

**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/15/0008**

**Date of Decision:** 7 April 2016

**Appellant:** An Taisce – the National Trust for Ireland, Tailor’s Hall, Back Lane, Dublin 8

**Public Authority:** The Courts Service, Phoenix House, 15/24 Phoenix Street North, Smithfield, Dublin 7

**Issue:** Whether the Courts Service was justified in refusing an AIE request for information contained in the papers of a completed court case

**Summary of Commissioner's Decision:** The Commissioner found that refusal was justified because the Courts Service holds such information on behalf of the Courts in a judicial capacity while acting (in effect) as a servant of the Judiciary. When acting in that capacity the Courts Service is not a public authority within the meaning of article 3(1) the AIE Regulations. Accordingly, the Commissioner affirmed the Courts Service’s decision.

**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 24 February 2015, An Taisce – the National Trust for Ireland (an unincorporated association working to preserve and protect Ireland's natural and built heritage) submitted an AIE request to the Courts Service. The Courts Service was established by the Courts Service Act 1998. Section 5(b) of the 1998 Act establishes that it is a function of the Courts Service to provide support services for judges.

The request was for the following information:

A copy of the applicant's and respondent's papers in (the case of *Kelly v An Bord Pleanála* [2014] IEHC 400), to include the applicant's statement of grounds /affidavit/exhibits; the respondent's opposition papers/affidavits/exhibits; and the applicant's and respondent's written submissions.

As this was an AIE request, it ought to be understood as a request for any environmental information contained in those papers. The appellant was not a party to the proceedings.

The Courts Service replied on 27 February 2015, refusing the request on the basis that the Courts Service acts in a judicial capacity in holding such records on behalf of the High Court. For that reason, the Courts Service said that it is not, in this context, a public authority for the purposes of the AIE Regulations. The Courts Service suggested that it might be helpful for the appellant to read my predecessor's decision in the earlier AIE appeal case of Peter Sweetman and the Courts Service (case reference CEI/08/0005).

The appellant requested an internal review of the Courts Service's decision, arguing that the decision in CEI/08/0005 had "been overtaken by developments before the Court of Justice of the European Union" (CJEU), i.e. by the ruling in the case of *Flachglas TorGau GmbH v Federal Republic of Germany* (case C-204/09).

The Courts Service conducted an internal review, which affirmed the original decision. The appellant appealed to my Office on 27 March 2015, seeking a review.

## **Scope of Review**

The issue in this review was whether the Courts Service was justified in refusing an AIE request for information contained in the papers of a completed court case because it holds such papers in a judicial capacity on behalf of the Courts, and it is not in that context a public authority within the meaning of the AIE Regulations.

As set out in my Office's "Procedures Manual" (available at [www.ocei.ie](http://www.ocei.ie)), my practice in these circumstances is to seek to definitively resolve questions of this nature before addressing (if appropriate) the substantive issue of whether refusal might otherwise be justified under the terms of the AIE Regulations. Because the scope of review is limited, as described, I did not examine the requested records to see if they contain environmental information or consider whether refusal might be justified by any of the grounds provided in articles 8 or 9 of the AIE Regulations.

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

### **Relevant AIE Provisions**

Article 2(2) of the AIE Directive provides that “Member States may provide that this definition [of ‘public authority’] shall not include bodies or institutions when acting in a judicial or legislative capacity”. I will refer to this as “the permitted exemption in the AIE Directive”.

Article 3(2) of the AIE Regulations provides that: “notwithstanding anything in sub-article 3(1), ‘public authority’ does not include any body when acting in a judicial or legislative capacity”. I will refer to this as “the exemption in the AIE Regulations”.

### **The Appellant’s Position**

The appellant’s position is that “this appeal raises a neat legal point, namely: whether the Courts Service can lawfully rely on article 2(2) of the AIE Directive and article 3(2) of the AIE Regulations to refuse an information request on the basis that it is not a public authority because it is acting on behalf of the Courts, which are acting in a judicial capacity, in circumstances where the legal proceedings to which the information relates have ended”.

The appellant argued that the judgment of the CJEU in *Flachglas TorGau GmbH v Federal Republic of Germany (C-204/09) (Flachglas)* has “overtaken” the decision in CEI/08/0005 because “there is a direct read across” from the *Flachglas* judgment to the current request for access to court records where legal proceedings have ended. It submitted that it “can see no basis to distinguish the legislative exemption from the judicial exemption”.

### **The Public Authority’s Position**

The Courts Service’s position is that the decision in CEI/08/0003 properly reflects the legal position post-*Flachglas*. It denies that there is “a direct read across” from “the legislative process” considered in *Flachglas* to the circumstances of the court records in the current case. The Courts Service maintains that the judgment in *Flachglas* is “very strictly limited to the very particular circumstances and attributes of the legislative process”, which (it says) are apparent from the wording of the judgment. It pointed to “the particular nature of the judicial process as distinct from the legislative process and the particular circumstances and requirements pertaining to documents lodged with a court in proceedings before it”.

