# 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-108782-X6N0D1

**Date of decision:** 28 October 2021

**Appellant:** Right to Know CLG

**Public Authority**: Transport Infrastructure Ireland (TII)

**Issues:** (a) Whether the scope of the request includes additional documents which impact on, or are incorporated by reference into, the PPP contract;
(b) Whether the PPP contract as a whole is environmental information;
(c) Whether TII was justified in refusing access to the PPP contract on the grounds that the request is manifestly unreasonable; and
(d) Whether it is appropriate to exercise the power in article 12(5)(c) of the AIE Regulations.

**Summary of Commissioner's Decision:** The Commissioner found that:
(a) The scope of the request does not include documents which impact on, or are incorporated by reference into, the PPP contract;
(b) The PPP contract as a whole is environmental information;
(c) TII was not justified in refusing access to the PPP contract on the grounds that the request is manifestly unreasonable; and
(d) It is not appropriate in this case to exercise the power in article 12(5)(c), so TII must give fresh consideration to the appellant's request for 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**

1. On 1 September 2018, in relation to the operation of the M8 motorway near Fermoy, the appellant requested: (1) the index to the PPP contract with DirectRoute (Fermoy) Ltd ("the PPP contract"); and (2) a copy of the PPP contract.

2. On 1 October 2018, Transport Infrastructure Ireland (TII) provided access to the information in the first part of request, providing an electronic copy of the table of contents of the PPP contract. TII refused to provide access to the information in the second part of the request on the grounds that this part of the request is manifestly unreasonable under article 9(2)(a) of the AIE Regulations, in light of the volume of documents and the complexity of determining which parts of the PPP contract contain environmental information.

3. On 4 October 2018, the appellant requested an internal review. On 2 November 2018, on internal review TII affirmed its decision on the same grounds.

4. On 18 November 2018, the appellant brought this appeal to my Office.

5. On 5 December 2019, I made a decision on the appeal, with the reference CEI/18/0046. I found that TII was justified in refusing the appellant's request under article 9(2)(a) of the AIE Regulations and I affirmed TII's decision accordingly.

6. On 24 February 2020, the appellant appealed my decision to the High Court under regulation 13 of the AIE Regulations.

7. On 14 May 2021, the appeal to the High Court was remitted to me for reconsideration, as agreed between the parties to that appeal.

8. I have now completed a fresh review of the appeal under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and by TII at first instance, during the course of the High Court proceedings and following remittal of the appeal. In addition, I have had regard to:

    - 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 Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the "Minister's Guidance").

9. What follows does not comment or make findings on each and every argument advanced but I have considered all materials received in the course of the investigation and the proceedings.

**Scope of Review**

10. 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. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.

11. One of the considerations taken into account by TII in concluding that the request was manifestly unreasonable was that obligations under the PPP contract are determined by reference to a significant number of additional documents, including third party agreements, finance documents, corporate information, and other documentation relating to the arrangements surrounding the PPP contract. In addition, several TII specification documents are brought into the PPP contract by reference. TII only needs to consider documents additional to those specifically referenced in the index to the PPP contract if the scope of the appellant's request includes additional documents, which are incorporated by reference into the PPP contract, and documents which are referred to in the PPP contract and which impact on that contract ("ancillary documents"). As such, the first question before me is whether the scope of the request includes ancillary documents.

12. TII concluded that the request was manifestly unreasonable in part on the basis of the complexity of determining which parts of the PPP contract contain environmental information and which do not. This is only a relevant consideration if the PPP contract as a whole is not environmental information. As such, the second question before me is whether the PPP contract as a whole is environmental information.

13. My general practice in cases involving threshold jurisdictional questions, such as whether information is environmental information, is to limit my review to the threshold jurisdictional question (see the Procedures Manual for my Office at paragraph 17). However, I approach every appeal on its own particular facts. In light of the long history of this appeal, including the High Court proceedings, my Office sought submissions from the parties both on the threshold jurisdictional questions and the application by TII of the exception in article 9(2)(a). I am satisfied that it is appropriate in this case to address both the threshold jurisdictional question and the exception at issue. As such, the third question before me is whether TII was justified in refusing access to the information requested on the ground that the request is manifestly unreasonable.

