

**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/15/0027**

**Date of decision:** 26 October 2016

**Appellant:** Damien McCallig

**Public Authority:** The Department of Housing, Planning, Community and Local Government (the Department)

**Issue:** Whether the Department was justified in refusing access to certain information on wind energy modelling on the ground of article 8(a)(iv) because disclosure would adversely affect the confidentiality of the Department's proceedings

**Summary of Commissioner's Decision:** The Commissioner found that:

- The Department's refusal to provide access to information on the third part of the request was justified because such information was not held by or for the Department
- The Department's refusal to provide access to the withheld information was not justified

The Commissioner varied the Department's decision to reflect these findings. In addition, he required the Department to provide the appellant with access to the withheld information

**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**

Under Directive 2009/28/EC (the “Renewable Energy Directive”) Ireland has a binding national target for renewable energy consumption of 16% in 2020. As required under this Directive, Ireland adopted a national renewable energy action plan (NREAP) which sets out the approach to the achievement of these targets. The NREAP requires the further exploitation of Ireland’s wind-energy capacity. Wind energy development is guided by the 2006 Wind Energy Development Guidelines.

The Department (previously the Department of the Environment, Community and Local Government) published draft revisions to the noise, setback distance and shadow flicker aspects of the 2006 Guidelines in December 2013. This was followed by a public consultation process which received 7,500 submissions. The Department is now working on finalising the revised guidelines in close cooperation with the Department of Communications, Climate Action and Environment (DCCAE) (formerly the Department of Communications, Energy and Natural Resources (DCENR)).

On 30 July 2015, the appellant submitted an AIE request to the Department. He asked for certain information, shown here for ease of reference in a numbered list:

1. Modelling, analysis and related reports, carried out on Ireland's land area and the power generating potential from wind energy projects on those areas. In particular I am seeking access to the outcomes of the modelling under various setback and turbine height scenarios (for the State, as a whole, and by local authority area, if available);
2. Information relating to the minimum turbine size and setback distances required to meet Ireland's renewable energy targets; and
3. Information relating to minimum turbine size and setback distances required to provide for what the department would consider commercially feasible wind energy development in Ireland.

On 28 August 2015, the Department informed the appellant that it held five records within the scope of the request and refused access to all of this information.

On 8 September 2015, the appellant requested an internal review. On 8 October 2015, the Department affirmed its original decision and the appellant appealed to this Office on 17 October 2015.

### **Scope of Review**

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

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

### **Relevant AIE provisions**

Article 8(a)(iv) provides that 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).

Article 10(1) provides that, notwithstanding article 8, a request for environmental information shall not be refused where the request relates to information on emissions into the environment.

Article 10(3) provides that a public authority shall weigh the public interest served by disclosure against the interest served by refusal.

Article 10(4) provides that the grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.

### **The information at issue**

The Department says that it conducted a thorough search for relevant records and identified 5 records. It provided details of how it had conducted this search and confirmed in writing that that it holds no further relevant records. I accept this statement. The Department provided my Office with copies of the 5 records. I examined these and found that records 1, 3, 4 and 5 relate to part 1 of the request, while record 2 relates to part 2 of the request. I found no information relating to part 3 of the request in the records.

### **The Department's position**

The Department maintains that it is still in the deliberative process of deciding on finalised guidelines. It maintains that refusal on the ground of article 8(a)(iv) is justified since disclosure of the information would adversely affect the confidentiality of its proceedings, which (it argued) is protected by section 29 of the Freedom of Information (FOI) Act 2014. It maintains that refusal on this ground remains justified following the application of a public interest test under article 10(3).

The Department also maintains that the requested information does not provide information on emissions into the environment within the meaning of article 10(1) of the AIE Regulations, because such information as it contains on emissions is derived from hypothetical modelling scenarios rather than from actual emissions.

The Department argued that, since its deliberations are not complete, release of the information would not serve to inform, or provide clarity to, the public, and would interfere with its own final deliberations by leading to undue intrusion into that process.

### **The appellant's position**

The appellant questioned whether the Department is still in the deliberative process. He said that the then Minister for the Environment, Mr. Alan Kelly T.D., publically announced in October 2015 that his Department had concluded deliberations on the information requested. The appellant provided the following link to a local radio recording in support his claim: <http://www.midlandsradio.fm/news/kelly-local-clip-mb> . Unfortunately, my investigator was unable to access this clip to confirm its contents.

The appellant argued that even if the Department was still in the deliberative process, “merely forming part of incomplete process is not enough to warrant refusal under the AIE Regulations nor the FOI Act”. Furthermore, he argued, no evidence has been provided by the Department that release of the information would adversely affect anything.

