

Appeal to the Commissioner for Environmental Information

Case CEI/13/0005

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

Appellant: Andrew Duncan, Balrath, Ballinea, Mullingar, Co. Westmeath

Public Authority: Sustainable Energy Authority of Ireland (SEAI), Wilton Park House, Wilton Place, Dublin 2

Issue: Whether SEAI was justified in refusing the appellant's request for access to environmental information relating to a study on the viability and cost-benefit analysis of Ireland exporting renewable electricity

Summary of Commissioner's Decision: In accordance with article 12(5) of the AIE Regulations, the Commissioner reviewed the decision of SEAI and found that its refusal to provide access to the information requested was justified because, having regard to the definition of "environmental information" and article 4(1) of the Regulations, the study and related records do not contain environmental information. Accordingly, the Commissioner affirmed SEAI's decision to refuse the request, while varying the grounds for refusal.

Background

Directive 2009/28/EC (the Renewable Energy Directive) sets targets for the use of renewable energy by EU member states and provides for cooperation mechanisms whereby renewable energy produced in one member state may be exported to another member state and used by the receiving state to count towards meeting its renewable energy targets. In 2011, SEAI, in cooperation with the Department of Communications, Energy and Natural Resources (DCENR), EirGrid and the Commission for Energy Regulations (CER), commissioned a Study on the Viability and Cost-Benefit Analysis for Ireland Exporting Renewable Electricity using the cooperation mechanisms (the Study). In its submission to this Office, SEAI described the Study as a preliminary strategic scoping and exploratory examination of “the landscape of opportunity” and overall viability of Ireland exporting renewable electricity to other member states. The Study was completed in July 2012, by which time the Irish and UK Governments had begun a process of negotiation aimed at establishing a framework agreement to provide for Ireland exporting renewable electricity to the UK. In broad terms, the Study concluded that there is an opportunity [for Ireland] which is "worth exploring further".

On 24 January 2013 the Minister for CENR signed a Memorandum of Understanding on energy cooperation with the UK. The shared Understanding was that Ireland and the UK would collaborate to explore whether an intergovernmental agreement might be entered into under which Ireland would export renewable electricity to the UK. The Minister for CENR stated in the Dáil on 25 March 2014 that publication of the Study was "not appropriate at that stage of the discussions, due to its commercial sensitivity". In April 2014 the Minister reported that the negotiations had stalled because the UK Government was not in a position to conclude an agreement. Indicating that this is not necessarily the end of the matter, the Minister added that, "in the context of a European Internal Market and greater integration, greater trade in energy between Britain and Ireland is inevitable in the post-2020 scenario".

The appellant submitted an AIE request to SEAI on 21 March 2013. He requested access "to the environmental information held by SEAI in relation to the Study", and added that "this request includes but is not limited to:

1. The actual Study.
2. All documentation and correspondence from the stakeholder forum which occurred on 7 December 2011.
3. All correspondence and associated documentation (including review comments) from the following: a. EirGrid; b. DCENR; c. CER; d. trade bodies representing the renewable energy sector; and e. individual renewable energy developers.
4. All documentation and correspondence within SEAI associated with this report."

In its original decision, SEAI refused access to all of the information requested on the grounds that:

1. Making the information available would adversely affect the proceedings of public authorities (a ground mandating refusal under article 8(a)(iv), subject to article 10).

2. Making the information available would adversely affect commercial and industrial confidentiality (a ground permitting refusal under article 9(1)(c), subject to article 10).
3. The request was manifestly unreasonable (a ground permitting refusal under article 9(2)(a), subject to article 10).
4. The request concerns the internal communications of a public authority (a ground permitting refusal under article 9(2)(d), subject to article 10).
5. SEAI denied holding records relating to correspondence with trade bodies or individual developers (a ground permitting refusal under Article 7(5)).

The appellant requested an internal review on 22 May 2013. SEAI gave notice of its decision to affirm the original decision on 24 June 2013. The appellant appealed to this Office on 18 July 2013.

In conducting this review, I have taken account of the submissions made by the appellant and by SEAI. I have had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the Regulations (the Minister's Guidance); Directive 2003/4/EC (the AIE Directive), upon which the 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).

I regret the delay in concluding this review: it arose due to a shortage of resources in my Office, which has now been addressed.

Three preliminary issues arise in this case: compliance with the requirement for different decision-makers; compliance with the time-limits for decisions; and the adequacy of the provision of records to this Office.

