

**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/17/0021

Date of decision: 13 February 2018

Appellant: Right To Know CLG

Public Authority: Department of Transport, Tourism and Sport (the
Department)

Issue: Whether the Department's decision to refuse the appellant's AIE request for a submission from Ibec to the Department and the minutes of a subsequent meeting between Ibec and the Department was justified. The Department refused to grant access to the submission on the basis that it was not environmental information. The Department refused to grant access to the minutes on the basis that it did not hold that information.

Summary of Commissioner's Decision: The Commissioner found that the Department was justified in refusing the request for the submission on the basis that it was not environmental information for the purposes of the AIE Regulations. The Commissioner also found that the Department was justified in refusing the request for the minutes on the basis that the information is not held by or for the Department.

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 15 March 2017, Right To Know CLG (appellant) requested from the Department of Transport, Tourism and Sport (Department) the submission and the minutes of a meeting entered in the Register of Lobbying (Register) by Ibec. The designated public office holder who was listed as being lobbied in the Register was the Secretary General at the Department.

The entry in the Register stated that the intended results of the lobbying included:

- more ambitious investment plan for vital transport infrastructure projects,
- major road upgrades for the Atlantic corridor,
- engage with industry on the national action plan for decarbonising transport,
- ambitious investment programme in alternative road transport fuel infrastructure,
- increase investment on public transport, and
- enhanced commuter access and increase passenger throughput at Dublin airport including Metro North development.

The Department refused the appellant's request on 13 April 2017 on the basis that the submission was not environmental information and that it did not have a record of the minutes. On 14 April 2017, the Department received a request from the appellant for an internal review of its AIE request. The appellant did not receive a response to that internal review request. The appellant appealed to this Office on 22 May 2017.

Scope of review

Under article 12(5) of the AIE Regulations, my role is to review the Department's decision and to affirm, annul or vary it. As no internal review decision was issued by the Department, the decision under review is the Department's original decision of 13 April 2017.

In conducting my review I took account of the correspondence and submissions made by the appellant and the Department. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

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).

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:

“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.”

The public authority’s position

The Department provided my Office with two records relating to the appellant’s AIE request. The first record is a cover letter and submission from Ibec to an official at the Department (the submission). The second record is a letter from Ibec to an official at the Department (the letter).

The Department submitted that while article 3(1)(c) of the definition of environmental information “appears to come close in relevance” to the two records, the records are not “measures” and “activities”. The Department stated that the requested information was compiled “merely for briefing” or information purposes and that the information might not be entered into in any subsequent environmental measures or activities set out by the Minister or the Department. It also stated that as the requested information emanated from an outside source i.e. Ibec, it was “somewhat further removed” from the kind of measures and activities that could be relevant to the environment. While it recognised that the matters raised in the requested information “would have a logical follow-on relevance for environmental matters”, it stated that such environmental relevance would only emerge if there was “actual follow-on”.

The list of requested information is publicly available in the Register. Although the Department accepted that the information, in particular the submission, specifically listed very significant matters which have environmental relevance such as the Atlantic road corridor, Greater Dublin Area traffic congestion, fossil fuels and their management, aviation passenger management, it went on to state that those matters are not decisions, measures, or policy papers and as such are “distinctly removed” from such decision-making measures or reports. The Department said that for this reason the information is not environmental information.

Regarding the minutes of the meeting between Ibec and the Department, it stated that there is no record of the minutes and that it does not hold further information relevant to the appellant’s AIE request including the minutes of the meeting referred to in the request.

The appellant’s position

The appellant, in its request for an internal review, stated that as the entry on the Register provides that the subject matter of the submission relates to matters such as investment in transport infrastructure, upgrades to the Atlantic road corridor, decarbonising transport, alternative fuel infrastructure, public transport, and access to Dublin airport including Metro North it relates to environmental information.

