



Coimisinéir um Fhaisnéis Comhshaoil  
Commissioner for Environmental Information

**Decision of the Commissioner for Environmental Information  
on an appeal made under article 12(5) of the European Communities  
(Access to Information on the Environment) Regulations 2007 to 2018  
(the AIE Regulations)**

**Case:** OCE-101846-L2D7P1

**Date of decision:** 29 June 2021

**Appellant:** Right to Know CLG c/o Mr Ken Foxe

**Public Authority:** Department of Environment, Climate and Communications  
("DECC")

**Issue:** Whether a submission to the Minister concerning the approval of Covid-19 expenditure for the Poolbeg Refurbishment Project constitutes "environmental information" within the definition set out in the AIE Regulations.

**Summary of Commissioner's Decision:** The Commissioner found that the information was "environmental information" and remitted the matter to DECC for further consideration

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



## **Background**

1. By way of context, the request that is the subject of this review relates to the Poolbeg Refurbishment Project (the Poolbeg Project). The Poolbeg Project is a project to refurbish an oil storage terminal, located at Poolbeg. The Project is managed by the National Oil Reserves Agency (NORA), which is a statutory body with responsibility for the maintenance of strategic supplies of oil in line with Ireland's stockholding obligations to the EU and International Energy Agency. On 3 November 2020, the appellant submitted a request for information by email to the Department of Environment, Climate and Communications (DECC). The information requested consisted of a number of Ministerial submissions. One of those submissions related to "approval of Covid-19 Expenditure for [the] Poolbeg Refurbishment Project" (the Poolbeg Submission). This appeal relates only to the Poolbeg Submission.
2. On 2 December 2020, DECC wrote to the appellant informing him that the request for the Poolbeg Submission had been refused on the basis that it was not "environmental information". The appellant responded on the same date seeking an internal review of that decision. The outcome of the internal review was provided to the appellant by letter dated 18 December 2020, which upheld the conclusion reached in the original decision to the effect that the Poolbeg Submission was not "environmental information" within the scope of the AIE Regulations. The appellant appealed to my Office on 31 December 2020.

## **Scope of Review**

3. DECC refused access to the requested information on the grounds that it does not constitute "environmental information" within the meaning of the AIE Regulations.
4. Accordingly, my review in this case is concerned with whether the requested information (i.e. the Poolbeg Submission) is "environmental information" such that it falls within the scope of the AIE Regulations.

## **Preliminary matter**

5. Before setting out my analysis of the substantive issue in this case, I wish to highlight one important matter. Both the original decision and the internal review decision referred to the definition of environmental information in article 3(1) of the Regulations. However, neither provided any further reasoning in support of DECC's position that the Poolbeg Submission was not "environmental information". I would remind DECC that articles 7(4) and 11(4) of the AIE Regulations require it to provide reasons for refusal of AIE requests at both original decision and internal review stage.
6. As such, I encourage DECC to take steps to ensure that as much detail as possible is provided to applicants when responding to requests made under the AIE Regulations, in order for it to comply with the letter and the spirit of the AIE Regulations.

## **Definition of environmental information**

7. Article 3(1) of the AIE Regulations is the relevant provision to consider where the issue is whether information is "environmental information". In line with Article 2(1) of the Directive, article 3(1) of the AIE Regulations provides that "environmental information" means:



"any information in written, visual, aural, electronic or any other material form on:

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

#### **Submissions of the parties**

8. The appellant, in his appeal form of 31 December 2020, set out his position that the information in question "is clearly environmental information".
9. On 12 March 2021, my Investigator wrote to both the appellant and DECC inviting them to provide further detail as to their respective positions. In her correspondence with both parties, my Investigator noted that based on her initial examination of the case file, she considered that articles 3(1)(c) and 3(1)(e) might be of particular relevance to the information at issue. In her correspondence with DECC she requested that the following questions be addressed in its submissions:
  - (i) whether the Poolbeg Project might be considered a "measure" or "activity" within the meaning of article 3(1)(c) of the Regulations.
  - (ii) whether information in relation to approval of Covid-19 expenditure for the Project should be considered information "on" the Project, having regard to the decisions in *Redmond* and *ESB* as well as the *Redmond & anor v Commissioner for Environmental Information & anor* [2020] IECA 83 and *Electricity Supply Board v Commissioner for Environmental Information* [2020] IEHC 190 as well as the decision of the Court of Appeal of England and Wales in *Department for Business Energy and Industrial Strategy v Information Commission and Alex Henney* [2017] EWCA Civ 844, which is referred to in those decisions.
  - (iii) whether information in relation to approval of Covid-19 expenditure for the Project should be considered to be a "cost-benefit" or other form of economic analysis or assumption used within the framework of the Project, such that it fell within the definition of "environmental information" at article 3(1)(e) of the Regulations.



