



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 2014 (the AIE
Regulations)**

Case CEI/17/0018

Date of decision: 26 March 2018

Appellant: Right to Know CLG

Public Authority: Department of Justice, Equality and Law Reform (the Department)

Issue: Whether the Department's decision to refuse the appellant's AIE request for information concerning the consideration of the establishment of legal aid or other assistance mechanisms to remove or reduce financial and other barriers to access to justice in environmental matters pursuant to article 9(5) of the Aarhus Convention was justified. The Department refused to grant access to the information identified as being relevant to the AIE request on the basis that it was not environmental information within the meaning of the definition in article 3(1) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the Department was justified in refusing the request for information on the basis that the information identified as being relevant to the AIE request was not environmental information within the meaning of the AIE Regulations. The Commissioner also found that the Department fulfilled its obligations under article 7 of the AIE Regulations when processing the appellant's AIE request.

Right of Appeal: As set out in article 13 of the AIE Regulations, 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. Such an appeal must be initiated not later than **two months** after notice of the decision is given to the person bringing the appeal.

Background

On 2 March 2017, Right to Know CLG (appellant) requested from the Department of Justice, Equality and Law Reform (Department):

“All information concerning Ireland’s consideration of the establishment of legal aid or other assistance mechanisms to remove or reduce financial and other barriers to access to justice in environmental matters pursuant to article 9(5) of the Aarhus Convention.”

Article 9(5) of the Aarhus Convention states that:

“In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”

The Department refused the appellant’s request on the 28 March 2017 on the basis that the information sought was not environmental information. It stated that the appellant could make a request for the information under the *Freedom of Information Act 2014* (FOI request). The appellant requested an internal review of the Department’s decision on 29 March 2017. In addition to seeking a review of the Department’s conclusion that the information was not environmental information, the appellant also queried whether a search was carried out by the Department for information falling under the scope of its AIE request. The Department’s internal review decision, which was received by the appellant on 28 April 2017, affirmed the original decision maker’s refusal of the AIE request. It also stated that a search for information had been carried out using the search terms “Civil Legal Aid” and “Aarhus Convention” and that 13 records relevant to the AIE request had been identified. The internal review decision reiterated that the appellant could make an FOI request for the information sought. The appellant appealed to this Office on 4 May 2017.

Scope of review

Under article 12(5) of the AIE Regulations, my role is to review the Department’s internal review decision and to affirm, annul or vary it. In this instance, the appellant’s AIE request was refused solely on the basis that the information requested was not environmental information. I emphasise, as I have done in other appeals, that it is my practice to review as a preliminary matter whether particular information is "environmental information".

Accordingly, the scope of my review in this case is limited to the question of whether the information sought constitutes "environmental information" for the purposes of the AIE

Regulations and whether further information falling under the scope of the AIE request is held by or for the Department.

In conducting my review I have had regard to submissions of the parties and 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).

Relevant AIE provisions

Article 3(1) 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)”.

Article 7(5) of the Regulations provides that:

“Where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it.”

Analysis of the justification of the Department's internal review decision

The Department provided my Office with the 13 records, and a schedule of those records, which it identified as being relevant to the appellant's AIE request. The Department submitted that it did not consider the records to be environmental information within the meaning of the definition in article 3(1) of the AIE Regulations. Before considering whether any of the 13 records comprise or contain environmental information, I will consider the adequacy of the search carried out by the Department when processing the appellant's AIE request.

Search for information carried out by the Department

The appellant in its internal review stated that there was no indication from the Department's initial decision that it had conducted a search for information falling within the scope of the AIE request, but that it is implicit from the decision that such information exists. It also stated that there was no indication that the information falling under the scope of the AIE request had been considered on an individual basis as required under the AIE Regulations. The Department in its internal review decision stated that a search had been carried out for information using the search terms "Civil Legal Aid" and "Aarhus Convention" and that 13 records had been identified and considered in processing the AIE request. The appellant queried whether the search words used to search for information were sufficient. The appellant in its submission to my Office stated that the scope of Article 9(5) of the Aarhus Convention extends beyond civil legal aid. It also stated that the search words indicated that the search was carried out on electronic records only and that the Department's paper files did not appear to have been searched.

