**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/15/0002**

**Date of decision:** 24 June2016

**Appellant:** Fand Cooney

**Public Authority**: ESB Networks Limited (ESBN), ESB Business Centre, 27 Lower Fitzwilliam Street, Dublin 2

**Issue:** Whether ESBN was justified in refusing a request for information on the grounds that it is not environmental information or, if it is environmental information, whether refusal was justified under articles 8 and 9 of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that the information is environmental information, and, with the exception of certain information which the Commissioner found to be commercially sensitive, refusal was not justified.

Accordingly, the Commissioner varied ESBN’s decision and required ESBN to make certain 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**

**Ireland’s Electricity Networks**

This case concerns electricity supply. The supply of electricity is regulated in Ireland by the Commission for Energy Regulation (CER). Ireland has two electrical supply networks: a transmission network (which supplies electricity from generating stations to transformer stations) and a distribution network (which supplies electricity, at a reduced voltage, from transformer stations to consumers).

The Electricity Supply Board (ESB) was established in 1927 as a statutory corporation under the Electricity (Supply) Act 1927. The ESB describes itself as “a vertically integrated utility”, consisting of a number of separate business units which are collectively called “ESB Group”. These business units are separate legal entities. ESBN is one subsidiary of ESB Group and it carries out a number of licensed functions:

 It is responsible for the distribution network, as the licensed “distribution system operator” (DSO).

 It is also manages the performance of the licensed transmission system owner (which is the ESB), on ESB’s behalf. "Transmission system owner" is usually abbreviated as “TAO”, with the “A” standing for “Asset”—apparently to avoid confusion with the transmission system operator (“TSO”) licence held by EirGrid plc.

**The AIE request**

On 7 November 2014 the appellant submitted an AIE request to ESBN, seeking the following information:

A copy of the full business case submitted to the TSO / ESB Board for transmission reinforcement project number CP0645 "Portlaoise 110kV station - 2 new DSO 110kV transformer bays" (the project) including:

(a) Details of the associated cost / benefit analysis (CBA) (or other economic analysis as applicable).

(b) The objectives / key drivers / reasons upon which the project is based (short, medium and long-term).

(c) The justification for the project which may show or make reference to how this project is intended to support 'security of supply'.

(d) Current status of this project.

Prompted by ESBN, the appellant clarified that “TSO” should have read “DSO” and ESBN accepted this clarification.

The core of the request, therefore, was for a business case which was submitted internally within ESBN and/or to the Board of ESB.

On 2 December 2014 ESBN gave notice of its decision. It provided information relevant to parts (a), (b),(c) and (d) of the request, while refusing to provide access to the business case on the ground of article 9(2)(c) of the AIE Regulations.

The appellant requested an internal review of the decision on 10 December 2014 and, on 23 December 2014, ESBN gave notice of its review decision. It refused the request, again citing article 9(2)(c) as justification. It also said that “detailed cost benefit analysis has not yet been completed”. The decision-maker added that, in her view, the information requested is not environmental information.

The appellant appealed to my Office on 20 January 2015, seeking a review of this decision.

ESBN informed my Office that the project has not yet been implemented and its planning permission has expired. It is still expected to proceed, albeit in a revised form. A document on EirGrid plc’s website indicates that it is expected to be completed in 2017.

**Scope of Review**

Under article 12(5) of the AIE Regulations, my role is to review ESBN’s internal review decision and to affirm, annul or vary it.

In conducting this review, I took account of the submissions made by the appellant and by ESBN. I had regard to: the 2013 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, upon which the AIE Regulations are based (the AIE Directive); 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).

**ESB Network’s position**

ESB made a submission to this Office, on ESB headed paper, which purported to set out the “ESB’s position”. As this AIE request was addressed to ESBN, which is a separate legal entity and therefore a different public authority, my investigator asked ESBN for an explanation. From the explanation which followed, I understand that ESB Group has an “AIE Co-ordinator” and this person is authorised by ESBN to co-ordinate AIE correspondence on its behalf. In other words, I am given to understand that the decisions on this AIE request, and the subsequent submissions to my Office, are those of ESBN, communicated through the ESB Group’s AIE Co-ordinator. I accept this explanation, but it would be preferable if all correspondence emanating from a public authority in relation to an AIE request would be marked so as to make its exact provenance clear.

ESBN put forward multiple reasons as justification for refusal, and its arguments are set out below. I do not reproduce every detail of those arguments in this decision, but I have had regard to all of ESBN’s submissions.

