**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/15/0014**

**Date of decision:**  9 June 2016

**Appellant:** Tom White

**Public Authority**: The Environmental Protection Agency (the EPA)

**Issue:** Whether the EPA was justified in refusing a request on the ground that the information requested is not environmental information

**Summary of Commissioner's Decision:** The Commissioner found that the information at issue is environmental information within the meaning of the AIE Regulations. Accordingly, the Commissioner annulled the decision and remitted the request to the EPA for a fresh decision.

**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**

**The UGEE Programme (the programme)**

The EPA’s website explains that UGEE stands for Unconventional Gas Exploration and Extraction and that this “involves hydraulic fracturing (fracking) of low permeability rock to permit the extraction of natural gas on a commercial scale from unconventional sources such as shale gas deposits, coal seams and tight sandstones”. It states that:

“The Environmental Protection Agency awarded a contract to a consortium led by CDM Smith Ireland Limited, who will carry out a 24-month research programme looking at the potential impacts on the environment and human health from UGEE projects and operations (including construction, operation and aftercare). The research programme is composed of five projects and will involve field studies (baseline monitoring of water and seismicity), as well as an extensive desk-based literature review of UGEE practices worldwide. The research programme will be managed by a steering committee comprising the Environmental Protection Agency, the Department of Environment, Community & Local Government; the Department of Communications, Energy & Natural Resources; the Geological Survey of Ireland; Commission for Energy Regulation; An Bord Pleanála; the Northern Ireland Environment Agency, the Geological Survey of Northern Ireland and the Health Services Executive (nominated following Public Consultation).”

The website says that tenders were evaluated by a panel of 27 people to identify the most economically advantageous tender. Specified evaluation criteria include ultimate cost, technical merit of the human resources offered and the proposed approach and methodology.

The EPA’s website contains the following information about the composition of the panel:

The constitution of the evaluation panel was approved by the programme Steering Committee and included personnel with the capacity to make informed decisions on the tenders received. The evaluation panel consisted of 27 existing and retired personnel from the following organisations:

 An Bord Pleanála

 Commission for Energy Regulation

 Department of Communications, Energy & Natural Resources

 Department of the Environment Community and Local Government

 Department of the Environment – Northern Ireland

 Environmental Protection Agency

 ETH Zürich, Switzerland

 Geological Survey of Ireland

 Health Service Executive

 Northern Ireland Environment Agency

 Radiological Protection Institute of Ireland

 University College Cork

 University of Bergen, Norway

 University of Ulster

The website states that six tenders were received and “the contract was awarded following a robust evaluation process in full compliance with procurement guidelines”.

**The AIE Request**

On 22 April 2015 the appellant submitted an AIE request to the EPA, stating: “In a recent newspaper article, Brian Donlan of the EPA stated that those chosen to head up research into UGEE, namely CDM Smith, were appointed by a review panel of 27 people” (the panel). The request was as follows: “Please forward the names, and relative roles and expertise of all those 27 people, along with any conflicts of interest they mentioned in relation to their work on the tender review and selection process for the UGEE project”.

On 19 May 2015 the EPA gave notice of its decision to refuse the request on the basis that the requested information “does not come within the scope of the definition of environmental information as set out in article 3(1) of the AIE Regulations”. The EPA informed the appellant that a request for this information could only be made under the Freedom of Information Act 2014.

The appellant requested an internal review of the decision on 19 May 2015. The EPA carried out an internal review and gave notice of its decision to affirm the original decision on 4 June 2015.

The appellant appealed to this Office on 4 June 2015. I regret that there was a delay in processing the appeal. The delay arose due to a shortage of resources in my Office, which has now been addressed.

**The Information at issue**

The EPA provided my Office with a spreadsheet containing more detailed information on the composition of the panel. This information is within the scope of the request, but the EPA did not claim that it constitutes all of the information within the scope of the request that is held by or for the Agency.

In most appeal cases I require sight of all withheld information in order to complete my review. However, in this case, due to the nature of the information sought and the reason given for refusal, I considered that I would be able to come to a decision as to whether the requested information constitutes environmental information without having sight of all of the records held.

**Scope of Review**

Under article 12(5) of the AIE Regulations, my role is to review the EPA’s internal review decision and to affirm, annul or vary it. Since the EPA refused the request in the belief that the requested information is not environmental information, the scope of my review was limited to that issue alone.

In conducting my review I took account of the submissions made by the appellant and by the EPA. 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; 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).

