THE HIGH COURT

IN THE MATTER OF ARTICLE 12(9)(A) OF THE ACCESS TO THE INFORMATION ON THE ENVIRONMENT REGULATIONS 2007-2019

[2023] IEHC 227

Record No. 2021/242MCA

BETWEEN

THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

APPLICANT

-and-

COILLTE TEORANTA

-and-

PEOPLE OVER WIND

RESPONDENTS

-and-

MINISTER FOR ENVIRONMENT, CLIMATE AND COMMUNICATIONS

NOTICE PARTY

JUDGMENT of Ms. Justice Niamh Hyland delivered on 28 April 2023

Summary

1. This is an application under Regulation 12(9)(a) of the European Communities (Access to Information on the Environment) Regulations 2007-2018[1] (the "AIE Regulations" or the "Regulations") in respect of questions put to the Court by the Commissioner for Environmental Information ("the Commissioner"). Regulation 12(9)(a) permits the Commissioner to refer any question of law arising in an appeal under Regulation 12 to the High Court for determination and to postpone the making of a decision until after the determination of the court proceedings.

2. The two principal issues identified were whether the scheme of the Freedom of Information Act 2014 (the "FOI Act"), which permits a refusal to disclose records otherwise disclosable under the Act, represents a law which provides for the "confidentiality of public authorities" and whether, even if that is so, Coillte can rely on that FOI Act to resist disclosure of environmental information under the AIE Regulations. Coillte is in an unusual position in that, although it is a public body within the definition of s.6(1) of the 2014 Act, it is listed in Part 2 of Schedule 1 as an exempt agency and as such is not subject to the FOI Act.

3. At the hearing, the Commissioner made it clear he was no longer seeking answers to Questions C(4) or D(2). I have reformulated certain of the questions, and I set out below the reformulated questions and answers to Question A, Question C(1), (2) and (3) and Question D(1). Question B does not require a response because of the answers to those questions.

Question A: *Do the exemptions in the FOI Act create protection for the confidentiality of proceedings of public bodies such that the FOI Act provides for legal protection of confidentiality for the purposes of Regulation 8(a)(iv) of the AIE Regulations?*

[1] As set out in S.I. No. 133 of 2007, S.I. No. 662 of 2011, S.I. No. 615 of 2014 and S.I. No. 309 of 2018.

Answer: *The exemptions in the FOI Act create protection for the confidentiality of proceedings of public bodies where records sought to be disclosed are found to be exempt within the meaning of the FOI Act, such that the FOI Act protects the confidentiality of the proceedings of public authorities for the purposes of Regulation 8(a)(iv) of the AIE Regulations, (public authorities being defined in those Regulations).*

Question C(1) and (2): *Having regard to the response to Question A, is the confidentiality protection under the FOI Act identified in Regulation 8(a)(iv) available to Coillte, given its status as an exempt agency under the FOI?*

Answer: *The FOI Act only protects the confidentiality of proceedings of public bodies where records sought to be disclosed are found to be exempt within the meaning of the FOI Act. Records are only exempt where the public body seeking to withhold access is a body subject to the FOI Act, as defined by section 6 of the FOI Act, and where (if applicable), both limbs of the test for exemption are met: the records come within an exemption protecting the confidentiality of proceedings of public bodies and the public interest does not warrant disclosure. As Coillte is an "exempt agency" under the Act, the confidentiality protection under the FOI Act identified in Regulation 8(a)(iv) is not available to Coillte.*

Question C(3)*: If "public bodies" does not include exempt agencies, to what extent does the fact of the exclusion of those bodies from the FOI Act indicate that the confidentiality of their proceedings is otherwise protected?*

Answer: *The exclusion of Coillte from the definition of public body and accordingly from the FOI Act has no implications for the confidentiality of their proceedings in any other context.*

Question D(1): *If the FOI Act does not protect such confidentiality, does Regulation 8(a)(iv) of the AIE Regulations create a new species of confidentiality of proceedings, by reference to the FOI Act, for the purpose of refusal of access to environmental information?*

Answer: *The reference to the FOI Act in Regulation 8(a)(iv) is for the purpose of identifying one instance in domestic law where the confidentiality of the proceedings of public authorities is otherwise protected by law. It does not create law; it simply recognises existing law. As such it does not create a new species of confidentiality of proceedings for the purpose of refusal of access to environmental information.*

Background to the application

4. The questions arise in the context of an appeal brought by People Over Wind against a decision by Coillte of 20 February 2020. The Commissioner, having considered the arguments of the parties, decided that he required the assistance of the Court to further progress the appeal and made this application.

5. The questions concern two provisions of the AIE Regulations, Regulation 8(a)(iv), and Regulation 9, both of which implement Article 4 of the Directive 2003/4 on public access to environmental information ("Directive 2003/4" or the "AIE Directive). Article 4 provides various grounds upon which a public authority may refuse to disclose environmental information where disclosure would adversely affect certain interests, including confidentiality. Regulation 8(a)(iv) implements Article 4(2)(a), referring to confidentiality being protected by law, *inter alia*, by the FOI Acts 1997-2003. The FOI Act 2014 has repealed and replaced those Acts. I am therefore construing the reference to the previous FOI Acts as a reference to the FOI Act 2014 as provided for by s.26 of the Interpretation Act 2005. It is the meaning and implication of that reference insofar as

Coillte is concerned that forms the subject matter of the questions referred. Before setting out the circumstances in which the questions arose, it is helpful to establish the legal context in which the reference to the FOI Act arises by describing the relevant provisions of the AIE Directive, the AIE Regulations and the FOI Act.

The AIE Directive

6. Directive 90/313/EC on freedom of access to information on the environment was the first legislative measure adopted at EU level to address access to environmental information. The object of that Directive was to ensure freedom of access to information on the environment held by public authorities. Following the signature by the European Community (as it then was) of the Aarhus Convention, it was necessary to ensure that provisions of Community law be consistent with the Convention. A new legal instrument in respect of access to information on the environment was required. Accordingly, the AIE Directive was adopted on 28 January 2003. It was implemented in Irish law by the AIE Regulations.

7. The aim and purpose of the AIE Directive is not hard to discern. Many judgments of the CJEU and the Irish courts have considered this issue. The objectives of Directive 2003/4, identified at Article 1, are to guarantee the right of access to environmental information held by or for public authorities and to ensure that environmental information is progressively made available and disseminated to the public to achieve the widest possible systemic availability (see also Recital 9 to similar effect). Recital 16 of the Preamble is particularly important in the context of these proceedings. It provides as follows:

> *16. The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by*

disclosure should be weighed against the interest served by the refusal. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive."

