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/16/0016

Date of decision: 8 May 2017

Appellant: Thomas Freeman

Public Authority: ESB Networks Designated Activity Company (formerly ESB Networks Limited) (the Company)

Issues:

1. What information (if any) does the Company hold that is captured by parts 2, 3 and 4 of the AIE request?
2. Does such information constitute or contain environmental information?

Summary of Commissioner's Decision: The Commissioner found that the Company does not hold information captured by parts 2 and 3 of the request. He found that it holds information captured by part 4 of the request and this information contains environmental information.

Accordingly, the Commissioner expressed his expectation that the Company will now continue to process the AIE request in relation to the environmental information which he identified.

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 AIE Request

The appellant wrote to the Company on 13 January 2016, saying the following:

> "I wish to make the following request under the 2007 AIE Regulations. Some of the information sought is referenced in the attached document.
>
> 1. Copies of the easements acquired by ESB Networks for electricity lines, either compulsorily or by agreement, from 2009 to 2015 inclusive.
> 2. A copy of ESB Networks procedures for dealing with easements and loss of development (section 3.1 of the attached document refers).
> 3. A copy of the ESB Networks process for dealing with (i) landowners' claims for compensation and (ii) claims for devaluation of property (section 3.1 & 3.4 refers).
> 4. A copy of [a specific] letter from January 2009 (referred to in section 3.2).
> 5. Details of the stage payments made by ESB Networks as referred to in section 3.5 of the attached document, including how those stage payments are calculated.
> 6. Details of the 'consideration amounts' for 110kV angle masts and polesets referred to in section 3.5(c).

The "attached document" referred to by the appellant is an 18 page redacted document, produced by ESB Network Ltd, entitled "DH07 Planning Permission and Land Access" (DH07).

The Company gave notice of its decision on 12 February 2016. While it provided access to some information on a "without prejudice basis", it found that the requested information is not environmental information and refused the request on that basis. The Company also commented that: the request was voluminous; the records contain personal information; disclosure would adversely affect commercial or industrial confidentiality; and the public interest does not require disclosure.

The appellant requested an internal review of the decision on 7 March 2016. He added that the documents which the Company had made available were already in the public domain and do not contain any of the requested information.

The Company gave notice of its internal review decision on 24 March 2016. It affirmed the refusal of the request on the ground that the requested information is not environmental information. The internal review decision maker did not give detailed consideration to whether, if the requested information is environmental information, refusal might be justified on the grounds of the concerns mentioned by the original decision-maker (i.e. the request is voluminous; the records contain personal information; disclosure would adversely affect commercial or industrial confidentiality; and the public interest did not require disclosure), but briefly endorsed those concerns.

The appellant appealed this decision in so far as it concerned parts 2, 3 and 4 of his request.

Scope of Review

My primary role is to review the decisions of public authorities on AIE requests. In this case the Company's decision was made on the request as a whole. However, since this appeal only concerns parts of the overall request, the Company suggested that it would be appropriate for me to review its decision only in so far as it relates those parts, while taking account of the context in which the decision as a whole was made. This was agreed.

The scope of this review is therefore limited to: identifying any information that is held by the Company and captured by parts 2, 3 and 4 of the request and determining whether any such information constitutes environmental information.

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

Preliminary issue: confirming the identity of the public authority to which the AIE request was addressed

Although this issue is not disputed by the parties, I nonetheless thought that I should satisfy myself on this matter as a preliminary step. Throughout his AIE request the appellant referred to "ESB Networks". Potential for confusion arises because ESB Networks and ESB Networks Ltd (now renamed "ESB Networks DAC") are two separate entities. "ESB Networks" is a business division of the ESB, which is a statutory corporation. While the ESB is a public authority for the purposes of the AIE legislation, ESB Networks is part of that public authority and is not itself a public authority. On the other hand, ESB Networks Ltd (now ESB Networks DAC) is a wholly owned subsidiary company of ESB and it is the licensed distribution system operator. It is a separate legal entity in its own right and a public authority for the purposes of the AIE legislation. This potential for confusion is all the greater because documents produced by ESB Networks DAC often bear the "ESB Networks" logo, which is the ESB logo followed by the word "Networks".

