

Public consultation on the Review of the Access to Information on the Environment Regulations 2007-2018 Gas Networks Ireland Submission

Gas Networks Ireland (GNI) is a fully owned subsidiary of Ervia (formally known as Bord Gáis Éireann). GNI builds, owns, operates and maintains the natural gas network in Ireland and connects all gas customers to the network, regardless of their gas supplier. There are currently over 705,000 customers connected to the gas network and GNI's core purpose is to ensure these customers receive a safe, efficient and secure supply of natural gas. Gas Networks Ireland believes that the gas network is integral to Ireland's energy system.

Gas Networks Ireland welcomes the review of the Access to Information on the Environment Regulations 2007 - 2018 (the "**AIE Regulations**" or the "**Regulations**") being undertaken by the Department of the Environment, Climate and Communications (the "**Department**"). Gas Networks Ireland is committed to transparency in its dealings with the public and recognises the role played by the AIE Regulations in supporting that approach.

GNI considers that in order to be effective, transparency mechanisms must be clear and easy to navigate both for applicants and for the public authorities providing access to information. GNI notes that the definition of 'environmental information' provided in the Regulations has been the subject of a significant amount of judicial consideration in Ireland and elsewhere owing to the apparent breadth of the definition. The review of the Regulations provides an opportunity to codify some of the clarity provided by the courts in order to allow requesters to understand the scope of their rights.

The AIE Regulations also lack the certainty of the Freedom of Information Act 2014 (the "**FOI Act**") with the result that the AIE system operates less effectively than that of FOI. In particular, the exceptions based on commercial confidentiality and commercially sensitive information are less clear under the AIE Regulations with the result that scope for refusal on such grounds is reduced, to the detriment of the legitimate commercial interests of public authorities.

We have outlined our comments in relation to the AIE Regulations in greater detail below.

1. Definition of Environmental Information

The definition of "environmental information" in the AIE Regulations is as follows:

"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);¹

This definition is taken practically verbatim from article 2(1) of Directive 2003/4/EC² (the “**Directive**”). However, the vagueness of the definition nonetheless has the potential to lead to bad faith requests for information which frustrate the intent of the Directive and the relevant provisions of the Aarhus Convention³. In particular, the definition should clarify to what extent information should be considered to be information “on” environmental factors (the items listed under (a) – (f)) taking into account recent case-law from Ireland and the UK on this matter. Such case-law has narrowed the definition of environmental information by interpreting “on” to mean “*about, relates to or concerns*” an environmental factor as opposed to being merely connected to an environmental factor as some earlier jurisprudence suggested. It is also significant that the courts in both jurisdictions are increasingly promoting a purposive approach to interpretation of the definition of environmental information and the Regulations more widely, that is, one which takes into account the intent and aims of the Directive and the Aarhus Convention with the result that the broad definitions contained in the Regulations have been tightened.

(a) Interpreting “on” in the definition of environmental information

It has been clear since the landmark CJEU decision in *Case C-316/01 Glawischnig*⁴ that more than a minimal connection to an environmental factor is required when making an environmental information request under the Directive. This case provided that the Directive is “*not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a)*”.⁵

This approach was followed in the significant UK decision of *Department of Business, Energy and Industrial Strategy v The Information Commissioner & Alex Henney*⁶, where the broad approach to defining what constitutes environmental information, often referred to as the “bigger picture approach”, was rejected by the UK Court of Appeal as it could lead to “*a general and unlimited right of access to all such information*” contrary to *Glawischnig*. Instead, the UK Court of Appeal interpreted information as being “on” an environmental factor if “*it is about, relates to or concerns*

¹ European Communities (Access to Information on the Environment) Regulations 2007 (S.I. 133 of 2007), regulation 3(1).

² Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 (the “**Aarhus Convention**”).

⁴ *Glawischnig Bundesminister fur Sicherheit und Generationen*, (13 June 2003) Case C-316/01.