8. The CJEU has referred to those objectives of the AIE Directive as being directed towards ensuring a general principle of access to environmental information held by or for public authorities and to ensure the widest dissemination of same (see Case C-442/14 *Bayer Crop Science v Stichting De Bijenstichting* (ECLI:EU:C:2016:890) and Case C-279/12 *Fish Legal v Information Commissioner* (ECLI:EU:C:2013:853)). In *Bayer Crop Science*, a suggested interpretation of the term "emissions into the environment" that would have been contrary to the Directive's objective of the widest possible disclosure of environmental information was rejected, *inter alia*, having regard to the purpose of the Directive. There is simply no dispute about the fact that the AIE Directive should be interpreted in the widest fashion possible to promote maximum access to environmental information. I have approached the question of the correct interpretation of the AIE Regulations bearing this principle in mind.

9. Turning now to the provisions of the Directive, Article 1 identifies that its objective is:

"(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and

(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted."

10. Article 2 defines a "public authority". This definition was considered by the CJEU in *Fish Legal,* which was in turn considered by the Supreme Court in *NAMA v Commissioner for Environmental Information* [2015] 4 IR 626. Article 2(3) defines "*information held by a public authority*" as "*environmental information in its possession which has been produced or received by that authority*". Article 2(4) defines "*information held for a public authority*" as "*environmental information which is physically held by a natural or legal person on behalf of a public authority*". Article 3 obliges Member States to ensure that public authorities are required, in accordance with the provisions of the 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.

11. As I identify above, Article 4, headed up "Exceptions", provides that Member States may provide for a request for environmental information to be refused if disclosure would adversely affect certain interests. One of these is the confidentiality of the proceedings of public authorities where such confidentiality is provided for by law (Article 4(2)(a)). I note that a reference to the CJEU on the contours of the meaning of proceedings under Article 4(2)(a) has been made by Simons J. in *Right to Know CLG v An Taoiseach* [2021] IEHC 233. Another is the confidentiality of commercial or industrial information where such confidentiality is provided for by national or community law to protect a legitimate economic interest (Article 4(2)(d)). In both of those cases, the Directive permits a Member State to provide a ground for refusal because of an adverse effect on confidentiality where that interest is protected by law in a context other than the AIE Directive. In other words, where public authorities have an entitlement to refuse disclosure of information on the basis of existing law, those public authorities may invoke that law to justify refusal from disclosure in the context of a request for access to environmental information.

12. Article 4 also permits Member States to provide for refusal of environmental information where disclosure would adversely affect identified interests without reference to confidentiality being provided for by law, such as intellectual property rights or international relations, the course of justice, public security or national defence.

13. Even where protection from disclosure is identified, either directly or by reference to existing provisions of law, a further step is required. Article 4(2) provides, *inter alia*, as follows:

> *"The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case the public interest served by disclosure shall be weighed against the interest served by the refusal."*

Aarhus Convention

14. The relevant provisions in respect of confidentiality in the Convention can be found at Article 4 which provides, *inter alia*, as follows:

> *"(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.*
>
> *(4). A request for environmental information may be refused if the disclosure would adversely affect:*

(a) The confidentiality of the proceedings of public authorities where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law.

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

…

(6) Each Party shall ensure that, if information exempted from disclosure under paragraphs 3(c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested."

The AIE Regulations

15. The AIE Regulations were adopted initially in 2004 to transpose the Directive, and have been amended a number of times as identified above (see footnote 1 to this judgment). Regulation 8 is at the centre of the questions posed by the Commissioner in these proceedings. It provides as follows:

> *"8. A public authority shall not make available environmental information in accordance with article 7 where disclosure of the information—*
>
> *(a) would adversely affect—*
>
> *...*
>
> *(iv) without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts)*
>
> *or*
>
> *(b) to the extent that it would involve the disclosure of discussions at one or more meetings of the Government, is prohibited by Article 28 of the Constitution*
>
> *...*
>
> *Discretionary grounds for refusal of information*
>
> *9. (1) A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect-*
>
> *...*

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

16. It is interesting to contrast the approach in Regulations 8 and 9. The former makes refusal not just optional but mandatory by the public authority where the requisite conditions are met. By way of contrast, refusal in relation to commercial confidentiality as provided for by Regulation 9 is at the discretion of the public authority.

The FOI Act 2014

17. The FOI Act establishes a statutory scheme whereby members of the public can request access to information from certain identified bodies. It establishes a right of access in respect of records held by bodies that come within the definition of an FOI body and identifies the circumstances in which disclosure can be refused. The operation of the FOI Act has recently been described by the Supreme Court in *Minister for Communications, Energy and Natural Resources v The Information Commissioner* [2021] ILRM 81 ("*Enet*").

18. An FOI body is defined as either a public body (see s.6) or a prescribed body (see s.7). A public body is defined by reference to certain types of entities established in the State. Exempt agencies are defined by s.6(3) and are identified in Part 2 of Schedule 1. Coillte is a named exempt agency.

19. Records are defined very widely in the definition section including written, printed material, maps, plans, tapes, electronic device, film tape, etc. However, the obligation of public bodies holding such records to disclose them is not absolute. The public bodies may invoke a wide range of circumstances defined by the Act justifying withholding the information.

20. As may be seen from the above description, the FOI Act creates obligations of disclosure not previously provided for. However, it is not an absolute obligation. To borrow an analogy from the world of equity, the Act provides both a sword and a shield. The "sword" is the provisions of the 2014 Act that allow the requester to seek and obtain records of the public body holding them where the records fall within the ambit of the 2014 Act. The "shield" is the statutory exemptions that permit a refusal of records in prescribed circumstances. Some of those circumstances coincide with existing confidentiality exceptions whether at common law, in statute or the Constitution in the case of cabinet confidentiality. Other grounds for refusal arguably do not exist outside the context of the FOI Act. However, it must equally be remembered that an obligation to disclose records falling within the scope of those exemptions may not have existed, certainly not in the form provided for, prior to the enactment of the FOI Act.

21. Part 4 of the Act establishes 12 categories of records in respect of which access can be refused and details the circumstances in which a request may be refused by an FOI body. The exemptions identify circumstances in which records held by FOI bodies are confidential and may not be subject to disclosure. Where a body can rely upon one of the exemptions, the record is known as an exempt record and does not require to be disclosed. In *Enet* the Supreme Court confirmed that exempt records are those falling under s.2(1)(a) of the FOI Act, namely: "*a request in relation to which the grant of an FOI request would be refused pursuant to Part 4 or by virtue of Part 5*".