My investigator asked the Department to provide an account of the steps actually taken to search for information relevant to the appellant's AIE request, including any search of the Department's paper files. The investigator also asked the Department how it came to the conclusion that the search words used were sufficient for the purposes of identifying and locating information relevant to the appellant's AIE request. The Department in its response acknowledged that Article 9(5) of the Aarhus Convention extends beyond civil legal aid. However, it stated that in the context of the work of the Department it is hard to see a policy area other than that dealing with the provision of civil legal aid which would provide assistance mechanisms. It added that the Courts Policy Division is the only other policy division within the Department that might have involvement in this matter. It went on to say

that the Courts Policy Division was contacted and that it verbally confirmed that it was not involved with this matter and that it did not have any documentation of relevance to it.

The Department stated that the electronic search it conducted was used to identify where to search in the first instance, and that the results from that search led to the searching of the relevant paper files. The Department explained that it carried out two electronic searches. The first search involved a search of the electronic document libraries and paper files related to civil legal aid, as the matter was identified as most likely being a civil legal aid one. After that search failed to identify any information relevant to the AIE request, a further electronic search was carried out of the document libraries and a “mail in” database of the Freedom of Information Unit. The Freedom of Information Unit at that time had responsibility for the circulation of records and correspondence which spanned the remit of more than one division. Two files were identified as being related to the Aarhus Convention during the second electronic search which led to a “full search” of the two identified paper files and the identification of the records relevant to the AIE request. The two files identified related to a Memorandum for Government and the ratification of conventions which had been circulated for observations to a number of divisions within the Department. The Department stated that only two divisions came back with observations; the coordination unit which had responsibility for civil legal aid at that time and the Freedom of Information Unit. The Department submitted that this reinforces its conclusion that the AIE request only concerns those two divisions.

The Department provided my Office with a detailed account of its search for information when processing the AIE request, which I have summarised above. I am satisfied that in processing the request it searched both electronic and paper files. It is not in dispute in this appeal that the assistance mechanisms referenced in Article 9(5) of the Aarhus Convention extend beyond civil legal aid. However, I accept the Department’s rationale for concluding that the division with responsibility for civil legal aid and the Courts Policy Division were the divisions most likely to hold information relevant to the AIE request. The Department is best placed to identify which divisions within it might hold information relevant to the AIE request. I also accept that the identification of the two files in the second search supports its conclusion that the divisions searched were the ones most likely to hold information relevant to the AIE request. I have seen no evidence in the course of this review which would cause me to reject the Department's conclusions about which divisions might hold information relevant to the AIE request.

Regarding the search words used, while Article 9(5) of the Aarhus Convention extends beyond civil legal aid, the Department also searched for information using the search term “Aarhus Convention”. In view of the fact that the Department is not the Department with primary responsibility for the Aarhus Convention, I am willing to accept that information held by or for it relating to the Aarhus Convention would be generally labelled with the term “Aarhus Convention”. As the Department does not have primary responsibility for the Aarhus Convention, it is reasonable to expect that it would not hold a large amount of information relevant to the AIE request. In this instance I think it is reasonable to conclude that a search for information relating to the Aarhus Convention using the search term “Aarhus Convention” would return results relating to all aspects of the Convention, including the consideration of the establishment of assistance mechanisms extending beyond civil legal aid pursuant to Article 9(5) of the Aarhus Convention. Therefore, I am satisfied that the search terms used by the Department were sufficient to identify information falling under the scope of the AIE request.

In the circumstances of the appeal, I am satisfied that the Department took adequate steps to identify and locate records relevant to the AIE request. Accordingly, I find that the Department has fulfilled its obligations under article 7 of the AIE Regulations with respect to the appellant's AIE request for information relating to the establishment assistance mechanisms to remove or reduce financial and other barriers to access to justice in environmental matters pursuant to article 9(5) of the Aarhus and that article 7(5) applies.

Definition of environmental information

Article 3(1) defines environmental information as any information on the categories listed at paragraphs (a) to (f) of that article (reproduced above under the heading “Relevant AIE provisions”). For information to qualify as environmental information it must fall into one of the six categories set out in the definition.

It is accepted by both parties in this appeal that the 13 records are not environmental information within the meaning of article 3(1)(a), (b), (e) or (f). It is also the case that the records are not in and of themselves measures or activities affecting or likely to affect the elements and factors of the environment or a measure designed to protect those elements. The central issues in this appeal are whether the relevant records are:

- “information on” on a measure designed to protect the environment - specifically Article 9(5) of the Aarhus Convention or
- reports on the implementation of environmental legislation - namely article 9(5) of the Aarhus Convention.

