[2023] IEHC 640

THE HIGH COURT

[HC.MCA.2022.0000278]

IN THE MATTER OF ORDER 84C OF THE RULES OF THE SUPERIOR COURTS AND REGULATION 13 OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007-2018

BETWEEN

COILLTE CUIDEACHTA GHNÍOMHAÍOCHTA AINMNITHE

APPELLANT

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

AND

PERSON(S) UNKNOWN AKA JOHN AND/OR JANE DOE

NOTICE PARTIES

JUDGMENT of Humphreys J. delivered on Wednesday the 22nd day of November, 2023

1. It is not every day that litigation features cameo appearances by Willy Wonka, Mel Gibson, Russell Crowe, Charlton Heston, Ed Harris, Gene Hackman, Neil Diamond, Mickey Rourke and Nick Nolte.

2. But by a strange coincidence, Coillte has been bombarded with requests for environmental information in the names of characters played by the latter individuals (leaving Mr Wonka briefly aside), and other apparently pseudonymous names. With the skills of a forensic psychiatrist trying to build a profile of a suspect, and without even the benefit of a *Norwich Pharmacal* [1974] A.C. 133 order, Coillte have pretty much identified the person (more likely than not to be singular, one could reasonably infer without being certain about it) at the centre of this exercise as someone interested in Americana and, more specifically, deeply versed in American cinema, particularly of the 1980s and later. One can also add that this person is obviously equally versed in the Irish legislative scheme regarding access to information on the environment (and while his motive is legally irrelevant, maybe I can say in passing that the possibility did cross my mind that rather than merely having a specific grudge against Coillte and its parent Department, he might (also) have been engaging in legal activism by hoping to stir up a dispute of the present kind with a view to establishing a right to make an anonymous request). He might also be proficient in computer programming, seeing that (writing as Mr Wonka, Ms Hazel Wood and other names) he would appear to have also generated over 30,000 requests against the Department of Agriculture, Food and the Marine, which would be hard to do other than in an automated manner. All of that probably narrows it down quite a bit. One might have to beg forgiveness for wondering whether, if this case was a filmscript for one of the movies of such interest to the requester, or perhaps the televised version, it would be at this point that Colleen Rooney would enter the story to join the pieces in a way that had stumped the professionals.

3. Whoever he is, Coillte's correspondent generated a very large number of probably anonymised or pseudonymised requests in identical or near identical format between 13th March and 30th May, 2022 seeking access to information on the environment. No physical addresses were provided.

4. Ms Deirdre Coleman of Coillte, in response to Ms McGoldrick for the Commissioner, avers as follows:

> "4. I say that in my Grounding Affidavit I referred at §7 to the Appellant receiving a 'very large number of anonymised / pseudonymised requests' and identified the number as 58 of those requests as being covered by these proceedings. Ms McGoldrick correctly refers to the Commissioner receiving 58 appeals. However, for the purpose of updating this Honourable Court and in the interests of clarity, over the relevant period the Appellant received 97 anonymised / pseudonymised AIE requests in total, of which 81 were appealed to the Respondent. The OCEI decided to batch the first 58 cases received, with a further 23 cases remaining to be decided upon.
>
> 5. I say that at §8 of Ms McGoldrick's Affidavit she states it doesn't appear to her that the names of the requesters are those of fictional characters or celebrities. I say not all of the pseudonyms can be traced but insofar as they can I beg to refer to Table 1 below where the Appellant has set out its views on the possible inspiration for the various pseudonyms used.

Requester	Notes
Dermot James	Irish historical author - 'The Gore Booths of Lissadell' 'John Hamilton of Donegal: 1880 -1884 This Recklessly Generous Landlord'

Russell Price	Character called 'Russell Price' in Under Fire (1983) played by Nick Nolte
Alex Grazier	Character called 'Alex Grazier' in Under Fire (1983) played by Gene Hackman
Ed Oates	Character called 'Oates' in Under Fire (1983) played by Ed Harris
Jack Callaghan	Character called 'Jack Callaghan' in While You Were Sleeping (1995) played by Bill Pullman
Tom Farrell	American actor appearing in movies such as The Screaming Manor Tommy Farrell, actor in dozens of westerns from the 1940s to the 1980s
Charles Horman	American journalist and documentary filmmaker who was executed in Chile in 1973 - movie made about his story called 'Missing' in 1982
Tom Cody	Character called 'Tom Cody' in Streets of Fire (1984) played by Michael Pare
Matt Garth	Character called 'Captain Matt Garth' in Midway (1976) played by Charlton Heston
Stanley White	Character called 'Captain Stanley White' in Year of the Dragon (1985) played by Mickey Rourke
Frank Dunne	Character called 'Frank White' in Gallipoli (1981) played by Mel Gibson
Ben Wade	Character called 'Ben Wade' in 3.10 to Yuma (2007) played by Russell Crowe and movie of same name in 1957 played by Glenn Ford
Frank Ridgeway	Character called 'Frank Ridgeway' in Eddie and the Cruisers (1983) played by Tom Berenger
Eddie Wilson	Character called 'Eddie Wilson' in Eddie and the Cruisers (1983) played by Michael Pare
Jess Robin	Character called 'Jess Robin' in The Jazz Singer (1980) played by Neil Diamond
Jason Sweet	American actor of the same name

6. I say that at §12 of Ms McGoldrick's Affidavit she states that she is not aware of any instance where a public authority has sought confirmation of the identity of a requester. I understand that this was in fact done in the case of *Wind Noise Info and Wexford County Council* CEI/14/0017. However, more to the point, Ms McGoldrick appears to be unaware of the difficulties which public bodies experience in processing vast numbers of anonymous requests. Earlier requests from requesters using some of the names used by the requesters in these proceedings had been processed in the normal way by the Appellant because, at that juncture, they appeared to be typical or one-off requests. It is only when the significant numbers of anonymous / pseudonymous requests of similar style, type and phraseology and approach began to be received by the Appellant from 10 March 2022 onwards that this issue became apparent. It was at that point that the Appellant became aware of what appears to be an organised campaign and took steps to verify the identity of requesters.

7. At §14 of Ms McGoldrick's Affidavit she refers to the Appellant having 4 weeks to process the requests and a further 4 weeks if required. However, the reality is that the Appellant had no prospect of being able to process this unprecedented number of requests in the permissible time period, in addition to processing the 'genuine' requests. Between 10 March 2022 and 7 June 2022, the Appellant received 130 verified and anonymised / pseudonymised requests. This equates to just over 2 voluminous AIE requests received per working day during March to May 2022 (62 working days) with a further 1 received in June 2022. Since 7 June 2022 the Appellant has received no new anonymised / pseudonymised requests. I say that this fortifies the Appellant in its view that these requests all originate from a single source and / or form part of a co-ordinated campaign as they all abruptly ceased at the same time. I say the unprecedented number of requests can be seen by reference to the table below:

Coillte AIE statistics 2018-2022

	2018	2019	2020	2021	2022
Total AIEs	11	11	22	73	663
Internal Reviews	0	2	7	12	207
OCEI	0	2	3	4	123

8. I say that the impacts on the Appellant's operations from what appears to be a concerted and co-ordinated campaign is serious. In addition to significant expenditure of management time and resources, I say that the Appellant has increased the AIE Team from 0.5 staff FTE (full-time equivalent) to 3.5 staff FTE. By way of example, I beg to refer to a spreadsheet where all 58 requests the subject matter of these proceedings are listed along with the estimated time for them to be addressed. The total estimated time to deal with these requests is 152 days, although in practice dealing with the requests tends to take longer than the estimate. I beg to refer to a spreadsheet that I have initialled with the letters DC1 prior to the swearing hereof which lists the requests the subject matter of these proceedings, gives a summary of the actions required to answer each one and an estimate of the likely time.

