



**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)**  
**CEI/17/0017**

**Date of decision:** 29 May 2019

**Appellant:** Right to Know CLG (appellant)

**Body Concerned:** Office of the Secretary General to the President (the OSGP)

**Issue:** Whether the OSGP was justified in refusing the appellant's request for access to a copy of records relating to two speeches given by the President of Ireland, including a copy of all emails, memos, letters, briefing notes and draft speeches, on the ground that it is not a public authority for the purposes of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that, in the circumstances of this case, Article 13.8.1<sup>o</sup> of the Constitution precludes the OSGP from being subject to the review procedure under Article 6 of the AIE Directive in so far as the information relates to the exercise and performance of the powers and functions of the President. He therefore found that the OSGP is not a public authority within the meaning of article 3 of the AIE Regulations, as amended by S.I. No. 309 of 2018 European Communities (Access to Information on the Environment) (Amendment) Regulations 2018, for the purposes of this review. Accordingly, the Commissioner found that he has no jurisdiction to review the OSGP's decision on this AIE request.

**Right of Appeal:** A party to this appeal 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**

On 9 February 2017 the appellant wrote to the general information email address for the President, and to two officials at the OSGP, seeking access to a copy of records relating to the President of Ireland. The appellant requested:

- "- A copy of all records – to include emails, memos, letters, briefing notes, draft speeches and so on – relating to a speech given by President Higgins in Paris in July 2015 at the Summit of Consciences for the Climate.
- A copy of all records – to include emails, memos, letters, briefing notes, draft speeches and so on – relating to an address given by President Higgins at the New Year's Greeting Ceremony in January 2016."

On 13 February 2017 an official emailed the appellant informing it that a member of staff at the OSGP would contact the appellant in due course. The appellant did not receive any further response in relation to its request.

On 24 March 2017 the appellant requested an internal review on the basis of the deemed refusal of the original request. The appellant received an automatic reply, but again, no further response was forthcoming.

On 2 May 2017 the appellant appealed to my Office on the basis of the deemed refusal of its request at both decision-making stages.

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 the 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 had regard to [Bunreacht na hÉireann](#) (the [Constitution](#)).

What follows does not make comment or findings on each and every argument advanced but all relevant points have been considered.

## **Scope of Review**

Article 12(3) of the AIE Regulations provides for a right of appeal to my Office where a decision by a public authority has been affirmed under article 11, i.e. on internal review. Article 11(5)(a) of the AIE Regulations clarifies that a decision to refuse a request, which may in turn be appealed to my Office, includes a request that "has been refused on the ground that the body or person concerned contends that the body or person is not a public authority within the meaning of these Regulations".

The OSGP submitted that it is excluded from the definition of public authority in the AIE Regulations. Accordingly, this review is limited to the question of whether the OSGP is a public authority for the purposes of the AIE Regulations.

### **Relevant Legal Provisions**

#### **The Constitution**

Article 13.8 of the Constitution provides that:

"1° The President shall not be answerable to either House of the Oireachtas or to any court 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.

2° The behaviour of the President may, however, be brought under review in either of the Houses of the Oireachtas for the purposes of section 10 of Article 12 of this Constitution, or by any court, tribunal or body appointed or designated by either of the Houses of the Oireachtas for the investigation of a charge under section 10 of the said Article."

#### **The AIE Regulations**

Article 3(1) of the AIE Regulations provides that:

"'public authority' means, subject to sub-article (2)—

- (a) government or other public administration, including public advisory bodies, at national, regional or local level,
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),

and includes—

- (i) a Minister of the Government,
- (ii) the Commissioners of Public Works in Ireland,
- (iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),
- (iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),
- (v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),
- (vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,
- (vii) a company under the Companies Acts, in which all the shares are held—
  - (I) by or on behalf of a Minister of the Government,
  - (II) by directors appointed by a Minister of the Government,
  - (III) by a board or other body within the meaning of paragraph (vi),or
  - (IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information".

In *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*), available at [www.courts.ie](http://www.courts.ie), O'Donnell J. interpreted the structure of the definition of "public authority" as "reproducing the international and European law terms, and thereafter attempting to clarify the scope of application of those terms within the Irish legal system, rather than somehow extending them." Accordingly, clauses (i) to (vii) in article 3(1) do not extend the primary elements of the definition contained at paragraphs (a) to (c), which correspond to the definition of "public authority" as set out in Article 2(2)(a) to (c) of the Directive.

