

Decision of the Commissioner for Environmental Information on an appeal made under article 12(5) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE Regulations)

Case CEI/15/0007

Date of decision: 7 June 2016

Appellant: Mr Ken Foxe, Raidió Telefís Éireann

Public Authority: Department of Defence (the Department)

Issue: Whether the Department was justified in refusing the appellant's request for access to information on the Ministerial Air Transport Service (MATS) on the ground that the information concerned was not environmental information within the meaning of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner varied the decision of the Department to refuse the appellant's request. He found that the Department was justified in refusing access to MATS information on names of passengers and time spent on board aircraft by officials, on the basis that this information does not fall within the definition of "environmental information" contained in the AIE Regulations. He found that the Department was not justified in refusing to provide access to MATS information on dates of travel, destinations of travel, flight durations, the number of passengers travelling, and the names of office holders and departments availing of the service, as this information falls within paragraph (c) of the definition of environmental information. The Commissioner also found that information on dates and destinations of travel is environmental information under paragraph (b) of the

definition. The Commissioner stated that, unless his decision is appealed to the High Court, the Department should make a new decision on the appellant's request under the AIE Regulations.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Background

The Department operates a Ministerial Air Transport Service (MATS), which provides the Government and the President with national and international air travel services. This service is operated on a flexible basis, using military air bases. The service employs a number of aircraft operated by the Department, including a Learjet 45 aircraft with capacity for 7 passengers.

The Department publishes certain MATS information on its website (www.defence.ie). Information is provided in spreadsheet form. For each MATS journey, the Department publishes information on the departure date, return date, ministerial time on board, details of locations of travel, the name of the department of State travelling, identity of Ministers travelling, and number of passengers on board. The Department does not publish any MATS information on travel by the President.

The appellant is a journalist with the Investigations Unit of RTÉ. On 19 February 2015, the appellant made a request to the Department for access to information relating to "all travel domestic and foreign undertaken relating to ministerial/VIP travel on the government jet(s), CASA aircraft, military helicopters and any other relevant aircraft in the period between March 2011 and the current date". The appellant requested access to five specific categories of information: "dates of travel; destination; number and name of passengers; and minutes and time on board". The appellant specifically requested access to environmental information on air travel by the President.

The Department replied on 26 February 2015 and refused to provide access on the basis that the information sought did not "fall within the remit of the AIE Regulations". The appellant sought an internal review of this decision on 4 March 2015. In an internal review decision of 16 March 2015, the Department affirmed the refusal on the basis that the air travel information sought was not environmental information as defined by article 3(1) of the AIE Regulations. The Department conceded that information regarding emissions by Department of Defence aircraft could be the subject of an AIE request, but did not accept that the information requested by the appellant was related to emissions into the environment. The appellant appealed the internal review decision to my Office on 19 March 2015.

Scope of Review

Directive 2003/4/EC (the Directive) implements the first pillar of the 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"). The Directive is transposed into Irish law by the AIE Regulations. In making this decision I have had regard to the *Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) published by the Minister for the Environment, Community and Local Government [the Minister's Guidance]; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide].

The Department contends that the requested information does not fall within the definition of "environmental information" provided by article 3(1) of the Regulations. The Department has not made alternative arguments under articles 8 or 9 of the Regulations. Therefore, the scope

of this review is limited to the question of whether the information requested by the appellant falls within the definition of "environmental information".

Relevant Legislative Provisions, Case Law and OCEI Decisions

The Regulations

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 including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
- (d) reports on the implementation of environmental legislation,
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);"

The Aarhus Guide remarks at page 50 that in defining environmental information, the clear intention of the drafters was to "craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation."

Decisions on interpretation of the AIE Regulations

In *NAMA v. Commissioners for Environmental Information* [2015] IESC 51, O'Donnell J. held at paragraph 10 that because the AIE Regulations implement an EU Directive, it is required that the courts approach interpretation "so far as possible, teleologically, in order to achieve the purpose of the Directive." In *Minch -v- Commissioner for Environmental Information* [2016] IEHC 91, the High Court affirmed the need for a teleological approach to interpretation of the AIE Regulations, and stated that the preamble to the Aarhus Convention "suggests a broad approach to the question of interpretation is correct."

Court of Justice of the European Union (CJEU) Case Law

In my decision in the case of Mr Gavin Sheridan and An Garda Síochána [CEI/13/0013] (the *Garda Aircraft* case), I outlined in detail the development of the "minimum connection" test in relation to the definition of "environmental information". Although I have not repeated that analysis in this decision, the same principles apply in this case. In particular, I refer to the decision of the CJEU in *Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [C- 316/01].

In that case, the then European Court of Justice found that information on compliance measures relating to the labelling of genetically modified products did not fall within the definition of "environmental information" contained in Directive 1990/313/EEC on the freedom of access to information on the environment (subsequently repealed and replaced by Directive 2003/4/EC). The Court stated at paragraph 25:

"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."