My Investigator noted that DECC might wish to have regard to specific decisions of the Court of Appeal for guidance when responding to her questions.

10. The appellant responded to my Investigator, relying on my recent decision in case [OCE-93480-F7W4P3](#) *Mr D and the Department of Housing, Planning and Local Government* in support of his position that the Poolbeg Submission was environmental information. He submitted that the information “clearly relates to a measure likely to have an impact on the environment” and relied on recent media commentary in support of his position that the site of the Poolbeg Project was of significant importance in the context of the architectural and industrial heritage of Dublin.
11. DECC provided submissions to the Office on 23 March 2021. In summary, the position of DECC as outlined in those submissions was as follows:
  - (i) On the balance of probability, it was unlikely that the Poolbeg site could be construed as affecting or likely to affect the elements of the environment as the oil to be stored on the Poolbeg site is part of the State's strategic oil reserve, which is virtually never used. Historically, strategic stocks have been released to the domestic market only once, in 1999, when a relatively small quantity of kerosene (equating to about 2% of total volumes held) was placed on the market, in response to a shortage. DECC also stated that appropriate measures were in place on the site to prevent any oil spill occurring from causing environmental damage.
  - (ii) Article 3(1)(c) was not applicable as the information requested did not refer to any activities affecting or likely to affect the elements and factors referred to in Articles 3(1)(a) and (b) as well as measures or activities designed to protect those elements.
  - (iii) Article 3(1)(e) was not applicable as no measures and activities coming under Article 3(1)(c) were described in the documents.
  - (iv) Article 3(1)(a) did not apply as the subject matter of the submission to the Minister was the seeking of ministerial approval for funding required due to the enforced closure of the Poolbeg construction site, and the cessation of works for almost three months in 2020, along with increased contractor claims relating to compliance with HSA, HSE and Construction Industry Federation Covid-19 working protocols.
  - (v) Article 3(1)(b) did not apply as the submission did not refer to any factor which is likely to affect any element of the environment.
12. On 20 April 2021, the High Court delivered judgment in the case of *Right to Know v Commissioner for Environmental Information & RTÉ* [\[2021\] IEHC 353](#) (RTÉ). As my Investigator considered that decision to be of relevance in the circumstances of this case, she wrote to both parties, on 4 May 2021, to provide them with an opportunity to make further submissions in light of it.
13. The appellant responded on the same date submitting that the decision in RTÉ lent further weight to his arguments that the information requested should be released. He submitted that, on the basis of the judgment in RTÉ as well as my recent decisions in Cases [OCE-99030-Q7T4G0](#) *Right to Know CLG and the Defence Forces* and [OCE-93480-F7W4P3](#) *Mr D and the Department of Housing,*



*Planning and Local Government*, he did not see any grounds on which DECC could continue to dispute that the information requested was “environmental information”.

14. DECC responded on 18 May 2021 to advise that it did not wish to make any further submissions on the matter.

### **Analysis and Findings**

15. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and DECC. I have also examined the contents of the records at issue. In addition, I have had regard to:
- the judgments in *Minch v Commissioner for Environmental Information* [2017] IECA 223 (*Minch*), *Redmond & Anor v Commissioner for Environmental Information & Anor* [2020] IECA 83 (*Redmond*), *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 (*ESB*) and *Right to Know v Commissioner for Environmental Information & RTÉ* [2021] IEHC 353 (*RTÉ*);
  - the judgment of the Court of Appeal of England and Wales in *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (*Henney*) which is referenced in the decisions in *Redmond*, *ESB* and *RTÉ*;
  - the decisions of the Court of Justice of the European Union in [C-321/96](#) *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat (Mecklenburg)* and [C-316/01](#) *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen (Glawischnig)*
  - the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister’s Guidance);
  - Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
  - the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
  - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’).
16. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered. As outlined above, the issue that I must consider is whether the Poolbeg Submission is “environmental information” within the meaning of the AIE Regulations.
17. The AIE Regulations transpose the AIE Directive at national level and the definition of “environmental information” in the Regulations, mirrors that contained in the Directive. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive.
18. According to national and EU case law on this matter, while the concept of “environmental information” as defined in the AIE Directive is broad (*Mecklenburg* at paragraph 19), there must be more than a minimal connection with the environment (*Glawischnig* at paragraph 25). Information



