

**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/15/0009

Date of decision: 7 April 2016

Appellant: Fand Cooney

Public Authority: Commission for Energy Regulation, (CER)

Issue: Whether CER was justified in refusing a request for information on an EirGrid project on the ground that it is not environmental information within the meaning of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that one of the withheld records was outside the scope of the request and the remaining records constitute environmental information. Accordingly, the Commissioner annulled CER's decision and remitted the request to CER to make a fresh decision on the request in accordance with the AIE Regulations.

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 14 November 2014, the appellant submitted an AIE request to CER seeking the following information:

1. A copy of the full business case submitted to CER for transmission reinforcement project number CP0585 (the Laois / Kilkenny reinforcement project) (the project) including any supporting documents for the business case such as:
 - (a) Details of the associated cost / benefit analysis (or other economic analysis as applicable).
 - (b) The objectives / key drivers / reasons upon which the project is based (short, medium and long term).
 - (c) Also, details of any approval of capital expenditure that may have been issued by CER to ESB / EirGrid regarding this project.

The appellant asked for the information to be made available by 21 November 2014.

No decision was notified to the appellant within the one month permitted period, and accordingly a decision refusing the request was deemed to have been made on 13 December 2014.

On 18 December 2014, the appellant sought an internal review of the deemed refusal decision.

No decision was notified to the appellant within the one month permitted period.

Accordingly, the appellant acquired a right of appeal to this Office, which she exercised on 29 January 2015. My staff informed CER of the appeal and asked CER to provide copies of its records of the request and CER's responses.

CER replied, stating that it had not issued a formal decision on the request and providing a log of correspondence with the appellant. CER explained that it had received two requests from the appellant and that, due to a clerical error, the current request was not directed internally to the "Networks team" until 28 November 2014. CER explained that that team then engaged in "attempting to discuss the request" with the appellant "in advance of issuing a decision" and "this was not possible until January 2015". On 5 February 2015, CER asked my Office for "an extension of time to issue a decision, after which the OIC (sic) may consider the matter further". No extension was granted.

CER replied to the appellant on 10 February 2015. It provided a schedule listing 3 records held by it, which it considered to be within the scope of the request. It refused access to each of these records on the basis that they did not contain environmental information within the meaning of the AIE Regulations. CER informed the appellant of a right of appeal, and indicated that any such appeal should be made in writing to CER.

Notwithstanding CER's approach, the appellant had already appealed to my Office, having rightly regarded CER's failure to deliver decisions within the prescribed timescales as having given rise to deemed refusals.

Regrettably, on 25 February 2015 an error was made by my Office. The appeal was mistakenly deemed by my staff to have been made prematurely, and declared invalid. When the error was discovered on 27 March 2015 a new appeal case was opened. A letter confirming acceptance of the new case was sent to CER on 30 March 2015. My staff have apologised to the appellant for this error and I would like to offer my sincere apologies also. Such an error had not previously occurred and steps have been taken to avoid a recurrence.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review the internal review decision of the relevant public authority and to affirm, annul or vary it.

In this case, CER did not give notice of an internal review decision within the permitted period. CER's eventual decision, although necessarily invalid due to being late, set out CER's reason for refusing the request and it is this reason which was considered in this review.

In conducting the review I took account of all arguments advanced by the appellant and by CER. 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).

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);

Article 10(7) provides that where a decision (on an original AIE request) is not notified to the applicant within the relevant period specified in article 7, a decision refusing the request shall be deemed to have been made by the public authority concerned on the date of expiry of such period.

Article 12(4)(a)(ii) provides that an appeal (to OCEI) under this article shall be initiated, where no decision is notified by the public authority (following a request for internal review),

not later than one month from the time when a decision was required to be notified under article 11(3).

Preliminary issue: Has all information within the scope of the request and held by or for CER been provided to my Office?

CER provided the appellant with a schedule listing the records held by or for CER which CER regarded as being within the scope of the request. Those records are:

1. *TSO* Revenue Review Queries Response 8*”, dated 31 March 2010: (*TSO is Transmission System Operator)
2. *CP585 Loughteeog 400/ 100kV Station* Stage 1*, dated 16 April 2008 (*also known as the ‘Laois / Kilkenny reinforcement project’).
3. *GDC Internal Approval Report*: an unsigned and undated report (*GDC is Grid Development & Commercial—a business unit of EirGrid plc).