In its submission to this Office on this appeal, the appellant stated that as the lobbying related to transport and related measures it is something which “affects the environment in many ways such as greenhouse gas emissions, air pollution, construction of roads and rail, energy

use and so on” and is environmental information. The appellant also stated that it is not credible that the Department did not maintain a minute of the meeting with Ibec.

Analysis of the justification of the Department’s decision

In this review I have to determine if the letter and the submission, identified as coming within the scope of the request, falls within the definition of environmental information within the meaning of article 3(1) of the AIE Regulations. I also have to consider whether further information i.e. minutes of the meeting between Ibec and the Department are held by or for the Department.

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 legislation”). For information to qualify as environmental information it must fall into one of the six categories set out in the definition.

My approach to determining whether information is environmental information within the meaning of the definition in the AIE Regulations is set out in [CEI/15/0007](#) (Mr Ken Foxe, Raidió Telefís Éireann and the Department of Defence) (available at www.ocei.ie/decisions/). Although I have not repeated that analysis in this decision, the same principles apply in this case. I have of course, also considered the jurisprudence of the courts on the question of the definition.

Having examined the contents of the letter and the submission and considered them in light of each paragraph of the definition in article 3(1), I am satisfied that neither are environmental information within the meaning of article 3(1)(a), (b), (d), (e) or (f). I went on to consider whether they were environmental information within the meaning of article 3(1)(c).

Are the matters referenced measures or activities within the meaning of paragraph (c)?

Applying the approach set out in CEI/15/0007 to this case, I first considered whether the matters referenced in the requested information were measures or activities affecting or likely to affect the elements and factors of the environment or a measure designed to protect those elements.

The Department submitted that the matters referenced in the letter and the submission are not measures and activities within the meaning of article 3(1)(c). The Department stated that as the requested information was compiled “merely for briefing” or for information purposes and might not be entered into in any measures subsequently decided on it was not a measure or activity within the meaning of article 3(1)(c). I accept that the requested information is not in itself a measure or activity within the meaning of article 3(1)(c). However, the fact that information is compiled for briefing or information purposes does not mean it is not capable of being environmental information. Article 3(1) of the AIE Regulations provides that *any* information *on* paragraphs (a) to (f) is environmental information. Once a public authority holds information, or it is held for it, that falls under one of the six paragraphs in definition of environmental information it is environmental information for the purpose of the AIE Regulations. Thus, I do not accept that information that is compiled for informational or briefing purposes falls outside the definition of environmental information in article 3(1).

The Department also stated that as the requested information emanated from an outside source i.e. Ibec, it was “somewhat further removed” from the kind of measures and activities that could be relevant to the environment. I do not agree that information from a source outside a public authority diminishes the possibility that it may be environmental information within the meaning of article 3(1). The issue is, as I have stated directly above, whether a public authority holds information, or information is held for it, that falls under one of the six paragraphs in the definition of environmental information. The source of the information is not relevant. Accordingly, I do not accept that as the requested information emanated from an outside source it is “somewhat further removed” from the kind of measures and activities that could be relevant to the environment.

The Department went on to state that the environmental relevance of the matters referenced would only emerge if there was “actual follow-on”. I note that in [*Minch -v- Commissioner for Environmental Information & Anor*](#) [2017] IECA 223 the Court of Appeal at paragraph 40 stated that I am not “required to make a judgment as to whether the plan or policy is ever likely to be put into effect and in that sense is or is not likely to affect the environment.” I also note that the Court stated “the reference to “likely to affect” the environment [in article 3(1)(c)] should really be understood in the sense of being “capable” of affecting the environment”. Thus, I do not consider that the question of actual follow-on is relevant when considering the environmental relevance of information. If information was not to become

environmental information until it is acted upon, it is probable that the measure would actually have affected the factors or elements of the environment before it becomes environmental information. The test under article 3(1)(c) is whether the measure is likely to affect, or in the words of the Court of Appeal in *Minch* is “capable" of affecting”, the factors and elements of the environment and whether the information is information *on* that measure. Accordingly, I do not accept that there must be “actual follow-on” before the environmental relevance of the matters referenced emerges and it becomes environmental information for the purposes of article 3(1)(c).

