

**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/18/0031

Date of decision: 27 March 2019

Appellant: Right to Know CLG

Public Authority: Department of Communications, Climate Action &
Environment (the Department)

Issues: Whether the Department was justified in refusing to grant this AIE request on the ground that the requested information is not environmental information within the meaning of article 3 of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that some of the withheld information is environmental information within the meaning of article 3 of the AIE Regulations. Accordingly, he varied the Department's decision and required it to make a new decision in relation to that information.

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

Statutory Instrument (S.I.) Number 309 of 2018 was signed by the Minister for Communications, Climate Action and Environment on 27 July 2018. A copy may be accessed on www.irishstatutebook.ie [here](#). The title of the S.I. is “European Communities (Access to Information on the Environment (Amendment) Regulations 2018” and the explanatory note which accompanies it explains:

“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.”

On 10 August 2018 the appellant submitted an AIE Request to the Department seeking:

- Copies of all records held by the Department relating to Statutory Instrument (S.I.) Number 309 of 2018.
- Copies of any correspondence and submissions received by the Department in advance of the making of S.I. No. 309 of 2018 by the Minister.

The Department issued its decision on 24 August 2018. This decision refused the request on the basis that the requested information “does not fall within the definition of environmental information set out in article 3 of the AIE Regulations”. It informed the appellant that it could request the information under the Freedom of Information Act 2014 and provided advice on how to do that.

The appellant requested an internal review, maintaining that “the material is environmental information under 3(1)(c) of the AIE Regulations”.

On 18 September 2018, the Department issued a review decision which affirmed the original decision. It rejected the appellant’s view and said that S.I. 309 of 2018 is not a measure affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) and neither is it a measure or activity designed to protect those elements.

The appellant appealed to my Office on the same day and said:

“The Department had not provided us with any information about the records they hold so that we could even begin to determine whether they are environmental information or not. They have not provided a schedule of records associated with the request. We believe that the records are likely to contain environmental information

either in part or in full. We would ask that close attention is paid to the judgment in [case C-57/16P] when making your decision”.

C-57/16P was a case between ClientEarth (an environmental non-governmental organisation) and the European Commission which was heard by the Grand Chamber of the Court of Justice of the European Union. Judgment was delivered on 4 September 2018 and it is available at curia.europa.eu [here](#).

The Department provided my Office with a copy of the 97 records which it had identified as being captured by the request.

Scope of Review

This review required me to determine if the information at issue contains environmental information that has been withheld from the appellant.

In carrying out my review I had regard to the submissions made by the appellant 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); the Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’); and the relevant jurisprudence of the courts.

The appellant's position

My Office invited the appellant to make a submission but it declined to do so. It said "it is impossible to see how information relating to an amendment to the AIE Regulations cannot be classified as environmental information". I noted its earlier request for close attention to be paid to the judgment in C-57/16P.

The Department's position

The Department made a submission in which its decision-maker explained that he had examined the requested information in its entirety, in view of the definition of environmental information set out in the AIE Regulations, and decided that the information did not fall within the scope of the definition. He explained that, in particular, he had examined article

3(1)(d), which concerns "reports on the implementation of environmental legislation" and formed the view that this article applies only to reports on the operation of environmental legislation, i.e. "how effective or otherwise is the environmental legislation being implemented". He submitted that the material requested does not contain any 'reports' and its subject matter concerns an amendment to the AIE Regulations. He said that he "does not believe that this falls into the category of 'implementing environmental legislation' and does not affect the environmental factors as defined in the Regulations".

The Department also submitted that the judgment in C-57/16P is not relevant. It said that C-57/16P dealt with a refusal to grant access to an impact assessment report for a proposed binding instrument setting a strategic framework for risk-based inspection and surveillance in relation to EU environmental legislation. It said that the records in that case:

"were defined precisely as environmental reports and the refusal to grant access was on [the] basis of what could be summarised as 'deliberative process'. This has no relevance to this Department's decision not to grant access to records which was based on the definition of environmental information".

The law

Article 3 of the AIE Regulations defines 'environmental information' as follows:

“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).

The case law on the interpretation of the definition makes it clear that information does not have to be intrinsically ‘environmental’ to be environmental information but it must be information on one or more of the six categories provided.

Analysis

I read the judgment in in C-57/16P to see if it added anything to my understanding of the scope of the definition of environmental information. I concluded that it did not.

I then examined the records at issue and found that they do not contain environmental information within the meaning of paragraphs (a), (b), (e) or (f) of the definition of environmental information.

I proceeded to consider the category of environmental information provided by paragraph (d), which is ‘information on reports on the implementation of environmental legislation’. I was satisfied that each of the statutory instruments which together make up Ireland’s AIE Regulations constitute ‘environmental legislation’. I searched the records for ‘information on reports on the implementation of environmental legislation’ but did not find any. I concluded that the records do not contain environmental information within the meaning of paragraph (d) of the definition.

Next, I examined the records with a view to identifying any information on ‘activities’ or ‘measures’ that might be relevant when considering paragraph (c). While I did not identify any potentially relevant ‘activities’, I identified each of the S.I.s that make up the Irish AIE Regulations as individual ‘measures’ in their own right. They are S.I.s numbered 133 of 2007, 662 of 2011, 615 of 2014 and 309 of 2018.

I considered each of those S.I.s in turn, in order to determine whether they are measures that affect or are likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition. I concluded that they are not.