CER provided my Office with a copy of the schedule and the records. The records contain no information relevant to part (c) of the request.

Record 1 is an EirGrid document which lists a number of projects in a table. This document does not form part of a business case. I therefore find that Record 1 is outside of the scope of the request.

Record 2 is an EirGrid report prepared for submission to the Board of EirGrid for the purpose of seeking capital approval for the project. It includes information which sets out the justification for the project, which is relevant to part (b) of the request.

Record 3 includes cost-benefit analysis for the project, which is relevant to part (a) of the request.

I understand that Records 2 and 3 constitute the information on the project which was submitted to CER in relation to the project. Taken together, I am satisfied that they constitute what could be called “a business case”. It is clear that CER regards this as an accurate description. I noted that none of these documents was addressed to CER. They are copies of internal EirGrid documents which were passed to CER on request. My investigator queried the absence of any document specifically addressed to CER but was assured by CER that this is how the process works. I accept that assurance.

In response to queries posed by my investigator, CER confirmed in writing that it holds no further relevant records.

It is not my function to investigate whether CER ought to hold other records (for example, records relevant to part (c) of the request). Similarly, it is not my function to investigate whether the withheld records ought to include further information. My function is to review the public authority’s decision to refuse access to requested information where such information was held by or for the public authority, in a material form, when the request was made. In the circumstances, I accept CER’s assurance that I have been provided with all of the relevant information.

CER’s position

CER set out its position in a letter to the appellant dated 15 February 2015. CER acknowledged that it holds information within the scope of the request, but denied that it is environmental information.

CER noted that the definition of environmental information contained in the AIE Regulations does not refer to all information relating to energy. In CER's view, the definition "encompasses energy affecting or likely to affect elements of the environment such as air, water, soil, etc". It argued that policies, programmes etc (as set out in paragraph (c) of the definition) are also "linked to energy affecting or likely to affect elements of the environment, rather than including every energy policy, programme or analysis".

CER acknowledged that the meaning of "environmental information" is to be given a broad interpretation, but argued that "too broad an interpretation of this definition would suggest that all of the records of CER could be considered to be 'environmental information', as the majority of CER's records relate directly to energy. This would defeat the purpose of distinguishing environmental information from other types of information".

CER argued that the records at issue "specify the technical need of the power system and the requirement for development of (the project)". It added that those documents "do not explore or relate at all to the impact the development may have on the environment".

CER did not put forward any grounds which could justify refusal to provide access to the information requested if I were to find that it is environmental information within the meaning of the AIE Regulations. However, CER asked me to ensure that "the relevant third parties" are notified and given an opportunity to make submissions.

The Appellant's position

The appellant set out her view as to why the requested information is "environmental information" in a submission to my Office.

In relation to that part of her request which asked for a cost-benefit analysis, she referred to the definition of "environmental information" in the AIE Regulations and argued that "it is obvious that:

- All energy projects which have potential to impact on the environment clearly fall within the definition.
- The construction and operation of the Laois-Kilkenny Reinforcement project, i.e. a large substation on an 18 acre site with capacity for 16 powerlines, designed in part to facilitate the integration of renewable energy into the grid but which also uses Sulphur Hexafluoride (which she described as "the most potent greenhouse gas there is") is clearly an activity that is likely to affect the elements and factors referred to in paragraphs (a) and (b) (of the definition).
- Cost-benefit analysis or other economic analysis and assumptions relating to this project are clearly defined as environmental information under (e) – even if it only contains purely financial information."