9. I say that the Appellant is committed to the dissemination of environmental information pursuant to AIE Regulations. However, it appears to it that the requests the subject matter of these proceedings are not designed to elicit environmental information and appear to be a part of a wider campaign engaged in by persons unknown for questionable motives. I say that the campaign has very significant implications for the Appellant's operations and has the unfortunate side effect of diverting scarce time and resources away from genuine requests for environmental information with attendant delays and frustration for genuine members of the public or NGOs looking to utilise the machinery provided by the AIE Regulations in order to access information on the environment."

5. Generally, Coillte replied to these requests by seeking a (current) address from the applicants, and confirmation that the names were the applicants' actual (legal) names.

6. None of this information was provided. Accordingly, Coillte regarded each of the requests as incomplete and invalid, none of the purported requesters received the information sought within the one-month timeframe set out in domestic law.

7. In total Coillte received 97 apparently anonymised / pseudonymised AIE requests, all of which were rejected as invalid.

8. The requesters then issued a request to Coillte to carry out an internal review. Again Coillte sought contact details and asked the requesters to "confirm that the name given by you in your application is your actual legal name" or to "provide [Coillte] with your actual name" and to "state your current address". Coillte advised the requesters that it was not asking them to state why they were making the request but was "simply asking...for confirmation of your name and address" and that "unless and until [Coillte] receive[d] the information sought above, your request will not be processed". These requests were again ignored so the applications for internal reviews were in effect rejected as invalid.

9. Of the various rejections, 81 were appealed to the Commissioner between 13th June and 4th July 2022. The Commissioner addressed on the first 58 cases received *en bloc*, with a further 23 cases remaining to be decided upon.

10. The Commissioner sought further submissions in relation to the appeals from both Coillte and the requesters. Coillte made a submission on 29th July, 2022 on foot of a number of questions posed by the Commissioner but, despite a request to that effect, was not provided with sight of the submissions made by the requesters. That is not a ground of appeal as such in the present case.

11. The outcome was an omnibus decision on 29th August. 2022 which is identified by the Commissioner as "Case Number OCE-124853-T4T4P0, [PLUS 57 OTHER CASES]". The Commissioner decided that he did have jurisdiction to consider the appeal and that Coillte was not justified in treating the request(s) as invalid under article 6(1)(c) of the AIE Regulations.

12. The Commissioner thought that Coillte was "slightly evasive" (para. 48), although I don't think that this comment was entirely warranted in the circumstances. The decision went on to hold (at para. 49):

> "Coillte was asked by my Investigator what exactly it was seeking from appellants by way of 'confirmation' of the appellants' names and addresses. It did not provide any further clarity in response to that request. It is clear however from its communications with the appellants that it was not satisfied that the names provided by them were their real names. None of the appellants appear to have confirmed that the name used in their request was their real name and instead maintain that they are not required to provide such confirmation. It is questionable whether, had they done so, Coillte would have been satisfied with a simple written confirmation or whether, as appears a plausible and logical next step, if it remained unsatisfied, it might have then sought proof of identity from an appellant. A requirement to provide such proof would make the procedure for making an AIE request more onerous and

may dissuade potential requesters. Even a requirement to provide a legal name and address without any proof of identity or address may be enough to dissuade potential applicants. While Coillte have stated on a number of occasions that it is not requiring the appellants to 'indicate why they are making the request, what connection (if any) they have with the information requested or seeking any other information concerning their interest (if any) in making the requests concerned', in many cases, the inclusion of the requester's legal name and address as part of the request might reveal their interest in making the request. For example, an individual who had previously made objections to a public authority in relation to a project with environmental impact might reveal their interest in environmental information by including their name as part of a request. The same is true of an individual who is required to provide their address in order to obtain information on a measure or activity in their locality with environmental impact. The same can also be said where the information is being sought by an organisation with particular environmental objectives. In those cases, requiring the applicant to identify themselves could amount to a requirement to state an interest, contrary to the express provisions of article 3(1) and Recital 8 of the Directive."

13. Ms Coleman records that since 7th June, 2022 Coillte has received no new anonymised/ pseudonymised requests. She says that "this fortifies [Coillte] in its view that these requests all originate from a single source and /or form part of a co-ordinated campaign as they all abruptly ceased at the same time."

14. Ms Joanna Adams of the Department of Agriculture, Food and the Marine (DAFM) avers as follows:

"4. I say DAFM shares the Appellant's concerns at the unusually large number of requests being made in the recent past under the AIE Regulations. I swear this Affidavit for the purposes of demonstrating that the issues raised by the Appellant are issues of general application and to demonstrate why the proliferation of anonymous / pseudonymous requests for environmental information is an issue of operational concern to the DAFM.

5. I say that DAFM received an annual average of about 167 requests for access to information on the environment in the 3-year period 2019 to 2021 inclusive ranging from 69 in 2019 to 290 in 2021. Typically, 50-70% of these requests related to forestry matters. During that 3-year period there was a total of 23 referrals to the Office of the Commissioner of Environmental Information ('OCEI') of which 18 related to forestry matters.

6. I say that the number of AIE requests increased to 32,297 in 2022 of which 30,630 related to forestry matters. Some 105 of the latter were referred to the OCEI. ...

7. I say that this recent level of enquiry is absolutely unprecedented in my experience. Almost all of the 2022 AIE requests received were anonymised / pseudonymised and were in a format that would lead one to believe that there was commonality in the authorship of the requests. Many of the requests were made in the names of motion picture characters (similar to the experience of the Appellant) and of Willy Wonka and Hazel Wood.

8. I say that I have been shown the list of 18 anonymous / pseudonymous requesters who submitted the requests the subject matter of the Appellant's proceedings. I say that the DAFM has received requests from all 18 requesters (in each case using the same email address as that used by that person / person in their requests to the Appellant) that suggests that there is a degree of co-ordination as between the requests being received by the Appellant and those being received by the DAFM. I say that in 2022, we received approximately 465 requests from persons using the names used by the requesters in these proceedings. No requests were received by any of the mentioned names prior to 2022.

9. I say that the DAFM has no way of knowing if these requests are being submitted by one or more persons as, as in these proceedings, they have refused to provide any identifying information. I say that a definite trend has emerged whereby DAFM will receive numerous requests from one of these names for a period of time which will then be replaced by a new name but asking for very similar information.

10. I say that anonymous AIE requests and / or the use of pseudonyms by requesters is a source of concern for DAFM as our experience has shown that anonymity can be utilised by some requesters to intentionally abuse the AIE process to taunt DAFM staff and cause operational disruption. This is apparent from an AIE request received from a requester calling themselves 'Willy Wonka'. I say that 'Willy Wonka' made 745 individual requests between 29 September 2022 and 4 October 2022 - a period that covers 4 working days. These requests were made by email only and contained abusive and disparaging remarks about DAFM staff members. I say that, as DAFM was considering his requests 'Willy Wonka' withdrew them on 12 October 2022 offering the observation 'Boo Hoo', only to resubmit them again on 17 October 2022 with all the attendant administration implications for the DAFM. I say that it became clear at this point that this requester had little or no legitimate

interest in the information they were purporting to seek and instead appeared to be more interested in using the AIE process to undermine DAFM operations and frustrate hard working DAFM staff. In the circumstances, DAFM reasoned that it had no choice but to refuse to commit any further time and resources into processing those particular AIE requests at least until such time as the requester properly identified themselves in accordance with the requirements of Article 6(1)(c) of the AIE Regulations. On that basis, DAFM replied to the Willy Wonka email address and refused the AIE request on the basis that it was not validly made in accordance with Article 6(1)(c) of the AIE Regulations. The written decision included information on how to appeal that decision to the OCEI but to date no appeal has been lodged.