14. The appellant submitted that I should exercise the power in article 12(5)(c) of the AIE Regulations to require TII to make environmental information available to the appellant if I find the refusal not to be justified. As such, if I find that the refusal was not justified, the fourth question before me is whether it is appropriate in this case to exercise the power in article 12(5)(c) of the AIE Regulations to require TII to make available environmental information to the appellant.

**Analysis and Findings**

Context of the request

15. The TII website describes a public-private partnership (or "PPP") as "an arrangement between a public authority and a private partner designed to deliver a public infrastructure project and service under a long-term contract. Under this contract, the private partner bears significant risks and

management responsibilities. PPP infrastructure projects are generally funded and constructed by the private partner, following which it is made available for public use and is paid for by the State and/or users over an extended period (typically 25-35 years), after which the asset comes into State ownership."

16. In relation to the M8 motorway, the TII website states as follows: "[The] M8 Rathcormac - Fermoy Bypass … is one of the projects announced by the NRA in June 2000 under Tranche II of the PPP Roads programme. This project lies on the N8 Cork to Dublin route and involved the construction of an 18 km stretch of road incorporating a Blackwater crossing viaduct with an approximate length of 450 metres. The PPP contract was awarded in June 2004 to the DirectRoute (Fermoy) Limited consortium … The scheme comprises 17.5 km of motorway. The scheme involves the construction of 3 interchanges and includes a 450 m long viaduct spanning the Blackwater Valley. In addition, there are a further 18 structures constructed (comprising 7 overbridges, 2 underbridges, 1 service tunnel at the toll plaza, 4 river bridges and 4 underpasses) along with local road realignments. Direct Route is required to [design, build, maintain, operate, re-invest and finance]. … The contract was signed on the 11th June 2004 and will extend for 30 years from that date. The construction is anticipated to take approximately 3 years and Direct Route will be responsible for collection of tolls for a period of approximately 27 years." The website also provides detail about the cost of the project, DirectRoute's financing, and payments between TII and DirectRoute and the State. TII confirmed to this Office that use of the road commenced on 2 October 2006.

Question 1: Does the request include ancillary documents?

17. TII states that it has interpreted the appellant's request as including the following documents:

    a. The PPP contract, including its schedules and annexes and appendices;

    b. Documents which are incorporated by reference into that contract and documents which are referred to in the PPP contract and which impact on that contract ("ancillary documents").

18. The appellant submits that documents incorporated by reference form part of the PPP contract, but is not in a position to comment on whether other ancillary documents form part of the PPP contract.

19. I have considered the main body of the PPP contract, including examples where external documents are referred to (for example, other contracts concluded at around the same time) which determine certain obligations under the PPP contract. I have also considered the index to one of the schedules, which was provided to my Office on request to illustrate the structure of a schedule containing annexes and appendices.

20. The appellant requested "the index to the PPP contract" and "a copy of the contract itself". The request is a simple one. Viewed objectively, in light of the request as a whole and the ordinary language used, I think it is clear that the appellant is requesting a copy of the PPP contract, to include any material referenced in its index. This includes all 14 Parts of the PPP contract, as well as

its 29 Schedules, including annexes and appendices. In this case, I do not think that the request could reasonably include ancillary documents, even where such documents impact on a particular obligation under the PPP contract, are incorporated by reference into the PPP contract or relate to the wider transaction of which the PPP contract forms a part. Any such document would need to be separately requested. As such, I find that the scope of the request does not include ancillary documents.

Question 2: Is the PPP contract as a whole environmental information?

21. The second question before me is whether the information at issue falls within the definition of "environmental information" in article 3(1) of the AIE Regulations. For the reasons given below, I find that the PPP contract as a whole is environmental information, within the meaning of paragraph (c) of the definition.

22. This conclusion relates to the PPP contract, but does not include any ancillary documents, in light of my decision on scope above. I make no decision about whether ancillary documents are, or contain, environmental information.

