



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: OCE-100984-J8R7L8

Date of decision: 31 May 2021

Appellant: Mr. P

Public Authority: An Garda Síochána

Issue: Whether An Garda Síochána was justified in refusing access to information relating to mobile phone or other communication masts held on Garda property on the basis that the information is not “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the information at issue was environmental information, within the meaning of article 3(1) of the AIE Regulations.

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

1. On 13 November 2020, the appellant requested:
 - a. a list of all mobile phone masts or other such communications masts held on Garda property around Ireland; and
 - b. a record of how much the Gardaí are paid each year for each of the communication masts, broken down according to the location of the mast.
2. On 18 November 2020, An Garda Síochána refused access to the information sought on the basis that it is not environmental information, within the meaning of article 3(1) of the AIE Regulations.
3. On 18 November 2020, the appellant requested an internal review of the decision. In his request, the appellant stated that the “*information requested is clearly environmental information. Mobile phone masts are emitters of radio frequency electromagnetic fields as per the following information note from the Environmental Protection Agency:* <https://www.epa.ie/radiation/emf/health/mobilephoneshealth/>. This is one of the factors explicitly outlined in Section (b) of the definition of environmental information in the AIE Regulations. The location of such mobile masts is also the subject of a licensing arrangement through the OPW, which is a measure under Section (c) of that definition.”
4. On 1 December 2020, An Garda Síochána made an internal review decision affirming its original decision on the basis that the information requested is not environmental information.
5. The appellant brought this appeal to my Office on 8 December 2020.
6. 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 in his appeal and by An Garda Síochána. I have also 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’).
7. I have had regard to the judgments in *Minch v Commissioner for Environmental Information* [2017] IECA 223 (“Minch”), *Redmond & Another v Commissioner for Environmental Information & Another* [2020] IECA 83 (“Redmond”), *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 (“ESB”) and *Right to Know CLG v. Commissioner for Environmental Information and Raidio Teilifís Éireann* (High Court, 20 April 2021) (“RTÉ”) and the



decisions of the European Court of Justice in Case C-316/01 *Glawischnig v Bundesminister für Sicherheit und Generationen* (“*Glawischnig*”) and C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat* (“*Mecklenburg*”). I have also had regard to the judgment of the Court of Appeal of England and Wales that is referred to in the latter three Irish judgments, *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (“*Henney*”).

8. What follows does not comment or make findings on each and every argument advanced but I have considered all materials submitted in the course of the investigation.

Scope of Review

9. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority’s internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.
10. An Garda Síochána refused the appellant's request for information on the basis that the information was not environmental information. My powers as Commissioner for Environmental Information apply only in respect of environmental information held by or for a public authority. Accordingly, the scope of this review is confined to whether or not the information at issue falls within the definition of “environmental information” in article 3(1) of the AIE Regulations.

Preliminary Matters

11. According to a file note dated 19 November 2020, which was submitted to my Office for the purposes of my review, An Garda Síochána advised the appellant that the Office of Public Works is the owner of Garda stations and offices and that any requests for information on Garda premises should be made to the Office of Public Works. On being notified of the appeal to my Office, An Garda Síochána stated in email correspondence with my Office that the Freedom of Information Office of An Garda Síochána did not seek the requested information. As such, the content of the information was not examined by An Garda Síochána at the time of the decision or the internal review and the records were not initially provided to my Office.
12. On foot of correspondence between my investigator and An Garda Síochána, searches were conducted for the requested information and two records were provided to my Office. Following provision of those documents, An Garda Síochána confirmed its view that the requested information is not environmental information, within the meaning of article 3(1) of the Regulations.

The positions of the parties

13. An Garda Síochána submits that the information requested does not meet the definition of environmental information in either paragraph (b) or (c). In respect of paragraph (b), An Garda Síochána submits that the requested list of masts does not provide information on the factors listed therein; it would merely provide the appellant with a list of mast locations without providing any actual information on emissions. In respect of paragraph (c), An Garda Síochána submits that the only acts which can be considered as possible ‘measures’ are those which are the precise subject of the appellant’s request, namely a ‘list’ of communication masts and a ‘record’ of payments in respect of them. It submits that neither the list nor the record meets the definition of ‘measures’ in



paragraph (c) and that it is not relevant to consider whether licensing arrangements in respect of the masts are measures. An Garda Síochána also submits that the information requested is not information on measures ‘affecting or likely to affect’ the environment.

