Energy for generations

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Submission made in response to the public consultation on the review of the European Communities (Access to Information on the Environment) Regulations 2007 -2018

To whom it may concern,

The Department of the Environment, Climate and Communications published a request for submissions on the review of European Communities (Access to Information on the Environment) Regulations 2007 -2018 (the "Regulations") on 8 March 2021. The purpose is to respond to findings of the Aarhus Convention Compliance Committee ("ACCC") and to review and consolidate the Regulations, ensuring continued compatibility with EU law.

ESB welcomes this review and the opportunity to provide feedback on the Regulations. Our observations and recommendations in response to this request are outlined below.

In providing this submission, ESB has considered the guidance provided by the Minister for the Environment, Community and Local Government (as he then was) on implementation of the Regulations (the "Ministerial Guidelines"); Directive 2003/4/EC (the "AIE Directive"); the Aarhus Convention: An Implementation Guide (June 2014 edition) (the "Aarhus Guide") relating to the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "Aarhus Convention"); and, where appropriate, judicial interpretation of the Regulations.

ESB considers the following matters to be worthy of review:

(1) Article 9(2)(a) – Refusal of information: Manifestly Unreasonable Requests

(2) Article 10 – Incidental provisions relating to refusal of information

(3) Article 3 – Interpretation: Definitions of "Environmental Information" and "Public Authority"

(4) Article 9(1)(c) – Refusal of information: Commercial Confidentiality

(5) Article 11 – Internal review of refusal

(6) Article 7 (1) – Action on request: Meaning of "held by, or for"

(7) Article 7 (2) – Action on request: Time Limits

(8) General – Overlap with Freedom of Information ("FOI") Act 2014 (as amended)

These are considered in turn below.

1. **Article 9(2)(a) – Refusal of information: Manifestly Unreasonable Requests**

1.1 Under Article 9(2)(a) of the Regulations, a public authority may refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought.

1.2 Article 9(2)(a) is based on Article 4(1)(b) of the AIE Directive, and indirectly on Article 3(3)(b) of the Aarhus Convention, neither of which expressly refers to the volume or range of the information sought. There was no requirement, under European law, for the State to impose this added limit, by linking the expression used in the AIE Directive ("manifestly unreasonable") with volume and range.

1.3 The Aarhus Guide makes clear that a request will be "manifestly unreasonable" for many reasons other than the volume and complexity of the information requested (Aarhus Guide, page 84).

1.4 The Explanatory Memorandum attached to the draft AIE Directive (COM (2000) 402 final 2000/0169 (COD)) explains that:

> "Public authorities should also be entitled to refuse access to environmental information when requests are manifestly unreasonable or formulated in too general a manner. Manifestly unreasonable requests would include those, variously described in national legal systems as vexatious or amounting to an abus de droit. Moreover, compliance with certain requests could involve the public authority in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities. Authorities should be able to refuse access in such cases in order to ensure their proper functioning."

1.5 By including the phrase "having regard to the volume or range of information sought" at Article 9(2)(a) of the Regulations, the Irish law can be read to exceed the requirements of the Directive. As is clear from the Explanatory Memorandum, public authorities ought to be entitled to refuse requests where such requests constitute an abuse of process, are frivolous or vexatious.

1.6 This has consequences for the operation of the Regulations, in practice.

1.7 In particular, it makes it more easy for persons requesting information to limit their risk of refusal under Article 9(2)(a), by artificially splitting information requests. By "splitting requests", we mean the artificial device of making multiple requests about related information, whether:

(a) separated sequentially, where staggered over time, or

(b) separated by the name of the person making the request, where those persons are connected and acting in concert.

1.8 Also, it makes it more difficult for public authorities to rely on the motive of the persons requesting information, where those appear calculated to interfere with the functions, powers and duties of the public authority.

1.9 The right to access information does not include the right to burden public authorities with requests that constitute an abuse of process, are frivolous or vexatious.

1.10 We request amendment of Article 9(2)(a) to more closely follow the language in Article 4(1)(b) of the AIE Directive, by removing the phrase “having regard to the volume or range of information sought”.

2. **Article 10 – Incidental provisions relating to refusal of information**

2.1 Article 10(3) of the Regulations provides that public authorities shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal. This is also reflected in the Ministerial Guidelines, para 13.4, page 27. The wording of the Regulations differs from Recital 16 and Article 4(2) of the AIE Directive which provide that public authorities may refuse a request for environmental information in “specific and clearly defined cases” and that “in every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal.”

2.2 There is little guidance on what must be taken into account when examining the “public interest” involved or whether “every particular case” to be determined relates to each applicant (or related applicants) or each individual request submitted (or related requests).

