

Appeal to the Commissioner for Environmental Information
Case CEI/13/0013

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

Appellant: Mr Gavin Sheridan

Public Authority: An Garda Síochána

Issue: Whether An Garda Síochána was justified in refusing access to a weekly breakdown of the hours of helicopter and other aircraft usage for the year 2012, any contract for fuel provision for the Garda fleet, and the electricity bill for Garda Headquarters at Harcourt Street, Dublin 2, for the month of December 2012 on the ground that the information concerned is not environmental information within the meaning of the AIE Regulations

Summary of Commissioner's Decision: In accordance with Article 12(5) of the AIE Regulations, the Commissioner reviewed the decision of An Garda Síochána and found that it was justified in refusing access to the information concerned on the ground that it is not environmental information within the meaning of the Regulations. He affirmed the decision of An Garda Síochána accordingly.

Background

In a request to An Garda Síochána dated 4 May 2013, the appellant sought access under the AIE Regulations to the following information:

The total number of hours flown by each helicopter and aircraft owned or controlled by An Garda Síochána, broken down by week, for the year 2012;

Any contract between An Garda Síochána and a fuel provider for the provision of petrol/diesel to members of An Garda Síochána (in reference to arrangements entered into with a given fuel provider to allow for the purchase of fuel by ordinary members of the force);

The electricity bill for Garda Headquarters at Harcourt Street, Dublin 2, for the month of December 2012.

At no point in the decision making or review process has An Garda Síochána disputed that it is a public authority for the purposes of the AIE Regulations. However, in its original response to the appellant's request, dated 4 June 2013, An Garda Síochána dealt with the matter through its Press Office by addressing the requested items of information in an informal manner and including links to websites where information on public procurement and the arrangements between individual Garda members and the Garda Credit Union could be found. In relation to helicopter or aircraft usage, however, the response stated that "An Garda Síochána do not release this level of detail in respect of any aircraft within An Garda Síochána, as to do so could compromise national security and could compromise Garda operations".

The appellant applied for internal review on 5 June 2013, noting the lack of any specific reference to the provisions of the AIE Regulations in the original decision. However, he clarified in relation to item 2 of this request that he sought "any contract between An Garda Síochána and any provider of fuel for the Garda fleet nationally". The appellant subsequently appealed to my Office on the basis of An Garda Síochána's deemed refusal of his internal review request.

Regrettably, a long delay arose in dealing with the appeal, which was largely due to a shortage of resources that has now been addressed. In addition, in light of certain comments made by the Supreme Court in the case of *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 [hereinafter referred to as the *NAMA case*], I considered it appropriate to take legal advice on the scope of the environmental information definition following the submissions made by the appellant in response to the views expressed by an Investigator in this Office in a message dated 6 July 2015.

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 the appellant and An Garda Síochána and to the legal advice I received. 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. In addition, I have examined a sample record of Garda helicopter flying hours for 2012, broken down by month, which was compiled for the purposes of this review from invoices received from the relevant contractor. I have also examined a copy of the electricity bill for Garda Headquarters at Harcourt Street, Dublin 2, for the month of December 2012. (No records relating to item 2 of the request were forwarded to my Office, because it is the position of An Garda Síochána, as explained below, that no such records exist.)

Scope of Review

The question before me is whether An Garda Síochána was justified in effectively refusing the appellant's request for (1) a weekly breakdown of its helicopter and other aircraft usage for the year 2012, (2) any contract with a fuel provider for the Garda fleet nationally, and (3) the electricity bill for Garda Headquarters at Harcourt Street for December 2012.

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.

Analysis and Findings

Issues initially raised

In its initial submission dated 24 December 2013, An Garda Síochána raised the question of whether the applicant's request was for "environmental information" within the meaning of the AIE Regulations. It suggested that at least some of the information would be more appropriately sought under the Freedom of Information (FOI) Act 1997 to 2003, but as An Garda Síochána was not previously prescribed as a public body for the purposes of FOI, the information was regarded as protected by law. An Garda Síochána therefore argued that the request was subject to mandatory refusal under Article 8(a)(iv) on the basis that disclosure would adversely affect the confidentiality of proceedings where such confidentiality is otherwise protected by law. Alternatively, and without prejudice to its claim for refusal under Article 8(a)(iv), An Garda Síochána argued that Article 9(1)(a) (public security) applied to the details requested at item 1 of the request (but it pointed out that its Annual Report provides information about the total number of hours of helicopter usage). In relation to items 2 and 3 of the request, An Garda Síochána made varying claims for refusal under Article 9(1)(c) (commercial or industrial confidentiality) and Article 7(5) (information not held).

In response to the notification of An Garda Síochána's position on the matter, the appellant argued that An Garda Síochána had failed to demonstrate that the information was not environmental information or that any refusal grounds applied. He therefore maintained that the requested information must be released in full.

