



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-93468-X5H1G3**

(legacy reference CEI/19/0027)

**Date of decision:** 10 December 2020

**Appellants:** Philip Lee Solicitors

**Public Authority:** Department of Housing, Local Government and Heritage

**Issues:**

1. Whether refusal to provide access to certain information was justified because it was not held by the Department
2. Whether refusal to provide access to certain other information that is held by the Department was justified on the grounds of 8(a)(iv) or 9(1)(c) of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that the Department was justified in not providing access to certain information because it did not hold the information. He found that refusal to provide access to certain other information was not justified on the ground of articles 8(a)(iv) or 9(1)(c) and he required the Department to release it.

**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 March 2019 the appellants submitted an AIE request to what was then the Department of Housing, Planning and Local Government asking for information concerning foreshore licences for subsea fibre optic cables, under six headings.
2. On 12 April 2019, the Department notified the appellants of its decision to release one record in full, refuse access to four records on the ground of 8(a)(iv) of the AIE Regulations and release redacted versions of 29 records, citing article 8(a)(iv) as justifying the redactions. It also cited sections 15, 30, 31, 36, 39 and 40 of the Freedom of Information Act 2014 (FOIA).
3. On the same date, the appellants asked for an internal review of parts of that decision. They were entitled to receive a decision by 11 May 2019 at the latest. As they did not, they acquired the right to appeal to my Office from that date.
4. On 14 May 2019, i.e. three days outside of the statutory timeframe, the Department issued an internal review decision which affirmed the original decision and apologised for the delay.
5. The appellants appealed to my Office on 17 May 2019. The Department with responsibility for this request was since re-named as the Department of Housing, Local Government and Heritage.

## Refinement of scope

6. The appellants initially limited the scope of their appeal to:
  - Records 26 and 30, which were refused in full.
  - The redacted information in released records 15, 19 and records 23 to 32.
  - Any additional information held on the “bespoke valuations” process or methodology.
7. In addition to information on licences granted for site investigation or survey purposes, which was expressly excluded from the request, the appellants excluded the following additional information from the scope of their appeal: the names of specific third party companies; the precise locations of foreshore involved; or the specific fee agreed/proposed in any case.
8. My investigator asked the Department to reconsider its position in light of this reduced scope. The Department declined to revise its position. Later in the course of my Office’s investigation, the Department raised a new ground, article 9(1)(c) of the AIE Regulations, as another ground justifying the withholding of records 26 and 30.

9. Later still, the appellants further refined the scope of their appeal, saying:
- “This appeal is for specific and time-limited information on the methodology for valuing licences granted for subsea fibre optic cables under section 3 of the Foreshore Act 1933... [It] does not seek any information in relation to nominal charges for public interest projects, nor does it seek information on the valuation methodology for other classes of infrastructure, nor does it seek any information on different charges applied in different counties within Ireland”.
10. Following engagement by my investigator, they confirmed that the scope of their appeal is limited to information on:
- (i) the criteria that trigger bespoke valuations; and
  - (ii) the methodology / process of bespoke valuations.
11. They confirmed that they do not seek any other information, including information on standard charges relating to public infrastructure projects undertaken by or on behalf of the State, or details related to the buying-out of rents for long leases.
12. The Department indicated a concern about how the release of records 26 and 30 could affect the interests of the Valuation Office. Accordingly, my Office invited the Valuation Office to make a submission. The Valuation Office declined the offer.
13. The Department also indicated concern about how the release of records might affect the interests of the Department of Public Expenditure and Reform (DPER). Accordingly, my Office invited DPER to make a submission. DPER informed my Office that, after considering the matter, it had decided not to make a submission.
14. In carrying out my review I examined the withheld information. I had regard to all of the submissions made by the appellants and the Department. 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. What follows does not comment or make findings on each and every argument advanced, but all relevant points have been considered.