The appellant submitted that as the lobbying related to transport and related measures which affect the environment, the letter and the submission are therefore environmental information. Ibec, in the entry in the Register, described the submission and the meeting as relating to national transport policy. I accept that the requested information relates to Ireland’s national transport policy.

However, the Department submitted that as the matters referenced are not decisions, measures or white paper or green paper type documents they are distinctly removed from such matters. I note that the Court of Appeal in *Minch* in stated at paragraph 39 that:

“It is, however, perhaps significant that Article 3(1)(c) of the 2007 Regulations refers to “plans” or “policies” “affecting or likely to affect the environment...” The wording here suggests that the document in question must have graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however tentative, aspirational or conditional such a plan or policy might be – which, either intermediately or mediately, is likely to affect the environment.”

Although some of the matters referenced in the requested information do not explicitly refer to particular plans, programmes or policies by name, a search of the Department’s website shows that there is some form of a plan, programme or policy in relation to each of the matters referenced in the requested information. For example, the Atlantic road corridor and the Dublin Metro (of which the Metro North was one of three options) formed part of the Government’s 10 year national transport plan known as ‘Transport 21’ that was announced in 2005. The Department published its ‘National Policy Framework on Alternative Fuels Infrastructure for Transport in Ireland - 2017 to 2030’ in 2017 detailing its plans to create an alternative fuel infrastructure. That policy forms a part of the Department’s vision to decarbonise transport by 2050 as set in the Department of Communications, Climate Action and Environment’s ‘National Mitigation Plan’ (July 2017). Accordingly, I accept the

lobbying and the matters referenced in the requested information relate to transport measures within the meaning the term ‘measures’ in article 3(1)(c).

The Environmental Protection Agency’s most recent figures on Ireland’s greenhouse gas (GHG) emissions – set out in “[Ireland’s Provisional Greenhouse Gas Emissions](#)” - show that with overall emissions at 20% the transport sector is Ireland’s third biggest emitter of GHG (EPA, 2016). Therefore, I accept that each of the measures referenced in the requested information are capable of affecting the elements and factors of the environment, such as affecting Ireland’s greenhouse gas emission, air pollution, its energy use, and the construction of roads and rail. Accordingly, I am satisfied that the matters referenced in the requested information are measures affecting or likely to affect the factors and elements of the environment within the meaning of article 3(1)(c).

Are the letter and the submission information on measures within the meaning of paragraph (c)?

Following the approach set out in CEI/15/0007, having found that the matters referenced in the requested information concern measures were measures within the meaning of article 3(1)(c) I went on to consider whether the requested information was information *on* those measures.

As I have stated in other cases (see [CEI/11/0001](#) (Mr. Gavin Sheridan and Central Bank of Ireland) (available at www.ocei.gov.ie/en/Decisions/) and CEI/15/0007) 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 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 under article 3(1)(c) is a useful test to use when considering the scope of the definition of environmental information.

Accordingly, the issue in this review is the connection of the requested information to the measures referenced in the requested information.

The Letter

I examined the contents of the letter and considered whether it was information on any of the measures considered above. The letter does not mention or refer to any measures or activities

that affect or are likely to affect the factors and elements of the environment or any measures or activities designed to protect the elements of the environment. The letter states that Ibec wants to arrange a meeting with the Department to outline its priorities. It does not specify what those priorities are or what they relate to. It does not provide any information about the measures considered above or any other measures or activities. Consequently, I do not consider that there is a sufficient connection between the letter and the measures considered above or any other measures or activities. Accordingly, I am not satisfied that the letter is information on a measure or activity and thus is not environmental information within the meaning of article 3(1)(c).