11. I say that 'Willy Wonka' stated in his emails that he would be sending in 30,000 requests shortly. After DAFM had refused his requests under Article 6(1)(c) of the AIE Regulations, an individual who provided a name and address sent in 29,640 individual requests.

12. I say that 'Willy Wonka' identifies some of the 18 anonymous requesters by name (i.e. P Corran, R Price, D James, A Grazier, J Callaghan) and request number which information 'Willy Wonka' should have no way of knowing unless the requests originate from the same person and / or the requests are being co-ordinated. I beg to refer to a selection of the correspondence received from 'Willy Wonka' upon which I have marked with the initials JA prior to the swearing hereof.

13. I say that the vastly increased number of AIE requests has had a very significant effect on the operations of the DAFM. DAFM has had to create a dedicated AIE unit in the Forestry division to cope with the demands in the increases in requests being received in 2022. There are now 9 staff working full-time on AIE requests. The effect of the requests across the division affects all staff members (admin, inspectors, ecologists, Ministers office), who have to give responses / emails / data etc that is requested and the ripple effect from these anonymised / pseudonymous requests on the operations of the DAFM are significant with real life knock on implications for Forestry licencing, significant expenditure of tax-payers money and pressure in reverting to genuine requests for information which comply with the requirements of the AIE Regulations.

14. I say that the AIE Directive and AIE Regulations place an obligation on public authorities to process reasonable AIE requests within a period of one month or two months at the very latest. I say that anonymised AIE requests allow individual requesters to submit several large and complex AIE requests at the same time under different names thereby concealing the manifestly unreasonable nature of their AIE request. Such conduct has the potential to seriously undermine the efficiency and effectiveness of the AIE system at the expense of the public interest and legitimate users of the system.

15. I say that the DAFM is very concerned in relation to the proliferation of anonymous requests and / or the use of pseudonyms by requesters for access to information and that are even more concerned that the same person or persons appear to be making these requests to the Appellant and the DAFM. I say that the consequences are severe and have adverse environmental implications as they significantly frustrate, in particular, the Forestry and licencing operations of the DAFM."

Procedural history

15. The matter comes before the court as an appeal on a point of law under art. 13(1) of the 2007 regulations and by originating notice of motion in accordance with Order 84C r. 2(1) RSC.

16. The proceedings were initiated on 27th October, 2022.

17. While not naming the various aliases in the title, the motion was served on the following as reflected in the addressees of the motion:

"To:
The Notice Parties:
Person(s) Unknown AKA John and/or Jane Doe
Alex Grazier agrazier36@gmail.com
Ben Wade benbwade0@gmail.com
Charles Horman charleshorman2@gmail.com
Dermot James dermotjames385@gmail.com
Ed Oates oatesed2@gmail.com
Eddie Wilson eddie4wilson@gmail.com
Frank Dunne dunnefrank34@gmail.com
Frank Ridgeway frankridge05@gmail.com
Jack Callaghan jackc5883@gmail.com
James Austin jimaustin710@gmail.com
Jason Sweet jasonsweet617@gmail.com

Jess Robin robinjess333@gmail.com
Liam O'Hara liamohara373@gmail.com
Matt Garth garthmatt638@gmail.com
Mel Mooney mooneymel9@gmail.com
Patrick Corran pcorran36@gmail.com
Russell Price russprice111@gmail.com
Stanley White stanwhite101010@gmail.com
Tom Cody tom8cody@gmail.com
Tom Farrell tomfarrell456@gmail.com"

18. This is possibly not a completely irrelevant detail. It doesn't seem hugely likely that so many emails of different and independent requesters would be in a quite similar format [some variation of alleged first and second names] + [a number] + [@gmail.com]. The inference again is that it is somewhat more likely than not that the whole exercise is the work of the same person (or people co-ordinating with each other, but Occam's razor applies to that alternative scenario).

19. On the day of commencement of Practice Direction HC119, 17th April, 2023, the case was administratively transferred to the Commercial Planning and Environmental List, and was sent to the List to Fix Dates. A hearing date of 14th November, 2023 was fixed, and the matter was heard on that date when judgment was reserved.

Relief sought

20. The relief sought in the originating notice of motion is as follows:

"1. An Order pursuant to Article 13 of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 and Order 84C of the Rules of the Superior Courts setting aside the decision of the Commissioner for Environmental Information made on 29 August 2022 in relation to Case Number OCE-124853-T4T4P0, PLUS 57 OTHER CASES.

2. A Declaration that the Commissioner for Environmental Information erred in fact and/or in law in accepting and considering the purported appeals the subject matter of that decision and/or that he had no jurisdiction to do so pursuant to Article 12(3) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018.

3. A Declaration that the Commissioner for Environmental Information erred in law in his construction of Article 6(1) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 and/or that Coillte was entitled to require that persons seeking to make requests thereunder provide a name and/or confirmation thereof and/or address for the purposes of satisfying the requirements of Article 6(1) of the Regulations as a necessary and lawful requirement for the making of a valid request.

4. Such further and other Orders as this Honourable Court deems meet.

5. A Declaration that Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, and/or that the interpretative obligation set out in Case C-470/16 North East Pylon Pressure Campaign Limited v. An Bord Pleanála under which, in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, apply to these proceedings.

6. Costs"

Relevant legal provisions

21. There are three related legal instruments of relevance to deciding this issue:

(i) the Aarhus Convention;
(ii) the AIE directive; and
(iii) the AIE regulations.

22. I will address these in turn.

Aarhus Convention

23. Article 2(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998 defines "the public" as follows:

"4. 'The public' means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups;"

24. Article 4(1) to (3) of the Aarhus Convention provide:

"Article 4

Access to environmental information

1. Each Party shall ensure that, subject to the following paragraphs of this Article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where

requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:
(a) without an interest having to be stated;
(b) in the form requested unless:
(i) it is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
(ii) the information is already publicly available in another form.
2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.
3. A request for environmental information may be refused if:
(a) the public authority to which the request is addressed does not hold the environmental information requested;
(b) the request is manifestly unreasonable or formulated in too general a manner; or
(c) the request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure."

25. Article 9(1) of the Aarhus Convention provides:

"Article 9
Access to justice
1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.
In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.
Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph."

The AIE Directive

26. 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 provides a mechanism in EU law for requesting environmental information.

27. The AIE directive defines relevant terms at Article 2:

"Article 2
Definitions
For the purposes of this Directive:
1. 'Environmental information' shall mean 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 referred to in (a);
(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 (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 (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 (a) or, through those elements, by any of the matters referred to in (b) and (c).
2. 'Public authority' shall mean:

(a) government or other public administration, including public advisory bodies, at national, regional or local level;
(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).
Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.
3. 'Information held by a public authority' shall mean environmental information in its possession which has been produced or received by that authority.
4. 'Information held for a public authority' shall mean environmental information which is physically held by a natural or legal person on behalf of a public authority.
5. 'Applicant' shall mean any natural or legal person requesting environmental information.
6. 'Public' shall mean one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups."

