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/15/0032

Date of decision: 26 October 2016

Appellant: Damien McCallig

Public Authority: The Department of Communications, Climate Action and Environment (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 its proceedings

Summary of Commissioner's Decision: The Commissioner found that

- The Department's refusal to provide access to information on the second and third parts 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 on the first part of the request 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 of Housing, Planning, Community and Local Government (which was then the Department of the Environment, Community and Local Government) published draft revised guidelines to the noise, setback distance and shadow flicker aspects of the 2006 Guidelines in December 2013. To inform this process, it conducted a public consultation process which received 7,500 submissions. It is now working on finalising revised guidelines in close cooperation with the Department (which was previously called the Department of Communications, Energy and Natural Resources).

On 26 August 2015 the appellant submitted an AIE request to the Department. He asked for certain information in a bullet-pointed list, shown here for ease of reference as 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 21 September 2015, the Department informed the appellant that it held 7 records within the scope of the request and refused access to all of this information.

On 17 October 2015 the appellant requested an internal review. On 11 November 2015 the Department affirmed its original decision, and the appellant appealed to this Office on 22 November 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.

The information at issue

The Department acknowledged holding 7 relevant records. I examined these records in the light of the AIE request and found that the information which they contain relates to part 1 of the request. None of it relates to parts 2 or 3. All of the records were held when the AIE request was made. The records contain the inputs and outputs of various hypothetical modelling scenarios. There is no reason to believe that these scenarios were the only ones modelled, since there might have been further modelling carried out since the date of the AIE request. However, I am satisfied that these records constitute all of the records, within the scope of the request, which were held by or for the Department when the AIE request was made.

The Department's position

In its original decision, the Department explained that it was working with the (then) Department of the Environment, Community and Local Government in a process which is intended to lead to the adoption of revised guidelines to the noise, setback distance and shadow flicker aspects of the 2006 Wind Energy Development Guidelines.

The Department maintains that it is "still in the deliberative process" and the modelling records are being used to inform the decision-making process. It said that:

> "This is a very technical area and engagement between the two Departments is ongoing".

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 is justified following the application of a public interest test. It said that it had "weighed the public interest served by disclosure against the interest served by refusal", but it did not specify all of the public interests which it had identified.

The Department maintains that the requested information does not provide information on emissions into the environment, but did not provide details of how it made this determination.

My investigator sought several clarifications from the Department. The Department confirmed that its Minister is not the lead decision-maker on the revised Guidelines. The "deliberative process" in which it is engaged is therefore, essentially, the process of the Minister for Communications, Climate-Action and Environment deciding on his view on revised Guidelines. The Department also confirmed that none of the modelling data could be said to be obsolete. It said that:

> "The modelling exercises were preceded by 2 extensive public consultations… (which) elicited a very significant number of varied responses from the public…the process of finalisation of the Guidelines remains ongoing."

> "Disclosure would be contrary to the public interest because deliberations are not complete, because the modelling outputs would not inform or provide clarity to the public and because it would interfere with the decision-making process."
>
> "There is a high risk that (disclosure) would cause confusion in the public mind."
>
> "This Department considers that releasing the modelling results could pre-empt decision-making by the two Ministers."

It argued that disclosure could prejudice investment in the wind energy sector, damage that sector, and would negatively impact on Ireland's ability to meet its 2020 renewable energy targets. It argued that release would potentially contribute to increasing the cost of compliance.

It emphasised that there are sensitive issues still at the level of negotiation between Government Ministers and Departments which will ultimately require a Government Decision. It argued that for all of these reasons, disclosure would not be in the public interest.

The appellant's position

The appellant questioned whether the Department is still in the deliberative process. He argued that even if the Department was still in the deliberative process, "merely forming part of an 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 as including "information of a statistical, financial, econometric or empirical nature, together with any analysis thereof". He stated that the 3 elements of his request fall into this category of exemption under section 29(2).

The appellant also argued that it is clear from his request that article 10(1) applies in this instance, as the information requested 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 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 reasons 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 submitted that his argument 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 that case 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". The appellant argued that it is clear, given the purpose and scope of the review of the wind energy guidelines and the obvious content of the information requested, that the requested information relates in a sufficiently direct manner to emissions into the environment and it must therefore must 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; and
> 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 information is not environmental information and I am satisfied that it is.