**Relevant AIE provisions**

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);

**The Appellant’s position**

I do not intend to reproduce the appellant’s argument in full, but I have considered it in full. In a submission to my Office, the appellant said that “there seems to be some confusion as to who exactly the public authority is in this case”. He suggested that the EPA, the programme’s steering committee, and the panel could each be considered to be public authorities in this context.

The appellant argued that “the research study into UGEE is clearly a research study into Energy, and its effects on health and the Environment and as such is clearly Environmental Information” and he referred to the provisions of paragraph (c) of the definition of environmental information.

He argued that information on the panel would constitute environmental information within the meaning of paragraph (e) of the definition, since the panel would decide the best tender for the programme. In support of this, he argued that the panel’s task included performing a cost-benefit analysis of tenders. He argued that conflict of interest declarations clearly come within the realm of assumptions used within the framework of the administrative functions being provided by the panel. He submitted that, in doing its work, the panel would take into account any declared conflicts of interest “or the assumption of none”.

The appellant submitted that the individual role, expertise and declared conflicts of interest of members of the panel would “have an impact on the end result analysis”, causing, in turn, an impact on the effects that the programme would have on the Environment and on Human Health. In support of this, he argued that the panel was selected because of the bearing each member could have on the outcome of the analysis, adding that “otherwise one could pick the first 27 people on the number 10 bus”.

The appellant argued that the provisions of the AIE Directive need to be considered in the context of the Aarhus agreement and added that “without access to information one is effectively denied access to Justice: one of the other pillars of the Aarhus Convention”.

In a later submission, the appellant expanded on his position. He argued that the information requested “is inherently environmental information, and atomisation of such information” contradicts the Aarhus convention, Directive and Regulations. He did not explain what information he regarded as being at risk of “atomisation”, but he appeared to be concerned that any information released should not be so redacted as to deny access to important contextual information. He argued that, even if an atomisation approach is used, the information is clearly environmental information within the meaning of paragraph (e) of the definition and was used within environmental decision-making. He argued that the public interest in withholding the information is weak, in light of the panel’s decision to select “a company with strong links to fracking”.

The appellant argued that there can be no doubt that the programme is intended “to deal with policy” and that “all attendant information should be considered holistically”. He said that there is no policy on Shale Gas/UGEE/Fracking in Ireland and no decision on policy will be made until the programme is completed. He argued that the identities of the panel’s members should already be made public under article 7 of the AIE Directive (which deals with “Dissemination of Environmental Information”). He argued that “there are issues with the tender-winner”, including “undeclared conflicts of interest”. He wants to know if the panel included: health representatives; industry representatives; UK Government representatives; or Northern Irish Health Service representatives. I have not established whether the information on the composition of the panel which is included in the background section of this decision (and which partly answers these questions) was available on the EPA’s website when the request was made.

The appellant cited an AIE adjudication from the United Kingdom which concerned information about “a research review not unlike the UGEE study” and which concluded that the “report should be released in full” (UK Information Commissioner’s Office decision reference number FER0562043).

The appellant said that the EPA told him twice that he could apply for this information as a Freedom of Information request, but he said that he prefers to pursue an AIE request because the AIE regime includes a public interest test. As an indicator of the public interest in this matter, he said that there were approximately 1350 responses to the public consultation exercise carried out in relation to the terms of reference for the programme. He added that “given the controversy” over the company which was awarded the contract “there have been debates and questions asked in both the Dáil and the Northern Irish Assembly and it has also featured in the recent Westminster elections”. He said that “a number of (Irish) County Councils have passed motions of no confidence in the output of the research” by the company which was awarded the contract “given their ties to the industry”.

**The EPA’s position**

The EPA’s position is that the requested information is not environmental information within the meaning of the legislation. In a submission to this Office, the EPA said that it was guided in taking this view by my predecessor’s decision in appeal case CEI/09/0015 (Pat Swords and RTE) and by independent legal advice.

In CEI/09/0015, it was found that refusal to provide information consisting of the names and qualifications of RTE personnel was justified in the circumstances, because such information was not environmental information within the meaning of the AIE Regulations. That decision may be accessed on my Office’s website (at [www.ocei.gov.ie/en/Decisions/](http://www.ocei.gov.ie/en/Decisions/)).

**Analysis and Findings**

In relation to the appellant’s concerns about “who exactly the public authority is in this case”, my review is solely concerned with an AIE request made to the EPA, and the EPA has not denied that it is a public authority within the meaning of the AIE Regulations. It is therefore not necessary for me to consider whether any of the other parties in this case might also be public authorities.