28. Article 3 provides the procedure for seeking information:

"Article 3
Access to environmental information upon request
1. Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.
2. Subject to Article 4 and having regard to any timescale specified by the applicant, environmental information shall be made available to an applicant:
(a) as soon as possible or, at the latest, within one month after the receipt by the public authority referred to in paragraph 1 of the applicant's request; or
(b) within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to in (a) cannot be complied with. In such cases, the applicant shall be informed as soon as possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it.
3. If a request is formulated in too general a manner, the public authority shall as soon as possible, and at the latest within the timeframe laid down in paragraph 2(a), ask the applicant to specify the request and shall assist the applicant in doing so, e.g. by providing information on the use of the public registers referred to in paragraph 5(c). The public authorities may, where they deem it appropriate, refuse the request under Article 4(1)(c).
4. Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless:
(a) it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants; or
(b) it is reasonable for the public authority to make it available in another form or format, in which case reasons shall be given for making it available in that form or format.
For the purposes of this paragraph, public authorities shall make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.
The reasons for a refusal to make information available, in full or in part, in the form or format requested shall be provided to the applicant within the time limit referred to in paragraph 2(a).
5. For the purposes of this Article, Member States shall ensure that:
(a) officials are required to support the public in seeking access to information;
(b) lists of public authorities are publicly accessible; and
(c) the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:
- the designation of information officers;
- the establishment and maintenance of facilities for the examination of the information required,
- registers or lists of the environmental information held by public authorities or information points, with clear indications of where such information can be found.

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

29. Article 4 provides for exceptions. Sub-paragraph (1) is particularly relevant:

"Article 4

Exceptions

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

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

(b) the request is manifestly unreasonable;

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

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

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

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

30. Article 6 provides for access to justice to review decisions of public authorities:

"Article 6

Access to justice

1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article."

The AIE regulations

31. The transposing legislation, the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 are consolidated at https://www.ocei.ie/legislation-and-resources/legislation/AIE-Regs-2007-2018-Unofficial-Consolidation.pdf

32. Article 6 allows the making of a request for information on the environment:

"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,

(c) state the name, address and any other relevant contact details of the applicant,

(d) state, in terms that are as specific as possible, the environmental information that is the subject of the request, and

(e) if the applicant desires access to environmental information in a particular form or manner, specify the form or manner of access desired.

(2) An applicant shall not be required to state his or her interest in making the request."

33. Article 7 provides for the mechanics of making an appeal:

"Action on request

7. (1) A public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the applicant any environmental information, the subject of the request, held by, or for, the public authority.

(2) (a) A public authority shall make a decision on a request and, where appropriate, make the information available to the applicant as soon as possible and, at the latest, but subject

to paragraph (b) and subarticle (10), not later than one month from the date on which such request is received by the public authority concerned.
(b) Where a public authority is unable, because of the volume or complexity of the environmental information requested, to make a decision within one month from the date on which such request is received, it shall, as soon as possible and at the latest, before the expiry of that month—
(i) give notice in writing to the applicant of the reasons why it is not possible to do so, and
(ii) specify the date, not later than 2 months from the date on which the request was received, by which the response shall be made, and make a decision on the request and, where appropriate, make the information available to the applicant by the specified date.
(3) (a) Where a request has been made to a public authority for access to environmental information in a particular form or manner, access shall be given in that form or manner unless—
(i) the information is already available to the public in another form or manner that is easily accessible, or
(ii) access in another form or manner would be reasonable.
(b) Where a public authority decides to make available environmental information other than in the form or manner specified in the request, the reason therefore shall be given by the public authority in writing.
(4) Where a decision is made to refuse, in whole or in part, a request for environmental information, the public authority concerned shall—
(a) subject to paragraph (b), notify the applicant of the decision not later than one month following receipt of the request,
(b) in a case to which sub-article (2)(b) applies, notify the applicant as soon as possible but not later than 2 months following receipt of the request,
(c) specify the reasons for the refusal,
(d) inform the applicant of his or her rights of internal review and appeal in accordance with these Regulations, including the time within which such rights may be exercised.
(5) 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.
(6) Where sub-article (5) applies and the public authority concerned is aware that the information requested is held by another public authority, it shall as soon as possible—
(a) transfer the request to the other public authority and inform the applicant accordingly, or
(b) inform the applicant of the public authority to whom it believes the request should be directed.
(7) Where a request is made to a public authority which could reasonably be regarded as a request for environmental information but which is not a request that has been made in accordance with—
(a) article 6(1), or
(b) the Freedom of Information Acts 1997 and 2003,
the public authority concerned shall inform the applicant of his or her right of access to environmental information and the procedure by which that right can be exercised, and shall offer assistance to the applicant in this regard. (8) Where a request is made by the applicant in too general a manner, the public authority shall, as soon as possible and at the latest within one month of receipt of the request, invite the applicant to make a more specific request and offer assistance to the applicant in the preparation of such a request.
(9) Where, in a request for information on factors affecting or likely to affect the environment, the applicant specifies that he or she requires information on the measurement procedures, including methods of analysis, sampling and pretreatment of samples, used in compiling that information, the public authority shall, as Article 8(2) of the Directive requires, either make the information available to the applicant or refer the applicant to the standardised procedures.
(10) A public authority shall, in the performance of its functions under this article, have regard to any timescale specified by the applicant.
(11) Where a request is made for information which has been provided to the public authority on a voluntary basis by a third party and, in the opinion of the public authority, release of the information may adversely affect the third party, the public authority shall take all reasonable efforts to contact the third party concerned to seek consent or otherwise to release the information, pursuant to article 8(a)(ii) and article 10."

34. Hence, where no decision is made on a request within the statutory time limit, the request is in principle deemed to be refused: for examples see *Friends of the Irish Environment v.*

Commissioner for Environmental Information [2019] IEHC 597, [2019] 5 JIC 2108 (O'Regan J.); *Right to Know CLG v. Commissioner for Environmental Information* [2022] IESC 19, [2023] 1 I.L.R.M. 122, [2022] 4 JIC 2902 (Baker J.).

35. Article 11 provides for internal review. The terms of engagement on which such review can happen are as follows:

> "11. (1) Where the applicant's request has been refused under article 7, in whole or in part, the applicant may, not later than one month following receipt of the decision of the public authority concerned, request the public authority to review the decision, in whole or in part.
> (2) 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 and that person shall—
> (a) affirm, vary or annul the decision, and
> (b) where appropriate, require the public authority to make available environmental information to the applicant, in accordance with these Regulations."

36. Article 12 provides for appeal to the Commissioner. Sub-para. (3) provides for the scope of jurisdiction:

> "(3) Where—
> (a) a decision of a public authority has been affirmed, in whole or in part, under article 11, or
> (b) a person other than the applicant, including a third party, would be incriminated by the disclosure of the environmental information concerned,
> the applicant, the person other than the applicant or third party may appeal to the Commissioner against the decision of the public authority concerned."

Grounds of challenge

37. Coillte has two principal grounds of appeal which can be summarised as follows:

(i) issue 1 is the contention that the appeal to the Commissioner only arises from a refusal of an application, not from a rejection of an application *in limine* as not constituting a valid application; and

(ii) issue 2 is the contention that the Commissioner was wrong to hold that Coillte was not entitled to seek information as to the names and addresses of the applicants.

