

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2018 No. 855 JR]**

**IN THE MATTER OF THE EUROPEAN COMMUNITIES  
(ACCESS TO INFORMATION ON THE ENVIRONMENT)  
REGULATIONS, 2007 - 2018**

**BETWEEN**

**RIGHT TO KNOW CLG**

**APPLICANT**

**AND**

**AN TAOISEACH**

**AND**

**MINISTER FOR COMMUNICATIONS, CLIMATE ACTION  
AND THE ENVIRONMENT, IRELAND AND ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Meenan delivered on the 28th day of February, 2020**

**Introduction**

1. The applicant is a non-governmental organisation which was established as a company limited by guarantee. Its object is to improve, promote and advocate for increased rights of public access to information. It was incorporated on 24 July 2015 and is funded through voluntary donations from members of the public.
2. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 provides for public access to environmental information (the Directive). Recital (1) of the Directive states: -

*"Increased public access 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."*

The Directive was transposed into Irish law by the "*European Communities (Access to Information on the Environment) Regulations, 2007 - 2018*" ("*the AIE Regulations*").

3. The AIE Regulations were considered, in detail, in *Right to Know CLG v. An Taoiseach & Anor.* [2018] IEHC 372. In that case the trial judge, Faherty J., identified a number of issues for consideration: -
  - "(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, ...
  - (c) ...

- (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 ...”
4. In giving her judgment, Faherty J. stated: -
- “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. ...”
5. However, the issue in the application before this Court is a good deal less complex than the issues faced by Faherty J.
6. The applicant maintains that the requirement in the AIE Regulations that a person seeking environmental information shall: “*state that the request is made under these Regulations*” (Regulation 6(1)(b)) is unlawful, unconstitutional and incompatible with the terms of the Directive. This does not appear to have been an issue raised before Faherty J. in the earlier *Right to Know CLG* case.
7. The factual basis for the application, which I will set out in detail later, was an exchange of emails between the applicant and the first named respondent. The applicant maintains that this response from the first named respondent amounted to a refusal to provide the environmental information sought.

**Application for judicial review**

8. By order of the High Court of 22 October 2018, the applicant was given leave to seek the following reliefs, *inter alia*, by way of judicial review: -
1. An order of *certiorari* quashing the implied decision of the first named respondent made in or about 7 September 2018, (the “*internal review decision*”) to refuse to carry out an internal review of the decision of 8 August 2018 (the “*initial decision*”) refusing to provide the information sought by the applicant on 3 August 2018 pursuant to the AIE Regulations;
  2. A declaration that Article 6(1)(b) of the AIE Regulations imposes an obligation on a party making a request that is not permitted and/or required by the AIE Directive and, therefore, is contrary to the AIE Directive and, in particular, Article 3 thereof;
  3. A declaration that Article 6(1)(b) of the AIE Regulations, insofar as it purports to transpose the AIE Directive, is invalid as it amounts to an unconstitutional and unlawful exercise of legislative power in breach of Article 15.2.1 of Bunreacht na hÉireann; and

4. Further or other orders including, if necessary, a preliminary reference to the Court of Justice of the European Union ("CJEU") pursuant to Article 267 of the Treaty on the Functioning of the European Union with regard to the proper interpretation of the AIE Directive, and, in particular, Article 3 thereof.
9. The first issue which I wish to address is whether or not there was, in fact, a refusal to provide the environmental information sought by the applicant.

**Alleged refusal to provide environmental information**

10. The applicant sent the following email on 3 August 2018 at 17:14, which was the Friday of the August bank holiday weekend: -

*"Dear Sir or Madam,*

*Please provide access to the following:*

1. *All documents considered by the government in relation to the Appropriate Assessment (AA) and Strategic Environmental Assessment (SEA) of the National Planning Framework (NPF).*
2. *All documents considered by the government in relation to whether AA and SEA were required for National Development Plan (NDP).*
3. *All statements made at meetings of the government in relation to the AA and SEA of the NPF and NDP.*
4. *Records of any discussions at meetings of the government in relation to the AA and SEA of the NPF and NDP ..."*

11. This was responded to on the following Tuesday, 7 August, at 11:00: -

*"Good Morning,*

*With reference to your email below, I would be grateful if you could clarify if you are making an FOI request or an AIE request please ..."*

12. This email was responded to by the applicant later that day, at 15:27, as follows: -

*"Dear Sir or Madam,*

*Thank you for your email, we have nothing further to add to our request at this stage and it is considered that a valid request has been made ..."*

13. The first named respondent replied to this email at 15:51, as follows: -

*"Good afternoon,*

*I am just seeking clarification from you as to whether you wish your request to be dealt with as an FOI request or an access to information on the environment request.*

*I need this clarification in order to assign it to the appropriate personnel ..."*

14. The applicant responded to this the following day, 8 August, at 9:58, as follows: -

*"Thank you a valid request has been made, please deal with it according to your legal obligations ..."*

15. Later that day, at 17:01, the first named respondent replied as follows: -

*"Good evening,*

*Further to your emails below, Regulation 6(1)(b) of the access to the information on the environment Regulations ... state that 'a request for environmental information shall state that the request is made under these Regulations'. Section 12(1)(a) of the Freedom of Information Act, 2014 ... states that 'a person who wishes to exercise the right of access shall make a request, in writing or in such other form as maybe determined, addressed to the head of FOI body concerned for access to the record concerned stating that the request is made under this Act.'*

*Unless I receive clarification as to which statutory process is being invoked your request cannot be processed ..."*

- The final response from the applicant, later that day at 17:34, was as follows: -

*"Thank you*

*Please conduct an internal review of this refusal to provide the requested information."*

