

Appeal to the Commissioner for Environmental Information
Case CEI/13/0010

European Communities (Access to Information on the Environment) (AIE) Regulations 2007 to 2014

Appellant: Mr. Lar McKenna

Public Authority: ESB Networks (ESB)

Issue: Whether ESB was justified in refusing the appellant's request for access to certain categories of records relating to "thermal and hydro-electric power generation schemes and the effect of those schemes on land"

Summary of Commissioner's Decision: In accordance with Article 12(5) of the AIE Regulations, the Commissioner reviewed the decision of ESB and found that it was justified in refusing the request under Article 9(2)(a) of the Regulations. He affirmed the decision of ESB accordingly.

Background

In a request dated 22 April 2013, the appellant sought access under the AIE Regulations to records relating to "thermal and hydro-electric power generation schemes and the effect of those schemes on land". In particular, in reference to an article prepared by Amicus Technology Limited, the appellant sought access to the following categories of records:

- a copy of the records within the ESB 'master database' of property;
- a copy of the records within the ESB 'Excel spreadsheet' which contains all of the ancillary information for the property (land) held in the 'master database';
- a copy of the records within the ESB 'Access database';
- copies of the property related records and associated maps including copies of the rights of way and wayleaves.

In a belated decision dated 21 June 2013, ESB refused the request on the basis that the requested information was not environmental information within the meaning of Article 3(1) of the Regulations. Alternatively, ESB claimed that the request would be subject to refusal under Articles 9(2)(a) on the basis that it was manifestly unreasonable having regard to the volume and range of information sought. On 28 June 2013, the appellant applied for an internal review of ESB's decision, arguing that the requested information fell within subparagraph (c) of the environmental information and that it should be readily available for dissemination. In a decision dated 13 August 2013, ESB affirmed its original decision. On 11 September 2013, the appellant appealed to this Office against ESB's decision. Regrettably, however, a long delay then arose in dealing with the appeal, which was largely due to a shortage of resources that has now been addressed.

I have now completed my review under Article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by ESB and the appellant. I have also had regard to: the Guidance provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations; Directive 2003/4/EC, upon which the AIE Regulations are based; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide] relating to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is more commonly known as the Aarhus Convention.

Scope of Review

The question before me is whether ESB was justified in refusing the appellant's request for the specified records relating to "thermal and hydro-electric power generation schemes and the effect of those schemes on land". In a submission dated 16 October 2015, the appellant has sought to modify his request by extending it beyond the database referred to in his request to include information on flood compensation agreements and the details of thermal and electric power stations. However, my review on appeal is confined to the terms of the original request.

Definition of "environmental information"

The AIE Regulations are based on Directive 2003/4/EC. In line with Article 2(1) of the Directive, Article 3(1) of the AIE Regulations defines "environmental information" as

"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 . . . 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 ... conditions of human life, cultural sites and built structures ...affected by the state of the elements of the environment...or through those elements, by any of the matters referred to in paragraphs (b) and (c)".

The Directive was adopted to give effect to the first pillar of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is more commonly known as the "Aarhus Convention". The Directive replaced Council Directive 90/313/EEC, the previous AIE directive, in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making.

ESB's submissions

Not environmental information

In its submissions to this Office, ESB maintains its position that the appellant's request is not for environmental information within the meaning of Article 3(1) of the Regulations. It explains that the appellant's request, which is based on the article by Amicus Technology, relates to an historical mapping project involving the digitisation of maps. The digitisation project was carried out to create a database of certain land in which ESB has an interest, i.e. land associated with ESB's hydro-electric power schemes, but ESB emphasises that the project was a simple digitisation/scanning exercise of existing maps which also involved the

compilation of a related Excel spreadsheet and an Access database for administrative purposes. Referring to the digitised maps, the related Excel spreadsheet and the Access database as "the Database", ESB states that the exercise of creating the Database did not impact on the environment in any way. ESB also says that the Database is not used for any operational reason connected with the generation of electricity, the operation of dams or management of fisheries that might potentially impact on the environment. "It is simply a property management tool i.e. it is a record of certain land in which ESB has an interest."