The appellant sent his AIE request to foi@esbnetworks.ie, which is the email address provided for use in Freedom of Information requests by ESB Networks DAC on its website (www.esbnetworks.ie/). I am therefore satisfied that the appellant directed his AIE request to ESB Networks Ltd - now ESB Networks DAC - and that references to "ESB Networks" in the AIE request should be understood as references to ESB Networks DAC (the Company).

First substantive issue: identifying the information (if any) that is captured by parts 2, 3 and 4 of the AIE request and held by the Company

My investigator asked the Company for a copy of its records relating to parts 2, 3, 4 of the AIE request. Each of those parts referred to paragraphs in the DH07 document referred to earlier. This document was created by the Company and its front page states that it was submitted to the Commission for Energy Regulations (CER) on 27 November 2009.

The Company supplied records numbered 1 to 14, along with a schedule. In an accompanying letter, the Company said that records 1 -13 are "possibly" relevant to parts 2 and 3 of the request, and record 14 is relevant to part 4. In a later submission the Company said that records 2, 3, 4 and 10 are out of scope because they are not captured by the request. It argued that this is because the references in the AIE request to DH07 mean that the request should be understood as being confined to records which informed the drafting of DH07. I considered the contents of the relevant sections in DH07 and I found no basis for that conclusion. It is simply the case that DH07 suggests the existence of certain documents which the appellant was specifically asking for in his AIE request. So, while I do not accept the Company's argument in this regard, I am satisfied that the request has to be understood in the light of what those references to DH07 mean.

The paragraphs in DH07 referred to in parts 2 and 3 of the AIE request are 3.1 and 3.4. These announce that new procedures "were developed" for dealing with easements and loss of development, along with a processes to be followed for dealing with landowners' claims for compensation and claims for devaluation of property. Paragraphs 3.1 and 3.4 relate to the same procedures and processes: the "new procedures" referred to in paragraph 3.4 are clearly those referred to earlier in the "new approach" reported in paragraph 3.1. It is clear to me that the appellant, by wording his AIE request as he did, was asking for a copy of these new procedures. I take it that "new" in these circumstances means documents which were "new" when DH07 was drafted in late 2009. The introduction to section 3 in DH07 indicates that the new processes and procedures referred to had been introduced following a review which had been initiated in June 2006. I conclude from this that records which pre-date June 2006 must be outside of scope as they would not be captured by the references to paragraphs 3.1 and 3.4. Of the records provided to my Office by the Company, these out of scope records, according to the dates shown on the records, are records 2, 4, 11, 12, and 13.

Records 5, 6, 7, 8 and 9 are undated. My investigator asked the Company when these records were created. The Company said that it was not in a positon to "precisely" date those records without further work, but it added that those documents do not relate to "new procedures" referenced in DH07. On hearing this, my investigator asked the Company the following question:

> "Can you identify, please, the actual documents that are described in section 3.4 of DH07? Do I have copies of them? If I do, which are they amongst the 14 records you provided?"

The Company replied saying:

> "No document evidencing 'new procedures' as set out in 3.4 of DH07 was uncovered during searches. In so far as the language you have referred to in DH07 is suggestive of the creation of further documents, it is incorrect".

Surprised at this revelation, my investigator sought confirmation of this statement. The Company confirmed that:

> "No new procedures were in fact developed. Hence, no document evidencing "new procedures" as set out in 3.4 of DH07 was uncovered during searches conducted".
>
> "The processes referred to in DH07 were internal undocumented processes… and the simple fact is that no information (i.e. documentation) could be located/produced in relation to the procedures referred to in DH07 because no such information exists".

I understand that when the Company said that no such information exists it meant that it does not exist in a material form. The right to access environmental information is limited to environmental information that is held in a material form. A public authority is under no obligation arising from AIE legislation to put information into a material form in order to respond to an AIE request.

The Company's position, in effect, is that while DH07 (a document which was submitted to the regulator, CER) "is suggestive of the creation of further documents" (to use the Company's own words) and which spoke of "procedures drawn up" under the heading "achievements", no such procedures were in fact "drawn up" in writing. I find this surprising. I also find it surprising that new processes were developed with the stated aim of ensuring that "a consistent ... approach [to securing easements] is taken to each situation" (in the wording of paragraph 3.4 in DH07), yet those procedures were not documented. I find it difficult to see how new procedures could possibly ensure consistency throughout a nationwide organisation unless they were documented and circulated along with a written instruction that they replace all previous documented and undocumented procedures.

