

**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/14/0014

Date of decision: 17 February 2016

Appellant: Mr Lar McKenna,

Public Authority: EirGrid plc,

Issue: Whether EirGrid was justified in refusing a request for information relating to: (1) studies on the relationship between electricity lines/pylons and property values; (2) any cost-benefit analyses of such studies; (3) records relating to a code of practice concerning landowners' rights

Summary of Commissioner's Decision: The Commissioner noted that, following the intervention of his Office in the course of this review, EirGrid provided the appellant with access to all of the information which it held in relation to part (1) of the request. In accordance with article 12(5) of the AIE Regulations, the Commissioner reviewed EirGrid's decision to refuse access to the remaining information. He found that refusal was justified because some of the information is not held and the information which is held is either not environmental information or is environmental information to which the AIE Regulations do not apply by virtue of article 4(1). Accordingly, the Commissioner affirmed EirGrid's decision to refuse those parts of the 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 February 2014 the appellant submitted an AIE request to EirGrid, seeking the following information: (1) any records held by EirGrid, including studies, reports or analysis, on the effects of high voltage electricity lines and /or pylons on land and property values; (2) any cost benefit analysis of such studies, reports or analysis; and (3) any records held in respect of the *IFA/ESB Code of Practice for Survey, Construction and Maintenance of Overhead Lines in Relation to the Rights of Landowners* (the Code), including legal advice, correspondence, and cost-benefit analyses. “IFA” is the Irish Farmers’ Association and “ESB” is the Electricity Supply Board.

On 5 March 2014 EirGrid wrote to the appellant, saying that the request was too general. EirGrid asked the appellant to narrow the scope of the request and suggested that he might ask for information about a particular project, piece of infrastructure, development or land-holding.

On 21 May 2014 the appellant clarified the request, but without narrowing it to the degree suggested by EirGrid. EirGrid accepted the request and took this date to be the date when time started to run in relation to processing the request. The items of information sought in the clarified request (as numbered by EirGrid) were:

1. Any records held by EirGrid, including but not limited to, studies, reports or analysis carried out by or on behalf of EirGrid on the effects of high voltage electricity lines and/or pylons on land and property values.
2. Any cost benefit analysis of the studies, reports or analysis referred to at 1 above.
3. Any records held by EirGrid in respect of the Code, including but not limited to:
 1. The minutes of the EirGrid Board meeting wherein it was decided to adopt and use the Code.
 2. Legal advice received by EirGrid in relation to the Code.
 3. Any communication or correspondence between EirGrid and the ESB at the time EirGrid adopted the Code.
 4. Correspondence between EirGrid and the IFA (the third party) in relation to the Code.
 5. The cost benefit analysis carried out in respect of the compensation provisions of the Code.
 6. The cost benefit analysis of the “loss of development” section of the Code.

EirGrid refused to provide access to any of the information requested. It denied that the information sought in parts 1 and 2 of the request was environmental information. It denied access to legal advice on the grounds of legal privilege and because disclosure would adversely affect the course of justice. It denied access to all of the other information requested in part 3 of the request on the ground that it did not hold such information.

The appellant requested an internal review of the decision. In doing so, he clarified that he intended parts 1 and 2 of his request to be understood as a request for information on cost-benefit or other economic analysis and assumptions used within the framework of measures and activities within the meaning of paragraph (e) of the definition of environmental information set out in article 3 of the AIE Regulations. In its internal review decision, EirGrid said that the information sought in parts 1 and 2 of the request was not environmental information because property values cannot be environmental information. However, EirGrid added that, if it was

held to be environmental information, refusal would be justified by article 9(1)(b). It affirmed its decision to refuse parts 3.1, 3.3, 3.5 and 3.6 of the request on the basis that it did not hold such information. EirGrid affirmed its decision to refuse part 3.2 on the grounds of legal privilege and article 9(1)(b). In relation to part 3.4 of the request, EirGrid admitted to having since found records of such correspondence but refused to make them available because they did not contain environmental information.

On 22 September 2014, the appellant appealed to this Office for a review of EirGrid's decision.

I regret the delay in bringing this case to a close. The delay was primarily due to a shortage of resources in my Office, which has now been addressed.