Compliance with the requirement for different decision-makers

The appellant complained that, contrary to the Regulations, the original decision and the internal review decision were both made by the same person. It would be contrary to the Regulations for this to occur and it could have the effect of rendering the internal review decision invalid. My investigator examined the decision-notices given by SEAI to the appellant. He found that while both notices were signed by the same person, neither disclosed the identity or position of any decision-maker. SEAI has since informed my Office of the identities of two decision-makers, along with a written assurance that the internal review decision-maker was unconnected with the original decision and holds the same rank as the original decision maker. I am satisfied by this assurance that both decisions were made by different people as required by the Regulations.

The Regulations are silent as to whether a public authority ought to disclose the names and grades of decision-makers acting on its behalf. However, I consider it highly desirable that public authorities would disclose such information when giving notice of decisions, in the interests of transparency; an applicant ought to be able to see that the requirements of the Regulations have been met.

Compliance with the time-limits for notification of decisions

SEAI acknowledges that it “appears” not to have complied with the time-frames specified in the Regulations and that, because it was late in notifying the appellant of its intention to extend the period for making an internal review decision, SEAI is deemed to have refused the request for internal review. SEAI says that this arose due to its own error. It says that it proceeded to deal with the request on the basis of the extended deadline and the appellant did not raise this as an issue. SEAI also acknowledged that it notified the appellant of its internal review decision two days after the due date.

Provision of records to this Office

SEAI provided my Office with relevant records, but denies holding any records relevant to parts 3d and 3e of the request, except for two items of correspondence which fall within the scope of part 2 of the request.

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

SEAI says that the reason why it does not hold such records is that it did not receive or engage in such correspondence. SEAI provided me with a description of how it conducted its search for records of this type. The description included an account of how SEAI sought records, including any held by the preceding Head of Department, along with correspondence between SEAI staff and officials from the other public bodies involved in the project. SEAI also described having tasked its Information Technology Manager with searching the electronic files of staff who were involved in the project but who had since left the organisation. Accordingly, SEAI has assured me that it did not find any records of this kind (other than the records falling within part 2 of the request, as previously mentioned). In light of the above search details and assurance, and in the absence of any reason to believe otherwise, I accept that SEAI has provided copies of all relevant records to this Office.

Scope of Review

Under article 12(5) of the Regulations, my role is to review SEAI’s internal review decision and to affirm, vary or annul it. My review is concerned with whether SEAI withheld environmental information and, if it did, whether its decision to refuse to provide such information was justified.

Statutory provisions

Article 3(1) of the 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 ... in as much as they are, or may be, 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)."

Article 4(1) provides that the Regulations apply to environmental information other than, subject to sub-article (2), information that, under any statutory provision apart from these Regulations, is required to be made available to the public, whether for inspection or otherwise. (The exception in article 4(2) is not relevant to this case.)

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

The Appellant's position

The appellant argued that SEAI failed to demonstrate that tests (which the Aarhus Guide says must be passed before a public authority can withhold information for reasons of commercial confidentiality) were passed. The Aarhus Guide states that national law must explicitly protect the type of information withheld as a commercial or industrial secret, and that it is "difficult for an enterprise operating in a monopolistic manner, such as certain state-run enterprises, to assert a claim of commercial confidentiality" since it has no competitors. He added that the Aarhus Convention Compliance Committee has emphasised that even when there is a legitimate claim of commercial or industrial confidentiality, founded in law to protect legitimate economic interests, the public interest could nonetheless require disclosure. He argued that SEAI failed to document precisely how it applied a public interest test, contrary to the requirements of the Aarhus Guide. In its submission to this Office, SEAI acknowledged that "the level of consideration given to the public interest is not readily apparent" from the face of either of its decisions.

In response to SEAI's claim that the request was manifestly unreasonable having regard to the volume or range of information sought, the appellant said that SEAI did not explain how it reached this conclusion. He pointed out that, while the Regulations permit a one month extension where the volume or complexity of the information requested is problematic, SEAI failed to inform him that it was exercising this discretion in the manner required but nonetheless took a one month extension, only to still conclude that refusal was justified because the request was manifestly unreasonable.

The appellant argued that SEAI cannot claim "internal communications" as justification for refusal because the Aarhus Guide states that once information has been disclosed to a third party it cannot be claimed to be an internal communication. I note that the view expressed in the Minister's Guidance is that this ground can apply to communications between public authorities as well as to communications within a public authority.

Finally, the appellant argued that SEAI's claim that its negotiating position would be compromised by disclosure is ridiculous, given that Ireland is already exporting wind power.