Issue 1 – whether the Commissioner erred in holding that valid appeals had been lodged

38. To determine what the Irish regulations mean we need to first ask what EU law means. That is consistent with the comments of O'Donnell J. in *National Asset Management Agency v. Commissioner for Environmental Information* [2015] IESC 51, [2015] 4 I.R. 626, [2015] 2 I.L.R.M. 165, [2015] 6 JIC 2301 at para. 9.

39. In *Right to Know CLG v. An Taoiseach & Ors* [2023] IECA 68, [2023] 3 JIC 2401 (Faherty J.) the Court of Appeal sets out at para. 26 that the public authority refused to process the request due to lack of clarity as to compliance with the formal requirements for a valid request. That was not a refusal. The Court of Appeal nonetheless treated such a validity-related approach by the public authority as being an appealable refusal. If there is to be consideration of a reference to the CJEU, can a point along these lines be referred notwithstanding the Court of Appeal judgment which already involves an answer?

40. As I pointed out in *Enniskerry Alliance v. An Bord Pleanála (No. 3)* [2022] IEHC 337, [2022] 6 JIC 1002 (at para. 70), the freedom of individual national courts and tribunals to have direct access to the CJEU is a fundamental element of the architecture of European law.

41. Unfortunately, this right has been challenged in modern Europe. The orders made by the Vice-President of the Court of Justice of the European Union of 27 October, 2021, *Commission v. Poland,* C-204/21, ECLI:EU:C:2021:878, and the Order of 21 April 2023 in that case, C-204/21 R-RAP, ECLI:EU:C:2023:334, concern an infringement action by the Commission arising from legislation in Poland which included provisions along the following lines (from para. 2 of C-204/21 R-RAP):

> "... Article 42a(1) and (2) and Article 55(4) of the ustawa – Prawo o ustroju sądów powszechnych (Law relating to the organisation of the ordinary courts) of 27 July 2001 (Dz. U. of 2001, No 98, item 1070), as amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019 (Dz. U. of 2020, item 190; 'the amending law') ('the amended Law relating to the ordinary courts'), Article 26(3) and Article 29(2) and (3) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), as amended by the amending law ('the amended Law on the Supreme Court'), Article 5(1a) and (1b) of the ustawa – Prawo o ustroju sądów administracyjnych (Law relating to the organisation of the administrative courts) of 25 July

2002 (Dz. U. of 2002, item 1269), as amended by the amending law ('the amended Law relating to the administrative courts'), and Article 8 of the amending law, which prohibit any national court from reviewing compliance with the EU requirements relating to an independent and impartial tribunal previously established by law...

... points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts and points 1 to 3 of Article 72(1) of the amended Law on the Supreme Court, under which the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law may be classified as a 'disciplinary offence', ..."

42. In Miasto Łowicz, C-558/18 and C-563/18, ECLI:EU:C:2020:234, the context was disciplinary investigation against judges for making references to Luxembourg. The CJEU said:

"55 ... it is important to note, as is clear from the Court's settled case-law, that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 176, and judgment of 24 October 2018, XC and Others, C-234/17, EU:C:2018:853, paragraph 41).

56 In accordance with equally settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (judgments of 5 October 2010, Elchinov, C-173/09, EU:C:2010:581, paragraph 26, and of 24 October 2018, XC and Others, C-234/17, EU:C:2018:853, paragraph 42 and the case-law cited).

57 Therefore, a rule of national law cannot prevent a national court from using that discretion, which is an inherent part of the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and of the functions of the court responsible for the application of EU law, entrusted by that provision to the national courts (judgment of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 103 and the case-law cited).

58 Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted (see, to that effect, order of the President of the Court of 1 October 2018, Miasto Łowicz and Prokuratura Okręgowa w Płocku, C-558/18 and C-563/18, not published, EU:C:2018:923, paragraph 21). Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in the preceding paragraph.

59 For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence (see, to that effect, order of 12 February 2019, RH, C-8/19 PPU, EU:C:2019:110, paragraph 47), which independence is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 54 and the case-law cited)."

43. Such an attempt to limit individual judges from exercising the EU law right to refer could never happen in Ireland – right?

44. Insofar as views were expressed in *Minister for Justice v. O'Connor* [2015] IECA 227, [2018] 3 I.R. 1, [2015] 10 JIC 2301 to the effect there should not be a reference, where a higher domestic court has already opined, "otherwise than in wholly exceptional circumstances" (Ryan P.) or that "having regard to the hierarchical system of our legal system and the importance of precedent in that legal system, it would inappropriate for this court to take a step which might be thought indirectly to impeach the authority of [a decision of the Supreme Court]" (Hogan J.), one has to very respectfully conclude that such *obiter* views, while of course understandable, are best understood more as empirical observation as to judicial inclinations than doctrinal rule. Subject to the CJEU

stating otherwise, the EU law position seems to be that if a domestic judge in any EU member state thinks that a point so decided really isn't *acte clair*, she does have a freedom to refer it, and to suggest whatever answers she considers are warranted, and that doing so can neither be prohibited nor restrained by quasi-legal condemnations of that being "inappropriate". The *obiter* reference by Hogan J. to "our" legal system, while connoting an understandable and wholesome allegiance to the legal traditions and culture of the Anglosphere, is nonetheless suggestive of common law exceptionalism which wouldn't be a concept that would carry a whole lot of weight in European law in a context like this. The freedom to refer isn't more limited in common law countries.

45. That freedom emerges from the CJEU caselaw (none of which is cited or referred to in *O'Connor*), which was summarised in *Enniskerry Alliance v. An Bord Pleanála (No. 3)* [2022] IEHC 337, [2022] 6 JIC 1002 para. 44 quoting the notice party's submission there:

> "166/73 Rheinmuhlen: 'A rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings.'
>
> *C-378/08 ERG*, §32: 'a lower court must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it.'
>
> *C-188/10 Melki* and Abdeli, §42, Affirmed the same rule.
>
> *C-416/10 Krizan*, §68: 'a national rule pursuant to which legal rulings of a higher court bind another national court, cannot take away from the latter court the discretion to refer to the Court of Justice questions of interpretation of the points of European Union law concerned by such legal rulings.'
>
> *C-136/12 Consiglio Nazionale di Geologi,* §36 : 'It is for the referring court alone to determine and formulate the questions referred for a preliminary ruling . National rules which have the effect of undermining that jurisdiction must be disapplied.'"

46. Indeed in fairness to the court in *O'Connor*, it was acknowledged that the court there had the freedom to refer a point notwithstanding a Supreme Court decision, "strictly speaking" (per Hogan J. at para. 34). But there isn't anything particularly strict about speaking thus.

47. Subject to any further clarification of this issue by the CJEU, a judge can make a reference that might be seen to suggest a different answer than that arrived at by a higher domestic court. She is entitled to a systemic acknowledgement of a court or tribunal's freedom to do so without being stigmatised as acting inappropriately. In terms of deterring the exercise of the right to refer, there is little difference in practice between an assertion that a reference is prohibited and an assertion that a party or an appellate court is entitled to label the exercise of that right as "inappropriate". The right to refer and the duty of sincere co-operation also implies an entitlement to suggest the answer that seems most appropriate to the referring court even if that might be different to that arrived at by a higher domestic court. Otherwise the referring court would be failing to offer its best efforts at co-operation to the CJEU and would be presenting the question on an insincere and inadequate premise.