⁵ *Ibid* at paragraph 25.

⁶ *Department of Business, Energy and Industrial Strategy v The Information Commissioner & Alex Henney* [2017] EWCA Civ 844.

the measure in question".⁷ The definition of environmental information under the UK regulations is also practically identical to the definition contained in the Directive and thus to the definition contained in the AIE Regulations.

The approach in *Henney* has since been endorsed in Ireland in *Redmond v Commissioner of Environmental Information and Coillte Teoranta*⁸ and *ESB and Commissioner of Environmental Information and Lar McKenna*⁹. Such that commentators including Quinn now hold that the "*central question that should now be asked by a decision-maker in determining whether or not the information is "on" an Environmental Factor, such as to qualify as environmental information under the definition, is whether that information "is about, relates to or concerns" the Environmental Factor in question.*"¹⁰

(a) Interpretation of "likely to affect" in article 3(1)(c)

In *Redmond*, the meaning of the phrase "likely to affect" in the definition of environmental information in article 3(1)(c) was examined, with the Court of Appeal concluding that a measure or activity is "likely to affect" the environment for the purposes of paragraph (c) if:

*"there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. Something more than a remote or theoretical possibility is required (because that would sweep too widely and could result in the "general and unlimited right of access" that Glawischnig indicates the AIE Directive was not intended to provide) but 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)".*¹¹

Thus, there needs to be a "*real and substantial possibility*" that a measure will affect the environment before such information would become accessible. This is a sensible approach which tightens the standard previously applied as set out in the High Court decision in *Minch*,¹² which suggested a measure need only be "*capable*" of affecting the environment. Again, the approach taken towards interpreting this phrase suggests a move towards narrowing the definition of environmental information in line with the CJEU's guidance.

O'Regan J in *ESB* has also clarified that a fact specific and context specific approach must be adopted when examined whether information is environmental information. This involves examining not just the context for the creation of the requested information, but also the content of that information.¹³ Adopting this guidance should also lead to a more refined approach to the interpretation of the right of access to environmental information.

(b) A Purposive Approach

⁷ *Ibid* at paragraph 37.

⁸ *Redmond v Commissioner of Environmental Information and Coillte Teoranta* [2020] IECA 83.

⁹ *ESB and Commissioner of Environmental Information and Lar McKenna* [2020] IEHC 190.

¹⁰ Conor Quinn, "From "Bigger Picture" to "Reading Down": the Courts Tighten the Definition of "Environmental Information" under the AIE Regulations" (2020) 2 I.P.E.L.J 50 at 53.

¹¹ *Redmond v Commissioner of Environmental Information and Coillte Teoranta* [2020] IECA 83 at paragraph 63.

¹² *Minch v Commissioner for Environmental Information* [2017] IECA 223.

¹³ *ESB and Commissioner of Environmental Information and Lar McKenna* [2020] IEHC 190 at paragraph 45.

The leading decision of *NAMA v Commissioner for Environmental Information*¹⁴ offers crucial guidance on the larger question of how the AIE Regulations should be interpreted by promoting a teleological or purposive approach to interpretation of the Regulations. This approach requires referring to the intent of the Directive and the Aarhus Convention when interpreting the Regulations, in particular, much attention has been placed on recital 1 of the Directive which provides that:

“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.”

This recital suggests that the right of access to information should be focused on facilitating greater participation in environmental decision making. Thus, this purposive reading of the Regulations also has the effect of refining the right of access to environmental information.