Whether the request relates to information on emissions into the environment for the purposes 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 the creation of electro-magnetic fields (EMFs). However, 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 under 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 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.

I note that section 29 is not a mandatory exemption. Also, the guidance on section 29 published by the Office of the Information Commissioner observes, at paragraph 2.1.1, that:

> The exemption has two requirements:
> - the record must contain matter relating to the deliberative process, and
> - disclosure must be contrary to the public interest.
>
> These are two independent requirements and the fact that the first is met carries no presumption that the second is also met. It is therefore important for FOI bodies to show to the satisfaction of the Commissioner that both requirements have been met.

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 it contains a small amount of factual information, such as the size of the land area of the Republic of Ireland. However the records include proposals and model calculations. 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 any 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.

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 (ultimately) for the purpose of a decision by the Department of Housing, Planning, Community and Local Government 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.

<u>Whether the granting of the request would be contrary to the public interest</u>

The appellant put forward six reasons why disclosure would be in 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 for 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 could compromise and interfere with the decision-making 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 do not 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 "interfere with the decision-making process". I consider that it is likely that disclosure would lead to further attempts by some members of the public to feed into the deliberative process. The issue which this raises is whether such efforts would, on balance, benefit or harm the decision-making process. In this regard I note that there is nothing in the section 29 exemption itself that requires that the deliberative process be protected until its completion. Previous Information Commissioners have stated that if the purpose of the

exemption was to protect matter relating to the deliberative process until that process had been completed the Oireachtas could have enacted a specific provision to that effect.

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 acknowledged that the public had not had an opportunity to submit observations on the hypothetical scenarios used in the modelling exercises, but said that "the possibility of further public consultation in the matter cannot be ruled out".

In any event, I feel that I must conclude that further public input (following disclosure) could potentially benefit the decision-making process. Such a result could not, to use the Department's phrase, be ruled out. Disclosure would therefore serve 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 decision-making 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. However, I note that the Department did not make this argument, but instead argued that disclosure could "pre-empt decision-making" by the two Ministers. I take this to mean that the Department is concerned that disclosure could reveal a decision before it is made.

I find it difficult to accept an argument that disclosure of the results of modelling exercises could both fail to inform or provide clarity to the public *and* disclose a decision which has yet to be made. Because further modelling may have been carried out in the year since the AIE request was made, I cannot see how anyone who might gain access to the withheld information in this case could reasonably foresee, with any degree of certainty, the outcome of this process. They would learn about some of the implications of various policy options. As a result, they would, I believe, gain a greater appreciation of the difficulty of the decision to be made.

Because I do not see that the withheld information points to what the eventual decision might be, I cannot see how disclosure could harm the wind-energy sector. The Department has not made a compelling argument (or any argument) as to why I should conclude that such effects would follow disclosure. It seems to me that the real risk of prejudicing investment in the wind-energy sector and of harming Ireland's ability to meet its renewable energy targets would come from further delay in deciding on the revised guidelines.

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.

After carefully considering the arguments put forward by the parties, I arrived at the following view. There is good reason to believe that anything which could lead to further significant delays in the decision-making process would not be in the public interest. However, any prolongation of the deliberative process following disclosure could only occur if the Departments involved are open to further public inputs. Currently, while the Department has not ruled out any further public consultation, the lead decision-making Department (Housing, Planning, Community and Local Government) maintains that the period of public consultation is over. At the same time, if disclosure were to lead to a submission being made to either or both Departments which was of such significance that it could not be ignored, such a submission would appear to be highly important and very much in the public interest. While there is a strong public interest in making the decision as soon as possible, there is also a strong public interest in getting it right. For these reasons I am not persuaded that granting the request would be contrary to the public interest in the meaning of section 29 of the FOI Act. As that is my conclusion, I must find that refusal to provide access to the withheld information is not justified by the reason given.

Decision

Having reviewed the Department's decision, I find that

- The Departments' refusal to provide access to information on the second and third parts 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 reference to article 8(a)(iv).

Accordingly, 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