Scope of the AIE regime

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 Case CEI/11/0001, Mr. Gavin Sheridan and Central Bank of Ireland (26 March 2012), available at www.ocei.gov.ie, my predecessor, Ms. Emily O'Reilly, accepted with some reservation that official travel by car is an activity within the ambit of paragraph (c) of the definition. However, she questioned whether the definition of environmental information was intended to encompass the activities of individual staff members of public authorities as compared to higher level measures and activities such as policies, legislation, plans, programmes, and environmental agreements, i.e. the examples given in paragraph (c).

Subsequently, in Case CEI/12/0004, I noted that I generally agreed with my predecessor's approach to the environmental information definition, but I did not revisit the question of whether official travel by car or otherwise is an activity within the meaning of paragraph (c) of the definition. I observed, however, that while the definition is broad, the examples it provides are meant to illustrate the types of information that it encompasses. The definition itself does not describe what is meant by "activities", as opposed to "measures", but the Aarhus Guide refers to "decisions on specific activities, such as permits, licences, permissions" The Aarhus Guide further states: "The test is whether the activities or measures may have an effect on the environment." I also noted that the European Commission itself has recognised [in its "Report from the Commission to the Council and the European Parliament on the experience gained in the application of Directive 2003/4/EC on public access to environmental information", dated 17 December 2012] that the access rights that exist for environmental information, described as 'information in any form on the state of the environment or on the state of human health and safety', are distinguishable from the right of access to 'general administrative information'.

The purpose of the Directive

In its recent judgment in the *NAMA* case, the Supreme Court explained that, in interpreting the AIE Regulations, it is not sufficient to have regard to national law and, in particular, the normal principles of statutory interpretation in Irish law. The Regulations must be understood as implementing the provisions of Directive 2003/4/EC (and indirectly the Aarhus Convention) and, as a matter of constitutional law, ought not to go further (but not fall short of) the terms of the Directive. Accordingly, the Court found that, in order to understand the Regulations, it is necessary to understand exactly what the Directive does and means, which may also mean interpreting the provisions of the Convention. In this context, it is relevant to note that, in Ireland, access to information held by public bodies, including information about the functions and activities of public bodies, is generally made available through the FOI legislation; it is not the purpose of AIE to provide a method of avoiding the requirements or restrictions of FOI unless the request for information is in keeping with the intention of the Directive.

The Recitals to Directive 2003/4/EC reflect that the decision was taken to replace the previous AIE Directive (90/313/EEC) in order to address the problems identified in the report produced by the Commission under Article 8 of Directive 90/313/EEC. It was also intended to ensure that European law was consistent with the Aarhus Convention. The Commission's

report, entitled “Report from the Commission to the Council and the European Parliament on the experience gained in the application of Directive 90/313/EEC of 7 June 1990, on freedom of access to information on the environment” highlighted the problem that in some Member States a strict interpretation of the definition of “information relating to the environment” had resulted in the refusal of requests for information on such matters as the public health effects of the state of the environment, radiation or nuclear energy, and on financial or needs analyses underpinning environmental projects. Therefore, as specified in Recital 10 to Directive 2003/4/EC, the definition was "clarified so as to encompass information in any form on the state of the environment, on factors, measures or activities affecting or likely to affect the environment or designed to protect it, on cost-benefit and economic analyses used within the framework of such measures or activities and also information on the state of human health and safety, including the contamination of the food chain, conditions of human life, cultural sites and built structures in as much as they are, or may be, affected by any of those matters". Thus, the purpose of the new Directive in relation to the environmental information definition was to clarify the definition by extending the categories of information concerned in order to ensure that it encompassed information on such matters as the public health effects of the state of the environment, radiation or nuclear energy, and on financial or needs analyses underpinning environmental projects.

In the circumstances, the Investigator assigned to the case questioned whether the term "activities", as used in Article 3(1)(c) of the AIE Regulations, could be given its ordinary (or literal) meaning in a manner that would extend the definition to include the regular business or operational activities of a public authority such as An Garda Síochána. In a submission dated 21 July 2015, however, the appellant argued through his solicitor that the Investigator was taking an unduly narrow view of the environmental information definition. He argued that even under the old Directive, the definition was understood to be broad, and in his view, the word "activities" "clearly envisions an individual act with an environmental impact, such as helicopter flight". He stated that the list of examples given in the definition "is not in any way a list that limits the type of activities that are covered by the definition", provided that the activities or measures concerned have an effect on the environment.

Case-316/01 [*Glawischnig*] concerned a request for information relating to administrative measures for checking products manufactured from genetically modified soya and maize. In finding that the requested information did not qualify as environmental information, the Court explained:

"The Community legislature's intention was to make the concept of 'information relating to the environment' defined in Article 2(a) of Directive 90/313 a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities (see *Mecklenburg*, paragraphs 19 and 20).

Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision."

This aspect of the *Glawischnig* judgment was followed by Advocate General Kokott in relation to the 2003 Directive in Case C-266/09, *Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden*. In her opinion dated 23 September 2010, she stated:

"The Court has held, even with regard to the old Environmental Information Directive, that the legislature's intention was to make the concept of 'information relating to the environment' a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities. The new Environmental Information Directive contains a definition which is wider and more detailed. Neither the old nor the new Environmental Information Directive is intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with an environmental factor. To be covered by the right of access, such information must fall within one or more of the categories set out in the directive. It must therefore be examined whether the contested information can be classified in one of those categories."