More specifically, ESB contends that a map, digital or otherwise, is not, in and of itself, environmental information, because it simply provides details of a "topographical feature that exists in a particular geographical location (e.g., a river or road)". "The map does not provide details of the state of that feature, such as whether a river is polluted or has changed level or course over time". In support of its position, ESB refers to the guidance note of the UK Information Commissioner's Office (the UKICO) entitled "What is environmental information", which states:

"The state of the elements of the environment covers quality and quantity. It will include physical, biological and chemical characteristics. It is not limited to current conditions, but includes past and predicted future conditions."

Thus, ESB considers that the "key question is whether the information relates to the conditions of the items that make up the environment".

In relation to the ancillary information requested, ESB maintains that it is necessary to consider why such information is held in light of the six categories of information set out in Article 3(1) of the definition. ESB says that the ancillary information which is stored in the Excel spreadsheet and the Access database consists solely of:

- (a) Townland name;
- (b) County name;
- (c) The ESB scheme that the property is associated with;
- (d) ESB's interest in the land;
- (e) The source of the mapping;
- (f) The map scale; and
- (g) A reference number for the historical OSi map detailing where the original is stored within the ESB archive.

It is ESB's position that this information does not relate to the state of any elements of the environment or to factors affecting those elements. ESB also highlights the fact that the information is held "for administrative purposes". According to ESB, "the information is kept . . . for general business purposes, rather than on the basis that it has any connection with the environmental impact of any of the schemes to which it relates."

Regarding Category 4 of the request, ESB takes the view that the appellant is seeking information in relation to rights of way or wayleaves associated with hydro-electric schemes and recorded in the Database. ESB states: "Any such rights of way or wayleaves would have been negotiated on a confidential basis. The bare existence of a right of way or wayleave does not, of itself, constitute environmental information." ESB also regards the Supreme Court's recent obiter remarks in the case of *National Asset Management Agency v*

Commissioner for Environmental Information [2015] IESC 51 as noteworthy, because they suggest that property-related information requested in that case did not fall within the "common understanding of information relating to the environment".

Manifestly unreasonable

Alternatively, and without prejudice to its position that the requested information is not environmental information, ESB maintains that the appellant's request is manifestly unreasonable having regard to the volume or range of information sought (Article 9(2)(a) refers). ESB describes the request as voluminous, involving as it does over 800 maps, plus the related entries in the Excel spreadsheet and Access database in respect of each of those maps. It describes Category 4 of the request as potentially encompassing "an incredibly broad 'catch-all' request" that "would be far beyond the scope of the digitisation project and retrieval of the same would be a monumental exercise".

Regardless of whether Category 4 is confined to the information related to the digitisation project or not, ESB notes that the appellant's overall request seeks a broad range of information, including a Master database, a related Excel Spreadsheet, an Access database and other property related records and associated maps, to include copies of rights of way and wayleaves. ESB also notes that the information requested spans a period of 80 to 90 years.

Moreover, according to ESB, the requested rights of way and wayleave information contain personal information. ESB maintains that disclosure of such information would adversely affect the confidentiality of personal information of third parties who have not consented to the disclosure of the information and that Article 8(a)(i) of the Regulations therefore applies. Given the resources that would be involved in processing the request, whether seeking the consent of the third parties involved or redacting the relevant information, ESB contends that processing the request would be onerous and would impose an unreasonable burden on its staff resources. Referring to the UKICO guidance on the matter, ESB maintains that "the balance of the public interest lies in favour of not granting the request for access to this information on the basis that the impact of dealing with the request, which relates to certain information generated over the course of 80 or 90 years, would expose ESB to a disproportionate burden in terms of diverting staff to deal with the request, and that dealing with this request would prevent ESB from delivering its essential services to the Irish public including the delivery of important national infrastructure and maintaining continuity of supply".

