Decision of the Commissioner for Environmental Information
on an appeal made under article 12(5) of the European Communities
(Access to Information on the Environment) Regulations 2007 to 2014
(the AIE Regulations)

Case CEI/17/0045

Date of decision: 15 February 2018

Appellant: Stephen Minch

Public Authority: Department of Communications, Climate Action and Environment (the Department)

Issues:

1. Whether the request relates to information on emissions into the environment as per article 10(1) of the AIE Regulations
2. If the request does not relate to information on emissions into the environment, whether articles 8(a)(iv) and/or 9(1)(c) justify the non-disclosure of the information at issue

Summary of Commissioner's Decision: The Commissioner found that the request does not relate to information on emissions into the environment as per article 10(1). He found, after weighing the public interest in accordance with article 10(3), that article 9(1)(c) justifies the non-disclosure of the withheld information. As that was his finding, it was not necessary for him to consider article 8(a)(iv). Accordingly, the Commissioner did not require the Department to make environmental information available to the appellant.

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

On 18 May 2013 the appellant submitted an AIE request to the then Department of Communications, Energy and Natural Resources (DCENR) (since renamed the Department of Communications, Climate Action and Environment) seeking a copy of a report entitled "Analysis of options for potential State intervention in the roll out of next-generation broadband" (the Report). The Department refused the request on the basis of its belief that the Report is not environmental information within the meaning of the AIE Regulations. The appellant appealed to my Office. My Office gave the case the reference number CEI/13/0006. In due course I completed my review and I affirmed the Department's decision. A copy of my decision is available on my website, www.ocei.ie, here. The appellant appealed to the High Court. The High Court did not make a finding as to whether or not the Report constituted environmental information, but found that I had erred in my approach to answering that question. The Court remitted the matter to me for further determination. A copy of the Court's judgment is available on the Courts Service's website, www.courts.ie, here.

I appealed certain parts of the High Court's decision to the Court of Appeal and that Court delivered its judgment on 28 July 2017. A copy of the Court's judgment is available on the Courts Service's website, www.courts.ie, here. The Court found that the Report constitutes environmental information within the meaning of article 3(1)(e) of the AIE Regulations, *if* it was used in the preparation of the National Broadband Plan (NBP). The Court subsequently noted that the Department accepted that the Report had been used in the preparation of the NBP. The Court ordered the AIE request to be remitted to me "limited to the consideration of the question of such exemptions as may apply to the release of said Report".

On remittal, my Office gave this case the new reference number CEI/17/0045 for administrative reasons. I note and accept the Department's confirmation that the Report was used in the preparation of the NBP. I am therefore satisfied that the Report constitutes environmental information. For this reason, I annul the Department's decision on the AIE request.

My investigator asked the Department for an update of its position in relation to providing the appellant with a copy of the Report. The Department responded by saying that it had no

objection to providing the appellant with access to parts of the Report but believed that full disclosure would not be appropriate. It provided my Office with a complete copy of the Report, along with a redacted copy together with written arguments as to why I should not require the release of the redacted information. My investigator asked the Department to provide the appellant with a copy of the redacted Report, along with its arguments as to why the release of the complete Report would be inappropriate. The Department willingly complied with that request. After receiving the redacted Report and considering its contents and the Department's arguments, the appellant informed my Office that he does not accept the Department's position.

The complete Report is a 28-page document. In the redacted version approximately 10 pages of information are block-redacted. In other words, almost 2/3 of the information in the Report has now been released to the appellant.

Scope

In accordance with the Court of Appeal's Order, my role now is "limited to the consideration of the question of such exemptions as may apply to the release of said Report".

As the Department has since provided the appellant with access to parts of the Report, I am now solely concerned with those parts of the Report which remain withheld. As I have annulled the Department's decision, I am no longer reviewing a 'decision'. My task now is to determine whether it would be appropriate for me to require the Department to make the information that it redacted in the released Report available to the appellant.

In undertaking my task I took account of the submissions made by the appellant and the Department. I 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).

Preliminary Matter – Intellectual Property

The Report was prepared for the Department by consultants Analysys Mason Limited. My investigator noted that the Report contained the following notice:

> Copyright © 2012. The information contained herein is the property of Analysys Mason Limited and is provided on condition that it will not be reproduced, copied, lent or disclosed, directly or indirectly, nor used for any purpose other than that for which it was specifically furnished.

