THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 697 J.R.]

BETWEEN

RIGHT TO KNOW CLG

APPLICANT

AND
AN TAOISEACH
AND
MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND ENVIRONMENT

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 1st day of June, 2018

1. This matter comes before the Court arising from the first respondent's refusal of the applicant's application for access to "all documents which show cabinet discussions on Ireland's greenhouse gas emissions from 2002 to 2016".

2. The request was made under the European Communities (Access to Information on the Environment) Regulations, 2007 – 2014 ("the AIE Regulations") and Directive 2003/4/EC on Public Access to Environmental Information ("the Directive").

3. This request was replied to by letter of 5th May, 2016 from Ms. Maura Duffy on behalf of the first respondent, wherein the applicant was advised as follows:

> "Following a search of Departmental files 31 records have been identified as being relevant to your request. The attached schedule provides a list of these records, however, having regard to the provisions of Articles 8(b) and 10(2) of the 2007 AIE Regulations which give effect to Cabinet confidentiality, I have decided to decline access to such documents. The decision of Mr. Justice O'Neill given in the High Court in June, 2010 (*An Taoiseach v. Commissioner for Environmental Information and Gary Fitzgerald*) is also relevant to this request."

4. Attached to the decision was a "schedule of documents for AIE 2016/0001", which listed the 31 documents together with a brief description of same. All were "withheld". The basis for the refusal in respect of each document was "AIE Regulation 8(b) and 10(2)".

5. Pursuant to Article 11 of the AIE Regulations, the applicant sought an internal review of the decision on the following grounds:

> 1. That the decision was wrong in law in that it did not comply with the obligation under EU law to give primacy to EU law over national law.
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> 2. That the Directive was directly effective in that it gave the applicant a right of access to the documents requested and no exemptions under the Directive applied or had been cited in the original decision.
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> 3. The AIE Regulations clearly required a balancing exercise to be carried out in all circumstances which was not done.
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> 4. That the High Court was wrong in *An Taoiseach v. Commissioner for Environmental Information* and the case must be disapplied.
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> 5. No balancing test was carried out and such a test was required to be conducted by the review-decision-maker.

6. The internal review was undertaken by Mr. John Shaw, Assistant Secretary in the first respondent's department. His decision ("the review decision") issued on 27th June, 2016. In relevant part, it reads as follows:

> "I refer to your request under the Access to Information on the Environment Regulations 2007 – 2014 for an Internal Review in relation to the decision sent to you on 5 May 2016. I confirm that I have reviewed [the] decision in this case and have affirmed the original decision not to release the records under the provisions of Articles 8(b) and 10(2) of the AIE Regulations which relate to the Constitutional protection for the confidentiality of discussions at meetings of the Government."

7. The applicant was advised that it could appeal to the Commissioner for Environmental Information. The applicant did not appeal. Rather, the within proceedings issued on 7th September, 2016. By Order of Fulham J. dated 7th October, 2016, leave was granted to the applicant to seek relief by way of *certiorari* of the review decision together with a number of declaratory reliefs, including a declaration that the second respondent, in transposing the Directive, was not permitted under EU law to exclude an entire class of documents from disclosure, and that the second respondent was not permitted under EU law to narrow the broad right to access documents relating to emissions into the environment contained in the last sentence of the second paragraph of Article 4(2) of the Directive.

8. The grounds upon which the applicants rely are as follows:

> •The review decision was made without lawful jurisdiction, is incompatible with EU law and should be quashed and remitted for the internal review requested by the applicant to be conducted in accordance with the State's EU law obligations.
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> • In relying on the constitutional protection of Cabinet confidentiality to overrule a right contained in directly effective provisions of the Directive, the first respondent is giving primacy to national law over EU law, in clear breach of the case law of the European Court of Justice (ECJ).
>
> • The reasons given in the review decision, such as they are, merely state the conclusion of the review decision-maker, namely that the original decision has been upheld. The review decision fails to set out reasons for the decision, contrary to established principles of national and EU law. The dearth of reasons makes an effective review of the substance of the review decision, either by the court or the Commissioner for Environmental Information impossible. Furthermore, the review

decision maker failed to engage with the applicant's detailed submissions. In the absence of any or any adequate reasons, it is not possible effectively to exercise the right of appeal to the Commissioner for Environmental Information as provided for in the AIE Regulations.

• The review decision is based on a fundamental error, namely that it was not open to the review decision-maker to disapply national law, which the first respondent appears to source in *An Taoiseach v. Commissioner for Environmental Information* [2013] 2 I.R. 510.

• The rights asserted by the applicant derive from EU law. The provisions of the Directive allow for refusal of access on the limited grounds specified in the Directive, which fall to be construed in the light of the Convention on Access on Information, Public Participation in Decision Making and Access to Justice in Environmental Matters done at Aarhus Denmark on 25 June 1998 ("the Aarhus Convention") and on no other grounds. It was not open to the second respondent, in making the AIE Regulations, to add new grounds that are not provided for in the Directive.

• Article 4(2) of the Directive disapplies certain exemptions to access to information that are permitted under Article 4(2) where the relevant information relates to emissions into the environment. Article 10(2) of the AIE Regulations attempts to limit the scope and operation of Article 4(2) of the Directive and, as such, is incompatible with the Directive.

• Article 8(b) of the AIE Regulations appears to put a mandatory obligation on a public authority to refuse a request for information if release of the information sought "would involve disclosure at one or more meetings of the government". Yet the entirety of Article 8 of the AIE Regulations is subject to Article 10 thereof. Article 10(3) of the AIE Regulations imposes an obligation on a public authority, when considering a request for information, to "weigh the public interest served by disclosure with the public interest served by refusal". Accordingly, the first respondent should have carried out a balancing test prior to any refusal of access to the documents, or any part of them. This requirement for a balancing exercise derives from EU law, as set out in Article 4(2) of the Directive in mandatory terms. Yet no such balancing test was carried out by the review decision maker or in the original decision.

9. The applicant's case is grounded on the affidavit of Gavin Sheridan, journalist, and managing director of the applicant. He avers, *inter alia*, as follows:

> "This case raises fundamental issues in relation to the relationship between national law and EU law, in addition to fundamental issues about transparency of Irish Government decision-making in relation to environment matters. The right to access environmental information contained in the Aarhus Convention, the Directive and AIE Regulations is not an abstract, standalone right; rather, it is central to ensuring effective public participation in decisions in environmental matters, ensuring accountability for such decisions and making sure that the best possible decision is made."

10. The applicant also relies on an affidavit sworn by Professor John Sweeney, emeritus Professor of Geography at Maynooth University whose career in research and teaching in North America, Africa and Ireland focused principally on aspects of climatology and climate change.

11. In their statement of opposition, the respondents oppose the judicial review application on the following grounds:

> 1. The applicant's arguments were recently considered and rejected by the High Court in *An Taoiseach v. Commissioner for Environmental Information.* The applicant has put forward no basis on which it could be said that that case was wrongly decided.
>
> 2. The confidentiality of Cabinet discussions is protected by Article 28.4.3 of the Constitution, subject only to the jurisdiction of the High Court to order disclosure on the grounds set out in Article 28, which do not apply in the instant case. There is moreover an important public interest in protecting the confidentiality of Cabinet discussions.
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> 3. The disclosure of material relating to Cabinet discussions is a ground for refusal in Article 8(b) of the AIE Regulations, and such discussions are expressly exempted from the general obligation to disclose material relating to emissions into the environment by virtue of Article 10(2) of the said Regulations.
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> 4. There is no conflict between the provisions of the AIE Regulations and the Directive. Records of Cabinet discussions constitute "internal communications" within the meaning of Article 4(1)(e) of the Directive, and, accordingly are not covered by the exemption contained in Article 4(2) thereof in respect of information on emissions into the environment.
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> 5. Alternatively, without prejudice to the foregoing, records of Cabinet discussions constitute "proceedings of public authorities" within the meaning of Article 8(a) (iv) of the AIE Regulations and Article 4(2)(a) of the Directive, the confidentiality of which is protected by law. As such discussions do not constitute "information on emissions into the environment" they are not covered by the exemption in Article 4(2) of the Directive in respect of information on emissions into the environment.
>
> 6. Further (and without prejudice to the foregoing), records of Cabinet discussions constitute "internal communications" within the meaning of Article 9(2) (d) of the AIE Regulations and hence their disclosure may be refused pursuant to Article 9(2)(d). The records also constitute "internal communications within the meaning of Article 4(1) (e) of the Directive, and as such are not covered by the exemption in Article 4(2) of the Directive in respect of information on emissions into the environment.
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> 7. Even if there was any basis for arguing that there was a conflict between national and EU law, it is denied that the first respondent had any jurisdiction to disapply Regulation 8(b) and 10(2) of the AIE Regulations, much less Article 28.4.3 of the Constitution, based on his own interpretation of the Directive. Pursuant to the laws of the State, it is the express function of the courts under Article 34 of the Constitution to determine such matters, as expressed by the High Court in *An Taoiseach v. Commissioner for Environmental Information.*
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> 8. It is denied that the review decision-maker failed to give reasons for the refusal. It is clear from both the applicant's application for an internal review and from the pleadings herein that the applicant fully understood the reasons for the refusal.
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> 9. It is denied that there is any conflict between the AIE Regulations and EU law or that the first respondent did or was

required to give primacy to national law over EU law.