Article 3(2) of the AIE Regulations at the date the request was made, and when the appeal was made to my Office, provided that:

"Notwithstanding anything in sub-article (1), 'public authority' does not include any body when acting in a judicial or legislative capacity."

On 27 July 2018 the Minister for Communications, Climate Action and Environment signed S.I. No. 309/2018 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 (the 2018 Regulations). The 2018 Regulations substituted article 3(2) with the following:

"Notwithstanding anything in sub-article (1), in these Regulations 'public authority' does not include—

- (a) the President,
- (b) the Office of the Secretary General to the President,
- (c) the Council of State,
- (d) any Commission for the time being lawfully exercising the powers and performing the duties of the President, or
- (e) any body when acting in a judicial or legislative capacity."

The Explanatory Note to the 2018 Regulations states that:

"The purpose of these Regulations is to amend the European Communities (Access to Information on the Environment) Regulations 2007 to clarify the status of certain offices."

### **The AIE Directive**

Article 2(2) of the AIE Directive provides that:

"'Public authority' shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)."

The second paragraph of Article 2(2) of the AIE Directive provides that:

"Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

Article 6 of the AIE Directive provides that:

"1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article."

### **The Aarhus Convention**

Article 2(2) of the Aarhus Convention provides that:

"'Public authority' means:

- (a) Government at national, regional and other level;
- (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity".

### **OSGP's Position**

The OSGP submits that:

- Article 6 of the AIE Directive requires that applicants must have access to a review procedure before a court of law or another independent and impartial body.
- However, Article 2(2) of the AIE Directive provides that Member States may exclude institutions or bodies from the definition of "public authority" where national constitutional provisions make no provision for a review procedure of such institutions or bodies within the meaning of Article 6.
- Article 13.8.1° of the Constitution, which was in place at the time the AIE Directive was adopted, is one such constitutional provision as it precludes the President and the OSGP from being answerable to any court within the meaning of Article 6 of the AIE Directive.
- The President and the OSGP are therefore exempt from the definition of "public authority".

It submits that the President's immunity under Article 13.8.1° of the Constitution extends to bodies which are integral to the Presidency, including the OSGP. It states that designating it as a public authority for the purposes of the AIE Regulations "would inevitably make the President answerable to the courts". It says that "[t]his would clearly cut across the provisions of Article 13.8.1° of the Constitution." It also states that a review by the Commissioner is just one step in an appeals process which leads to the High Court. It asserts that drawing the President into such an appeals process, including through cases relating to records held by the OSGP, could lead to a constitutional incongruence whereby the President could find himself or herself before a court to which he or she cannot be answerable for the performance of his or her powers and functions or would be unable to represent his or her interests in a process where the court is the final arbiter of how the system works.

It states that EU law does not require the OSGP to be included in the definition of public authority, as the President and his or her Presidential bodies "demonstratively meet the test of Article 2.2 of the Directive allowing for the exclusion from the definition of 'public authority'."

In addition, it states that the inclusion of the OSGP is discretionary under Article 2(2) of the AIE Directive; therefore, the decision to include it is not necessitated by the obligations of European Union (EU) membership. It says that "the State had discretion to transpose EU law in a way that did not cause unnecessary constitutional offence". It states that including the OSGP in the definition of public authority would have been "a clear affront" to Article 13.8.1° of the Constitution.

It also states that the 2018 Regulations only clarified and made explicit that the President and the OSGP were always excluded from the definition of public authority. It states it understood that the omission of the President and the OSGP from the list of bodies specified for inclusion in the definition of public authority in article 3(1)(i) to (vii) of the AIE Regulations or "the indicative list" of public authorities published by the Department of Communications, Climate Action and Environment meant that the Irish State intended that they be excluded from the definition of "public authority".

The OSGP also submits that, as the President forms part of the Legislature pursuant to Article 15 of the Constitution and "acts in a legislative capacity", he or she is exempt from the definition of "public authority" under article 3(2) of the AIE Regulations and the second provision in Article 2(2) of the AIE Directive.