The Courts Service denied that it is within its power to make court papers available to persons other than the parties to proceedings, unless by permission of a court. It maintains that court records are held subject to section 65(3) of the Court Officers Act 1926, which provides that “all ... papers lodged in ... any court ... 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”. It cited the judgment by Finnegan J. in *Minister for Justice v Information Commissioner* [2001] IEHC 35, in which it was held that this provision created a “general prohibition on the disposal of documents but from which a judge can dispense: until there is such a dispensation there is a prohibition in place within the meaning of section 46(1)(a)(i)” [of the Freedom of Information Act 1997].

The Courts Service referred to a passage in the Aarhus Guide (page 49) (which was also cited by my predecessor in CEI/08/0005), which says “Many of the provisions of the (Aarhus) Convention should not apply to bodies acting in a judicial capacity, in order to guarantee an independent judiciary and to protect the rights of parties to judicial proceedings”. With regard to the latter, the Courts Service submitted that pleadings and other material in submissions made in court proceedings may include content ultimately judged to be irrelevant and which may even contain vexatious or scandalous assertions. It also maintains

that it does not control the court records which it holds. It submitted that “access to court documents is subject, under primary legislation, to the control of, and therefore permission being sought from, the court”. It argued that this requirement is not displaced by the AIE Regulations. It observed that my predecessor concluded in CEI/08/0005 that “it would appear that the (Aarhus) Convention envisages that bodies acting in a judicial capacity might be treated differently to other bodies”.

The Courts Service argued that “no direct comparison may be made between the nature of the legislative and judicial functions respectively, or between records created or used for the purposes of those respective functions”.

### **Analysis and Findings**

I note that, with regard to court papers relating to proceedings which have not concluded, neither party to this appeal has challenged the finding in CEI/08/0005 that the Courts Service holds such papers in a judicial capacity on behalf of the courts.

I must determine whether, in light of the *Flachglas* judgment, the Courts Service was justified in refusing an AIE request for information contained in the papers of a completed court case on the basis that the Courts Service holds such papers in a judicial capacity on behalf of the Courts and it is not, in the circumstances, a public authority within the meaning of the AIE Regulations.

In approaching the matter I looked first at the decision in CEI/08/0005. Secondly, I considered whether the relevant law had changed since the decision in CEI/08/0005 was made. Thirdly, I considered if there is any reason (such as the judgment in *Flachglas*) why I should interpret the law differently from the interpretation applied in CEI/08/0005.

AIE appeal case CEI/08/0005 concerned a request for access to affidavits held by the Courts Service in relation to two concluded judicial review cases. The issue before the then Commissioner was whether the Courts Service was acting in a judicial capacity when it held information of the type sought. The Commissioner noted that court records are held by the Courts Service but controlled by the courts. She found that the Courts Service holds such records, not in its administrative capacity, but in a judicial capacity which it exercises on behalf of the courts. Accordingly, the Commissioner found that, in that particular context, the Courts Service was not a public authority within the meaning of article 3(1) of the AIE Regulations and refusal of the request was justified. I endorse the reasoning employed in this decision. A full account of it may be accessed at [www.ocei.ie](http://www.ocei.ie).

I am satisfied that the AIE Directive has not changed since the decision in CEI/08/0005 was made in December 2008. My investigator examined changes made to Ireland's AIE law during that period (specifically, the European Communities (Access to Information on the Environment) Regulations 2011 (Statutory Instrument No. 662 of 2011) and the European Communities (Access to Information on the Environment) Regulations 2014 (Statutory Instrument No. 615 of 2014). Neither the definition of “public authority” nor the content or operation of article 3(2) of the European Communities (Access to Information on the Environment) Regulations 2007 had been amended. I am therefore satisfied that the relevant law which underpinned the finding in CEI/08/0005 has not changed.

I considered if the relevant law has been overtaken by the judgment in *Flachglas*, as the appellant claims.

I carefully examined the Court's judgment, which was delivered on 14 February 2012. The background to the case was that the German State had invoked the permitted exemption in the AIE Directive to provide, in its national law, that the highest federal authorities, when

acting in the context of a legislative process or issuing regulatory instruments, are not required to provide environmental information. I noted that German law provided for the exemption to apply when a body is “acting in the context of a legislative process”, rather than the arguably broader context of “acting in a legislative capacity” referred to by the AIE Directive. The case concerned a request for a preliminary ruling from the Court as to whether the AIE Directive could be interpreted as allowing this exemption to apply to Government Ministries when they participate in the legislative process, and, if so, whether it could apply only until such time as the legislative process had ended. The Court held that:

“... the option given to Member States by that provision (i.e. by article 2(2) of the AIE Directive) of not regarding 'bodies or institutions acting in a legislative capacity' as public authorities may be applied to ministries to the extent that they participate in the legislative process" (and that) "option can no longer be exercised where the legislative process in question has ended".