In December 2015 my investigator informed EirGrid that, in his opinion, records held by EirGrid in relation to part 1 of the request appeared to constitute environmental information within the meaning of paragraph (e) of the definition set out in article 3(1) of the AIE Regulations (set out below). He added that it was doubtful if refusal to provide access to those records could be justified by the reason given. EirGrid subsequently informed my Office that it had decided to make those records available to the appellant and confirmed on 15 January 2016 that it had done so. In taking this step, EirGrid continued to maintain that the information contained in those records does not constitute environmental information. EirGrid said that the release of records was an attempt to progress the matter, done in the interests of openness and transparency.

Preliminary issue: have all relevant records been identified and made available to my Office?

EirGrid provided copies of records to my Office, listed in 3 schedules. Schedule 1 listed records relevant to part 1 of the request, since made available to the appellant. Despite having refused access to information relating to part 2 of the request on the grounds that it was not environmental information and its disclosure would adversely affect the course of justice, EirGrid informed my Office that it had, in fact, found no records relevant to that part of the request. Notwithstanding this, EirGrid provided copies of records on "costings in general" and listed them in Schedule 2. I reviewed these records and found them to be outside of the scope of the request and did not consider them further. EirGrid maintains that all the records listed in Schedule 2 are already in the public domain in any case. I am not surprised that EirGrid found no records meeting part 2 of the request. It seems to that any such records would have been cost-benefit analyses of studies which were themselves economic and cost-benefit analyses. I am satisfied that the information which the appellant intended to be captured by part 2 was effectively captured by part 1 and since made available amongst the Schedule 1 records. EirGrid maintains that it found no records relating to parts 3.1, 3.2, 3.3, 3.5 and 3.6 of the request, while it listed records relevant to part 3.4 in Schedule 3.

Article 7(5) applies where a public authority says that it does not hold information which has been requested. My approach to cases where a public authority has effectively refused a request on this ground is guided by the experience of the Information Commissioner: a similar, though not identical, ground for refusal in relation to records "not held" is provided by section 15(1)(a) of the Freedom of Information Act 2014. That approach is to assess the adequacy of the searches conducted by the public authority in looking for relevant records and to decide whether the decision-maker was justified in determining that the information was not held by or for the public authority. It is not normally my function to search for information.

EirGrid provided my Office with a detailed account of how it searched for relevant records. That account included details of a search across all “platforms” maintained by EirGrid’s Legal Department, as well as direct checks with staff who were employed by EirGrid when it took over certain functions from the ESB. EirGrid has assured my Office, in writing, that, to the best of its knowledge, such records were never held by or for EirGrid.

In relation to part 3.3 of the request, the appellant argued that EirGrid's claim that it does not hold such information is inconsistent with a statement made by EirGrid in correspondence between the parties. EirGrid had stated: "as there is a large number of projects ... in which correspondence would pass between EirGrid and the ESB in relation to matters arising under the Code... the specific amount or records and/or volume of correspondence would be large". I note that EirGrid made this statement before the appellant narrowed his request for "any communication or correspondence between EirGrid and the ESB" by adding the qualification "at the time EirGrid adopted the Code of Practice". Since EirGrid's position (explained below) is that it never "adopted" the Code, the absence of records meeting this criterion is not inconsistent with EirGrid's earlier statement. In light of the above search details, assurance, and explanation, and in the absence of any reason to believe otherwise, I am satisfied that EirGrid has provided copies of all relevant records to this Office.

It is notable that it took longer than usual for my Office to receive the records at issue in this case. This was because EirGrid had initially decided that the information sought was not environmental information and therefore did not search for relevant records before being asked to do so by my Office. It is the experience of this Office that records within the scope of a request have to be carefully examined, document by document, before an opinion can be formed as to whether or not they contain environmental information.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review EirGrid's internal review decision and to affirm, vary or annul it. Given that EirGrid released all records related to part 1 of the request, my review was confined to EirGrid's decision in relation to parts 2 and 3 of the request.

In conducting this review, I took account of the submissions made by the appellant, EirGrid and the third party. 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, 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).

Statutory 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);

Article 4(1) provides that the AIE Regulations do not apply to environmental information other than, subject to article 4(2), information that, under any statutory provision apart from the AIE Regulations, is required to be made available to the public, whether for inspection or otherwise.