I find the situation puzzling. However, the Company has categorically confirmed that no new procedures were documented, and I have to accept that confirmation. I have no role in investigating how public authorities manage their affairs. Accordingly, I accept that the Company does not hold information relevant to parts 2 or 3 of the AIE request. It would have been helpful if the Company had told the appellant, when first replying to his request, what it later told my investigator, i.e. that "in so far as the language… in DH07 is suggestive of the creation of further documents, it is incorrect". It is clear to me that parts 2, 3 and 4 of the AIE request were seeking precisely those records which DH07 reasonably suggested to have been created.

I am left with part 4 of the request. This asked for a copy of a specific letter from January 2009 (referred to in section 3.2)". The Company said that this is record 14 and that is evidently the case. It is the information in this letter that is therefore at issue in the remainder of this review. I will refer to this as "the letter".

The contents of the letter

It would not be appropriate for me to disclose the contents of the letter here, but I will say that it:

- Refers to a specific proposal by ESB Networks/EirGrid to construct a 110 kV transmission line between two identified locations and the possible extension of another line.
- Announces the achievement of an agreement on "important issues surrounding the delivery of these HV electricity projects".
- Explains the benefits that the new line would bring.
- Confirms the terms under which agreement was reached, including the amounts of various payments and how these would be paid in stages.
- The third and final page contains further information about the nature of the agreement and a signature.

Second substantive issue: does the letter constitute or contain environmental information?

The appellant's position

In his request for internal review, the appellant set out why he believed that certain records which he reasonably believed to be held by the Company contained environmental information. The following is my synopsis of his argument:

- In my earlier decision in AIE appeal case CEI/14/0016, I found that:

  "The Grid Link project (a high-voltage power-line construction project) was a measure likely to affect elements of the environment within the meaning of the AIE Regulations".

- The appellant argued that this finding confirms that the erection of an overhead line is an activity which affects, or is likely to affect, elements of the environment. He further argued that:

  "Accordingly, the details of any payments made to landowners as a direct result of the activity relates to and informs the economic analysis of the particular project and future similar projects."

- He submitted that:

  "There is a very close link between the construction of electricity lines, the compensation paid to landowners as a result of that activity and the acquisition of easements for the lines which detail the effects of the line on lands under and adjacent the line."

  "The information sought … relates to the effects which the activity… has on the elements and factors referred to in article 3(1) and 3(1)(b) and to economic analysis relating to and arising as a result of the activities."

  "The overall cost of any particular electricity line project includes the cost of acquiring easements and the cost of compensation to landowners as a result of damage to their land caused by the activity is all environmental information".

- He quoted again from my decision in case CEI/14/0016, which said:

  "The withheld information is information on an economic analysis which informed the identification of preferred options for the … project. This economic analysis was itself an integral part of the project … [and is] therefore information on an economic analysis used within the framework of a measure likely to affect elements of the environment."

In a later submission to my Office, the appellant expanded on the basis of his belief that the requested information is environmental information.

- He submitted that the phrase "conflicts with landowners" reflects situations where an electricity line, either proposed or existing, comes into conflict with a landowner's use

of land: it describes a situation that needs to be addressed rather than a disagreement between the Company and a landowner. He emphasised that when the Company engages in the development or construction of an electricity line (including dealing with associated conflicts) it is performing a statutory function. He provided examples of how dealing with conflicts can impact on land and landscape. One example was forestry: the Company requires a tree-free corridor wherever a line runs. He submitted that legislation allows the ESB to cut trees as required, but instead of exercising this statutory power, the Company seeks landowner agreement. He suggested, therefore, that the conflicts procedure has an effect on land and information on such procedures is, accordingly, environmental information.

- He submitted that the information on the cost of an activity which affects environmental elements is environmental information on how a public authority carries out its statutory function.