does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond* at paragraph 58; see also *ESB* at paragraph 43). However, a mere connection or link to the environment is not sufficient to bring information within the definition of environmental information. Otherwise, the scope of the definition would be unlimited in a manner that would be contrary to the judgments of the Court of Appeal and CJEU.

19. The right of access to environmental information that exists includes access to information “on” one or more of the six categories at (a) to (f) of the definition. The information sought by the appellant in this case is information contained in submissions to the Minister on the approval of Covid-19 expenditure for the Poolbeg Project. I do not consider this to be information on elements of the environment or factors affecting or likely to affect those elements. As such, in my view the aspects of the definition contained in articles 3(1)(a) and 3(1)(b) do not require further consideration. Neither is article 3(1)(d) relevant as the information requested is not information on the implementation of environmental legislation. This leaves articles 3(1)(c), 3(1)(e) and 3(1)(f) to be considered.
20. The appellant’s view is that the information requested “clearly relates to a measure likely to have an impact on the environment” which suggests that he considers article 3(1)(c) to apply in this case. He also submits that the Poolbeg Project was of significant importance in the context of the architectural and industrial heritage of Dublin which might be interpreted as an argument that article 3(1)(f) applies. DECC’s position is that none of the aspects of the definition at article 3(1) of the Regulations are relevant in this case. I will consider article 3(1)(c) of the AIE Regulations first.

***Is the requested information “environmental information” within the meaning of article 3(1)(c)?***

21. Article 3(1)(c) provides that “environmental information” includes “information on ... measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements”. The information requested in this case is a submission to the Minister concerning Covid-19 expenditure for the Poolbeg Project.
22. In his decision in *RTÉ*, Barrett J expressly endorses the approach set out in *Henney* to determine the “information on” element of the definition of “environmental information” (*RTÉ* at paragraph 52). Where an assessment under article 3(1)(c) is to be carried out, the first step in this approach is to identify the relevant “measure” or “activity”. As outlined in article 3(1)(c), the “measure” or “activity” must be one which affects or is likely to affect the elements and factors of the environment referred to at articles 3(1)(a) and (b) or it must be designed to protect the elements referred to in article 3(1)(a). It is also important to note in this regard that information may be “on” one measure or activity, more than one measure or activity or both a measure or activity which forms part of a broader measure (*Henney* at paragraph 42). In identifying the relevant measure or activity that the information is “on” one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned, and it may be relevant to consider the purpose of the information (*ESB* at paragraph 43).