In addition, ESB refers to a second request made by the appellant on the same day [which has since been withdrawn] and a further lengthy request on 1 July 2014. ESB therefore suggests, in reference to section 15(1)(g) of the Freedom of Information (FOI) Act 2014, that it is appropriate to have regard to whether the request in this case forms part of a pattern of manifestly unreasonable requests. ESB also refers to other correspondence that the appellant has been engaged in over the years regarding various matters, which it says "has taken up considerable time and resources", as well as other legal proceedings.

Other refusal grounds

ESB also argues that other refusal grounds are relevant to the request. In particular, ESB says that the background layer to the maps is used under a licence provided by Ordnance Survey Ireland (OSi) and that the licence prohibits ESB from, amongst other things, giving away OSi data. ESB says that it is responsible for holding the OSi data in a manner secure from

unauthorised use or access and that the licence contains a confidentiality clause. Accordingly, ESB maintains that it must withhold access to the digitised maps under Article 9(1)(d) of the Regulations on the basis that the disclosure of the information requested would adversely affect intellectual property rights.

As referenced above, ESB also contends that Article 8(a)(i) applies in respect of the requested rights of way and wayleave information. As the rights of way or wayleaves were negotiated on a confidential basis, ESB considers that the information is also protected under Articles 8(a)(iv) and 9(1)(c) of the Regulations. ESB also considers that certain information falling within Category 4 of the request qualifies as internal communications within the meaning of Article 9(2)(d) of the Regulations. In addition, ESB describes the commercial character of its business and argues that disclosure of the requested would adversely affect the commercial or industrial confidentiality of both ESB and OSi such that Article 9(1)(c) of the Regulations applies. Throughout its submissions, ESB argues that any public interest served by disclosure is far outweighed by the public interest served by refusal. It notes, however, that details of land owned by ESB may be acquired from the Property Registration Authority (PRA) and therefore regards Article 7(3)(a)(i) as also relevant to the request.

The appellant's submissions

The appellant was notified of the relevant issues arising in ESB's submissions and given an opportunity to respond. In his submissions, he argues that the maps in question, which describe land used for or in connection with hydro-electric power schemes, fall squarely within the definition of environmental information. More specifically, he states that the maps contain information in written/visual/electronic form on the state of land, water, landscape and natural sites arising directly from ESB activities, i.e. the development of hydro-electric power stations. He emphasises that he is not seeking information on the environmental impact of creating "the Database", but rather the information within the Database itself, i.e. the maps and associated information relating to ESB hydro-electric schemes. In relation to the topography depicted by a map, whether digital or otherwise, he states:

"The topographical features of land or the location of a river or a road shown on a map created before ESB developed any particular hydro-electric scheme will likely be very different from those details shown on a map created after the scheme has been completed. The differences between the before and after maps might, for example, be used to calculate the area and levels of land flooded to facilitate the hydro-electric scheme or the volume of water held by the ESB in a particular reservoir or lake serving the scheme. Those differences describe the environmental impacts of the particular hydro-electric scheme which caused those changes to the environment to occur."

He argues that at least some of the ancillary information is required to properly understand the maps concerned and is therefore also environmental information. He notes that wayleaves and rights of way are necessary for the flow of electricity generated by a hydro-electric plant. He also notes that wayleave notices and agreements contain specific information relating to a transmission line, such as the voltage and height of the line. He

therefore argues that the information requested regarding wayleaves and rights of way is likewise environmental information.

In response to ESB's claim regarding the personal information at issue, the appellant states that the only personal information included in a wayleave notice and/or wayleave agreement is the name and address of the person on whom the notice was served. He contends that "it would be a simple matter to redact the name of the person from the wayleave notice/wayleave agreement before it is released". While he does not deny that at least some of the wayleave agreements may have been negotiated on a confidential basis, he says that the electricity wayleave process is usually one of compulsory acquisition rather than negotiated agreement. Alternatively, he suggests that, like personal information, any confidential or sensitive information can be redacted before release. He does not deny that land owned by ESB may be accessible through the PRA, but he says that wayleave notices and/or agreements for ESB electricity lines are not.