22. The exemptions are wide ranging. Some identify obligations of confidentiality that are already well established in other contexts, for example legal professional privilege (s.31), information obtained in confidence (s.35), commercially sensitive information (s.36) and personal information (s.37). Others identify obligations of confidentiality that may not be established in common law, although they may exist under a diverse range of statutory

provisions. Examples of this are s.29 which protect deliberations of FOI bodies, s.30 which protects functions and negotiations of FOI bodies, s.31 which protect parliamentary papers, papers of a tribunal of enquiry, or other tribunal appointed by the government, s.32 which protects law enforcement and public safety, s.33 which protects security, defence and international relations, s. 39 which protects research and natural resources and s.40 which protects the financial and economic interests of the State.

23. Some of the FOI exemptions may reflect protections that very likely exist in contract law, for example where a public body has contracted with a third party in respect of research or the financial interests of the State, the contract with the third party may provide for confidentiality.

24. A very small number of the exceptions are mandatory and prevent disclosure without providing for any circumstances in which disclosure may be permissible, for example s.31(1)(b) which authorises a head to refuse to grant an FOI request if its disclosure would constitute contempt of court. The vast majority of the exceptions require the public body to carry out a balancing exercise whereby the public body must consider whether the public interest in release is greater than the public interest in refusal. That is known as the public interest override.

25. Section 11(8) of the Act is heavily relied upon by People Over Wind in support of its assertion that the FOI Act does not provide protection on the basis of confidentiality but rather only provides a basis to refuse records. Later in this judgment, I describe s.11(8) and explain why I do not agree with that contention.

Procedural History

26. On 12 November 2018 People Over Wind submitted an AIE request to Coillte regarding a proposed windfarm in Cullenagh, Co. Laois in respect of 6 categories of information. On 16 November 2018 Coillte responded and informed People Over Wind that it considered

the categories to be overly broad, specifically in respect of categories 1 to 4 and invited People Over Wind to make a more specific request. People Over Wind responded on the same day removing category 2 and reformulating requests for the remaining categories as well as further clarifications. The categories requested were in the following terms:

"1. A copy of the cost benefit analysis (or other economic analysis if this exists) used to underpin the Cullenagh Co. Laois wind farm project.

2. Removed

3. A copy of the business case for the Cullenagh wind farm project, Co. Laois. (In the instance that there are differing versions, I am requesting that all versions are supplied.)

4. All documentation that was submitted to Coillte Board regarding the Cullenagh wind farm project, Co. Laois.

5. A copy of the decision of the Board to proceed with the project.

6. A copy of all Board meeting minutes discussing the project."

27. On 11 December 2018 Coillte informed People Over Wind that it was refusing access to each of the categories requested. It refused access to categories 1, 3, 4 and 6 on the basis that the information was not environmental information under the Regulations and that it was information that would adversely affect industrial or commercial confidentiality under Regulation 9(1)(c) of the Regulations. Category 5 was refused on the basis that no decision had yet been made. Categories 1 and 3 were also refused on the additional basis that it was information in the course of completion under Regulation 9(2)(c) and that once completed it would, as identified above, fall foul of Regulation 9(1)(c).

28. On 10 January 2019, People Over Wind requested an internal review of this decision from Coillte but received no response. It brought an appeal against this decision to the Commissioner on 23 February 2019. In its submissions to the Commissioner during that

appeal, Coillte identified a revised position; that it did not hold any records in relation to categories 1, 3 or 5 and that the discrete records it had found that fell under categories 4 and 6 were subject to the exceptions at Regulation 8(a)(iv) and/or Regulation 9(1)(c) and additionally that category 6 was also subject to Regulation 9(2)(d). It was further identified that in the interim between the decision and the appeal, Coillte had identified 11 records falling under categories 4 to 6 that were not considered in the decision under appeal.

29. On 22 November 2019 the Commissioner decided that Coillte did hold information falling under categories 3 and 5 and that the information falling under categories 3 to 6 was environmental information. It was further held that parts of the fifth record were beyond the scope of the requests but that those falling under category 6 were not subject to the "internal communication" exception under Regulation 9(2)(d) of the AIE Regulations. Finally, it was concluded that Coillte held no information in respect of category 1.

30. The Commissioner made no finding in this appeal in respect of Coillte's invocation of the exceptions in Regulations 8(a)(iv) and 9(1)(c) in circumstances where there was uncertainty as to Coillte's treatment of the request, given Coillte had found 11 further records falling under the scope of the request. The Commissioner concluded it would be preferable for Coillte to weigh all the competing interests in respect of all of the records at the same time. To that end the Commissioner proposed, if People Over Wind were amenable, that Coillte regard itself as having been issued with an AIE request seeking all environmental information and documentation on the Cullenagh project, all decisions (including interim ones) on each stage of the project and all information in the 11 further documents found by Coillte in the course of the appeal. On 20 January 2020 People Over Wind confirmed it would like Coillte to proceed to consider that remitted request.

31. On 20 February 2020 Coillte refused access to all 17 records identified by it as falling under the request. There were 17 in circumstances where Coillte had inadvertently

indicated to the Commissioner that it had found 11 records when in fact it had found 12 further records. The documents were described as minutes of meetings of Coillte's board and decision items submitted to the board in respect of the Cullenagh project, containing information on Coillte's business development strategy, considerations of business risks, potential joint ventures, legal and business costs, and a number of interim decisions contingent on external events and like matters.

32. Coillte grounded its refusal in three ways. The first related to Regulation 8(a)(iv) of the AIE Regulations. Coillte identifies that it interprets this Regulation to mean that the exemptions under the FOI Act are effectively "imported" into the regime under the AIE Regulations and therefore if information on the proceedings of public authorities is protected under the FOI Act, Coillte must not release the records, despite the fact Coillte is an exempt agency under the FOI Act. Coillte then went on to decide that s.30(1)(a), (b) and (c), and s.31(1)(a) applied. It further decided that confidentiality is provided for by law under s.33 of the Forestry Act 1988 (the "1988 Act").