10. It is denied that the review decision is based on a fundamental error of law as alleged in the statement of grounds: the first respondent had no role in considering whether the AIE Regulations correctly implemented the Directive; he was limited to applying the AIE Regulations as interpreted by the High Court in *An Taoiseach v. Commissioner for Environmental Information*.

11. It is denied that Article 8(b) of the AIE Regulations gives effect to a ground of refusal which is not recognised by the Directive or that it qualifies any right set out therein.

12. It is further denied that Article 10(2) of the AIE Regulations is incompatible with or limits the scope of Article 4(2) of the Directive.

13. The first respondent examined each of the relevant documents and considered whether same came within the protection afforded to Cabinet discussions in the AIE Regulations. Having regard to the constitutional status and public importance of Cabinet confidentiality under Irish law, any public interest that would be served by the disclosure of the requested document's is clearly and decisively outweighed by the importance of protecting Cabinet confidentiality.

14. The first respondent acted within jurisdiction as laid down in the AIE Regulations.

15. The AIE Regulations protect material from disclosure which is covered by Article 28.4.3 of the Constitution, and there is no conflict between domestic law and EU law in this regard.

16. Without prejudice to the foregoing, even if such a conflict did exist (which is denied) the interpretation and resolution of such was not for the first respondent.

12. In his affidavit grounding the statement of opposition, Mr. Shaw, the review decision-maker, avers that for the purpose of conducting the review he examined the submission of Ms. Duffy outlining the reasons for her decision, the applicant's request for the review, legal advice from the Attorney General's office, the schedule of documents withheld and copies of the individual documents. He goes on to state:

> "I say that I considered each of the documents to see whether they properly came within the protection afforded the Cabinet discussions in the AIE Regulations, and, in doing so, had regard to the importance of the principle of cabinet confidentiality. I say that, having conducted this exercise, I affirmed the decision of Ms. Duffy not to release the documents under Article 8(b) and 10(2) of the AIE Regulations."

The relevant statutory provisions
13. At this juncture, it is apposite to set out the relevant provisions of the Directive and the AIE Regulations as arise for consideration in this case.

The Directive
14. Article 3 of the Directive provides:

> "1. Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.
>
> 2. Subject to Article 4 and having regard to any timescale specified by the applicant, environmental information shall be made available to an applicant:
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> (a) as soon as possible or, at the latest, within one month after the receipt by the public authority referred to in paragraph 1 of the applicant's request; or
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> (b) within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to in (a) cannot be complied with. In such cases, the applicant shall be informed as soon as possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it.
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> …
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> 5. For the purposes of this Article, Member States shall ensure that:
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> (a) officials are required to support the public in seeking access to information;
>
> (b) lists of public authorities are publicly accessible; and
>
> (c) the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:
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> - the designation of information officers;
>
> - the establishment and maintenance of facilities for the examination of the information required,
>
> - registers or lists of the environmental information held by public authorities or information points, with clear indications of where such information can be found.

Member States shall ensure that public authorities inform the public adequately of the rights they enjoy as a result of this Directive and to an appropriate extent provide information, guidance and advice to this end."

15. The Directive also provides for the basis upon which access to environmental information may be refused:

"Article 4

Exceptions

1. Member States may provide for a request for environmental information to be refused if:

(a) the information requested is not held by or for the public authority to which the request is addressed. In such a case, where that public authority is aware that the information is held by or for another public authority, it shall, as soon as possible, transfer the request to that other authority and inform the applicant accordingly or inform the applicant of the public authority to which it believes it is possible to apply for the information requested;

(b) the request is manifestly unreasonable;

(c) the request is formulated in too general a manner, taking into account Article 3(3);

(d) the request concerns material in the course of completion or unfinished documents or data;

(e) the request concerns internal communications, taking into account the public interest served by disclosure.

Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion.

2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;

(b) international relations, public security or national defence;

(c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;

(e) intellectual property rights;

(f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;

(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;

(h) the protection of the environment to which such information relates, such as the location of rare species.

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment. Within this framework, and for the purposes of the application of subparagraph (f), Member States shall ensure that the requirements of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are complied with (1).

3. Where a Member State provides for exceptions, it may draw up a publicly accessible list of criteria on the basis of which the authority concerned may decide how to handle requests.

4. Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested.

5. A refusal to make available all or part of the information requested shall be notified to the applicant in writing or electronically, if the request was in writing or if the applicant so requests, within the time limits referred to in Article 3(2) (a) or, as the case may be, (b). The notification shall state the reasons for the refusal and include information on the review procedure provided for in accordance with Article 6."

The AIE Regulations
16. In similar vein to Article 3 of the Directive, Article 7 of the AIE regulations puts an obligation on a public authority to make available environmental information held by it on receipt of a request made under Article 6.

17. For the purposes of the within proceedings, the relevant provisions of the AIE Regulations which provide for exceptions to the right of access are as follows:

> 8. A public authority shall not make available environmental information in accordance with article 7 where disclosure of the information—
>
> (a) would adversely affect—
>
> …
>
> (iv) without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law …
>
> or
>
> (b) to the extent that it would involve the disclosure of discussions at one or more meetings of the Government, is prohibited by Article 28 of the Constitution.
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> …
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> 9. (2) A public authority may refuse to make environmental information available where the request—
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> …
>
> (d) concerns internal communications of public authorities, taking into account the public interest served by the disclosure.
>
> *Incidental provisions relating to refusal of information*
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> 10. (1) Notwithstanding articles 8 and 9 (1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment.
>
> (2) The reference in sub-article (1) to information on emissions into the environment does not include a reference to any discussions on the matter of such emissions at any meeting of the Government.
>
> (3) The public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.
>
> (4) The grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.
>
> (5) Nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information…"

18. A request for access to similar documents as those requested by the applicant in the present case was made by a member of the public in 2007, which led the Commissioner for Environmental Information to order the release of certain documents. This decision was challenged by the first respondent in the High Court leading to the judgment in *An Taoiseach v. Commissioner for Environmental Information*, the decision referenced in the original decision in the within proceedings and upon which the respondents rely in answer to the applicant's within challenge. In the course of his judgment, O'Neill J. had cause to consider the provisions of the Directive and the AIE Regulations.

An Taoiseach v. Commissioner for Environmental Information
19. In *An Taoiseach v. Commissioner for Environmental Information,* the notice party sought access to documents relating to cabinet decisions or reports of cabinet discussions on Ireland's greenhouse gas emissions. Having been refused, the notice party appealed to the Commissioner for Environmental Information, who decided that the exception for cabinet discussions as set out in Article 10(2) of the AIE Regulations was not in conformity with the Directive. As the Directive was directly effective, the Commissioner directed the disclosure of a document which concerned cabinet discussions on greenhouse gas emissions. The appellant appealed the decision to the High Court on the grounds that the Commissioner had no jurisdiction to interpret or disapply the AIE Regulations, and that in any event she had wrongly interpreted the AIE Regulations and the Directive. The Commissioner argued that in view of the primacy of EU law, she was obliged not to apply any provision of national law which was incompatible with EU law.

20. In allowing the appeal, O'Neill J. held in the first instance that the Commissioner did not have jurisdiction to consider whether the AIE Regulations were inconsistent with the Directive. He held that questions involving the interpretation of EU law, and its compatibility with national law, were a matter for the courts and not for administrative bodies such as the Commissioner. In his view, the case law of the ECJ was clear in determining that the primacy of EU law is secured by the general EU rule to that effect, but that it is then left to Member States to determine procedures for the enforcement of EU law within the architecture of their respective legal systems. Accordingly, there was no difficulty under EU law in reserving questions of the interpretation of EU law and its compatibility with national law to the courts rather than to administrative bodies such as the first respondent.

21. The applicant's statement of grounds takes issue with O'Neill J.'s findings in this regard, and in the course of his written submissions counsel for the applicant argued that O'Neill J's finding in this regard is difficult to reconcile with the principle of the supremacy of EU law as set out by the ECJ. However, in the course of the hearing of the within application, counsel accepted that as far as the decision which is sought to be impugned in the within proceedings is concerned, the question of whether the review

decision-maker was obliged to disapply national law in favour of the Directive is somewhat irrelevant given that the matter is now before the Court on judicial review and has not been pursued by way of appeal to the Commissioner for Environmental Information. In any event, and insofar as the applicant sought to argue to the contrary, I am satisfied that the recent decision of the Supreme Court in *Minister for Justice v. Workplace Relations Commission* [2017] IESC 43 has upheld the position that the EU principles of equivalence and effectiveness are not infringed by requiring that a claim that secondary legislation was not to be obeyed if contrary to EU law is to be brought before the High Court for determination.

22. I turn now to those parts of the judgment of O'Neill J. in *An Taoiseach v. Commissioner for Environmental Information* which are germane to the issues which fall to be decided in the within proceedings.

23. In the course of his judgment, O'Neill J. considered how the AIE Regulations and the Directive were to be interpreted in the context of a request for records of discussions of the Government.