### **Preliminary matter - the Department's treatment of the request**

15. The manner in which the Department referred to the Freedom of Information Act (FOIA) in its treatment of the request was unsatisfactory. Its original decision, for example, stated that "Information contained in records 4-6, 8-12, 15-23 and 31 are partly refused under sections 36 and 40 of the FOIA". The appellants objected to this in their request for an internal review, saying:

"The FOIA does not offer the public authority under the AIE Regulations a blanket exemption from disclosure. The AIE Regulations are a separate legal regime, and it is not appropriate to simply transpose across into the AIE Regulations all of the exemptions applicable under FOI".

16. The Department's review decision referred to "information redacted under" sections of the FOIA. The appellants submitted that the Department "for all intents and purposes, treated this AIE request as if it were a request for records under the FOI Act". I would remind the Department that AIE requests, and each part thereof, should be dealt with by reference to the AIE Regulations, only referring to a provision of the FOIA where that reference has its basis in the AIE Regulations.

### **Scope of Review**

17. The Department's summary of its review decision referred to unspecified information in records 24 to 32 having been "redacted under" section 39 and explained as follows:

"I am satisfied that the information redacted under section 39 of the FOIA relates to the protection of the environment, and that should this information be released it could reasonably be expected to cause harm to the wellbeing of the environment".

18. My investigator put it to the Department that its decision did not cite article 8(a)(iii) of the AIE Regulations. This is the article which can justify refusal of an AIE request where disclosure would adversely affect the protection of the environment. He asked the Department if its position now relied, in part, on that article and asked, if it did, how disclosure could harm the environment. The Department said it was not relying on that article, offered no explanation as to how disclosure could harm the environment, and made no further reference to that argument. I am satisfied from this that the Department no longer wishes to pursue its "protection of the environment" argument and I do not have to make any determination on it.

19. Accordingly, I was satisfied that the scope of this appeal requires me to determine:

- I. Whether the Department's refusal to provide access to information on the methodology or process of bespoke valuations was justified because it was not held by the Department.

- II. Whether the Department's refusal to provide access to withheld information on the criteria that trigger bespoke valuations was justified on the ground of 8(a)(iv) of the AIE Regulations.
- III. Whether article 9(1)(c) justifies the withholding of information on the criteria that trigger bespoke valuations in records 26 and 30.

## **Analysis and Findings**

### **Issue 1: Information on the bespoke valuations process or methodology**

20. This issue concerns information on the bespoke valuations process or methodology other than information on the criteria that trigger such valuations. The Department did not provide access to such information on the basis that it does not hold it.

21. The appellants said in their request for internal review:

"It must be assumed that the Department has some written record or information on the process for carrying out bespoke valuations of foreshore licences for subsea fibre optic cables, setting out an evaluation methodology, the approach to determining 'market value', or 'fair value', yet it would appear that no such information has been identified or released by the Department pursuant to the AIE request".

22. My investigator asked the Department for details of its search efforts and it responded by saying:

"The relevant physical files, databases and e-mail accounts were searched for all relevant information that formed the subject of this AIE request and all records found were included in the schedule of records".

23. The review decision-maker stated as follows:

"... all records discovered by me in the processing of this AIE Request were identified in the Schedule of Records. No other records are held by me or within my knowledge on bespoke valuation process or methodology."

24. The Department went further and explained that, not only does it not hold information of this type, but it would not be appropriate for it to do so, notwithstanding the fact that the Valuation Office falls under the aegis of the Department, because:

"The Department would never have been involved in, concerned about, and therefore would have no reason to have, information on bespoke valuations process or methodology related to Foreshore consents, and it has not been shared with or discussed with this Department. As the Valuation Office is an independent body, such information would not, as a matter of principle, be shared with the Department as it would not be appropriate".

25. I have considered the appellant's argument in this regard, but have seen no evidence to suggest that the Department holds the documentation that the appellant believes it ought to have. It is not my role to determine the type of information that should be held by public authorities. The Department's search criteria and process appear to me to have been comprehensive, resulting in the production of a schedule of records. I have no reason to doubt its completeness.
26. From reviewing the status of the relevant bodies, I am also satisfied that the Valuation Office operates independently from the Department. I am therefore satisfied that the information sought in this regard is not held by or for the Department.

