



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 CEI/16/0041

Date of decision: 30 May 2019

Appellant: Right to Know CLG

Public Authority: Department of Defence (the Department)

Issue: Whether the Department was justified in refusing access to information relating to the President's use of the Ministerial Air Transport Service (MATS), including the dates of travel, departure point and destination, flying time and the number of passengers, on the basis that the President is not a public authority for the purpose of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that the Department was not justified in refusing the appellant's request. He found that the information on the dates of travel, departure point and destination, flying time and the number of passengers is environmental information under article 3(1)(c). He found that the information on the departure point and destination, and the dates of those journeys, is environmental information under article 3(1)(b). The Commissioner did not accept the assertion that the information is excluded from the scope of the AIE Regulations on the basis that it relates to the President. He was also not satisfied that article 8(a)(i), 8(a)(ii) or 9(1)(a) applied to the information as claimed. Accordingly, he annulled the Department's decision and required it to make the information available to the appellant.

Right of appeal: A party to this or any other person affected by this decision may appeal this decision 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:

The Department operates the MATS, which provides the Government and the President with national and international air travel services for official engagements. The Department publishes certain MATS usage information for the Government on its website (www.defence.ie). The information published includes the departure date, return date, time on board, the route, the Department, the title of the relevant Minister or office holder, and the number of passengers. The Department does not publish usage information relating to the President.

On 13 September 2016 the Department received a request for access to:

"a spreadsheet of all travel undertaken by the Ministerial Air Transport Service - to include flights by any aircraft (government jet, Learjet, Beechcraft, Air Corps helicopters etc) - relating (only) to travel by the Presidents Mary McAleese and Michael D Higgins in the period 11 November 1997 to the current date. This spreadsheet to include the date of travel, departure point and destination, flying time, and if possible, the number of other passengers."

On 20 September 2016 the Department notified the appellant that it had refused the request in full on the basis that the President is not a public authority within the meaning of the AIE Regulations and the AIE Directive.

On 21 September the Department received an internal review request from the appellant. In its internal review decision of 7 October 2016, the Department affirmed its earlier decision refusing the request on the basis that the President is not a "public authority" within the meaning of the AIE Regulations and the AIE Directive. The appellant appealed to my Office against this decision on 11 October 2016.

I regret the delay that arose in dealing with this appeal. This case, and other cases before my Office, raised complex legal points which required careful and detailed consideration. The difficulties were further compounded by legal developments which arose during the course of this case.

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 of the parties and to:

- the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance),
- Directive 2003/4/EC (the AIE Directive) upon which the AIE Regulations are based,
- the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), and
- The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the Aarhus Guide).

I have also examined the information at issue in this case, which was forwarded to my Office by the Department for the purposes of my review. What follows does not make comment or findings on each and every argument advanced but all relevant points have been considered.

Scope of the Review

The issues at the centre of this review are whether information relating to the President's use of the MATS, which is held by the Department, including the dates of travel, departure point and destination, flying time and the number of passengers:

- is environmental information within the meaning of article 3 of the AIE Regulations,
- is excluded from the scope of the AIE Regulations because the President's immunity under Article 13.8.1° of the Constitution extends to include information relating to the President, and
- falls under the exceptions to disclosure in article 8(a)(i), 8(a)(ii) or 9(1)(a) of the AIE Regulations.

Department of Defence's position

Environmental Information

The Department submits that the information is not environmental information. It states that the connection between the information and the environment is so minimal and remote that it falls outside the scope of the definition of environmental information in article 3(1) of the AIE Regulations. The Department contends that the definition is confined to information on matters affecting or likely to affect the environment. It states that aircraft movement cannot be said to have these effects, nor does the use of a particular form of transport constitute an "activity" under article 3(1)(c) of the AIE Regulations.

Information is excluded from the scope of the AIE Regulations

The Department submits that the President does not fall within the definition of "public authority" set out in article 3(1) of the AIE Regulations or Article 2 of the AIE Directive. It also submits that the President is excluded from the scope of the AIE Regulations pursuant to Article 13.8.1° of the Constitution and the second paragraph of Article 2(2) of the AIE Directive, as clarified by S.I. No. 309/2018 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2018.