The appellant challenged the Department’s reliance on section 29 of the FOI Act. He stated that the FOI Act clearly exempts (from protection) “factual information” which is defined to include “information of a statistical, financial, econometric or empirical nature, together with any analysis thereof”. He stated that the three elements of his request fall into this category of exemption under Section 29(2) and in part to the other elements of this section’s exemptions.

The appellant also argued that it is clear from his request that article 10(1) applies in this instance, as the requested information relates to emissions, both in relation to the reduction of emissions into the environment (Ireland’s wind energy potential, guidelines for planning and spatial modelling) and emissions from wind energy development such as noise and shadow flicker.

He said that information provided by the Department showed that the withheld documents relate to the wind energy planning guidelines which will propose more stringent day and night noise limits for future wind energy developments. He argued that since I have previously found that noise is an emission, this is another reason why his request relates to emissions for the purposes of article 10(1).

He argued that his request clearly relates to information on Ireland's ability to meet its renewable energy targets, i.e. by means of reduction in carbon dioxide and other harmful emissions. Furthermore, he argued, electricity itself, and its generation, is an emission for the purposes of the AIE regulations.

The appellant argued that his claim that his request relates to emissions is supported by the judgment of the General Court of the Court of Justice of the European Union in Case T-545/11 (*Stichting Greenpeace Nederland-v-Pesticide Action Network Europe*), in which 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”. He argued that it is clear that, given the purpose and scope of the review of the wind energy guidelines and the obvious content of the information requested, the requested information relates in a sufficiently direct manner to emissions into the environment and it must therefore be released.

The appellant stated that he was unable to ascertain, from the Department’s refusal-decisions, the public interests which were weighed-up when those decisions were made. He said that there is no evidence that the required restrictive nature filter under article 10(4) was applied. He added that:

“It would be astonishing if the restricted public interest in non-disclosure could trump significant public interests in disclosure in this instance, such as:

1. The public interest in individuals being able to exercise their rights under the AIE Regulations in order to enhance their understanding of the reasons for courses of actions taken by a public body, in this case the Department;
2. The public interest in members of the public having a reassurance and knowledge that public bodies in their provision of a high level of service can disclose certain information, in the public interest, in relation to deliberations;

3. The public interest in increasing the openness, transparency and accountability in the conduct of public business in particular in an area of such public importance;
4. The public interest in ensuring that expert reports are accurate and reliable in an area where those developing such reports may have a pecuniary/conflicted interest through related activities;
5. The public interest in involving the public at the earliest stage possible in environmental decision making - as required under Aarhus, EU and Irish law - to ensure that environmental decisions are taken under appropriate heightened scrutiny;
6. The public interest in having the public fully informed, through access to information, in order to scrutinise the reasons put forward by politicians in delaying important policy decisions, in particular during the pre-election period of the parliamentary cycle, when heightened scrutiny of such decisions or delays is required by the electorate in any functioning democracy”.

### **Analysis and Findings**

The Department did not argue that the withheld information is not environmental information and I am satisfied that it is.

#### **Whether the request relates to information on emissions into the environment within the meaning of article 10(1)**

The General Court of the Court of Justice of the European Union interpreted the provision of the AIE Directive which relates to information on emissions in Case T-545/11 (*Stichting Greenpeace Nederland-v-Pesticide Action Network Europe*). I understand from this ruling that an AIE request relates to information on emissions into the environment if the withheld information relates in a sufficiently direct manner to emissions into the environment.

The production of electricity from wind rather than from burning fossil-fuels reduces carbon emissions, while the supply of electricity involves electro-magnetic fields (EMFs). I noted, however, that the withheld information does not contain any information on either carbon emissions or EMFs.

The withheld information includes information on noise, and noise is an emission into the environment. However, the withheld information does not tell a reader anything about noise currently emitted. The Minister’s Guidance says at paragraph 13.2 that “it is considered that ‘emissions into the environment’ means actual emissions, and does not include information on, for example, plans on emissions which have yet to occur”. Since the withheld information does not say anything about actual emissions, I am satisfied that it does not relate in a sufficiently direct manner to emissions into the environment. I therefore find that the request does not relate to information on emissions into the environment within the meaning of article 10(1).

#### **Whether refusal is justified under article 8(a)(iv) because disclosure would adversely affect the confidentiality of the proceedings of public authorities, after a public interest test (as required by article 10(3))**

For refusal on this ground to be justified, the confidentiality of the proceedings must be protected by law. The Department argued that it is protected in this case by section 29 of the FOI Act. Section 29(1) provides that:

A head may refuse to grant an FOI request—

- (a) if the record concerned contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and
- (b) the granting of the request would, in the opinion of the head, be contrary to the public interest, and, without prejudice to the generality of paragraph (b), the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make.

