

**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/16/0025**

Date of decision: 6 July 2017

Appellant: Dr Fred Logue on behalf of FP Logue Solicitors (the appellant)

Public Authority: Department of the Environment, Community and Local Government (the Department)

Issue: Whether the Department was justified refusing the appellant's request on the basis that the information requested did not fall within the definition of "environmental information" set out in article 3(1) of the AIE Regulations.

Summary of Commissioner's Decision: In accordance with article 12(5) of the Regulations, the Commissioner reviewed the Department's decision on the appellant's request. He found that the Department was not justified in its decision to refuse all of the appellant's request, as the draft protocols contained some environmental information on measures designed to protect the elements of the environment in the form of information on the provisions of the Aarhus Convention and procedures of the Aarhus Convention Compliance Committee. He found that this information fell within paragraph (c) of the definition of "environmental information".

Notwithstanding this, the Commissioner considered articles 12(5)(c) and 7(3)(a), and found that it is not appropriate to require the Department to provide access to information which is publicly available and easily accessible.

He found that the remainder of the information did not fall within the definition of environmental information, as it was not information on the Aarhus Convention or the proceedings of the Aarhus Convention Compliance Committee.

He found that the Department's draft protocols are not measures for the purposes of paragraph (c) of the definition of environmental information set out in article 3(1). He also found that Ireland's participation in the Aarhus Convention Compliance Committee proceedings is not a measure or activity for the purpose of paragraph (c).

The Commissioner annulled the Department's decision in part, insofar as it concerned environmental information on the provisions of the Aarhus Convention and procedures of the Aarhus Convention Compliance Committee. In all other respects, he affirmed the Department's decision that the draft protocols do not contain environmental information. The Commissioner did not require the Department to make any environmental information available.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision 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 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) was signed on 25 June 1998. The Convention has been ratified by the European Union and Ireland. The Aarhus Convention is implemented in European Union law by a number of legislative provisions, including Directive 2003/4/EC on public access to environmental information (implemented in Ireland by the AIE Regulations).

Article 15 of the Aarhus Convention provides for a compliance review mechanism. In October 2002, the Meeting of the Parties to the Aarhus Convention adopted decision I/7 on review of compliance, establishing the Aarhus Convention Compliance Committee (ACCC). In accordance with paragraphs 18 to 24 of the annex to decision I/7, communications may be brought before the ACCC by one or more members of the public concerning any Party's compliance with the Convention. The ACCC has published its procedures for processing such communications.

On 17 May 2016, the appellant made a request to the Department for access to "Details of the procedures used by Ireland for its participation in proceedings before the Aarhus Convention Compliance Committee. The procedures to include instructions to officials responsible for drafting documents and gathering information, procedures for consultations with relevant public authorities, engagement of lawyers, drafting of submissions, internal approval in the Department of the Environment and/or other public authorities and procedures for political approval by relevant Ministers and/or the Cabinet. This may be documented in a procedures manual for example."

In a decision of 15 June 2016, the Department refused the appellant's request on the basis that the information requested did not fall within the definition of "environmental information" as set out in article 3(1) of the AIE Regulations. The appellant disputed the Department's decision, and requested an internal review pursuant to article 11 of the AIE Regulations. In an internal review decision of 13 July 2016, the Department affirmed its earlier decision, and commented that the information requested was limited to logistics and procedural matters.

Scope of review

Pursuant to article 12(5) of the AIE Regulations, my role is to review the Department's internal review decision, and to affirm, annul or vary that decision. In this instance, the appellant's request was refused solely on the basis that the information sought was not environmental information within the definition set out in article 3(1). I note that, in line with my decision in the case of Gavin Sheridan and Dublin City Council (CEI/12/0004), it is my practice to review as a preliminary matter whether particular information is "environmental information". Accordingly, the scope of my review in this case has been limited to the question of whether the information sought constitutes "environmental information" for the purposes of the AIE Regulations.

In making this decision I have had regard to submissions made to my Office by the parties in the course of the appeal. I have also had regard to *Guidance for Public Authorities and others on implementation of the Regulation* (May 2013) published by the Minister for the Environment, Community and Local Government [the Minister's Guidance], and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide].

The Department's Position

The Department of Communications, Climate Action and the Environment made a submission to my Office on this appeal, and furnished me with copies of its procedures concerning ACCC communications.

The Department categorised the information held as draft protocols for engagement between public bodies in dealing with communications before the ACCC. The Department submitted that this information does not concern the state of the elements of the environment or factors affecting or likely to affect the elements of the environment, or the matters set out in paragraphs (d), (e), or (f) of the definition of "environmental information" contained in article 3(1) of the AIE Regulations.

The Department considered whether the information sought fell within paragraph (c) of the definition of "environmental information". The Department submitted that the draft protocols are not measures affecting or likely to affect the elements of the environment, notwithstanding their connection to the Aarhus Convention. The Department sought to rely on the decision of the previous Commissioner for Environmental Information in CEI/12/0008 (Ms. Attracta Uí Bhroin and the Department of Arts, Heritage and the Gaeltacht) insofar as the Commissioner accepted in that case "that the AIE Regulations and Directive are measures designed to protect the elements of the environment, but in an indirect and aspirational manner only." The Department submitted that the proceedings of the ACCC are not measures or activities designed to protect the elements of the environment, as they are only remotely linked to the protection of such elements. The Department contended that national protocols relating to the ACCC therefore do not contain information on relevant measures or activities for the purposes of paragraph (c).