### Finding

27. I find that the Department's refusal to make information available to the appellants on the bespoke valuations process or methodology (other than information on the criteria that trigger such valuations) was justified because the information was not held by the Department.

### **Issue 2: Information refused under article 8(a)(iv)**

28. Article 8(a)(iv) of the AIE Regulations provides that a public authority shall not make available environmental information where:

“disclosure of the information would adversely affect, without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts); or (b) to the extent that it would involve the disclosure of discussions at one or more meetings of the Government, is prohibited by Article 28 of the Constitution”.

29. In keeping with the refined scope of this review, I identified information on the criteria which trigger bespoke valuations in records 25, 26, 27, 28, 31 and 32. I found no such information in records 15, 19, 23, 24, 29, and 30. Of the records which contain relevant information, some set out statements of criteria to be observed while others speak of criteria which are “recommended”, “advised” or which “should” be applied. I regarded all such information as relevant to bespoke valuation triggers.
30. It will be evident to the appellants from the information already released that actual or recommended bespoke valuation triggers include circumstances where:
- a valuation based on the “standard charges” calculation method exceeds ‘x’ euros per annum;

- a wayleave length that exceeds 'y' metres;
  - a wayleave area that exceeds 'z' hectares; and
  - other factors.
31. The Department identified the 'proceedings' which it had in mind as those relating to its operation of foreshore licensing. I understand that this includes past, present and future licensing matters. The appellants argued that their AIE request "does not relate to any confidential 'proceedings' within the meaning of article 8(a)(iv), let alone proceedings protected by law".
32. I am satisfied that the internal process through which the Department and its Minister consider and determine whether to grant a foreshore licence and fix the amount of any associated rent, fee or periodic payment, may properly be characterised as the proceedings of a public authority within the meaning of article 8(a)(iv). I am also satisfied that the withheld information is information on those proceedings, in that it is related to, is about, and / or informs, such proceedings.
33. The Department claims that the confidentiality of the proceedings is protected in law by the Freedom of Information Act (FOIA) 2014. Before considering if this is the case, I shall first assess whether any or all of the relevant information would be exempt from an FOI request on the ground relied on by the Department. Since the Department had cited multiple sections of the FOIA in relation to all of the withheld information, before the scope of the appeal was refined, my investigator invited the Department to identify the FOIA provision(s) which it relied on in relation to the information now at issue, i.e. information on the criteria which trigger bespoke valuations. The Department replied, saying that it relied solely on section 36 of the FOIA. The Department had previously cited section 36(1) subsections (b) and (c) as the relevant provisions in this regard.
34. Section 36(1)(b) of the FOIA applies to the disclosure of "financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation", whereas section 36(1)(c) applies to the disclosure of "information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates".
35. The appellants submitted that the Department's reliance on FOIA exemptions was inappropriate. They submitted that the Department's processes and criteria should be transparent, fair and equitable, and "confer no advantage to any particular person or entity, otherwise there is a risk of state-aid or other anti-competitive action".
36. The Department submitted that releasing the various thresholds that trigger bespoke valuations "may give applicants or potential applicants the wrong impression as to what charges will ultimately apply". It added that:

“A key consideration for developers is the length of time that the overall assessment of a licence application will take. Applying a bespoke charge to a licence application results in a considerably longer assessment when compared with applications that attract standard charges. Therefore, it is important that developers can be provided with the right information as to which type of valuation their proposal will attract once it has been technically assessed by the Department. The final charge to be applied is only considered after the project has been evaluated in terms of project type, scale, location etc. ... This information is commercially sensitive and it would undermine the Minister’s position if such information is released i.e. what triggers bespoke valuations”.