33. The second ground related to Regulation 9(1)(c) of the AIE Regulations which provides a public authority may refuse a request where such disclosure would adversely affect the commercial or industrial confidentiality of the authority as provided for by Irish or EU law to protect a legitimate economic interest. Coillte decided that s.30(1)(a), (b) and (c) and s.31(1)(a) are equally applicable under this ground as they were in the context of Regulation 8(a)(iv) except to note that the records contain sensitive information received in confidence by Coillte on the commercial and industrial activities of Coillte and its joint venture partners. Additionally, Coillte found that the commercial and industrial confidentiality exemptions at s.35(1) and s.36(1) of the FOI Act applied.

34. Finally, in the alternative, Coillte decided that Regulation 9(2)(d), which allows a public authority to refuse to release information where it concerns internal communications,

applied to all the records except record number 5 and that the balance of legitimate public interests did not weigh in favour of disclosure.

35. On 26 February 2020 People Over Wind sought an internal review of this decision. On 26 March 2020 Coillte's internal review affirmed its original decision to refuse disclosure. People Over Wind then brought a second appeal to the Commissioner on 27 April 2020. The Commissioner sought submissions on the appeal from both parties during the appeal and ultimately concluded it should refer questions of law to this Court in respect of the interaction between the FOI Act and the AIE Regulations as discussed below. On 20 July 2021 the Commissioner invited the parties to make submissions on the formulation of the questions for the Court and provided the parties with a draft Statement of Facts which recounted the procedural history to that point. On 23 August 2021 Coillte made submissions on the form of questions. No submissions were received from People Over Wind.

36. After those questions were referred, but before this matter came before this Court for hearing, the Commissioner wrote to the parties on 21 October 2022 noting that both Coillte and the Minister for the Environment, Climate and Communications (the "Minister"), who had been joined as a Notice Party, had in their legal submissions argued that the Statement of Facts was insufficient to ground the questions referred to the Court. The Commissioner proposed to make findings on six identified matters. None of the parties identified any additional facts they considered ought to be the subject of a finding or objected to the proposed approach. On 8 December 2022 the Commissioner adopted a Supplemental Statement of Facts where he found the following facts:

- The initial request to Coillte and the original appeal were valid;
- Coillte is a public authority for the purposes of the AIE Regulations;

- Coillte is an exempt body within the meaning of Part 2 of Schedule 1 of the FOI Act 2014;
- The records in question were not in the public domain.

37. The Commissioner refused to make a finding as to whether the information sought was commercial or industrial in circumstances where it was considered that the basis for the finding would depend on the applicable legal test, as the terms "commercial or industrial confidentiality" in Regulation 9(1)(c) of the AIE Regulations can only be interpreted by reference to the Irish or EU law that purports to provide for that confidentiality. As such, the Commissioner felt that no finding in this respect could be made pending the determination of the questions referred to this Court.

Questions Referred/Objection on Jurisdiction

38. I have attached the full text of the questions referred to this judgment as Annex A. On close consideration of those questions, it seemed to me that the answers to certain of those questions would be more useful to the Commissioner if the questions were somewhat reformulated. I am satisfied that I am entitled to reformulate questions where I consider it necessary by analogy with the case stated procedure (see *inter alia*, *DPP v Croom-Carroll* [1999] 4 IR 126 and *DPP (Kearns) v Maher* [2004] 3 IR 512 as discussed in Delany and McGrath on Civil Procedure (4th Ed., 2018) from para. 32.73 onwards. As I address each question, I explain how and why I have reformulated it. My main goal has been to render the question as specific as possible to the facts of the appeal before the Commissioner and to avoid giving a hypothetical or advisory type opinion.
39. Both the Minister and Coillte raised preliminary objections to this Court answering certain of the questions referred, either as phrased by the Commissioner, or at all. Both had objections in relation to what might be termed deficiencies in the findings of fact by the Commissioner as detailed above, and the Minister made a further related objection on the

jurisdiction of this Court under Regulation 12(9)(a). However, before dealing with the detail of this, it is important to summarise the various positions of the parties by the time the matter came to be heard. The Minister considered that the Court could, on the basis of the material before it, answer Questions A, C(1-3) and D(1). People Over Wind had no objection to any of the questions being asked. Coillte had a strong objection to Question B being answered, and a milder objection to Question A being answered (counsel conceding at the hearing that because it did not relate to a wide variety of sections of the Act, he could see how it could be answered). The principal objection of Coillte was that the Commissioner had not made findings as to whether any of the FOI provisions referable to proceedings of public authorities, or commercial/industrial confidentiality invoked by Coillte to resist disclosure were actually engaged. It had no objection to the remaining questions in C or D being answered.

40. Because I am not answering B, I do not need to engage with Coillte's objection on that point. In respect of its objection to Question A, it is worth recalling it was in fact Coillte who suggested that the questions raised by the appeal, including the correct interpretation of Regulation 8(a)(iv), should be referred as a question of law arising in the appeal pursuant to Regulation 12(9) of the AIE Regulations (see letter of 16 December 2020 from Mason Hayes Curran, solicitors for Coillte to the Commissioner).

41. In those circumstances, I do not consider it necessary to set out in detail the chronology of objections and the communications between the parties in this respect. Nor shall I address the issues raised in relation to the absence of findings of fact insofar as Question B is concerned, given that I have not deemed it necessary to answer it. Equally, given that question D(2) has been withdrawn I do not need to engage with the extensive arguments in relation to the permissibility of the sub-questions contained therein.

42. Separately to the objections of the parties, I should satisfy myself that I have sufficient findings of fact in order to answer the questions of law referred, and in particular should avoid answering hypothetical or abstract questions not referable to the facts found.

43. Regulation 12(9)(a) provides:

> *"The Commissioner may refer any question of law arising in an appeal under this article to the High Court for determination and shall postpone the making of a decision until after the determination of the court proceedings."*

44. The Minister identifies that the main jurisdictional limitation in the section is that the question must arise from the appeal. The Minister submits that the original Statement of Facts amounts to a chronology of the procedural steps of the application to Coillte and the appeals to the Commissioner and that the Supplemental Statement of Facts made no further findings relevant to the questions in this appeal. He argues that in circumstances where no application has ever been made under Regulation 12, the procedure for stating a case from the District Court under s.52 of the Courts (Supplemental Provisions) Act 1961 can provide guidance as it can be exercised where there is a question of law "arising" in proceedings. The Minister draws my attention to the decision of McMahon J. in *O'Neill v Butler* [1979] ILRM 243 where the Court held that a District Court Judge could not "*ask the High Court to define generally and without reference to particular facts the meaning of expressions used in a statute*". Similarly, in *O'Shea v West Wood Club Limited* [2015] IEHC 24 O'Malley J. held that the matter arising "*must relate to a matter in issue in the case*". Finally, it is noted that the Supreme Court in *DPP v Brennan* [1998] 4 IR 67 held that it was necessary that a District Court Judge find the facts relevant to the point of law. The Minister argues that this objection is particularly acute where, at the request of the Commissioner, the parties did not address Regulation 9(1)(c) and as such it would be

difficult to see how any question of law in that respect could be "arising" in respect of its determination.

