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-93420-N1Y6Y4

Date of decision: 21.05.2021

Appellant: Ms. L

Public Authority: Department of Housing, Planning and Local Government (the Department)

Issue: Whether the Department was justified in refusing the appellant's request for the submissions made to the public consultation conducted by the Department in respect of the General Scheme on the Housing and Planning and Development Bill 2019 on the basis that the information was not "environmental information" within the meaning of article 3(1) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the information at issue constitutes 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 11 February 2020, the appellant requested an electronic copy of, or access through a URL to, the submissions made on the Department's public consultation on the General Scheme of the Housing and Planning and Development Bill 2019 (the "General Scheme").

2. On 12 March 2020, the Department notified the appellant that it had identified 294 documents falling within the scope of the request, but refused the appellant's request on the basis that the information was not "environmental information". In summary, the Department concluded that the General Scheme is not affecting or likely to affect the environment as it is concerned with access to the courts.

3. On 9 April 2020, the appellant requested an internal review. The appellant submitted that the General Scheme amends the access to justice regime for environmental decisions under the planning acts, which facilitate oversight of environmental protection. The appellant pointed the Department to the decision of the Commissioner in Case CEI/18/0031, and the cases referred to by the Commissioner in that decision.

4. On 30 April 2020, the Department issued a review decision, which affirmed the original decision.

5. The appellant brought this appeal to my Office on 29 May 2020.

6. I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and the Department. 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 Envirnmental 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 Sicherieit und Generationen* 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 in *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 ("*Henney*"), which is referred to in *Redmond, ESB* and *RTÉ*.

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. The Department 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 question before me is whether the information at issue falls within the definition of "environmental information" in article 3(1) of the AIE Regulations. Although I noted the Department's submissions in relation to the sensitivity of the information, any reasons that may be taken into account by the Department in deciding not to release the information are secondary to the assessment of whether the information is environmental information.

Context of the request

11. The General Scheme was published in November 2019, following approval by the Government. It proposes amendments to the Planning and Development Act 2000 (the "2000 Act"). On its website, the Department describes the 2000 Act as follows:

> "*The Planning and Development Act 2000 (as amended) forms the foundations for planning in Ireland. This Act covers a huge range of planning-related issues, and combines a wide range of different legislation into one place.*
>
> - *It sets out the detail of regional planning guidelines, development plans and local area plans.*
> - *It explains how Ministerial Guidelines work.*
> - *It sets out how the process of applying for and obtaining planning permission works.*
> - *It contains special requirements for protected structures, conservation areas and areas of special planning control.*
> - *It explains the relationship between planning and social housing supply.*
> - *It sets out Ireland's planning appeals and enforcement processes.*
> - *It describes Strategic Development Zones and Environmental Impact Assessment.*

- *It clarifies how a range of particular planning processes, including for State development, operates.*
- *Basically, if it needs planning permission, this Act outlines how. If it doesn't need planning permission, this Act explains why.*"

12. The amendments proposed by the General Scheme are to Part III of the 2000 Act, which relates to control of development. Among other things, Part III provides for: the imposition of obligations to obtain permission in respect of development of land; the process of appeal against decisions of a planning authority in relation to permission; the publication of documents in relation to planning applications; powers for planning authorities, including in relation to the acquisition of land for open spaces and in relation to the use of land; and the process for challenging planning decisions by judicial review.

13. The specific amendments proposed are to sections 50, 50A and 50B of Part III, relating to the process for challenging planning decisions by judicial review. In summary, the amendments would alter:

    a. the point at which a challenge to planning decisions may be initiated (head 3);

    b. the alleged deficiencies to which a challenge to planning decisions may be addressed (head 3);

    c. the notice requirements when applying for leave for judicial review of planning decisions (head 4);

    d. the standard that must be met before an application for leave for judicial review of planning decisions may be successful (head 4);

    e. the legal standing rules when applying for judicial review of planning decisions (heads 4 and 5); and

    f. the special legal costs rules that apply in proceedings in the Superior Courts relating to environmental matters taken pursuant to specified EU law provisions (head 6).

14. The Department invited submissions in order to "inform the further development of the Bill". The consultation ran from 9 December 2019 until 27 January 2020. Some 294 responses were received by the Department. Respondents were notified that all submissions and comments submitted would be subject to release under the AIE Regulations.