24. The learned judge noted that the obligation to disclose records of cabinet discussions, and the compatibility of the AIE Regulations with the Directive, depended on whether the records in question were considered either:-

> (i) "internal communications of public authorities" as referred to in Article 4(1)(e) of the Directive and Article 9(2)(d) of the AIE Regulations. If this interpretation were adopted, cabinet discussions were exempt from disclosure.
>
> (ii) "proceedings of public authorities" as referred to in Article 4(2)(a) of the Directive and Article 8(a)(iv) of the AIE Regulations. It was noted that given that this exemption is subject to the exception contained in Article 10(1) of the AIE Regulations and Article 4(2) of the Directive relating to "information on emissions into the environment", cabinet records which contained material relating to emissions into the environment would not be exempt from disclosure.

25. O'Neill J. considered that a third interpretation was that records of cabinet discussions were neither of the above, and that such records were covered separately under Article 8(b) of the AIE Regulations.

26. As his judgment discloses, O'Neill J. preferred the third interpretation, namely that records of Cabinet discussions were covered solely by Article 8(b) of the AIE Regulations. His reasoning was expressed in the following terms:-

> *"It is clear that the Regulations of 2007 expressly and unequivocally make provision for discussions at meetings of the Government in art. 8(b) and article 10(2). Hence, applying the primary canon of construction, namely ascertaining the true meaning of the words used and applying same unless absurdity is produced, I am of the opinion that, for the purpose of the Regulations of 2007, it must be taken that the only provisions of the Regulations of 2007 that govern or affect cabinet confidentiality are arts. 8(b) and art. 10(2) and not art. 8(a)(iv) or art. 9(2)(d). The opening phrase in art 8(a)(iv), namely 'without prejudice to paragraph (b)', tends to reinforce this conclusion. Article 10(2) has the effect of protecting from disclosure a record of discussion at a meeting of the Government of emissions into the environment." (at para. 81)*

27. Having so found, O'Neill J. then considered whether the express exception for Cabinet records in Article 8(b) and Article 10(2) of the AIE Regulations "*is inconsistent with the Directive and, therefore invalid*". It was in this context that the question of the correct categorisation of Government meetings arose for consideration, and whether Article 4(1)(e) or Article 4(2)(a) of the Directive applied.

28. O'Neill J. formed the view that it was "*somewhat artificial and strained*" to consider cabinet meetings as the "proceedings" of a public authority within the meaning of Article 4(2)(a) of the Directive. Rather, he held that it was clear from the circumstances in which members of the Government met at cabinet to communicate in a private and internal manner that the records of such discussions could only be interpreted as "internal communications" within the meaning of Article 4(1)(e) of the Directive. Any other conclusion would lead to "*absurd results*". O'Neill J.'s conclusions were expressed as follows:

> *"[84] On the other hand, meetings of the Government are the occasions when, as provided for in Article 28.4.2° of the Constitution, the members of the Government come together to act as a collective authority, collectively responsible for all departments of State. Meetings of the Government are the constitutionally mandated means or system of communication between its members for the purpose of discharging their collective responsibility. These meetings and their records are required by the Constitution to be private and confidential unless otherwise directed by the High Court under Article 28.3 of the Constitution. Whereas many aspects of the functions of the Government are essentially public and external in nature, meetings of the Government are quintessentially private and internal to the overall functions of the Government. Thus, in my judgment, this constitutionally mandated form of communication between members of the Government can only be regarded as the internal communications of a public authority. Any other conclusion would lead to absurd results, as pointed out by counsel for the appellant, in that communications between members of the Government in any other context apart from formal meetings of the Government would have to be regarded as internal communications and protected from disclosure but the same communications at a Government meeting would, as 'the proceedings of a public authority', attract disclosure. Manifestly such a state of affairs, apart from its obvious absurdity, would seriously undermine the discharge of collective responsibility by the Government, as required by Article 28.4.2° of the Constitution. In this regard, I should further add that I am quite satisfied that the distinction sought to be drawn between communications between the members of a public authority and between officials of that authority or between officials of the authority and the members of the authority is devoid of any rational merit and has no discernible basis either in the express provisions or, by way of necessary implication, in the Directive or the Regulations of 2007.*
>
> *[85] Hence in my view art. 4(1)(3) (sic)of the Directive clearly applies to meetings of the Government and thus there is no conflict between arts. 8(b) and 10(2) of the Regulations of 2007 and the Directive."*

The issues which arise in the within case

29. Having regard to the pleadings and the written and oral submissions of the parties, I consider that the following issues arise in the within proceedings:

> a. Whether the respondents are seeking to rely on new legal grounds to justify the review decision-maker's refusal to disclose, which were not set out in the review decision or in the original decision.
>
> b. Whether Government discussions are "internal communications" under Article 4(1)(e) of the Directive, as found by

O'Neill J. in *An Taoiseach v. Commissioner for Environmental Information*.

c. Whether *An Taoiseach v. Commissioner for Environmental Information* was otherwise wrongly decided;

d. Whether the exemptions provided under the Articles 8(b) and 10(2) of the AIE Regulations impose a class based exemption to the right of access to environmental information, derived not from the Directive but from the constitutional protection for the confidentiality of discussions at Government meetings. If so, whether in this regard the said provisions are inconsistent with the Directive?

e. Whether the review decision-maker acted in breach of the Directive and/or the AIE Regulations in failing to interpret any relevant exemption under the AIE Regulations in a restrictive way, taking into account the public interest served by the disclosure;

f. Whether the review decision-maker acted in breach of the Directive and/or the AIE Regulations in failing to weigh the public interest served by disclosure against the interest served by refusal on a case by case basis;

g. Whether the review decision-maker acted in breach of the Directive and/or the AIE Regulations in failing to consider granting partial access to the requested information; and

h. Whether the review decision-maker acted in breach of national and/or EU law in failing to give reasons or adequate reasons for his decision.

Are the respondents seeking to rely on grounds to justify the refusal of information which were not relied on by the review decision-maker?

30. As the statement of opposition discloses, the respondents rely, by way of alternative argument to their position that the review decision-maker properly refused access pursuant to Article 8(b) and 10(2) of the AIE Regulations, on Article 4(2)(a) of the Directive and Article 8(a)(iv) of the AIE Regulations as a basis for refusal of the information sought by the applicant. They further plead that Government discussions do not constitute "information on emissions into the environment"; hence the respondents effectively contend that the exemption provided for in the last sentence of the second paragraph of Article 4(2) of the Directive did not apply in this case.

31. The applicant's response to this argument is that the respondents cannot be permitted to rely on a basis for refusal (Article 4(2)(a) of the Directive or Article 8(a)(iv) of the AIE Regulations) which was not contained in the review decision. Furthermore, it is contended that the respondents cannot be permitted, in their now reliance on Article 4(2)(a) of the Directive, to argue that the information sought did not constitute information concerning emissions into the environment, as, again, this was not the basis of refusal in the review decision. Nor is such a case made in Mr. Shaw's affidavit. It is however acknowledged by the applicant that if the documents in question are not documents concerning emissions into the environment, then the emissions override as contained in the second paragraph of Article 4 of the Directive cannot be invoked in the applicant's favour if the Court were to hold that Government discussions constituted "proceedings" for the purposes of Article 4(a) of the Directive or Article 8(a)(iv) of the AIE Regulations. However, it is further argued, if the respondents are permitted to rely on Article 4(2)(a) of the Directive as a basis for a refusal under that Article, or its equivalent under the AIE Regulations, that the first respondent was still mandated to carry out the requisite balancing exercise, as provided for both in the Directive and the AIE Regulations, which did not occur.

32. Counsel for the applicant also objects to the respondents' reliance on Article 4(1)(e) of the Directive and Article 9(2)(d) of the AIE Regulations since, again, none of these provisions was cited by the review decision-maker as a basis for the refusal.

33. The respondents reject the applicant's claims that in relying on Article 4(1)(e) and 4(2)(a) of the Directive and on Article 8(a)(iv) and 9(2)(d) of the AIE Regulations, they are raising new arguments not dealt with in the review decision. Contrary to the applicant's submission, the respondents say that they have not sought to amplify the reasons given in the review decision. It is submitted that all of the aforesaid provisions were considered at some length by O'Neill J. in *An Taoiseach v. Commissioner for Environmental Information*, a case which was specifically referred to by the original decision-maker, whose decision was subsequently upheld in the review decision. The respondents argue that in such circumstances there is no basis on which the applicant can claim that there is anything new in the arguments being advanced by the respondents. It is submitted that the arguments being made by both sides in the present case bear a striking similarity to those advanced in *An Taoiseach v. Commissioner for Environmental Information* and by the applicant in the case presented to the review decision-maker.