*Examination of the content of the information*

23. I have considered whether, in this case, I should examine the content of the PPP contract as a whole before coming to a conclusion as to whether it is environmental information. TII maintains that the request is manifestly unreasonable having regard to the volume or range of information sought. TII's view is that it would defeat the purpose of article 9(2)(a) of the AIE Regulations if I were to require TII to make available the entire PPP contract and the ancillary documents for the purposes of my review to establish whether the information the subject of the request is environmental information. However, TII provided my Office with a copy of the PPP contract without its schedules or any ancillary documents ("the main body of the PPP contract"). I have reviewed the main body of the PPP contract so provided.

24. In light of the guidance of the High Court in *Right to Know CLG v. Commissioner for Environmental Information and Raidio Teilifís Éireann* [2021] IEHC 353 ("*RTÉ*"), it is my view that I should decide on a case by case basis whether it is essential for me to review the entire content of the requested information before determining whether it is environmental information. In many cases, the content of the requested information will be highly relevant to the determination. This is one of the reasons why, in most cases, I require the public authority to make the requested information available to my Office for the purposes of my review. In other cases, the information requested will not itself be intrinsically environmental and the question will be whether the information requested is information 'on' a different measure or activity which is likely to affect the environment. In such cases, examination of the entire content of the requested information may be unnecessary.

25. In this case, I accept that it would defeat the purpose of article 9(2)(a), and would pre-empt my decision on the application of that exception, if I were to require TII to provide my Office with additional information beyond the main body of the PPP contract. The information provided to my

Office enables me to understand the broader content of the information. On the particular facts in this appeal, it is my view that it is not necessary to examine the schedules to the PPP contract in order to determine whether the PPP contract as a whole is environmental information.

*Position of the parties on whether the PPP contract as a whole is environmental information*

26. The principal submissions of the parties are summarised below to enable my findings to be understood. However, I wish to assure the parties that I have taken into account all materials submitted during the course of the investigation and the proceedings, including matters not summarised below.

27. In short, the appellant submits that the PPP contract as a whole is environmental information because it is about, relates to or concerns a motorway, which is an element of the environment, and the design, building, maintenance and operation, etc, of a motorway, which is a measure or activity that affects the environment.

28. TII submits that the PPP contract as a whole is not environmental information. TII accepts that the M8 Rathcormac-Fermoy Bypass Public Private Partnership scheme or project, and/or the design, construction, maintenance and operation of the M8 Rathcormac-Fermoy Bypass are capable of being described as a measure or activity within the meaning of paragraph (c) of the definition, but submits that the PPP contract cannot properly be described as a measure. TII submits, in effect, that not all of the information in the PPP contract is information 'on' the PPP scheme or the construction of the motorway. TII submits that, while some of the PPP contract contains environmental information, numerous clauses and schedules such as clause 15 (health, safety and security), clause 21 (liaison procedures) and clause 34 (payments) and schedule 8 (representative), schedule 12 (variations) and schedule 27 (dispute resolution procedure) have no connection to the environment or environmental matters. Certain of the information in the PPP contract is of a purely legal nature, being contractual terms pertaining to the development and operation of the M8. Such information is not linked specifically to any impact on the environment and should therefore be regarded as general administrative information. TII submits that the intention of the AIE Regulations is not to give a general and unlimited right to all information held by a public authority that has a connection with the environment and that a mere connection or link to the environment is not sufficient to bring the information within the scope of the definition. TII submits that it would only be possible to ascertain the nature and extent of the environmental information contained in the PPP contract with a detailed assessment of its content.

*Approach to the definition of environmental information*

29. Article 3(1) of the AIE Regulations 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);".

30. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive. The right of access under the AIE Regulations is to information "on" one or more of the six categories at (a) to (f) of the definition. According to national and EU case law on the definition of "environmental information", while the concept of "environmental information" as defined in the AIE Directive is broad (C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat* ("*Mecklenburg*"), at paragraph 19), there must be more than a minimal connection with the environment (C-316/01 *Glawischnig v Bundesminister für Sicherieit und Generationen*, at paragraph 25). Information does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond & Another v Commissioner for Environmental Information & Another* [2020] IECA 83 ("*Redmond*"), at paragraph 58; see also *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 ("*ESB*") at paragraph 43).