2.3 In *M50 Skip Hire & Recycling Limited v. Commissioner for Environmental Information* [2020] IEHC 430, para. 16, Mr Justice Heslin acknowledged that it was noteworthy that no definition of “public interest” is contained in either the Regulations or in the AIE Directive. The High Court held that it was clear from the terms of Article 10(3) that a public authority enjoys a discretion insofar as weighing, in each individual case, the public interest served by disclosure against the interest served by refusal to disclose environmental information.

2.4 With regard to the meaning of “each individual case” and “every particular case,” the objectives of the AIE Directive should be considered. The AIE Directive permits public authorities to refuse to process vexatious and frivolous AIE requests or those that are deemed to be manifestly unreasonable. The objective is designed to protect public authorities from diverting time and resources away from their core functions to process overly burdensome requests.

2.5 In the same way that persons requesting information should not be free to limit their risk of refusal under Article 9(2)(a), by artificially splitting information requests, they should not be free to manipulate the public interest balance by the same kind of splitting.

2.6 We request amendment of Article 10(3) to more closely follow the language in Article 4(2) of the AIE Directive, so that “In every particular case, the public authority shall consider and weigh the public interest served by disclosure against the interest served by refusal.”

3. **Article 3 – Interpretation: Definition of Environmental Information**

3.1 "Environmental Information" under the Regulations (which directly transposes Article 3 of the AIE Directive) is given a wide scope.

3.2 Interpreting the scope of Environmental Information, in particular paragraph (c) of the definition in the Regulations, has provoked much confusion among public authorities and persons making requests, with appeals frequently coming before the Commissioner and the Courts.

3.3 In its judgment in Case C-321/96 *Mecklenburg* v *Kreis Pinneberg*, the CJEU acknowledged that the concept of environmental information in the AIE Directive is quite broad (paragraph 19). This was echoed by the Court of Appeal in *Redmond v Commissioner for Environmental Information* [2020] IECA 83, paragraph 58, in which Collins J. held that information does not have to be intrinsically environmental to fall within the scope of the definition.

3.4 In the more recent decision of *Mr D and the Department of Housing, Planning and Local Government* (OCE-93480-F7W4P3 (23 February 2021), paragraph 21), the Commissioner held that although the definition for environmental information is broad, a mere connection or link to the environment is not sufficient to bring the information within its scope. 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 the CJEU above.

3.5 In *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190, paragraph 43, in the context of paragraph (c), the High Court found that it was not limited to examining the precise issue with which the information is concerned and could instead consider the wider context in its determination. The Court did however state that information that is too remote from the relevant measure or activity would not qualify as environmental information for the purposes of the Regulations.

3.6 Similar to the *McKenna* case, the UK Court of Appeal in *The Department for Business, Energy and Industrial Strategy v The Information Commissioner & Anor* [2017] EWCA Civ 844 found that information would not qualify as environmental information if it is "likely to be too remote from or incidental to the wider project to be "on" it for the purposes of [the Regulations]" (paragraph 43).

3.7 In light of the above, it is clear that the interpretation given to the definition of "environmental information" has not provided the clarity sought by public authorities and persons making AIE requests. It would help all interested parties for there to be clarification in the Regulations to assist navigating the definition of Environmental Information, particularly in relation to the scope of paragraph (c).

3.8 The Courts have confirmed that information which is too remote should not fall within the scope of the definition, but not all parties will be familiar with these judgments. It would help for the Regulations to make this clear and/or for updated guidelines to accompany any revised Regulations. These could provide much welcome precision, which in turn would expedite and improve the efficiency of processing AIE requests.

4. **Article 3 – Interpretation: Definition of Public Authority**

4.1 In determining whether an entity falls within the definition of "public authority" under the Regulations, the national and EU courts have confirmed that an entity will not qualify simply by virtue of being an emanation of the State. Nonetheless, as the CJEU outlined in Case C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others*, paragraph 64, this may be an indication of control for the purposes of paragraph (c) of the definition.

4.2 In the recent High Court decision in *Right to Know CLG v Commissioner for Environmental Information & Raheenleagh Power DAC* [2021] IEHC 46 (where an appeal is expected), Owens J. held that a subsidiary company fell within the definition of "public authority" because it was under the "control" of another public authority and, in this instance, provided public services and responsibilities relating to the environment.

4.3 The Court emphasised in *Raheenleagh Power DAC* that, while control is part of the test under Article 2(2)(c) of the Directive, not every legal entity which can be described as "under the control of" public authorities will automatically come within the remit of Article 2(2)(c). This is because the entity being considered must also have "public responsibilities or functions … relating to the environment" or provide "public services, relating to the environment" (paragraph 57).