The Department's position

15. The Department submits that neither the submissions nor the General Scheme itself constitute a measure or an activity within the meaning of paragraph (c) of the definition. It relies on the rationale of the Court of Appeal in *Minch* at paragraph 42, where Hogan J found: "*as the Report had simply examined various financial models for broadband roll-out, it cannot be said that it had developed to the point where its contents represent a "plan" or "policy" or "programme" such as would constitute a "measure" for the purposes of Article 3(1)(c) of the 2007 Regulations*". The Department submits that it cannot be said that the draft proposals in the General Scheme had

developed to a point where its contents represent a "plan", "policy" or "programme". It states that the draft legislative proposals in the General Scheme are essentially a first draft, are still being developed, and will likely further evolve and be subject to further refinement as they go through the legislative process in the Oireachtas.

16. The Department notes that a mere connection or link to an environmental factor is not sufficient to bring information within the scope of the AIE regime. It submits that the General Scheme does not affect any of the environmental elements or factors, nor is it aimed at protecting those elements or factors. It states that the proposals are not aimed at altering in any way the development consent process under Part III of the Act and the proposals do not involve any individual projects requiring environmental assessment. Rather, the General Scheme is amending the administrative processes in relation to the taking of judicial reviews against planning decisions in the High Court under the Act. The Department notes that a judicial review does not question an individual decision but is a mechanism by which an application can be made to the High Court to challenge the *decision making processes* of administrative bodies and lower courts. It submits that the proposals in the General Scheme do not prevent any individual/organisation seeking recourse through the courts; whether an individual is successful or not in their pursuit through the courts including any liabilities that may arise is a matter for the judiciary. Under the proposals, all individuals will maintain a constitutional right of access to the courts. In any event, the Department submits that the act of an individual accessing the court has no environmental impact. It points to the fact that an environmental assessment of the proposals in the General Scheme is not required under the Strategic Environmental Assessment Directive, as the proposals relate only to the procedures for challenging decisions following the development consent process. Similarly, the draft Regulatory Impact Assessment prepared by the Department did not include an "environmental" assessment of the General Scheme. The Department suggests that to conclude that the General Scheme affects or is designed to protect the environment would be stretching the definition of environmental information to the extreme.

The appellant's position

17. The appellant submits that article 9 of the Aarhus Convention, the 2000 Act and the General Scheme itself are all capable of being measures in this case. She submits that the General Scheme is not an academic exercise or thought experiment (in contrast to the document at issue in *Minch*), but has progressed to the stage where there are concrete proposals to amend the legislation and there was a public consultation and associated press releases by the Minister. She states that it is clear there was a considerable effort involved and pre-legislative scrutiny of the General Scheme was envisaged.

18. The appellant submits that the 2000 Act is aimed at protecting the environment. The short title of the 2000 Act states that the act is "to provide, in the interests of the common good, for proper planning and sustainable development including in the provision of housing." The 2000 Act transposes the Environmental Impact Assessment Directive, the Integrated Pollution Prevention and Control Directive, the Habitats Directive and the Strategic Environmental Assessment Directive, all of which also have as their objective the protection of the environment. In addition, the 2000 Act, and in particular sections 50 to 50B, are identified by the Government as being key to Ireland's implementation of the access to justice obligations under the Aarhus Convention (see Ireland's

periodic National Implementation Reports). The Aarhus Convention recognises in Article 1 that access to justice in environmental matters is a key measure to protect the environment. The appellant also submits that the proposed changes to the 2000 Act are affecting or likely to affect the environment, by either increasing or decreasing the efficacy of specific measures on access to justice and access to judicial review.

19. The appellant submits that, once a measure has been identified that is affecting, likely to affect or designed to protect the environment, any information on that measure is environmental information and this should be interpreted expansively. She submits that the responses to the consultation will have an effect on the General Scheme, the 2000 Act and the Aarhus Convention because the responses will inform the further development of the Bill. She submits that the consultation responses allow the public to see what views there are on the proposed amendment, an objective expressly identified in the AIE Directive.

Analysis and findings

20. The question before me is whether the information comprised in the 294 documents relevant to the request is environmental information within the meaning of article 3(1) of the Regulations, in particular paragraph (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 record(s), and the extent to which I can describe certain matters, in my analysis is limited.

21. The appellant requested copies of, or access to, submissions made on the Department's public consultation on the General Scheme. The information requested is, essentially, correspondence from members of the public and public bodies to the Department in relation to proposed legislative change.