Are the records environmental information within the meaning of article 3(1)(c)?

The appellant, in its request for an internal review, stated that the information requested was environmental information within the meaning of paragraph (c) of the definition as “the matter of legal aid/assistance mechanisms in environmental cases falls squarely within the scope of Article 9(5) of the Aarhus Convention which is a measure affecting or likely to affect the environment.” In its submission to my Office, the appellant stated that its AIE request concerns Ireland’s consideration of the implementation of Article 9(5) of the Aarhus Convention. It cited my decision in [CEI/16/0025](#) (Dr Fred Logue on behalf of FP Logue Solicitors and the Department of the Environment, Community and Local Government) (available at <http://www.ocei.ie/decisions/>). The appellant stated that in that case I found that the Aarhus Convention is a measure designed to protect the environment within the meaning of article 3(1)(c). The appellant went on to contend that the information requested is for “information on” that measure and is therefore environmental information.

The Department submitted that, in affirming its initial decision on the AIE request, its decision maker at internal review stage determined that the information requested was not environmental information as the records relate to the Department’s observations to the sponsoring Department on the ratification of the Aarhus Convention.

In CEI/16/0025, I accepted that the Aarhus Convention is a measure designed to protect the elements of the environment for the purpose article 3(1)(c). I see no reason to depart from that position in this review. I note that the appellant’s AIE request was for information concerning the consideration of the establishment of legal aid or other assistance mechanisms to remove or reduce financial and other barriers to access to justice in environmental matters pursuant to article 9(5) of the Aarhus Convention, and not on the Aarhus Convention more generally. I accept that if the records are “information on” the consideration of the establishment of such assistance mechanisms it would be environmental information within the meaning of article 3(1)(c). For that reason, I will consider if the records are “information on” the consideration of the establishment of legal aid or other assistance mechanisms to

remove or reduce financial and other barriers to access to justice in environmental matters within the meaning of the definition of environmental information in article 3(1)(c).

As I have stated in other cases (see [CEI/11/0001](#) (Mr. Gavin Sheridan and Central Bank of Ireland) and [CEI/15/0007](#) (Mr Ken Foxe, Raidió Telefís Éireann and the Department of Defence) (available at www.ocei.ie/Decisions/)), the European Court of Justice in [C-316/01](#) *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen* (Glawischnig) suggests that right of access is not unlimited, and that only information which has more than a minimal connection with environmental factors falls within the definition of environmental information. In [CEI/15/0007](#), I stated that a “bigger picture” approach to whether information is information on a measure or activity, and that an assessment of what is “integral” to a measure or activity is a useful test to use when considering the scope of the definition of environmental information under article 3(1)(c). The same principles that I set out in that case apply in this case. I have of course also considered the jurisprudence of the courts on the question of the definition. Accordingly, the issue in this review is the connection of the information identified as relevant to the AIE request to the consideration of the establishment of legal aid or other assistance mechanisms to remove or reduce financial and other barriers to access to justice in environmental matters pursuant to Article 9(5) of the Aarhus Convention.

Having reviewed the records, I am not satisfied that the information contained in them is information on the consideration of the establishment of legal aid or other assistance mechanisms to remove or reduce financial and other barriers to access to justice in environmental matters pursuant to Article 9(5) of the Aarhus Convention. I note that the request itself is very specific and does not extend to information on the Aarhus Convention more generally. While I cannot detail the contents here, the records concern the observations from the then Department of Justice, Equality and Law Reform to the then Department of Environment, Community and Local Government on proposed legislation it was sponsoring. Although records 1 to 8 relate to the Aarhus Convention, only one paragraph in record 1, a small portion of record 5 and two sentences in record 6 could in any way be potentially relevant to Article 9(5) of the Aarhus Convention. With the exception to those parts of records 1, 5 and 6, the remainder of records 1 to 8 do not in any way relate to, or consider the establishment of such assistance mechanisms in accordance with, Article 9(5) of the Aarhus Convention. Accordingly, I am satisfied that the remainder of the information in records 1 to 8 does not fall under the scope of the appellant's AIE request. Accordingly, I do not need to

determine for the purposes of this review whether the information in the remainder of the information in records 1 to 8 comprise or contain environmental information within the meaning of article 3(1)(c).