Subsection (2) provides that subsection (1) does not apply to a record if and in so far as it contains any or all of the following:

- (a) matter such as rules, procedures, guidelines, interpretations and precedents used, or intended to be used, by an FOI body for the purpose of making decisions, determinations or recommendations;
- (b) factual information;
- (c) the reasons for the making of a decision by an FOI body;
- (d) a report of an investigation or analysis of the performance, efficiency or effectiveness of an FOI body in relation to the functions generally or a particular function of the body;
- (e) a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of an FOI body made pursuant to any enactment or scheme.

The appellant argued that section 29(1) cannot apply because the withheld information is factual information. The guidance on section 29 published by the Office of the Information Commissioner states at paragraph 3.3.1 that:

The exemption at section 29(1) does not apply to a record in so far as it contains factual information (section 29(2)(b)). Section 2 of the Act states that

“factual information” includes information of a statistical, financial, econometric or empirical nature, together with any analysis thereof.”

Having examined the withheld information in the light of the definition of factual information, I find that the information includes a small amount of factual information, such as the size of the land area of the Republic of Ireland. In my view all scientific or technical reports (as described in section 29(2)(e)) invariably contain at least some factual information. It cannot have been the intention of the legislature that refusal to release such reports could never be justified simply because they contain factual information. I conclude that I should interpret section 29 as meaning that section 29(1) can apply to scientific or technical reports used for the purpose of a decision of an FOI body made pursuant to an enactment, even when they contain some factual information.

With regard to what is meant by a deliberative process, the guidance on section 29 published by the Office of the Information Commissioner provides the following assistance at paragraph 2.2.2:

A deliberative process may be described as a thinking process which informs decision making in FOI bodies. It involves the gathering of information from a variety of sources and weighing or considering carefully all of the information and facts obtained with a view to making a decision or reflecting upon the reasons for or against a particular choice.

The guidance on section 29 published by the Office of the Information Commissioner says at paragraph 2.3.9 that:

Where there is information in the record(s) which falls within paragraphs (b), (d) or (e) of section 29(2) and the timing of the release of the record(s) is problematic, then the provisions of section 16(1)(b) may possibly be relevant.

Section 16(1)(b) provides that where an FOI request is made, and information contained in the record concerned falls within paragraph (b), (d) or (e) of section 29(2) and the giving of access to the record on or before a particular day (the “specified day”) would, in the opinion of the head concerned, be contrary to the public interest, the head concerned may defer the offering of access to the record to the requester concerned until the day immediately after the specified day.

I considered the provisions of section 16(1)(b) and I am satisfied that it does not apply in this case, as the Department has not appointed a specified day.

I am satisfied that the Department is an FOI body engaged in a deliberative process and that the withheld information constitutes matter relating to that deliberative processes. The modelling reports are the reports of technical experts relating to the subject of their expertise and they are being used for the purpose of a decision by the Department pursuant to section 28 of the Planning and Development Act 2000. Therefore, a head could refuse an FOI request for the withheld environmental information in reliance on section 29, provided that the granting of the request would be contrary to the public interest.

#### Whether the granting of the request would be contrary to the public interest

The appellant put forward six reasons (listed above) to show why disclosure would not be contrary to the public interest. I noted that the first four of these do not require disclosure before a decision is made. As for the fifth reason, the public have already been involved in the process at an early stage. The sixth reason put forward was “the public interest in having the public fully informed, through access to information, in order to scrutinise the reasons put forward by politicians in delaying important policy decisions, in particular during the pre-election period of the parliamentary cycle, when heightened scrutiny of such decisions or delays is required by the electorate in any functioning democracy”. It is certainly true that the decision has been delayed: the news media reported that it had been expected in 2014. It is also true that this delay straddled a national pre-election period. The then Minister for the Environment, Mr Alan Kelly, T.D., explained the delay in the Dáil in November 2015 by saying that:

“My department received 7,500 submissions from members of the public during this process, which was a huge number indicating a phenomenal amount of interest”.

He said that account was being taken of these submissions and “a phenomenal amount of work” is involved.

The then Minister for Communications, Energy and Natural Resources, Mr Alex White, T.D., said that:

“It is no secret that this is a difficult issue, because there is a tension between the need for genuine community and citizen engagement ... and compliance with renewable energy targets.”

Clearly, the reason for delay is related to the challenge of finding the right balance between competing public-policy interests.

In my opinion, it is at least possible that disclosure of the withheld information would help the public to scrutinise the reasons put forward by politicians in delaying this important policy decision. I therefore accept that this public interest argument would favour disclosure now, before a decision is made.

Turning to the Department’s position, it argued that disclosure would be contrary to the public interest because it would not serve to inform, or provide clarity to, the public, and because it would lead to undue intrusion into the final stage of the deliberative process.