It is worth noting that such an approach has also been adopted by the UK Court of Appeal in *Henney*, with that court suggesting that the “*very broad*” domestic legislation should be assessed and “*read down*” in light of the purposes of the Directive and Convention.¹⁵ More recently, this approach also appears to have been approved in Ireland in the *Redmond* decision.¹⁶

(c) Conclusion

The net result of this case-law is a clear move towards narrowing the definition of “environmental information” to provide for a more focused and effective right of access to environmental information. This approach makes sense considering the availability of the FOI regime which should be utilised, where possible, for other wider requests for information held by public authorities/bodies. A move towards refining the right of access to environmental information would also assist public authorities and applicants alike by providing greater certainty and potentially enabling authorities to respond to access requests more efficiently and effectively. It is worth noting also that the Office of the Environmental Commissioner (“OCEI”) has noted that the breadth of the “environmental information” definition slows down their work, stating, “[t]he task of determining whether information is or is not environmental information, in particular, often has the effect of slowing down casework, especially when records are large, numerous or both”.¹⁷ Improved certainty and efficiency will benefit the public.

It would therefore be of assistance to all stakeholders to narrow the existing definition, particularly by providing in the text of the Regulations that information “on” an environmental factor means “*about, relates to or concerns*” such a factor.¹⁸ Such an

¹⁴ *NAMA v Commissioner for Environmental Information* [2015] 4 I.R. 626.

¹⁵ *Department of Business, Energy and Industrial Strategy v The Information Commissioner & Alex Henney* [2017] EWCA Civ 844 at paragraph 48.

¹⁶ *Redmond v Commissioner of Environmental Information and Coillte Teoranta* [2020] IECA 83 at paragraph 99.

¹⁷ Commissioner for Environmental Information Annual Report 2019 at page 73.

¹⁸ For the avoidance of doubt, the scope to amend the definition of environmental information is restricted but not removed by the requirement to ensure proper implementation of the Directive. Under article 288 TFEU, “A directive shall be binding, **as to the result to be achieved**, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. This means that provided the definition achieves the result of the Directive then the requirements of EU law are met.

approach would conform to the CJEU's guidance in *Glawischnig* which excludes a "general and unlimited right of access to all such information" under the Directive. The Department should also consider the general acceptance of the purposive approach in interpreting the AIE Regulations and consider making specific provision for the aims of the Directive and the Aarhus Convention, particularly aiding participation in environmental decision-making, to be accounted for in the text of the Regulations when considering requests for environmental information.

2. Commercially Sensitive Information

(a) Grounds of refusal based on commercial confidentiality and sensitivity under the AIE Regulations and FOI Act

It is submitted that commercially sensitive information is not offered the same level of protection under the AIE Regulations as it under the FOI Act. Under the AIE Regulations, a public authority may refuse a request for environmental information based on commercial or industrial confidentiality under regulation 9 of the Regulations. Regulation 9(1) of the AIE Regulations provides that:

*[a] public authority **may** refuse to make available environmental information where disclosure of the information requested **would adversely affect—***

[...]

(c) commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest,

In contrast, the FOI Act includes an exception for information gained in confidence under section 35 and commercially sensitive information under section 36 of the Act. Section 35(1) of the FOI Act provides:

*a head **shall** refuse to grant an FOI request if—*

(a) the record concerned contains information given to an FOI body, in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or

(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) in Part 1 or 2 of Schedule 3 of an enactment specified in that Schedule) or otherwise by law.

Section 36(1) then provides:

*a head **shall** refuse to grant an FOI request if the record concerned contains—*

[...]

(a) *trade secrets of a person other than the requester concerned,*

(b) *financial, commercial, scientific or technical or other information whose disclosure **could reasonably be expected to** result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation,*

(c) *information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.*

Thus, unlike the FOI Act, there is no explicit exception based on commercial *sensitivity* under the AIE Regulations only commercial or industrial *confidentiality*. In addition, under the AIE Regulations public authorities *may* refuse access to environmental information which *would* adversely affect commercial or industrial confidentiality whereas as much higher standard of confidentiality applies to such information under the FOI Act, such that a head *shall* refuse to grant an FOI request if it contains information gained in confidence by an FOI body or the release of such information would constitute a breach of confidence under section 35 and a head *shall* refuse to grant an FOI request if the record contains “*financial, commercial, scientific or technical or other information whose disclosure **could reasonably be expected to** result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation*” under section 36.