16. It is clear to me from these emails that there was, in fact, no refusal to provide the environmental information sought. The response from the first named respondent to the request for environmental information was not a refusal but rather a clarification as to which statutory process was being relied upon because, depending upon the statutory basis of the request, different procedures would apply. This was set out in a replying affidavit of Ms. Aoife Joyce, Assistant Principal Officer with the second named respondent, wherein she stated: -

*"at all times, the first named respondent was willing to process the request made by the applicant and simply wished to know whether the request was being made pursuant to the AIE Regulations or the Freedom of Information Act, 2014. While the regimes established under the AIE Regulations and the Freedom of Information Act, 2014 both relate to the disclosure of information they are separate statutory regimes each with their own procedures and requirements ..."*

17. Later in the affidavit she states: -

*"It appears from these proceedings that the applicant intended for the request to be a request under the AIE Regulations. The first named respondent remains willing to deal with the request for environmental information from the applicant in the terms contained in the original request made on 3rd August, 2018."*

18. It is hard not to reach the conclusion that there is no basis for this application. On this alone I could dismiss the application, but will consider what is the complaint of the applicant, namely, that enquiring as to whether the environmental information is being sought under the AIE Regulations is unlawful.

### **The AIE Regulations**

19. These Regulations provide for, *inter alia*, a definition of "environmental information" and "public authority". What is in issue in these proceedings is Regulation 6, which states: -

*"Request for environmental information*

*6.(1) A request for environmental information shall –*

*(a) be made in writing or electronic form,*

*(b) state that the request is made under these Regulations ..."* (emphasis added)

No objection is taken by the applicant to other provisions in the Regulations that deal with, *inter alia*, the definition of "environmental information", "public authority" and grounds upon which environmental information may be refused.

20. As stated earlier, the AIE Regulations transpose into Irish law the Directive. It is necessary to consider the terms of the Directive.

### **Directive**

21. In the recitals, at number 15 it is stated: -

*"Member States should determine the practical arrangements under which such information is effectively made available. ..."*

Article 3, which is entitled "access to environmental information upon request", provides that: -

*"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."*

Of particular relevance to this application is Article 3(5), which provides: -

*"For the purpose of this Article, Member States shall ensure that:*

- (a) *officials are required to support the public in seeking access to information;*
  - (b) ...
  - (c) *the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:*
    - *the designation of information officers;*
    - *the establishment and maintenance of facilities for the examination of the information required,*
- ...”

Use of the term “*such as*” clearly indicates that what is listed is not an exhaustive list of the practical arrangements to be put in place to ensure the effective availability of environmental information.

### **Consideration of issue**

22. The requirement under Regulation 6(1)(b) that a person seeking environmental information is to state that the request is made under the AIE Regulations does not in any way limit the environmental information that has to be disclosed. Rather, it seems to me that it is a practical step so as to ensure easy and efficient access to the information. Article 3(5)(c) provides for “*the designation of information officers*”. It is entirely practical and sensible to ensure that when there is a request for environmental information sought under the AIE Regulations that it is directed towards an officer who is charged with dealing with it. This can only be done by requiring persons seeking the information to state that they are relying on the AIE Regulations. This point is further emphasised by the fact that environmental information may also be obtained under, for example, the Freedom of Information legislation, in which case a different system is followed. This was referred to in the email from the first named respondent, of 8 August 2018 (para. 15 above), and also in the replying affidavit of Ms. Aoife Joyce which I have already referred to.
23. The Directive requires that practical arrangements be put in place for ensuring right of access to environmental information. The requirement under Regulation 6(1)(b) is such an arrangement. Far from being a restriction on access to environmental information, this request actually assists in the provision of information. I am therefore satisfied that Article 6(1)(b) is entirely permissible by the Directive.
24. The applicant submits that insofar as Regulation 6(1)(b) of the AIE Regulations transposes the Directive, it is unconstitutional and amounts to an exercise of legislative power in breach of Article 15.2.1 of the 1937 Constitution, which provides that: -

*“The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”*

However, the applicant accepts that the Oireachtas may delegate the power to make Regulations which will give effect to the “*principles and polices*” in the “*parent act*”,

provided that the power of delegation is exercised in accordance with such principles and policies.

25. I have already stated that the restriction alleged by the applicant is not a restriction on access to environmental information but rather a practical step to ensure compliance with the Directive. Further, as already stated, the practical arrangements listed in Article 3(5)(c) are not an exhaustive list, and so the State has considerable scope to make practical arrangements so as to ensure the effectiveness of the AIE Regulations.
26. Under s. 3 of the European Communities Act, 1972, in transposing the AIE Directive the State may make Regulations that "*contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations ...*".
27. I am satisfied that the provisions of Regulation 6(1)(b) are permissible by the European Communities Act, 1972 and do not infringe upon Article 15.2.1 of Bunreacht na hÉireann. I therefore also dismiss the application on this ground.
28. A further submission by the respondents was to the effect that there was a failure on the part of the applicant to exhaust all alternative remedies in advance of commencing these proceedings. In particular, that the applicant failed to use the appeal mechanisms established by the AIE Regulations. Given the views which I have expressed on the application herein, I do not propose to consider this aspect.

### **Conclusion**

29. I have already expressed the view that I do not believe that there was a factual basis for these judicial review proceedings to be initiated. In looking at the terms of the emails exchanged, there was not a refusal to provide the environmental information sought. Rather, a request was made by the respondents that the applicant identify the statutory basis for the application, a request that was necessary so that the application could be properly processed.
30. Even if there was such a refusal, I am fully satisfied that Regulation 6(1)(b) of the AIE Regulations represents a lawful transposition of the Directive. I have to say that I found no merit or substance in the application herein and I therefore refuse the reliefs sought.