



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-97486-M8K1L1

Date of decision: 20 April 2021

Appellant: Right to Know CLG c/o Mr Ken Foxe

Public Authority: Office of Public Works (OPW)

Issue: Whether the OPW was justified in refusing access to information relating to pest control and gardening or landscaping at Áras an Uachtaráin for 2018, 2019, and 2020 on the basis that the exception at article 3(2) of the AIE Regulations applied to it.

Summary of Commissioner's Decision: The Commissioner found that the information was not excluded from the scope of the AIE Regulations pursuant to article 3(2). He annulled the OPW's decision in full, and expressed his expectation that it would make a new decision on the request in accordance with 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 17 July 2020, the appellant, citing the Freedom of Information Act 2014 (FOI Act) requested the following from the OPW:

“- a record/spreadsheet/database of the amount of money spent on pest control at the following location in each of 2018, 2019, and 2020: Áras an Uachtaráin.

- a copy of any reports, memos, submissions, or other such review or overview documents relating to the issue of pest control at any of the above locations during the same period.

- a record/spreadsheet/database of the amount of money spent on gardening or landscaping at the following location in each of 2018, 2019, and 2020: Áras an Uachtaráin.”

The appellant referred the OPW to my decision in Case [CEI/16/0041](#) (Right to Know CLG & the Department of Defence) in its request.

2. On 29 July 2020, the appellant received a decision on the request of 17 July. On the same day, the appellant replied to say that the request inadvertently cited the FOI Act and asked for the request to be re-submitted as an AIE request.
3. On 25 August 2020, the OPW notified the appellant that it made a decision on his AIE request of 29 July 2020 refusing access to information requested pursuant to article 3(2) of the AIE Regulations. On the same day, the appellant requested an internal review of that decision.
4. On 24 September 2020, the OPW made an internal review decision affirming the decision of the original decision-maker refusing refuse access to the information requested pursuant to article 3(2). The appellant appealed the OPW’s internal review decision to my Office on the same day.
5. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and the OPW. 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’).

Scope of Review

6. 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. The OPW refused access to the information requested on the basis that article 3(2) of the AIE Regulations applied to it. Accordingly, the question before me is whether the information at issue is excluded from the scope of the AIE Regulations under article 3(2).
7. Whether the information is excluded from the AIE Regulations in the manner contended by the OPW is a threshold jurisdictional matter (for more information please see OCEI's Procedures Manual, available at www.ocei.ie). In accordance with my general practice in cases concerning a threshold jurisdictional question, my review is limited to the preliminary matter of whether the information is excluded from the AIE Regulations in the manner contended by the OPW. As this case involves a threshold jurisdictional matter it was assigned for investigation before older cases, which were in the allocation queue before it.

Relevant articles of the AIE Regulations and the AIE Directive

8. Article 7(1) of the AIE Regulations, which transposes Article 3(1) of the AIE Directive, provides that:

“A public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the applicant any environmental information, the subject of the request, held by, or for, the public authority.

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

“environmental information held by a public authority' means environmental information in the possession of a public authority that has been produced or received by that authority;

“environmental information held for a public authority' means environmental information that is physically held by a natural or legal person on behalf of that authority”.

This transposes the equivalent provision in Article 2(3) and 2(4) of the AIE Directive defining those terms.

10. Article 3(1) of the AIE Regulations defines “public authority”, which includes a range of public entities, some specifically defined, while also providing criteria for assessing whether or not a body falls within the remit of the AIE Regulations.
11. Article 3(2) of the AIE Regulations (as inserted by S.I. No. 309/2018 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2018) provides that:

"Notwithstanding anything in sub-article (1), in these Regulations 'public authority' does not include—

- (a) the President,
- (b) the Office of the Secretary General to the President,
- (c) the Council of State,
- (d) any Commission for the time being lawfully exercising the powers and performing the duties of the President, or
- (e) any body when acting in a judicial or legislative capacity."

The Explanatory Note to the 2018 Regulations states that:

"The purpose of these Regulations is to amend the European Communities (Access to Information on the Environment) Regulations 2007 to clarify the status of certain offices."

12. Article 3(1) defining "public authority" and article 3(2) excluding certain bodies from that definition transposes Article 2(2) of the AIE Directive. Article 2(2) of the AIE Directive provides that:

"'Public authority' shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)."