Also, although the appellant has argued that the information he requested should already have been made public under article 7 of the AIE Directive (which was transposed by article 5 of the AIE Regulations), I have no remit to investigate or comment on whether or how well public authorities fulfil their obligations under those articles.

Given that the programme is administered by the Environmental Protection Agency, I considered whether it is a measure designed to protect elements of the environment. The aim of the programme (as set out by the EPA’s website) is “to further our understanding of the potential impacts on the environment and human health from UGEE projects/operations (including construction, operation and aftercare)”. The EPA’s website provided the following information about the background to the programme, setting out the facts which led to its adoption:

“In May 2012, the EPA released the report from a preliminary study “*Hydraulic Fracturing or ‘Fracking’: A Short Summary of Current Knowledge and Potential Environmental Impacts*”. This short desk study was conducted for the EPA by the University of Aberdeen and provided an introduction to the environmental aspects of fracking including a review of regulatory approaches used in other countries and areas for further investigation and research. In brief, some of the key findings of the study were:

- The importance of knowledge of local geology regarding potential impacts on groundwater quality and possibility of induced seismic activity.

- The importance of well integrity for preventing groundwater contamination.

- The uncertainty regarding the “carbon footprint” of shale gas in comparison to conventional natural gas. This is an important climate change issue.

- Baseline studies are needed before drilling begins (surface water; groundwater; seismic).

- The small number of published, peer reviewed, scientific studies in the area.

Further research is required to fully understand the potential impacts on the environment from the use of this technology. The key questions this research needs to answer are:

1) Can this technology be used whilst also fully protecting the environment and human health?

If the answer is yes, then:

2) What is best environmental practice in using the technology?”

My investigator found (from the Internet) that Ireland reported to the European Commission in late 2014 that:

“In Ireland, the position is that no decisions will be made on any proposal for the use of hydraulic fracturing in exploration drilling as part of an unconventional gas exploration programme, until there has been time to complete and consider the outcome of a major research programme, directed at examining the potential environmental impacts of hydraulic fracturing, which has been commissioned by the Environmental Protection Agency”.

From the above, I understand that the programme is designed to inform policy-makers who will be faced with important environmental decisions. Adopting a broad interpretative approach to the definition of “environmental information”, I consider that the programme may reasonably be characterised as a measure designed to protect elements of the environment.

It is clear that the panel’s work must have included some degree of economic analysis, as the members evaluated and compared tenders to identify the most economically advantageous tender. It is also clear that such analysis informed the selection of the successful tender, and was therefore used within the framework of the programme.

In my view, the credibility and value of any analysis depends in large measure on the credentials of the people who conducted the analysis. For this reason, I find that information on the names, relative roles, expertise and conflicts of interest of the panel is information on the panel’s analysis and is therefore, in the circumstances, environmental information.

**Summary of Conclusion**

I find that the programme is a measure designed to protect elements of the environment. I am satisfied that the panel conducted an economic analysis and used it within the framework of the measure. I find that the requested information is information on the economic analysis which was used by the panel within the framework of the programme. I find that it is therefore environmental information within the meaning of paragraph (e) of article 3(1) of the AIE Regulations.

I distinguish this conclusion from that in case CEI/09/0015 (Pat Swords and RTE): in that case, the information was not found to fall within any of the six categories of environmental information set out in the definition. My finding in the current case illustrates how the question of whether information is environmental information cannot be approached on the basis of a belief that certain classes of information are incapable of constituting environmental information. Answering this question requires consideration of the special circumstances of each case.

**The implications of my finding**

In this case the EPA refused the request in the belief that the requested information was not environmental information. The EPA did not put forward any reason which could justify refusal in the event of it being found to be environmental information. This was not an unreasonable approach. I acknowledged in my decision in the case of CEI/12/0004 (Gavin Sheridan and Dublin City Council) that the boundaries of what constitutes environmental information are unclear. In that decision, I expressed the view that public authorities cannot reasonably be expected to devote significant resources to processing AIE requests where they have valid concerns that the requested information is not environmental information. Where the information is subsequently found to be environmental information, the public authority must further process the request in accordance with the AIE Regulations.

**Decision**

Having reviewed the EPA’s decision in accordance with article 12(5) of the AIE Regulations, I find that the requested information is environmental information. Accordingly, I find that refusal was not justified for the reason given and I annul the EPA’s decision.

In light of this decision, the EPA should now conduct a thorough search for all of the relevant information which it holds (or which is held elsewhere on behalf of the EPA) and further process the request in accordance with the AIE Regulations.

**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**  
9 June 2016