48. The obvious legal purposes of the right to refer notwithstanding a decision of a higher domestic court is that it is axiomatic that, with all possible respect to those courts, any appellate court's view on a debatable EU law point does not have absolutely definitive status, because a later CJEU reference in another case could show the position to be otherwise. As I pointed out in *Balscadden Road SAA Residents Association v. ABP (No. 2)* [2021] IEHC 143, [2021] 3 JIC 1217, that is not entirely hypothetical. In *X.X. v. The Minister for Justice & Equality* [2018] IECA 124, [2018] 5 JIC 0401 (Unreported, Court of Appeal, 4th May, 2018), Hogan J., for the Court of Appeal, expressed the opinion (differing from my view on that point in the judgment appealed against) that "[o]ne can, I think, leave to one side the provisions of the recast Asylum Procedures Directive (2012/32/EU) since it does not apply to Ireland. It could not, therefore, be relied for any purpose in interpreting the relevant provisions of [Irish law implementing directive 2005/85/EC, which does apply to Ireland]". But later in Judgment of 14 January 2021, *K.S. & M.H.K. v. Minister for Justice and Equality*, C-322/19 and C-385/19, ECLI:EU:C:2021:11 following a reference under art. 267 TFEU (which I had made to clarify the matter subsequent to *X.X.*), the CJEU completely rejected the premise of Hogan J.'s view, saying that "[a] national court must take account of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, which, pursuant to Articles 1 and 2 and Article 4a(1) of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, does not apply in the Member State of that court, in order to interpret the provisions of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, which is, by contrast, applicable in that Member State in accordance with Article 4 of that protocol." Thus a directive can't be "left to one side" merely because it doesn't apply to Ireland, if it's relevant to interpreting a directive that does so apply, or to domestic legislation implementing the latter. The

obvious problem all along with the *obiter* view expressed in *X.X.* was that the meaning of something doesn't depend on the country you are standing in when you are reading it. The common law is a wonderful system but that doesn't create legal exceptionalism, or exemption from uniform interpretations of EU law. This sort of problem could arise again any time a court, including on appeal, decides a debatable EU law point without a reference. So with absolutely no disrespect intended, even an appellate court's analysis of EU law can turn out to require modification in the light of later clarification from Luxembourg, and the same holds true in any member state. Appellate courts in "our" system are neither less nor more fallible than their counterparts elsewhere in this regard. Only Luxembourg can provide definitive clarity. The right to refer is vital and the concept that it could be a disciplinary matter or stigmatised as inappropriate – even in a common law country, one might add - is fundamentally incompatible with EU law.

49. However in the light of *O'Connor* one could not say with absolute confidence that Irish law as it currently stands fully accepts that the position I have outlined is *acte clair*. This raises a first question which arises in the present case as follows:

> **Whether article 4(3) TEU, article 267 TFEU or the general principles of EU law including the principle of supremacy have the effect that the courts of a member state are obliged to disapply any rule or practice of the domestic law of the member state, such as the principle of following decisions of higher courts in a hierarchical common law system and the importance of precedent in such a legal system as embodied in the doctrine of stare decisis, that would have the effect of discouraging or inhibiting a court from referring a question that it is otherwise minded to refer to the CJEU or rendering that inappropriate on the ground that to do so could in effect call into question a previous interpretation of EU law by another court in that member state of higher hierarchical standing than the referring court, or that would have the effect of discouraging or inhibiting the referring court, insofar as it may be minded to suggest possible answers to the questions being referred, from proposing an answer that it is otherwise minded to propose to the CJEU or rendering that inappropriate on the ground that to do so could in effect call into question a previous interpretation of EU law by another court in that member state of higher hierarchical standing than the referring court.**

50. With the issue of the legitimacy of considering the point at all in this context thus addressed, we can turn to the merits. Coillte points out that the Commissioner has previously held that the name of a "valid" natural or legal person must be provided: *Wind Noise Info and Wexford County Council,* Case CEI/14/0017.

51. The differences between the parties on this issue include the following:

(i) Coillte say that a request for the purpose of administrative appeal only means a valid request; the Commissioner says it means a purported request rejected for any reason;

(ii) Coillte says that an applicant only means an identified applicant whereas the Commissioner considers that pseudonymous or essentially anonymous applications are permitted; and

(iii) Coillte says that the provision for rejection of manifestly unreasonable complaints allows requests to be made for the identity of applicants; the Commissioner rejects this.

52. The second question therefore is:

> **Does the word "request" in Article 6(1) of Directive 2003/4 read in the light of Article 4(1) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998 mean only a request that is valid by reference to the Directive and by reference to the transposing domestic law of the member state concerned?**

53. A third question is:

> **Does the word "applicant" in Article 2(5) of Directive 2003/4 read in the light of inter alia Article 4(1)(b) and/or Article 6(1) and/or (2) and/or Articles 2(5) and 4(1) and (3)(b) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998 mean a natural or legal person identified by their actual name and/or a current physical address, or does it include an anonymous or pseudonymous person and/or an applicant whose contact details are identified by email only?**

54. The latter question is intimately related to the fact that the directive envisages a route of access to the domestic courts. That engagement is clearly impossible unless people engage with the process in their actual names and provide an actual address at which they are capable of being served and contacted.

Issue 2 –whether Coillte erred in holding that the requests were invalid

55. As noted above, the Irish legislation needs to be viewed in the light of the meaning of the EU directive. This relates to the question of how much scope the domestic legislature may have to make provision for practical arrangements to implement the directive, as considered in *Right to Know CLG v. Commissioner for Environmental Information* [2023] IECA 68.

56. National legislation here provides that a requester must:

> "state the name, address and any other relevant contact details of the appellant."

57. The ordinary meaning of "address" is physical address.

58. The New Shorter English Dictionary (Oxford, Clarendon Press, 1993) Vol. I p. 25 defines "address" in the sense with which we are concerned as "5. The superscription of a letter etc.; the name of the place to which anyone's letters etc. are directed; one's place of residence. .. b Computing. A sequence of bits which identifies a particular location in a data processing system". The two examples given for this sense of the word are "E HEMINGWAY I got into the cab and gave the driver the address of Simmons" (from *A Farewell to Arms* (1929)) and, gratifyingly, "JOYCE The partially obliterated address and postmark" (also gratifyingly, one notes in passing that even Hemingway requires a first initial for identification – not so for Joyce). That is a quotation from Chapter 16 ("Eumaeus") of *Ulysses* (p. 535), in a scene where Leopold Bloom interacts with a red-bearded sailor, D. B. Murphy of Carrigaloe, at a jarvey shelter. Murphy produces a postcard which he claims was sent to him:

> " ... A friend of mine sent me.
>
> He fumbled out a picture postcard from his inside pocket which seemed to be in its way a species of repository and pushed it along the table. The printed matter on it stated: *Choza de Indios. Beni, Bolivia*."

59. Bloom then *inter alia* examines the address:

> "Mr Bloom, without evincing surprise, unostentatiously turned over the card to peruse the partially obliterated address and postmark. It ran as follows: *Tarjeta Postal, Señor A Boudin, Galeria Becche, Santiago, Chile*. There was no message evidently, as he took particular notice. Though not an implicit believer in the lurid story narrated (or the eggsniping transaction for that matter despite William Tell and the Lazarillo-Don Cesar de Bazan incident depicted in Maritana on which occasion the former's ball passed through the latter's hat) having detected a discrepancy between his name (assuming he was the person he represented himself to be and not sailing under false colours after having boxed the compass on the strict q.t. somewhere) and the fictitious addressee of the missive which made him nourish some suspicions of our friend's bona fides, nevertheless it reminded him in a way of a longcherished plan he meant to one day realise some Wednesday or Saturday of travelling to London via long sea not to say that he had ever travelled extensively to any great extent but he was at heart a born adventurer though by a trick of fate he had consistently remained a landlubber except you call going to Holyhead which was his longest."