My investigator wrote to Analysys Mason Limited and invited it, if it so wished, to make a submission for my consideration. The company declined to do so, saying that it would rely on the Department to reflect its views. The Department's subsequent submission to my Office did not include any intellectual property/copyright argument. I therefore gave no further consideration to this issue.

Does the AIE request relate to information on emissions into the environment?

The Department argued against full disclosure of the Report on the grounds of article 8(a)(iv) and 9(1)(c). Neither of these grounds can justify non-disclosure where article 10(1) of the AIE Regulations applies. That article provides that:

> Notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment.

The appellant submitted that this article applies in this case, while the Department submitted that it does not apply. I therefore considered this matter first. The Department simply said, in a submission, that it had considered whether the AIE request relates to information on emissions into the environment and "determined that it does not".

The appellant offered a submission in support of the opposite view. He submitted that "the intervention scenario proposed in the NBP of 2012 would cause wireless emission and the NBP further details 2000 wireless installations", and he cited excerpts from the NBP in support of those statements. Those excerpts gave details of specific internet speeds in various scenarios. He also cited table 3.1 from the Report (which the Department had disclosed to him) arguing that it showed that, under scenario 2, 70% - 90% of the population would be provided with terrestrial 4g wireless technology and by satellite. He added that the

Department informed him in writing on 6 October 2017, in relation to a different AIE request which the appellant had made seeking the same Report that is currently at issue, that:

> Although your request can be said to relate to information on emissions into the environment in accordance with article 10(1), the information cannot be disclosed as per your request.

My investigator asked the Department about the first part of that sentence. The Department confirmed that it had included those words in correspondence with the appellant. However, it explained:

> [That] form of words was used in error and it was not the Department's intention to suggest, nor could it be the position, that the request can be said to relate to information on emissions into the environment.

The appellant further submitted that:

> The choice of technologies, the proportionate use of those technologies and the intensity of the provisioning of those technologies will directly affect 'emissions into the environment' … in the form of radio wave radiation, but will also affect the quantity of other emissions into the environment in the form of carbon dioxide, sulphur dioxide, nitrogen dioxide and mercury compounds, occasioned by the necessary burning of fossil fuels to provide the required power. The Report is therefore environmental information concerning emissions into the environment.

The appellant specifically argued that the Report *concerned* emissions into the environment and that the information which he seeks *relates* to emissions into the environment. However, while he maintained that article 10(1) applies in this case, I note that he did not specifically argue that the information at issue constitutes or contains information *on* emissions into the environment. I acknowledge that it is difficult, to say the least, for an appellant to say whether information which he has not seen constitutes or contains information on emissions into the environment. I accept that the construction and use of broadband infrastructure consumes electricity and the production of electricity involves carbon and other emissions into the environment. I also accept that the use of broadband services is likely to lead to the emission of electromagnetic radiation into the environment. However, the question for me is

whether the AIE request relates to information on emissions into the environment within the meaning of the AIE Regulations.

Analysis

The AIE Regulations have to be interpreted in light of the AIE Directive. The Supreme Court approved of this approach in its judgment in *NAMA -v- Commissioner for Environmental Information* [2015] IESC 51, when it held that "In order to understand what the statutory instrument means and does in this case, it is necessary … to understand exactly what the Directive does and means".

Article10(1) of the AIE Regulations transposed that part of Article 4(2) of the AIE Directive which provides that "Member States may not, by virtue of paragraph 2(a), (d), (f) (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment".

The European Court of Justice (CJEU) has clarified how that part of Article 4(2) of the AIE Directive is to be understood. In its judgment on case C-442/14 (which was delivered on 23 November 2016), the Court held that:

> Information on emissions into the environment within the meaning of … article 4(2) of the [AIE Directive] must be interpreted as covering not only information on emissions as such, but also data concerning the medium to long-term consequences of those emissions on the environment.

The Court also held that 'emissions into the environment' covers the release into the environment of products or substances to the extent that release is actual or foreseeable under normal or realistic conditions. It also held that where article 10(1) applies, "only relevant data which may be extracted from the source of information concerning emissions into the environment must be disclosed where it is possible to separate those data from the other information contained in that source".