Regarding the issue of an OSI copyright, the appellant states the following:

"I have contacted the Ordnance Survey Office and they have confirmed to me that the OSI licence held by ESB can be extended to allow the release of OSI data to a third party such as myself. The OSI has provided me with a form which must be completed by ESB before the data can be released. I have attached a copy of that form and I invite your office or the ESB to contact [a named staff member] in the Copyright section of the Ordnance Survey Ireland Dublin office to confirm that this is acceptable."

The appellant disputes that his request is manifestly unreasonable, as the 800 maps referred to by ESB have been digitised and could be quickly and easily copied onto a high capacity hard drive or similar device. In relation to Category 4 of his request, the appellant states that he is willing to reduce the extent and scope of his request in order to bring the volume of information sought to "a more manageable level" and says that he would be happy to liaise with this Office for this purpose.

Analysis and Findings

Environmental Information

In Case C-204/09, *Flachglas Torgau GmbH v. Federal Republic of Germany* (14 Feb. 2012), available at www.bailii.org, the Court of Justice of the European Union (CJEU), otherwise known as the European Court of Justice (ECJ), clarified that "the right of access guaranteed by Directive 2003/4 only applies to the extent that the information requested satisfies the requirements for public access laid down by that directive, which requires inter alia that the information is 'environmental information' within the meaning of Article 2(1) of the directive". In other words, the AIE regime only applies with respect to "environmental information" as that term is defined and therefore there are limits to the scope of the AIE regime. My approach to determining the scope of the environmental information definition is set out in Case CEI/13/0006, Mr. Stephen Minch and Department of Communications, Energy and Natural Resources (18 Dec. 2014), and Case CEI/12/0004, Mr. Gavin Sheridan and Dublin City Council (20 Dec. 2013), which in turn generally follow the approach of my

predecessor, Ms. Emily O'Reilly, as set out in Case CEI/12/0008, Ms. Attracta Uí Bhroin and Department of Arts, Heritage and the Gaeltacht (13 March 2013); and Mr. Gavin Sheridan and Central Bank of Ireland (26 March 2012), all available at www.ocei.gov.ie. In essence, I have adopted a "remoteness" test in determining whether requested information meets the definition of "environmental information" under Article 3(1) of the AIE Regulations. Accordingly, following the guidance provided by the CJEU in Case-316/01, *Glawischnig v. Bundesminister für soziale Sicherheit und Generationen* (12 June 2003), available at www.bailii.org, I take the view that, in order for information to qualify as "environmental information" for the purposes of the Regulations, it is necessary for the information to fall within one of the six categories set out in the definition in Article 3(1). It is not sufficient that the requested information simply "relates to" one of the six categories, however distantly.

In this case, it seems to me that ESB has taken an unduly narrow approach to the environmental information definition by focusing on the digitisation project itself rather than the nature of the information contained in the resulting Database. It has referred to the UK guidance on the "state of the elements of the environment" without acknowledging that the guidance also notes that environmental information may be found in maps and digital records. In my view, it is not the purpose of the digitisation project that is determinative; rather, it is whether the contents of the Database provide any information that falls within one of the six categories of the environmental information definition. Moreover, as ESB is in the electricity business, it is to be expected that the information it holds for "general business purposes" may overlap with information of an environmental nature.

Taking a simplistic view of the matter, it seems to me that a digitised or otherwise detailed map is likely to provide information on land and landscape, i.e. the physical characteristics of the geographical location featured. Indeed, I would regard topography as being synonymous with landscape. For instance, as ESB itself acknowledges, one can see from a map whether the location includes a river or a road. The map may say little or nothing about the quality of the characteristics featured, but I do not believe that this is required in order for a map to qualify as environmental information under Article 3(1)(a) of the definition. If the information captured by the other categories of the request also include information on the physical characteristics of the land or landscape concerned, it may likewise qualify as environmental information.

