

**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/16/0010

Date of decision: 17 August 2016

Appellant: Thomas Freeman

Public Authority: The Electricity Supply Board (ESB)

Issue: Whether the ESB was justified in effectively refusing an AIE request by transferring it to another public authority within the ESB Group without first determining if the requested information was held by or for the ESB itself

Summary of Commissioner's Decision: The Commissioner found that, while the AIE request was made to the ESB, the ESB did not process it in accordance with the AIE Regulations. Accordingly, the Commissioner annulled the ESB's deemed refusal. The ESB should now process the request in accordance with the AIE Regulations.

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 ESB is a statutory corporation established under the Electricity Supply Acts 1927 – 2004. It has established subsidiary companies under the Companies Acts, one of which is ESB Networks Limited (ESBNL). ESBNL is a wholly owned subsidiary of ESB. "ESB Group" is the term used to describe the ESB together with its subsidiary companies.

On 11 December 2015, the appellant emailed an AIE request to the ESB.

On 8 January 2016, ESBNL gave notice of its decision to refuse the request for stated reasons.

On 11 January 2016, the appellant requested an internal review of the original decision.

On 12 February 2016, an internal review decision refusing the request was notified to the appellant, signed by a person who stated that they were designated as the person to review decisions made by ESNL.

The appellant appealed to my Office and his appeal was accepted.

Scope of review

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

In conducting my review I took account of the submissions made by the appellant and by the ESB. 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 7 of the AIE Regulations sets out the obligations of public authorities when they receive requests for environmental information made pursuant to those Regulations.

Article 7(1) provides that a public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the applicant any environmental information, the subject of the request, held by, or for, the public authority.

Article 7(2) provides that:

- (a) A public authority shall make a decision on a request and, where appropriate, make the information available to the applicant as soon as possible and, at the latest, but subject to paragraph (b) and subarticle (10), not later than one month from the date on which such a request is received by the public authority concerned.

Article 7(5) provides that where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it.

Article 7(6) provides that, where article 7(5) applies and the public authority concerned is aware that the information requested is held by another public authority, it shall as soon as possible—

- (a) transfer the request to the other public authority and inform the applicant accordingly, or
- (b) inform the applicant of the public authority to whom it believes the request should be directed.

Article 10(7) provides that where a decision is not notified to the appellant within the relevant period specified in article 7, a decision refusing the request shall be deemed to have been made by the public authority concerned on the date of expiry of such period.

Article 11(1) provides that where the applicant's request has been refused under article 7, the applicant may request the public authority to review the decision.

Article 12(3)(a) provides that where a decision of a public authority has been affirmed in whole or in part under article 11, the applicant may appeal the decision to the Commissioner against the decision of the public authority concerned.

Article 12(4)(a) provides that an appeal shall be initiated, where no decision is notified by a public authority, not later than one month from the time when a decision was required to be notified under article 11(3).

The issue

Since my role is to review the decision of the public authority, it follows that I must first identify the decision which I am to review. In the ESB's view, the decisions given by ESBNL were valid. According to this view, the decision to be reviewed is ESBNL's internal review decision. However, the facts of the case cast doubt on this view.

In his appeal to this Office the appellant wrote (with original emphasis in bold):

My original request was submitted to the **Electricity Supply Board**.... On 8 January 2016 I received a letter from **ESB Networks Limited** which refused to release the requested information....

The case file shows that:

- The AIE request was sent by email to sustainability@esb.ie and copied to info@esb.ie.
- It was addressed to "AIE Officer, Electricity Supply Board".

From this, I am satisfied that the request was made to the ESB. Yet the decisions which issued were made by ESBNL. The ESB did not communicate any decision. I have to determine if it is the internal review decision made by ESBNL which I am to review, or a refusal decision by the ESB, deemed made pursuant to Article 10(7).

My investigator asked ESB why the decisions which followed the requests emanated from ESBNL.

