

**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/19/0046

Date of decision: 3 June 2020

Appellant: Mr. M

Public Authority: Dublin Airport Authority [daa]

Issue: Whether daa was justified in refusing the appellant's request for access to a draft report pertaining to an Optioneering study undertaken with regard to a new runway at Dublin Airport under article 9(2)(c) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that daa was not justified in refusing the appellant's request for access to the report at issue under article 9(2)(c) of the Regulations. Accordingly, he annulled daa's decision and directed the release of the report.

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

This appeal relates to a request for environmental information about a study carried out in 2011 into noise levels associated with a proposed second runway at Dublin Airport. On 17 June 2019, the appellant requested “details in relation to the Dublin Airport optimization exercise carried out in 2011.” Upon request from daa to clarify his request, the appellant referred to a separate report produced in relation to noise contours for the runway development, which states: “As the proposed routes are still being developed with the IAA, those from the Dublin Airport optimization exercise undertaken in 2011 have been reused...” The appellant confirmed that his request related to this exercise.

In its decision dated 2 August 2019, daa refused access to the information requested, stating that article 9(2)(c) of the AIE Regulations applied. The appellant requested an internal review of this decision, following which daa affirmed its original decision on 13 September 2019. Neither daa’s original decision nor its internal review decision provided reasons for daa’s application of article 9(2)(c) to the request.

The appellant appealed to my Office on 7 October 2019 on the basis that he did not believe that article 9(2)(c) was correctly applied in the circumstances of his request.

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 and daa and I have examined the contents of the record at issue. I have also 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’).

Scope of Review

My review in this case is concerned solely with the question of whether daa was justified in refusing access to a report entitled “Dublin Airport Runway System Development Optioneering: Noise: Runway Network A vs. B”, which was drafted in April 2011 (the report), on the basis of the exception provided by article 9(2)(c) of the AIE Regulations.

It is not in dispute that the report comprises environmental information within the meaning of article 3(1) of the AIE Regulations.

Analysis and Findings

The grounds for refusal of a request for environmental information are set out in articles 8 and 9 of the AIE Regulations, but any proposed refusal is subject to the provisions of article 10 of the AIE Regulations. Article 10(1) states: "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". Article 10(3) of the Regulations requires public authorities to consider each request on an individual basis and to weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest. I take article 10(4) to mean, in line with the Minister's Guidance, that there is generally a presumption in favour of the release of environmental information. In addition, I note that article 10(5) clarifies, in effect, that a request should be granted in part where environmental information may be separated from other information to which article 8 or 9 of the AIE Regulations applies.

In this case, daa has refused access to the report, details of which are set out below, on the basis of article 9(2)(c) of the AIE Regulations, which is a discretionary provision allowing for the refusal of access to environmental information where the request "concerns material in the course of completion, or unfinished documents or data."

The report was the result of a study commissioned by daa in 2010. The study was carried out and the report was prepared in 2011 by an acoustic consultancy firm. The purpose of the study, as set out in the report's introduction, was "to establish the likely noise effects/ differences associated with two parallel runway configuration options..." In its submissions to my Office, daa states that the report was never finalised, due to a number of external factors that affected the plans for construction of a new runway at Dublin Airport. According to daa, the study carried out in 2010/2011 has been subsumed into the work currently being undertaken for a planning application that is due to be submitted to Fingal County Council at some point later this year. As such, daa maintains that the report remains a draft report and is a component of material that is currently in the course of completion. As a result, daa maintains that the report falls within the exception provided for at article 9(2)(c) of the AIE Regulations.

The appellant does not agree with daa's application of this exception, stating that the report cannot be held out to be unfinished, as the study was carried out in 2011 and is now complete. The appellant also states that there is a clear public interest in disclosing the report, as the report reveals information, to which the public is entitled, about noise and air

pollution and the potential effects on the local community of the options considered by daa in this study.

The Minister's Guidance explains: "Public authorities are not obliged to make available material that is incomplete or in preliminary [or] other draft form; this might apply, in particular, to reports or studies. Normally, a public authority should also be able to withhold information until the completion of a normal periodic statement/ summary of the data concerned. However, public authorities should consider the possibility in particular cases of releasing interim reports or results. In general, ongoing monitoring of environmental emissions should not be treated as unfinished data – but release would seem appropriate when periodic release of information takes place." As this passage indicates, the relevant consideration when assessing the application of article 9(2)(c) of the AIE Regulations is the status of the report itself, and not the overall process to which the report relates.