The Court considered whether the executive body's participation in the legislative process constituted “acting in a legislative capacity” within the meaning of the AIE Directive. In this regard, the Court adopted what it called a “functional interpretation”. Rather than adopting the view that “only the legislature can act in a legislative capacity” and “only the judiciary can act in a judicial capacity”, the Court had regard to the functions assigned to the relevant bodies in national law. It recognised that German law assigned a role in the legislative process to the executive branch, i.e. to Government Ministries. German law exempted such bodies from constituting “public authorities” for AIE purposes “when acting in the context of the legislative process or issuing regulatory instruments”. Accordingly, the Court accepted that German ministries, when participating in the legislative process, could be said to be acting in a legislative capacity. Notably, while the Court found that “acting in a legislative process”, in the circumstances, constituted “acting in a legislative capacity”, it did not rule that a body can only act in a legislative capacity when it is participating in a legislative process.

The appellant's case is that there is a “direct read-across” from *Flachglas* to the current request for records relating to a concluded judicial process. It argues that the Courts Service ceases to act in a judicial capacity in holding court papers when the relevant proceedings conclude. This argument rests on the proposition that the “judicial capacity” in which the Courts Service is acting applies on a “case-by-case” basis. Whether or not this proposition is correct is the nub of the issue.

When the Court in *Flachglas* considered the extent of the legislative capacity being exercised by the ministry in that case, it had regard to the national law which assigned legislative functions to that body. Following that example, I looked at the provisions in Irish law which assign functions to the Courts Service. I noted that the Courts Service Act 1998 assigns the function of “providing services to judges” without a temporal or procedural qualification. I noted that section 65(3) of the Court Officers Act 1926 provides that “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”. I examined the High Court ruling in *Minister for Justice v Information Commissioner* [2001] IEHC 35, and noted the ruling by Finnegan J. that this provision (i.e. section 65(3) of the Court Officers Act 1926) creates “a general prohibition on the disposal of (court) documents but from which a judge can dispense: until there is such a dispensation there is a prohibition in place within the meaning of section 46(1)(a)(i)” [of the Freedom of Information Act 1997].

I concluded that Irish law provides that court records are controlled by judges, and such control does not expressly come to an end when proceedings conclude. At the same time, Irish law assigns the function of "providing services to judges" to the Courts Service and one such service is the storage and safe-keeping of court records. I found nothing to support a view that the status of the capacity in which the Courts Service acts when it holds court records changes when individual proceedings end. On the contrary, all indications available to me point in the opposite direction; supporting a view that the Courts Service's record-holding function on behalf of judges survives the conclusion of proceedings and persists at the discretion of the judge who actually controls the records of each case.

I took the view that the Courts Service acts in an ongoing, albeit limited, judicial capacity in holding records for the courts, even after individual proceedings have concluded.

For the sake of completeness, since my analysis concerned statutory interpretation, I considered the contents of the Minister's Guidance (published in May 2011 and therefore post-dating the decision in CEI/08/0005). I noted that, at paragraph 5.7 it suggests that "judicial capacity refers, for example, to the processes of determination (normally statutory in nature) which are open to the hearing of submissions from different parties, and where the authority concerned is required to act in a judicial manner". That guidance is presented as an "example" of what 'judicial capacity' refers to and does not limit the scope of the expression 'judicial capacity' to the lifetime of proceedings. I noted that the Minister's Guidance was drafted after, and presumably in the full knowledge of, my predecessor's finding in CEI/08/0005, yet did not set out any guidance which would be incompatible with that finding. I also consulted the Aarhus Guide (second edition, published in 2014 and thereby also post-dating CEI/08/0005). I considered its guidance on "judicial capacity" and found no basis for questioning the reasoning employed in the decision in CEI/08/0005 or for altering my view in this case.

### **Summary of Conclusion**

I concluded that the Courts Service holds papers relating to completed court proceedings in a judicial capacity, while acting (in effect) as a servant of the Judiciary. In that context, it is not a public authority within the meaning of the AIE Regulations. I therefore find that the *Flachglas* judgment has not overtaken the reasoning behind the decision in case CEI/08/0005.

### **Decision**

In accordance with article 12(5) of the AIE Regulations, I reviewed the Courts Service's decision in this case. I find that the decision is justified because the Courts Service, in holding information on behalf of the courts, both during proceedings and after proceedings have concluded, is acting in a judicial capacity. It is therefore not, in that context, a public authority within the meaning of the AIE Regulations. Accordingly, I affirm the Court Service's decision.

### **Right of Appeal**

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 is given to the person bringing the appeal.

**Peter Tyndall**

**Commissioner for Environmental Information**

7 April 2016