ESB explained that:

"ESB is strongly of the view that the unique position that ESB and ESB Networks Limited (ESBNL) find themselves in (i.e. where ESBNL is, in effect, a "public authority within a public authority") requires a purposive interpretation of the Regulations, which in turn, requires the ESB Group to adopt a process regarding requests made under the Regulations that best facilitates the intent of the legislation – that is, to respond efficiently and definitively to requests made by members of the public to either public authority within the ESB Group. It is perhaps unfortunate that the legislation does not explicitly cater for the position that we find ourselves in (i.e. a "public authority within a public authority"). We think that that it would be counterintuitive to the aims of the legislation (and place an unnecessary expense and administrative burden on those public authorities) to adopt anything other than a purposive interpretation and in so doing force members of the public through arbitrary and unnecessary administrative hoops before addressing the substantive issue of their requests."

In relation to how this request was handled on receipt, the ESB said that:

"The AIE Co-Ordinator logged the requests and forwarded the request to the decision maker in ESBNL for a response. His view was that the records requested were more

likely to be held, if at all, by ESBNL (notwithstanding that the request was addressed to the AIE Officer, ESB)."

ESB added that:

"We are unaware of any other circumstance in which a body corporate (in this case ESB) is a public authority and its wholly owned subsidiary (a separate and legally distinct body corporate – in this case ESB Networks Limited) is also (separately and in its own right), a public authority. "

My investigator suggested to ESB that it, as a separate public authority, had not responded to the applicant as required by the AIE Regulations. The ESB disagreed, saying:

"We do not accept that there was no response from ESB – on a purposive interpretation of the Regulations, it was immaterial to which public authority (ESB or ESBNL) the request was (factually) addressed and the ESB Co-Ordinator duly responded by passing the matter to that part of the ESB Group that he felt was most likely to be in the best position to deal efficiently with the substantive matter of that request (having logged the request in our tracking system)."

The ESB added that:

"... in an effort to deal expeditiously and efficiently with requests under the Regulations - regardless of to whom they are addressed and regardless of how and where they are first received by ESB / ESBNL - ESB has established a centralised administrative process in our shared services centre (referred to as Business Service Centre) to handle all such requests and respond within the statutory time limits to requestors. In line with this process all requests received are funnelled to the AIE Coordinator email address, which logs the date of the request, issues an acknowledgement of receipt of the request to the requester along with a unique reference number, and directs the request to a decision maker in the relevant part of the business within the ESB Group - i.e. the part of the business to which the query relates and/or within which the requested records are likely to be held (if held at all).

The records requested in this case relate to ESB's functions as licenced transmission asset owner (TAO) and/or distribution asset owner (DAO). However, ESB's TAO and DAO functions are managed by ESBNL pursuant to regulatory arrangements in place and approved by the Commission for Energy Regulation. Therefore, it could be argued that the specific records sought are 'held by' ESB itself and it could be argued at the same time that they are held by ESBNL acting as manager (i.e. on behalf of ESB). ESBNL took the decision to handle the request as asset manager; the decision was made in that context and the internal review was subsequently carried out by me as the person designated for such purposes by ESBNL under Article 11(2) of the Regulations. In that context it is largely moot as to whether the records are physically held by ESB as asset owner or ESBNL as asset manager; and this explains my reference to files 'held by' ESB. I appreciate that the regulatory and contractual arrangements between ESB and ESBNL are complex; it is an unfortunately reality that they do not lend themselves to straightforward or clear-cut categorisation for purposes of the Regulations; however, those are the circumstances in which we have to operate under the Regulations and to

make decisions in the most efficient way possible to reflect the intent of the Regulations – i.e. dealing with the substantive matter of requests received.

The distinction between ESB and ESBNL (and in particular the various functions carried on by each) is not well understood by members of the public (albeit that information on the roles and functions of each is published on both ESB and ESBNL's website and elsewhere (e.g. at the website of the Commission for Energy Regulation). In our experience, requests received under the Regulations are rarely addressed correctly to one or other of ESB or ESBNL."

Analysis

I am satisfied that the AIE request was made to the ESB as a separate public authority from ESBNL.

ESB, as a separate public authority, did not process the request in accordance with the AIE Regulations.

