

**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/19/0001

Date of decision: 29 July 2019

Appellant: Pdraig O'Reilly

Public Authority: EirGrid PLC (EirGrid)

Issue: Whether EirGrid's refusal to provide access to the information requested in parts 1 and 2 of this AIE request relating to aspects of the North South Interconnector Project was justified under the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that EirGrid did not make any decision on much of the information captured by part 1 of the request. Given the close relationship between the information captured by parts 1 and 2, the Commissioner considered that both of those parts must be considered together. Accordingly, he annulled EirGrid's decision on those parts of the request and required EirGrid to make a fresh decision in accordance with the 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

This case involved an Infrastructure Agreement and a project. The Infrastructure Agreement was made between EirGrid and ESB and it is published on the website of the Commission for Regulation of Utilities (www.cru.ie) [here](#). The project is the North South Interconnector Project, which proposes to connect the electricity grids of Ireland and Northern Ireland.

On 17 October 2018 the appellant submitted an AIE request to EirGrid asking for “the following information relating to the North South Interconnector Project;

1. A copy of the Committed Project Parameters (CPP) as defined in clause 7.7.1 [of] the Infrastructure Agreement but excluding clause 7.7.2(h).
2. A copy of the ‘comments’ received by EirGrid from the Electricity Supply Board as defined in clause 7.7.2 of the Infrastructure Agreement.
3. A copy of the Project Implementation Plan provided to EirGrid by the Electricity Supply Board as defined in clause 7.7.3 of the Infrastructure Agreement.
4. A copy of the Project Agreement as defined in the Infrastructure Agreement.”

EirGrid acknowledged receipt of the request and sought clarification of the reference to 7.7.2(h), saying that, as there was no clause 7.7.2(h), it presumed that the reference was meant to be to clause 7.7.1(h). The appellant confirmed that this presumption was correct.

On 16 November 2018 EirGrid gave notice of its decision to refuse the request. The following is a summary of the reasons given for refusal:

- The first and second parts of the request were refused because:
 - Disclosure would adversely affect the confidentiality of EirGrid’s proceedings, as per article 8(a)(iv) of the AIE Regulations and the protection of the confidentiality of the deliberations of Freedom of Information (FOI) bodies provided by section 29(1) of the FOI Act 2014.
 - The request concerned material in the course of completion (as per article 9(2)(c) of the AIE Regulations) and it concerned the internal communications of public authorities (as per article 9(2)(d) of the AIE Regulations).
- The records requested in the third and fourth parts of the request did “not yet exist”.

On 18 November 2018, the appellant requested an internal review, saying that he was “not in agreement with the refusal”, but without saying why.

On 18 December 2018, EirGrid issued a review decision. This affirmed the original decision for the reasons given in that decision while adding one additional reason, which was:

“Items 1 and 2 of your request are also exempt under article 9(1)(c) of the AIE Regulations, because disclosure would adversely affect commercial or industrial confidentiality provided by law to protect legitimate economic interests.”

In relation to identifying where in law such confidentiality is protected, the decision cited sections 29(1) and 30(1) of the Freedom of Information Act 2014. It included details showing how EirGrid considered the public interest and explained why EirGrid did not hold the records requested in parts 3 and 4 of the request.

The appellant appealed to my Office on 3 January 2019, saying that the requested information is not commercially sensitive and is of fundamental interest to affected landowners.

Scope of appeal

The appellant confirmed that he accepts that the records requested in parts 3 and 4 of the request were not completed and he excluded those parts from the scope of his appeal. The information at issue was therefore:

- A copy of the Committed Project Parameters as defined in clause 7.7.1 of the Infrastructure Agreement (excluding clause 7.7.1(h)).
- A copy of the ‘comments’ received by EirGrid from the Electricity Supply Board as defined in clause 7.7.2 of the Infrastructure Agreement.