22. For the reasons set out below, I find that the requested information is environmental information, within the meaning of paragraph (c) of the definition.

Approach to the definition of environmental information

23. 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);".

24. 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

25. 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). 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, and it may be relevant to consider the purpose of the information (*ESB* at paragraph 43). The list of examples of measures and activities given in that paragraph are illustrative examples (*Redmond* at paragraph 55).

26. I consider that the appropriate measure in this case is the General Scheme. The General Scheme is a detailed proposal for legislative change, which has been published for consultation. In effect, it is a statement of the Government's position or policy as to how the process for challenging planning decisions by judicial review should work. 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). I also note that the fact that something falls outside the examples given in the Aarhus Guide, the judgment of the Court of Appeal in *Minch* or of the Court of Justice in *Mecklenburg* does not mean that it is not a measure or activity. In my view it matters not whether the General Scheme is characterised as a policy, a position, a plan or some other category. The General Scheme falls squarely within what is envisaged by the term 'measure' in paragraph (c) of the definition.

27. I also consider that the General Scheme is sufficiently well developed to constitute a measure. In *Minch*, Hogan J observed at paragraphs 39-40 that "the document in question must have graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however tentative, aspirational or conditional such a plan or policy might be ….". In other words, a policy or plan must be more than an academic thought experiment, but it does not need to be at its final stage of development; it may be tentative, aspirational or conditional. In this case, far from being an academic thought experiment, the legislative proposals are sufficiently well-developed that a draft Regulatory Impact Analysis has been prepared, legislative text has been drafted with detailed explanatory material, and the Government has concluded that the proposals are fit to be published for comment. In my view, the fact that the proposals will likely further evolve and be subject to further refinement does not render the General Scheme incapable of being a measure.

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

28. 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).

29. In my view, the General Scheme is both likely to affect and designed to protect the environment, for the reasons outlined in detail below. I should say that this is a factual conclusion and not a value judgement on the merits of the proposed changes. It is a matter for the Government and the Oireachtas to decide, in accordance with the democratic process and within the bounds of European law, where the appropriate balance lies between the objective of enabling judicial review of planning decisions and other objectives such as ensuring an efficient court system and managing the costs of litigation.

Designed to protect the environment

30. The objective of the Aarhus Convention is "*to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*" (Article 1). To that end, it obliges contracting parties to guarantee three broad categories of rights for citizens and their associations, namely rights of access to information, rights to participate in decision-making, and rights of access to justice in environmental matters. The CJEU has described the objectives of the Aarhus Convention, and linked EU Directives giving the public wide access to justice in environmental matters (such as those mentioned in section 50B of the 2000 Act), as pertaining "*more broadly, to the desire of the European Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role*" (Case C-260/11 *Edwards and Pallikaropoulos*, paragraph 32). In other words, EU legislation which requires that the public be given wide access to justice in environmental matters relates to the protection of the environment.

31. Part III of the 2000 Act is part of Ireland's implementation of Article 9 of the Aarhus Convention and of the access to justice provisions in EU Directives, such as the Environmental Impact Assessment Directive and the Integrated Pollution Prevention and Control Directive. In its periodic National Implementation Reports, Ireland specifically relies on the provisions in sections 50 and 50A of the 2000 Act to demonstrate its implementation of article 9(2), (3) and (4) of the Aarhus Convention. In light of this, I consider that sections 50 to 50B of the 2000 Act pertain to the preservation, protection and improvement of the environment and so they are, at least in part, designed to protect the environment. If enacted, the legislative provisions in the General Scheme will form part of that legislative scheme, so the General Scheme is also designed to protect the environment.

Likely to affect the environment

32. In its Notice on Access to Justice in Environmental Matters, C/2017/2616, the European Commission aimed to provide clarity and a reference source for national administrations, national courts and the public on access to justice in environmental matters. The Commission analysed the connection between various access to justice measures and the environment. In general terms, the Commission observed:

> "*Under EU law, access to justice in environmental matters represents a set of supportive rights which serves two purposes. It enables individuals and their associations to exercise the rights conferred on them by EU law, and it helps ensure that the aims and obligations of EU environmental legislation are attained*." (paragraph 31)