*Is there a relevant “measure” or “activity” in this case?*



23. The Aarhus Guide notes that the Aarhus Convention expressly includes “administrative measures, environmental agreements, policies, legislation, plans and programmes” when referring to “measures” and “activities” likely to affect the environment in the context of its definition of “environmental information”. Similar wording is used in article 2(1)(c) of the AIE Directive and article 3(1)(c) of the AIE Regulations. The Aarhus Guide notes that the use of these terms suggests that some degree of human action is required. The Guide also describes the terms “activities or measures”, as referring to “decisions on specific activities, such as permits, licences, permissions that have or may have an effect on the environment”. The Court of Appeal in *Minch* was of the view that the reference to “plans” and “policies” in article 3(1)(c) is significant, and suggests that the “measure” or “activity” in question must have “graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however tentative, aspirational or conditional such a plan or policy might be – which, either intermediately or mediately, is likely to affect the environment” (paragraph 39). Hogan J went on to explain that this requirement for there to be a plan or something in the nature of a plan, curtails a potentially open-ended or indefinite right of access to documents (paragraph 41). If this were not the case, then virtually any information held by or for a public authority referring, either directly or indirectly, to environmental matters would be environmental information. This would run contrary to the CJEU’s judgment in *Glawischnig* (paragraph 21; see also *Glawischnig* at paragraph 25).
24. The CJEU in *Mecklenberg* stated at paragraph 20 of its judgment that “the use in Article 2(a) of the Directive of the term ‘including’ indicates that ‘administrative measures’ is merely an example of the ‘activities’ or ‘measures’ covered by the directive”. It noted that “as the Advocate General pointed out in paragraph 15 of his Opinion, the Community legislature purposely avoided giving any definition of ‘information relating to the environment’ which could lead to the exclusion of any of the activities engaged in by the public authorities, the term ‘measures’ serving merely to make it clear that the acts governed by the directive included all forms of administrative activity”.
25. Barrett J remarked in *RTÉ* that “the European Court of Justice [in *Mecklenberg*] could not have taken a more expansive view of what comprises an administrative measure for the purposes of the 1990 directive” (paragraph 19). He also noted that Recital 2 of the current AIE Directive should be borne in mind when approaching case-law, such as *Mecklenberg*, which is concerned with Directive 90/313/EEC, the predecessor to the current AIE Directive (*RTÉ*, paragraph 7). Recital 2 of the AIE Directive provides as follows:
- “Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment initiated a process of change in the manner in which public authorities approach the issue of openness and transparency, establishing measures for the exercise of the right of public access to environmental information which should be developed and continued. This Directive expands the existing access granted under Directive 90/313/EEC....”
26. Barrett J considered the reference to the current AIE Directive having “initiated a process of change” to be noteworthy and concluded that “what had been in play over the course of the lifetime of [the previous AIE] directive and its more recent successor is an evolutionary process”, the consequence being that “one must approach the current directive as being not just expansive but increasingly so” (*RTÉ*, paragraph 8). He also stated that it was “difficult to conceive of how the Community legislature could have taken a more expansive approach to the scope of the concept of



“environmental information”, having regard to Recital 10 of the current AIE Directive (*RTÉ*, paragraph 9). As such, it is clear that an expansive view should be taken as to what constitutes a “measure” or “activity” within the meaning of article 3(1)(c).

27. The essential question is whether the “measure” or “activity” in question is one “affecting or likely to affect the environment” (*Redmond* at paragraph 57). An activity is “likely to affect” the elements and factors of the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. While it is not necessary to establish the probability of a relevant environmental impact, something more than a remote or theoretical possibility is required (*Redmond* at paragraph 63).
28. As set out above, the Poolbeg Project is a project to refurbish an oil storage terminal, located at Poolbeg. The intention of the Project, as I understand it, is that on its completion, a portion of the State’s strategic oil reserve will be stored at the refurbished Poolbeg terminal. I am satisfied, therefore, that the Poolbeg Project is a measure which affects or is likely to affect the elements and factors of the environment referred to at articles 3(1)(a) and 3(1)(b) of the Regulations.
29. DECC submits that this reserve is unlikely to be used and that appropriate measures are also in place on the site to prevent any oil spill occurring from causing environmental damage. As such, DECC’s submission notes that “even if the widest view possible was taken as to whether the Poolbeg site could in the fullness of time be construed as “affecting or likely to affect the elements of the environment”, this was deemed, on the balance of probability, to be unlikely”.
30. However, in his judgment in *Redmond*, Collins J makes it clear that “it is not necessary to establish the probability of a relevant environmental impact (because that would, in my opinion, sweep too narrowly and risk undermining the fundamental objectives of the AIE Directive)” (see paragraph 63). As such, if there is more than a remote or theoretical possibility that the Poolbeg Project will affect the elements and factors of the environment referred to at articles 3(1)(a) and (b) of the Regulations, that is sufficient to consider the Project to be a “measure” within the meaning of article 3(1)(c). In my opinion, the refurbishment of an oil storage terminal, which involves construction work and will ultimately result in the storage of significant oil reserves on the relevant site, is a measure which may affect elements of the environment as well as factors, which in turn may affect those elements. In my view, the establishment of prevention measures to ensure that an oil spill does not occur lends weight to the contention that there is a “real and substantial” possibility that the storage of oil upon completion of the Poolbeg Project might affect the surrounding environment. While I accept DECC’s contention that the oil reserves are “virtually never used”, they have been used once since 1999. As such I am satisfied that there is more than a remote or theoretical possibility that such reserves will be used and such use would have an environmental impact. As such, I consider that the Poolbeg Project is a measure which is likely to affect the elements and factors referred to at articles 3(1)(a) and 3(1)(b) of the AIE Regulations.
31. This is not the end of the matter, however, as the information at issue must be information “on” a “measure” or “activity” within the meaning of article 3(1)(c) of the Regulations. As noted above, the information requested in this case is information concerning Covid-19 expenditure for the Poolbeg Project.



