redacted records at issue) would be likely to remain unaware of the company's name. I took account of references to the company in publicly available documents, such as online information concerning planning and related matters. I cannot give further details of the various sources of information which I considered, lest it would identify the name of the company.

I concluded that disclosure of the withheld company name would not reveal to the interested public something that they would not otherwise know. I am therefore not satisfied that the disclosure of this information could materially prejudice anyone's interests. It follows that I do not regard that information, in the circumstances, as constituting "commercially sensitive information" within the meaning of S.I. No. 445/2000. Neither do I find any reason to believe that disclosure of the company name would cause injury or damage to persons or property. As that is my conclusion, I must find that EirGrid's refusal to provide access to the company name in the 4 documents at issue was not justified on the ground of commercial or industrial confidentiality.

Of the 4 records, the only information redacted from record 22 was the company name. I therefore did not consider this record any further.

The MIC data

The remaining records at issue are records 6, 29 and 49. I proceeded to consider whether the redaction of MIC figures in these records was justified on the ground of commercial or industrial confidentiality. As before, this required consideration of whether disclosure of the particular information on MVA values contained in those records would materially prejudice the interests of any person (because of EirGrid's reliance on S.I. 445/2000 and its Transmission System Operator (TSO) licence).

The appellant submitted that the company had itself made public its own MIC requirements in an Environmental Impact Statement that is publicly available at the offices of Kildare County Council. I checked this claim and found it to be correct.

I noted that EirGrid did not redact some MVA data in some of the redacted records. EirGrid argued that MVA figures were released unredacted in one table "in the context that the name [of the company] was redacted". EirGrid explained that "the decision to redact this information [i.e. the MIC data] was taken with a view to withholding commercially sensitive

information pertaining to our customer and their business". I appreciate that it is entirely proper for a public authority to be concerned about protecting the interests of customers. However, that concern must be considered in the light of the public authority's public law obligations, including those arising under AIE legislation. Accordingly, it would never be appropriate for a public authority to allow its response to an AIE request to be determined solely by concern to protect a customer's interests: any proposal to protect a customer ought to be rigorously tested in light of the right to environmental information to establish whether refusal to grant the request can be justified. In that process, it is desirable that a public authority would *ask* the customer if it believed that its interests would be materially prejudiced by disclosure, rather than presume that disclosure would have such an effect. My investigator put it to EirGrid that his impression was that EirGrid had not asked the company this question when it was making its decision. He invited EirGrid to correct him if that impression was wrong, but EirGrid did not offer any correction.

I considered the redacted MIC/MVA figures in light of the MIC data that was already in the public domain when EirGrid made its fresh decision on this case. I concluded that EirGrid had not established that disclosure of this information could materially prejudice the interests of any person. Most particularly, I concluded that it had not been established that disclosure of the withheld MVA figures could materially prejudice the interests of either EirGrid or the particular customer-company, in light of the information which both of these entities have already made public. As this was my conclusion, I must find that the redacted MIC values are not, in the circumstances, commercially sensitive information. It follows that the same information is not commercially sensitive information within the meaning of condition 22 of the TSO licence, which requires EirGrid to preserve the confidentiality of the commercially sensitive information that it holds. EirGrid also argued that condition 34 of the licence requires it to take all reasonable steps to protect persons and property from injury and damage that may be caused by EirGrid when carrying out its business. I have no reason to believe that the release of the information at issue could cause injury or damage to persons or property. It would be hard to argue that it could have such an effect given the information which the company itself had made public in the EIS which it submitted to Kildare County Council.

Finding: I find that EirGrid's decision to refuse to provide access to the information at issue in this review for reasons of commercial or industrial confidentiality was, in the circumstances, not justified.

Whether it would be appropriate for me to require EirGrid to make environmental information available to the appellant

As I said in my decision on case CEI/16/0046, which also involved EirGrid:

> It does not necessarily follow that because refusal of an AIE request was not justified for the reason given, or in the absence of any reason being given, that I should proceed to require a public authority to make information available to an appellant. I would need to be satisfied that the imposition of such a requirement would be appropriate in all of the circumstances.

I therefore considered the appropriateness of imposing a formal 'requirement to release information' on EirGrid in this case.

When asked by my investigator if EirGrid believes that disclosure would materially affect its own interests, the interests of the unnamed company or the interests of any other person. EirGrid said that it would respond after discussions with "the affected customer", i.e. the unnamed company. I took this to mean that EirGrid was only concerned about how disclosure might affect the interests of the company in question. In due course, EirGrid relayed the views of the company to my investigator. The company did not consent to release of the information at issue. When my investigator contacted the company directly, it considered the matter further before deciding not to make any submission or put on record any view on the matter. I took from this that the company did not want me to take account of views which it had expressed to EirGrid earlier in this process, and I have therefore not done so.

Late in the process of my Office's investigation, EirGrid drew my investigator's attention to a confidentiality agreement between EirGrid and the company, as well as drawing attention to a confidentiality clause in EirGrid's 'General Conditions of Connection and Transmission Use of System' document. The confidentiality agreement bound each party to respect the confidentiality of information received from the other for a period of 5 years after receipt. I note that records 6 and 49 are over 5 years old. Records 22 and 29 will be 5 years old in the next two months. Moreover, it appears likely that the redacted information contained within the subject records was given by the company to EirGrid over 5 years ago. In any case, the obligations in the agreement, by their own terms, do not apply to information which "is or becomes available to the public other than as a result of a breach" of the agreement. More importantly, the agreement expressly states that it does not apply to disclosure "as may be

required by applicable law or regulation". This is as it should be, since one cannot contract out of public law obligations. The confidentiality obligations contained in the 'General Conditions' document are similarly limited. I accept that these confidentiality issues are evidence that the parties intended to treat certain information as confidential. However, I do not find that these contractual confidentiality considerations alter the conclusions of my review.

As the company concerned chose not to express any view on how I should resolve this case, and as EirGrid did not persuade me that disclosure would cause harm to any interest, I am satisfied that, in all of the circumstances, it would be appropriate for me to require EirGrid to make the redacted information available to the appellant.

Decision

Having reviewed EirGrid's internal review decision in so far it related the name of a customer company and its MIC data, I find that refusal was not justified by the reasons given. I am satisfied that it would be appropriate for EirGrid to be required to make the withheld information available to the appellant.

Accordingly, under the power given to me by article 12(5), I hereby vary EirGrid's decision and require it to make available to the appellant the information that it had redacted in records 6, 22, 29 and 49.

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
15 February 2018