Equipped with that clarification, I examined the withheld information. I did not find any information on emissions into the environment within the meaning of the AIE Regulations and the AIE Directive as clarified by the CJEU. The withheld information does not include information *on* emissions into the environment or on *the consequences* of such emissions for

the environment. I am therefore satisfied that article 10(1) of the AIE Regulations does not apply to the withheld information in this case.

Article 9(1)(c) – the arguments of the parties

The Department argued that it should not be required to disclose the withheld information because of article 9(1)(c) of the AIE Regulations. That article provides that a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest. This article is itself subject to article 10(3), which provides that the public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.

The Department's position

The Department argued that full disclosure would prejudice the conduct or outcome of its contractual negotiations. The Department said that it has launched a procurement process to appoint a company or companies to build, roll out and maintain a high speed broadband network, for a 25 year contract, in the State intervention area as defined on its published High Speed Broadband Map. It maintains that full release would not only undermine the ongoing procurement process but would also unduly fetter the discretion of the Minister in obtaining detailed commercial and technical analysis for projects of this nature in the future. It submitted that it is crucial for the Department to have the discretion to conduct its deliberative process with certainty that sensitive commercial information received on a confidential basis can be retained as confidential. The Department submitted that real and substantial commercial interests would be threatened by complete disclosure. It said that it is engaged in highly sensitive negotiations with bidders on the technology to be used and the associated costs. It submitted that full disclosure would be likely to jeopardise that process, and significantly impair both the Department's ability to make a final decision and the ability of bidders to provide highly sensitive information to the Department in the future. Moreover, the Department argued that full disclosure could be detrimental to both the commercial interests and negotiating positions of bidders during the negotiation process.

The appellant's position

In an early submission to my Office made before the Department had released part of the Report and before it had elaborated on its position in relation to article 9(1)(c), the appellant said that the Department had not stated whether 'commercial' or 'industrial' confidentiality would be affected or in what way it would be affected. He also said that the Department had not stated *whose* confidentiality would be affected. He said that:

> It is unlikely that 'commercial or industrial confidentiality' would be adversely affected as the options considered in the study will refer to generic technologies that are industry standards, rather than specific operator deployments. Specific operator deployments are the subject of a separate mapping exercise being carried out by the Department, which is underway at present. References to specific operator deployments that could reasonably be described as confidential and that are not already in the public domain could, if present in the Report, be redacted. Article 10(5) requires public bodies to make available what they can.

In a later submission made after the Department had released part of the Report and elaborated on article 9(1)(c), the appellant submitted that the Department did not specify what information in the Report would be prejudicial to 'contractual or other negotiations'. He submitted that it is hard to accept that any bidder to the NBP gave information to Analysys Mason in 2012 that is identifiable, relevant to the current state of the procurement process and still harmful in 2018. He added that it also hard to accept that Analysys Mason, given their stated methodology of using existing models as a baseline and adopting them to reflect the technologies and scenarios under investigation, could have included any such information in the Report. The appellant denied that the interests of any bidders could be prejudiced by full disclosure, because the Department already has the prejudicial information.

Finally, the appellant submitted that, "if considered vice versa, i.e. harm to the Department, the assumption must be that Analysys Mason was the only consultant capable of providing the relevant harmful information. If that is not the case, the information must be as Analysys Mason stated, i.e. it used existing models as a baseline".

Article 9(1)(c) – analysis

Has national or Community law provided for the protection of confidentiality to protect a legitimate economic interest relevant to this case?

The Department submitted that section 36(1)(c) of the Freedom of Information Act 2014 (the FOI Act) is relevant to this case. The appellant did not offer any comment or argument on this point. Section 36(1)(c) provides that:

> Subject to subsection (2), a head shall refuse to grant an FOI request if the record concerned contains information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

The Department argued that full disclosure in this case would prejudice the conduct or outcome of its contractual negotiations. I therefore understand that the Department regards itself as 'the person to whom the information relates'. I also take it that the claimed 'legitimate economic interest' is the Department's interest in obtaining the best value for the taxpayer through its procurement process.

Subsection (2) provides that a head shall grant an FOI request to which subsection (1) relates in certain circumstances. The Department did not refer to this subsection. I considered the various circumstances set out in the subsection and concluded that none of them apply when the Department is regarded as 'the person to whom the information relates'.

