

**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/19/0023**

Date of decision: 15 June 2020

Appellant: Ms A

Public Authority: Environmental Protection Agency (EPA)

Issue: Whether refusal to provide access to radon test reports was justified by article 8(a)(i) of the AIE Regulations because the withheld information is personal information

Summary of Commissioner's Decision:

The Commissioner found, after taking account of the provisions of articles 8(a)(i) and 10 of the AIE Regulations and article 4(2) of the AIE Directive, that the EPA was justified in refusing access to the requested information

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

On 22 January 2019 the appellant submitted an AIE request to the EPA, as follows:

“I live at [address given], Dublin 8. I would be grateful if you could let me know whether any radon test has been carried out at this location. If so, I would be grateful for a copy of the test results. If my dwelling itself has not been tested, I would be grateful for a copy of the ten nearest radon test results held by the EPA”.

The EPA replied saying that:

“As the EPA provides a confidential radon measurement service to homeowners, we cannot release the result of a measurement to anyone other than the person who originally arranged the measurement. In general, radon levels in the Dublin area are low and about 94% of the homes we have tested have radon levels below the 200Bq/m³ [Becquerels per cubic metre] reference level. Our radon risk map shows parts of the country that are at particular risk from radon gas and for the area you live in, between one and five percent of homes are estimated to be above the reference level. I would be grateful if you could call me ... so that we could discuss your request for radon data in more detail and clarify if you would like to proceed with your AIE request given that the information requested is personal information that we cannot release.”

The appellant said that she wished to proceed and, on 6 February 2019, the EPA notified her of its decision to refuse the request under article 8(a)(i) of the AIE Regulations.

In a request for internal review, the appellant challenged the EPA's view that the requested information is personal information, saying that there is no confidentiality protected by law covering this information. She asserted that the decision was contrary to article 10(1)(a) since radon is an emission. She further argued that the decision was contrary to articles 10(3) and 10(4) because the request was not considered on an individual basis, the public interest was not properly considered and the grounds of refusal were not interpreted on a restrictive basis. She also said that the decision was contrary to article 10(5), because “no attempt was made to separate environmental information from other information supposedly covered by article 8(a)(i)”.

The EPA notified the appellant of its internal review decision on 4 April 2019. It stated that the EPA held no record of any radon test carried out at the address specified by the appellant. It therefore refused this part of the request in accordance with article 7(5) because the EPA did not hold the requested information. It refused the second part of the request because:

“A radon test result ... is confidential personal information to the person who requested the test and I am therefore refusing your request for test results in relation to other properties in accordance with article 8(a)(i) of the AIE Regulations”.

The decision notice did not address any of the points made in the appellant’s request for a review but advised her to arrange a radon test for her home and provided information about how that could be done.

The appellant appealed to my Office.

In exploring whether the case could be resolved otherwise than by way of a binding decision, my investigator endeavoured to broker a settlement between the EPA and the appellant. No settlement was achieved but the process established that the appellant does not seek the names and signatures of those who signed the test reports or the names and addresses of those who sought the tests.

Scope of review

The disputed information consists of ten radon test reports (i.e. as identified by the EPA as being for the addresses closest to that specified by the appellant) showing the full address and specific test results for each individual property, minus the excluded information described above.

In carrying out my review, I examined the reports as provided by the EPA. I had regard to the submissions made by the appellant and the EPA. I 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’); and the relevant jurisprudence of the courts. I also had regard to information about radon published by the EPA, HSE, and WHO.

The EPA did not argue that information in the reports is not environmental information and I am satisfied that it is.

Whether refusal to provide access to the radon test reports was justified by article 8(a)(i) of the AIE Regulations because the withheld information is personal information

Article 8(a)(i)

The EPA’s decision relied on article 8(a)(i), which provides that (subject to article 10):

“a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law.”

Although that article refers to “personal information”, both the AIE Directive and the Aarhus Convention refer to “personal data”.

Article 4(1) of the General Data Protection Regulation (Regulation (EU)2016/679 – the ‘GDPR’) defines ‘personal data’ as:

“any information relating to an identified or identifiable natural person (‘data subject’).”

