



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

**Decision of the Commissioner for Environmental Information
on an appeal made under article 12(5) of the European Communities
(Access to Information on the Environment) Regulations 2007 to 2018
(the AIE Regulations)**

Case: OCE-102190-N4X6Y3

Date of decision: 22 October 2021

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

Public Authority: Department of Housing, Local Government and Heritage (the Department)

Issue: Whether the Department was justified in refusing access to records concerning the reinstatement of a standing stone on the basis that they are not “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the records at issue are “environmental information” within the meaning of paragraph (c) of the definition in article 3(1) of the AIE Regulations. He annulled the Department’s decision and directed it to undertake a fresh decision-making process in respect of the records.

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 13 November 2020, the appellant, in a request received by the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, sought access to copies of any records referring or relating to the reinstatement of a standing stone at a farm in a named county since 1 January 2020. For reference, he linked a newspaper article on the matter. As the heritage function had moved, his request was transferred directly to the Department of Housing, Local Government and Heritage (the Department).
2. On 8 December 2020, the Department refused access to 27 records that it had identified as relevant to the appellant's request. It refused access to one record (record 22) under article 8(a)(iv) of the AIE Regulations and to the remaining records on the basis that they did not comprise "environmental information" within the meaning of the definition in article 3(1) of the AIE Regulations.
3. The same day, the appellant sought an internal review of the Department's decision in relation to the information which had been refused on the basis that it was not "environmental information". He contended that the information at issue was "environmental information" having regard to paragraphs (a), (c), and, in particular (f), of the definition in article 3(1) of the AIE Regulations. On 6 January 2021, the Department affirmed its original decision.
4. The appellant appealed to my Office on 12 January 2021.
5. I have now completed my review 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 the Department. I have also examined the contents of the records at issue. In addition, I have had regard to:
 - the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance);
 - Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
 - the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
 - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide').



6. I have taken account of the judgments of the Superior Courts in *Minch v Commissioner for Environmental Information* [2017] IECA 223 (*Minch*), *Redmond & Another v Commissioner for Environmental Information & Another* [2020] IECA 83 (*Redmond*), *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 (*ESB*) and *Right to Know CLG v. Commissioner for Environmental Information and Raidio Teilifís Éireann* [2021] IEHC 353 (*RTÉ*) and the decisions of the European Court of Justice in Case C-316/01 *Glawischnig v Bundesminister für Sicherheit und Generationen (Glawischnig)* and C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat (Mecklenburg)*. I have also had regard to the judgment of the Court of Appeal of England and Wales that is referred to in the latter three Irish judgments, *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (*Henney*).

Scope of Review

7. 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.
8. My powers as Commissioner for Environmental Information apply only in respect of environmental information held by or for a public authority. In accordance with my Office's Procedures Manual, available at www.ocei.ie, my general practice in cases such as this, concerning a threshold jurisdictional question, is to limit my review to the preliminary matter of whether the information at issue is "environmental information" such that it falls within the remit of the AIE Regulations.
9. Accordingly, I am satisfied that the scope of this review concerns whether the Department was justified in refusing access to records 1-21 and 23-27 on the basis that they are not "environmental information" within the meaning of the definition in article 3(1) of the AIE Regulations.

Analysis and Findings

Definition of "environmental information"

10. Article 3(1) of the AIE Regulations is the relevant provision to consider where the issue is whether information is "environmental information". In line with Article 2(1) of the AIE Directive, 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). "

11. The AIE Regulations transpose the AIE Directive. 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 (*Mecklenburg* at paragraph 19), there must be more than a minimal connection with the environment (*Glawischnig* at paragraph 25). Information does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond* at paragraph 58; see also *ESB* at paragraph 43).



12. It is the appellant's contention that the records at issue are "environmental information" in accordance with paragraphs (a), (c), and, in particular, (f) of the definition.
13. In its submissions to my Office, the Department outlined its position that, in particular, records 1-12, 18-20, 21, 23, 24, and 25-27 do not contain "environmental information". In doing so, it stated that none of those records "include information on the state of the elements of the environment or information on cultural sites inasmuch as they are, or may be, affected by the state of the elements of the environment." The Department sought the opinion of my Office as to whether records 13-17 constitute "environmental information."
14. In my view, paragraph (c) of the definition, which provides that "environmental information" means any information on 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, is the most relevant to this review. Accordingly, I will consider paragraph (c) first, before proceeding to consider the other paragraphs, including paragraph (f), if necessary.