I note that the parts of records 1, 5 and 6 that could be considered relevant to Article 9(5) of the Aarhus Convention do not explicitly refer to that article. The content of the one paragraph in record 1, the small portion of record 5 and the two sentences in record 6 does not amount to a "consideration of the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice". That information cannot be described as a consideration of the implementation of Article 9(5) of the Aarhus Convention or the consideration of the establishment of appropriate assistance mechanisms pursuant to that article. It is an observation from the Department to the then Department of Environment, Community and Local Government on proposed legislation it was sponsoring. I do not consider that there is a sufficient connection between that information and the consideration of the implementation of Article 9(5) of the Aarhus Convention or the consideration of the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. Accordingly, I am not satisfied that the paragraph in record 1, the small portion of record 5 and the two sentences in record 6 relating to Article 9(5) are environmental information within the meaning of article 3(1)(c).

Records 9 to 13 relate to environmental legislation more generally; only three paragraphs in record 10 relate to the Aarhus Convention. With the exception of the three paragraphs in record 10, the remainder of the information in records 9 to 13 do not relate to the Aarhus Convention. Accordingly, I am satisfied that the remainder of the information in records 9 to 13 does not fall under the scope of the appellant's AIE request. Regarding the three paragraphs in record 10 that are relevant to the Aarhus Convention, it is not clear or obvious that that information relates to Article 9(5) of the Aarhus Convention. It does not specifically consider the implementation of Article 9(5) of the Aarhus Convention or the establishment of assistance mechanisms pursuant to that article. For that reason, I do not consider that there is a sufficient connection between that information and the consideration of the implementation of Article 9(5) of the Aarhus Convention or the consideration of the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. As a result, I am not satisfied that the information in the three paragraphs in record 10 relevant to the Aarhus Convention is environmental information within the meaning the meaning of article 3(1)(c).

Are the records environmental information within the meaning of article 3(1)(d)?

The appellant in its submission to my Office stated that the Aarhus Convention is environmental legislation and that paragraph (d) of the definition of environmental information is engaged insofar as the AIE request covers reports on the implementation of Article 9(5) of the Convention.

My investigator informed the Department that it holds any reports on the implementation of Article 9(5) of the Aarhus Convention such information would fall within the meaning of article 3(1)(d). The investigator asked the Department if it holds any such report relating to the implementation of Article 9(5) of the Aarhus Convention or if such a report is held by a natural or legal person on behalf of the Department. The Department provided my investigator with a written assurance that no reports on the implementation of Article 9(5) of the Aarhus Convention are held by or for it. I have seen no evidence in the course of this review that contradicts the Department's assurance that it does not hold such reports.

Accordingly, I accept the Department's written assurance that reports on the implementation of Article 9(5) of the Aarhus Convention are held by or for it.

In relation to the 13 records identified as being relevant to the appellant's AIE request, the Department submitted that its internal review decision maker determined that if the records were reports on the implementation of environmental legislation then the information would be environmental information. It is implicit in that response that the decision maker considered the information and determined that the records were not reports on the implementation of environmental legislation and thus were not environmental information within the meaning of article 3(1)(d).

Having examined the contents of the records, I accept that the information in the 13 records is not environmental information within the meaning of article 3(1)(d). The records do not report on the implementation of environmental legislation, including Article 9(5) of the Aarhus Convention. As I noted above, none of the records consider whether legal aid or other assistance mechanisms to remove or reduce financial and other barriers to access to justice in environmental matters should be established. Neither do they consider existing legislation that might be relevant to Article 9(5) of the Aarhus Convention. They do not propose or consider options for establishing assistance mechanisms to remove or reduce financial and other barriers to access to justice in environmental matters pursuant to Article 9(5) of the Convention. Accordingly, I accept that the information in the 13 records are not reports on the implementation of Article 9(5) of the Aarhus Convention.

Finding

For the reasons outlined above, I find that the Department was justified in refusing the appellant's AIE request on the basis that the 13 records are not environmental information within the meaning of the definition of environmental information in article 3(1) of the AIE Regulations. I also find that the search carried out by the Department when processing the AIE request was sufficient for the purposes of identifying information held by or for it falling within the scope of the request.

Decision

I affirm the Department's decision that the information identified as being relevant to the AIE request is not environmental information within the meaning of the definition of environmental information in article 3(1) of the AIE Regulations. I also affirm that the Department has fulfilled its obligations under article 7 of the AIE Regulations with respect to the appellant's AIE request and that article 7(5) applies.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than **two months** after notice of the decision was given to the person bringing the appeal.

Peter Tyndall
Commissioner for Environmental Information

26 March 2018