34. In the first instance, I do not understand the applicant to be vigorously opposing the respondents' reliance on Article 4(1)(e) of the Directive. In any event, it is clear to the Court that given the reference in the original decision to *An Taoiseach v. Commissioner for Environmental Information*, and the upholding of the original decision by the review decision-maker, it can hardly come as a surprise to the applicant that the respondents would invoke Article 4(1)(e) of the Directive to aid their arguments as to why the applicant's challenge should fail, since O'Neill J. found, that Article 4(1)(e) "clearly applies to meetings of the Government". That being said however, I am persuaded by the applicant's submission that the respondents are attempting, *ex post facto*, to justify the refusal of the information sought by reference to, in particular, Article 4(2)(a) of the Directive and Article 8(a)(iv) of the AIE Regulations, in circumstances where the review decision-maker did not invoke those provisions and where the decision-maker solely relied on the discrete grounds for refusal as set out in Articles 8(b) and 10(2) of the AIE Regulations, as interpreted by O'Neill J., and in circumstances where ONeill J. expressly rejected the notion that cabinet discussions constituted "proceedings" of public authorities for the purposes of Article 4(2)(a) of the Directive and Article 8(a)(iv) of the AIE Regulations. However, the aforesaid notwithstanding, the applicant's written and oral submissions suggest that an issue for this Court is whether O'Neill J. erred in law in finding that, as a class of information and without any reference to the information at issue in the case, discussions at meetings of the Government are "internal communications" within the meaning of Article 4(1)(e) of the Directive, a submission which, to my mind, suggests that the Court is effectively being asked by the applicant to consider whether meetings of the Cabinet are otherwise than "internal communications" of the Government as a public authority, and whether, in fact, cabinet discussions constitute "proceedings" of a public authority for the purposes of Article 4(2)(a), in respect of which, albeit access to environmental information may be refused under Article 4(2)(a), access shall not be refused if the request relates to "information on emissions into the environment". In such circumstances, the Court will have to consider the provisions of Article 4(2)(a) of the Directive and Article 8(a) (iv) of the AIE Regulations as well as the provisions of Article 4(1)(e) and the corresponding provision in the AIE Regulations. However, the Court cannot lose sight of the fact that the within judicial review must be concerned solely with the actual grounds of refusal, which, in the words of the review decision-maker, "relate to the Constitutional protection for the confidentiality of discussions at meetings of the Government", as provided for in Articles 8(b) and 10(2) of the AIE Regulations.

Is An Taoiseach v. Commissioner for Environmental Information a full answer to the applicant's within challenge, as contended for by the respondents?
35. It is proposed under this heading to address issues (b) to (g) as identified above by the Court as arising in the within proceedings.

The applicant's submissions
36. It is clear from Article 8 of the AIE Regulations that the State, with respect to the mandatory obligation to disclose environmental information, has availed of all of the exceptions to this requirement provided for in Article 4(1) and (2) of the Directive.

37. With regard to the exceptions in issue in the within proceedings, it is clear that Article 4(1)(e) is replicated by Article (9)(2)(d) of the AIE Regulations and that Article 4(2)(a) of the Directive is replicated by Article 8(a)(iv) of the Regulations.

38. The principal argument canvassed on behalf of the applicant in the within proceedings is that Article 8(b) and 10(2) of the AIE Regulations provide for exceptions to the requirement to provide environmental information which are not provided for in the Directive. Counsel for the applicant submits that this is the crux of the within application for judicial review.

39. As is clear from the review decision, Articles 8(b) and 10(2) constitute the sole basis for the first respondent's refusal of the applicant's request. The applicant submits that such mandatory standalone bases for refusal are not provided for in the Directive. It is contended that there cannot be a blanket refusal of access to environmental information. In this regard, counsel cites the decision of the Compliance Committee of the UN Economic and Social Council dated 26th June, 2015, which held that "*the classicisation of an entire type of environmental information as exempt from disclosure runs contrary to the letter and spirit of the [Aarhus] Convention*". It is submitted that in *Conway v. Ireland* [2017] IESC 13, Clarke J. found it "*appropriate to have regard to decisions and commentaries of the Compliance Committee established under the Aarhus Convention for the purposes of facilitating the compliance by subscribing States with the terms of the Convention itself*".

40. Counsel points to the heading to Article 8 of the AIE Regulations - "Grounds that, subject to article 10, mandate a refusal". It is submitted that pursuant to the Directive, no ground of refusal of environmental information is mandatory; there is only mandatory disclosure of information subject to permitted exceptions. Furthermore, where a request for environmental information is sought to be refused under Article 4(1) or (2) of the Directive, it is mandatory that the public interest served by disclosure must be taken into account and weighed against the public interest served by a refusal. Moreover, consideration must be given to the question of partial disclosure.

41. It is specifically submitted on the applicant's behalf that insofar as the respondents plead that Article 8(b) is not inconsistent with the Directive, and that records of cabinet discussions constitute "internal communications" within the meaning of Article 4(1)(e) of the Directive and/or Article 9(2)(d) of the AIE Regulations and that therefore disclosure may be refused on that basis, there remained an obligation on the review decision-maker, before any refusal of the requested documents, "to take account of the public interest served by disclosure" as provided for both in Article 4(1)(e) of the Directive and Article 9(2)(d) of the AIE Regulations, which was not carried out in the present case.

42. More fundamentally, counsel submits that the rationale of O'Neill J. in *An Taoiseach v. Commissioner for Environmental Information* is illogical and flawed. It is contended that the learned judge reasoned backwards in order to find a ground for the refusal that is provided for in the Directive. More particularly, counsel asserts, even when finding that Article 8(b) of the AIE Regulations applied to discussions at meetings of the Government, the learned judge failed to read into Article 8(b) the requirement that a mandatory balancing exercise must be carried out (and which should have been carried by O'Neill J. in his appellate capacity), a requirement which is provided for both in Article 4(1)(e) of the Directive and, more particularly, in the second subparagraph of Article 4 of the Directive.

43. Counsel also places particular emphasis on the fact that the second subparagraph of Article 4 of the Directive specifically provides that the grounds for refusal mentioned in Article 4(1) and (2) "shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure" and that "in every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal". Moreover, over and above the requisite balancing exercise to be carried out, Article 4(4) of the Directive makes it mandatory for a public authority to make partial disclosure, where it is possible to do so, in respect of information falling within the scope of Article 4(1)(d) and (e) and Article 4(2) of the Directive.

44. It is thus submitted that O'Neill J. erred in upholding the first respondent's blanket approach in Article 8(b) to refusal of environmental information based on cabinet confidentiality, most especially in circumstances where O'Neill J. made no provision for the mandatory balancing exercise or the possibility of partial disclosure of documents.

45. It is suggested on behalf of the applicant that the AIE Regulations are incompatible with the Directive if the Regulations are to be interpreted as providing for a class exemption from the obligation to disclose environmental information. In aid of his submission in this regard, counsel cites *NAMA v. Commissioner for Environmental Information* [2015] IESC 51, where O'Donnell J. considered the manner in which the Directive was transposed into Irish law. He stated:-

> *"[8] It may be appropriate to pause here and make some observations on both the method, and terms, of the implementation of Directive 2003/4/EC into Irish law. If this directive had been implemented by primary legislation, then some difficulty in interpretation might be lessened since even if the provisions of Irish law were interpreted as more extensive than required by the Directive of 2003, that would not pose any problem as the Directive of 2003 already contemplates and permits the possibility that member states could adopt more extensive provisions. However, this directive is implemented by statutory instrument pursuant to the provisions of the European Communities Act 1972. It is the making of law by a body other than the Oireachtas (in this case the Minister) but is protected from constitutional challenge because it benefits from the terms of the Constitution adopted on accession to what was then the European Economic Communities under what was then Article 29.4.3° (subsequently renumbered) which provided that no provision of the Constitution would invalidate any laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the European Communities or European Union as the case may be. This exemption however only extends to provisions "necessitated by the obligations of membership" and thus in this context permits the making of law by statutory instrument insofar as it faithfully implements a directive pursuant to the obligations on Ireland as a member state to do so. If however a statutory instrument goes further than the implementation of the directive necessitates, it would to that extent be unconstitutional, since it would be the making of law by a body other than the Oireachtas, and not protected by the provisions of Article 29. There is thus a specific importance in Irish law in understanding the extent and terms of a directive, where implemented by secondary legislation. In addition to the obvious benefits therefore of democratic oversight that implementation by primary legislation would entail, that route would also avoid some of the difficulties of interpretation which arose in this case."*

46. O'Donnell J's judgment sets out the limitations on the statutory instrument method of transposing EU Directives. Counsel for the applicant submits however that it is possible for the Court to interpret the AIE Regulations in a manner as to conform to the requirements of EU law if the Court considers Article 8(b) of the AIE Regulations a subset of Article 4(1)(e), which brings with it the obligation to engage in the requisite balancing exercise, contained in Article 4(1)(e) itself and in the second sub paragraph of Article 4 and indeed which is provided for both in Article s 9(2)(d) of the AIE Regulations and, more particularly, in Article 10(3) thereof.