Article 4(1) of the GDPR specifies, moreover, that "an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".

I am satisfied that the information at issue relates to identifiable natural persons. I consider that the addresses of the properties tested for radon could be used to identify natural persons and therefore constitute personal data for the purposes of

the GDPR. I am also satisfied that the radon data which those reports contain is personal data. The appellant questioned whether or not the information might be personal data given that the person who requested the carrying out of the test might be an owner, occupier, tenant, prospective owner/occupier, a public authority or an agent of any of those categories of person. This does not change the fact that the relevant information is information on people's homes/properties that could, combined with other information which exists in recorded form, be used to identify those people.

Article 4(2) of the GDPR defines "processing" as including "disclosure by transmission; dissemination or otherwise making available". This means that releasing the information would constitute its 'processing'.

Article 5.1(b) of the GDPR provides that "personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes".

I am satisfied that the information at issue was collected for specified, explicit and legitimate purposes and that releasing it in response to this AIE request would constitute the 'further processing' of the information in a manner that would be incompatible with the purposes of its collection.

Accordingly, I find that the confidentiality of the information at issue is protected by the GDPR, a directly effective Regulation, and therefore it is not necessary for me to consider whether the confidentiality of the same information might be protected in national law; for example, by the Data Protection Acts.

I am satisfied that the information has not lost its quality of confidentiality and that the data subjects have not consented to its disclosure. It is clear that disclosure would adversely affect the confidentiality of the information. Accordingly, I find that article 8(a)(i) applies to the withheld information, subject to article 10 considerations.

Article 10 (1) of the AIE Regulations

This 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".

The appellant submitted that the request relates to information on emissions into the environment. While not expressing any firm position on this question, the EPA submitted a number of observations:

- It noted that the word “emissions” is not defined in the legislation.
- It cited the Minister’s Guidance which states that “emissions should be construed as including discharges of whatever kind to all environmental media”.
- It noted that the UK Information Commissioner’s guidance notes state that “emissions will generally be the by-product of an activity or process, which is added (or potentially added) to and affecting the elements of the environment, over which any control is relinquished”.
- It added that “radon is not the by-product of any man-made activity or process, nor is it added or potentially added by humans to elements of the environment”.

I take it from these comments that the EPA is inclined to doubt that information on the concentration of naturally produced radon in buildings is ‘information on emissions into the environment’ for the purpose of article 10(1) the AIE Regulations.

The legislation does not define the expression “emissions into the environment”.

The Aarhus Convention in article 4.4 provides for what has become known as the “emissions override”:

“The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed.”

That article goes on to specify other grounds for refusal (including the confidentiality of personal data) before adding:

“The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment”.

The AIE Directive uses the word emissions in two contexts:

- First, on its own as a single word which qualifies an emission as a ‘factor’ under paragraph (b) of article 2;
- Secondly, in article 4.2, which sets out a more extensive list of ‘exceptions’ that *cannot apply* where a request “relates to information on emissions into the environment”. These are:
 - (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;
 - (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;
 - (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;
 - (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;
 - (h) the protection of the environment to which such information relates, such as the location of rare species.

The emissions override in the AIE Directive is therefore more far-reaching than that in the Convention. It is, however, subject to an important qualification as follows:

“Within this framework, and for the purposes of the application of subparagraph (f), Member States shall ensure that the requirements of Directive 95/46/ EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are complied with”.

That Directive has been repealed and replaced by the GDPR. The ‘emissions override’ is itself subject to what could be called the ‘GDPR clause’. I take it that, although the AIE Regulations provide that article 8(a)(i) cannot apply as a reason for refusing to provide access to environmental information where the request relates to

information on emissions into the environment, the Directive provides that article 8(a)(i) can apply to a such a request if that is necessary in order to ensure compliance with the GDPR. Since the AIE Regulations must be interpreted and applied in a manner that gives effect to the AIE Directive, 'the GDPR clause' applies in this case.