**The Appellant’s position**

I understand that the appellant is satisfied that she has been provided with the appropriate information relating to parts (b), (c) and (d) of her original request. In submissions to my Office the appellant argued that refusal of the remaining information is not justified for the reasons given. A synopsis of her arguments is set out below. I did not reproduce every detail of her arguments, but I have had regard to all of her submissions.

**Preliminary Issue: identification of the information at issue**

When asked by my Office for copies of the withheld records, ESBN provided a schedule of documents, numbered 1 to 3.

Document 1 is entitled “investment appraisal”. It appears to be a business case for the project. It includes information on the technical issues and likely costs associated with various options. It then evaluates those options and identifies a preferred solution.

Document 2 is dated 28 February 2015. Since it post-dates the AIE request, it is outside of the scope of this review and will not be considered further.

Document 3 is undated and it lists the estimated completion dates for ESBN projects. It lists the completion target for the project as “2013”. This information does not fit within the scope of the request. Most notably, it did not constitute information on the “current” status of the project when the request was made in 2014. Document 3 is therefore outside the scope of my review. In any case, it is publicly available at [www.eirgrid.com](http://www.eirgrid.com).

To fall within the scope of the AIE request, document 1 must have been “submitted” within ESBN and/or to the ESB Board, by the date of the request. In response to a question posed by my investigator, ESBN stated that it had not been submitted to the ESB Board by that date. Indeed, ESBN said that it would never send such a document to the ESB Board.

Document 1 is signed as approved by an ESBN manager. A typed note adds “Approval by the relevant manager confirms that the Investment Appraisal document meets the requirements of Asset Management, ESB Networks. This does not infer that expenditure approval is granted”. I am satisfied from the above that document 1, which is dated 5 January 2010, had been submitted to the relevant manager in ESBN by the date of the request and it is therefore within the scope of the request.

Accordingly, I am satisfied that the information at issue in this review is that contained in document 1.

I approached this review by considering the following questions:

Question 1: Is there environmental information in document 1?

Question 2: Does the request relate to information on emissions into the environment?

Question 3: Is refusal justified under articles 8 or 9 of the AIE Regulations?

**Question 1: Is there environmental information in document 1?**

**The definition of environmental information**

Article 3(1) 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);

**ESBN’s position**

ESBN maintains that the requested information does not fall within any of the six categories of environmental information. In support of this view, ESBN said that the information sought relates to “internal works at an existing substation” and “does not have any direct or indirect link to, or impact on, the environment”. It said this is self-evident since the works constituted exempted development under the relevant planning laws and since it was not necessary to carry out an environmental impact assessment or any other environmental assessment. ESBN also pointed out that the section in document 1 entitled “Environment” was left blank because the works were not considered to have any impact, directly or indirectly, on the environment.

In relation to paragraph (e) of the definition of environmental information, ESBN argued that document 1 is not a CBA or economic analysis “in the sense of quantifying future costs and benefits and discounting them to present value for the purpose of evaluating article 3(1)(c)”. ESBN also stated that “the benefits are for third parties who wish to connect to the system and are not quantifiable by ESBN”.

**The appellant’s position**

The appellant set out her view as to why the requested information should be regarded as environmental information.

First, she argued that the project was intended to expand and change a part of the national electricity transmission/distribution system which is used to transmit energy in the form of electricity, and accordingly information on the project meets the requirements of paragraph (b) of the definition (i.e. information on energy).

Second, she argued that the flow of electricity releases emissions in the form of electro-magnetic fields (EMF), and the information requested therefore also meets the requirements of paragraph (b) for this reason. She argued that a transformer changes voltage and therefore affects both the flow of energy and the corresponding EMF emissions.

Third, she argued that new transformer bays can be used for further expansion of electrical infrastructure, e.g. to connect new power generation or powerlines, which can themselves affect energy and emissions, as well as other elements of the environment such as soil, land, water etc. She argued that even the type of transformer used can have effects on the environment depending on the materials it contains, and she quoted from the Waste Management (Hazardous Waste) Regulations 1998 (Statutory Instrument No.163 of 1998) which provides at Regulation 13(1) that:

“Contaminated equipment” means any equipment (including any **transformer**, power capacitor or receptacle containing residual stocks) which—

(a) contains PCBs, or

(b) having contained PCBs, has not yet been subject to decontamination”

“PCBs” stands for polychlorinated biphenyls: these are highly persistent bioaccumulative pollutants. Finally, the appellant submitted that the Aarhus Guide requires the definition of environmental information to be interpreted as intended to have as broad a scope as possible, and that it is exactly for requests like hers that the Aarhus Convention exists.