The Appellant's Position

In his internal review request to the Department, the appellant contended that the information sought is environmental information since Ireland's participation in ACCC proceedings and Ireland's attendant procedures come within paragraph (c) of the definition of "environmental information", as measures likely to affect the elements or factors referred to in paragraphs (a) and (b). The appellant submitted that recommendations of the ACCC have environmental effects since they directly influence the application of environmental law in Ireland. The appellant submitted that Ireland's participation in ACCC proceedings influences those recommendations.

In a submission to my Office, the appellant contended that the information requested fell within paragraph (c) of the definition of environmental information, and agreed that the information did not fall within the other parts of the definition. The appellant submitted that the procedures fell within the final part of paragraph (c) as information on measures designed to protect the

elements of the environment. The measures identified by the appellant in this regard were the Aarhus Convention, and the proceedings of the ACCC.

In contending that the Aarhus Convention and ACCC were measures designed to protect the elements of the environment, the appellant relied on the following two indents of the Preamble to the Aarhus Convention:

"Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,"

The appellant brought to my attention Article 1 of the Aarhus Convention, which states the objective of the Convention as follows:

"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

The appellant also submitted that Ireland's participation in the ACCC is a measure designed to protect the elements of the environment for the purposes of paragraph (c) of the definition. The appellant submitted that appeal CEI/12/0008 was wrongly decided, and contended that the objectives of the Aarhus Convention were not indirect or aspirational. The appellant submitted that paragraph (c) information was not limited to information on measures designed to protect the elements of the environment directly.

Analysis and findings

Consideration of whether the Department's procedures fall within the definition of "environmental information"

The scope of the definition of "environmental information"

The term "environmental information" is defined by article 3(1) of the AIE Regulations as any information on six categories broad subjects, set out in paragraphs (a) to (f) of the definition. Paragraph (a) includes any information on the state of the elements of the environment. Paragraph (b) includes factors affecting the elements of the environment. Paragraph (c) includes any information on 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. I concur with the appellant's view that articles (a), (b), (d), (e) and (f) are not relevant considerations in this case.

In *Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [C- 316/01] the then European Court of Justice found that information on compliance measures relating to the labelling of genetically modified products did not fall within the definition of "environmental information" contained in Directive 1990/313/EEC on the freedom of access to information on the environment (this Directive was subsequently repealed and replaced by Directive 2003/4/EC). The Court stated at paragraph 25:

"Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision."

Accordingly, the court distinguished between information which fell within one of the specified categories of environmental information, and other information which merely has a connection to environmental factors, and therefore falls outside the definition of "environmental information". I am satisfied that the interpretative approach in *Glawischnig* applies to the Directive 2003/4/EC and the AIE Regulations, and I have applied a "minimal connection" test in my previous decisions.

In appeal CEI/15/0007 (RTÉ and the Department of Defence), I stated that a "bigger picture" approach to what constitutes information on a measure or activity is consistent with the purpose of the Aarhus Convention, and that an assessment of what is integral to a measure or activity under paragraph (c) is a useful test to employ when considering whether information falls within this category.

Summary of information held by the Department

The Department provided me with copies of its procedures (referred to as draft protocols) for management of communications before the ACCC. These draft protocols describe ACCC procedures and set out appropriate actions for the management of ACCC communications by the State. The draft protocols do not refer to any particular proceedings of the ACCC. I am satisfied that the draft protocols were designed to manage and structure Ireland's administrative response to ACCC proceedings.

Consideration of the Aarhus Convention and the proceedings of the ACCC as measures under paragraph (c)

I accept that the Aarhus Convention is a measure designed to protect the elements of the environment for the purpose of paragraph (c). I am also willing to accept that the proceedings of the ACCC were designed to protect the elements of the environment by reviewing compliance of Parties to the Convention. I must therefore consider whether the draft protocols contain information on the Aarhus Convention or on the proceedings of the ACCC.

I examined the draft protocols and found that they contain integral information on the Aarhus Convention and the proceedings of the ACCC in the form of references to the Aarhus

Convention text and descriptions of ACCC procedures. I am satisfied that this information falls within paragraph (c) of the definition of environmental information. I therefore annul the Department's decision to the extent that I find the draft protocols contain some environmental information, namely information on the provisions of the Aarhus Convention, and descriptions of ACCC procedures.