“Ownership of Foreshore lands is vested in the Minister for Public Expenditure and Reform and this Department is responsible for administering the current regulatory system. In accordance with the Foreshore Act, DPER’s sanction is required for bespoke valuations over a certain threshold.... This Department is not in a position to comment on the evaluation undertaken by DPER in relation to the sanctioning or not of bespoke valuation”.

“This State is in direct competition with other EU Member States and Third countries with regard to the submarine cable industry. To the best of our knowledge, these competing jurisdictions do not release their valuation assessment criteria or charges and should those used in this jurisdiction be released it would place the State at a commercial disadvantage in seeking to attract industry and negotiate commercial contracts. This could also potentially distort competition in the submarine cable industry market if this State is unilaterally required to release information related to these charges”.

37. I reviewed the information at issue to see if it comes within the FOIA exemptions cited by the Department. Since the Department said that disclosure “would undermine the Minister’s position”, I take it that the Department regards the Minister as “the person to whom the information relates”. I therefore understand the Department’s argument to be that disclosure “could reasonably be expected to” result in a material financial loss to the State or could prejudice the competitive position of the Minister in the conduct of foreshore-licensing business on behalf of the State or could prejudice the conduct or outcome of foreshore licence negotiations undertaken by the Minister with regard to foreshore licences.
38. I do not see that disclosure would give applicants the wrong impression in relation to what charges may apply and/ or the length of time that the licence application process might take. On the contrary, disclosure could enable applicants to better appreciate the time the process might take, since it is clear that bespoke valuations take longer to conclude. Even if disclosure did give a wrong impression in this regard, I do not see that that this would mean that disclosure could reasonably be expected to pass the “harm test” required before sections 36(1)(b) or (c) of the FOIA apply. In any event, I do not accept that the possibility of environmental information

being misunderstood or misinterpreted is reason for it to be withheld in response to an AIE request.

39. I accept that Ireland is in direct competition with other EU Member States and Third countries with regard to what the Department calls “the submarine cable industry”. I do not accept the argument that disclosure would require Ireland, unilaterally, to release information that other competing states would not release: all EU member States have the same obligations in relation to the AIE Directive, and non-EU countries which are members of the UNECE have similar obligations under the Aarhus Convention.
40. Whether the fee for a foreshore licence is fixed following a bespoke or a standard valuation process, the fee itself is determined in Ireland by the Minister. I cannot see, and the Department has not shown, how disclosure of the bespoke valuation triggers that were in place at the relevant time could reasonably be expected to result in financial loss to the State. This is because I cannot see how disclosure would force the Minister to agree to lower fees or how it might put off people who might otherwise apply for licences. Neither can I see how disclosure could prejudice the competitive position of the Minister. Disclosure could shed light on how long it might take before the Department would quote a licence fee to an applicant but it would neither predict the outcome of the valuation nor tie the Minister’s hands in determining the fee to be charged.
41. I am not persuaded that disclosure could prejudice the conduct or outcome of foreshore licence negotiations undertaken by the Minister. I understand that any such negotiations may concern the level of the fee to be charged. But I have no reason to believe that whether or not a particular licence-application is to be subject to a bespoke valuation is a matter that is negotiated.
42. The Minister is free to set the triggering criteria and to change those criteria. I understand that, at any point in time, specific criteria apply, as a matter of fact. I cannot see how the disclosure of those criteria could undermine the Minister’s position. As I see it, disclosure would provide a statement of the Minister’s position, rather than undermine it.
43. I note that the information at issue does not include information on how DPER evaluates bespoke valuations.
44. All in all, after carefully considering the withheld triggering information and the submissions of the parties, I do not accept that disclosure could reasonably be expected to result in any of the harms specified in section 36(1)(b) of the FOIA or that it could cause the harm specified in section 36(1)(c) of the FOIA.
45. I conclude that subsections 1(b) and 1(c) of section 36 of the FOIA would not exempt the information at issue from an FOI request. Accordingly, as no further legal provisions have been cited as providing for the confidentiality of the proceedings at

issue here, I conclude that the Department has not shown that the confidentiality of its foreshore licence proceedings is “otherwise protected by law”.