60. What Leopold Bloom, Ernest Hemingway and the editors of the *New Shorter Oxford Dictionary* have in common is the understanding that the word "address" in the sense concerned means a physical address at which a person may be located or contacted (such as "Galeria Becche, Santiago, Chile"). The secondary computing sense of data location point doesn't apply in this context because the AIE regulations speak of the "address ... of the appellant". An appellant is not a point of data in a database so that sense is irrelevant. The legal dictionaries reinforce that ordinary meaning.

61. The *Oxford Dictionary of Law* doesn't define "address" although it defines the related concept of "address for service" in essentially physical terms:

> "The address, which a party to court proceedings gives to the court and/or the other party, to which all the formal documents relating to the proceedings should be delivered. Notices delivered at that address (which may be, for example, the address of his solicitors) are binding on the party concerned. Relevant rules are contained in the Civil Procedure Rules. See service."
>
> See https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095350620

62. Murdoch and Hunt's Dictionary of Irish Law 6th ed at p. 21 doesn't define address either, but refers to *Walsh v. Kildare County Council,* [2000] IEHC 103, [2001] 1 I.R. 483, [2000] 7 JIC 2902 (Finnegan J.) as authority for the proposition that an address cannot be "inadequate to afford the planning authority a choice of the full range of options for giving notice" (p. 21). Again that is consistent with the ordinary meaning of address as something physical. It also means "current" address in ordinary parlance, as Coillte reasonably suggested in correspondence.

63. Likewise the ordinary and natural meaning of "name" is a person's actual name, not a pseudonym.

64. That doesn't mean that we absolutely can't depart from that ordinary meaning if required to do so on a conforming interpretation, assuming that the required departure if such is required would

not be *contra legem*. But the issue of departure from the ordinary meaning doesn't arise until we identify whether EU law requires such a departure.

65. If Coillte is correct, as specified above, that the directive itself requires the furnishing of an actual name and physical address, then this issue doesn't arise. But assuming that the Directive doesn't require that (as addressed under Issue 1 above), the fall-back question is whether the directive permits either national law or the public authority concerned to require that.

66. As regards national law, the initial relevant point of disagreement is therefore a fourth question as follows:

> **If Directive 2003/4 does not have the effect that an applicant is required by virtue of the Directive itself to furnish an actual name and/or current physical address when making a request for environmental information, does Article 3(1) and/or (5)(c) of Directive 2003/4 read in the light of Article 4(1) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998 have the effect of precluding national legislation that requires an applicant to furnish his or her actual name and/or current physical address in order to make a request?**

67. Turning to whether the public authority can request such details, a fifth question is as follows:

> **If Directive 2003/4 does not have the effect that an applicant is required by virtue of the Directive itself to furnish an actual name and/or current physical address when making a request for environmental information, does Directive 2003/4 read in the light of Article 4 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998 have the effect that where a public authority forms the reasonable view that there is a prima facie question over the genuineness of information regarding his or her identity provided by an applicant, the public authority is prohibited from seeking confirmation as to the applicant's actual name and/or a current physical address, for the purpose of verifying the identity of the applicant, and not for the purpose of determining the interest of the applicant, even if the provision of the actual name and/or current physical address of an applicant could indirectly allow inference or speculation as to the interest if any of the applicant referred to in Article 3(1) of the Directive?**

68. There is a related issue which is whether the power to reject a request as manifestly unreasonable has the effect that a public authority must be required to know that person's identity. The courts and the Commissioner have grappled with such issues including in the FOI context: see e.g. *Grange v. Information Commissioner* [2022] IECA 153 (Haughton J.), *Mr Q and ESB Networks Limited*, Case CEI/15/0029.

69. The sixth and final question here is:

> **If the answer to the fourth question in general is "No", does Article 4(1)(b) of the Directive read in the light of Article 4(3)(b) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998 have the effect that a public authority is prohibited from seeking confirmation as to the applicant's actual name and/or a current physical address, for the purposes of determining whether a given request is manifestly unreasonable by reference to the volume, nature and frequency of other requests made by the same applicant, and not for the purpose of determining the interest of the applicant, even if the provision of the actual name and/or current physical address of an applicant could indirectly allow inference or speculation as to the interest if any of the applicant referred to in Article 3(1) of the Directive?**

Reference to the CJEU

70. The question now arises as to whether I should decide the foregoing questions myself or refer them to Luxembourg. The first question is one for the CJEU anyway but actually referring that here depends on any of the later questions being referred. One issue in that regard is whether the point is clear or could be the subject of doubt. But there is very little European or international material before me that could be said to resolve or determine this issue in a way that eliminates doubt.

71. The UNECE publication, The Aarhus Convention: An Implementation Guide (2nd Ed., UN, 2014) at pp. 55-56 is not hugely enlightening on this:

> "The definition of 'public' should be interpreted as applying the 'any person' principle (for an explanation of natural and legal persons, see comment to article 2, paragraph 2). For emphasis, the Aarhus Convention also explicitly mentions associations, organizations and groups. By way of comparison, the definition of 'public' in article 1 (j) of the Industrial

Accidents Convention is simply 'one or more natural or legal persons'. The same definition can currently be found in article 1, paragraph (x), of the Espoo Convention, although the 2004 amendment to the Espoo Convention, once in force, adopts the Aarhus Convention approach and will extend the definition to explicitly include associations, organizations and groups. In most cases, an association, organization or group of natural or legal persons will itself have legal personality, and therefore will already fall under the definition. The language can only be interpreted, therefore, to provide that associations, organizations or groups without legal personality may also be considered to be members of the public under the Convention. This addition is qualified, however, by the reference to national legislation or practice. Thus, ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply with the Convention's objective of securing broad access to its rights. The term 'public' in article 2, paragraph 4, is not in itself subject to any conditions or restrictions. Thus, where the Convention conveys rights on 'the public' without expressly adding any further qualifications on who of the public may enjoy those rights, the public are entitled to exercise those rights irrespective of whether they personally are 'affected' or otherwise have an interest. Articles 4, 5, 6, paragraph 7 and 9, and article 8 are examples of provisions which follow this approach. Moreover, article 3, paragraph 9, requires that no person be excluded from the definition on the grounds of nationality, domicile, citizenship, or place of registered seat. Persons who are non-citizens, therefore, have rights and interests under the Convention. For example, the rights under article 4 relating to requests for information apply to non-citizens and nonresidents as well as citizens and residents."