*Identification of a measure or activity*

31. Paragraph (c) requires the identification of a relevant measure or activity, which the information at issue is "on". I note that information may be "on" more than one measure or activity (*Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844[1] ("*Henney*") at paragraph 42). In identifying the relevant measure or activity, one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned (*ESB* at paragraph 43). The list of examples of measures and activities given at paragraph (c) is not exhaustive, but it contains illustrative examples (*Redmond* at paragraph 55). An expansive approach must be taken to applying both of those terms (*RTÉ*, paragraphs 17-19). The CJEU stated in *Mecklenburg* that the term 'measure' serves "merely to make it clear that the acts governed by

[1] This judgment of the England and Wales Court of Appeal was referred to in *Redmond*, *ESB* and *RTÉ*.

the directive included all forms of administrative activity" (paragraph 20, emphasis added), and a similarly expansive approach should be taken to the term 'activity' (*RTÉ*, paragraph 19).

32. Taking into account the above guidance, and as a matter of logic and common sense, I consider that the design, construction, maintenance and operation of the M8 Rathcormac-Fermoy Bypass ("the construction of the motorway") is an activity within the meaning of paragraph (c).

*Whether the activity affects, is likely to affect or is designed to protect the environment*

33. To meet the definition, the activity must affect or be likely to affect the elements and factors referred to in paragraphs (a) and (b) (i.e. the environment) or designed to protect the environment (*Redmond* at paragraph 57). An activity is "likely to affect" the elements and factors of the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. While it is not necessary to establish the probability of a relevant environmental impact, something more than a remote or theoretical possibility is required (*Redmond* at paragraph 63).

34. In my view, it is clear that there is a real and substantial possibility that the construction of the motorway will affect the state of the soil, land, landscape and, depending on the location of the motorway, natural sites. This conclusion is supported by the inclusion in annex 1 to the Aarhus Convention of the "construction of motorways and express roads" as decisions on which public participation is required under Article 6 of that Convention. This indicates the view of the parties to that Convention that the construction of motorways has a potential significant effect on the environment (see pp.131 and 239-240 of the Aarhus Guide).

35. However, I do not think that it is only the *construction* of a motorway that gives rise to a real and substantial possibility of environmental impact. The *design* of a motorway dictates to a substantial degree the amount of impact the motorway has on the environment. The *maintenance* of a motorway, including the road pavement, structures, landscaping, signs, lining, lighting, safety barriers, fencing and all other aspects of the road, has a direct impact on both the land and the landscape. There is a real and substantial possibility that the *operation* of a motorway will affect the environment, for example through the management of events on the motorway such as spillages. There is real and substantial possibility that *reinvestment* in a motorway during the course of a concession will affect the environment, as proper maintenance is only possible as a result of reinvestment. Finally, there is a real and substantial possibility that overall *financing* of the design, construction, maintenance and operation of a motorway will indirectly affect the environment, because the sufficiency of the financing provided will impact the quality of all of the other elements of the project.

*Whether the information is on the activity*

36. Where an activity has the requisite environmental effect, one must consider whether the requested information is "on" that activity within the meaning of article 3(1) of the AIE Regulations. Information is "on" an activity if it is about, relates to or concerns the activity in question. (*Henney*, paragraphs 37-44, referred to in *Redmond* at 99, *ESB* at 36-45 and *RTÉ* at paragraph 52). As "any information … on" an activity affecting or likely to affect the environment is *prima facie*

environmental information, the information at issue does not, in itself, have to affect or be likely to affect the environment (*Redmond* at paragraphs 57 and 59).

37. The PPP contract sets out the terms and conditions governing every aspect of the construction of the motorway. As such, it is clearly about, relates to and concerns the construction of the motorway. I do not consider that one can break down the contract into separate clauses and say that some of the clauses are 'on' the construction of the motorway and some are not. It is a basic principle of contract law that a contract must be construed as a whole (see, for example, *O'Leary v Volkswagon Group Ireland Limited* [2020] IECA 18 at paragraph 37). In any event, I do not consider that any of the individual topics covered by the contract are peripheral to, or remote from, the construction of the motorway. The clauses referred to by TII in its submissions, relating to health, safety and security, liaison procedures and payments, are part of the overall agreement about the construction of this motorway. They do not, for example, deal with the construction of a different motorway or with other unrelated functions or activities of either of the parties. I do not accept that any of the clauses in or schedules to the PPP contract are peripheral to or remote from the construction of the motorway.