14. The appellant’s position on appeal is the same as on application for internal review, as I have outlined above.

Analysis and findings

15. The question before me is whether or not the information requested is environmental information within the meaning of article 3(1) of the Regulations, in particular paragraphs (b) and (c) of that definition. In carrying out my review, I have examined the content of the records at issue. It should be noted that, while I am required by article 12(5)(b) of the AIE Regulations to specify reasons for my decision, I must also be careful not to disclose withheld information in my decisions. This means that the detail that I can give about the content of the records, and the extent to which I can describe certain matters, in my analysis is limited.
16. For the reasons set out below, I find that the requested information is environmental information, within the meaning of paragraph (c) of the definition. In light of this finding, it is not necessary for me to consider whether the information also falls within paragraph (b) of the definition.

Approach to the definition of environmental information

17. Article 3(1) of the AIE Regulations provides that:

“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);”.

18. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive. The right of access under the AIE Regulations is to information “on” one or more of the six categories at (a) to (f) of the definition. According to national and EU case law on the definition of “environmental information”, while the concept of “environmental information” as defined in the AIE Directive is broad (*Mecklenburg* at paragraph 19), there must be more than a minimal connection with the environment (*Glawischnig* at paragraph 25). Information does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond* at paragraph 58; see also *ESB* at paragraph 43).

Identification of a measure or activity

19. Paragraph (c) requires the identification of a relevant measure or activity which the information at issue is “on”. Information may be “on” more than one measure or activity (*Henney* at paragraph 42). The appellant pointed to the licensing arrangements underpinning the communications masts as the appropriate measure in this case.
20. An Garda Síochána provided my Office with two template licence agreements in respect of communications masts located on Garda property. An Garda Síochána has assured my Office that *template* agreements were provided because, although there is a separate licence agreement in respect of each installation concerned, those agreements vary only in matters of detail which are specific to each installation, for example the description of the premises and the fee payable in respect of that premises. I am satisfied that I did not need to examine each concluded agreement to come to a conclusion on whether the agreements are measures or activities. Without disclosing the contents of the template agreements, I can confirm that they contain the type of information that one would typically expect to see in an agreement of this nature.
21. Contrary to the submission of An Garda Síochána, in identifying the relevant measure or activity, one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned (*ESB* at paragraph 43). The list of examples of measures and activities given paragraph (c) are not exhaustive, but are illustrative examples (*Redmond* at paragraph 55). I note that the CJEU stated in *Mecklenburg* that the term ‘measure’ serves “merely to make it clear that the acts governed by the directive included all forms of administrative activity” (paragraph 20, emphasis added). The Aarhus Guide indicates that permits, licences and permissions are measures or activities (see p.53).
22. In this case, I consider that each decision to provide a licence enabling the installation of communication masts on Garda property – in other words, the licensing of communication masts on Garda property - is a measure or activity within the meaning of paragraph (c).

Whether the measure or activity is affecting, likely to affect or designed to protect the environment

23. To meet the definition, the measure or activity must be affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) (i.e. the environment) or designed to protect the



environment (*Redmond* at paragraph 57). A measure or activity is “likely to affect” the elements and factors of the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. While it is not necessary to establish the probability of a relevant environmental impact, something more than a remote or theoretical possibility is required (*Redmond* at paragraph 63).

24. I have considered the following publicly available sources in relation to the impact of communications masts on the environment. An Garda Síochána was provided with an opportunity to comment on these sources, but declined to do so.
- Information on the Environmental Protection Agency’s website in relation to electromagnetic fields, [here](#), [here](#) and [here](#) (the ‘EPA website’);
 - European Commission Joint Research Centre, Science for Policy Report, “[Best Environmental Management Practice in the Telecommunications and ICT Services Sector](#)”, March 2020 (the ‘BEMP Report’);
 - Council of Europe, Parliamentary Assembly Resolution 1815 (2011) (“[The potential dangers of electromagnetic fields and their effect on the environment](#)”), 27 May 2011 (the “Assembly Resolution”);
 - Scientific Committee on Emerging and Newly Identified Health Risks, “[Possible effects of Electromagnetic Fields on Human Health](#)”, 21 March 2007 (the ‘SCENIHR Report’); and
 - Commission for Communications Regulation (ComReg) mast [SiteViewer](#).
25. Drawing on these sources, I conclude that there is a real and substantial possibility that the licensing of communication masts on Garda property will affect the environment, for two reasons.
26. First, both radio and mobile phone masts emit radiofrequency electromagnetic fields (EMFs) with a spectrum of 3kHz to 300GHz (BEMP report, paragraph 1.3.1; EPA website). Although there is a lack of good quality data on the specific impact of EMFs on the environment (SCENIHR Report, paragraph 3.7), EMFs appear to have more or less potentially harmful, non-thermal, biological effects on plants, insects and animals as well as the human body, even when exposed to levels that are below the official threshold values (Assembly Resolution, paragraph 4). In light of this, there is a real and substantial possibility that any radio and mobile phone masts will affect the environment and, therefore, that the decision to licence the installation of communications masts on Garda property will affect the environment. I do not consider this to be a remote or theoretical possibility. Although there is sparse scientific data on the *specific* impact on the environment, the impact is sufficiently well known that the Council of Europe Parliamentary Assembly recommended that member states take active measures to reduce the risks posed by EMFs. Such recommended measures include reasonable measures to reduce exposure to EMFs, reconsideration of the scientific basis for the present standards on exposure, and putting in place information and awareness-raising campaigns on the risks of potentially harmful long-term biological effects on the environment and on human health (Assembly Resolution, paragraph 8).
27. Second, telecommunications and broadcasting infrastructures are composed of different structures such as telephone lines, antennas, dishes, radio masts, towers, base stations and buildings, which