SEAI's position

Grounds of refusal relied on in the internal review decision

In its internal review decision, SEAI set out its grounds for refusal. The grounds relied on were those provided for in articles 8(a)(iv), 9(1)(c), 9(2)(a) and 9(2)(d). SEAI argued that these grounds justified refusal of the request in its entirety, and it provided further details in support of this view in its submission. The following is a synopsis of SEAI's arguments on these grounds.

Justification on the ground of article 8(a)(iv): the proceedings of public authorities

SEAI said that disclosure would adversely affect the confidentiality of the proceedings of public authorities and that, in this case, such confidentiality is protected by section 20 of the Freedom of Information Acts 1997 and 2003. SEAI said, in September 2013, that the Study was "currently informing the process of reaching a decision of the Government". SEAI argued that, in the context of negotiations between Ireland and the UK, disclosure of confidential information which would show the Irish Government's negotiating position would be against the national economic interest. It also argued that the request concerned records relating to the deliberative processes of the public bodies concerned (including opinions, advice, recommendations, and the results of consultations, considered by public authorities) and that refusal was justified on this ground even after mandatory consideration of the public interest pursuant to article 10(3).

Justification on the ground of article 9(1)(c): protected commercial or industrial confidentiality

SEAI said that the [then] ongoing negotiations related to the commercial and industrial activities of the State, State owned bodies (such as EirGrid) and third parties involved in the production and supply of renewable electricity. SEAI's position is that these bodies were pursuing legitimate economic interests, and the confidentiality of the information at issue was protected by Freedom of Information law. In this regard, SEAI cited section 31 of the Freedom of Information Acts 1997 and 2003 as protecting the confidentiality of the information requested. SEAI stated that the Government commissioned the Study and that disclosure of the requested information would have a serious adverse effect on the competitive position of the State and of the relevant public bodies, as well as on the financial and commercial interests being pursued in the negotiations. By way of example, it said that disclosure could reasonably be expected to disclose the negotiation positions of the Government and DCENR relating to joint projects under the Renewable Energy Directive. SEAI argued that refusal was justified on this ground even after mandatory consideration of the public interest pursuant to article 10(3).

Justification on the ground of article 9(2)(a): request is manifestly unreasonable

SEAI said that parts 2, 3 and 4 of the request relate to a broad range of information and that the information sought was not environmental information. SEAI argued that these parts of the request were, consequently, manifestly unreasonable by their very nature. SEAI considered that, in these circumstances, it was entitled to refuse the entire request on this ground even after mandatory consideration of the public interest pursuant to article 10(3).

This argument is confused. Article 9(2)(a) provides that a public authority may refuse to make environmental information available where the request is manifestly unreasonable

having regard to the volume or range of information sought. This ground cannot be successfully invoked merely because a requester seeks a "broad range of information". Neither is it a ground which can justify refusal on the basis that the information requested is not environmental information.

Justification on the ground of article 9(2)(d): request concerns internal communications

SEAI said that the Study was commissioned by SEAI on behalf of DCENR, EirGrid, and the CER. It said that the request concerned internal communications within and between these public authorities. It added that information related to the Study is used by the Government in the context of negotiations with the UK Government. SEAI pointed out that the UK Government is also a public authority in the meaning of the Directive. SEAI argued that refusal was justified on this ground even after mandatory consideration of the public interest pursuant to article 10(3).

Additional grounds of refusal raised in SEAI's submission to OCEI

Four additional grounds for refusal were submitted at appeal which had not previously been put to the appellant: these grounds were articles 3(1), 7(5), 8(a)(ii), and 9(1)(a). SEAI stated that "cumulatively" all of these grounds justified refusal of the request in its entirety, even after consideration of the public interest pursuant to article 10(3).

There is no provision in the Regulations for refusal on "cumulative" grounds: each ground which purports to justify refusal must stand on its own merits. There may, on occasion, be multiple grounds justifying refusal, but they do not operate cumulatively.

Justification on the ground of article 3(1): not a request for environmental information

SEAI argued that "certain [items] of the information" sought in parts 2, 3 and 4 of the request were "merely related to, or associated with, the Study" and were therefore not environmental information in the meaning of the Regulations. SEAI did not, however, identify those items of information. SEAI cited this Office's decision in the case of Gavin Sheridan and the Central Bank of Ireland (Case CEI/11/0001) as showing that information on an activity affecting environmental elements or factors will only be environmental information if it is sufficiently connected to the environmental impact of the activity.