If ESB had considered the request and established that the requested information was not held by or for it, it could have informed the applicant and transferred the request to ESBNL in accordance with the provisions of article 7.

It is clear that ESB, as the public authority to which the request was made, did not itself consider the request or issue a decision.

Accordingly, I am of the view that a deemed refusal by the ESB arose due to its failure to notify the appellant of its decision within the relevant period specified in article 7. The request was not transferred to ESBNL in accordance with the Regulations, since such a step can only be taken after the public authority to which the request was addressed has informed the applicant that the requested information is not held by or for it. Accordingly, ESBNL never properly became a public authority in receipt of an AIE request. I therefore regard the purported decisions issued by ESBNL as invalid.

I do not accept ESB's argument that ESBNL is "a public authority within a public authority". ESBNL is a public authority which is owned by another public authority. In any case, even if ESBNL was a public authority within a public authority, that fact would not allow the "parent" public authority to depart from the AIE Regulations in processing an AIE request which was made to it.

I reject the ESB's argument that it is immaterial to which public authority the request was addressed. Members of the public have discretion to direct an AIE request to a public authority of their own choosing. The obligations of article 7 fall on the public authority selected by the requester.

I reject the ESB's argument that the particular structure of the ESB Group requires a purposive interpretation of the AIE Regulations in order to, in effect, allow the processing of AIE requests in a manner other than that prescribed in the AIE Regulations. In my view, the obligations of a public authority in receipt of an AIE request are clear and unambiguous in the AIE Regulations. A purposive interpretation to law can be used to attempt to resolve interpretative difficulties. I do not detect any interpretative difficulties which could justify such an approach in this case. While it might present practical challenges to the ESB Group for each of its constituent public

authorities to individually comply with the express requirements of the AIE Regulations, it is not impossible for them to do so.

I accept the ESB's assertion that the distinction between ESB and ESBNL (and in particular the various functions carried on by each) is not well understood by members of the public. I also accept that it may well be that, as ESB says, AIE requests "are rarely addressed correctly to one or other of ESB or ESBNL". It may also be the case that some information held by ESBNL is not held *for* the ESB. For these reasons it would be helpful for the ESB group to assist the public in directing their requests to a particular public authority. But it would not be appropriate for the ESB Group to re-direct AIE requests made to distinct public authorities, as happened in this case, other than in accordance with the AIE Regulations. Those Regulations provide that the transfer of a request can only take place after the public authority to which the request was addressed has informed the applicant that the requested information is not held by or for it (if that is found to be the case after appropriate internal enquiries and searching.)

With regard to ESB's statement that "it could be argued that the specific records sought are 'held by' ESB itself and it could be argued at the same time that they are held by ESBNL acting as manager, (i.e. on behalf of ESB)", it is not, in the first instance, a question of what might be argued. When a request is made to the ESB, the primary issue is whether the information is held by the ESB. If it is not, the next question is whether it is held elsewhere *for* the ESB. If it is held by ESBNL or elsewhere *for* the ESB, then the ESB should act accordingly: in such circumstances a transfer of the request to ESBNL (or elsewhere) would not be required or appropriate.

I acknowledge the complexity of the regulatory and contractual arrangements between the bodies which make up the ESB Group. But I do not accept that these justify departure from compliance with the AIE Regulations in order to facilitate the making of decisions in what the ESB Group might regard as "the most efficient way possible to reflect the intent of the Regulations". Each public authority must comply with the provisions of the Regulations. In processing AIE requests, a public authority must not exercise discretions which it does not have.

Findings

I find that the decision which I am to review is the 'deemed refusal' decision of the ESB. It is clear that the ESB never considered the request in any meaningful way, if at all. In particular, it never determined whether the requested information was held by or for the ESB.

Decision

Having reviewed the ESB's decision, I find that refusal was not justified.

A decision to refuse can never be justified where the request was not considered by the public authority to which the request was made.

I therefore annul the ESB's decision. The ESB, as the public authority to which the request was made, should now 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
17 August 2016