**Analysis**

I considered whether the project is a measure likely to affect elements of the environment or factors referred to in paragraphs (a) and (b) of the definition. Despite ESBN’s initial reliance on the exempted status of the project, it acknowledged that planning permission had, in fact, been sought and obtained for the project. My investigator accessed the planning application, which was lodged by the ESB and dated 15 April 2010. It described the proposed development in the following terms:

The development will consist of : an extension to an existing control building; two new 110kV to MV transformers and bunds; two new 110kV transformer bays; one No. 38kV end mast; a new palisade gate in an existing fence; a new oil receptor; and associated site works.

The planning file showed that the extension would be 205m2 in area, while the mast would be 12.6m high.

A project such as this is clearly likely to affect elements of the environment such as landscape. It is sufficient that some effect is likely; it is not necessary for any likely effect to be either significant or adverse. Moreover, a project can affect the environment despite not requiring planning permission or environmental impact assessment (EIA). Certain developments are deemed to be “exempted developments” on public policy grounds, for example: tree-felling; certain land-reclamation works; minor extensions to houses; and the construction of certain wind turbines within agricultural holdings. Exempted status does not mean that such developments have no effect on the environment. In any case, planning permission was applied for. Also, the fact that a project might not require EIA does not mean that it would have no effect on the environment.

I am satisfied that the project was a measure likely to affect elements of the environment. Accordingly, information on it is capable of being environmental information of the type described in paragraph (c) of the definition of environmental information.

I considered whether document 1 contains information on the project. I noted that it contained information on what was to be built, where, and why, as well as information on voltages, and information showing why the selected option was chosen over others. I am satisfied, from this, that document 1 constitutes information on the project.

**Finding**

I find that the information in document 1 constitutes environmental information within the meaning of paragraph (c) of the definition in the AIE legislation. As this is my finding, it is not necessary for me to consider whether the document contains environmental information within the meaning of any other part of the definition. Accordingly, I find that refusal to provide access to the requested information on the ground that it is not environmental information is not justified.

**Question 2: Does the request relate to information on emissions into the environment?**

The appellant raised the issue of emissions. I therefore considered whether the provisions of article 10(1) of the AIE Regulations apply in this case. Article 10(1) 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 General Court of the Court of Justice of the European Union interpreted the relevant provision of the AIE Directive in Case T-545/11 (*Stichting Greenpeace Nederland-v-Pesticide Action Network Europe*). The Court held that, in order for environmental information to constitute information on emissions, “it suffices that the information requested relates in a sufficiently direct manner to emissions into the environment”. Therefore, for the current AIE request to “relate to information on emissions into the environment”, the withheld information must relate in a sufficiently direct manner to emissions into the environment. Notwithstanding whether there might be some relationship between information on voltages and emissions, the fact is that document 1 says nothing about emissions, EMF or radiation. Applying the *Stichting Greenpeace* test, I find that the withheld information does not relate in a sufficiently direct manner to emissions into the environment for the purposes of article 10(1). Accordingly, I find that the request does not relate to information on emissions into the environment.

**Question 3: Is refusal justified by articles 8 or 9?**

**Article 9(1)(c) Commercial Confidentiality**

This article provides that (subject to article 10(3)) a public authority, shall refuse to provide 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.

ESBN’s position

ESBN argued that it operates in a competitive commercial environment and emphasised its reliance on competitive tenders from would-be suppliers. It explained that it is not the sole developer of infrastructure, as third parties can, and do, construct such infrastructure. (ESBN explained its project management process: after obtaining any necessary regulatory and planning consents and its Board has approved of the investment appraisal document, a competitive tender process is undertaken.) In the context of its competitive tender process, ESBN argued that the investment appraisal document is particularly commercially sensitive.

ESBN argued that its commercial interests constitute legitimate economic interests, including interests in: retaining and enhancing market position; ensuring that competitors do not gain access to commercially valuable information; protecting its commercial bargaining position in the context of existing or future negotiations; avoiding commercially significant reputational damage; and avoiding disclosures which would result in a loss of revenue or income. It provided some details of the specific interests it claims to be at risk.

ESBN argued that disclosure would reveal information on expected timelines, and give an indication of ESBN’s time constraints. It argued that if the market believes a buyer to be under pressure of time this may result in price premiums being applied to tenders.

ESBN emphasised that disclosure of the withheld information could seriously undermine its procurement process and lead to a range of adverse effects which would cause financial loss to ESBN and, ultimately, to the State by way of reduced dividends.