The appellant also presented an argument showing why she believed there must be Cost Benefit Analysis for the Laois-Kilkenny reinforcement project, which (she said) is valued at €80 million. She pointed out that the Public Spending Code (produced by the Department of Public Expenditure and Reform) requires that projects costing more than €20 million require Cost Benefit Analysis. She cited page 18 of guidance document S431/65/07 (Revised arrangements regarding Department of Finance's Guidelines for the appraisal and Management of Capital Expenditure Proposals in the Public Sector (2005) and Proposed Working Rules for Cost Benefit Analysis (1999)) as saying, "future project appraisals should take explicit account of (CO₂) emissions and include a value to reflect the costs associated with increased emissions (and benefits associated with reduced emissions) arising as a

consequence of the proposed investment”. Accordingly, she argued, “it is abundantly clear that a Cost Benefit Analysis as defined by the Irish State was required for this project and shall contain specific environmental information in addition to financial information”. She argued that Cost Benefit Analysis is a key decision-making tool which includes analysis of societal, environmental and financial information, without which it is difficult to see how CER could fulfil its legal environmental remit and its remit in relation to public expenditure.

Finally, the appellant argued that while it might not suit CER to have to consider that much of the information which it holds is environmental information, that is not a ground for refusal to make such information available. She added that “if environmental information which should be contained in the Cost Benefit Analysis (in addition to the financial information defined in the AIE Regulations) is not present, then it is clearly in the public interest that this information would be released”.

Analysis and Findings

I must determine if Records 2 and 3 contain environmental information. It is well established that for information to qualify as environmental information it must fall into one of the six categories listed in the definition set out in article 3(1) of the AIE Regulations. I examined the contents of the records and considered them in light of the definition.

I find that the project, to construct and operate a large electrical substation, is a measure likely to affect elements of the environment. Accordingly, information “on” the measure, within the meaning of the AIE legislation as properly interpreted, would be environmental information. Also, information on any cost-benefit or other economic analyses or assumptions used within the framework of the project would be environmental information. On the other hand, I find that, although the records show that protection of the environment was an important consideration in the selection of a preferred option for the project, and although the selected option was in fact identified as the option with the least environmental impact, the project could not be described as “a measure designed to protect elements of the environment”.

I regard the contents of Records 2 and 3 as containing a mixture of information on the measure (by which I mean information which is integral to the project, not merely related to it in some way), and information on cost-benefit and other economic analyses and assumptions used within the framework of the project. In relation to section 4 of Record 3, which sets out the “statutory and strategic planning context”, I note that much of the information in this section sets out what could fairly be described as “economic assumptions” about future energy needs.

In conclusion, I find that Records 2 and 3 constitute environmental information within the meaning of paragraphs (c) and (e) of the definition.

As previously mentioned, CER did not present any grounds which could justify refusal if I were to find that the requested information is environmental information. However, CER asked me to ensure that the relevant third parties are notified and given an opportunity to make submissions. I do not propose to adopt that approach. I take the view that it is for CER, as the public authority to which the request was made, to consider the interests of third parties in the first instance, where it has such concerns.

Accordingly, as set out in my decision in Case CEI/12/0004 (Gavin Sheridan and Dublin City Council), I consider that the correct approach in these circumstances is for me to remit the case for further consideration by CER. As I said in that decision, “where the request may adversely affect the interests of third parties, it seems to me that the principles of

Constitutional and natural justice would require that the affected third parties be given an opportunity to comment before any proposed release is directed”. I added in that decision that “the boundaries of the environmental information definition are unclear. I do not believe that public authorities can reasonably be expected to devote significant resources to processing requests under AIE where they have valid concerns that the requested information does not fall within the remit of the AIE Regulations”. In my view, the time has now come for CER to devote further resources to this case.

Comment on the handling of this case

I have already acknowledged and apologised for shortcomings in my Office concerning the handling of this case. There were shortcomings in relation to its handling by CER also. Some of the shortcomings arose when CER became confused between different AIE requests from the same appellant. Public authorities need to exercise care to avoid this happening. I acknowledge that CER made attempts to discuss the request with the appellant by telephone. Unfortunately the appellant was not always available to take up such offers. In any case, it is essential for public authorities to strictly observe the timeline-provisions in the AIE Regulations and that did not happen in this case.

Decision

In accordance with article 12(5) of the AIE Regulations, I have reviewed CER’s decision. I find that Record 1 is outside of the scope of the request and Records 2 and 3 constitute environmental information. Accordingly, I find that refusal of the request was not justified by the reason given. I therefore annul CER’s decision.

In light of this decision, CER should now process the request for Records 2 and 3 in accordance with the AIE Regulations.

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

7 April 2016