In my view, disclosure would inform the public to some extent. It would not, of course, provide “clarity” on what the ultimate decision will be, but I don’t regard that as determining the matter. Having said that, even if I were to accept that disclosure might not significantly *serve* the public interest (by providing information in an easily digested form and by providing clarity as to what the eventual decision is likely to be), this would not necessarily mean that disclosure would be *contrary* to the public interest. It would, in any case, be open to the Department, if releasing information, to provide guidance, at the same time, in order to assist the public in appreciating the limitations of what could be deduced from the released information. I therefore find that granting the request would not be contrary to the public interest for the reason that it would not serve to inform, or provide clarity to, the public.

I next considered the Department’s argument that disclosure would be contrary to the public interest because it “would lead to undue intrusion into the final stage of the deliberative process”. I consider that it is likely that disclosure would lead to further public attempts by some members of the public to feed into the deliberative process. The issue which this raises is this: whether such efforts would, on balance, benefit or harm the deliberative process.

In this regard, I first considered if disclosure could benefit the deliberative process. My investigator put it to the Department that the public consultation exercises which were carried out did not provide the public with an opportunity to submit observations on the models or the results of modelling which the Department says will inform the eventual decision. He put it to the Department that, if a member of the public had information which would show that the models used (or their results) were inaccurate or unreliable, it would appear to be in the public interest that the decision-maker would receive such information before, rather than after, a decision is made. If that were the case, he suggested, disclosure would serve the public interest and could not be contrary to it. The Department did not directly address this suggestion. It argued that there have already been two public consultation exercises on this matter and there comes a point in a process when public consultation must conclude and time must be allowed for the deliberative process. The Department added that: “It would also not be appropriate to provide information or material that is being used to assist or inform the deliberative process, before that process complete and a final decision is reached”. I have difficulty in accepting that statement, as it seems to fly in the face of the public right to participate in an informed way in environmental decision-making (a right recognised by the Aarhus Convention). However, I have no remit to investigate or rule on whether and to what extent public authorities have



recognised the right to participate in decision-making. I also accept that the existence of this right does not necessarily mean that there is a right to participate at every stage in decision-making. In any event, I feel that I must conclude that further public input (following disclosure) could potentially benefit the decision-making process and therefore it would be in the public interest. Any finding to the contrary would, I suggest, display an underappreciation for the contribution that informed citizens can make.

Notwithstanding this conclusion, I next considered whether disclosure could harm the deliberative process. Records of news coverage and parliamentary questions available on the internet indicate a widespread public and political desire for a decision to be made on these revised guidelines as soon as possible. The Programme for a Partnership Government (published on 11 May 2016) indicated that the Wind Energy Development Guidelines would be completed “as a matter of urgency” within 3 to 6 months. I concluded that anything which would significantly delay the deliberative process would not be in the public interest. The Department submitted in July 2016 that disclosure before a decision is taken “would contaminate the decision-making process, by creating further expansive debate and engagement prior to the new Ministers and both Departments having an opportunity to further consider and reflect on the available information”. The Department stresses that it is attempting to balance the needs of communities, natural and built heritage, and industrial concerns, in the interests of proper planning and sustainable development. While I am uncomfortable with language which would describe additional public input as “contamination”, I accept the point that disclosure at this stage could prolong the deliberative process, and any further significant delay would not be in the public interest.

After carefully considering all of the above issues, I arrived at the following view. I acknowledge that the Programme for Government has added extra impetus to the process of bringing the decision-making process to a conclusion soon. The Department has a well-founded concern about anything which could lead to further significant delays in that process. However, it occurred to me that prolongation of the deliberative process could only occur if the Department would be open to further public inputs. Currently, it is not. There is no obvious reason why disclosure should force the Department to change its stance: after all, it currently maintains that the period of public consultation is over. At the same time, if disclosure were to lead to a submission being made to the Department which was of such import that it could not be ignored, such a submission would appear to be highly important and very much in the public interest. There is a strong public interest in making the decision as soon as possible, but there is also a strong public interest in getting it right.

For these reasons I am not persuaded that disclosure would be contrary to the public interest. As that is my conclusion, I must find that refusal to provide access to the withheld information is not justified on this ground.

### **Decision**

Having reviewed the Department’s decision, I find that:

- The Department’s refusal to provide access to information on the third part of the request was justified because such information was not held by or for the Department.
- The Department’s refusal to provide access to the withheld information was not justified by the reason given.

Therefore, I vary the Department's decision to reflect the above findings.

According to the provisions of 12(5)(c), I require the Department to provide the appellant with access to the withheld information.

**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**  
26 October 2016