Subsection (3) provides that, subject to section 38, subsection (1) does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the FOI request.

I noted that the Aarhus Guide says of the 'confidentiality of commercial information' exemption at page 87 that:

> This exemption from the obligation to disclose information is predominantly focused on protecting legitimate economic interests of private entities; however, it may also be used to protect legitimate economic interests of public bodies or the State itself, provided that the requested information is of a commercial or industrial nature.

Having given the matter some consideration, I accept that the FOI Act provides for the protection of commercial confidentiality to protect the Department's legitimate economic interests in this matter, subject to the result of a public interest test that I have yet to conduct.

Would disclosure of the withheld information adversely affect commercial or industrial confidentiality?

The withheld information essentially concerns the likely costs of various models for the NBP. I am therefore satisfied that all of it may be described as 'commercial information'. I understand that the withheld information is not in the public arena and it has been, and continues to be, treated by the Department as strictly confidential. I am therefore satisfied that the information at issue is confidential as well as commercial. It is clear in the circumstances that disclosure of that information would result in the complete loss of its confidential quality. I am therefore satisfied that disclosure of the withheld information would adversely affect commercial confidentiality.

Having regard to the above, I concluded that non-disclosure might be justified in this instance by article 9(1)(c). In order to conclusively decide this point, I proceeded to consider article 10(3) of the AIE Regulations.

Article 10(3) Weighing the Public Interest

Article 10(3) provides that a public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.

The Department's position

The Department informed both the appellant and my Office of what it saw as factors favouring disclosure or non-disclosure. In favour of disclosure it identified:

- The right of the public to have access to environmental information under the AIE Regulations and the AIE Directive.
- The grounds for refusal of an AIE request must be interpreted on a restricted basis having regard to the public interest served by disclosure.
- Disclosure of information to the public can promote the effective and timely discharge of the Department's environmental functions.

The Department identified the following factors in favour of non-disclosure:

- Premature disclosure would impair the integrity and viability of the decision-making process to a significant and substantial degree, without countervailing benefit to the public, in this case the NBP procurement process.
- Broader community interests must be considered as distinct from those of the appellant and the subject of the record. It is important that the procurement process is protected in order to guarantee the best outcome for the entire country.
- The commercial entities bidding in the process are private entities and release of financial information in this Report may adversely impact their ability to negotiate with the Department or vice versa.
- In the interests of full transparency, the Department has already published, in full or redacted form, a number of reports that informed the Intervention Strategy, with the intention of informing the public. The withheld information is too sensitive to release.
- The need to ensure that AIE is not used to release highly sensitive commercial information.
- The ability of a public body to be able to provide a high level of public reassurance that they are fully protected from disclosure of information that is commercially sensitive.

The Department submitted that, having weighed all of the above factors, it believes that the public interest lies in favour of non-disclosure.

The appellant's position

The appellant submitted that the Department seems to set the AIE Regulations and the broader community interests in conflict.

He said that the Department seeks exemption from releasing the requested information because it has released other information, or that all of the information that has not been released is, by deduction, too sensitive.

He submitted, in relation to the last two factors cited by the Department in favour of non-disclosure, that the Department seems to be seeking a class-based exemption for 'sensitive' information into the future, based on a precedent that might be set by this case.

He submitted that the Department characterised lawful AIE requests as something that a public body should 'protect' the public from. He said that this is an odd characterisation of the AIE Regulations and the role of a public body under those Regulations.

He submitted that the Aarhus Convention recognises the importance of fully integrating environmental considerations in governmental decision-making and the desirability of transparency in all branches of government.

Analysis

As I conducted my deliberations on this case, I became aware through the news media of a significant development in the Department's ongoing procurement process. I have taken account of that development in coming to my decision.

I note that neither party identified a public interest factor in favour of disclosure which *specifically* relates to the information at issue in this case. I considered the Department's argument that full disclosure now would impair the integrity and viability of the decision-making process to a significant and substantial degree. It appears to me that if a current bidder were made aware of the advice received by the Department in the withheld information as to what the likely costs of implementation would be, the Department (and the taxpayer) would be disadvantaged. Any procurement project is disadvantaged by would be-bidders becoming aware, before or during price negotiations, of the range of costs that the procuring body is primed to expect. In that context, I accept that full disclosure would be likely to impair the integrity of the Department's procurement decision-making process. Any such effect would clearly be contrary to the public interest in obtaining services with the best possible value for money. In this regard, I agree that it is important that the procurement process is protected in order to guarantee the best outcome for the entire country, as argued by the Department.