38. I note that information may not be information 'on' an activity if it is not consistent with or does not advance the purpose of the AIE Directive (*ESB* at paragraph 44 and *Henney* at paragraph 47). However, I accept the appellant's submission that access to the PPP contract would enable the public to better understand the financing of this substantial and costly public infrastructure project and the trade-offs involved in its construction. I also accept that access to the PPP contract would contribute more generally to accountability and transparency in respect of outsourcing by the State of the design, build and operation of large infrastructure projects across the country that have an impact on the environment. The fact that this motorway has been in operation for some time does not alter this position. In this way, my conclusion that the requested information is information 'on' the construction of the motorway is consistent with, and advances the purposes of, the AIE Directive, as set out in recital (1).

Question 3: Was TII justified in refusing the request as manifestly unreasonable?

39. The third question before me is whether TII was justified in refusing the request as manifestly unreasonable. For the reasons given below, I find that TII was not justified in refusing the request on the basis that it was manifestly unreasonable, within the meaning of article 9(2)(a) of the AIE Regulations.

*Positions of the parties*

40. The parties made detailed observations in submissions to my Office and in the proceedings before the High Court on the question of whether the request is manifestly unreasonable. Although the summary that follows is brief, I have carefully considered all of the points raised by the parties.

41. TII submits, in summary:

    a. The exception in article 9(2)(a) is available where the cost or burden of dealing with a request is "too great", referring to the decision of the UK Upper Tribunal in *Craven v The*

*Information Commissioner and the Department of Energy and Climate Change* [2012] UKUT 442 (ACC) and the judgment of the Court of Justice of the European Union in T-2/03 *Verein für Konsumenteninformation v. Commission*.

b. When one includes ancillary documents, the PPP contract is extremely voluminous and contains many thousands of records. The PPP contract extends to 68 clauses (in 14 parts) and 29 Schedules (including 85 parts, 51 annexes and 72 appendices) and includes 180 drawings. Including ancillary documents, the PPP contract amounts to approximately 8,000 pages. However, even if the request does not include ancillary documents, the PPP contract would still amount to approximately 3,800 pages. While TII holds electronic copies of the PPP contract and its schedules, it does not hold electronic copies of all ancillary documents.

c. The environmental information within the PPP contract is not readily identifiable and would take many weeks to identify, requiring dedicated resources to be assigned to the task.

d. Even if the whole PPP contract is environmental information, the request remains manifestly unreasonable, as the task of identifying the depth and scope of the application of exceptions under the AIE Regulations, such as articles 9(1)(c) and 9(1)(d) would impose an unreasonable administrative burden, including consultation of third parties who may be affected by disclosure. While it is not possible to indicate with any degree of accuracy the time it would take, it might reasonably be assumed that review of the PPP contract, including ancillary documents, would require a dedicated resource of many weeks. Even if the request does not include ancillary documents, the time it would take to review would not be reduced to such a degree that it would change the manifestly unreasonable nature of the task. The team which would need to resource such a review is responsible for all the contracts in the PPP programme and such a review would divert it from this work. The third party consultation required could result in significant compensation claims from third parties against TII for the time taken by those third parties to review the PPP contract.

e. The public interest served by allowing TII to proceed with its core work of securing a safe and efficient network of national roads and provision of light railway and metro railway infrastructure, without the burden of processing the appellant's request for the PPP contract, significantly outweighs any public interest that would be served in disclosure of the requested information. It is also relevant that the request for information relates to a project which has been built and operational for many years and is a project in respect of which there is a significant volume of information and documentation available in the public domain. It does not appear that the request relates to any specific environmental decision-making.