ESBN argued that “in so far as any of the information relates to the DSO business”, such information is held under obligations of confidentiality under its licence and under the European Communities (Internal Market in Electricity) Regulations 2000 (Statutory Instrument Number 445 of 2000). It said that “specifically, information relating to third party investment plans (which form part of the drivers for the project) are confidential”. ESBN said that “Regulation 21 provides that the DSO shall preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its functions as DSO”. ESBN also stated that it is bound to preserve the confidentiality of commercially sensitive information by national law, under the terms of its licence.

ESBN submitted that there is no real public interest in disclosure in this case. It maintained that document 1 is an investment appraisal which has not been approved by its Board. It added that “it appears that the proposed works, as set out in that document, may now not proceed in this format”. ESBN argued that while the information might be “of interest” to certain members of the public (such as competitors and suppliers), disclosure would not benefit the general public and, in fact, the contrary would be the case. Among the public interest factors weighing against release would be the resulting lower dividends to the State.

ESBN argued that the general public interest in transparency and accountability of the conduct of the ESB Group’s business is, to the extent that it has an impact on the environment, more than adequately served by the scrutiny and oversight of transmission asset owner activities from a financial and corporate governance point of view by internal and external auditors and by CER. It submitted that this regulatory model, well established for all European electricity network companies, pre-supposes full open-book disclosure between the regulated entity and CER, and also pre-supposes the confidentiality of commercially sensitive information, unless determined otherwise by CER. ESBN submitted that there is a public interest in protecting the regulatory model, since a better performing regulated entity will attract lower cost funding.

The appellant’s position

The appellant submitted that for refusal to be justified under this article, the specific type of information at issue must be exempted by national law. Furthermore, she submitted, since the information at issue is directly relevant to environmental decision-making, it must be considered whether the overall assessment of the different options can be fully understood (by the public) if some of the key information is redacted. She added that the Aarhus Guide says that any grounds for redaction must be interpreted in a restrictive way, taking into account the public interest in disclosure and whether the information relates to emissions. The appellant cited material from the United Kingdom’s guidance on access to information on the environment which emphasised that: sufficient weight should be given to the public interest in accessing environmental information; it is important to have access to the “full picture”; a public authority refusing a request on this ground needs to show that adverse effects are more probable than not; and commercial sensitivity can decline with the age of the information.

The appellant submitted that the only possible adverse effects in the event of disclosure in this case “may be that potential tenders may be less competitive for this single project if they know the budget allocated to the project”. She argued that this could only happen if the tenders were to be sought for this project in a stand-alone exercise. She submitted that a search of e-tenders shows that it would be more likely that the ESB would seek tenders for individual packages of supplies, i.e. not expressly linked to any specific project, thereby lessening the monetary risk from disclosure.

The appellant submitted that it is exactly for cases such as this that the Aarhus Convention exists, i.e. “to provide access to the information necessary for the public to be informed on how decisions are made which will have an effect on the environment”. She cited Finance Circular 11/06 as emphasising that the “advantages of openness by public bodies in relation to the selection criteria for projects and progress on them… can contribute to better understanding and acceptance of project selection by interested parties”.

Analysis

I accept that ESBN operates in a competitive commercial environment and that its commercial interests are legitimate economic interests. I note its reliance on competitive tenders from would-be suppliers. [I note that the appellant acknowledged to my investigator that “if the business case appears to have been conducted correctly there may be an argument to consider some of the information relating to the selected project (option) as commercially sensitive”. I have no reason to doubt that the business case was properly prepared.]

S.I. 445/2000 defines “commercially sensitive information” as meaning “any matter the disclosure of which would materially prejudice the interests of any person”. According to the Interpretation Act 2005, "person" includes a body corporate. I further noted that the planning application acknowledged that “the existing 110kV electrical transformer station at Portlaoise is overloaded”.

I do not accept ESBN’s argument that information on timescale is commercially sensitive, because at all times an expected completion date for the project was (and currently is) published by EirGrid. I disagree with the appellant’s argument that information on options discarded by ESBN ought not to be considered as protected by commercial confidentiality. In my view, such information is as capable of being commercially sensitive as information on the preferred option. I noted that document 1 contains no information on third parties or their investment plans. I accept ESBN’s argument that information on costs is commercially sensitive, but am not satisfied that the remaining information is commercially sensitive.

The information on costs which I regard as commercially sensitive consists of the following: paragraph 1.3; paragraph 2.9; and Appendix 1 (with the exception of the diagram entitled “MV Overload Portlaoise 110/20kV”).

In relation to whether the confidentiality of the commercially sensitive information is protected by law, ESBN referred to its roles in relation to TAO and DSO functions without clarifying which information was relevant to which role. I therefore considered all of the information in the context of each role in turn.