72. My understanding is that there is no definitive decision of the German courts on these questions either.

73. In a paper on the German AIE legislation (known as UIG) available at https://fragdenstaat.de/dokumente/7701-anhang-a-rechtsgutachten-20200923_konvertiert/, (Umweltforschungsplan des Bundesministeriums für Umwelt, Naturschutz, Bau und Reaktorsicherheit Forschungskennzahl [3716 17 103 0] UBA-FB-00 [trägt die UBA-Bibliothek ein] Evaluation des Umweltinformationsgesetzes (UIG) Analyse der Anwendung der Regelungen des UIG und Erschließung von Optimierungspotentialen für einen ungehinderten und einfachen Zugang zu Umweltinformationen Anhang A: Rechtsgutachten von Univ.-Prof. Dr. Dr. h.c. Thomas Schomerus RiOVG, Leuphana Universität Lüneburg für das Unabhängiges Institut für Umweltfragen (UfU) e.V., Greifswalder Straße 4, 10405 Berlin unter Mitarbeit von Karl Stracke, Unabhängiges Institut für Umweltfragen e.V.Berlin, Lüneburg, Januar 2020 Im Auftrag des Umweltbundesamtes), the learned authors refer to both views on the question. They begin (at p. 110) by commenting:

"2.4.2.2 Anonyme Anträge
Umstritten ist, ob der Antragsteller mit Name und Adresse identifizierbar sein muss. Nach einer älteren Auffassung gehöre diese Identifizierbarkeit zum „Mindestinhalt des Antrags".[461] [citing Reidt/Schiller, in: Landmann/Rohmer, UmweltR, 85. EL Dezember 2017, UIG § 4 Rn. 5; Scherzberg, in: Fluck, Informationsfreiheitsrecht, § 4 UIG Rn. 16]."

(2.4.2.2 Anonymous applications
It is debated whether the applicant must be identifiable by name and address. According to an older view, this identifiability is part of the 'minimum content of the application'. [461])

74. The learned authors then discuss the alternative argument:

"Nach anderer Auffassung setzt ein wirksamer Antrag auf Informationszugang keine Identifizierung des Antragstellers voraus: „Die Identifizierung der antragstellenden Person wird durch § 4 UIG nicht gefordert und ist auch nicht immer notwendig. Die anonyme oder pseudonyme Antragstellung (vgl. § 13 Absatz 6 TMG) vor allem unter Nutzung moderner Kommunikationsdienste steht der Regelung des § 4 UIG nicht entgegen. Soweit anonyme Bezahlverfahren zur Verfügung gestellt werden, ist selbst die Identifizierung für die Durchsetzung eventueller Gebühren und Auslagen nicht mehr erforderlich (vgl. § 6 IFG-SH Z 2 aE)'.[462]" [Citing Karg, in: Gersdorf/Paal, BeckOK InfoMedienR, 18. Ed. 01.02.2017, UIG § 4 Rn. 5.]

(According to another view, a valid application for access to information does not require identification of the applicant: 'Section 4 UIG does not require the identification of the applicant and it is also not always necessary. The anonymous or pseudonymous Application (see Section 13 Paragraph 6 TMG) especially using modern communication services are not contrary to the requirements of Section 4 UIG. In so far as anonymous payment methods are provided, even identification for the enforcement of possible fees and expenses is no longer necessary (cf. § 6 IFG-SH Z 2 aE).' [462])

75. The discussion goes on:

"Für letztere Auffassung spricht, dass der Antrag auf Zugang zu Umweltinformationen nach § 3 Abs. 1 UIG keinen Nachweis irgendeines Interesses erfordert.[463] [Citing S. oben unter 2.3.1.2.3.] Der Antragsteller handelt als Repräsentant der Öffentlichkeit, für die ein grundsätzliches Interesse an Umweltinformationen vorausgesetzt wird. Die individuelle Person des Antragstellers ist für die Wirksamkeit des Antrags grundsätzlich irrelevant. Daher wird die Kenntnis von dieser Person materiell nicht gefordert. Antragsteller können grundsätzlich anonym oder unter Pseudonym auftreten. Verfahrensmäßig muss jedoch zumindest eine irgendwie geartete Adresse angegeben werden, an die die Umweltinformation gesandt werden soll. So kann ein anonymes Schreiben denklogisch nicht beantwortet werden. Im Internet ist es aber durchaus möglich und auch vielfach üblich, ohne den eigenen Echtnamen aufzutreten. Auch ist denkbar, dass jemand persönlich eine informationspflichtige Stelle aufsucht, ohne seinen Namen und Adresse anzugeben, und unmittelbar Einsicht in bestimmte, Umweltinformationen enthaltende Unterlagen begehrt."
(The latter view is supported by the fact that the request for access to environmental information in accordance with Section 3 Paragraph 1 UIG, does not require any proof of interest. [463] The Applicant acts as a representative of the public, for which a fundamental interest in environmental information is presumed. The applicant as an individual person is fundamentally irrelevant to the validity of the application. Therefore knowledge of [the identity of] this person is not materially required. Applicants can generally appear anonymously or under a pseudonym. However, procedurally at least some kind of address must be provided where the environmental information is to be sent. Logically, an anonymous letter cannot be responded to. On the internet it is certainly possible and often common to appear without one's own real name. It is also conceivable that someone visits an organisation that has a duty to provide information in person, without providing one's name and address, requesting immediate access to certain documentation containing environmental information.)

76. All of this just adds to the doubt about the ultimate answer to the questions considered, which reinforces the case for a reference. Overall it seems to me that these questions are appropriate ones to refer to the CJEU. They are necessary for the decision and they relate to the interpretation rather than application of EU law. Nor are they *acte clair* in the sense that there is or can be no disagreement about the answers. I will thus request the parties to file simultaneous written submissions in an *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265, [2021] 5 JIC 2704 format within the next 2 weeks for this purpose.

77. The State have a potential interest to the extent that although the issue of the compatibility of the regulations with the directive doesn't arise now, it may arise later. If Coillte's interpretation of EU law is incorrect, the extent to which a conforming interpretation is available remains a matter of dispute, but if it arises, that will be a matter of domestic law in the light of the ruling of the CJEU. So it may be that the validity of the regulations will come into focus, but that is something that can be returned to following answers to the questions. The Attorney General will have to be involved in any module arising on foot of that. There is no particular legal requirement for that issue to be pleaded other than by reference to any notice under O. 60 RSC, which strictly doesn't apply here because the issue is compatibility of legislation with EU law rather than the Constitution. However the parties should serve the State with all papers within 7 days and the matter will then be listed on the next following Monday to enable the State to contribute if necessary, in accordance with what is envisaged in the *Eco Advocacy* procedure.

78. As regards what is to happen pending the ruling of the CJEU, Coillte says a reference would not be a blocking tactic and that any future applications would be dealt with in a normal way in accordance with its own views. However any appeals before the Commissioner, of which there are at least the 23 referred to already, can be held over if required. It may be that some appeals in which the identity issue is a factor can be resolved without that having to be decided (although it's hard to see how that could happen if the jurisdiction to consider the appeal at all is contested). But in any matter where the referred issues are critical, it would be preferable if the Commissioner would not cut across any potential reference, thereby forcing the public authorities concerned to appeal to the court, where I will then park all such appeals pending the outcome in Luxembourg. If parking is to happen, it should happen at a stage before it generates more litigation.

Order

79. For the foregoing reasons, it is ordered that:

(i) the identified question be in principle referred to the CJEU;

(ii) the appellant be directed to serve the CSSO with all papers within 7 days (which may be via the ShareFile link, with access to be provided to such solicitors and counsel as are notified for the purpose by the CSSO to the List Registrar) and to inform the CSSO of the opportunity to contribute to the order for reference as well

as of the potential issue in due course regarding the compatibility of the regulations with EU law depending on the answers to the questions being referred;

(iii) the parties be directed to prepare simultaneous *Eco Advocacy* [2021] IEHC 265 submissions within 14 days;

(iv) the directions in that case be ordered to apply;

(v) the matter be listed for mention on the Monday next following notification to the CSSO; and

(vi) costs be reserved.