33. In relation to legal standing, the Commission observed:

> "*Decisions, acts and omissions represent the ways in which public authorities fulfil – or take a position on - duties placed on them under EU environmental law, for example to ensure that waste facilities and industrial installations operate under a permit. Apart from being a means of ensuring the protection of rights and interests, legal standing represents a means of ensuring accountability in respect of such decisions, acts or omissions.*" (paragraph 58)

34. In relation to costs, the Commission observed:

> "*The costs of a judicial review procedure present a potential major deterrent to bringing cases before a national court. This is especially true in environmental cases, which are often initiated to protect general public interests and without any financial gain in view. Indeed, after weighing the potential benefits of litigation against the risk of incurring high litigation costs, the public concerned may refrain from seeking a judicial review even in well justified cases.*" (paragraph 174)

35. The decisions of planning authorities have a substantial impact on the environment. Planning decisions impact on the air and the atmosphere, water, soil, land, landscape and natural sites, and the maintenance of biological diversity. They impact on whether there is pollution from substances, noise, radiation and waste.

36. Procedural rights, such as rights of access to the courts, are the means by which the courts can ensure that planning authorities operate in accordance with the law, including environmental law. Our adversarial legal system means that matters can only come before the courts if brought by a

litigant in accordance with the relevant rules governing the process for judicial review. I consider that key parts of the measure would reduce the number of decisions made by planning authorities which come before the courts for review. Specifically, I consider that:

a. The proposed changes to the point at which a challenge may be brought would prevent judicial review challenges to certain decisions which are not capable of appeal to An Bord Pleanála;

b. The proposed changes to the legal standing provisions would reduce the range of litigants who are entitled to challenge planning decisions; and

c. The proposed changes to the costs provisions would in practice reduce the number of litigants bringing challenges, given the deterrent effect of litigation costs for litigants.

37. None of these barriers to access relate to the merits of the decision being challenged. Rather, they are matters relating to the type of decision or the identity or means of the applicant. As a result, there is a real and substantial possibility that planning decisions that would previously have been quashed by the court and which have a significant environmental impact will not come before the courts for review. I do not consider the potential effect on the environment to be remote or theoretical. I find that, as a matter of fact, the measure is likely to affect the environment because it limits the availability of judicial review of planning and other environmental decisions, giving rise to a real and substantial possibility of an impact on the environment.

Whether the requested information amounts to information "on" the measure

38. Where the measure or activity which 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).

39. The Department's consultation webpage confirmed that responses will inform the further development of the Bill. Even in the absence of such a commitment, it is difficult to see how the Department could lawfully conduct a consultation without giving meaningful consideration to

consultation responses. As a result, my view is that the responses will inform the Department's decision-making on whether to proceed with the proposals and, if so, how to do so. Access to the consultation responses would enable the public to be informed about, and participate more effectively in, that decision-making process. Access to the information would also contribute to public awareness of environmental issues and a free exchange of views, by exposing the different perspectives of different respondents to the consultation. In this way, I consider that access to the information would advance the purposes of the Aarhus Convention and the AIE Directive, having regard in particular to recital (1) of the AIE Directive.

40. The majority of the submissions address the substantive proposals in the General Scheme, whether in general terms or by reference to the specific legislative provisions proposed. Such submissions clearly relate to and concern the General Scheme. They are not merely connected to the measure, as they will be used by the Government in determining whether to proceed with, vary or abandon its specific plans for legislative change. A small number of the submissions address more general matters to do with housing, development and planning and are effectively submissions about what ought to be in the General Scheme rather than what is in it. In my view, such submissions also relate to and concern the General Scheme, as they are submissions as to how the Government ought to develop the General Scheme into a Bill for introduction in the Oireachtas. As such, I am satisfied that all of the submissions are information "on" the General Scheme.

Decision

41. 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 the AIE Regulations. I therefore vary the Department's decision in relation to that information.

42. The appellant has submitted that I should not remit the decision to the Department and should instead exercise my powers under article 12(5)(c) of the AIE Regulations to require the Department to make available environmental information, in light of the passage of time since the initial request for information. I do not consider that it is appropriate to exercise that power in this case. The Department has not considered the potential application of exceptions or the balance of the public interest and I am not in a position to make a decision on such matters at first instance.

43. I require the Department 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. If it decides to refuse access it should give reasons grounded in the AIE Regulations.

Appeal to the High Court

44. 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.

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Peter Tyndall
Commissioner for Environmental Information
21.05.2021