In carrying out my review I had regard to the submissions made by the appellant and EirGrid. 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 records considered by EirGrid

EirGrid provided my Office with a copy of what it regarded as the withheld records. It presented ‘record 1’ as the information relevant to the first part of the request and ‘record 2’ as the information relevant to the second part.

EirGrid described record 1 as comprising one main document and eight appendices. It said it was “revision 6”, the latest draft of the CPP. A reading of clauses 7.7.1 and 7.7.2 of the Infrastructure Agreement might suggest that EirGrid would deliver a single document to ESB and, if ESB wished to make any comments, it would send EirGrid a single document containing its comments. However, EirGrid explained to my investigator that it was in fact an iterative process which involved: EirGrid sending an initial CPP document to ESB; ESB returning comments on that version of the CPP; EirGrid sending a revised CPP document to ESB for further comments. That cycle was repeated until there were six revisions of the original draft. “Revision 6” was dated 14 April 2018. It was the version of the CPP document as it stood on 17 October 2018 when the AIE request was made. EirGrid confirmed that it was this document that its decision makers had considered when addressing the first part of the request.

Part 2 of the request sought “a copy of the comments received by EirGrid from ESB as defined in clause 7.7.2 of the Infrastructure Agreement”. Accordingly, each time ESB sent comments to EirGrid, those comments were captured by this part of the request. EirGrid’s record 2 shows that ESB made comments on all but the seventh and final version of the CPP (i.e. “revision 6”).

Assessment

It was clear that each of the seven versions of the CPP which EirGrid sent to ESB was sent in order to comply with clause 7.7.1 of the Infrastructure Agreement. Each version was therefore captured by part 1 of the AIE request.

EirGrid confirmed to my investigator that its decision-maker did not consider the six earlier CPP documents when processing the AIE request and, therefore, the decisions which it subsequently issued did not convey any decision in relation to those documents. EirGrid explained that this was because it had simply not occurred to the decision-maker that the earlier revisions fell within the scope of the request. EirGrid added that “no attempt was made to hide the fact that there were earlier revisions”. I accept all of that.

The situation is that EirGrid made no decision to grant or refuse access to the information in the six earlier CPP documents, notwithstanding that this information was captured by the request. In contrast, EirGrid considered all of the comments made by ESB, even though all of those comments were made on the earlier CPP documents which EirGrid did not consider when processing this AIE request.

It is clear therefore that EirGrid failed to issue a decision on much of the information captured by the request. In other circumstance, I might have felt it appropriate to respond by making a decision on the information that the public authority had considered and refused, while requiring the authority to make a decision on the information that it had failed to consider. In the current circumstances, however, that would be problematic. If I were to make a decision on record 2, I would be determining whether the appellant should be granted access to ESB's comments in isolation from the documents which ESB had commented on. The comments would therefore lack context and either be unintelligible or, at the very least, not fully understandable. Further, when it came to weighing the public interest in disclosure against any identified interests served by refusal, similar difficulties would arise.

In light of these considerations, I decided that I should require EirGrid to reconsider parts 1 and 2 of the AIE request, this time taking full account of all of the information captured by those parts of the request.

Decision

Having carried out a review under article 12(5) of the AIE Regulations of EirGrid's decision on parts 1 and 2 of this AIE request, I annul that decision because it failed to consider and give any decision on much of the requested information. I expect EirGrid to reconsider and make a fresh decision on those parts of the request having regard to all of the relevant information which it holds.

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.

Note

In the interests of clarity for both parties, the following is how I expect EirGrid to respond to this decision.

If EirGrid decides not to appeal this decision to the High Court, it should:

1. Inform the appellant of that decision on the same day on which it is made.
2. Regard parts 1 and 2 of this request as constituting an AIE request received by EirGrid on the date when it makes that decision.
3. Process the request in accordance with the AIE Regulations, giving notice of a decision within the statutory timeframe and informing the appellant of his right to request a review of that decision.

Taking these steps would provide clarity to both parties on the latest date on which a decision should be received by the appellant.

Peter Tyndall

Commissioner for Environmental Information

29 July 2019