47. As to Article 4(2)(a) of the Directive, counsel submits that O'Neill J.'s conclusion in *An Taoiseach v. Commissioner for Environmental Information* that Article 4(2)(a) of the Directive was not intended to apply to meetings of the Government was arrived at without reference to the Directive or the Aarhus Convention and without applying the teleological approach to the interpretation of EU legislation as advocated by O'Donnell J. in *NAMA v. Commissioner for Environmental Protection* The applicant is thus asking the Court to revisit the question of whether cabinet discussions fall more properly within Article 4(2)(a) of the Directive, and not Article 4(1)(e). Counsel also submits that if cabinet discussions fall within Article 4(2)(a) of the Directive (as transposed by Article 8(a)(iv) of the AIE Regulations), the first respondent is expressly prohibited, pursuant to the last sentence of the second sub paragraph of Article 4 of the Directive, from refusing disclosure of requested information where the request relates to emissions into the environment.

48. Quite clearly, Article 10(1) of the AIE Regulations gives effect to the emissions override provision in the last sentence of the second paragraph of Article 4 of the Directive. However, Article 10(2) of the AIE Regulations excludes from the provisions of Article 10(1) any discussions of emissions into the environment "at any meeting of the Government". The applicant contends that in doing so, Article 10(2) of the AIE Regulations expressly disapplies the emissions override provided for in the second sub paragraph of Article 4 of the Directive, which is not permissible given the mandatory nature of the emissions override as set out in Article 4 of the Directive, and moreover in circumstances where the Directive requires that every refusal, be it under Article 4(1) or Article 4(2), must be balanced by taking into account the public interest served by disclosure and duly weighing that interest against the interests served by the refusal.

49. Insofar as the respondents now seek to rely on Article 4(2)(a) of the Directive (and Article 8(a)(iv) of the AIE Regulations), and by the same token argue that the Cabinet discussions cannot constitute information on emissions into the environment, which would obviate the emissions override provided for in Article 4(2), the applicant submits that in *An Taoiseach v. Commissioner for Environmental Information*, it was accepted by all parties that the material in question concerned emissions into the environment. (See para. 53) Counsel further contends that by virtue of his reliance on Article 10(2) of the AIE Regulations as a basis for the refusal, the review decision-maker is, in fact, asserting that the requested documents constitute information regarding emissions into the environment.

50. In aid of his submissions in this regard, counsel cites Case C-673/13P, *European Commission v. Stichting Greenpeace Nederland* (23rd November, 2016) where the ECJ emphasised that a restrictive approach cannot be taken into what constitutes information about emissions into the environment. (At para. 71 - 76) In a parallel judgment in Case C-442/14, Bayer v. Cropscience SA.NV (23rd November, 2016), the ECJ again reiterated this sentiment and, at para. 86, stated as follows:-

> *"…the public must have access not only to information on emissions as such, but also to information concerning the medium to long-term consequences of those emissions on the state of the environment, such as the effects of those emissions on non-targeted organisms. The public interest in accessing information on emissions into the environment is specifically to know not only what is, or foreseeably will be, released into the environment, but also, as the Advocate General stated … to understand the way in which the environment could be affected by the emissions in question."*

The respondents' submissions

51. In the first instance, counsel for the respondents submits that the questions in issue in the within proceedings must be viewed from the standpoint of the protections afforded to cabinet confidentiality in Irish law. Counsel contends that there is an important public interest in protection discussions at Cabinet.

52. An absolute claim to the confidentiality of such discussions was upheld by the Supreme Court in *A.G. v. Hamilton* (No. 1) [1993] 2 I.R. 250 as derived from Article 28.4.1 and 2 of the Constitution. In that case Finlay C.J. spoke of "*[t]he necessity for full, free and frank discussion between members of the Government prior to the making of decisions, something which appear to be an inevitable adjunct to the obligation to meet collectively and to act collectively*". He went on to state:

> *"The implication of this confidentiality from the provisions of the Constitution to which I have referred is, in my judgment, amply justified by the practical impossibility of carrying on the fundamental functions of Government in its absence. Since the sole issue raised before us in this appeal is whether such an absolute right of confidentiality exists, I am satisfied that the Court cannot be concerned with either the relevance of the questions sought to be asked concerning discussions at Government meetings, nor with any apparent breaches of such confidentiality which it is suggested have occurred in either documentary or oral evidence already afforded to the Tribunal. These matters would only be relevant if an issue of qualified privilege or confidentiality had arisen.*
>
> *I would, therefore, conclude that the claim for confidentiality of the contents and details of discussions at meetings of the Government, made by the Attorney General in relation to the inquiry of this Tribunal is a valid claim. It extends to discussions and to their contents, but it does not, of course, extend to the decisions made and the documentary evidence of them, whether they are classified as formal or informal decisions. It is a constitutional right which, in my view, goes to the fundamental machinery of government, and is, therefore, not capable of being waived by any individual member of a government, nor in my view, are the details and contents of discussions at meetings of the Government capable of being made public, for the purpose of this Inquiry, by a decision of any succeeding Government.*
>
> *I would, therefore, allow the appeal and grant to the applicant a declaration in the terms of this judgment, it not being necessary, clearly, having regard to the attitude of the learned respondent, to make any form of order of prohibition."*

53. Similar sentiments were expressed by Hederman J. where he stated:

> *"If it were permissible to compel in any circumstances the disclosure of the content of discussions which take place at Government meetings the executive role of the Government as envisaged by the Constitution would be undermined, perhaps even de-stabilised." (at p. 275)*

54. The sentiments in *A.G. v. Hamilton* are effectively replicated in Article 28.4.3° of the Constitution, following the 17th Amendment

thereof. It provides:

> "The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter –
>
> (i) in the interests of the administration of justice by a Court, or
>
> (ii) by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance."

55. The respondents contend that the principle of cabinet confidentiality in Irish law is in no way incompatible with the Aarhus Convention, or the Directive as implemented in the State. They submit that contrary to the applicant's arguments, O'Neill J. did not urge or create exemptions to the obligation to disclose environmental information over and above those provided for in the Directive. It is argued that what the learned judge did was to take the view that Cabinet discussions fell within the scope of Article 4(1)(e). While it is accepted that Article 9(2)(d) of the AIE Regulations transposed Article 4(1)(e) of the Directive, O'Neill J. was however satisfied to find that Article 8(b) of the AIE Regulations expressly provides for an exception to disclosure on the basis of cabinet confidentiality. Counsel submits that having found that discussions of the Cabinet were "internal communications" under Article 4(1)(e) and not "proceedings" of a public authority under Article 4(2)(a), O'Neill J. correctly concluded that Article 8(b) alone, and not Article 9(2)(d) or Article 8(a)(iv) of the AIE Regulations applied to meetings of the Government.

56. The respondents also assert that, from a purposive perspective, how could it be that Government discussions would not be internal communications or that they would have lesser status than the internal discussions of another type of public authority.

57. It is further contended that for the reasons stated in his judgment, O'Neill J. was also correct in considering that meetings of the Government did not constitute "proceedings" for the purposes of Article 4(2)(a) of the Directive.

58. It is thus submitted that the arguments canvassed on behalf of the applicant in this case have already been correctly rejected by O'Neill J. following his interpretation of the AIE Regulations and the Directive. In doing so, it is submitted that O'Neill J. properly applied the law. Accordingly, the respondents submit that the decision of O'Neill J. provides a full answer to the applicant's claim. In those circumstances, they assert that there is no basis upon which the Court should depart from the judgment in *An Taoiseach v. Commissioner for Environmental Information*. It is submitted that the applicant has not established any basis upon which the principle of judicial comity should be departed from and that the applicant has not achieved the threshold set out in *Re Worldport Ireland Limited* [2005] IEHC 189 such as would allow this Court to depart from the findings of O'Neill J.

59. In *Re Worldport*, Clarke J. addressed the issue of judicial comity in the following terms:

> *"It is well established that, as a matter of judicial comity, a judge of first instance ought usually to follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Huddersfield Police Authority v. Watson [1947] K.B. 842 at 848, Re Howard's Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered."*

60. In *Kadri v. Government of Wheatfield Prison* [2012] 2 ILLRM 392, Clarke J. cited his decision in *Re Worldport* and stated:

> *"A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing." (at p. 403)*

61. The *Re Worldport* principles also followed by Hogan J. in *A.G. v. Residential Institutions Board* [2012] IEHC 492 where the learned judge considered himself "*effectively compelled*" to follow earlier rulings on the issue of what constituted "*exceptional circumstances*" under the residential Institutions Redress Board Act 2002.

62. It is the respondents' contention that the applicant merely argues that the O'Neill J. was wrong in *An Taoiseach v. Commissioner for Environmental Information* without specifying how the learned judge erred.

63. While counsel acknowledges that one could argue that discussions of the cabinet could constitute both "internal communications" and "proceedings of a public authority", for the reasons given by O'Neill J., it is submitted that to equate Cabinet discussions with the "proceedings" of a public authority is an artificial construct.