The Department’s guidelines on the AIE Regulations offer some additional direction on the commercial or industrial confidentiality exception contained in regulation 9 in particular by highlighting that requests for information “*may be refused in circumstances where the release of information could be detrimental to the commercial interests of an individual or company*”.¹⁹ However, it would be welcome if this was clarified in the text of the Regulations which refer to commercial confidentiality only.

This discrepancy between how commercially sensitive information is dealt with depending on whether a record is requested under the AIE Regulations or the FOI Act could potentially lead to the AIE Regulations being used to access information in bad faith where such information would not be accessible under the FOI Act. This risk is increased by the broad definition of environmental information contained in the AIE Regulations.

(b) Inconsistency with FOI

It is submitted that the same standard should apply to commercially sensitive information under both regimes. Such an approach would be particularly welcome considering the recent case law on confidential and commercially sensitive information under the FOI Act related to the application of these grounds for refusal. The recent cases of *Minister for Communications Energy and Natural Resources v. Information Commissioner (“Enet”)*²⁰ and *UCC v Information Commissioner*²¹ provided helpful

¹⁹ European Communities (Access to Information on the Environment) Regulations 2007 to 2011 May 2013 Guidance for Public Authorities and others on implementation of the Regulations at paragraph 12.4.

²⁰ *Minister for Communications Energy and Natural Resources v. Information Commissioner* [2020] IESC 57.

²¹ *UCC v Information Commissioner* [2020] IESC 57.

clarity on the confidential information and commercially sensitive information exemptions.

Under *Enet* and *UCC*, information was initially refused by the FOI bodies in question by relying on section 36 and section 35, however the OCEI ordered that the information be released in both cases. In the 2019 Court of Appeal judgments of the two appeals, the Court of Appeal held that once a record was found to be confidential or commercially sensitive by reference to sections 35 and 36 of the FOI Act, the presumption in favour of disclosure set out in section 22(12)(b)²² of the Act plays no part. However, this interpretation was overturned by the Supreme Court in both cases, who agreed with the OCEI's decision and held that the presumption in favour of disclosure applied to confidential or commercially sensitive documents, such that a refusal to disclose such information had to be justified by reference to the balancing of interests test set out in sections 35 and 36 of the FOI Act.

However, it is worth noting that the Supreme Court also held in *Enet* that the Commissioner had erred in imposing an unduly high bar by requiring evidence of justifying reasons amounting to "exceptional circumstances" to establish a lawful refusal to disclose based on commercial sensitivity.²³ The Supreme Court instead held that:

*The standard is, without doubt, a civil standard, and it is not helpful to ask whether the standard is one of exceptionality, as it seems to me that it clearly is not, and what is required is evidence that is sufficient in all of the circumstances to establish justifying reasons for a refusal or a decision to grant.*²⁴

The Supreme Court's decisions in relation to the confidential and commercially sensitive information exceptions offered welcome clarity to FOI bodies by restoring the position prior to the Court of Appeal judgments with regard to the application of such exceptions, but also through confirming that exceptional circumstances are not required to justify a refusal to disclose based on commercial sensitivity.

It would be beneficial, to both public authorities and the OCEI, if confidential and commercially sensitive information could be treated in the same way under both the FOI and AIE systems. It would also offer certainty to public authorities and prevent the AIE Regulations potentially being used to access such information which would not be accessible under FOI.

3. Conclusion

In conclusion, we make the following general recommendations to the Department:

1. The definition of "environmental information" contained in the Regulations should be refined in line with recent case law; and

²² Section 22(12) of the FOI Act provides:

In a review under this section—

[...]

(b) a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified.

²³ *Minister for Communications Energy and Natural Resources v. Information Commissioner* [2020] IESC 57 at paragraph 178.

²⁴ *Ibid* at paragraph 179.

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2. The commercially sensitive information exception should be brought into line with the equivalent exception under the FOI regime.