The Aarhus Guide also sets out that "... the mere status of something as a draft alone does not automatically bring it under the exception. The words 'in the course of completion' suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the "course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. 'In the course of completion' suggests that the document will have more work done on it within some reasonable timeframe."

In this case, it is apparent that the report itself is not being actively worked on by daa. I acknowledge that preparation is in train by daa for a planning process, and review of the results set out in the report forms part of this preparation. However, the existence of a process involving the report does not necessarily render the report a record that is in the course of completion under the AIE Regulations. My view is supported by the Aarhus Guide, which states that "it is clear that the expression 'in the course of completion' relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared."

Although it was not finalised through a formal review process by daa, for a number of reasons the report does not appear to me to be incomplete. First, the exercise detailed in the report was carried out and finished in 2011. Further, the report sets out an assessment and provides recommendations on the options under consideration by daa, which are based on the prevailing circumstances at a point in time. Sections 3 and 4 of the report set out the sensitivities considered in drafting the report and Section 3 specifically confirms that the assessment was carried out in January 2011 based on "actual [departure] tracks occurring today." Section 1 of the report also shows the course of events leading to the production of the report, thereby leaving the reader in no doubt as to the timing and circumstances of the assessment contained therein. The author of the report, as identified by the headed paper and the signatories at the end of the report, is clearly outlined. The absence of any

endorsement or notes on finalisation by daa, or any other competent authority whose input is required prior to submission of a planning application, also indicates to the reader that this report was produced at a certain date, based on documented assumptions, by a consultancy firm for daa. It appears to be a reflection of the prevailing and projected position, as assessed by the consultancy firm for daa, at that point in time. Taking all of these factors into account, I conclude that the report is a standalone document that comprises environmental information in its own right, aside from the context for which it is now in use by daa.

Moreover, the revision and further consultation exercises that are being undertaken at present appear to me to be required in order to update the documentation that will be presented to Fingal County Council as part of the renewed planning application for an additional runway at Dublin Airport. I accept that daa is reviewing and utilising the assessment set out in the report; however the report itself as it pertains to the situation documented in 2011 does not appear to be subject to review or correction. As a consequence, I believe that the report is not an unfinished document within the meaning set out at article 9(2)(c) of the AIE Regulations. Therefore I conclude that the report does not constitute “material in the course of completion” or an incomplete document or incomplete data, to which the exception at article 9(2)(c) of the AIE Regulations applies.

In any event, article 10(3) of the AIE Regulations requires the public interest served by disclosure to be weighed against the interest served by refusal. In considering the public interest served by disclosure, I am mindful of the purpose of the AIE regime, as reflected in Recital (1) of the Preamble to the Directive, which provides: “Increased public access to environmental information and the dissemination of such information contribute to greater public awareness of environmental decision-making and, eventually, to a better environment.” As such, the AIE regime recognises a very strong public interest in openness and transparency in relation to environmental decision-making. I also believe that there is a strong public interest in transparency with regard to how public authorities, such as daa, carry out their functions with regard to environmental factors such as noise.

In its submissions to my office, daa states that the public interest will be served when all finalised documents are submitted to Fingal County Council as part of the planning application, at which stage all relevant materials, including conclusions drawn from noise reports, shall be made public. Before such materials are finalised, daa is of the view that their disclosure might lead to confusion. As I have set out above, I am satisfied that the purpose, scope and date of the report are sufficiently clear to the reader to minimise the risk of confusion. In any event, as a general matter, I do not accept that the possibility of an environmental information being misunderstood or misinterpreted is reason enough to refuse access to that information under the AIE regime.

It is my view that the report contains information that reveals an assessment of environmental factors at a point in time, the disclosure of which would meaningfully contribute to the public understanding of daa's environmental decision making processes and functions. I therefore conclude that, even if I had formed the view that the discretionary exception provided by article 9(2)(c) of the AIE Regulations were applicable to this case, the public interest in disclosure outweighs any interest served by refusal of access to the report.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I have reviewed daa's decision in this matter. I find, for the reasons set out above, that daa was not justified in refusing access to the report under article 9(2)(c) of the AIE Regulations. No other grounds for refusal of the report have been advanced.

As such, I annul daa's decision and direct the release of the report to the appellant.

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
3 June 2020