64. It is further submitted, however, that if the Court is persuaded that records of Cabinet discussions are "proceedings of public authorities", same are nevertheless protected from disclosure under Article 4(2) of the Directive and Article 8(a)(iv) of the AIE Regulations. It is asserted that Cabinet discussions are not caught by the "emissions override" provided for in Article 4(2) of the Directive and Article 10(1) of the AIE Regulations. The respondents contend that this is so because the only information which can constitute "information on emissions into the environment" is factual information relating to such emissions. Counsel contends that discussions of the Cabinet on such information cannot come within that definition. It is contended that this is borne out by the approach of the ECJ in *European Commission v. Stichting Greenpeace Nederland*, which considers emissions in the context of hard information. Counsel suggests that this is a long way from the concept of Cabinet discussions. Counsel also contends that, as the judgment in *A.G. v. Hamilton* makes clear, the protection afforded by Article 28 of the Constitution to Cabinet discussions was to afford full free and frank discussions to members of the Government "prior to the making of decisions". It is submitted that this is very different to the concept of "measures … policies, legislation, plans programmes" as contained in Article 2 of the Directive all which clearly refer to the outcome, rather than the process, of decision- making.

Considerations
65. Having regard to the parties' submissions, the first question to be addressed is whether in *An Taoiseach v. Commissioner for Environmental Information*, O'Neill J. was correct in his designation of the discussions of the Cabinet as "internal communications". Having considered the learned judge's rationale for so finding, and the basis upon which he came to the view that such meetings were not the "proceedings of a public authority" (emphasis added), I find no basis to depart from this finding. It seems to me that whether one approached the issue from a teleological approach or otherwise, the rationale of O'Neill J. on this issue cannot be faulted as either irrational or unreasonable.

66. However, for reasons which I articulate below, I find that I cannot agree with the learned Judge when, after noting that the AIE Regulations "*expressly and unequivocally*" make provision for discussions of the Government in Articles 8(b) and 10(2) of the AIE Regulations, he opines that "*the only provisions of the [AIE Regulations] that govern or affect cabinet confidentiality are arts, 8(b) and art.10(2) and not art.8(a)(iv) or 9(2)(d)*". Before addressing this however, I wish to address the learned judge's finding that Article 8(b) of the AIE Regulations was not inconsistent with the Directive because it was in effect a subset (my words) of Article 4(1)(e) of the Directive. Overall, and albeit, as counsel for the applicant points out, there is no express provision in the Directive which provides for Cabinet confidentiality, I find no basis to depart from the learned judge's conclusion that a valid basis for the genesis of Article 8(b) can be found in Article 4(1)(e), given that Article 4(1) of the Directive provides that a Member State may provide for a request for environmental information to be refused in certain circumstances, including those provided in Article 4(1)(e) namely, where the request "concerns internal communications, taking into account the public interest served by disclosure". (emphasis added)

67. It is however submitted on behalf of the applicant that if there is to be a refusal of access to environmental information it must be justified by reference to the considerations set out in the Directive. It is submitted that this is so not least because of what is contained in Article 4(1)(e) itself but more specifically given the second subparagraph of Article 4, which, in part, states that "[t]he grounds of refusal mentioned in paragraphs 1 and 2 [of paragraph 4] shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal." Counsel for the applicant also points out that this latter provision is fully replicated in Article 10(3) and (4) of the AIE Regulations, and indeed the provisions of Article 4(1)(e), with its in-built balancing of interests requirement, are replicated in Article (9)(2)(d) of the AIE Regulations. I accept the applicant's submissions in this regard.

68. The necessity for such a balancing exercise, as set out in the Directive and the AIE Regulations, has been recognised by the ECJ in Case C-266/09 *Stichting Natur en Milieu v. Netherlands* (16th December, 2010):-

> *"It is apparent from the very wording of Article 4 of Directive 2003/4 that the European Union legislature prescribed that the balancing of the interests involved was to be carried out in every particular case."*

69. Counsel for the applicant also cited the opinion of Advocate General Kokott in Case C-71/10 *Office of Communications v. Information Commissioner* (10th March, 2011). Advocate General Kokott opined that, in conformity with the Directive, a balancing exercise had to be done in every particular case and that the exceptions to the provision of environmental information set out in Article 4(1) and (2) of the Directive "*are not illustrative but exhaustive*".

70. In its decision of 28th July, 2011, in the same case, the ECJ stated:-

> *"…public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal."*

71. I am satisfied that that Office of Communications v. Information Commissioner is authority for the proposition that there can only be reliance (even if it is to be cumulatively) on the exceptions provided for in the Directive if a balancing exercise is done in each case.

72. In Case C-71/14, *East Sussex City Council v. Information Commissioner* (6th October, 2015), the ECJ emphasised the rights provided for in the Directive stating:-

> *"…the EU legislature, in adopting Directive 2003/4, intended to ensure the compatibility of EU law with the Aarhus Convention by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of public authorities…"*

73. The Court also has regard to Case C-416/10 Krizan v. Slovakia (15th June, 2013), where the ECJ opined that "rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of European Union law". (at para. 70)

74. Part of the case made by the respondents is that the applicant should not be permitted to raise the issue of the review decision-maker's failure to consider whether partial disclosure of the requested environmental information should be made. It is said that this is so in light of the applicant's failure to raise this issue in the leave application or in the statement of grounds. The respondents say that no leave was granted on this point. Over and above this, counsel submits that there is in any event an unreality to the applicant's complaint in this regard given the protection afforded to cabinet discussions in Article 8(b) of the AIE Regulations. While partial disclosure is provided for in the Directive, in the AIE Regulations and the Aarhus Convention, counsel argues that this is without prejudice to the confidentiality of information exempted from disclosure in these instruments.

75. On the leave issue, I am not persuaded by the respondents' submission. It is apparent from the Order of Fulham J. that leave was granted on the basis, inter alia, that the review decision-maker erred in failing to carry out the requisite balancing exercise. Albeit that with regard to the issue of the balancing requirement the statement of grounds refers only to a failure to comply with Article 10(3) of the AIE Regulations and Article 4(2) of the Directive, and does not refer to Article 10(5) of the AIE Regulations or Article 4(4) of the Directive, which provide, respectively, for the possibility of partial disclosure, to my mind, this is not a basis for the Court to accede to the respondents' submission. I accept the applicant's argument that, in effect, the question of partial disclosure can be viewed as a subset of the requisite balancing exercise and, thus, the leave Order is sufficient to encompass this ground of challenge.

76. To return now to the more substantive arguments in this case and, in particular, to the judgment of O'Neill J. in *An Taoiseach v. Commissioner for Environmental Information*. In the first instance, I wish to make clear that insofar as the learned judge found that Article 8(a)(iv) of the AIE Regulations not applicable to Government discussions, I cannot disagree with that conclusion. It is not in issue between the parties in the present case that Article 8(a)(iv) in effect replicates Article 4(2)(a) of the Directive, which provides that a request for environmental information may be refused if the disclosure of such information would adversely affect the

"proceedings" of public authorities. As O'Neill J. found that Government discussions were not "proceedings", and given that this Court has found no basis to disagree with that conclusion, it follows that Article 8(a)(iv) of the AIE Regulations has no applicability to Cabinet discussions.

77. However, that being said, as I have already intimated, I cannot agree with the learned judge's finding that it is only Articles 8(b) and 10(2) of the AIE Regulations that affect cabinet confidentiality. It is my view that the provisions of Article 10(3),(4) and (5) of the AIE Regulations also affect cabinet discussions. I hasten to add that the basis upon which I find myself diverging from the finding of the learned judge is tempered by the fact that in his decision O'Neill J. did not in fact address the question of the obligation on a public authority to engage in a balancing exercise before refusing access to environmental information.

78. It is submitted on behalf of the applicant that the overall result of the findings of O'Neill J. is that there is in the AIE Regulations what counsel describes as a "category exemption" for Government discussions from the fundamental requirement to disclose environmental information as provided for in the Directive which is subject only to limited exceptions, which themselves must be interpreted restrictively and which demand the requisite balancing exercise to be carried out on a case by case basis before any refusal. If the AIE Regulations in fact provide for a class exemption for Government discussions, then to my mind the Regulations are inconsistent with the Directive. Is that however the case? I do not believe it to be so.

79. There is no doubt that, as formulated, Article 8(b) of the AIE Regulations provides that a public authority, (for the purposes of this case the Government) "shall" not make available environmental information "to the extent that it would involve the disclosure of discussions at one or more meetings of the Government…" Counsel for the applicant makes much of the fact that this mandatory "shall" is contained in Article 8(b) in circumstances where Article 4(1)(e) of the Directive, the provision where both O'Neill J. in *An Taoiseach v. Commissioner for Environmental Information* and this Court find a legitimate basis for Article 8(b), provides only that a public authority is *permitted* (and not *mandated*) to provide for exceptions to the fundamental requirement to disclose environmental information. However, I do not find that the existence of the word "shall" in Article 8 of the AIE Regulations necessarily renders Article 8(b) inconsistent with the Directive. I so find because of what is contained in Article 10(3), (4) and (5) of the AIE Regulations, which *mandates* a public authority to:

- consider each request on an individual basis;
- weigh the public interest served by disclosure against the interest served by refusal;
- interpret grounds for refusal on a restrictive basis having regard to the public interest served by disclosure; and
- consider the possibility of providing partial information

80. To my mind, there is nothing in the AIE Regulations which immunises records of Government discussions from the mandatory requirements of Article 10(3), (4) and (5) of the AIE Regulations, which provisions replicate the requirements of the Directive. In those circumstances, the Court finds no basis to impugn Article 8(b) of the AIE Regulations *of itself* as being necessarily contrary to the letter and spirit of the Directive, once the provision is construed as a subset of Article 4(1)(e) of the Directive, and given that pursuant to the provisions of Article 10(3), (4) and (5) of the AIE Regulations, which faithfully transpose the Directive, a public authority may refuse access to environmental information only where the requirements of those provisions have been substantively and procedurally adhered to.