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

13. The Supreme Court in *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*), available at www.courts.ie, held that in interpreting the AIE Regulations, it is not sufficient to have regard to national law and, in particular, the normal principles of statutory interpretation in Irish law (paragraph 10). The AIE Regulations must be understood as implementing the provisions of the AIE Directive (and indirectly the Aarhus Convention) and, as a matter of constitutional law, ought not to go further than, but not fall short of, the terms of the Directive. It stated that if, as a matter of domestic interpretation, the provisions of the AIE Regulations might appear to go further or fall short of what the AIE Directive requires, an Irish court might be required to adopt another interpretation which is consistent with the provisions of the Directive, if that is

possible. Accordingly, the Court found that, in order to understand the AIE Regulations, it is necessary to understand exactly what the Directive does and means, which may also mean interpreting the provisions of the Aarhus Convention.

Appellant's position

14. In its internal review request of 25 August 2020 the appellant stated that the information requested is not held by the President, the Council of State, or Office of the Secretary General. The appellant stated that the effect of article 3(2) is that these bodies are excluded from the definition of a 'public authority' and, therefore, do not have to process requests under the AIE Regulations. It also stated that in Case CEI/16/0041 that the Department of Defence was required to disclose environmental information relating to the President as article 3(2) did not apply to the Department. It further stated that article 3(2) of the AIE Regulations differs from section 42 of the FOI Act in that article 3(2) applies to named bodies and how those bodies deal with requests under the AIE Regulations. It also cited the decision of the Information Commissioner in Case [180527](#) (Right to Know CLG and Department of Business, Enterprise and Innovation). In this regard, the appellant stated that in order for a record to relate to the President there must be a sufficiently substantial link between the record and the purpose of section 42 of the FOI Act, which is to protect the unique constitutional position of the Office of the President.
15. In its submission to my Office the appellant reiterates that article 3(2) has no relevance to this case as it only relates to the status of certain public bodies and whether they are public authorities for the purposes of the AIE Regulations. It states that there is no question that the OPW is a public authority for the purposes of AIE, and, therefore must process the request. It rejects that there is a lack of clarity on the issues that arise in this case.

OPW's position

16. The OPW submits that the decision maker formed the opinion that all records relating to the President are excluded under both Freedom of Information (FOI) and AIE. It states that the decision maker sought clarity from the Central Policy Unit at the Department of Public Expenditure and Reform. It also states that there appears to be a lack of clarity in the legislation for the OPW to fully and categorically decide on the release of such records.
17. The OPW also submits that it considers that it had a duty of care and that providing such information may have generated negative media coverage. It further states the decision maker consulted with other staff who previously managed FOI and AIE requests and it is considered best practice to refuse requests pertaining to Áras an Uachtaráin.

Analysis and Findings

18. Article 3(2) of the AIE Regulations excludes the bodies listed from the scope of the definition of "public authority" set down in article 3(1). Article 3(2) does not contain a provision excluding environmental information from the scope of the AIE

Regulations either because it relates to a body or institution listed in article 3(2) or otherwise.

19. Article 2(2) of the AIE Directive, which article 3(2) transposes, provides that Member States can exclude certain "bodies or institutions" from the definition of "public authority". As with article 3(2) of the AIE Regulations, Article 2(2) does not provide for the exclusion of environmental information relating to bodies or institutions which are excluded from the definition of "public authority" set down in that article.
20. I accept the appellant's argument that article 3(2) of the AIE Regulations only excludes certain bodies or institutions from the definition of "public authority" in article 3(1). As I note directly above at paragraphs 18 and 19, neither article 3(2) of the AIE Regulations nor Article 2(2) of the AIE Directive provide for the exclusion of environmental information relating to bodies or institutions which are excluded from the definition of "public authority".
21. I note the submissions and discussion between the parties in relation to section 42 of the FOI Act. As set out above, the AIE Regulations are an instrument of European law and so require an interpretation consistent with the AIE Directive. The provisions of the FOI Act are not relevant to my analysis in this regard, as the FOI Act is an instrument of domestic law. It is therefore unconnected to the AIE Regulations in many respects, notwithstanding its comparable purpose in some other respects. For the avoidance of doubt in relation to the parallels drawn between the two regimes, as set out above, neither article 3(2) nor articles 8 and 9 of the AIE Regulations, provide an exception to disclosure of environmental information relating to the President. Moreover I note that the High Court judgment in *Right to Know CLG -v- An Taoiseach & anor* [2018] IEHC 372, available at www.courts.ie, indicates that it would not be permissible under the AIE Directive for a class exemption exempting a whole category of information from the obligation on public authorities to make available environmental information in article 7(1) of the AIE Regulations (and Article 3(1) of the AIE Directive).
22. Having considered the matter carefully, I am satisfied that article 3(2) of the AIE Regulations does not exclude environmental information which is held by a public authority relating to a body or institution that is not a "public authority" for the purpose of the Regulations. Accordingly, I consider that where a body which is a public authority for the purposes of the AIE Regulations holds environmental information relating to a body or institution that is not a "public authority" the environmental information the public authority holds falls within the scope of the AIE Regulations. Therefore, where a public authority receives a request for environmental information held by or for it, including environmental information relating to a body or institution that is not a "public authority" for the purposes of the AIE Regulations, it should make the environmental information available, subject only to the exceptions set down in articles 8 and 9 and the obligations in article 10 of the AIE Regulations.

