

Ms. Fiona Marshall  
Secretary to the Aarhus Convention Compliance Committee  
Office S-429-4, Palais des Nations  
Av. de la Paix 10  
CH-1211 GENEVA 10  
Switzerland

by email

Saturday 27 October 2018

**Re: ACCC/C/2016/141**

Dear Ms Marshall,

I refer to a letter from the Party Concerned (26/10/2018) which relates a version of a case concerning me.

*Stephen Minch v. Commissioner for Environmental Information*

*On 28 July 2017 the Court of Appeal delivered its decision in Stephen Minch v. Commissioner for Environmental Information and found that the Report constitutes environmental information within the meaning of article 3(1)(e) of the AIE Regulations. The appeal was remitted to the OCEI for further determination. On 15 February 2018 the Commissioner delivered a decision and determined that the AIE request did not relate to information on emissions into the environment as per article 10(1) of the AIE Regulations. The appellant was issued with a redacted copy of the material requested in January 2018 and the Commissioner held that the non-disclosure of the redacted information was justified on commercial confidentiality grounds by article 9(1)(c) of the AIE Regulations, following a weighing of the public interest in accordance with article 10(3) of those Regulations. No appeal was lodged against that decision.*

Please note,

1. The judgement of the Court of Appeal on 28th July 2017 and the subsequent court order of 6th October set aside the decision of the Commissioner that the requested information was not environmental information. The Court of Appeal made a determination that the inferences that the Commissioner had drawn from the facts were “not legally sustainable”.
2. Because the Commissioner’s original decision had not considered other exemptions raised by the public body at the request stage, the court had no option but to remit the matter to the Commissioner for determination of those exemptions. That process took 14 weeks during which the public body was afforded 3 successive timeframes to meet the Commissioner’s submission schedule, all of which were missed without consequence. The matter was brought to a head when I made a pre-emptive submission and asked the Commissioner’s investigator to conclude his work. The public body then belatedly made its submission.
3. In relation to the Commissioner’s new decision of 15th February 2018<sup>1</sup> no inferences should be drawn from the Party Concerned’s statement that “*No appeal was lodged against that decision.*”.
4. My thinking at the time was that,
  - While the Court of Appeal had found that the plan under article 3(1)c was likely “*on any view*” to have “*significant environmental impacts*”, it had changed substantially by February 2018 to such an extent that, in my view, it had become, on balance, environmentally benign<sup>2</sup>. In the circumstances there was no reason for me to appeal on environmental grounds.

---

<sup>1</sup> <https://www.ocei.ie/decisions/stephen-minch-and-the-dep/index.xml>

<sup>2</sup> As confirmed by the un-redacted portion of the Report, the 2012 plan originally envisaged a near 100% wireless broadband intervention. By 2016 the plan was to be delivered predominantly by ‘Fibre to the Home’ technology.

- The remaining redacted information in the associated report and originally requested under article 3(1)e, was, by that time, at least six years old and, to all intents and purposes, irrelevant to the likely outcome of the plan as envisioned in early 2018.
- Undertaking another statutory appeal against the Commissioner in the High Court meant substantial financial risk in view of the very high costs associated with the superior courts in Ireland.
- In relation to that risk, the Commissioner had previously declined three offers by me (through my lawyers) to control our costs under the Environment (Miscellaneous Provisions) Act 2011. There was no reason to believe the Commissioner would not continue to resist the provisions of the Act in a new appeal. In that event I would face a further three years of financial uncertainty while the appeal proceeded once again through the courts.
- The new decision of the Commissioner (15/02/18) deliberately<sup>3</sup> did not consider the Article 8 exemption originally raised by the public body. It is questionable whether this omission contravened the relevant remittal order<sup>4</sup> from the Court of Appeal. If I had appealed the new decision to the High Court and won a second time, the court might have had to remit back to the Commissioner once again for a consideration of that last outstanding exemption.
- In view of the above, as a matter of pragmatism, I decided not to pursue a further appeal. I did not seek or receive legal advice in making that decision.

On the substance of the new decision, I believed that the Commissioner again drew unsustainable inferences from the facts and relied on unsustainable assertions from the public body. Moreover the Commissioner's reasoning appeared to be inadequate under Article 12(5)(b). In particular I noted the following from the Commissioner's decision.

*"As I conducted my deliberations on this case, I became aware through the news media of a significant development in the Department's ongoing procurement process. I have taken account of that development in coming to my decision."*

Leaving aside that an information request made in 2013 could be de-railed by a news event in early 2018, the Commissioner's decision did not state what "significant development" he took account of, or the media source, or the inferences he drew from it. The Commissioner's investigator did not raise the "significant development" with me in any way.

Yours sincerely,



Stephen Minch

---

<sup>3</sup> "In the circumstances, there is no need for me to consider article 8, as any consideration of that article could not alter my decision."

<sup>4</sup> "IT IS ORDERED that the Request dated the 18th day of May 2013 of Stephen Minch for access to the said Report be remitted to the Commissioner limited to the consideration of the question of such exemptions as may apply to the release of said Report" Court of Appeal 06/10/2018