81. In answer to the applicant's reliance on the ECJ jurisprudence referred to earlier, counsel for the respondents contends that this case law does not deal with the concept of "internal communications" as set out in Article 4(1)(e) of the Directive. While it is the case that the ECJ has not specifically addressed Article 4(1)(e), I find that that does not take from the import of the ECJ's rulings, particularly in circumstances where the ECJ's rulings, in some of the quoted case law at least, directly address how the exemptions from disclosure contained the Directive must be addressed by the relevant public authority.

82. The respondents also contend that it is evident from the review decision, and Mr. Shaw's affidavit, that individual consideration was afforded to all of the documents identified in the decision. It is also submitted that insofar as the applicant complains that the review decision-maker did not weigh the documents against the public interest in disclosure, the fact of the matter is that the very subject provided for in Article 8(b) of AIE Regulations, i.e. cabinet confidentiality, reflect that any balancing exercise could only ever come down on the side of the first respondent, given the strong protection given to cabinet confidentiality in Irish law.

83. I find that I cannot agree with the respondents' submissions in the above regard. The fact of the matter is that the Directive, and the AIE Regulations, provide for a fundamental right of access to environmental information. If it is to be refused on the grounds permitted in the Directive, it must be justified via the processes set out in the Directive, as replicated in the AIE Regulations. The methodological requirements of Articles 10(3) and (4) of the AIE Regulations are apparent. They require an engagement by the public authority decision-maker which respects the underlying purpose of the Directive, as has been emphasised in the jurisprudence of the ECJ.

84. Accordingly, the very fact of the constitutional protection afforded to Cabinet confidentiality in Irish law, as reflected in Article 8(b) cannot, to my mind, be solely dispositive of the applicant's request for access to environmental information. For a refusal of such information (including information about emissions into the environment) to be justified, the requisite weighing exercise must be embarked on. It must not be a formulaic exercise. Any decision on a request for environmental information must reflect the fact that the process of engagement with the request (whatever the ultimate outcome) was conducted in accordance with the letter and spirit of the Directive.

85. It is the case, and accepted by counsel for the applicant, that neither Article 4(1)(e) of the Directive nor Article 9(2)(d) of the AIE Regulations contain the specific recognition given in the last sentence of the second subparagraph of Article 4 to the mandatory disclosure of information on emissions into the environment (what counsel for the applicant described as the emissions override). The emissions override applies only to requests for environmental information which might otherwise be refused under Article 4(2) of the Directive, including where the confidentiality of the proceedings of public authorities are provided for by law. However, the absence from Article 4(1)(e) of the Directive, and Article 9(2)(d) of the AIE Regulations, of that extra (absolute) imperative to the right of access to information on emissions into the environment does not, to my mind, translate into a carte blanche for the first respondent to refuse information on emissions into the environment by sole reliance on Article 8(b) of the AIE Regulations. As I have stated, before a refusal under Article 8(b) can be justified, the first respondent decision-maker must engage in the requisite balancing exercise. Given the strong imperative in the Directive towards disclosure of environmental information, it cannot suffice, as occurred in the present case, that the applicant's request was refused by reference, *inter alia*, to Article 8(b) of the AIE Regulations, without some indication in the review decision as to why it was considered that the public interest in the confidentiality of Government

discussions should prevail over the public interest which disclosure of the information would serve. The provisions of Article 10(3) and (4) of the AIE Regulations cannot be disapplied solely because the review decision- maker invoked Article 8(b) as a basis for the refusal of the requested information. I take this view even if the applicant had not furnished submissions with its application for a review of the original decision.

86. As it happened, the applicant furnished extensive submissions and specifically advised that there were a number of factors which the review decision-maker should take account of when considering the balancing test required by the AIE Regulations. The factors relied on included, *inter alia*, the following:

> •The now global scientific consensus that climate change is real and is caused by emissions into the atmosphere;
>
> • The consensus that climate change poses the biggest challenge that humanity has ever faced;
>
> • That the Intergovernmental Panel on Climate Change (IPCC) had concluded that "*human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history*", and that "*some of these changes have been linked to human influences*";
>
> • That national policy on climate change recognises the threat of climate change for humanity such that the Department of the Environment has listed the potential impact on climate change as being:
>
> o Sea level rise
>
> o More intense storms and rainfall events
>
> o Increased likelihood and magnitude of river and coastal flooding
>
> o Water shortages in Summer in the east of the country
>
> o Adverse impacts on water quality and
>
> o Changes in distribution of plant and animal species on land and in the oceans.
>
> •That the purpose of the Directive and the Aarhus Convention on which it was based had to be taken account of as had been confirmed by the Supreme Court in *NAMA v. Commissioner for Environmental Information*.
>
> •That regard had to be had to the aims of the Directive as reflected in its recitals, to wit,
>
> "Increased public awareness to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."

87. It is of course not the function of this Court, on judicial review, to engage in the requisite balancing exercise or assess the merits of the applicant's arguments as advanced in the review application. Nor is it the function of the Court to assess the weight to be given to the respective public interests. That is the function of the decision-maker and, specifically, was the obligation of the review decision-maker as regards the decision which is sought to be impugned in the within proceedings. To my mind, there is no way in which it can be established from the review decision whether the requisite balancing exercise was embarked on in the instant case. In my view, the absence of any indicator in the review decision that it was carried out suggests that no balancing exercise, as mandated by Article 10(3) and (4) of the AIE Regulations, was in fact embarked upon. The same goes for the mandatory obligation under Article 10(5) of the AIE Regulations.

88. Nor can the Court draw comfort from the contents of Mr. Shaw's affidavit. Albeit he cites the matters which he took into consideration in coming to his decision, there is no reference therein to whether in fact the public interest served by disclosure was weighed against the interest served by refusal, or whether a restrictive approach was taken to the decision to refuse, as required by the Directive and the AIE Regulations.

89. For all of the reasons cited above, I am satisfied that insofar as the review decision-maker relied on Article 8(b) of the AIE Regulations to refuse the requested information, that refusal was not in accordance with the letter or spirit of the Directive or indeed the AIE Regulations and the review decision cannot thus be upheld for this reason.

Did the review decision-maker's invoking of Article 10(2) of the AIE Regulations form a legitimate basis upon which to refuse the requested information?

90. The next question to be addressed is whether the review decision can nevertheless be upheld by virtue of the decision-maker's reliance on Article 10(2) of the AIE Regulations.

91. To put Article 10(2) into context, one must firstly look to Article 10(1) of the Regulations which provides:

> "Notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the legal request relates to information on emissions into the environment."

This provision in effect transposes the specific recognition given in the last sentence of the second subparagraph of Article 4 of the Directive to the mandatory disclosure of information on emissions into the environment. As already stated, the emissions override applies only to requests for environmental information which could otherwise be refused under Article 4(2) of the Directive, including under Article 4(2)(a).

92. Save for Article 8(b), it is to be noted that Articles 8 and 9(1) of the AIE Regulations transpose by and large the provisions of Article 4(2) of the Directive into Irish law. The Court has already found that as Government discussions do not constitute "proceedings", Article 4(2)(a) of the Directive or its equivalent, Article 8(a)(iv) in the AIE Regulations, have no bearing on the instant

case.

93. I turn now to Article 10(2) of the AIE Regulations which provides:

> "The reference in sub-article (1) to information on emissions into the environment does not include a reference to any discussion on the matters of such emissions at any meeting of the Government."

94. Counsel for the applicant contends that the review decision-maker's reliance on Article 10(2) of the AIE Regulations is illogical in circumstances where in *An Taoiseach v. Commissioner for Environmental Information*, on which the respondents rely as a full answer to the applicant's within challenge, O'Neill J. found Article 8(b) of the AIE Regulations to be within the scope of Article 4(1)(e) of the Directive, to which the emissions override as provided for in the last sentence of the second subparagraph of Article 4 of the Directive does not in any event apply. It is thus queried by the applicant as to why it was felt necessary by the decision-maker to invoke Article 10(2) at all, if the sole purpose of Article 10(2) is to be construed as an attempt to negate the provisions of the last sentence of the second subparagraph of Article 4 of the Directive.

95. More fundamentally, however, it is argued on the applicant's behalf that ONeill J.'s finding as to the compatibility of Article 10(2) of the AIE Regulations with the Directive has the effect of providing the first respondent with a class exemption from disclosure of information concerning emissions into the environment, which, the applicant submits, is at total variance with the requirements of the Directive and the jurisprudence of the ECJ.

96. A reading of the Articles 8, 9(1), 10(1) and (2) of the AIE Regulations suggests to the Court that the objective of Article 10(2) was to immunise Government discussions insofar as they might constitute the "proceedings" of a public authority from the mandatory requirement to disclose information on emissions into the environment, as provided for in the Directive. In effect, Article 10(2) in the AIE Regulations appears to be a mechanism to ring fence cabinet discussions (given the protection afforded thereto in the Constitution) from the provisions of Article 10(1) of the Regulations and the last sentence of the second subparagraph of Article 4 of the Directive.