45. I agree that the case stated procedure and the case law on same is of considerable assistance in deciding upon the approach of the Court where a question of law arising in an appeal is referred for determination under Regulation 12(9)(a). I should not answer abstract questions of law, or interpret the law, without anchoring facts. The questions must arise in relation to a matter at issue in the appeal. What is also clear from the wording of Regulation 12(9) is that where there is a question of law upon which the Commissioner requests guidance, no decision should be made until after the determination of the Court. That sounds like an obvious approach; but in fact it has particular resonance here, where, if I accepted Coillte's objection to answering Question A on the basis that the Commissioner was first required to determine whether any of the FOI provisions referable to proceedings of public authorities applied to the environmental information at issue, I would be effectively requiring the Commissioner to make a decision, albeit a provisional one, before the giving of answers by the Court.

46. That is because any such decision would involve a mixed question of fact and law and necessitates the Commissioner taking a view on the very points I am being asked to decide in this reference i.e. whether the reference to the FOI Act in Regulation 8(a)(iv) is a reference to a confidentiality provision within the meaning of the Directive and, if so, whether Coillte can benefit from it. Moreover, it is Coillte who justified its refusal of certain records on the basis that disclosure would adversely affect the confidentiality of its proceedings, which were protected by s.30 and 31 of the FOI Act. Although it did not rely on s.29 in its refusal decision, in the submissions on the appeal it also invoked s.29.

47. Therefore, the following facts are established:

- A request for information under the AIE Regulations has been made to Coillte;

- Coillte has refused it, *inter alia* because disclosure would affect the confidentiality of its proceedings, as protected under provisions of the FOI Act;
- An appeal has been brought to the Commissioner by People Over Wind;
- Objections have been raised to the Commissioner permitting Coillte to rely upon the provisions of the FOI Act under Regulation 8(a)(iv), *inter alia* because Coillte is an exempt agency;
- To resolve the appeal, the Commissioner must decide whether the FOI Act provisions may be relied upon and whether Coillte in particular may rely upon them given its status as an exempt agency.

48. The above facts mean that I am not being asked to "*define generally and without reference to particular facts the meanings of expressions used in a statute*", to take the words of McMahon J in *O'Neill v. Butler*. The questions of law referred arise in this appeal. They relate to a matter at issue in the appeal. The Commissioner cannot proceed with the appeal until they are decided. The question of whether the FOI exemptions are available at all is a threshold question and it is only if the FOI exemptions apply in principle that it would be necessary to consider the detail of whether the exemptions could in fact be relied upon. In the circumstances, the questions posed are not abstract or hypothetical. In those circumstances, I am satisfied that Regulation 12(9)(a) has been properly invoked.

Question A

49. Question A as posed by the Commissioner was in the following terms:

"Article 8(a)(iv) of the AIE Regulations allows for a refusal of access to environmental information where disclosure would adversely affect "the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts)". The Freedom of Information Act 2014 ("the

FOI Act") creates a number of exemptions to the right of access to records under the Act. Do the exemptions in the FOI Act create freestanding protection for the confidentiality of proceedings of public bodies for all purposes such that the FOI Act provides for legal protection of confidentiality for the purposes of article 8(a)(iv) of the AIE Regulations? Alternatively, are the exemptions in the FOI Act merely exceptions to the duties of disclosure under that Act, having regard to section 11(8)?"

50. I have reformulated it as follows:

"Do the exemptions in the FOI Act create protection for the confidentiality of proceedings of public bodies such that the FOI Act provides for legal protection of confidentiality for the purposes of Regulation 8(a)(iv) of the AIE Regulations?"

51. Essentially, I have removed the references to "freestanding" protection and protection "for all purposes" as they make the answer conditional on characterising the protection in a particular way and "bake in" the arguments of People Over Wind, which arguments I find unconvincing for the reasons I set out below. However, I explain below in some detail why I do not think that it is necessary to find that the protection afforded by the FOI Act is either freestanding or available for all purposes in order to find that it comes within what is envisaged by Article 4 of the AIE Directive. For similar reasons, I have not answered the separate question in relation to s.11(8) as in my view that question essentially consists of a submission as to why the first part of Question A ought to be answered in a particular way. However, I have fully set out why I have arrived at my conclusion on Question A, including by reference to s.11(8).

Summary of arguments of the parties

52. Simply put, three different points of view have been articulated in the within proceedings as to what the reference in Regulation 8(a)(iv) to the FOI Act means. The position of People Over Wind is that the reference to the FOI Act cannot be treated as an instance of

where the confidentiality of the proceedings of public authorities are protected by law, since the FOI Act does not represent an instance of legal protection of confidentiality of proceedings of public authorities. Its interpretation effectively requires me to ignore the words in parenthesis or at a minimum to treat them as unnecessary and adding nothing to the wording of Article 4.

53. The Minister takes a different approach, arguing that Regulation 8 does not purport to identify all the circumstances in which confidentiality is protected by law, and that the reference to the FOI Act and exempt records under the Act is included as one example of the circumstances in which the confidentiality of information has been recognised in national law.

54. Coillte treats the wording quite differently, at least insofar as its most expansive interpretation is concerned. It says that the reference to the FOI Act is simply a reference to the conceptual framework of that Act to identify the type of records that are exempt from the AIE Regulations. In other words, according to Coillte, Regulation 8(a)(iv) imports the confidentiality protections of the FOI Act and identifies them as a code of confidentiality, available in the context of the AIE Regulations irrespective of whether the public authority seeking to deploy those protections is a body subject to the FOI Act and entitled to avail of those exceptions in the context of an FOI request.

55. As identified already, Coillte, although a public body within the definition of s.6(1) of the 2014 Act, is specifically identified as not being a public body for the purposes of the FOI Act given that it is an exempt body within the meaning of the Act. It is not therefore subject to the regime established by the FOI Act. Coillte has responded to this exclusion from the Act by making two arguments: first, it argues that it should be treated as a public body enjoying the benefit of protection by law of the confidentiality of proceedings of public authorities, even though it is an exempt agency; and second, in the alternative, it makes a

more expansive argument, that Regulation 8 is not simply referring to existing confidentiality laws but is in fact creating a new species of confidentiality law that derives from the FOI Act but can be availed of by any public authority in the context of AIE, including those not covered by the FOI Act. Because the definition of a public body under the FOI Act is not the same as the definition of a public authority under the AIE Regulations, other bodies may be in the position of Coillte i.e., a public authority for AIE purposes but not a public body for FOI purposes.

