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Record No: 2021 *142* MCA

IN THE MATTER OF ARTICLE 12(9)(a) OF THE ACCESS TO THE INFORMATION ON THE ENVIRONMENT REGULATIONS 2007-2018

BETWEEN:-

THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

Applicant



AND

COILLTE TEORANTA and PEOPLE OVER WIND

Respondents

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ORIGINATING NOTICE OF MOTION OF THE APPLICANT

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TAKE NOTICE that on , the *8<sup>th</sup>* day of *November*, 2021, at 11 o'clock in the forenoon or at the first opportunity thereafter, Counsel appearing on behalf of the Appellant will apply to this Honourable Court sitting at the Four Courts, Inns Quay, Dublin 7, for the reliefs set out hereunder:-

1. Guidance from this Honourable Court pursuant to Article 12(9)(a) of the Access to Information on the Environment Regulations 2007-2018 ("the AIE Regulations"), implementing Directive 2003/4/EC ("the Directive") in respect of the following questions. The Directive and the AIE Regulations provide for a broad right of access to environmental information held by public authorities. This right of access is subject to a number of exceptions, contained in Article 4 of the Directive and transposed by articles 7, 8 and 9 of the AIE Regulations. Article 4(2)(a) of the Directive is transposed by article 8(a)(iv) of the AIE Regulations. Article 4(2)(d) of the Directive is transposed by article 9(1)(c) of the AIE Regulations.
  - A. Article 8(a)(iv) of the AIE Regulations allows for a refusal of access to environmental information where disclosure would adversely affect

*"the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts)".* The Freedom of Information Act 2014 (**"the FOI Act"**) creates a number of exemptions to the right of access to records under that Act. Do the exemptions in the FOI Act create freestanding protection for the confidentiality of proceedings of public bodies for all purposes, such that the FOI Act provides for legal protection of confidentiality for the purposes of article 8(a)(iv) of the AIE Regulations? Alternatively, are the exemptions in the FOI Act merely exceptions to the duties of disclosure under that Act, having regard to section 11(8)?

- B. Article 9(1)(c) of the AIE Regulations allows for a refusal of access to environmental information where disclosure would adversely affect *"commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest"*. Do sections 30, 31, 35 and 36 of the FOI Act create freestanding protection for commercial or industrial confidentiality, such that these sections provide for legal protection of commercial or industrial confidentiality under national law for the purposes of article 9(1)(c) of the AIE Regulations? As above, alternatively, are these exemptions in the FOI Act merely exceptions to the duties of disclosure under that Act, having regard to section 11(8)?
- C. If the FOI Act does protect the confidentiality referred to in questions 1 and 2 for all purposes:
1. Is such confidentiality protected in respect of "public bodies" only?
  2. If the FOI Act protects such confidentiality in respect of public bodies only, to what extent does the term "public bodies" include partially included agencies or exempt agencies under Schedule 1 to the FOI Act?
  3. If "public bodies" does not include partially included agencies or exempt agencies, to what extent does the fact of the exclusion of those bodies from the FOI Act indicate that the confidentiality of their proceedings is otherwise protected?
  4. What are the boundaries of that confidentiality? For example, to what proceedings does it apply; what are the limits of the confidentiality protection?

- D. If the FOI Act does not protect such confidentiality for all purposes:
1. Does article 8(a)(iv) of the AIE Regulations create a new species of confidentiality of proceedings, by reference to the FOI Act, for the purpose of refusal of access to environmental information?
  2. If yes:
    - i. Is the creation of a new species of confidentiality of proceedings in the AIE Regulations within the Minister's vires under section 3 of the European Communities Act 1972, having regard to Article 15.2.1 of the Constitution?
    - ii. Is the creation of a new species of confidentiality of proceedings compatible with the Directive, having regard to Article 4(2)(a)?
    - iii. If the creation of a new species of confidentiality of proceedings is intra vires and compatible with the Directive, what are the boundaries of that new species of confidentiality of proceedings? For example: to whom does it apply; to what proceedings does it apply; and what are the limits of the confidentiality protection?

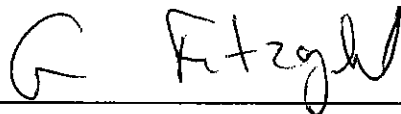
2. Directions as to the hearing of this application.

3. Such further or other relief as to this Honourable Court appears appropriate.

**WHICH SAID APPLICATION** will be grounded upon this Notice of Motion, the Affidavit of Deidre McGoldrick, sworn on the ~~31<sup>st</sup>~~<sup>9</sup> day of ~~August~~<sup>September</sup> 2021, the nature of the case and the reasons to be offered.

Dated this 10 day of September 2021

Signed:



Legal Services Unit

Office of the Ombudsman and Commissioner for Environmental Information

Solicitors for the Applicant  
5 Earlsford Terrace  
Dublin 2

To: The Central Office  
The Four Courts  
Inns Quay  
Dublin 7

And to:

Coillte Teoranta  
Dublin Rd,  
Kilmacullagh,  
Newtown Mount Kennedy,  
Co. Wicklow,  
A63 DN25.

People Over Wind  
c/o Ms Paula Byrne,  
Cullenagh,  
Portlaoise,  
Co. Laois.

THE HIGH COURT

Record No. 2021/ MCA

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