Taking a different view of the matter, I note that in my recent decision in Case CEI/13/0008, *Mr. Oliver Cassidy and Coillte Teoranta* (1 Oct. 2015), I found that maps depicting lands that had been agreed for use in relation to wind energy projects contained environmental information within the meaning of Article 3(1)(c) of the Regulations. In this case, the Database provides information on the property and property interests acquired by ESB over the last 80 to 90 years for the purposes of its hydro-electric power schemes. The ancillary information includes the scheme that the property concerned is associated with. Accordingly, the information concerned would reveal the geographical location of the lands used for ESB's hydro-electric power schemes. Therefore, like the maps at issue in Case CEI/13/0008, the information requested in this case may be regarded as providing information on measures (the schemes) and activities (property acquisition for the purposes of the schemes) affecting elements of the environment, such as water, soil, land, landscape and natural sites.

This is not to say that all of the details included in the request would necessarily qualify as environmental information. Having regard to the guidance provided by the CJEU in Case-316/01 [*Glawischnig*], it may well be that the connection between certain items of the

requested information and an environmental element or factor is indeed too minimal. Given the nature of the request, it would not be possible to determine the full scope of the environmental information concerned without examining the requested information in full.

Article 9(2)(a)

However, Article 9(2)(a) of the Regulations allows a public authority to refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought. I accept ESB's submissions that the request in this case is for a voluminous amount of information that could not be processed without imposing an unreasonable burden on staff resources. The article upon which the request is based reflects the large scale of information involved in the "major mapping project" discussed. The request involves not only maps dating back over 80 years, but also all ancillary information for the property concerned as well as the property-related records covered by Category 4 of the request. All of these items of information would, in turn, need to be examined in detail to determine, firstly, whether the information qualifies as environmental information within the meaning of the Regulations, and secondly, whether the qualifying environmental information involves the intellectual or personal property rights of third parties or otherwise falls within the ambit of one of the refusal grounds provided for under the Regulations. Thus, processing the request would not be a simple matter of copying the information to a digital storage device, as the appellant has suggested. Indeed, the appellant, in his response to the notification of ESB's submissions, has confirmed that ESB holds an OSi licence for data contained in the Database. As the release of information under AIE is without restrictions, it is not open to either ESB or this Office to seek an extension of the licence for the purpose of granting the appellant's AIE request. Moreover, the appellant does not dispute that Category 4 of his request includes personal information and perhaps other confidential or sensitive information that would need to be considered for redaction before release.

Given the sheer scale of the request, I accept that it is manifestly unreasonable within the meaning of Article 9(2)(a) of the Regulations. The AIE Regulations do not expressly require public authorities to offer assistance in modifying manifestly unreasonable requests; the unreasonable nature of such requests is clear or obvious and thus the applicant concerned may be regarded as having known or ought to have known that the request was unreasonable. This is not to say that, in the normal course, a public authority would not be expected to offer to assist an applicant in making a new, more manageable request. The Minister's Guidance states that public authorities "are requested . . . to assist the applicant (to reformulate a request, for example) as appropriate". In this case, however, the request was based on an article which itself referred to the large scale of information involved, and it has been brought to the appellant's attention that issues of intellectual property rights personal information, and confidentiality are involved. The appellant has also suggested that, notwithstanding the large volume of his current request, it does not in fact cover all of the information he seeks. In the circumstances, I would not consider it to be an appropriate use of the limited resources of this Office to liaise with the parties in an effort to bring the volume of the appellant's down to "a more manageable level" in the manner he has suggested.

As ESB has noted, details of its property ownership may be acquired from the Property Registration Authority. In the circumstances, I do not believe that the public interest served by disclosure outweighs the interests served by refusal. Accordingly, I find that ESB was justified in refusing the appellant's request on the basis that Article 9(2)(a) applies. It is therefore not necessary to address ESB's arguments regarding the question of a pattern of

manifestly unreasonable requests or to determine whether any other grounds for refusal may apply.

Decision

In accordance with Article 12(5) of the AIE Regulations, I have reviewed the decision of ESB in this case. I find that ESB's decision to refuse the appellant's request was justified under Article 9(2)(a) of the Regulations. I affirm ESB's decision accordingly.

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