Regulation 21 of S.I. 445/2000, cited by ESBN, relates to the obligations of the transmission system owner (TAO). It provides that:

The transmission system owner shall preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its functions under these Regulations unless required to disclose such information in accordance with the law.

Regulation 21 applies only to information that was “obtained” by the licensee. It is not clear if any of the information in document 1 was “obtained” by ESBN, as opposed to being “produced” by ESBN. It might have been “obtained” in previous tenders for other projects, perhaps, or it could have been “produced” by estimating prices likely to be cited in future tenders after allowing for cost-increase/decrease trends. Without identifying the information (if any) which was “obtained” by ESBN, it is not possible to identify information which might be protected by Regulation 21.

My investigator accessed a copy of the TAO licence from the internet. Condition 16.1 obliges the Licensee to preserve the confidentiality of commercially sensitive information held and/or obtained by it in the discharge its functions as transmission system owner. According to this condition, the obligation applies regardless of how the information came to be held. “Confidential information” is defined in condition 16 as “any commercially sensitive information held and/or obtained by the Licensee in the discharge of its functions as Transmission System Owner”, and “commercially sensitive information” is defined as “any matter the disclosure of which would materially prejudice the interest of any person”. I am satisfied that the confidentiality of commercially sensitive information held by ESBN in the discharge of the functions of the transmission system owner is protected in law by this licensing condition.

Moving on to consider “DSO business”, Regulation 24 of S.I. 445/2000 provides that:

The distribution system operator shall preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its functions under these Regulations unless required to disclose such information in accordance with the law.

Once again, it was not clear whether any of the information in document 1 had been “obtained” by ESBN. My investigator obtained a copy of ESBN’s distribution system operator (DSO) licence from the internet. Condition 21.1 obliges ESBN to:

Preserve the confidentiality of commercially sensitive information held and/or obtained by it in the discharge of its functions as Distribution System Operator in accordance with Regulations (of 2000 to 2008), the Single Electricity Market Regulations 2007 (Statutory Instrument Number 406 of 2007), the Electricity Regulations Act 1999 and the DSO licence.

According to this condition, confidentiality obligations apply to commercially sensitive information regardless of how it came to be held.

From the above considerations, I am satisfied that the confidentiality of commercially sensitive information in document 1 is protected in law by conditions in the relevant TAO and/or DSO licences. In light of this conclusion, I find that refusal to provide access to this information could be justified, subject to a public interest test.

I considered the public interest arguments put forward by the appellant and by ESBN. I reject ESBN’s argument that any public interest in access to this information is met by the existing regulatory mechanisms. A key feature of the right of access to environmental information is the recognition that citizens are entitled to inform themselves in order to make up their own minds. Moreover, far from being required to defer to regulatory bodies, citizens are entitled to seek environmental information so as to be able scrutinise the performance of such bodies. I acknowledge that there is considerable truth in the appellant’s claim that “it is exactly for cases such as this that the Aarhus Convention exists”, i.e. to provide access to the information necessary for the public to be informed on how decisions which will have an effect on the environment are made. However, the right to environmental information is not an unlimited right. In particular, the public interest in disclosure must be weighed against the interests served by refusal, and the latter often include competing public interests. In the present case, competing public interests include the public interest in ESBN’s ability to operate in the most cost-effective manner possible.

Finding

On balance, I find that the public interest in access to information on anticipated costs does not outweigh the interests served by refusal. I therefore find that ESBN was justified under article 9(1)(c) in refusing access to those parts of document 1 which I have identified as constituting commercially sensitive information, but was not justified in refusing access to the remainder of the information on this ground.

**Article 8(a)(i) Personal Information**

Article 8(a)(i) provides that (subject to article 10) 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.

ESBN’s position

ESBN submitted that the names of staff listed in document 1 should be redacted to protect their personal privacy, as they have not consented to the release of their names. ESBN put forward no argument to show that the names of members of staff constitute personal information, the confidentiality of which is protected by law, or to show that disclosure of such information would adversely affect confidential personal information.

The appellant’s position

The appellant submitted that “the names of the authors and designers and those checking and authorising such documents are a formal part of the quality-control process and cannot be construed as personal information, as they are the actions conducted by employees as part of their work”. She cited the Freedom of Information Act 2014 and argued that, under that Act, the name or position of a member of staff does not constitute personal information.

Analysis

Having had regard to the definition of “personal information” set out in section 2(1) of the Freedom of Information (FOI) Act 2014 and to the context in which the names appear, I am satisfied that the names of individual members of staff of an FOI body do not constitute personal information in the meaning of that Act.