4.4 The interpretation and meaning of "under the control of" has been examined by the courts. In *Fish Legal*, the CJEU held that "under the control of" included any entity which does not determine "in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it" (paragraph 60). In the Aarhus Guide, "under the control of" is stated as relating to persons that are "publicly owned" or entities "performing environment-related public services that are subject to regulatory control" (page 48).

4.5 The case law makes it clear that subsidiaries may fall within the definition of "public authority" following an examination of the facts on a case-by-case basis. The test to be applied in each instance is subjective, as demonstrated by *Fish Legal.*

4.6 For clarity, we would suggest that additional wording be provided on the definition of "public authority" confirming that subsidiary entities of public authorities are not automatically also public authorities for the purpose of the Regulations.

4.7 We would also suggest that guidance be provided on the appropriate course of action to take in circumstances where, athough it should be uncommon, subsidiaries *are* in fact found to be public authorities for the purpose of the Regulations. In such an instance, it should be clear that a parent company can process all AIE requests received (rather than delay responses to requests, by transferring to/from the subsidiary entity to which the request relates). In practice, ESB has received AIE requests relating to information held by both the parent and subsidiary companies, leaving a question as to which entity is most appropriate to process the request.

4.8 Additionally, the courts have placed a repeated emphasis on whether an entity is "under the control of" of a public authority in determining whether it falls within the definition. *Fish Legal* has provided guidance on the test to be applied. It would help for the meaning of "under the control of" to be set out in further detail, including to make clear that mere "influence" is not "control".

5. **Article 9(1)(c) – Refusal of Information: Commercial Confidentiality**

5.1 Article 9(1)(c) of the Regulations permits public authorities to refuse to make environmental information available where to do so would adversely affect commercial or industrial confidentiality.

5.2 ESB, in pursuance of its statutory powers, frequently engages with the private sector. This engagement generates environmental information which commercial and industrial stakeholders consider to be confidential. This is particularly notable with regard to contestably built grid infrastructure.

5.3 However, under the current regulations, there is concern that such information is open to being requested by private competitors through the AIE procedure. There remains debate about whether information regarding fees, design specifications and methodology are open to disclosure under AIE requests.

5.4 In our view, if the grounds for refusal referred to "commercial sensitivity", it would provide our commercial and industry counterparties with greater certainty that information, which they require remain confidential to protect their legitimate economic interests, will be protected from disclosure through AIE requests. The AIE Directive makes clear that this is allowed where "provided for by national or Community law to protect a legitimate economic interest". Our request is for national law to clearly and expressly provide for that protection.

6. **Article 11 – Internal review of refusal**

6.1 Article 11(2) of the Regulations provides that following receipt of a request for a review under sub-article (1), the public authority concerned shall designate a person "unconnected with the original decision whose rank is the same as, or higher than, that of the original decision-maker to review the decision." Article 6(1) of the AIE Directive requires public authorities to ensure that any applicant has access to a review procedure in which the AIE request can be reviewed by "that [authority] or another public authority or reviewed administratively by an independent and impartial body established by law".

6.2 The Ministerial Guidelines outline the procedure to be followed in the application of Article 11(2), stating that the public authority should assign the role of reviewer to an officer of at least the same grade as the original decision-maker, though not necessarily from within the same public authority.

6.3 The Ministerial Guidelines suggest that a reviewer need not be from within the same public authority (and the AIE Directive does clearly allow the review to be carried out by another public authority). Even so, an ESB subsidiary (which is a public authority in its own right under the AIE Regulations) has faced recent (in our view, unjustified) complaints about internal reviews carried out by a reviewer that is not an employee of the relevant subsidiary to which an AIE request was made. It would help for this to be clear in the Regulations.

6.4 ESB has an employee assigned to act as the internal reviewer for all decisions relating to AIE requests within the ESB group of companies. The reviewer is not an employee of each individual subsidiary of ESB. Having one designated reviewer within the group avoids duplication of administrative tasks, increases the efficiency of the review process and ensures that each request is examined by an appropriate and suitably qualified reviewer.

6.5 It does not make sense for ESB to allocate such a role to an individual within each subsidiary, particularly in light of the requirements for a reviewer to be unconnected with the original decision and of a rank equal to that of the original decision-maker. Also, in the event that a wider cohort of subsidiaries becomes exposed to the obligations under the Regulations, it is entirely possible that a subsidiary would not have any employee at the point in time when a request is made.