may have a visual impact on the character and amenity of the local environment as well as the aesthetic value assigned to the landscape, both in urban and rural contexts (BEMP report, paragraph 1.3.2). It is clear from the briefest perusal of the ComReg SiteViewer that each individual mast is capable of having a visual impact on the surrounding environment. As a result, in my view there is a real and substantial possibility that the licensing of communication masts on Garda property will affect the landscape because there is a real and substantial possibility of a visual impact on the character and amenity of the local environment.

Whether the requested information amounts to information “on” the measure

28. Where the measure or activity that the information is about has the requisite environmental effect, one must consider whether the information is “on” that measure or activity within the meaning of that word as it is used in article 3(1) of the definition. Information is “on” a measure or activity if it is about, relates to or concerns the measure or activity in question. It is not sufficient for information to be merely connected to the measure or activity, but the information need not be specifically, directly or immediately about the measure or activity. It is permissible to consider the wider context in determining whether information is “on” a measure or activity, which may not be apparent on the face of the information itself. (*Henney*, paragraphs 37-44, referred to in *Redmond* at 99, *ESB* at 36-45 and *RTÉ* at paragraph 52). Information that is integral to the relevant measure or activity is information “on” it (*ESB* at paragraphs 38, 40 and 41), while information that is too remote from the relevant measure or activity does not qualify as environmental information (*ESB* at paragraph 43). Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be “on” the relevant measure or activity (*Redmond* at paragraph 99). As “any information ... on” a measure affecting or likely to affect the environment is *prima facie* environmental information, the information at issue does not, in itself, have to affect or be likely to affect the environment (*Redmond* at paragraphs 57 and 59). However, consideration of whether information is “on” the measure does require examination of the content of the information (*ESB*, paragraph 50).
29. In this case the appellant sought (a) a list of all mobile phone masts or other such communications masts held on Garda property around Ireland; and (b) a record of how much the Gardaí are paid each year for each of the communication masts, broken down according to the location of the mast. The request for a list of masts is effectively seeking a list of Garda properties upon which such masts are located. Identification of the premises on which a mast is located under a licence is naturally a key part of the decision to grant such a licence, so such information is clearly about, relates to and concerns the licensing of communications masts on Garda premises. Similarly, the fee to be paid to the licensor in respect of each licence is about, relates to and concerns that licence.
30. I consider that access to the requested information would advance the purposes of the AIE Directive, specifically the purpose of ensuring more effective participation by the public in environmental decision-making. In other words, understanding which Garda properties house communication masts and how much they are paid for those masts would assist the public in participating in decisions to grant or renew such licences, in light of their impact on the environment. As such, I am satisfied that the information requested is information “on” the licensing of communication masts on Garda premises.



Decision

31. Having carried out a review under article 12(5) of the AIE Regulations, I find that the information requested is environmental information, within the meaning of article 3(1) of the AIE Regulations. I therefore vary An Garda Síochána's decision in relation to that information.
32. I require An Garda Síochána to notify the appellant of a new decision on whether it will provide access to that information, within the statutory timeframe provided under article 7 of the AIE Regulations.
33. I note An Garda Síochána's position in its submissions to my Office that the exception in article 8(a)(iv) of the AIE Regulations would apply to the information requested. This view was not communicated to the appellant in its original decision or its decision on internal review. If it decides to refuse access to the information on that or any other ground, I would remind An Garda Síochána that the requirements of the AIE Regulations must be substantively and procedurally adhered to, including by carrying out the balancing exercise required by article 10(3) and (4) of the AIE Regulations (see *Right to Know CLG v An Taoiseach (No. 2)* [2018] IEHC 372, paragraphs 67-71).

Appeal to the High Court

34. 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

31 May 2021