Article 12(5)(c) provides that where I annul a decision of a public authority, and where it is appropriate to do so, I must require the public authority to make available environmental information to the applicant. I note that under article 7(3)(a)(i) of the AIE Regulations, where a request for access to information is made in a particular form or manner, the public authority must provide the information in that form or manner, unless the information is already available to the public in another form or manner. I note that the text of the Aarhus Convention, decision I/7 on review of compliance, and written ACCC procedures on communications are publicly available on the United Nations Economic Commission for Europe website (www.unece.org). Accordingly, I am satisfied that insofar as the Department's procedures contain information on ACCC procedures or on the provisions of the Aarhus Convention, the Department is not obliged to provide access to this information as recorded in its own procedural documents, since this environmental information is easily accessible to the public online. I therefore find that, for the purposes of article 12(5)(c), it is not appropriate to require the Department to provide access to this environmental information.

The remainder of the information in the draft protocols concerns procedural actions to be taken by Irish public authorities in response to ACCC communications. I have considered whether this information falls within the "bigger picture" of paragraph (c) as information on the Aarhus Convention or on ACCC proceedings, or whether it is merely information with a minimal connection to these measures, in the manner described in *Glawischnig*. In his internal review request to the Department, the appellant stated that information on Ireland's procedures for responding to ACCC proceedings was "directly related" to the Aarhus Convention as a measure. While this information is certainly connected to the measures under consideration, I do not consider it accurate to say that this information is information **on** the Aarhus Convention or **on** the proceedings of the ACCC. The arrangements described in the protocols are incidental national processes for responding to the primary measures, but these bureaucratic details do not of themselves impart integral information on the Aarhus Convention or the ACCC (other than by describing those measures to an extent, which I have addressed above). I therefore find that the information on procedural actions set out in the draft protocols is not information on the Aarhus Convention or on the ACCC for the purposes of the AIE Regulations, and therefore this information does not fall within the definition of environmental information set out in paragraph 3(1).

Consideration of the draft protocols and Ireland's participation in ACCC proceedings as measures and activities under paragraph (c)

I am not satisfied that the draft protocols are, of themselves, measures affecting or likely to affect the factors and elements referred to in paragraphs (a) and (b) of the definition. I am also not satisfied that the draft protocols were designed to protect the elements of the environment. The draft protocols are national guidelines on the effective management of ACCC proceedings by

Irish public authorities. These procedures were adopted at Ireland's discretion, and do not determine Ireland's obligations under the Aarhus Convention. The procedures do not address particular proceedings or recommendations of the ACCC on compliance. Accordingly, the likely effects of the draft protocols, and their intended design objectives, are limited to effective representation of Ireland's position at ACCC proceedings.

I have also considered the appellant's submission that Ireland's **participation** in ACCC proceedings is a distinct measure or activity affecting, or likely to affect, the factors or elements referred to in paragraphs (a) and (b), or an activity designed to protect the elements of the environment for the purpose of paragraph (c) of the definition.

In order to consider Ireland's participation in ACCC proceedings as a distinct measure for the purposes of paragraph (c), I must be satisfied that such participation is, of itself, a measure or activity affecting or likely to affect the factors and elements. In his internal review request to the Department, the appellant contended that Ireland's participation could influence recommendations of the ACCC, which could in turn affect the elements of the environment. While I am satisfied that Ireland's participation is likely to affect the compliance mechanism, since Ireland's engagement assists the ACCC in making an informed decision on national compliance. However, I am not satisfied that participation alone can be said to have effects on the environmental elements and factors. Effects on the environment arising from ACCC proceedings are properly ascribed to the Aarhus Convention as a measure, which I have discussed above.

Further to this, I am not satisfied that Ireland's participation in the ACCC is designed to protect the elements of the environment; Ireland's procedures and responses to ACCC communications are designed to ensure appropriate engagement with the Aarhus Convention compliance mechanism.

Accordingly, I find that the Department's draft protocols and Ireland's participation in ACCC proceedings are not relevant measures or activities for the purpose of paragraph (c) of the definition of "environmental information".

Decision

In accordance with article 12(5) of the AIE Regulations, I have reviewed the Department's decision on the appellant's request. I find that the Department was not justified in its decision to refuse the appellant's request, as the draft protocols contained some environmental information on measures designed to protect the elements of the environment (specifically, information on the provisions of the Aarhus Convention and the procedures of the Aarhus Convention Compliance Committee). I find that this information falls within paragraph (c) of the definition of "environmental information".

Notwithstanding this, and having considered articles 12(5)(c) and 7(3)(a), I find that it is not appropriate to require the Department to provide access to information on the provisions of the Aarhus Convention or procedures of the Aarhus Convention Compliance Committee, as this information is publicly available and easily accessible.

I find that the remainder of the information contained in the Department's draft protocols does not fall within the definition of "environmental information", as it is not information on the Aarhus Convention or on the proceedings of the Compliance Committee.

I find that the Department's draft protocols are not measures for the purposes of paragraph (c) of the definition of environmental information set out in article 3(1). I also find that Ireland's participation in the Aarhus Convention Compliance Committee proceedings is not a measure or activity for the purpose of paragraph (c).

Accordingly, I annul the Department's decision in part, insofar as it concerns information on the provisions of the Aarhus Convention and procedures of the Aarhus Convention Compliance Committee. In all other respects, I affirm the Department's decision that the draft protocols do not contain environmental information. I find that it is not appropriate to require the Department to make any environmental information available.

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
6 July 2017