I considered whether the names of staff might be protected under the Data Protection Acts 1988 and 2003. Under those Acts, "personal data" means data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller. I am satisfied that information in document 1, specifically the first and last names of the people involved along with information which identifies them as employees of ESBN, is personal data (but not “sensitive personal data”) in the meaning of those Acts. The disclosure of this information would constitute the “processing” of this data, in the meaning of the Acts. The Acts provide that personal data shall not be processed by the data controller unless the processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the fundamental rights and freedoms or legitimate interests of the data subject.

Finding

My investigator readily found information on the internet identifying 3 employees of ESBN with the same names as those which appear in document 1. In light of this and the fact that ESBN put forward no argument as to why disclosure of the names of the members of staff would be contrary to Data Protection law, I see no reason to regard disclosure of names in these circumstances as inconsistent with Data Protection law. Accordingly, I find that refusal to disclose this information is not justified under article 8(a)(i) of the AIE Regulations.

**Article 8(a)(iv) Proceedings of a Public Authority**

Article 8(a)(iv) provides that (subject to article 10) a public authority shall not make available environmental information where disclosure of the information 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 with respect to exempt records within the meaning of those Acts).

ESBN’s position

ESBN argued that refusal would be justified under article 8(a)(iv), because document 1 “constitutes a record relevant to the internal operations of a public authority”. ESBN argued that disclosure would adversely affect the confidentiality of its proceedings where such confidentiality is otherwise protected by law, and said that “it is noteworthy that Freedom of Information (FOI) does not apply” to the ESB.

In its submissions, ESBN argued that the legal protection of confidentiality in this instance is provided by the FOI Act 2014. It quoted Guidance Note 22 of the FOI Central Policy Unit of the Department of Public Expenditure and Reform as saying that “FOI exemptions that may be particularly relevant to Risk Management are: section 29(1) (deliberations of public bodies); section 30(1) (functions and negotiations of public bodies); section 32(1) (law enforcement and public safety); section 35(1) (information obtained in confidence); and section 40(1) (financial and economic interests of the State and of public bodies).

The appellant’s position

The appellant submitted that the business case “has nothing to do with how the company operates internally”, adding that it could not be construed to be some kind of ‘trade secret’.

She said that the document which she seeks is “a common factual and objective evaluation requirement of all entities which spend public money”.

Analysis

I am satisfied that the information in document 1 is information which sheds light on ESBN’s proceedings, in particular on its process for making decisions on infrastructural projects.

To successfully invoke this ground for refusal it would be necessary for the confidentiality of ESBN’s proceedings to be protected by law.

I disagree that “it is noteworthy FOI does not apply” to the ESB. I regard the status of the ESB as being of no consequence, since this case concerns the obligations of ESBN, as a distinct public authority. What is relevant is that ESBN is subject to FOI, and FOI exemptions are capable of providing legal protection for the confidentiality of certain kinds of information. I considered each of the FOI exemptions cited in turn.

I first considered the “deliberations of public bodies”. I noted that section 29 is a discretionary exemption which cannot justify refusal unless the release of the information would be contrary to the public interest. I am satisfied that document 1 concerns the deliberative processes of ESBN. I considered the public interest arguments made by the parties and concluded that the release of what I have identified as commercially sensitive information in document 1 would be contrary to the public interest, because it would weaken the ability of ESBN to obtain the most competitive tenders from suppliers, and this result would be contrary to the public interest for the reasons already stated. I concluded that it would not be contrary to the public interest to release the remaining information in document 1. Accordingly, I accept that the commercially sensitive information in document 1 is protected by law by virtue of this section of the FOI Act. I also accept that its disclosure would adversely affect the confidentiality of ESBN’s proceedings.

I reached a similar conclusion from my consideration of section 30(1) (functions of public bodies) and section 40(1) (financial and economic interests of public bodies).

I took the view that section 32(1) (law enforcement and public safety) is not relevant.

I considered section 35(1) (information obtained in confidence) and concluded that this section could apply, at most, to some of the financial information in document 1 (if any of it was obtained in confidence). I have already found that such information is protected under sections 29, 30(1) and 40(1), so it is not necessary for me to make any finding as to whether information in document 1 is protected by section 35(1).

Finding

I concluded from my considerations of the FOI Act, that the information which I have identified as being commercially sensitive is protected by the FOI Act. Refusal to make it available following an AIE request may therefore be justified under article 8(a)(iv) of the AIE Regulations where disclosure would adversely affect the confidentiality of the ESBN’s proceedings. I am satisfied that disclosure of the commercially sensitive information in document 1, especially before such information was submitted to ESBN’s Board, would adversely affect the confidentiality of ESBN’s proceedings. I am also satisfied that the public interest in disclosure of the commercially sensitive information does not outweigh the interests served by refusal.