That decision has to be properly understood: it did not involve a finding that particular classes of record can be dismissed as not containing environmental information without careful examination of the contents of each record.

Justification on the ground of article 7(5): information not held

SEAI maintained that article 7(5) justified refusal to provide information related to parts 3(d) and 3(e) of the request, because such information was not held by SEAI. Specifically, SEAI said that it did not hold information relevant to these parts of the request other than two items of correspondence relating to the Stakeholder Forum (which therefore fell within the scope of part 2 of the request).

Justification on the ground of article 8(a)(ii): third party interests

SEAI acknowledged its obligations to third parties under article 7(11). It said that the Study was commissioned by SEAI on behalf of DCENR, EirGrid, and the CER. It argued that the release of the Study and any related or associated documentation or associated correspondence could well adversely affect - among others - the interests of the Government and DCENR in ongoing international negotiations with the UK. SEAI stated that, pursuant to article 7(11), it contacted DCENR seeking its consent to release the information requested and DCENR did not consent. Accordingly, SEAI's position is that refusal of the request was

justified under article 8(a)(ii), even after mandatory consideration of the public interest pursuant to article 10(3).

Refusal can only be justified under this ground in relation to information provided by the third party: SEAI has not indicated which elements of the withheld information were provided by DCENR.

Justification on the ground of article 9(1)(a): international relations

SEAI argued that disclosure would adversely affect the [then] ongoing international negotiations (which, it said, were informed by the Study) between Ireland and the UK, and other negotiations envisaged to take place as a result of the Renewable Energy Strategy 2012 – 2020. It argued that such negotiations are liable to have significant economic and legal consequences for Ireland and that refusal was therefore justified on this ground even after mandatory consideration of the public interest pursuant to article 10(3).

I note that while these particular negotiations have ceased for the time being, they (or similar negotiations with other member states) could resume at some stage in the future.

SEAI's weighing of the public interest

In its submission, SEAI set out how it weighed the public interest in favour of disclosure against the public interest in favour of refusal. Summarised, SEAI viewed these interests as consisting of the following:

In favour of release: the public interest in members of the public exercising their AIE rights and in having access to environmental information to the greatest extent possible.

In favour of refusal: the public interest— in preserving the confidentiality of Government negotiations being carried out in the national interest; in preserving the confidentiality of the deliberative process which precedes the adoption of policy; in Government being able to pursue the national interest; in the regulation of the renewable energy market; in the State and State-owned and commercial entities being able to pursue legitimate economic interests without suffering harm from the disclosure of sensitive information; in the protection of internal communications of public authorities.

SEAI argued that the public interest in refusal outweighed that in favour of disclosure in this case.

Analysis and Findings

I am satisfied that the request was a valid request for environmental information. I approached this review by considering two questions:

Question 1: Do the withheld records contain environmental information?

Question 2: If they do, was refusal justified?

Question 1: Do the withheld records contain environmental information?

I considered the Study and the remaining records separately.

The Study

I examined the Study and considered its contents in light of the definition of environmental information.

I find that the Study does not contain environmental information within the meaning of paragraphs (a), (b), (d) or (f) of the definition of environmental information in article 3(1).

I considered whether the Study might constitute a measure or activity affecting or likely to affect the elements or factors referred to in the definition. I note that the Study does not conclude with any decision to adopt a policy or to undertake any activity capable of having an effect on the relevant elements or factors. Following an appraisal of various hypothetical scenarios, the Study broadly concludes that the proposition of exporting renewable electricity presents Ireland with an opportunity which is worth exploring further. The Study is, essentially, just a step (albeit a significant step) in a process of consideration which might or might not lead to a proposal to enter into an inter-governmental agreement. The form which such an agreement might take would be shaped by the views of the other government involved, through negotiation: this is not a situation in which the Irish Government could itself simply adopt a policy entirely of its own making. Any agreement which might be entered into would be expected to lead to the bringing forward of proposals for development projects which, if granted planning permission, would lead to environmental effects. But this Study, in itself, is not capable of having environmental effects. In light of these considerations, I find that the Study does not constitute a measure or activity affecting or likely to affect the relevant elements or factors

I considered whether the Study might constitute environmental information by reason of it being a cost-benefit analysis. To qualify as environmental information of this type, information would have to consist of a cost-benefit or other economic analysis or assumption(s) used within the framework of an identifiable measure or activity affecting or likely to affect the relevant elements or factors. The Study is clearly a cost-benefit and economic analysis of various hypothetical scenarios, and it does contain economic assumptions. But it does not appear to have yet been used within the framework of a measure or activity affecting or likely to affect relevant elements or factors. If it were to be used within such a framework in the future, the information it contains could potentially constitute environmental information of this type. However, at the time of making this decision, I could not find any evidence that the Study constituted environmental information of this type.