At paragraph 16 of the judgment, the Court clarified the term "environmental factors" in the context of its decision by reference to "information on the state of water, air, soil, fauna, flora, land and natural sites" - the first part of the earlier definition of environmental information. Although the definition of "environmental information" was subsequently expanded in Directive 2003/4/EC, I consider that *Glawischnig* demonstrates the principle that in order for the AIE Regulations to apply, information must have more than a minimal connection to the state of the elements of the environment.

Irish and United Kingdom Decisions on the scope of "environmental information"

In the case of Mr. Gavin Sheridan and Central Bank of Ireland [CEI/11/0001], the previous Commissioner applied the *Glawischnig* judgment and found that in order for information to fall within the definition, it must be "indicative of the environmental impact of the activity to which it relates". The Commissioner went on to apply the test proposed by the United Kingdom First Tier Tribunal in *Nottinghamshire County Council and Information Commissioner* (EA/2010/0142) (the *Nottinghamshire* case), which states at paragraph 79:

"The litmus test is that this information - and the key financial indicators within it - can be adjusted over a broad commercial range of negotiation in terms of the confidential information without having any effect on environmental issues."

In the case of the *Department for Energy and Climate Change v The Information Commissioner & Anor* [2015] UKUT 671 (AAC), the Administrative Appeals Chamber of the Upper Tribunal considered the meaning of "any information on" for the purposes of article 2(1)(c) of the United Kingdom Environmental Information Regulations, (the EIR). The Upper Tribunal held that "it is permissible to look beyond the precise issue with which the disputed information is concerned and to have regard to the "bigger picture". This approach is

consistent with a broad interpretation of the EIR as mandated by the Aarhus Convention and the Directive." The Upper Tribunal cited the earlier decision of the UK Information Tribunal in *Mersey Tunnel Users Association v Information Commissioner and Halton Borough Council* (EA/2009/0001) as a worked example of the "bigger picture" approach to the question of what information can be said to be information "on" a measure. In the *Mersey Tunnel* case, the Information Tribunal considered whether information on tolling of a proposed transport project was information on the project for the purposes of the EIR. The Tribunal heard evidence that the only way the project could be delivered was if tolling was carried out. The Tribunal therefore held that the tolling information was information on the project for the purposes of the EIR, as such information was "an integral part to the Project and its viability."

I consider that the United Kingdom bigger picture approach to what constitutes information **on** a measure or activity is consistent with the purpose of the Aarhus Convention, and that an assessment of what is integral to a measure or activity under paragraph (c) is a useful test to employ when defining the scope of the definition of environmental information.

The Appellant's Position

In submissions to this Office, the appellant referred to paragraph (b) of the definition of "environmental information" as the basis for his request, as well as the general obligations to provide access to information under article 5 of the AIE Regulations. The appellant submitted that air transport produces significant carbon emissions, and that MATS flights represent an unnecessary emission in the context of widely available commercial flights. The appellant submitted that the five categories of information sought ("dates of travel; destination; number and name of passengers; and minutes and time on board") were essential contextual information on air travel and fell within the definition.

The Department's Position

The Department submitted that the information sought does not fall into any of the six categories set out in the definition of environmental information. The Department was of the view that direct information on emission levels would be covered by the Regulations, but the information requested by the appellant did not fall within the definition.

Analysis and Findings

The Department provided my Investigator with five spreadsheet files containing MATS information for the years 2011 to 2015. Each spreadsheet contained a breakdown of information by aircraft type. For each aircraft type, the Department provided information on dates of outward and return journeys, the identity of the State official travelling, time spent on board by the State official, total flight time, destinations visited on route, and total number of passengers.

Paragraph (b) of the definition of "environmental information"

The appellant requested five specific types of MATS information (dates of travel, destination, time on board, number of passengers and names of passengers). The appellant submitted that

this information was environmental information under paragraph (b) of the definition - i.e. information on a factor affecting or likely to affect the state of the elements of the environment. Of the five types of information requested, I consider that destination information is strongly indicative of distance travelled, which is a reflection of the amount of fuel consumed and the quantity of consequent emissions. For example, the Learjet 45 used by the Department flew from Baldonnell to Brussels on 17 March 2016, a direct distance of 428 nautical miles. The European Organisation for the Safety of Air Navigation, Eurocontrol, provides a publicly available tool for calculating emissions - the small emitters tool (SET). This tool makes it possible to estimate CO2 emissions for a flight considering the make of an aircraft and the distance travelled. The SET estimates that a Learjet 45 would emit 2.6 tonnes of carbon dioxide on a journey of 428 nautical miles.

Accordingly, I conclude that information on destinations of travel is indirect information on emissions and is therefore environmental information. I consider that the date of a journey is an integral contextual part of destination information, which should not be separated from that information. I am not satisfied that details of time spent on board aircraft by officials, or details of the names or number of passengers can be categorised as indirect information on a factor affecting the state of the elements of the environment, and therefore such information does not fall within paragraph (b) of the definition.