32. The next step of the *Henney* approach, endorsed by Barrett J in the *RTÉ* case, is to engage in a fact and context-specific analysis of the information in question to determine whether that information is information “on” the relevant measure. That analysis must be conducted having regard to the purpose of the Aarhus Convention, the AIE Directive and the Regulations (see *Henney* at paragraphs 47 and 48 and *RTÉ* at paragraph 52).

*Is information concerning Covid-19 expenditure for the Poolbeg Project information “on” the Project?*

33. Where the measure or activity has the requisite environmental effect, one must consider whether the information is “on” that measure or activity within the meaning of that word, as it is used in article 3(1) of the AIE Regulations.
34. As noted above, in order to address this question, a purposive interpretation of the Aarhus Convention, the AIE Directive and the Regulations is required. *Henney* suggests that, in determining whether information is “on” the relevant measure or activity, it may be relevant to consider the purpose of the information such as why it was produced, how important it is to that purpose, how it is to be used, and whether access to it advances the purposes of the Aarhus Convention and AIE Directive (paragraph 43; see also *ESB* at paragraph 42). Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be “on” the relevant measure or activity (*Redmond* at paragraph 99). As the Court noted in *Henney*, the recitals of both the Aarhus Convention and the AIE Directive refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions in the Convention and Directive may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as on a given measure (see *Henney* at paragraph 48 and *RTÉ* at paragraph 52). Thus, information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be “on” the relevant measure or activity (see *Redmond* at paragraph 99). Finally, as the High Court noted in *ESB* information that is integral to the relevant measure or activity is information “on” it (see paragraphs 38, 40 and 41) while information that is too remote from the relevant measure or activity does not qualify as environmental information (*ESB* at paragraph 43).
35. I am satisfied that information on the expenditure associated with the Poolbeg Project is information that is integral to that Project. DECC argues that since the need for increased expenditure arises due to the enforced closure of the Poolbeg construction site as a result of the Covid-19 pandemic, the cessation of works for almost three months in 2020, and increased contractor claims relating to compliance with Covid-19 working protocols, the information requested is not “environmental information”. However, in my view this is something of a red herring. If additional expenditure is required in respect of the Project, but not made available, this will impact on a “measure” which, as outlined above, is likely to affect elements and factors of the environment. As such, the reason such expenditure has become necessary is not determinative of the question of whether information relating to such expenditure is information “on” the Project. DECC has also submitted that the information requested did not refer to any measures or activities affecting or likely to affect the elements and factors referred to in articles 3 (1)(a) and (b) as well as



measures or activities designed to protect those elements. However, as noted by Collins J in *Redmond* information does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond* at paragraph 58). In my view, public access to information on the need to incur increased costs in respect of a measure which has an environmental impact contributes to greater awareness of environmental matters and is necessary to enable informed public participation in environmental decision-making.

36. I am satisfied therefore that the Poolbeg Submission is information on a measure likely to affect the elements and factors referred to in articles 3(1)(a) and (b) of the Regulations such that it is “environmental information” within the meaning of article 3(1)(c).
37. In light of my findings above, it is not necessary to address the questions of whether the requested information comes within the aspects of the definition of “environmental information” contained at articles 3(1)(e) and 3(1)(f) of the AIE Regulations.

#### **Decision**

38. Having carried out a review under article 12(5) of the AIE Regulations, I annul DECC’s decision that the information requested did not constitute “environmental information” within the meaning of article 3(1) of the AIE Regulations. This matter is now remitted to DECC, who should process the appellant’s request in accordance with the AIE Regulations.

#### **Appeal to the High Court**

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

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**Peter Tyndall**  
**Commissioner for Environmental Information**  
29 June 2021