I considered whether the same S.I.s are measures that were ‘designed to protect’ the elements of the environment. In AIE appeal case [CEI/12/0008](#) (available at www.ocei.ie) my predecessor accepted that “the AIE Regulations and Directive are measures designed to protect the elements of the environment, but in an indirect and aspirational manner only”. The published decision indicates that she did so after reflecting on the wording of recital (1) to the preamble to the Directive, which states:

“Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment”.

I considered the matter afresh in the current case. The AIE Regulations were made in order to transpose the right of access to environmental information provided by the AIE Directive into Irish law. I therefore considered the *purpose* of the provision of that right, which is partly set out in recital (1) to the preamble to the Directive (see above). I concluded that the provision of the right was not intended to be an end in itself but was motivated by the desire of the legislature to facilitate more effective participation by the public in environmental decision-making, with the expectation that this would lead, eventually, to a better environment. In other words, the Directive was designed to affect the environment indirectly, because the legislature believed that it would lead to a better environment. The AIE Regulations were designed to give effect to the Directive, which must mean that they were designed to contribute towards the achievement of the Directive’s aims, including the aim of achieving a better environment.

‘Achieving a better environment’ necessarily requires the protection of current environmental values in the first place and then the improvement of those environmental values over time. I noted that the AIE Regulations are not designed to protect the environment by using the methods that are typically employed in environmental legislation. For example, they do not *prohibit* certain interventions in the physical environment or require those who wish to intervene in the environment to first submit *impact assessments* or seek prior *consent* by means of a licence or some other permission. On the other hand, I noted that no environmental legislation *directly* protects the environment. Typically, in order for legislation to protect the environment certain expectations of the part of the legislators must be borne out in practice: people must become *aware* of the law, they must *comply* with it, and there must be a system of *surveillance* which detects and responds to non-compliance.

Viewed in this light, the indirect and aspirational manner in which the AIE Regulations are expected to contribute to environmental protection does not mean that those Regulations were not “designed to protect” the environment.

From the above considerations, I accept that the Irish AIE Regulations are, both individually and collectively, measures designed to protect elements of the environment. It follows that information on those measures is environmental information within the meaning of paragraph (c) of the definition provided in the AIE Regulations. I therefore proceeded to examine the records with a view to identifying environmental information within the meaning of paragraph (c) of the definition.

I was mindful at all times that AIE is about access to environmental information and not about access to records per se. I had no reason to doubt that the 97 records provided by the Department to my Office constituted all of the relevant records held by the Department. I took the view that written information is information ‘on’ a measure if it would tell a reader something about that measure. Since I was concerned with environmental information that has been *withheld* by the Department, I disregarded information that has not been withheld.

I was satisfied that the information contained in the published S.I.s has not been withheld. Anyone reading the AIE Regulations, S.I. by S.I., following the sequence in which they were made over the years would see that:

- In 2018 the Minister for Communications, Climate Action and Environment believed that the status of certain State offices was not sufficiently clear in the AIE Regulations 2007 – 2014.
- The particular Offices he had in mind were the Office of the President, the Office of the Secretary General to the President, the Council of State, and any Commission for the time being lawfully exercising the powers and performing the duties of the President.
- The Minister believed it was desirable to add greater clarity to that matter and decided that the best way to do this was by making S.I. 309 of 2018.

In other words, key elements of information that show the ‘who, what, why, when and how’ of the making of S.I. 309 of 2018 have not been withheld from the appellant. It is equally clear to anyone who reads the AIE Regulations what is *not* in them. Accordingly I did not regard information on what is or is not in the AIE Regulations as withheld environmental information.

I searched the withheld records seeking environmental information that continues to be withheld from the public in general and the appellant in particular. In particular, I sought to identify information which would shed further light on *why* it was believed that the AIE Regulations 2007 – 2014 might need to be clarified.

On examining the withheld records, I noted that most of the information they contain would not tell a reader anything about the AIE Regulations 2007 – 2018 that is not already in the public domain. I did, however, form the view that the following documents contain environmental information within the scope of the request that has been withheld.

Chronologically, these are:

- A. A letter sent to the Department by another Department, dated 10 May 2017, referring to legal advice concerning the desirability of a clarification to the law.
- B. Information in the last paragraph of an email sent from a public authority to the Department on 5 July 2017.
- C. An email dated 28 March 2017 sent by the Office of the Attorney General referring to legal advice.
- D. A legal opinion dated 3 March 2017.
- E. An email dated 22 May 2017 disclosing legal opinion.
- F. A letter dated 13 February 2018 from the Department to the Office of the Attorney General setting out a proposal to clarify the status of certain State offices in the context of the AIE Regulations 2017 to 2014.
- G. An internal Department email containing legal advice on the same subject, dated 18 July 2017 and headed “Internal Memorandum of Legal Advice”.

I found no other information that I regarded as environmental information within the scope of the request that has been withheld by the Department.

Decision

I find that the information identified in A to G (above) is environmental information within the meaning of the AIE Regulations. I therefore vary the Department's decision in relation to that information. I require the Department to notify the appellant of a new decision on whether it will provide access to that information. If it decides to refuse access it should give reasons grounded in the AIE Regulations.

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.

If the Department decides to appeal this decision it should immediately inform the appellant. If it decides not to appeal this decision, it should notify the appellant and inform it that it may expect to receive a new decision within one month from that notification, after which time it would acquire the right to request an internal review.

Peter Tyndall

Commissioner for Environmental Information

27 March 2019