The Department further submits that Article 13.8.1° of the Constitution places all information relating to the President outside of the scope of the AIE Regulations (even where information on the President is held by a third party, as in this case). It states that the President's immunity under Article 13.8.1 of the Constitution cannot be circumvented by indirectly requesting information from the Department. It says that the constitutional arrangements protecting the President from political and judicial scrutiny are deemed to be in the public interest and are accommodated in comparable legislation such as the Freedom of Information Act 2014 (FOI Act). It also states that the information requested concerns the President's official acts and functions as it relates to the President's external relations functions pursuant to section 3 of the Republic of Ireland Act 1948 (1948 Act).

Article 8(a)(ii) of the AIE Regulations

Alternatively, the Department submits that the exception to disclosure concerning the voluntary supply of information to public authorities under article 8(a)(ii) applies to the information. It states that the information was not produced by the Department, but rather that it originated, and was derived directly, from information provided by the OSGP pursuant to the President's external relations functions. It contends that under Article 13 of the Constitution the President

cannot be compelled to provide information in respect of the exercise and performance of his or her functions. It maintains that it follows that, as the President is not capable of being put under a legal obligation to provide the information, the President voluntarily provided the information. It states that consent has not been given for release of the information. It also says that disclosure would be contrary to the public interest as it would act as disincentive to the voluntary provision of the information. In addition, it states that there is a public interest in maintaining and protecting the State's constitutional framework.

Article 9(1)(a) of the AIE Regulations

The Department submits that the exception to disclosure concerning international relations, national defence and public security under article 9(1)(a) applies to the information. It states that the information reveals the itinerary of the President. It contends that if the information were released, it could be combined with other public information to compile an accurate picture of Presidential travel, which would adversely affect national security. By way of example, it says that information about the President's future itinerary could be combined with the unavailable information about what specific airfield is used when the President leaves the State. It states that, while a threat to the President may appear unlikely at this moment, it cannot be ignored. In support of its position, it cited the UK Information Commissioner's decision in Decision Notice FS50368290 (*Metropolitan Police*). The Department states that disclosure of the information would be contrary to the public interest for reasons of public defence and public security and that the balance of public interest weighs against disclosure. It says that there is no significant public interest in disclosure of the information. It also says that the information does not reveal anything about the state of the environment or the level of emissions and as such the public interest in disclosure is negligible.

Office of the Secretary General to the President's position

The Office of the Secretary General to the President (OSGP) was invited to make submissions as a third party to this case.

Environmental Information

It submits that the information sought is incidental to the activity of Presidential air travel, and suggested that only core information, such as fuel usage, would fall within the definition.

Information is excluded from the scope of the AIE Regulations

The OSGP submits that the President is not a public authority within the scope of the AIE Regulations. It cited the second paragraph of Article 2(2) of the AIE Directive, Article 13.8.1° of the Constitution, the Declaration by the European Community concerning certain specific provisions under Directive 2003/4/EC (as annexed to Decision 2005/370) and the judgment of the Court of Justice of the European Union (CJEU) in C-204/09 *Flachglas TorGau GmbH v Federal Republic of Germany (Flachglas)*, available at www.curia.europa.eu, in support of its position.

It also submits that, as Article 13.8.1° of the Constitution precludes the President from participating in proceedings before the courts, it necessarily follows that records relating to the President are exempt from release regardless of which public authority holds them. It notes that records relating to the President are held throughout the Government system.

Article 8(a)(i) of the AIE Regulations

The OSGP submits that disclosure of the information amounts to the release of personal information relating to natural persons who have not consented to disclosure. It states that the confidentiality of this information is otherwise protected by law. It also states that the interests of the current and former President could be adversely affected if the information were disclosed.

Article 9(1)(a) of the AIE Regulations

The OSGP submits that it is concerned that disclosure of the information would constitute a risk to the security of the Head of State and that the information therefore falls under article 9(1)(a). It states that release of the information when combined with other information which is available could expose vulnerabilities in the President's pattern of travel and constitute a security threat. It cited the UK Information Commissioner's decision in *Metropolitan Police* and the UK Information Commissioner's guidelines on regulation 12(5)(a) of the Environmental Information Regulations 2004 (S.I. 2004 No. 3391) (the UK equivalent to the AIE Regulations).

Appellant's position

Environmental Information

The appellant submits that the information is environmental information and cited my decision in Case [CEI/15/0007](#) (Mr Ken Foxe, Raidió Telefís Éireann and the Department of Defence), available at www.ocei.ie, in support of its position.