She repeated this language in her opinion dated 14 October 2010 in Case C-524/09, *Ville de Lyon*, in which she summarily dismissed the argument that data relating to greenhouse gas emission allowance trading qualifies as environmental information under paragraph (c) (as opposed to paragraph (b)) on the basis that, while the "emission allowance market" (to which the transaction/trading data relates) is "part of a system which as a whole serves climate protection, . . . to what extent the market contributes to achieving that aim cannot be seen from the data".

I agree with the appellant that the environmental information definition is broad, and having taken legal advice, I find no reason to depart from my predecessor's finding that the word "activities" may connote acts such as official travel. However, I am advised in light of the *Glawischnig* judgment that the Directive did not intend for information with only a minimal connection to an environmental element or factor to be captured; thus, information about travel and other such activities would not fall within the definition where the connection with an effect on the environment is minimal or remote.

The appellant's request

In this case, I accept that helicopter and other aircraft usage by An Garda Síochána is an activity for the purposes of paragraph (c) of the definition. However, I find that the connection between the requested information and any impact on the environment from air travel is too remote, and subject to too many variables, to qualify as environmental information. For instance, I note that the amount of fuel used and emissions resulting from aircraft usage depends upon such factors as the weight of the equipment on board, the altitude and speed at which it is flown, the flight mode, wind streams, and air temperature. Thus, the weekly number of hours flown by an aircraft can change without there being any meaningful change in factors such as the energy expended or emissions released into the environment. The number of hours flown also does not, of itself, reveal how much noise the aircraft made. In the circumstances, I consider that the weekly number of hours flown by each aircraft does not provide sufficient information about how aircraft usage affects the environment in order to fall within the scope of the definition.

I should point out that according to An Garda Síochána, records of weekly hours flown by each aircraft are not actually maintained and are therefore not held. It has explained that the Garda Air Support Unit, which operates the aircraft, utilise a flight management database to record mission deployments, which in turn generates a rolling total of aircraft hours flown. For the purpose of my review, monthly totals from 2012 for the helicopters used were provided to my Office based on the invoices received from the maintenance contractor. An Garda Síochána has also explained why it considers that the release of the specific details of the flying hours would adversely affect national security operations directed at drug trafficking, organised criminal gangs and terrorist organisations and why it therefore considers that Article 9(1)(a) of the Regulations would apply. I do not consider it necessary to make any findings on these claims, however, as I find that the information is not within the remit of AIE in the first instance.

In relation to item 2 of the appellant's request, I find that the connection between a contract for fuel provision and the environment is too minimal where the contract does not provide meaningful information on such matters as the amount of fuel used by the public authority. In his submission dated 21 July 2015, the appellant referred to the report by the Aarhus Convention Compliance Committee in a case referred to as Communication ACCC/C/2007/21 in arguing that the provisions of a financing agreement must be examined in determining whether it contains environmental information. The information requested in that case, however, concerned a finance contract for the construction of a thermo-power plant. The Committee stated: "It has to be noted in the context that the documents requested are in general not environmental information and only some parts of the documents . . . relate to the environment." As an example of when a financing agreement "may sometimes" amount to a measure affecting or likely to affect the elements of the environment, the Committee referred to a financing agreement dealing with "specific measures concerning the

environment, such as the protection of a natural site". In the circumstances, the Committee was unwilling to state as a general rule whether provisions of a financing agreement are to be regarded as environmental information or not, but rather advised that the matter must be "determined on a case-by-case basis". In this case, the request is simply for any contract for fuel provision, which is very distinguishable from a contract to finance a major construction project such as a thermo-power plant. In any event, however, An Garda Síochána has explained that it does not directly contract for its fuel provision. The contract for fuel provision is provided through the National Procurement Service (NPS) of the Office of Government Procurement and is not specific to An Garda Síochána. Thus, while it seems that the information requested at item 2 does not in fact exist, it also follows that the (NPS) contract that does exist would not provide information on the actual fuel usage by An Garda Síochána or its members.

Regarding item 3 of the appellant's request, I likewise find that the connection between a monthly electricity bill for a particular set of premises of a public authority and an environmental impact is too minimal for the requested information to fall within the ambit of the environmental information definition. Such a record for a body such as An Garda Síochána simply says too little about energy usage and its effect on the elements of the environment to be captured by the definition. However, An Garda Síochána has agreed to provide administrative access to the monthly bill outside of AIE, subject to redaction of the monetary billing information.

Decision

In accordance with Article 12(5) of the AIE Regulations, I have reviewed the decision of An Garda Síochána in this case. I find that An Garda Síochána was justified in refusing the appellant's request on the ground that the information concerned is not "environmental information" within the meaning of the Regulations. I affirm An Garda Síochána'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
11 December 2015