56. The Commissioner takes an avowedly neutral stance but it is perhaps fair to say that he was sufficiently persuaded by the arguments of People Over Wind such that he decided to move away from his previous approach whereby, in cases involving proceedings of public authorities, he treated information that would be an exempt record under the FOI Act as being protected by national law confidentiality provisions and as such potentially protected from disclosure under the AIE Regulations, subject to the balancing exercise contained in those AIE Regulations. It was because of his concerns about the strength of the arguments of People Over Wind, (as he perceived them) that he decided to refer questions under Regulation 12(9)(a).

Interpretation of Regulation 8(a)(iv)

57. When embarking upon the difficult exercise of construing Regulation 8(a)(iv) I should start by acknowledging the very useful guidance on statutory interpretation in the recent Supreme Court decision of *Heather Hill v ABP* [2022] IESC 43. This identifies that the words of any section are the first port of call in its interpretation. The Court should construe those words having regard to the context of the section, of the Act in which the section appears, the pre-existing relevant legal framework and the object of the legislation insofar as it is discernible. I do not understand any different approach to be taken in the context of the interpretation of a statutory instrument. Because this is a case involving the

transposition of the AIE Directive, I must also take into account the imperative to ensure that the interpretation I adopt is to the greatest extent possible consistent with the aim and purpose of the AIE Directive. As identified in *Heather Hill*, where EU law mandates an approach, the implementing legislation must be interpreted to ensure that that approach is adopted insofar as this is possible having regard to the wording and purpose of the legislation.

58. To recall, Regulation 8(a)(iv) provides that a public authority shall not make available environmental information where disclosure would adversely affect "*the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts)"*. In my view, the normal and ordinary meaning of the wording of Regulation 8(a)(iv) suggests that the words in parenthesis are an example of where the confidentiality of the proceedings of public authorities are protected by law. They are not by any means an exhaustive list of where confidentiality is protected in Irish law, nor do they purport to be. The word "including" in that context suggests to me that the Regulations have simply identified one instance where this is the case. The reference to exempt records within the meaning of the FOI Act is a further specification of when the FOI Act protects the confidentiality of the proceedings of public authorities i.e., when records are designated as exempt within the meaning of the FOI Act. However, People Over Wind have argued that Regulation 8(a)(iv) cannot be construed in this way as the FOI Act does not in fact protect the proceedings of public authorities on the grounds of confidentiality.

Subject matter question

59. To determine this argument, it is necessary for me to consider two separate issues. The first may be described as a subject matter question i.e., does the FOI Act contain provisions

capable of protecting the proceedings of public authorities. The second is whether, if so, the FOI exemptions can be considered to be the provision of confidentiality by law, as identified by Article 4(2)(a) of the Directive.

60. Taking the first question first, none of the parties disputed that certain sections of the Act could be described as protecting the proceedings of public authorities, although People Over Wind pointed out that no provision of the FOI Act squarely protected the proceedings of public authorities and that only incomplete protection might be given by one or more of the grounds of exemption in the FOI Act. That cannot in my view be a reason for holding the FOI Act is not capable of protecting the confidentiality of proceedings of public authorities. Since the AIE Directive has – in respect of certain subject areas - chosen to provide protection against disclosure by referring to other protections in national or EU law in respect of categories of protection created by the Directive, it must be anticipated that the national or EU law relied upon in that respect will not precisely mirror the categories of protection in the AIE Directive. Rather what must be considered is whether that existing law is capable of protecting the categories of protection, even if the scope of protection in national or EU law for example is not described in precisely the same way as the areas entitled to protection under the Directive.

61. Coillte relied upon s. 30 and s.31 of the FOI Act in refusing access to People Over Wind. Section 30 provides that a head may refuse to grant an FOI Act request if access could reasonably be expected to:

> *"(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of an FOI body or the procedures or methods employed for the conduct thereof,*

(b) have a significant, adverse effect on the performance by an FOI body of any of its functions relating to management (including industrial relations and management of its staff), or

(c) disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the Government or an FOI body."

62. Section 30(2) provides that an override exists whereby subsection 1 shall not apply where the public interest would on balance be better served by granting than by refusing to grant the FOI request concerned.

63. Section 31 provides as follows:

"31. (1) A head shall refuse to grant an FOI request if the record concerned—

(a) would be exempt from production in proceedings in a court on the ground of legal professional privilege,

(b) is such that the head knows or ought reasonably to have known that its disclosure would constitute contempt of court, or

…

(4) Where an FOI request relates to a record to which subsection (1)(a) applies, or would, if the record existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would be contrary to the public interest, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists."

64. In its decision of 20 February 2020, Coillte asserted that certain of the requested records reflected legal advice sought and obtained by them in respect of aspects of the project and/or its projects generally, as well as the implications of certain Court proceedings and related legal costs. Section 30 undoubtedly has the potential to be invoked to protect the

confidentiality of the proceedings of public authorities where they, and the records in question, are subject to the FOI Act. Section 31 is less obvious in my view since its purpose is not to protect the proceedings of public authorities but rather to protect communications between lawyer and client. The fact that the client may be a public authority does not in my view necessarily bring it within the description of a provision intended to protect the confidentiality of proceedings of public authorities. (The type of situation identified by Coillte in fact sits more comfortably under Regulation 9 of the Directive, which provides that a public authority may refuse to make available environmental information where disclosure would adversely affect the course of justice, including criminal inquiries and disciplinary inquiries).

65. However, there is another provision of the 2014 Act that could be considered to protect the proceedings of public authorities i.e., s.29. Section 29 provides that a head may refuse to grant an FOI Act request in the following circumstances:

"29. (1) A head may refuse to grant an FOI request—

(a) if the record concerned contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and

(b) the granting of the request would, in the opinion of the head, be contrary to the public interest, and, without prejudice to the generality of paragraph (b), the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make.

66. This was not invoked by Coillte in its decision, but the Commissioner pointed out at the hearing that, when the Commissioner is considering an appeal, he is making a *de novo* decision and he can therefore himself decide to apply s.29.