Information is excluded from the scope of the AIE Regulations

The appellant submits that the question of whether the President is a public authority subject to the AIE Regulations is not relevant to this case. It states that the information is held by the Department, which is a public authority for the purposes of the AIE Regulations. It asserts that Article 13.8.1° of the Constitution does not confer absolute secrecy on all information relating to the President. It states that Article 13.8.1° of the Constitution defines the separation of powers between the President, the Courts and the Oireachtas and no more. It also states that Ireland cannot narrow the scope of the AIE Directive either through transposition measures or by the application of national constitutional constraints. It added that, if the Department's position in this case were upheld, then only environmental information relating to public authorities would be accessible under the AIE Regulations, contrary to my decision in Case [CEI/16/0004](#) (Friends of the Irish Environment Limited and the Department of Agriculture, Food and the Marine), available at www.ocei.ie.

Article 8(a)(i) of the AIE Regulations

The appellant disputes that article 8(a)(i) applies to the information. It states that disclosure "would" have to have an adverse affect on the current and former President before this exception is engaged. It also states that information about the President's official duties is often published on the website for the President (at www.president.ie) or published in the media, and therefore, the President does not have an expectation of privacy in relation to the performance of official functions which require the use of the MATS. It says that, in the event I find that the exception is engaged, the public interest lies in favour of release of the information.

Article 8(a)(ii) of the AIE Regulations

The appellant states that there is no indication that the information was voluntarily provided to the Department by the President as required by article 8(a)(ii). It also argues that the purpose of article 8(a)(ii) is not to protect information of the kind at issue in this case but rather to protect the identity of whistle blowers or people who make complaints about breaches of environmental law.

Article 9(1)(a) of the AIE Regulations

The appellant submits that the Department has failed to explain its reliance on this exception, particularly since President does not have any substantive role in public defence or security. It states that it is difficult to see how the requested information, some of which is almost 20 years old, could compromise the security of the President or how information relating to the former President could compromise the security of the current President. It says that the President routinely publishes his diary and information relating to official engagements. It notes that the Department publishes similar flight information for other state officials, without any apparent concern for public security. It suggests that if the Taoiseach's use of the MATS can be safely published, then the President's use of it can also be safely published. The appellant states that the distance travelled by an aircraft directly relates to the quantity of carbon dioxide emissions generated. It says that air travel is one of the most environmentally harmful modes of transport and that the public has a right to know the details of the use of environmentally harmful modes of transport by public officials including the President.

Definition of "Environmental Information"

My powers as Commissioner apply only with respect to "environmental information" held by or for a public authority. Therefore, I will first deal with the issue of whether the information requested is environmental information.

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)".

As noted above, the Department submits that the connection between the information and the environment is so minimal and remote that the information does not meet the definition of environmental information. The appellant argues that the information is environmental information and cites my decision in Case [CEI/15/0007](#) (Mr Ken Foxe, Raidió Telefís Éireann and the Department of Defence), available at www.ocei.ie, in support of its position.

In Case CEI/15/0007 I found that similar MATS information was environmental information. I stated that an assessment of what is integral to a measure or activity under article 3(1)(c) is a useful test to employ when defining the scope of the definition of environmental information. I also explained that the phrase "any information . . . on" should be interpreted in a manner that includes information which supports the aims of accountability and transparency in decision-making within the definition. I found that aircraft usage by the Department is an activity affecting the elements and factors of the environment since the activity of air travel emits carbon dioxide into the air. I also found that the MATS information on the dates of travel, destinations of travel, time on board, the number of passengers travelling and the names of office holders and departments availing of the MATS is information on the activity of official air transport. I therefore found that such information is environmental information under article 3(1)(c) of the definition of environmental information. In addition, I found that information on the destinations of travel is indirect information on emissions and therefore environmental information under article 3(1)(b) of the definition of environmental information. I also found that the date of the journey is an integral contextual part of the destination information which should not be separated from the destination information. In reaching my decision in that case, I adopted a purposive interpretation of the definition of "environmental information" in line with the objectives of the Aarhus Convention.

Having reconsidered the matter in light of the arguments made in this case, I find no reason to depart from the approach taken in Case CEI/15/0007. It is noteworthy that the public authority in Case CEI/15/0007 was the Department of Defence and that it did not appeal my finding that the information in that case, which is the same type of information requested in this case, is environmental information.