42. The appellant submits, in summary:

a. A request is manifestly unreasonable only if it is fundamentally incompatible with the purpose of the AIE Directive and can be considered to have no value to the public or section of the public. The appellant points to the appeal of the Upper Tribunal decision in *Craven* to the UK Court of Appeal (*Dransfield v The Information Commissioner and Devon County Council; Craven v. The Information Commissioner and The Department of Energy*

*and Climate Change* [2015] EWCA Civ 454) and observes that the Court expressly declined to make a finding about the meaning of "manifestly unreasonable".

b. There is a high degree of public interest in accessing the information, which means that it cannot be manifestly unreasonable irrespective of the volume of information.

c. In any event, in the context of a road project, the scale of the PPP contract is not excessive and information on this scale is published as a matter of routine by public authorities and developers. For example, for large developments, an Environmental Impact Assessment Report and Natura Impact Statement will often run into several thousand pages and will include hundreds of drawings, many sections, sub-sections and annexes.

d. TII has an obligation to ensure that environmental information that it holds is up to date, accurate and comparable and must organise the environmental information held by or for it with a view to its active and systematic dissemination to the public. The appellant nor the public in general should have their right of access to environmental information prejudiced because TII has failed to comply with its obligations under the AIE Directive.

e. It is questionable whether TII's capacity to operate (which involves billion euro budgets and multi-year contracts) would be impacted at all by this request.

f. Compensation to third parties in respect of the right of access does not arise because the right of access is a statutory right. If compensation arises as a result of TII's contractual arrangements, that is a matter for TII but not a relevant matter for the purposes of this request.

*Approach to the exception in article 9(2)(a)*

43. The scheme of the AIE Directive is to provide for a general right of access to environmental information on request (Article 3) with specific, exhaustive exceptions to that general right of access (Article 4). Recital (16) informs the approach that must be taken to the AIE Directive, providing that: "The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases."

44. Article 4(1)(b) of the AIE Directive provides that "Member States may provide for a request for environmental information to be refused if the request is manifestly unreasonable". The European Commission's First Proposal for the AIE Directive envisaged that the exception in Article 4(1)(b) would cover requests "variously described in national legal systems as vexatious or amounting to an *abus de droit*. Moreover, compliance with certain requests could involve the public authority in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities. Authorities should be able to refuse access in such cases in order to ensure their proper functioning." The Aarhus Convention Compliance Committee has emphasised that "whether or not a request is manifestly unreasonable relates to the nature of the request itself, for example, its volume, vagueness, complexity or repetitive nature, rather than the reason for the request,

which is not required to be stated" (Report adopted on a request for advice by Belarus, ACCC/A/2014/1, paragraph 28).

45. In respect of a request which is voluminous or wide-ranging, within the meaning of article 9(2)(a) of the AIE Regulations, it is clear that more than simple volume or complexity is required. Both article 7(2)(b) of the AIE Regulations and Article 3(2)(b) of the AIE Directive specifically envisage that public authorities will deal with voluminous or complex requests, albeit in a longer timeframe. In this respect, I note the findings of the Court of Justice of the European Union in the analogous case of T-2/03 *Verein für Konsumenteninformation v. Commission*, at paragraphs 108-110,[2] and the guidance at page 84 of the Aarhus Guide. I also note the parallel duty in Article 7(1) of the AIE Directive to ensure that public authorities organise environmental information with a view to its active and systematic dissemination to the public, and article 5 of the AIE Regulations which seeks to implement that provision. In his Opinion in C-217/97 *Commission v Germany* at paragraph 30, Advocate General Fennelly stated that the duty in Article 7 of the AIE Directive indicates that individual requests should, in principle, be on matters of detail. As such, the fact that a request is detailed does not mean that it is necessarily unreasonable.

*Does the exception in article 9(2)(a) apply in this case?*

46. I have found above that the scope of the request does not include ancillary documents. In light of that finding, my consideration of whether the request is manifestly unreasonable will focus on the request for the PPP contract, as set out in its index. I accept that the requested information is voluminous within the meaning of article 9(2)(a), in that it seeks a large document comprising approximately 3,800 pages.

47. When considering whether a request is manifestly unreasonable, it is necessary to examine the impact on the public authority of dealing with the request. In particular, I must examine whether responding to the request would involve the public authority in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities. In light of the findings of the Court of Justice of the European Union in T-2/03 *Verein für Konsumenteninformation v. Commission*, at paragraphs 101-115, I consider that the exception in article 9(2)(a) is only available where the administrative burden entailed by dealing with the request is particularly heavy. The burden is on the public authority to demonstrate the unreasonableness of the task entailed by the request.