### **Appellant's Position**

The appellant submits that the status of the President is not relevant to this case. Notwithstanding this, it submits that the President is a public authority under article 3(1)(a) or 3(1)(b) or both (except when acting in a legislative capacity). It states that the President forms part of the Legislature (under articles 15.1.2° and 15.2.1° of the Constitution). It also states that the President is the Head of State and has certain powers under the Constitution.

The appellant submits that a right of appeal under the AIE Regulations does not conflict with Article 13.8.1° of the Constitution. It states that:

- The Commissioner is not a court for the purposes of Article 13.8.1°.
- Article 13.8.1° does not exclude an administrative review of a decision under the AIE Regulations and that a review under Article 6 of the AIE Directive is not a review within the meaning of Article 13.8.1°.
- Article 13.8.1° only provides the President with partial immunity for the exercise of his or her powers and functions of his or her office or for any act done or purporting

to be done by him or her in the exercise and performance of those powers and functions.

- A decision on an AIE request is an administrative decision and cannot be considered to be an exercise of the President's powers and functions as set out in the Constitution.
- A review under Article 6 of the AIE Directive does not concern the exercise and performance of the President's powers and functions.
- The President would not have to participate in any such review.

In support of its position it cites *State (Walshe) v Murphy* [1981] 1 IR 275 (*Walshe*). It states that any request for information to the President could be handled administratively by the OSGP. It says that requests to Government Departments are handled by officials in the Departments and that there is never any suggestion that the relevant Minister would have to personally answer to a Court in relation to the request.

The appellant also states that the OSGP does not have any constitutional immunity from a review procedure within the meaning of Article 6 of the AIE Directive and does not meet the criteria in the third provision of Article 2(2) of the AIE Directive that must be satisfied before a Member State can exercise this discretionary provision. It says that OSGP has been recognised as a public body for the purposes of the Freedom of Information Act 2014 (FOI Act). It contends that under the doctrine of equivalence Ireland cannot treat EU law rights less favourably than domestic rights. It concludes that the OSGP must, therefore, also be a public authority for the purposes of the AIE Regulations.

It also submits that Article 2(2) of the AIE Directive is a discretionary provision and that by not implementing it the Legislature decided not to exclude bodies or institutions for which Ireland's constitutional provisions do not provide for a review procedure. It states that "in deciding not to exercise the option [in Article 2(2)], the Oireachtas clearly intended that such bodies be included in the scope of what is a public authority." It also states, in reference to the Supreme Court's judgment in *NAMA*, that the indicative list of public authorities in article 3(1)(i) to (vii) of the AIE Regulations "does not expand or limit the definition of public authority and each case must be considered with reference to articles 3(1)(a), (b) and (c)".

In addition, it submits that the 2018 Regulations are invalid. It states that their provisions are contrary to the AIE Directive - in particular Article 2(2) of the Directive. It says that the provisions of the 2018 Regulations are not necessitated by the obligations of EU membership. It states that any reliance by me on the 2018 Regulations to refuse access to the information would breach its fundamental right of access to the information requested. In support of its argument, it again cites the Supreme Court's judgment in *NAMA*. It also cites the CJEU's judgment in [C-378/17 Minister for Justice and Equality and Commissioner of the Garda Síochána](#), available at [www.curia.europa.eu](http://www.curia.europa.eu).

## **Analysis and Findings**

### **The 2018 Regulations**

Article 3(2)(b) of the AIE Regulations (as substituted by the 2018 Regulations) provides that the definition of public authority in article 3(1) does not include the OSGP.

The AIE Regulations, including the 2018 Regulations, were made in the exercise of the power conferred by section 3 of the European Communities Act 1972 to give effect to the AIE Directive. The Recital to S.I. No. 133/2007 - European Communities (Access to Information on the Environment) Regulations 2007 (the 2007 Regulations), and to the 2018 Regulations, states that the Regulations were enacted for the express purpose of giving effect to the AIE Directive.

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.

#### Article 2(2) of the AIE Directive

The second provision of Article 2(2) provides that Member States may exclude from the definition of public authority bodies or institutions when acting in a judicial or legislative capacity. The third provision of Article 2(2) provides that, if a Member State's constitutional provisions at the date the AIE Directive was adopted make no provision for a review procedure within the meaning of Article 6, the Member State may exclude those bodies or institutions from the definition of public authority. Article 6 is the access to justice provision of the AIE Directive which requires that a requester has access to a review procedure before a court of law or another independent and impartial body established by law in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final.