Paragraph (c) of the definition of "environmental information"

I have also considered whether the information requested is environmental information under paragraph (c) of the definition, i.e. as information on an activity affecting or likely to affect the elements or factors mentioned in paragraphs (a) and (b) of the definition. I accept that aircraft usage by the Department is an activity affecting the elements and factors under paragraphs (a) and (b), since the activity of air travel employs combustion engines which emit carbon dioxide into the air. I next considered whether the specific information requested (dates of travel, destination, time on board, and number and names of passengers) was information **on** the activity of air travel.

The definition of environmental information is framed broadly to include "any information... on..." the subjects set out in paragraphs (a) to (f). The Oxford English Dictionary defines "on" in this sense as "In reference to, with respect to, as to, concerning, about". I consider that information on the activity of air travel includes information about or concerning the activity. When considering the meaning of terms derived from the Aarhus Convention, it is useful to consider the preamble to the Convention, which includes the following expressions of purpose,

"Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns"

and

"Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,"

Assessing the meaning of "any information... on..." in light of the above statements, I am satisfied that information which supports the aims of accountability and transparency in decision-making should be considered as included within the definition. The judgment of the European Court of Justice in *Glawischnig* suggests that right of access is not unlimited, and only information which has more than a minimal connection with environmental factors falls within the definition of environmental information. I am satisfied that information which describes the integral parts of an activity affecting the environment, bearing in mind the aims of the Aarhus Convention, can be said to have a sufficient connection to environmental factors, even if such information does not directly reflect the state of the elements of the environment.

I am satisfied that details of dates of travel, destinations of travel, flight duration, and numbers of passengers are integral information on the activity of official air travel, disclosure of which would facilitate accountability of and transparency in an activity affecting the environment. I therefore find that the above four types of information are within the definition of "environmental information". The appellant also requested information on names of passengers, and details of time on board aircraft in minutes. I consider that the identities of office holders or departments availing of MATS is information on the activity of official air transport. Such information reflects the level of demand on services by different state offices and departments. Insofar as the appellant has requested the identity of parties travelling, I find that identities of office holders or departments availing of flight services is environmental information.

Conversely, I consider that the names of individual passengers accompanying office holders are an incidental aspect of the activity at issue. I also consider that the amount of time spent on board aircraft by officials is incidental information on the activity (as distinct from information on the duration of a flight, which I have found is environmental information). I am not satisfied that incidental information, which does not define the conduct of the activity under consideration, falls within the AIE Regulations. Accordingly, I find that the names of individual passengers (other than the identity of office holders), and information on time spent on board an aircraft by officials (as opposed to information on the actual duration of a flight) are not environmental information.

I therefore find that the Department was justified in refusing access to information on the names of passengers and the time spent on board aircraft by officials. I also find that the Department was not justified in refusing access to MATS information on dates of travel, destinations of travel, flight durations, the number of passengers travelling, and the names of office holders or departments availing of the service.

Consideration of legislative capacity

I note that article 3(2) of the AIE Regulations provides that bodies acting in a judicial or legislative capacity are not subject to the Regulations. I do not consider that the information held by the Department in this case relates to the legislative capacity of the Office of the President, and therefore such information is capable of being environmental information.

Reconsideration of the request by the Department

The scope of this review is limited to the question of whether the requested information was environmental information under the definition contained in article 3(1) of the AIE Regulations. As I previously commented in my decision in Mr Gavin Sheridan and Dublin City Council (CEI/12/0004), the procedural approach of my office in such circumstances is as follows:

"If it is determined that the matter is within the remit of AIE, and no appeal to the High Court is made, the public authority should then deal with the request in accordance with the Regulations. If the appellant remains dissatisfied with the handling of his request following internal review and thus appeals again to this Office with respect to the original request, then the matter will be reopened administratively without payment of a new fee and given priority treatment by this Office insofar as it is practicable to do so."

On the basis of the above, and where no appeal of this decision is made to the High Court, the Department should make a new decision on the appellant's request, in line with the AIE Regulations, having regard to the exceptions to disclosure under articles 8 and 9, and the public interest considerations under articles 10(3) and (4).

Decision

I hereby vary the decision of the Department to refuse the appellant's request. I find the Department was justified in refusing access to MATS information on names of passengers and time spent on board aircraft by officials, on the basis that this information does not fall within the definition of "environmental information" contained in the AIE Regulations. I find that the Department was not justified in refusing to provide access to MATS information on dates of travel, destinations of travel, flight durations, the number of passengers travelling, and the names of office holders and departments availing of the service, as these aspects of the request fall within paragraph (c) of the definition. I also find that information on dates and destinations of travel are environmental information under paragraph (b) of the definition.

Should no appeal of this decision be made to the High Court in the time allowed by the AIE Regulations, the Department should process the appellant's request in accordance with the AIE Regulations.

Appeal to the High Court

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

Peter Tyndall
Commissioner for Environmental Information
7 June 2016