48. I have found above that the contract as a whole is environmental information. In light of this finding, I have considered whether responding to the request in this case would involve TII in disproportionate cost or effort, or obstruct or significantly interfere with the normal course of TII's

[2] That decision relates not to the AIE Directive but to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents. That Regulation does not contain a specific exception to the right of access for manifestly unreasonable requests, but it provides in Article 6(3): "In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution." The CJEU has interpreted that provision as enabling the EU institutions to decline to carry out a concrete, individual examination of requested documents, in exceptional cases, where the request relates to a "manifestly unreasonable" number of documents.

activities. The AIE Regulations do not specifically provide that the burden of proof rests with the public authority in relation to justifying a refusal to make information available. However, I am satisfied that the scheme of both the AIE Regulations and the AIE Directive make it clear that there is a presumption in favour of release of environmental information. As such, I expect that if a public authority wishes to rely on the manifestly unreasonable nature of a request, that public authority will clearly demonstrate the actual and specific impact that dealing with the request would have on the public authority's normal activities.

49. In this case, TII submits that identifying applicable exceptions, including the process of consulting third parties, would impose a significant burden. TII did not provide any specific timeframe for how long review of the material would take, but it indicated that it would not take significantly less than a dedicated resource of many weeks. TII submits that this use of resource is unreasonable and would adversely affect its core work.

50. TII has not persuaded me that the burden of dealing with the request would be particularly heavy, in the context of its overall work. The request is for a contract which was negotiated and concluded by TII, which has been operated in practice by TII for some time and which is held in electronic form. TII should be sufficiently familiar with the PPP contract and its operation that it can relatively quickly identify any information which is, for example, particularly commercially sensitive such that its disclosure *would* adversely affect commercial or industrial confidentiality and where the interest served by refusal would outweigh the public interest served by disclosure. I do not believe that it would be consistent with the objectives and purpose of the AIE Directive if I were to find that a request was manifestly unreasonable solely on the basis of the theoretical complexity of assessing whether an exception applies to information.

51. In addition, the exception in article 9(2)(a) is not intended to endorse any failure by public authorities to comply with their duties of dissemination of environmental information under article 5 of the AIE Regulations and Article 7 of the AIE Directive. Accordingly, it is relevant to consider whether the information requested is the kind of environmental information that one would expect to be organised by the public authority in a manner that enables its easy dissemination.

52. The information in this appeal is effectively a single document, albeit a lengthy one. As I explained above, I consider that there is a substantial public interest in information of this kind being available to the public. I accept the appellant's submission that access to the PPP contract would enable the public to better understand the financing of this substantial and costly public infrastructure project and the trade-offs involved in its construction. I also accept that access to the PPP contract would contribute more generally to accountability and transparency in respect of outsourcing by the State of the design, build and operation of large infrastructure projects. Moreover, as set out above, the Aarhus Convention specifically envisages that decisions on the construction of motorways should be subject to the public participation requirements in Article 6 of that Convention. Accordingly, I am satisfied that a contract governing the design, construction, maintenance, operation, re-investment and financing of a motorway is the kind of information that should be organised by public authorities in a manner that it can be easily disseminated to the public, whether that dissemination is proactive or in response to an AIE request. This includes advance consideration by the public authority of whether exceptions would apply to any of the information if requested and whether the information to which any such exceptions apply may be

separated from other information, in accordance with articles 8, 9 and 10 of the AIE Regulations. Had TII carried out such an exercise in this case, it would not be in the position of having to expend staff time now reviewing the PPP contract following receipt of an AIE request for the information.

53. On the facts of this case, and taking all of the above into account, my view is that the threshold for a request to be manifestly unreasonable has not been met. Accordingly, TII was not justified in refusing the request on the basis of article 9(2)(a) of the AIE Regulations.

54. In light of my conclusion that the exception does not apply, it is not necessary for me to consider the public interest balance under article 10(3) of the AIE Regulations.

Question 4: Is it appropriate to exercise the power in article 12(5)(c) of the AIE Regulations?

55. The appellant submits that the power in article 12(5)(c) is expressed as a duty and that the words "where appropriate" are intended to distinguish between outcomes which annul decisions of public authorities and outcomes in which a refusal is affirmed, in whole or in part. The appellant submits that, unless I affirm the decision of a public authority or exercising my power would serve no purpose or be incompatible with the purpose of the AIE Regulations and the AIE Directive, it will never be "appropriate" to decline to require the public authority to make available environmental information. The appellant submits that article 12(5)(c) recognises that my jurisdiction extends beyond disputes over refusal to grant access to information, for example disputes over charges imposed.