Information at issue

23. The disclosure obligation in article 7(1) of the AIE Regulations (and Article 3(1) of the AIE Directive) applies where: the body the request has been made to is a “public authority”; the information requested is “environmental information”; and the environmental information is “held by or for” the public authority. It is not in dispute that the OPW is a public authority within the meaning of article 3(1) of the AIE Regulations. It is also not in dispute that the OPW is not one of the bodies or institutions excluded from the definition of public authority by article 3(2) of the AIE Regulations.
24. The OPW confirmed to my investigator that it is responsible for the maintenance of the building and estate at Áras an Uachtaráin including daily gardening and maintenance of the grounds. I note that the OPW provided a copy of the information requested to my Office during its investigation and explained its process for organising pest control and gardening and landscaping supplies for Áras an Uachtaráin. It set out that the foreman for the Áras an Uachtaráin, who is based in OPW Offices in the Phoenix Park, contacts the relevant company when required. It also explains that records relating to visits by the pest control company are held by the OPW and the process it carries out for paying for the service.
25. 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. The records at issue in this case contain information relating to pest inspection visits, a spreadsheet regarding pest control and a spreadsheet relating to gardening at Áras an Uachtaráin.
26. Having examined the records submitted to my Office by the OPW, I consider that they align with the OPW’s description of its process and procedures for pest control and gardening or landscaping at Áras an Uachtaráin. I am satisfied that the information requested is in the possession of the OPW and was produced and received by it. I am also satisfied that the information in its possession relates to the OPW’s own actions and responsibilities as the body responsible for the maintenance of the building and estate at Áras an Uachtaráin. I, therefore, conclude that the information requested is “held by” the OPW within the meaning of the definition in article 3(1) of the AIE Regulations.
27. As I set out above, article 7(1) of the AIE Regulations transposes Article 3(1) of the AIE Directive. The latter part of Article 3(1) provides that a requester does not have to state its interest in the request. This is transposed in article 6(2) of the AIE Regulations which provides that an applicant shall not be required to state his or her interest in making the request. Accordingly, I consider that any interest a requester has in the making of its AIE request including the potential for the information being used to generate media coverage and any related duty of care by the OPW is not relevant to the question before me in this case, which is whether or not the

information at issue is excluded from the scope of the AIE Regulations under article 3(2). As set out above at paragraphs 20 to 22, I find that article 3(2) of the AIE Regulations does not exclude information relating to the bodies and institutions excluded from the definition of “public authority” in article 3(1) in the manner contended by the OPW.

Conclusions

28. For the reasons set out above, I am satisfied that the information requested is “held by” the OPW within the meaning of the definition in article 3(1) of the AIE Regulations. I am also satisfied that the requested information which is held by the OPW is not excluded from the scope of the AIE Regulations pursuant to article 3(2), notwithstanding the fact it may also relate to the President which is a body or institution that is excluded from the definition of “public authority” by that article.

Decision

29. Having carried out a review under article 12(5) of the AIE Regulations, I annul the Office of Public Works’ decision. In light of my decision I expect the Office of Public Works to process the appellant’s request in accordance with the AIE Regulations.

Appeal to the High Court

30. 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
20 April 2021