The second provision of Article 2(2) is similar to the final provision in the definition of public authority in the Aarhus Convention. The third provision of Article 2(2) seems to have appeared for the first time in the final version of the AIE Directive as passed by the EU Legislature. The legislative history of the AIE Directive does not provide any clarity on how the third provision should be interpreted or applied. The meaning of the second paragraph of Article 2(2) was considered by the Advocate General (AG) in her Opinion in [C-204/09 Flachglas Torgau GmbH v Federal Republic of Germany \(Flachglas\)](#), available at [www.curia.europa.eu](http://www.curia.europa.eu). In particular, the AG considered whether the third provision delimits the circumstances in which Member States may adopt the exclusion in the second provision or if the third provision is a separate stand-alone exclusion. Noting that the preparatory documents for the AIE Directive do not provide any answer to that relationship, the AG stated, at paragraph 43, that she considered that the third provision of Article 2(2) was a different "exemption" which was "entirely separate" to that in the second provision. Thus, the AG considered that there are two exclusions to the definition of public authority in Article 2(2):

- one exclusion in the second provision of Article 2(2) for bodies when acting in a legislative or judicial capacity, and
- a separate exclusion in the third provision of Article 2(2) where a Member State's constitutional provisions precluded a body's decisions from the review procedures in the Directive when it was adopted.

The judgment of the CJEU in *Flachglas* supports the proposition that the second and third provisions of Article 2(2) provide for two separate exclusions. The CJEU stated, at paragraphs 45 to 48, that:

"45 It is true that, as the referring court noted, the second sentence of the second subparagraph [referred to in this decision as the third provision] of Article 2(2) of

Directive 2003/4 provides that if their constitutional provisions at the date of adoption of that directive make no provision for a review procedure within the meaning of Article 6 of that directive, Member States may exclude those bodies or institutions from that definition.

46 However, that provision was intended to deal with the specific situation of certain national authorities, and in particular authorities acting in an administrative capacity, whose decisions, at the date of adoption of Directive 2003/4, could not, according to the national law in force in certain Member States, be subject to review in accordance with the requirements of that directive.

47 That interpretation is supported by the Declaration by the European Community concerning certain specific provisions under Directive 2003/4.

48 Therefore, that provision has neither the aim nor the effect of limiting the option given to the Member States to exclude bodies and institutions acting in a legislative capacity from the scope of the directive, an option which is, moreover, provided for without restriction by the Aarhus Convention itself."

I am satisfied that the jurisprudence which I have set out above makes clear that there are two distinct exclusions in Article 2(2). The first is when a body is acting in a judicial or legislative capacity. The second is when a Member State's constitutional provisions precluded a body's decisions from the review procedure prescribed in Article 6 of the AIE Directive at the time the AIE Directive was adopted.

I accept the OSGP's argument that Article 2(2) of the AIE Directive allows for the continuation of a Member State's constitutional arrangements. It seems to me that the purpose of the second exclusion is to ensure that, where a body's decisions would otherwise be subject to the review requirements in the AIE Directive but a Member State's constitutional provisions preclude such a review, the Member State can maintain the pre-existing constitutional order that is present in that State. This could arise where a Member State's constitution provides for the separation of powers between the various organs of government. By providing for the exclusion, a conflict between the AIE Directive and the Member State's constitutional order is avoided.

In addition, I consider that the exclusion of bodies, other than when acting in a judicial or legislative capacity, from the definition of public authority is permissible under the Aarhus Convention. As noted by the CJEU in *Flachglas* at paragraph 47 the Council of the European Union when approving the Aarhus Convention made a Declaration concerning certain specific provisions under the AIE Directive (see Annex to Council Decision [2005/370/EC](#), available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu)). That Declaration states:

"In relation to Article 9 of the Aarhus Convention, the European Community invites Parties to the Convention to take note of Article 2(2) and Article 6 of [the AIE] Directive. These provisions give Member States of the European Community the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information.

Therefore the ratification by the European Community of the Aarhus Convention encompasses any reservation by a Member State of the European Community to the extent that such reservation is compatible with Article 2(2) and Article 6 of Directive 2003/4/EC."