I am satisfied that official air travel, which employs combustion engines that emit emissions such as carbon dioxide into the air, including the MATS, is an activity affecting the elements of the environment. Route information, such as information on the departure point and destination, is a strong indication of distance travelled, which can in turn be used to calculate aircraft emissions. I am therefore satisfied that route information is indirect information on emissions and is environmental information under article 3(1)(b) of the AIE Regulations. The date of the journey is an integral contextual part of route information, which should not be separated from that information.

In addition, I am satisfied that the dates of travel, destinations of travel, flight duration, and numbers of passengers are integral information on the activity of official air travel, disclosure of which would facilitate accountability of and transparency in an activity affecting the environment. I am also satisfied that the information requested, which describes integral parts of an activity affecting the environment, has more than a minimal connection to environmental factors. Accordingly, I am satisfied that the information requested regarding the dates of travel, destinations of travel, flight duration, and numbers of passengers disclosure of which would

facilitate accountability of and transparency in an activity affecting the environment is environmental information under article 3(1)(c) of the definition of "environmental information".

For the reasons above, I find that the information requested is environmental information within the meaning of article 3(1) of the AIE Regulations.

Analysis and Findings

Information held by the Department

Article 3(1) of the AIE Regulations provides that "'environmental information held by a public authority' means environmental information in the possession of a public authority that has been produced or received by that authority". This is the equivalent provision to Article 2(3) of the AIE Directive, which provides that "'Information held by a public authority' shall mean environmental information in its possession which has been produced or received by that authority." The Aarhus Convention does not define "held by".

The Department has explained in its submissions that its database in respect of the MATS is updated with information derived directly from information originally provided by the OSGP when seeking approval from the Department of the Taoiseach for the President's use of the MATS. It states that it is notified once a flight has been approved. The information relevant to the proposed flight is then given to it to process the flight arrangements and the MATS database is updated. In addition, it says that at the beginning of each month the Air Corps provides it with information on all of the MATS flights for the previous month and the MATS database is updated as appropriate.

I accept the appellant's argument that the information requested in this case is held by the Department, which is a public authority for the purposes of the AIE Regulations. It is clear from the description that the Department has provided, which I have set out above, that the information in the Department's MATS database was "received by" the Department. I note that the Department acknowledges that it receives information from the Air Corps each month about all MATS flights for the previous month, information the Department presumably holds as the body responsible for organising and providing the MATS. Thus, I am satisfied that the environmental information which was requested in this case is in the possession of the Department. I conclude that the environmental information requested is "held by" the Department within the meaning of the definition in article 3(1) of the AIE Regulations and Article 2(3) of the AIE Directive, notwithstanding the fact it relates to a body or institution which is excluded from the public authority definition.

Information relating to the President

Notwithstanding that the environmental information requested is held by the Department, the Department and the OSGP contend that, pursuant to Article 13.8.1° of the Constitution, all information relating to the President, regardless of what body holds it, is excluded from the scope of the AIE Regulations.

I accept that the President's immunity for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions under Article 13.8.1° of the Constitution excludes the President from the definition of public authority in article 3(1) of the AIE Regulations, as clarified by the amendment to the AIE Regulations by the 2018 Regulations. I also accept that the exclusion of the President from the definition is consistent with the AIE Directive,

specifically the third provision of Article 2(2), which permits the exclusion of bodies from the definition of public authority where a Member State's constitutional provisions precluded the body from the review procedure prescribed in Article 6 of the AIE Directive at the time the Directive was adopted. However, I am not satisfied that the President's immunity under Article 13.8.1° of the Constitution extends to exclude from the scope of the AIE Regulations all information relating to the President.

The Supreme Court in *NAMA* held, at paragraph 10, that in interpreting the AIE Regulations, it is not sufficient to have regard to national law and, in particular, the normal principles of statutory interpretation in Irish law. The AIE Regulations must be understood as implementing the provisions of the AIE Directive (and indirectly the Aarhus Convention) and, as a matter of constitutional law, ought not to go further (but not fall short of) the terms of the Directive. It stated that if, as a matter of domestic interpretation, the provisions of the AIE Regulations might appear to go further or fall short of what the AIE Directive requires, an Irish court might be required to adopt another interpretation which is consistent with the provisions of the Directive, if that is possible. Accordingly, the Court found that, in order to understand the AIE Regulations, it is necessary to understand exactly what the Directive does and means, which may also mean interpreting the provisions of the Aarhus Convention.