6.6 While ESB (and its subsidiaries) consider its internal review process to align with the provisions of the Regulations, we request added clarity that:

(a) the Regulations permit an external reviewer to carry out the review process; and

(b) it is sufficient for an employee of a parent company to carry out the review process for any of its subsidiaries.

6.7 This would ensure efficient review processes are in place, with the most appropriate reviewer allocated for each AIE request received. This would also benefit any public authority that prefers to outsource non-core administrative tasks, ensuring that persons making AIE requests have confidence that the review is both impartial and independent. In turn, this would lead to fewer complaints against reviewer decisions and reduce any waste of public authority resources in completing the process.

7. **Article 7 (1) – Action on request: Meaning of "held by, or for"**

7.1 Article 7(1) of the Regulations states that a public authority shall make available to the person making the request any environmental information, the subject of the request, "held by, or for," the public authority. This mirrors Article 3(1) of the AIE Directive.

7.2 Further, Article 7(5) of the Regulations provides that where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it and transfer the request to the public authority to which it relates. Article 4(1)(a) of the Directive clarifies that in these circumstances, the information sought must not be held by or for the public authority "to which the request is addressed".

7.3 These provisions are not easily applied to AIE requests received by a public authority holding information on behalf of another related public authority, such as in the case of the ESB group of companies.

7.4 In practice, ESB Networks DAC (in its capacity as service agent to ESB for the management of the distribution network) has received several AIE requests for information held by it for ESB. While, literally, ESB Networks DAC could process and respond to these requests, we believe that request must be made to and/or passed to ESB. It is a matter for ESB to consider the individual request in relation to information held *for* it. .

7.5 We request that the Regulations be amended to address the (admittedly uncommon) circumstance where a public authority, in fact and law, holds information *for* another public authority. The Regulations should make clear that the public authority holding information *for* another, must transfer the request and that the public authority for whom the information is held is the one that must consider the request and balance the necessary interests relating to its information.

8. **Article 7 (2) – Action on request: Time Limits**

8.1 Article 7(2) of the Regulations and Article 3(2) of the AIE Directive require that environmental information shall be made available to an applicant:

(a) at the latest, within one month after the receipt by the public authority of the request; or

(b) within two months after the receipt of the request, if the volume and the complexity of the information is such that the request cannot be complied with within one month.

8.2 Neither the Regulations nor the Directive provide guidance on how public authorities are to navigate this deadline should it conclude on a weekend or what consideration, if any, should be given to public holidays occurring within one month of receipt of the AIE request.

8.3 Additionally, the Regulations do not provide for any "stopping of the clock" in circumstances where an AIE request requires the public authority to consult with a third party or where, as permitted under Article 7(8) of the Regulations, an applicant is invited to make a more specific request. In these instances, public authorities often find themselves under increased pressure to meet a deadline that is already burdensome.

8.4 In practice, decisions of the Commissioner have confirmed that AIE requests received on a Saturday or Saturday may be understood as having been received on the next working day. In light of this, and for ease of the administrative burden that would otherwise be involved, it seems appropriate for deadlines that fall outside of the normal working week should extend to the next working day.

8.5 We request that the Regulations be amended to allow for:

(a) AIE requests which are received outside of working hours to be considered as being received on the next Working Day (i.e., a day that is not a weekend or Bank Holiday);

(b) where decisions on AIE requests fall due on a day other than a Working Day, they should be considered to fall due on the next Working Day;

(c) "stopping of the clock" in circumstances where an AIE request requires the public authority to consult with a third party or where, as permitted under Article 7(8) of the Regulations, an applicant is invited to make a more specific request; and,

(d) "stopping the clock" in circumstances where a charge or fee is imposed for searches or copies of records, so that the obligation to release information is contingent upon discharge of the relevant fee. We consider that implied in Article 7(2)(a), as the obligation to release arises "where appropriate" and note that Recital (18) of the AIE Directive contemplates "advance payment", but would welcome clarification.

9. **General – Overlap with Freedom of Information ("FOI") Act 2014 (as amended)**

9.1 Where two requests for information are made, one under the FOI Act and one under the Regulations, it does not make sense for the public authority to have to prepare separate responses, according to the different procedures and requirements of each code. This risks confusion for the persons making those requests also, where their benign objective can be presumed to be to secure the greatest volume of relevant information possible. The unnecessary duplication gives rise to an administrative burden that only increases the risk of refusal of a request.

9.2 It would make sense for the public authority to deal with the request under the AIE Regulations first, releasing them from the burden of dealing with the request under the FOI Act. We appreciate that would require amendment to the FOI Act.

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