Accordingly, I am satisfied that, where a Member State's constitutional provisions precluded a body's decisions from being subject to the review requirements in Article 6 of the AIE Directive at the time the Directive was adopted, that body can be excluded from the definition of public authority.

#### Article 13.8.1° of the Constitution of Ireland

As noted above, the 2018 Regulations substituted article 3 of the Regulations to provide that the definition of public authority in article 3(1) does not include, among others, the President or the OSGP. The OSGP contends that it is excluded from the definition because the President's immunity under Article 13.8.1° of the Constitution extends to include the OSGP and that the 2018 Regulations clarified that pre-existing legal situation. However, the appellant contends that the 2018 Regulations are invalid.

I am satisfied for the reasons given above that the third provision of Article 2(2) of the AIE Directive permits a Member State such as Ireland to preserve its constitutional order including the separation of powers between the organs of government. The issue at the centre of this case is whether the President's immunity under Article 13.8.1° of the Constitution extends to include the OSGP in the circumstances of this case. In order to address this issue, I must first examine the scope of the President's immunity in relation to Article 6 of the AIE Directive before going on to consider whether the President's immunity extends to include the OSGP.

#### *The President's Constitutional immunity*

Article 13.8.1° of the Constitution provides that:

"The President shall not be answerable to either House of the Oireachtas or to any court 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."

The AIE Directive was adopted on 14 February 2003. The Constitution was enacted by the people of Ireland on 1 July 1937. Accordingly, I am satisfied that Article 13.8.1° of the Constitution was in place at the date the AIE Directive was adopted.

The appellant submits that a right of appeal under the AIE Regulations does not conflict with the President's immunity under Article 13.8.1° of the Constitution. I note that the appellant cited the High Court decision in *Walshe* in support of its position. In *Walshe* the issue was whether the appointment of a temporary District Court judge by the President was precluded from review by the Court due to Article 13.8.1° of the Constitution. However, the Court in *Walshe* held that the appointment of the judge was in fact a decision and act of the Executive and that decisions of the Executive were not immune from judicial review by the courts under Article 13.8.1° of the Constitution. I note, moreover, that the Chief Justice of the Supreme Court in *Draper v Attorney General* [1984] IR 277 (*Draper*) held, in peremptory removing the President from the proceedings, that the bringing of proceedings against the President was *prima facie* in breach of the Constitution. Thus, I do not agree with the appellant that a right of appeal under the AIE Regulations does not conflict with the President's immunity under Article 13.8.1° of the Constitution.

I accept the OSGP's submission that an appeal under article 12 of the AIE Regulations is one step in an appeal process leading to proceedings before the Superior Courts which could result in the President having to participate in proceedings before the courts. Article 6 of the AIE Directive requires Member States to ensure that requesters have access to a review procedure in respect of their requests. Ireland has established a three stage review procedure

for the purposes of Article 6. The first stage is an internal review by the relevant public authority of its initial decision on a request. The second stage is an appeal to me under article 12 of the AIE Regulations. The third stage is an appeal to the High Court on a point of law under article 13 of the AIE Regulations, thereby allowing the legality of any decision I make to be tested before the Superior Courts. If the President were a public authority for the purposes of the AIE Regulations, he or she would be obliged to make a decision on a request for environmental information in accordance with the provisions of the AIE Regulations. I note that any decision by the President on a request would be reviewable by me under article 12. I also note that any decision I made arising from that review could be subject to an appeal to the High Court on a point of law under article 13. I further note that, if the President did not comply with a decision of mine, he or she would be subject to my powers under articles 12(6) and (7) and to subsequent enforcement proceedings in the High Court under article 12(8) of the AIE Regulations.

In my view, Article 13.8.1° of the Constitution precludes the President from review by any court or under article 12 of the AIE Regulations. It seems to me that the President's immunity from review by the courts necessarily extends to review by any administrative review body, especially where, as in this case, a decision could result in judicial proceedings against the President. I note that the President's immunity is subject only to impeachment by the Houses of the Oireachtas pursuant to Article 13.8.2° of the Constitution. I also note that the Constitution largely predates the growth of the administrative state and administrative bodies set up by the legislature with quasi-judicial roles. I am satisfied that the participation of the President in the appeal process under the AIE Regulations would be inconsistent with the President's immunity under Article 13.8.1° of the Constitution. Accordingly, I accept that Article 13.8.1° of the Constitution precludes the President from the review procedure prescribed in Article 6 of the AIE Directive.