Identification of a measure or activity

15. Paragraph (c) requires the identification of a relevant measure or activity, which the information at issue is "on". Information may be "on" more than one measure or activity (*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). The CJEU stated in *Mecklenburg* that the term 'measure' serves "merely to make it clear that the acts governed by the directive included all forms of administrative activity" (*Mecklenburg* at paragraph 20, emphasis added). It is also important to note that the measures and activities covered by paragraph (c) are not limited to the acts of public authorities and may involve private actors (the Aarhus Guide at page 53).
16. The vast majority of known archaeological monuments in Ireland, including standing stones, are protected under the National Monuments Acts 1930 to 2014, in particular by inclusion in the statutory Record of Monuments. Any person who proposes to carry out, or to cause or permit the carrying out of, any work at or in relation to a Recorded Monument is legally required to give notice in writing to the Minister for Housing, Local Government and Heritage (the Minister) and not to commence the work for a period of two months after having given the notice (except in the case of urgent necessity and with the consent of the Minister).



17. This case relates to the reinstatement of a standing stone. The standing stone in question is a Recorded Monument under the National Monuments Acts 1930 to 2014. Work was carried out by member(s) of the public to re-erect the standing stone from a fallen position.
18. I am satisfied that the reinstatement of the fallen standing stone by member(s) of the public is an activity within the meaning of paragraph (c).

Whether the measure or activity is affecting, likely to affect or designed to protect the environment

19. To meet the definition, the measure or 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). A measure or 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).
20. In its submissions to my Office, the Department, in essence, queried whether the references to the soil and ground in records 13-17 met the threshold to be considered environmental information. For the purposes of paragraph (c), the question at issue is not whether the information sought is, in itself, information that can be described as affecting or likely to affect the environment. Rather it is the measure or activity that is subject to that threshold test (*Redmond* at paragraph 57). Furthermore, once it has been established that there is a real and substantial possibility of environmental effect, the actual outcome / extent of the impact of the measure or activity is irrelevant. In this respect, I note the analysis of Hogan J in *Minch* at paragraph 40 of his judgment.
21. In my view, there is a real and substantial possibility that any change in the position of a standing stone, in particular where moved from a fallen to an upright position, will affect the state of the landscape in which it is located as well as the state of the land and soil at that location. As such, I am satisfied that there is a real and substantial possibility that the reinstatement of the fallen standing stone will affect the environment.
22. I find, therefore, that the reinstatement of the fallen standing stone by member(s) of the public is an activity likely to affect the environment.



Whether the information is on the measure or activity

23. Where the relevant measure or activity has the requisite environmental effect, one must consider whether the requested information is “on” that measure or activity within the meaning of article 3(1) of the AIE Regulations. Information is “on” a measure or activity if it is about, relates to or concerns the measure or activity in question (*Henney* at paragraphs 37-44, referred to in *Redmond* at paragraph 99, *ESB* at paragraphs 36-45, and *RTÉ* at paragraph 52). As “any information ... on” a measure 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). However, consideration of whether information is “on” the measure does require examination of the content of the information (*ESB* at paragraph 50).
24. In this case, the activity identified is the reinstatement of the fallen standing stone by member(s) of the public. Having examined the records at issue, I am satisfied that they can be described as follows:
- records regarding media coverage about the reinstatement of the standing stone (including emails from members of the public), the identification of the standing stone by the Department, and the release of a statement on the standing stone by the Department (records 1-12, 18-20, and 25-27);
 - records regarding site inspections carried out by the Department in April 2018 and November 2020 (records 13-17); and
 - records regarding a letter from the Department to the owners of the land on which the standing stone is located (records 21, 23, and 24).
25. As noted above, the vast majority of known archaeological monuments in Ireland, including standing stones, are protected under the National Monuments Acts 1930 to 2014. I am satisfied that the records at issue comprise information reviewed, created and/or compiled by the Department about the reinstatement of the fallen standing stone when considering the matter, in light of media coverage relating to same.
26. Accordingly, I find that the records amount to information “on” the reinstatement of the fallen standing stone by member(s) of the public.



Conclusion

27. In conclusion, I find that the records at issue are environmental information within the meaning of paragraph (c) of the definition in article 3(1) of the AIE Regulations. In light of this finding, it is not necessary for me to consider whether the records also fall within other paragraphs of the definition.
28. At this stage, I consider that the most appropriate course of action to take is for me to annul the Department's decision in respect of the records at issue. In doing so, while I welcome the fact that the Department indicated to this Office that it would be willing to release certain information if it was found to be environmental information, I also note that it expressed its concerns regarding the release of other information. In the circumstances of this case, I do not consider it appropriate to simply direct the release of all records. Instead, I consider that the matter should be remitted back to the Department to allow it to undertake a new decision-making process in respect of the records at issue. The appellant will have a right to an internal review and a review by my Office if he is not satisfied with the Department's decision.

Decision

29. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul the Department's decision to refuse access to the records at issue on the basis that they are not "environmental information" within the meaning of the definition in article 3(1) of the AIE Regulations. I direct the Department to conduct a new decision-making process in respect of the records in accordance with the provisions of the AIE Regulations.

Appeal to the High Court

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

Peter Tyndall
Commissioner for Environmental Information
22 October 2021