I therefore find that refusal to provide access to the commercially sensitive information (but not the remaining information) is justified by article 8(a)(iv). In reaching this conclusion, I weighed the public interest in disclosure against that served by refusal.

**Article 9(2)(c) (material in the course of completion)**

Article 9(2)(c) provides that (subject to article 10(3)) a public authority, may refuse to provide access to environmental information where the request concerns material in the course of completion, or unfinished documents or data.

ESBN’s position

ESBN argued that document 1 was “in draft form” and had not been concluded. Capital approval for the project had not yet been secured from the Board of ESBN. It said that the project plan has continually evolved and was (as of 8 April 2015) under ongoing review. ESBN says that document 1 had not yet been approved by its Board. It said that the project might not go ahead as envisaged when document 1 was drawn-up.

ESBN argued that document 1 is “not a complete or static document, as it has, since the time of its drafting, continually evolved” and it was “under ongoing review… deliberations continue with often many further iterations to the Investment Appraisal”.

ESBN maintained that document 1 was part of a business case and risk assessment which was in the course of completion when created. ESBN argued that document 1 ought not to be regarded as finalised until close to a decision to implement it. ESBN argued that refusal is justified on this ground even after considering the public interest in disclosure.

The appellant’s position

The appellant expressed doubt over ESBN’s claims that document 1 was not complete and that the project had not yet been approved by the Board of ESBN. She put forward an argument which relied heavily on the Public Spending Code, published by the Department of Public Expenditure and Reform (the Code). According to its terms, the Code is binding on all “State companies” and it is clear that the appellant believes that it is binding on ESBN. She submitted that, under the Code, submission to the sanctioning authority (CER in this case) is the last step in a seven step process. In light of this, and “since the ESB had already submitted the business case to CER”, she argued that this shows that “the ESB was satisfied that the business case (was) sufficient to support their application for funding”.

Analysis

I understand that “material in the course of completion” means information in a material form which is still being actively worked on, while “unfinished documents” means incomplete documents, on which work has ceased or been postponed.

The appellant argues that since ESBN submitted the project to CER, and since the Public Spending Code stipulates that submission to an external approval body is the last of seven stages, ESBN must have regarded document 1 as being sufficiently complete for external submission and, for that reason, ESBN ought not to be able to claim that it was unfinished.

Two difficulties arise with this argument. First, ESBN maintains that it submitted the project, but not the associated business case, to CER. Second, ESBN maintains that it is not subject to the Public Spending Code. ESBN told my investigator that:

ESB is neither a Government Department nor is it a public body, nor is ESB in receipt of public monies: ESB is not required to comply with the requirements of the Public Spending Code.

I understand that, when it referred to “ESB”, it intended that reference to be understood as including a reference to ESBN. ESBN acknowledges that, as a State Company, the Board of ESB is required to satisfy itself annually that it complies with the Code, and said that “ESB does so”.

It is not necessary for me to determine if these statements reflect the true legal position. It suffices for my purposes that this is the position as ESBN see it, because it goes some way to explain ESBN’s practice of including a project in a list submitted to CER before its own Board has approved of the project’s business case, in contrast with how the appellant believes ESBN should act.

Finding

I disagree with ESBN’s argument that document 1 was an unfinished document. It had been prepared, revised and signed as “approved by the relevant manager” when the AIE request was made. The fact that such documents might often be revisited and later amended by ESBN does not alter the fact that, at face value, document 1 was a fully completed document. Any later iterations might replace document 1, but they would be, in effect, separate documents. I accept that the project plan was in the course of completion and that the business case in document 1 might later be replaced with another. But document 1 was complete when the AIE request was made and, accordingly, I find that refusal was not justified under article 9(2)(c).

**Article 9(2)(d) (internal communications)**

Article 9(2)(d) provides that (subject to article 10(3)) a public authority, may refuse to provide access to environmental information where the request concerns the internal communications of public authorities, taking into account the public interest served by disclosure.

ESBN’s position

ESBN submitted that formal internal memoranda or reports provide a space for uninhibited and frank communication of information, assessments or opinions and recommendations before taking commercial decisions. It argued that document 1 constitutes the internal management communications of ESBN. ESBN also argued that premature release of this information prior to a Board decision would potentially fetter the Board’s authority to approve, amend or not approve the investment appraisal, as the case may be.