Findings:

46. I find that there is no information on criteria for triggering bespoke valuations in records 15, 19, 23, 24, 29, and 30. I find that such information is to be found in records 25, 26, 27, 28, 31 and 32. I find that the confidentiality of the relevant proceedings is not provided for in law by sections 36(1)(b) or (c) of the FOIA. As that is my finding, I cannot find that the Department’s refusal to provide access to the information at issue is justified by article 8(a)(iv) of the AIE Regulations.

**Issue 3: Information refused under article 9(1)(c)**

47. I turn now to consider whether article 9(1)(c) justifies the withholding of information on the criteria which trigger bespoke valuations contained in records 26 and 30. As stated above, I identified such information in record 26 but found none in record 30.

48. Article 9(1)(c) provides that a public authority may refuse to make environmental information available where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.

49. I accept that the withheld information is currently treated as “confidential” by the Department and I accept that it is “commercial information” in the sense that it relates to how the Department goes about deciding on charges for licences. I accept that disclosure would bring the confidentiality of that commercial information to an end. For article 9(1)(c) to apply, however, commercial confidentiality must be provided by law. The Department confirmed that relies on section 36(1)(b) and (c) of the FOIA. As I have found that these provisions of law do not apply to the information now at issue, I cannot accept the Department’s position.

50. As the Department has not persuaded me that commercial or industrial confidentiality, *provided for in law* to protect a legitimate economic interest, applies in this case, I cannot find that article 9(1)(c) applies to justify the withholding of the information at issue.

Findings:

51. I find that the Department’s refusal to provide access to information in record 26 on the criteria which ‘trigger’ bespoke valuations was not justified by article 9(1)(c) of the AIE Regulations.

## **Decision**

52. Having carried out a review under article 12(5) of the AIE Regulations of those parts of the Department's decision which were the subject of this appeal, I make a number of findings to vary its decision. I find that that the decision to refuse to provide access to information on the process or methodology for conducting bespoke valuations was justified, because the Department does not hold that information. I find that its decision to refuse access to information on the criteria which trigger bespoke valuations was not justified. I therefore require the Department to make the information set out in the appendix to this decision available to the appellant.

## **Appeal to the High Court**

53. 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**  
10 December 2020

Appendix overleaf

**Appendix to Decision of the Commissioner for Environmental Information on  
Case OCE-93468-X5H1G3 (legacy reference CEI/19/0027)**

The following information on criteria for bespoke valuations is required to be released to the appellants:

(Note: Records 25, 27, 28, 31 and 32 were released redacted. Another copy of these records should now be released, this time with the information specified below *unredacted*, so it can be seen in context)

Record 25:

- All information on the third page down to and including the title (in bold font) to subparagraph (2).
- The information that was redacted on the fifth page (one of which is a distance in km and the other is an amount of money in euros).
- The information redacted on the eighth page (an amount of money in euros)

Record 27:

- The redacted figure (a distance in km) on the first page (in an email dated 17 September 2017).
- The two figures redacted from the email shown on the sixth page and dated 15 January 2015 (one is an area in hectares and the other is an amount of money in euros).

Record 28:

- All information on the second page following after the line: “The Valuation Office suggests that a bespoke valuation should be requested where the proposed development meets one or more of the following criteria” down to, and including, the topic of subparagraph (2) (shown in bold font).
- The three figures redacted in paragraph 2(2) on page four.
- The figure redacted from (a) in the conclusion section on the last page.

Record 31:

- The figure redacted on page 2.
- The two figures redacted on page 4.

Record 32:

- The figure redacted in paragraph (a).

Records 26: This was refused in whole: it should now be released with the following information shown in clear (what is not listed here may be redacted).

- From section (1): The words from “Bespoke valuations should be requested where...” and the remainder of section (1) which follows.
- The title of section (2.1) (shown in bold font).
- All information in paragraph 2.2 from the words “The length of the wayleaves for pipelines and cables should be capped....” and the “Note” in bold at the bottom of that page.

End