Since I have already concluded that, in order to comply with the AIE Directive and its GDPR clause, the personal data at issue should not be disclosed, it is not necessary for me to make a finding on the question of whether radon in this particular case is an emission for AIE purposes or whether or not the emission override is limited to emissions caused by human activity.

Article 10(3)

This requires me to consider the request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.

Refusal would protect the confidentiality of personal data that is protected by the GDPR. The right to privacy and data protection are fundamental rights under articles 7 and 8 of the Charter of Fundamental Rights of the European Union 2000. The right to privacy has also been recognised by the Irish Courts as an unremunerated right under article 40.3 of the Constitution of Ireland. While the right to privacy and the protection of personal data are not absolute rights, they merit a very significant weighting.

The appellant stressed the public interest in tenants having information on emissions which could affect their health. She submitted that, given its public health significance, the radon information falls under the duty of active dissemination in the Directive—in particular article 7(4).

She added the following comment:

“The EPA is devoting resources to publicising the risk from radon and encouraging people to test dwellings. The effectiveness of this publicity work being undertaken in the interest of public health is being affected by a legal opinion that information on radon concentrations in buildings is confidential, leading to communication on the basis of very general information such as <https://www.epa.ie/radiation/radonmap/>. That legal opinion affects my ability to

access information which may help me to understand my own exposure to radon. [Also], the public interest is most immediately

- a) the interest of citizens in information on emissions that affect our health,
- b) the effective use of the EPA's resources when some of the information they should be able to make available to the public is deemed confidential,
- c) the improvements in public health which result from action to reduce radon concentrations, which action would be more effective in the absence of the information barrier”.

The EPA acknowledged that greater transparency could lead to greater public awareness of radon and that there is a strong public interest in people being aware of radon levels in areas where they live. However, it pointed to what it sees as the low usefulness of the data in the reports for the public, saying that radon test results are of limited value to people who do not live at the addresses tested, their usefulness reduces with the passage of time and none of the test results indicate any risk to health.

The EPA provided information on its public radon-awareness campaigns and the radon predictive map on the website www.radon.ie. It said that where extremely high levels of radon (above 2,000 Bq/m³) are measured, the EPA may also issue a press release in the area to inform the local community. The implication here is that disclosure would not add to information already available to the public.

The EPA went on to argue that disclosure would be contrary to the public interest because it “could discourage voluntary testing of homes for fear of the results later becoming public”. The EPA believes that this would be likely to undermine its policy of encouraging the greatest possible public uptake of home radon testing. The EPA cited a qualitative study of residents’ perceptions of radon health risks as identifying fear of “difficulty in selling houses with elevated radon levels” as an obstacle to choosing to have homes tested.

I accept the sincerity of the appellant’s belief that disclosure would “remove an information barrier” and enable the public to be better informed about radon. However, I am inclined to share the EPA’s fears that disclosure would instead be

likely to deter those who might otherwise seek radon tests from doing so. Rather than removing “an information barrier”, disclosure would lead to the EPA and residents having *less* information on radon in Irish homes owing to the deterrent effect of the loss of the confidentiality of information about radon levels within private homes leading to fewer people applying for such tests. I see this is a significant public interest factor weighing in favour of refusal of the request.

I consider that the withheld environmental information is itself of little value to the public. I am satisfied that, despite the strong association between radon and health risks such as lung cancer, the information in the reports does not relate to any *imminent* threat to human health or the environment. I cannot agree that the public disclosure of the information at issue would lead to ‘improvements in public health’ following actions to reduce radon concentrations.

Weighing the public interest in disclosure against the interests served by refusal, I find that the latter outweighs the former. Accordingly, I find that the withholding of the information at issue is justified by article 8(a)(i) after taking account of article 10(3) of the AIE Regulations and article 4 of the AIE Directive. I reached this conclusion after considering article 8(a)(i) on a restrictive basis in the light of the public interest in disclosure, as per article 10(4) of the AIE Regulations.

Article 10(5) provides that:

“Nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information.”.

I take the view that all of the information at issue is personal data and none of it may be separated from the information to which article 8(a)(i) applies.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I hereby affirm the EPA’s decision to refuse to provide access to the ten requested radon reports.

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 June 2020