

**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/16/0038

Date of decision: 31 July 2017

Appellant: Friends of the Irish Environment Limited

Public Authority: The Courts Service

Preliminary Issue: Whether the Commissioner has jurisdiction to review the Courts Service's decision on the appellant's AIE request

Issues for Review:

1. Whether the Courts Service's decision to refuse the AIE request was justified
2. If it was not justified, whether it would be appropriate for the Commissioner to require the Courts Service to make information available to the appellant

Summary of Commissioner's Decision: The Commissioner found that the Courts Service holds information of the type requested while acting in a judicial capacity on behalf of the Judiciary. When acting in such a capacity, the Courts Service is not a public authority within the meaning of article 3(1) the AIE Regulations. Accordingly, the Commissioner found that he has no jurisdiction to review the Courts Service's decision on this AIE request.

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

On 9 July 2016 the appellant submitted an AIE request to the Courts Service seeking the following information:

- a. The applicants', respondents' and notice parties' pleadings, affidavits/exhibits and written submissions as part of the proceedings before the High Court in *Balz & Anor v An Bord Pleanála* (High Court record no.2013/450 JR); and
- b. The perfected orders (plain copy) arising from those proceedings.

The Courts Service replied on 13 July 2016 refusing the request on the ground that the scope of the AIE Regulations does not extend to cover court proceedings or legal documents filed in court proceedings.

On 18 July 2016 the appellant asked for an internal review of that decision.

The appellant appealed to my Office on 15 September 2016, saying that it had not received a response to its request for an internal review. The Courts Service said that "no internal review response issued ... due to an oversight".

Scope of Review

In most appeal cases, my role is to review the decision of a public authority on a request for access to environmental information. If I find that refusal was not justified for the reasons given, my role is to decide whether it would be appropriate for me to require the public authority to make environmental information available to the appellant.

In this case, a preliminary issue arises: whether the Courts Service is a 'public authority' within the meaning of article 3(1) of the AIE Regulations when it holds information of the type requested. Since my jurisdiction to review decisions extends only to the decisions of 'public authorities' within the meaning of article 3(1), I must determine this question as a preliminary issue.

In carrying out my task I took account of the submissions made by the appellant and the Courts Service. 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).

Preliminary Issue: Jurisdiction to review the Courts Service's decision

The Courts Service submitted to my Office that it is "not a 'public authority' as defined under article 3(2) of the [AIE] Regulations".

Article 3(1) provides that:

'public authority' means, subject to sub-article (2)—

- (a) government or other public administration, including public advisory bodies,

at national, regional or local level,
(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and
(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),
and includes—

- (i) a Minister of the Government,
- (ii) the Commissioners of Public Works in Ireland,
- (iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),
- (iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),
- (v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),
- (vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,
- (vii) a company under the Companies Acts, in which all the shares are held—

- (I) by or on behalf of a Minister of the Government,
- (II) by directors appointed by a Minister of the Government,
- (III) by a board or other body within the meaning of paragraph (vi), or
- (IV) by a company to which subparagraphs (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information.

Article 3(2) provides that

“Notwithstanding anything in sub-article (1), “public authority” does not include any body when acting in a judicial or legislative capacity”.

A reasonable approach therefore would be to first consider whether the Courts Service qualifies as a public authority under article 3(1) when article 3(2) does not apply and, if I find that it does, proceed to consider whether the effect of article 3(2) is that the Courts Service is not a public authority in the specific circumstance of this case.

In *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*) O'Donnell J. considered the significance of that part of the definition which follows the words “and includes”, and concluded that “it was not here intended to operate as extending the meaning of the prior paragraphs”, i.e. paragraphs (a), (b) and (c). I therefore began by considering whether the Courts Service is a public authority of type (a) when article 3(2) does not apply.

My predecessor found in case CEI/08/0005 that “there is no doubt that the Courts Service ... is a public authority when carrying out its administrative work”. In considering the matter afresh, I took account of the following:

1. The definition provided in the AIE Regulations for this type of ‘public authority’ replicates the definition set out in article 2(2)(a) of the AIE Directive, which is: “government or other public administration, including public advisory bodies, at

national, regional or local level”.

2. In *NAMA*, O'Donnell J. relied, when interpreting the definition, on paragraph 51 of the judgment of the Court of Justice of the European Union in the case of *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12), which held:

“Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of article 2(2)(a) of Directive 2003/4. This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.”

3. Applying this test, I am satisfied that the Courts Service is an administrative authority which forms part of the public administration of the State and that it is a legal person (set up by, and governed by, the Courts Service Act 1998) which only the State could dissolve.

I therefore find that the Courts Service is a public authority of type (a) when article 3(2) of the AIE Regulations does not apply.

Next, I considered whether article 3(2) applies in the circumstances of this case. This involves considering whether the Court Service would hold records of the type requested ‘when acting in a judicial or legislative capacity’. It is clear that the Courts Service does not act in a legislative capacity. Therefore the question is whether, when the Courts Service holds information of the type requested, it does so when acting in a judicial capacity.