67. Therefore, there are at least two provisions of the FOI Act that by reason of their subject matter could be invoked to seek to protect the confidentiality of proceedings of public authorities. These sections are unlikely to fall under traditional common law heads of confidentiality but are specific to the FOI Act. I surmise they were thought to be necessary in circumstances where the FOI Act gave the public a far greater entitlement to records of public bodies than they had previously had, without being required to show an interest in the records or give a reason for the request. In those circumstances, I take the view that the FOI Act contains provisions capable of protecting the proceedings of public authorities from disclosure subject to the conditions established by that Act, in particular the balancing exercise or public interest override.

Are the FOI Act provisions confidentiality provisions

68. Turning back to the arguments made by People Over Wind, it is necessary to identify why they consider that any protection from disclosure in the FOI Act cannot be treated as a reference to a confidentiality provision within the meaning of Article 4 of the Directive and that I should therefore effectively ignore the reference in Regulation 8(a)(iv) to the FOI Act or at best treat it as a reference to existing confidentiality provisions where they exist elsewhere i.e. where disclosure may be refused on grounds of legal professional privilege or commercial sensitivity. Their reasoning goes as follows. They argue that there are four sources of confidentiality in Irish law – the Constitution, contract, statute and the common law. A "true" confidentiality provision justifies the withholding of the information in all circumstances. They accept that some of the provisions of the FOI Act protect "traditional" confidentiality entitlements but argue that other provisions do not

protect existing heads of confidentiality. Overall, they argue that the exemptions in the FOI Act cannot be described as confidentiality provisions, that the FOI Act merely provides a basis upon which a public body may authorise disclosure and accordingly, the FOI Act cannot be considered as a reference to confidentiality protected by law. They emphasise the limited nature of the finding that a record is exempt i.e., that this decision only operates in the FOI sphere and does not prevent a record being disclosed in some other context. At paragraph 28 of their written submissions, they emphasise that the right to refuse to disclose a record under the FOI Act is not because the record is confidential but because the FOI Act allows or mandates a refusal to disclose. At paragraph 29 they argue the FOI Act does not create confidentiality in respect of exempted records, while acknowledging that some exemptions relate to pre-existing obligations of confidentiality under the existing law of confidence (paragraph 43). At paragraph 46, they identify that the exemptions are directed solely at a limitation of the obligations under the FOI Act to grant an FOI request and not at creating a general freestanding category of confidentiality. At paragraph 50, they argue that the question the FOI Act answers is whether the public body has the authority to disclose the document, and not whether disclosure would breach a duty of confidentiality.

69. A core element underpinning their argument is s.11(8) of the FOI Act. This provides as follows:

> *"(8) Nothing in this Act shall be construed as prohibiting or restricting an FOI body from publishing or giving access to a record (including an exempt record) otherwise than under this Act where such publication or giving of access is not prohibited by law."*

70. They argue that s.11(8) further establishes that the FOI Act is a separate and standalone regime to the concept of confidentiality at law. They argue that it establishes that while in

the context of FOI, a public authority may refuse to provide access to information on particular grounds, they cannot rely on a putatively valid ground for refusal under the FOI Act where that information is sought on a different legal basis.

71. The Commissioner echoes the arguments of People Over Wind. He notes at paragraph 39 that s.11(8) clarifies that the 2014 Act does not prevent disclosure of information otherwise than pursuant to the right of access under the Act and that this provision may suggest that the FOI Act does not itself create a duty of confidentiality. He relies upon *Kennedy v Charity Commission* [2014] UKSC 20 and says that if the courts reach the same conclusion as the U.K. courts in that case, it may suggest the exemptions under Part 4 only have effect in relation to requests for information under s.11(1) of the FOI Act. He notes that only where the FOI Act reflected a duty of confidentiality recognised by law would such an exemption be relevant for the purposes of the AIE Regulations.

72. The Minister and Coillte take a different view. The Minister, for his part, contends that the FOI Act <u>does</u> provide for the confidentiality of records held by public authorities. The Minister submits that in our domestic law a duty of confidentiality can arise in a number of circumstances both under statute and at common law and that the extent of that duty will depend on the particular factual context and on a range of factors from the identity of the entity involved, the substantive issue the subject of the information, and the legal framework within which the public authority is operating. The Minister argues therefore that the FOI Act is simply one of many potential sources for a duty of confidentiality under Irish law. In his submission, the FOI Act sets out twelve categories of records held by FOI bodies which are "*confidential and may not be subject to disclosure*", or put another way, the FOI Act "*identifies the circumstances in which those bodies which are FOI Bodies may be subject to obligations of confidentiality*".

73. Coillte argues that it does not understand there to be any interpretive uncertainty with regard to Regulation 8(a)(iv). It is submitted that the Regulation makes it "*explicitly clear*" that in a case where exempt records under the FOI Act do not have to be produced under the FOI Act, this is to be considered a circumstance where "*confidentiality is protected by law*". Coillte submits that the plain and ordinary meaning of Regulation 8(a)(iv) is that information that would negatively affect the confidentiality of proceedings of a public authority does not have to be released where that detriment is protected by an FOI Act exemption.

74. Coillte also contends that the FOI Act provisions are equally applicable as confidentiality provisions with respect to Regulation 9, arguing that the specific reference in Regulation 8(a)(iv) to the FOI Act is by way of example only and serves simply to definitively identify the FOI regime as the type of confidentiality provision that is adverted to in a general way subsequently in Regulation 9(1)(c).

75. With regard to s.11(8), Coillte's submission is that the section does nothing more than identify that nothing in the FOI Act should be interpreted as restricting the publication of a record otherwise than under the FOI Act where that release is not prohibited by some other law. It is submitted that the reference to "nothing in this Act" is critical in that, while Regulation 8(a)(iv) makes a specific reference to the FOI Act, the basis for the prohibition on disclosure is the AIE Regulations and not the FOI Act itself. Thus, that prohibition is unaffected by s.11(8) as it applies internally to the FOI Act. Further, it is argued that s.11(8) does not operate to prevent or restrict a body from applying exemptions to disclosure where it is seeking to protect the confidentiality of its proceedings.