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

Article 9(1)(b) provides that, subject to article 10, a public authority, may refuse to provide access to environmental information where disclosure would adversely affect the course of justice.

The Appellant's position

The appellant argued that part 2 of his request falls clearly within the scope of paragraph (e) (cost-benefit and economic analysis) in the definition of environmental information. He argued that EirGrid's ongoing involvement in the erection of high-voltage electricity lines is an "activity" within the meaning of paragraph (c) of the definition. In relation to part 3 of his request, he argued that the Code is a "measure" within the meaning of the AIE Regulations, while the practices described in the Code constitute "activities".

He argued that "there is no dispute that EirGrid is involved in the planning and development of electricity infrastructure which touches directly on the state of elements of the environment (e.g. land, landscape etc.) and the factors which affect those elements (e.g. electromagnetic radiation). He believes that the request "clearly comes within ... cost benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in" the AIE Regulations. He stated that the construction of high voltage electricity transmission lines and/or pylons on land is an activity which has a direct effect on the value of land on which the

line/pylons are placed. He argued that part 2 of his request therefore falls within the category of “economic analysis arising from EirGrid’s activities”.

The appellant stated that EirGrid ought to have provided him with a schedule of all withheld documents, but did not do so.

The appellant questioned the credibility of EirGrid’s statement that it has no record of a Board meeting at which it was decided to adopt the Code, when (he alleges) it is clear that EirGrid has adopted the Code.

He argued that the public interest in providing access must be weighed against the interest served by refusal of access, and that EirGrid has not done this.

EirGrid’s position

EirGrid maintains that it does not hold information relevant to parts 2, 3.1, 3.2, 3.3, 3.5 or 3.6 of the request.

EirGrid acknowledged, when it notified the appellant of its internal review decision, that it had located records related to part 3.4 of the request. It provided my Office with copies of those records. EirGrid’s position is that such records do not contain environmental information within the meaning of the AIE Regulations.

In its submission, EirGrid offered an explanation as to how it comes to observe the Code whilst denying that it holds any record of a decision to adopt it. The explanation is as follows: The Code dates from 1985, while the establishment of EirGrid resulted from the commencement of the European Communities (Internal Market in Electricity) Regulations, 2000 (Statutory Instrument Number 445 of 2000). EirGrid was created from what was formerly known as “ESB National Grid”. Although not itself a party to the Code, EirGrid says that its practice, since its inception, has been to apply the Code to new overhead transmission lines. EirGrid explained that this is because the ESB (despite having transferred some functions to EirGrid), still constructs, maintains and owns the transmission lines. EirGrid maintains that, since this is the case, it would not be possible for EirGrid to introduce an alternative Code without the involvement of the ESB. The explanation, in effect, is that EirGrid “inherited” the Code when it was established.

In its internal review decision EirGrid had refused access to information on the grounds of article 9(1)(b), because disclosure would adversely affect the course of justice. However, EirGrid did not, either in that decision or in its later submission to my Office, offer that argument as a reason justifying refusal in relation to 3.4 of the request. There is therefore no requirement to consider article 9(1)(b) in relation to those records.

Analysis and Findings

I am satisfied that the request was a valid request for environmental information. I am also satisfied, for the reasons explained above, that EirGrid does not hold information relevant to parts 2, 3.1, 3.2, 3.3, 3.5 or 3.6 of the request.

I examined the records relating to part 3.4 of the request, which asked for any correspondence between EirGrid and the third party in relation to the Code. After carefully considering these records, I concluded that the only environmental information which they arguably contain is information contained in references to the titles of electricity projects. I am satisfied that this is

information which is required by the Planning and Development Act 2000 to be published. Accordingly, by virtue of article 4(1), it is information to which the AIE Regulations do not apply.

Decision

In accordance with article 12(5) of the AIE Regulations, I have reviewed EirGrid's decision. I find that EirGrid does not hold some of the requested information, while the requested information which it holds is either not environmental information within the meaning of the AIE Regulations or is environmental information to which the AIE Regulations do not apply. Accordingly, I find that refusal was justified on the grounds of articles 3(1), 4(1) and 7(5), and I affirm EirGrid's decision in relation to parts 2 and 3 of the 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