56. I do not accept this submission. I understand article 12(5)(c) as empowering me to require a public authority to make available environmental information to the applicant, *but only* where appropriate. The AIE Regulations leave determination of the circumstances in which that will be appropriate to my discretion (subject, of course, to the requirements of administrative law). In many cases, the public authority will have considered applicable exceptions. In such cases, it is highly likely to be appropriate for me to exercise the power in article 12(5)(c). However, there are some cases involving threshold jurisdictional issues, such as whether the person or body concerned is a public authority or whether the information is environmental information, where the public authority will not have considered applicable exceptions, concluding instead that the AIE Regulations do not apply at all. Similarly, a public authority may have refused the request as manifestly unreasonable and may not have assessed the information in detail to consider whether exceptions apply, as to do so would defeat the purpose of the exception in article 9(2)(a). In such cases, and depending on the particular facts and circumstances of the case, it may not be appropriate for me to exercise the power in article 12(5)(c).

57. In this case, TII decided that the request was manifestly unreasonable, within the meaning of article 9(2)(a). On this basis, TII submits that it did not examine the information in question to consider whether any other exceptions apply, as to do so would defeat the purpose of the exception in article 9(2)(a). I have found above that TII was not justified in applying that exception in this case. However, TII submits in the alternative that other exceptions apply to some of the information, in particular article 9(1)(c) of the AIE Regulations. In those circumstances, I do not consider that it is appropriate for me to require TII to make environmental information available to the appellant

without first allowing TII to consider the application of exceptions. It is appropriate to enable TII to engage in such a task in light of my conclusions above regarding scope and that the PPP contract as a whole is environmental information.

58. The appellant submits that I have no power to 'remit' cases to a public authority for further consideration. In summary, the appellant submits that my powers are confined to those expressly set out in the AIE Regulations, which provide for no express power of remittal. I have carefully considered the appellant's submissions on this point. In my view, remission of decisions to a public authority for fresh consideration is not the exercise of a power as such and therefore does not require express statutory provision. Rather, it is the natural result of my decision to annul or vary a public authority's decision, in circumstances where I have not required the public authority to provide the information under article 12(5)(c) of the AIE Regulations. In other words, the annulment or variance of the public authority's decision leaves a void, which must (in the absence of any requirement as to specific action) necessarily be filled through a fresh decision by the public authority, in order to vindicate the rights of the appellant under the AIE Regulations.

59. As set out above, I consider that it is not appropriate in this case to exercise the power in article 12(5)(c) of the AIE Regulations. The natural consequence of this conclusion is that TII must give fresh consideration to the request, in accordance with the AIE Regulations.

**Decision**

60. Having carried out a review under article 12(5) of the AIE Regulations, I find that:

    a. The scope of the request does not include documents which impact on, or are incorporated by reference into, the PPP contract;

    b. The PPP contract as a whole is environmental information, within the meaning of paragraph (c) of the definition;

    c. TII was not justified in refusing access to the PPP contract on the grounds that the request is manifestly unreasonable; and

    d. It is not appropriate in this case to exercise the power in article 12(5)(c), so TII must give fresh consideration to the appellant's request for information.

61. Accordingly, I annul TII's decision. I expect TII to notify the appellant of a fresh decision on the request in light of my findings above.

62. I note TII's position that the exception in article 9(1)(c) of the AIE Regulations would apply to some of the information requested. If TII decides to refuse access to the information on these or any other grounds, I would remind TII that the requirements of the AIE Regulations must be substantively and procedurally adhered to. This includes carrying out the balancing exercise required by article 10(3) and (4) of the AIE Regulations (see *Right to Know CLG v An Taoiseach (No.*

*2)* [2018] IEHC 372, paragraphs 67-71) and identifying whether information which may be withheld may be separated from information which may not, in accordance with article 10(5) of the AIE Regulations.

**Appeal to the High Court**

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

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**Peter Tyndall**
**Commissioner for Environmental Information**
28 October 2021