I note that Article 2(2) of the AIE Directive states that Member States may exclude "*bodies or institutions*" from the definition of public authority. However, Article 2(2) of the AIE Directive does not provide for the exclusion of information relating to bodies or institutions which are excluded from the definition of public authority pursuant to a Member State's constitutional provisions where the information is held by a body which is a "public authority". In addition, I note that the exceptions to disclosure of environmental information in Article 4 of the AIE Directive do not provide an exception: for information held by a public authority which relates to a body which is not a public authority under Article 2(2) of the Directive, for information held by a public authority which relates to a body which is excluded from the definition of public authority pursuant to the second paragraph of Article 2(2) of the AIE Directive, or on the grounds that the information was provided to the public authority by a body which is not a public authority.

It is not clear to me that the President's immunity under Article 13.8.1° of the Constitution precludes the President, or another entity representing the President's interests, from electing to participate in proceedings which may arise from the decision in this review. It is important to note that, unlike with the FOI Act which excludes from its scope records relating to the President, neither the AIE Directive nor the AIE Regulations provide for the exclusion of records relating to the President.

For the reasons given above, I am not satisfied that the requested information, which is held by the Department, is excluded from the scope of the AIE Regulations on the basis that it relates to the President.

Exceptions to disclosure in articles 8 and 9 of the Regulations

I have found above that the appellant made a request to the Department for access to environmental information which is held by the Department. I will now proceed to consider whether refusal of access to the information is justified pursuant to article 8(a)(i), 8(a)(ii) or 9(1)(a) of the AIE Regulations as claimed by the Department and the OSGP.

Article 8(a)(i) of the AIE Regulations

Article 8(a)(i) is the relevant exception to consider when dealing with personal information. Article 8(a)(i) provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law.

According to the Department, the information arises from the President's external relations functions under section 3 the 1948 Act. Neither the Department nor the OSGP has explained how such information qualifies as personal information for the purposes of or within the meaning of the AIE Regulations. In any event, it has not been shown how disclosure of information relating to the President's use of the MATS would adversely affect the confidentiality of such information.

I am therefore not satisfied that the requested information falls within the exception to access provided for by article 8(a)(i) of the AIE Regulations.

Article 8(a)(ii) of the AIE Regulations

Article 8(a)(ii) provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the interests of any person who, voluntarily and without being under, or capable of being put under, a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information.

I am not aware of any judgments by the CJEU or the national courts concerning this exception. I accept that one purpose of the exception is to protect whistle blowers and people who make complaints about breaches of environmental law. However, I am not persuaded this is the sole purpose of the exception.

As the Supreme Court in *NAMA* emphasised, the AIE Regulations should be interpreted in light of the AIE Directive, which in turn, should be interpreted in light of the Aarhus Convention. I note that the language of Article 4(2)(g) of the AIE Directive (which article 8(a)(ii) transposes) differs slightly from article 8(a)(ii) and from Article 4(4)(g) of the Aarhus Convention. Similar to article 8(a)(ii), Article 4(4)(g) of the Aarhus Convention refers to "[t]he *interests* of a third party which has supplied the information requested" (Emphasis added). However, Article 4(2)(g) of the AIE Directive refers to "the *interests or protection* of any person who supplied the information" (Emphasis added).

While the Aarhus Guide is not legally binding (Case C-182/10 *Solvay and Others*, available at www.curia.europa.eu), I note that the Guide provides, at page 89, that "this exception is meant to encourage the voluntary flow of information from *private persons to the government*" (Emphasis added). The Minister's Guidance, at paragraph 11.3, explains that article 8(a)(ii) is "intended to safeguard informal and voluntary communications between public authorities and third parties which are essential to good public administration generally". I stated in Case [CEI/15/0022](http://www.ocei.ie) (Colman O'Sullivan, RTÉ and The Office of Public Works), available at www.ocei.ie, that it is my understanding that this exception is intended to safeguard the passage of information by members of the public to public authorities, where such communication is desirable in the public interest, and where without such a safeguard, such communication might be deterred. Having

reconsidered the matter in light of the arguments made in this case, I find no reason to depart from the approach taken in Case CEI/15/0022.