97. In light of the provisions of the last sentence of the second subparagraph of Article 4 of the Directive, if it were the case that Cabinet discussions constituted "proceedings" of the Government as the public authority it undoubtedly is, Article 10(2) of the AIE Regulations clearly would not be compatible with the Directive, in my view. As already stated, the Court has not departed from the finding of the learned O'Neill J. that cabinet discussions do not constitute "proceedings" for the purpose of the Directive.

98. Was the the review decision-maker entitled to rely on Article 10(2) as a ground of refusal by virtue of the fact that in *An Taoiseach v. Commissioner for Environmental Information*, O'Neill J., having found that Article 8(b) of the AIE Regulations fell within the scope of Article 4(1)(e) of the Directive and not Article 4(2)(a) (a finding with which this Court is satisfied should not be departed from), was also satisfied to find no conflict between Article 10(2) and the Directive? To my mind, this question must be answered in the following way. I am of the view that the learned O'Neill J.'s finding on the compatibility of Article 10(2) with the Directive poses difficulty if it was understood by the review decision-maker as somehow immunising cabinet discussions from the rigors of the Directive, as transposed by Article 10(3), (4) and (5) of the AIE Regulations. As found by this Court, the review decision-maker was obliged to have regard to the overarching premise of Article 3(1) of the Directive, which provides that requested environmental information "shall" be made available, and the provisions of Article 4, which refer, to paraphrase Advocate General Kokott, to the "exhaustive" basis upon which access to environmental information may be refused, provided always that the requisite balancing exercise between the public interest in disclosure and the public interest in refusal is engaged upon in the manner in which this Court has outlined above.

99. Thus, insofar as the review decision-maker may have considered *An Taoiseach v. Commissioner for Environmental Information* to be an authority for the proposition that a refusal of access to Government discussions on emissions into the environment falls outside of the mandatory balancing requirements provided for in the second subparagraph of Article 4 of the Directive, as transposed by Article 10(3) and (4) of the AIE Regulations, and which is also alluded to in Article 4(1)(e) itself, he was in error in his understanding in that regard. In all of the circumstances, I find that the review decision cannot be upheld by virtue of its reliance on Article 10(2) of the AIE Regulations.

100. In all the circumstances, the applicant's challenge to the review decision on the grounds that it was not made in accordance with the State's EU law obligations is made out.

Alleged absence of reasons in the review decision

101. I turn now to the other ground upon which the review decision is challenged, namely the alleged absence of reasons in the review decision. In the first instance, the applicant asserts that both the original decision and the review decision leave a number of fundamental issues unexplained, namely:

> a. The precise ground under which the Directive was used on behalf of the first respondent to refuse the information sought, whether Article 4(1) (e) or Article 4(2)(a) of the Directive. It is submitted that the reference in the original decision (upheld by the review decision maker) to *An Taoiseach v. Commissioner for Environmental Information* would suggest that it was Article 4(1)(e) of the Directive (albeit it is not mentioned) but by the same token the reference in both decisions to Article 10(2) of the AIE Regulations would suggest that the basis of the refusal might have been Article 4(2)(a) of the Directive (Article 8(a)(iv) of the AIE Regulations);
>
> b. Whether, whichever ground of refusal was used, same was interpreted restrictively, as required by the legislation;
>
> c. Whether the requisite balancing exercise was carried out, and, if so, the factors considered;
>
> d. Whether each document was examined to see if potentially controversial or particularly sensitive sections could be redacted thus allowing the balance to be released to the applicant.

102. As regards the foregoing submissions, these have been largely addressed by the Court, as should be clear from the earlier part of the within judgment.

103. It is also submitted on behalf of the applicant that the review decision did not contain any or any adequate reasons, contrary to the requirements of Article 4(5) of the Directive, as transposed by Article 11(4) of the AIE Regulations, and indeed the right to reasons as enshrined in the EU Charter and in national law. It is contended that the absence of reasons in the review decision is especially problematic when the applicant's extensive internal review submissions are considered, with which there was no

engagement by the review decision-maker. In particular, it is argued that no reasons are adduced in the review decision to explain why it was felt appropriate not to comply with the requirements of Article 10(3) of AIE Regulations.

104. Counsel thus submits that the review decision is thus vitiated by the absence of reasons. In aid of his submissions counsel cites *RPS v. Kildare County Council* [2016] IEHC 113, where Humphreys J. states:

"The purpose of a right to reasons

> *52. The recognition of a legal right to reasons, as a matter of natural justice, constitutional law, under the ECHR, and in EU law, reflects and serves a range of important policy objectives.*
>
> *53. Firstly and most immediately, the reasons must enable the tenderer to know whether it has grounds to challenge the decision by way of judicial review.*
>
> *54. Secondly, the reasons must enable the court to effectively conduct such a judicial review, if initiated.*
>
> *55. However in addition to these two primary reasons, there are also a number of further important justifications for an effective right to reasons.*
>
> *56. Fundamentally, the provision of reasons encourages and supports better administrative decision making. A decision maker is more likely to come to a conclusion that is both correct and seen to be correct if he or she is, at all stages, mindful of the need to explain and support the decision in terms of articulated reasons. A requirement for publication of reasons enhances the decision making process, and encourages more robust thought on the part of the decision maker.*
>
> *57. Furthermore, a requirement of reasons acts as a promoter of "transparency" in the terms of recital 3 to the 1989 directive, or alternatively phrased, as a significant deterrent to arbitrary administrative action or malpractice. Unsound or even improper decisions can readily be cloaked with reassuring bureaucratic language. It is much harder to mask an improper decision if there is a clear standard for the articulation for sustainable and objective reasons."*

105. The respondents refute the contention that the review decision is devoid of reasons. They say that contrary to the applicant's criticisms, reasons were set out in the review decision in that the requisite provisions of the AIE Regulations as relied on by the decision-maker were referred to. They rely on the fact that specific reference was made in the review decision to the original decision which itself made specific reference to *An Taoiseach v. Commissioner for Environmental Information*. Moreover, they point out that the original decision, as referred to in the review decision, set out the basis for the refusal of each document identified by the decision- maker as falling within the applicant's request. Accordingly, the respondents submit that the broad gist of the reasons for refusal was made available to the applicant, which was sufficient. In those circumstances they contend there was compliance with the legal requirement to give reasons, as set out in *Mallak v. Minister for Justice, Equality & Law Reform* [2012]3 I.R. 297. It is further submitted that the applicant's complaints about a dearth of reasons such that it was inhibited in pursuing an appeal or an application for judicial review is wholly inconsistent with the fact that the applicant furnished detailed submissions to the review decision-maker and commenced the within proceedings.

106. As regards the latter argument, I am in agreement with the respondent that the applicant has not made out a case that it was inhibited from commencing the within judicial review by reason of any dearth of reasoning in the review decision. However, I accept the applicant's argument that the review decision did not comply with the reasons requirements of Article 4(5) of the Directive as transposed by Article 11(4) of the AIE Regulations. In light of the adjudicatory processes in which a decision-maker is required to engage pursuant to Articles 10(3) (4) and (5) and 11(4) of the AIE Regulations, the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted cannot, to my mind, constitute a sufficient reason for the refusal. Furthermore, insofar as an argument is made by the respondents that the applicant could infer the reasons for the decision, I am not persuaded that that argument should prevail in this case. As stated by Clarke J. in *EMI Records v. Data Protection Commissioner* [2013] 2 I.R 169:

> *"such matters should not be left to inference where there is an express statutory requirement that reasons be included in the document putting the measure in force and where the reasons might be open to reasonable doubt."*

I am satisfied that the reasons ground has been made out to the extent outlined herein.

Summary

107. For the reasons set out herein, the challenge to the review decision has been made out. Accordingly, I propose to grant *certiorari* of the first respondent's review decision of 27th June, 2016, with the matter to be remitted for consideration in accordance with the State's EU obligations. I will hear submissions as to what declaratory orders (if any) arise on foot of the Court's findings.

Postscript

108. At paragraph 5 of the statement of opposition, and in their submissions to the Court, the respondents contended, insofar as they relied on Article 4(2)(a) of the Directive as a ground for refusal, that Government discussions do not constitute "information on emissions into the environment". While the relevance of this argument vis a vis Article 4(2)(a) and the emissions override does not arise for consideration since the Court has not departed from O'Neill J.'s finding that Government discussions constitute "internal communications", it remains the case that what was requested by the applicant on 5th May, 2016 was "all documents which show cabinet discussions on Ireland's greenhouse gas emissions from 2002-2016", information not substantially different, save the timeframe, from what was in issue in *An Taoiseach v. Commissioner for Environmental Information*. Counsel for the applicant argues that if, as is now being contended by the respondents, the requested documents do not concern emissions into the environment (albeit they are essentially identified as such in the review decision), reasons will have to be given by the review decision maker in as to why such a conclusion has been reached. I agree with this submission.