The Company's position

In its internal review decision, the Company said that:

> "In keeping with the approach adopted by the Commissioner for Environmental Information in case CEI/13/0005 (and referred to in his decision in case CEI/14/0016) I have considered whether the information in parts 2,3 and 4 might constitute a measure or activity affecting or likely to affect the elements or factors referred to in the definition of environmental information… no element of the environment is or potentially can be affected in any way by the handling or outcome of claims for monies of the type mentioned in [your request]. I therefore find that the information … is not "environmental information" and I affirm [the original decision] on that basis".

When the appeal was made to my Office in relation those parts of the request, the Company made a submission explaining how it had decided that the requested information is not environmental information.

In my recent decision on case CEI/16/0017, I said:

> "In my experience, public authorities set about determining whether documents contain environmental information in one of three ways:
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> 1. By considering the wording of the request and its subject matter.
>
> 2. By relying on familiarity with the contents of relevant documents, i.e. without gathering and re-examining those records, or
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> 3. By examining the contents of the relevant documents.
>
> It is rarely the case that the first approach is upheld at appeal. To be successfully applied, the second approach requires a very high level of familiarity with the relevant records, and those records would eventually have to be gathered and copied in the event of an appeal being made to my Office. The third approach is usually the most

> appropriate approach… The approach of my Office to the question of whether certain information is or contains environmental information (unless it is very obvious in rare cases from the wording of the AIE request that the requested information could not constitute or contain environmental information) is to examine the contents of the relevant records."

The Company's account showed that it applied a combination of the first two approaches listed above: it considered the wording of the request and its subject matter, and relied on familiarity with the contents of relevant documents, without gathering and re-examining those records. The decision-maker explained:

> "I did not consider it necessary as a matter of principle to have regard to any particular records or information in this case, in order to be able to conclude that what the requester was seeking was not "environmental information". This is because of the very terms in which the various elements of the request in this case were expressed. Applying the knowledge and expertise of our organisation, and my own familiarity with the nature and context of the documents sought and the character of the information within them, I was in a position clearly to identify from the terms of the request itself that what the requester was seeking was not "environmental information", when mapped onto the definition of that expression in the AIE Regulations."

I accept that this approach can be appropriate in the right circumstances. I do not have to make a finding as to whether I consider that it was an appropriate approach in this case, because I am now solely concerned with record 14. However, I note that the Company (in its internal review decision) suggested that the overall request might have been manifestly unreasonable owing to the volume and range of information sought. A valid concern about the volume and range of information sought is indeed a good reason to think twice before searching for and examining all relevant records. In my experience it is best for a public authority to deal first with such concerns and only then, if satisfied that an AIE request is not manifestly unreasonable, consider whether the information requested constitutes or contains environmental information.

The Company submitted that the requested information:

> "is not information on any environmental element or factor, or affecting measure or activity, and has no bearing on the decision-making which leads to the placement of an electricity line, or of lines in general… because the requested information relates to matters that post-date decision-making in relation to any line placement".

Analysis

As I found in case CEI/14/0016, a plan to construct an overhead power-line is a "measure likely to affect elements of the environment" within the meaning of the AIE Regulations. The information on page 1 of the letter is integral information on such a plan and I am therefore satisfied that it is environmental information.

I am also satisfied that information on how much would be paid to those who facilitate the project as integral information on the plan. For this reason, I regard this information as environmental information.

I do not regard information on how such payments are structured or sequenced as integral information on the plan: such payments could be structured in any number of ways, none of which would be in any way likely to affect elements of the environment.

Decision

Having reviewed the Company's internal review decision:

1. I accept that the Company does not hold environmental information captured by parts 2 and 3 of the request, despite having produced a document which gave the appellant the reasonable expectation that such information was held in a material form.
2. I find that the information in the letter which relates to the sequencing of payments and which is contained in subparagraphs (i), (ii) (iii) and in the paragraph which follows paragraph (iii) and ends in the words "this approach", is not environmental information.
3. I find that the other information in the letter is environmental information.

Under the power given to me by article 12(5), I therefore vary the Company's decision and find that the information described at 3. in the preceding paragraph is environmental information. Accordingly, I expect the Company to complete the processing of the AIE request in relation to that environmental 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
8 May 2017