The appellant’s position

The appellant submitted that the Code makes it absolutely clear that a project-appraisal document which shows the alternatives considered is a document which is compiled in the public interest in order to ensure value for money. She said that it was never intended to be considered only as internal correspondence, as it would be expected to be supplied to the sanctioning authority in support a request for public funding.

The appellant argued that, since ESBN submitted this project as part of a programme of works to CER, ESBN must have sent its business case to CER. This argument was supported by an email dated 6 November 2014 in which CER told the appellant (with my emphasis added in bold):

“The CER’s role is to approve a total level of capital expenditure which EirGrid and ESB Networks can spend on capital projects. We assess the approved list of projects as the level of expenditure which is planned for each project and **the business case**. If the level of proposed expenditure is excessive (in our view), we do not allow the companies to recover that portion of costs from consumers. If we do not agree with **the business case** set out, we can require amendments to the plans.…”

When my investigator queried this, ESBN said that the business case sent to CER was for the overall programme of works (a programme which included the project at issue) and it did not include specific details on the project at issue. ESBN assured my investigator that none of its submissions to CER contained a specific business case for this project.

Analysis

The Aarhus Guide notes that “parties (i.e. the contracting States) may wish to clearly define ‘internal communications’ in national law”. The Minister’s Guidance explains that “internal communications could include internal minutes or other communications between officials or different public authorities, or between officials and Ministers”, but it stops short of defining the expression.

I accept that document 1 was prepared for the purpose of internal communication. I note that at the time of the request it had not been communicated to the Board of ESBN. However, its conclusions must have been communicated to someone outside of ESBN, since a planning application was lodged for the preferred option before the AIE request was made and it was signed by a person employed in ESB Engineering and Facility Management Limited, acting on behalf of the ESB. While none of this shows that document 1 itself had been shared with people outside of ESBN, it is clear that information contained in document 1 (i.e. information on the preferred solution) was shared outside of ESBN.

I considered if such communication ought to affect how I characterise document 1. The Aarhus Guide (which is not a binding authority) suggests that once information has been disclosed by the public authority to a third party, it cannot be claimed to be an internal communication. The Minister’s Guidance, in contrast, says that the expression may be applied to communications “between officials or different public authorities”. Given the way in which ESB Group has arranged its business structure, I am willing to accept that the sharing of information by ESBN with its associates within ESB Group may be characterised as an internal communication.

In light of these considerations, I am satisfied that the AIE request in this instance concerns the internal communications of public authorities, and refusal could be therefore be justified if the interest served by refusal outweighed the public interest in disclosure.

I have already found that the interest served by refusal of access to the commercially sensitive information outweighs the public interest in disclosure of that information.

I considered the remaining information with a view to weighing the public interest in disclosure against the interests served by refusal on internal communication grounds. I fully accept the value of frank and uninhibited internal communications in public bodies. However, I do not see how the release of the remaining information could in any way affect or inhibit frank internal communications within ESBN (or within the ESB Group) in the future. Neither do I see how its release could fetter the ESBN Board’s authority to approve, amend or reject the business case. For these reasons, I give a low weight to the interests served by refusal of the remaining information.

I am satisfied that there is a significant public interest in the release of information which would show how Ireland’s electricity networks are managed and developed. In the circumstances of the present case, I accept that the public interest in access to the withheld information would be weakened by the redaction of the financial information in document 1. It would also be weakened by the fact that the project is unlikely to proceed as originally planned. However, the remaining information would still be of public interest, by which I mean it would be of interest to citizens who wish to understand how and why ESBN decided to embark on this project, and in so doing, to understand how ESBN plans other projects and whether ESBN sends detailed project plans to CER. Even without information on costs, document 1 includes information on project drivers, problems to be addressed by the project, options considered, and a comparison of feasible options.

On balance, I find that the public interest in access to the widest-possible range of environmental information which would allow scrutiny of an appraisal document used by a public authority as part of a process which led to a planning application for a project likely to affect elements of the environment outweighs the interest served by refusal.

Finding

I conclude that refusal to grant access to the commercially sensitive information is justified by this ground, but refusal to grant access to the remaining information is not justified.

**Decision**

In accordance with article 12(5) of the AIE Regulations, I have reviewed ESBN’s decision. I find that that the withheld information is contained in the investment appraisal document and it is environmental information. I find that refusal to provide access to what I have identified as commercially sensitive information was justified on the grounds of article 8 (a)(iv), 9(1)(c), and 9(2)(d), and refusal to provide access to the remaining information was not justified. Accordingly, I vary ESBN’s decision and require ESBN to make the remaining 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.

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**Peter Tyndall**  
**Commissioner for Environmental Information**  
24 June 2016