I am not convinced that full disclosure now might adversely affect a bidder's ability to negotiate with the Department, or that even if that were the case, that such a result would be contrary to the public interest. However, I accept that full disclosure now might adversely affect the Department's ability to negotiate the best possible deal with a potential provider.

I note that the Department has already provided the public with access to information about the NBP, but I do not agree with its characterisation of this being done in the interests of *full*

transparency: full transparency is exactly what the Department seeks to prevent, at this point in time, at least.

I do not accept that full disclosure could compromise the Department's ability to make decisions on relevant matters. Neither do I accept that disclosure could compromise the willingness or ability of consultants to give similar advice in future. Neither do I accept that disclosure would adversely affect the interests of any bidder.

I have difficulty with the Department's last two "public interest factors in favour of non-disclosure": the "need to ensure that AIE is not used to release highly sensitive commercial information" and the need to protect the "the ability of a public body to be able to provide a high level of public reassurance that they are fully protected from disclosure of information that is commercially sensitive". I do not see that there is any public interest in securing those goals. Whether highly sensitive commercial information should be released in response to an AIE request depends entirely on a case by case examination. Once information is found to be environmental information and once the person or body holding it is a public authority within the meaning of the AIE Regulations when it holds such information, disclosure might be required notwithstanding anything in articles 8 or 9 of the AIE Regulations, if the public interest served by disclosure outweighs the interest served by refusal (even where the latter is itself a valid public interest). In that regard, I share some of the appellant's concerns. Similarly, I am disappointed by the Department's belief that there is a public interest in public bodies being able to provide assurances that commercially sensitive information is 'fully protected from disclosure'. Commercially sensitive information is not fully protected from disclosure. I will not comment here about the FOI Act, but public authorities may have to disclose environmental information, no matter how commercially sensitive it might be, if so required by the AIE Regulations. If the Department or any other public authority has been offering assurances to the contrary, they should cease doing so. The AIE Regulations afford due importance to industrial and commercial confidentiality. But 'highly sensitive commercial information' is not a class of information that is 'fully protected from disclosure'.

I am satisfied that the public interest in favour of disclosure in this case is the general public interest in access to environmental information. I have not identified a case-specific public interest in favour of disclosure, nor has the appellant proposed one. I recognise a public

interest in favour of non-disclosure in order to preserve the confidentiality of advice given to the Department on likely costs, while the procurement negotiation process is ongoing.

Mindful that the sensitivity of commercial information can decline with the passage of time, I took account of the fact that the Report at issue dates from July 2012. I concluded that, notwithstanding the passage of time, in circumstances where the process for which the Report was prepared is currently incomplete but at a critical stage, I had had no reason to believe that the importance of preserving confidentiality had actually, as opposed to merely potentially, diminished. Accordingly, on weighing the public interest, I find that the public interest served by disclosure is outweighed by the interest served by refusal.

As this finding means that it would be inappropriate for me to require the Department to provide the appellant with access to the withheld information, I will not impose such a requirement. In the circumstances, there is no need for me to consider article 8, as any consideration of that article could not alter my decision.

Article 10(5) Can any of the withheld information be separated and released without compromising commercial confidentiality?

Article 10(5) of the AIE Regulations provides that:

> (5) Nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information.

I considered whether any of the withheld information could be released without adversely affecting commercial confidentiality. I noted that while the Department's redaction included the headings of paragraphs and figures, that information was released in the unredacted list of the contents of the Report. I concluded that none of the withheld information could be separated out and released without adversely affecting commercial confidentiality.

Decision

I decided that the AIE request does relate to information on emissions into the environment as per article 10(1) of the AIE Regulations. I decided that the non-disclosure of the withheld information is justified on commercial confidentiality grounds by article 9(1)(c) of the AIE Regulations, following a weighing of the public interest in accordance with article 10(3) of those Regulations.

Accordingly, it would not be appropriate for me to require the Department to make the withheld 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
15 February 2018