In case CEI/08/0005 my predecessor found that documents relating to court proceedings are held by the Courts Service on behalf of the Courts and, in holding such information in these circumstances the Courts Service acts in a judicial capacity and, when acting in such a capacity, it is not a public authority within the meaning of the AIE Regulations.

In its letter of appeal in the current case, the appellant maintained that, by analogy with the Court of Justice of the European Union’s judgment in *Flachglas Torgau GmbH v Federal Republic of Germany* (case C-204/09)(*Flachglas*), the Courts Service cannot rely on the “acting in a judicial capacity” exemption once the proceedings in question have ended. I found against this argument in case CEI/15/0008, when I found that the Courts Service holds papers relating to concluded court proceedings in a judicial capacity while acting as a servant of the Judiciary. My finding in that case relied in part on Section 65 of the Court Officers Act 1926, which provides that:

(1) Nothing in this Act shall prejudice or affect the control of any judge or justice over the conduct of the business of his court.

(2) When an officer attached to any court is engaged on duties relating to business of that court which is for the time being required by law to be transacted by or before or under or pursuant to the order of a judge or judges of that court he shall observe and obey all directions given to him by such judge or judges.

(3) All proofs and all other documents and papers lodged in or handed in to any court in relation to or in the course of the hearing of any suit or matter shall be held by or at the order and disposal of the judge or the senior of the judges by or before whom such

suit or matter is heard.

In light of my previous decision on the same point, my investigator invited the appellant to make a submission setting out why I should reach a different conclusion in this case. While the appellant did not make a submission in response to this invitation, it had raised an argument in its letter of appeal which I had not previously considered: it argued that: “constitutional law supports our interpretation of a broad right of access to the requested information”. In support of this statement it cited the High Court judgment in *Allied Irish Bank Plc v Tracey* (No 2)[2013] IEHC 242. I therefore considered this argument and the Court Service’s counter argument (neither of which are reproduced here in full).

In *Tracey* (No 2) Hogan J said:

“In these circumstances the public are entitled to have access to documents which were accordingly opened without restriction in open court. This is simply part and parcel of the open administration of justice which the Constitution (subject to exceptions) enjoins.”

The Courts Service argued that:

“The difficulty which the [above passage] presents is that [it makes] no reference to the Court having been referred in argument to— and would appear on their face not to have taken into account— section 65(3) of the Court Officers Act 1926 and the dicta of Finnegan J. in *Minister for Justice v Information Commissioner* [2001] 3 IR 43.”

It went on to refer to *BPSG Limited t/a Stubbs Gazette -v- The Courts Service & Anor* [2017] IEHC 20 — which it described as “the most recent case in which access to court records was in dispute”—noting that, in this case, “unlike *Allied Irish Bank Plc -v- Tracey* (No. 2) , section 65 of the [Court Officers] 1926 Act and the judgment in *Minister for Justice v Information Commissioner* were brought to the Court's attention”).

I considered the arguments of the parties in this regard and concluded that they are not relevant to the question of whether article 3(2) of the AIE Regulations applies in this case. They relate to a broader question of access to court records which does not fall to me to resolve.

I am satisfied that there have been no changes to the AIE Directive or the AIE Regulations which would lead me to reach a different conclusion in this case to that which I reached in case CEI/15/0008. No argument has been presented in this case which would lead me to take a different view. I am therefore satisfied that the Courts Service holds records which were submitted to court, such as the “pleadings, affidavits/exhibits and written submissions” requested in this instance while acting in a judicial capacity. Court orders require separate consideration. Because they are produced by, rather than given to, the court, they do not appear to be covered by section 65(3) of the Court Officers Act 1926.

The Courts Service submitted that:

“Court orders are an integral part of the court's file and record, and it should not be assumed that, because they do not fall strictly within the category of documents mentioned in section 65(3) that their disposal is outside the control of the court.... Section 65(3) should not, therefore, be interpreted as setting a limit to the principle that court records are controlled by the court.

As Baker J. indicated at para. 67 of her judgment in the *BPSG* case cited above,

section 65(3) reflects the principle— corollary to that of judicial independence— that an individual court is entitled to control its own procedures and processes.

As mentioned by Finnegan J. in his judgment [in *Minister for Justice v Information Commissioner* [2001] 3 IR 43] access to Central Office files is confined to parties and their representatives. A court order issues from the court, not from the Court Service, and— by contrast with a written judgment which a judge may issue for public dissemination— is not a document which a member of the public not party to the court proceedings in which the order has issued is entitled to inspect, nor may such person, in the absence of a court order authorising such, obtain a copy of same”.

I accept the thrust of this argument, which is that even if court orders are not covered by section 65(3) of the Court Officers Act 1926, they are covered by section 65(1) of that Act. I therefore conclude that I ought to regard court orders in the same way as records which were given to a court.

Decision

I find that the Courts Service is not a ‘public authority’ within the meaning of article 3(1) of the AIE Regulations when it holds information of the type requested, because it does so when acting in a judicial capacity on behalf of the Judiciary. In these circumstances I do not have jurisdiction to review the Courts Service’s decision on this AIE request.

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
31 July 2017