The submission

I went on to consider whether the submission was information on any of the measures considered above. While I cannot detail the contents here, the submission outlines Ibec's priorities in relation to the matters referenced which I have found above are measures within the meaning of article 3(1)(c). The submission can be described as being akin to an agenda for the subsequent meeting with the Department in that it lists the matters that Ibec wants to address with the Department. Viewed in this manner the submission is better described as a communication to arrange a meeting and the proposed matters for discussion at that meeting. That is not to say that such information is not capable of being environmental information within the meaning of the AIE Regulations. However in the circumstances of this review, I consider that the submission does not contain or provide any substantive information on the measures that are referenced within. Therefore, I am not satisfied that the submission is environmental information within the meaning of article 3(1)(c) of the AIE Regulations.

In reaching my decision, I have considered whether the submission falls within the "bigger picture" of paragraph (c) as information on the measures referenced within it, or whether it is merely information with a minimal connection to those measures in the manner described in *Glawischnig*. In particular, I considered whether Ibec as a stakeholder of the Department might have some effect on any subsequent decisions made by the Minister or Department on the measures referenced in the submission. However in the circumstances of this review, the fact that Ibec is a stakeholder does not negate the fact that the submission is not integral to the measures referenced within. The submission is incidental to those measures. Accordingly, I find that the submission does not fall within the definition of environmental information under article 3(1)(c).

Search process for minutes of the meeting entered in the Register of Lobbying

As set out in the background above, the appellant's AIE request included a request for the minutes of the meeting entered in the Register by Ibec. The Department stated that no such minutes existed. The appellant does not accept that such minutes do not exist.

Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested information is held by or for the public authority concerned. In cases involving article 7(5), my approach is to assess the adequacy of the searches conducted by the public authority in looking for information relevant to the AIE request. As I stated in CEI/13/0015 (Mr Lar McKenna and EirGrid plc) (available at www.ocei.gov.ie/en/Decisions/), I must be satisfied that adequate steps have been taken to identify and locate relevant information, having regard to the relevant circumstances. Moreover, I noted that, in determining whether the steps taken are adequate in the circumstances, a standard of reasonableness must necessarily apply. I also stated that it is not normally my function to search for information.

The Department provided a written assurance that there is no record of the minutes and that it does not hold further information relevant to the appellant's AIE request, including the minutes of the meeting referred to in the request. My investigator asked the Department for an account of the steps actually taken to search for the requested minutes when it was processing the appellant's AIE Request. The Department stated that the head of the then Division of Corporate Governance which was responsible for preparing briefings for new Ministers, and the division responsible for processing the AIE request, contacted the Secretary General's office about the minutes. The Secretary General's office confirmed that there were no minutes from the meeting.

My investigator made further enquiries about how the Secretary General's office satisfied itself that there were no minutes. The Department responded stating that it was agreed before the meeting that it would be an informal meeting and as a result no minutes of the meeting were taken. I have no reason to reject the Department's account and I accept that the Department does not hold any minutes of the meeting. After considering the parties' submissions, I accept the Department's written assurance that it does not hold further information relevant to the appellant's AIE request, including the minutes of the meeting referred to in the request. I emphasise as I have had to do in other cases that it is outside my remit as Commissioner to adjudicate on how public authorities carry out their functions

generally, including with respect to their records management practices. I have no role in assessing how public authorities collect, maintain and disseminate environmental information. It is not for me to say whether the Department ought to have created such minutes. My role concerns access to environmental information which is held by or for the relevant public authority and no more than that.

Finding

For the reasons outlined above, I find that the Department was justified in refusing the appellant's AIE request for the letter and the submission on the basis that it was not environmental information within the meaning of the definition of environmental information in article 3(1) of the AIE Regulations. I find also that it was justified in refusing the appellant's AIE request for the minutes on the basis that the minutes are not held by or for it and that article 7(5) of the AIE Regulations applies.

Decision

I affirm the Department's decision that the letter and the submission are not environmental information within the meaning of the definition of environmental information in article 3(1) of the AIE Regulations. I also affirm the Department's decision that the minutes requested are not held by or for it.

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

13 February 2018