The appellant submits that Article 2(2) of the AIE Directive is a discretionary provision and that by not implementing it (before the enactment of the 2018 Regulations), the Legislature intended for the President to be included in the definition of public authority. However, I note that the CJEU in *Flachglas* clarified that express transposition is not necessary in order for a State to avail of an exclusion in a Directive. Article 13.8.1° of the Constitution, which was in place when the AIE Directive was adopted, is clear that the President shall not be answerable to any court for acts done, or purporting to be done, in the exercise and performance of the powers or functions of his or her office. In my view, Article 13.8.1° of the Constitution expressly and unambiguously confers on the President immunity from review including the review procedure prescribed in Article 6 of the AIE Directive. I consider that the dearth of cases involving the President before the courts since the foundation of the State supports my view.

For the reasons given above, I am satisfied that Article 13.8.1° of the Constitution precludes the President from the review procedure prescribed in Article 6 of the AIE Directive. I am also satisfied that Article 13.8.1° of the Constitution, which was in place at the time the AIE Directive was adopted, meets the requirements of the second exclusion in Article 2(2) of the AIE Directive. Accordingly, I am satisfied that the President is excluded from the definition of public authority in article 3(1) of the AIE Regulations. I am also satisfied that in explicitly excluding the President from the definition of public authority, article 3(2)(a) of the AIE Regulations merely clarified this pre-existing legal situation and is thus consistent with the AIE Directive in this case, specifically the third provision of Article 2(2).

### *The Office of the Secretary General to the President*

The OSGP submits that the President's immunity under Article 13.8.1° of the Constitution extends to include the OSGP and that this is consistent with, and meets the test in, Article 2(2) of the AIE Directive.

The appellant submits that the OSGP does not have constitutional immunity and does not meet the criteria in the second exclusion in Article 2(2) of the Directive that must be satisfied before a Member State can exercise this discretionary provision.

The post of Secretary General to the President and the OSGP were established by the Presidential Establishment Act 1938 (the 1938 Act). The Long Title to the 1938 Act provides that:

"An Act to provide the emoluments and allowances to be received by the President under Article 12 of the Constitution, to make provision for the granting of pensions to persons to who have held the office of the President and to widows of such persons, to create, as from the coming into operation of the Constitution, the post of Secretary to the President, and to make provision for other matters connected with the establishment of the President and the Office of the Secretary to the President."

Section 6(1) of the 1938 Act provides that "[t]here is hereby created, as from the coming into operation of the Constitution, the post of secretary to the President which shall be a permanent post in the civil service of the State and shall have attached to it such duties and functions in relation to the President and to the Commissions respectively constituted by Articles 57 and 14 of the Constitution as the Government shall from time to time direct".

Section 7 of the 1938 Act established an office to the secretary of the President, the staff of which are appointed by the Taoiseach with the concurrence of the Minister for Finance. Section 27 of the Civil Service Regulation (Amendment) Act 2005 provides that "[t]he office or post established by the Presidential Establishment Act 1938 known as the secretary to the President shall be known as the Secretary General to the President" and that "the Office of the Secretary to the President shall be construed as a reference to the Office of the Secretary General to the President".

It is apparent that the purpose of the 1938 Act was to provide for matters which were considered necessary for the proper functioning of the Presidency, including the establishment of the post of the Secretary General to the President and the OSGP. I note that the OSGP was established at almost the same time that the Constitution, which established the position of the President, came into operation. The OSGP is attached to the post of Secretary General to the President, both of which are attached the Constitutional office of the President. Thus, it seems to me that the Legislature's intention in enacting the 1938 Act was to provide the President with an administrative staff headed by the Secretary General to the President. I therefore accept that the OSGP is integral to the exercise and performance of the powers and functions of the President.

The request in this case was for a copy of information relating to the President - specifically a copy of information concerning to two speeches given by the President. The appellant disputes that the information requested is on the powers and functions of the President. However, the office of the President was established by Article 12.1 of the Constitution of Ireland and is Ireland's Head of State. I am satisfied that the President gave those speeches in his official capacity as the Head of State. It seems to me that the OSGP only holds the information requested in its capacity of providing the necessary administrative support to the President in carrying out his or her powers and functions. I consider that compelling the President's officers to be answerable to me in a review under article 12 of the AIE

Regulations, which is capable of leading to judicial proceedings before the courts, in respect of information relating to the exercise and performance of the President's powers and functions, would be inconsistent with the President's immunity pursuant to Article 13.8.1° of the Constitution.