I considered whether the Study might nonetheless contain environmental information in the form of information on other measures or activities affecting or likely to affect the relevant elements or factors. My investigator identified, within the Study, information on three subjects which, at face value, appear to potentially constitute "measures affecting or likely to affect" relevant elements or factors. These potential measures are the Renewable Energy Directive; the National Renewable Energy Action Plans (NREAPs) of Ireland and a number of other member states; and a Strategic Environmental Assessment (SEA) for Ireland's Offshore Renewable Energy Development Plan (OREDPA). I considered the information which the Study contained about these documents and the status of these documents in light of the AIE Regulations.

The Renewable Energy Directive provides for the cooperative mechanisms which underpin the Study, and basic information about the Directive is therefore included in the Study as background information. A reader of the Study would not learn anything about the Directive that they would not learn from reading the Directive itself. In other words, the information about the Directive which is contained in the Study may also be found in the Directive. Article 4(1) of the AIE Regulations provides that the Regulations do not apply to information that is required to be made available to the public. Therefore, if the Directive is required to be made public, the Regulations will not apply to the information about the Directive which is in the Study. Article 13 of Regulation 1049/2001 of the European Parliament and Council requires directives to be published in the Official Journal of the European Union, which means that directives have to be made available to the public. Accordingly, I am satisfied

that the AIE Regulations do not apply to the information in the Study which is about the Renewable Energy Directive.

The Study contains some information on Ireland's NREAP, along with data from the NREAPs of several other member states. This information is simply extracted from those Plans: a reader of the Study would not learn anything about those Plans that they would not learn from reading the Plans themselves. The Renewable Energy Directive, at Article 24.2, requires that member states' NREAPs are made public. Accordingly, I am satisfied that, in light of article 4(1) of the AIE Regulations, the AIE Regulations do not apply to the information about NREAPs which is contained in the Study.

At the time of the internal review decision, the OREDP existed only as a draft plan. It could be argued that this draft plan was itself a measure likely to affect relevant elements or factors. An SEA had been completed for the draft plan and both were published at the same time. The Study includes data extracted from this SEA. In this regard, the Study went no further than replicating such data: it did not add any analysis, for example. Moreover, I find that the provisions of article 4(1) of the AIE Regulations also apply to this information. Article 6 of Directive 2001/42/EC (the SEA Directive— transposed into Irish law by Statutory Instruments Numbers 435 and 436 of 2004) requires that the public must be given an opportunity to comment on SEA reports before decisions are made to adopt or reject proposed plans. Regulation 13(1)(b) of S.I. No. 435 of 2004 requires competent authorities to publish public notices of SEA reports along with the publication of notices of the preparation of draft plans. Such notices must explain how copies of a proposed plan and its associated SEA report can be inspected by the public. In this case, the SEA for the draft OREDP was published, as required, when the draft plan was published in 2010. In light of these considerations, I am satisfied that the information contained in the Study taken from the SEA of the draft OREDP is not subject to the AIE Regulations and should therefore be disregarded for the purpose of this review. I therefore do not need to determine if the draft OREDP was a measure likely to affect the relevant elements or factors in the meaning of the Regulations.

As a result of these considerations, I conclude that the Study does not contain environmental information within the meaning of the Regulations.

The remaining records

The remaining records comprise documentation and correspondence from the stakeholder forum, correspondence and associated documentation (including review comments) from EirGrid, DCENR, CER, along with documentation and correspondence associated with the Study, including draft versions. I examined these records and considered them in light of the definition of environmental information in the Regulations. The only information which I find to potentially constitute environmental information is the same information already considered above, which I found in draft versions of the Study. I find that article 4(1) applies to these items of information also, and I therefore conclude that the remaining records do not contain environmental information in the meaning of the Regulations.

Conclusion for question 1

I find that the withheld records do not contain environmental information in the meaning of the Regulations.

As that is my finding, it is not necessary for me to consider questions 2.

Decision

In accordance with article 12(5) of the AIE Regulations, I have reviewed SEAI's decision in this case. I find that the records held do not contain any environmental information within the meaning of the Regulations. I therefore find that refusal was justified and I affirm SEAI's decision to refuse the request.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of this decision was given to the person bringing the appeal.

Peter Tyndall

Commissioner for Environmental Information

11 December 2015