I noted above, the Department states that the information concerns the President's official acts and functions as it relates to the President's external relations functions pursuant to section 3 of the 1948 Act. The Long Title of the 1948 Act provides that the purpose of the Act is "to enable the President to exercise the Executive Power or any executive function of the State in or in connection with its external relations". Section 3 of that Act provides that "[t]he President, on the authority and on the advice of the Government, may exercise the executive power or any executive function of the State in or in connection with its external relations."

Thus, it appears that the information was supplied for the purpose of the President exercising the executive powers and functions of the State in or in connection with its external relations. I am satisfied that the information which was supplied by the President in the course of him or her carrying out the State's external relations functions could not have been supplied in the President's capacity as a private citizen or as a member of the public.

I am therefore not satisfied that the requested information falls within the exception to access provided for by article 8(a)(i)(ii) of the AIE Regulations.

Article 9(1)(a) of the AIE Regulations

Article 9(1)(a) provides that a public authority may refuse to make environmental information available where disclosure of the information requested would adversely affect international relations, national defence or public security. The Aarhus Convention, the AIE Directive and the AIE Regulations do not define the terms "international relations", "national defence" or "public security". The Aarhus Guide, at page 86, states that "it is implicit that the definition of such terms should be determined by the Parties in accordance with their generally accepted meaning in international law".

The Department submits that disclosure of the information would be contrary to the public interest for reasons of public defence and public security. The OSGP submits that disclosure of the information would constitute a threat to the security of the President. Having reviewed the information, I am satisfied that the disclosure of the information would not adversely affect international relations or national defence.

I consider that the relevant matter for consideration under article 9(1)(a) is whether disclosure of the information would adversely affect public security. I do not accept the appellant's argument that the President has to play a substantive role in public defence or security in order for this exception to apply. The office of the President of Ireland was created under Article 12 of the Constitution and the President is the Head of State. The President forms part of the Legislature and a range of formal powers are conferred upon the President by the Constitution. Furthermore, when carrying out functions under the 1948 Act, the President is exercising the State's external functions. Thus, I find that ensuring the security of, or protecting, the President falls under public security. I therefore accept that, if disclosure of the information would adversely affect the security of the President, then article 9(1)(a) applies.

However, while it is not necessary to show that disclosing the information would lead to a direct or immediate threat to the security of the President, in my view the expectation of or potential for harm must be more than hypothetical. The Department and the OSGP submit that if the information is disclosed it could be combined with information available elsewhere to create an

accurate picture or reveal a pattern of the President's travel arrangements. In particular, the Department states that the information could be combined with information about the President's future itinerary to reveal what specific airfield is used when the President leaves the State. However, neither the Department nor the OSGP has explained or illustrated how pooling of information in this manner would adversely affect the security of the President. I note that the Department otherwise publishes MATS information concerning the departure point, the dates of travel, destination, flying time and the number passengers for the Taoiseach and other officials who use the MATS. I also note that a significant amount of information regarding the President's official engagements, including the location of those engagements, is publicly available. In the circumstances, it seems to me that the public security concerns raised by the Department and OSGP are not well founded but rather hypothetical in nature.

I am therefore not satisfied that the requested information falls within the exception to access provided for by article 9(1)(a) of the AIE Regulations.

Referral

The Court in *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241 noted that it is open to me, as Commissioner for Environmental Information, to refer any question of law to the High Court pursuant to article 12(9)(a) of the AIE Regulations. At the time the decision in this case was appealed to me, my Office considered whether it was necessary to make a referral to the High Court in this, and other cases which raised similar issues, under article 12(9)(a) of the AIE Regulations. However after reviewing all the submissions in this case and the enactment of the 2018 Regulations, I concluded for the reasons outlined in this decision that it was not necessary to exercise the discretion afforded to me under article 12(9)(a) of the Regulations.

The appellant submitted that the Commissioner ought to take into account the judgment of the CJEU in *C-378/17 Minister for Justice and Equality and Commissioner of the Garda Síochána*, available at www.curia.europa.eu. I have considered that case and am satisfied that it is distinguishable from the circumstances in the current case for the reasons set out above in my analysis of the relevant legal provisions.

Decision

Having completed my review, I find that the information requested is environmental information and is held by the Department within the meaning of the AIE Regulations. I further find that refusal of access to the information is not justified under article 8(a)(i), 8(a)(ii) or 9(1)(a) of the AIE Regulations. Accordingly, I annul the Department's decision and require it to make the information available to the appellant.

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
30 May 2019