The appellant asserts that any request for information to the President could be handled administratively by the OSGP. It states that requests to Departments are handled by officials in the Department and that the relevant Minister does not personally answer to the Court in relation to the request. However, the appellant's argument fails to address the fact that Ministers are responsible for the performance and functions of their Department and that the decisions by officials in his or her Department are treated as decisions of the relevant Minister. Thus, while the relevant Minister does not personally answer to the Court in relation to requests, he or she is responsible for the request and any actions taken by the Department. In any event, the constitutional position of a Minister and the Minister's Department of State differs from that of the President and the Office established to provide the President with the means necessary to carry out his or her powers and functions.

In my view, the President's immunity under Article 13.8.1° of the Constitution necessarily extends to include the OSGP when it is providing the President with the means necessary to carry out his or her powers and functions. A finding that the President's immunity does not extend to include the OSGP in such circumstances would in effect mean that President's immunity is limited to the person of the President.

While the Explanatory Note to the 2018 Regulations is not legally binding, I note that it states that the purpose of the Regulations is "to clarify the status of certain offices" under the AIE Regulations. It is likely that the Minister when enacting the 2007 Regulations did not envisage appeals against the President or the OSGP due to Article 13.8.1° of the Constitution. Presumably, it was considered that such clarification was needed as a result of this and other appeals which had been made to my Office. Thus, I accept that the Minister in making the 2018 Regulations clarified the pre-existing legal situation that the President and the OSGP in relation to the exercise and performance of the powers and function of the President are excluded from the definition of public authority in article 3(1) of the AIE. Accordingly, I accept that article 3(2)(b) of the AIE Regulations (as substituted by the 2018 Regulations) confirmed the situation which was, and is, that the President's immunity under Article 13.8.1° of the Constitution extends to include the OSGP in relation to the exercise and performance of the powers and function of the President.

The appellant submits that the OSGP has been recognised as a public body for the purposes of the FOI Act and that under the doctrine of equivalence Ireland cannot treat EU law rights less favourably than domestic rights; therefore, the OSGP must also be a public authority for the purposes of the AIE Regulations. The decision to which the appellant refers is Case [170151](#) (Ms X and The Office of the Secretary General to the President), available at [www.oic.ie](http://www.oic.ie), which is not binding on me and which arose from a request for access to records concerning travel and expenses of the Secretary General to the President. I note the different definition of "public body" in the FOI Act from that of "public authority" in the AIE legislation. In any case, the facts of that case are distinguishable from those in this case in that the decision followed from a determination by the Minister for Public Expenditure and Reform that the Office of the Secretary General was an FOI body within the meaning of section 6 of the FOI Act. I annulled the refusal of the applicant's request and directed the OSGP to undertake the statutory decision making process on that request. I note that under section 46(1)(d) of the FOI Act, any record relating to the President is outside the remit of the FOI Act.

For the reasons given above, I satisfied insofar as the information requested relates to the exercise and performance of the President's powers and functions that the President's immunity under Article 13.8.1° of the Constitution extends to include the OSGP. I am also satisfied that Article 13.8.1° of the Constitution meets the requirement of the second exclusion in Article 2(2) of the AIE Directive. Furthermore, I am satisfied that article 3(2)(b) of the 2018 Regulations clarified the pre-existing legal situation. In the circumstances of this case, I am satisfied that the exclusion of the OSGP from the definition of public authority in article 3(2)(b) is consistent with the AIE Directive, specifically the third provision of Article 2(2). Accordingly, I find that the OSGP is not a public authority under the AIE Regulations for the purposes of this review.

### 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](http://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 in the circumstances of this case the Office of the Secretary General to the President is excluded from the definition of public authority pursuant to Article 13.8.1° of the Constitution and article 3(2)(b) of the AIE Regulations, and thus, is not a public authority for the purposes of the AIE Regulations. Accordingly, it was not obliged to process the appellant's request for access to information and I have no further jurisdiction in relation to this matter.

### 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

29 May 2019