76. Finally, Coillte impugns the Commissioner's reliance on the U.K. Supreme Court decision in *Kennedy* on two grounds. Firstly, it is submitted that the Court concluded that the U.K. FOI Act did not constitute a complete code in relation to the disclosure of records of public

authorities. It is argued this conclusion is ultimately irrelevant in the context of this case as, similarly to the previous point, the source of the prohibition is the AIE Regulations, with reference to the FOI Act, and is not the FOI Act itself. Beyond this, Coillte rejects the interpretation of the Commissioner that *Kennedy* suggests that the protections of the FOI could only be engaged where an application had been made under that Act. They submit that *Kennedy* merely established that the UK FOI Act had to be read in accordance with the overlapping UK Charities Act and has no bearing on the suggestions that FOI protections could only become effective where an application under that Act had been made.

77. Coillte submits that the protections of the FOI Act, with regard to FOI requests are only engaged where a third party has made a request under the Act but submits that the situation is different where the AIE Regulations provide protections for particular types of proceedings and categories of records by way of reference to the FOI Act.

Discussion

78. The import of this provision appears to be that, irrespective of what decision is made in respect of a record sought under the FOI Act, including a decision that the record is exempt, that decision may not be treated as restricting an FOI body from publishing or giving access to a record where it would otherwise be entitled to do so.

79. This has the effect that reliance on a section of the FOI Act designed to protect confidentiality does not have an effect outside the confines of the FOI Act. To give an example, if a party seeking a document from a public body within the FOI Act is entitled to it under law (for example pursuant to a contractual provision) and the record was previously refused under the FOI Act as an exempt record, the FOI body cannot rely on its exempt status to justify its refusal under the contractual provision.

80. This certainly means that the FOI Act provisions permitting invocation of confidentiality as a justification for refusal of access are limited in their scope of application and in this way, they may differ from other types of confidentiality provisions (although I have some reservations about this proposition as discussed below). But that conclusion is not determinative of Question A. Rather, I must return to the wording of Regulation 8(a)(iv) and consider whether the reference to the FOI Act may be described as the provision by law of the confidentiality of the proceedings of public authorities, as permitted as a ground for refusal by Article 4(2)(a) of the Directive.

81. It seems to me that, albeit in the context of a particular statutory regime which obliges public bodies to disclose records, s.29 and s.30 may correctly be described as protecting the confidentiality of the proceedings of public authorities. They permit a public body, which otherwise would have been obliged to disclose records, to refuse to disclose because of the specified impact on the proceedings of public bodies, for example where it might have a significant adverse effect on the performance of the body of its management functions as provided for by s.30(1)(b). The fact that the protection is not exhaustive i.e., may not be relied upon in the context of some other request outside the FOI Act does not seem to me to rid s.29 and s.30 of their protective effect in the context of FOI.

82. It is worth highlighting at this point that other confidentiality regimes apart from the FOI Act may require a balancing of interests, and that other legal obligations may result in the confidentiality being lost. In the opening paragraphs of Chapter 2 of "Toulson & Phipps on Confidentiality" (4th Ed., Sweet & Maxwell, 2020), entitled "Principles and Foundations" the authors set out, *inter alia,* the following as general principles: *"(7) A duty of confidentiality may be negated or qualified by public interest. (8) A duty of confidentiality may be subject to other qualifications either by agreement or by operation of law*." Both of these principles are strongly redolent of the machinery of the FOI Act. As

I have identified earlier this judgment, the FOI Act makes extensive use of a public interest balancing test. Of more immediate relevance in the context of the arguments of People Over Wind is the latter principle. It is true that s.11(8) goes further than simply qualifying confidentiality under the FOI Act; rather it identifies that the FOI Act is self-limiting insofar as confidentiality is concerned. That differentiates it from many other confidentiality provisions. But the People Over Wind argument is premised on the notion that obligations of confidentiality in other contexts are absolute and that it is only in the FOI context that this is not the case. No authority was provided for the proposition that a "true" confidentiality protection must be absolute. The argument fails to take into account situations where either the confidentiality regime itself provides for the protection to be removed, or the fact that every confidentiality regime is subject to qualification by operation of law. Interestingly, an example of the former approach may be found in Article 28.4.3 of the Constitution on cabinet confidentiality which provides for the confidentiality of discussions at meetings of the Government save where the High Court determines that disclosure should be made in respect of a particular matter for stated reasons. That is not of course the same as the more confined approach of the FOI Act; but nonetheless it undermines somewhat the People Over Wind approach that fails to acknowledge the limitations, both express and otherwise, that apply to confidentiality irrespective of the derivation of the obligation. In those circumstances, it is difficult to see why the acknowledgement in s.11(8) in the FOI Act that the protection it affords is limited to its own sphere wholly robs that protection of the quality of confidence.

83. People Over Wind say that what the FOI Act is protecting is not confidentiality but rather simply giving a reason to refuse disclosure. They say this does not answer the question as to whether disclosure would breach a duty of confidentiality and does not create a "*general freestanding category of confidentiality*". But the question is not whether disclosure would

breach a duty of confidentiality, by which I take them to be referring to an existing duty of confidentiality or whether the provisions create a freestanding category of confidentiality. Rather the question that the AIE Directive asks in the first instance is whether the confidentiality of the proceedings of public authorities is provided for in law. If the answer is yes, and disclosure of the information sought under the AIE Directive would adversely affect that confidentiality, then the public authority may refuse to disclose subject to the balancing of interests.

84. Here I take the view that the confidentiality of the proceedings of public authorities is provided for where the conditions identified by s.29 and s.30 of the Act are met. It is true that the records will only be treated as confidential in the context of a request under the FOI Act; but that is not sufficient in my view to prevent it from being treated as a provision that protects confidentiality.

Flachglas

85. This case appears to be the only instance where the CJEU have considered the confidentiality provisions of Article 4 of the AIE Directive. In summary, the German government rejected a request for access to information under the AIE Directive relating to the law on the national allocation plan for greenhouse gas emission licences in a given allocation. One of the justifications for refusal was because the information was covered by the confidentiality of the proceedings of public authorities. A reference was made from a German court asking, *inter alia*, whether the confidentiality of proceedings within the meaning of Article 4(2) was provided for by law where a national law provision was enacted to implement the provisions of the AIE Directive on confidentiality, or whether it was necessary for a separate statutory provision to provide for the confidentiality of the proceedings.

86. That question was answered in the following way by the Court:

"Indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as meaning that the condition that the confidentiality of the proceedings of public authorities must be provided for by law can be regarded as fulfilled by the existence, in the national law of the Member State concerned, of a rule which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, in so far as national law clearly defines the concept of 'proceedings', which is for the national court to determine."

87. In discussing the answer to question 2(b), the Court observed that:

"by specifying in indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 that the protection of the confidentiality of public proceedings must be "provided for by law", a condition which corresponds to the requirement laid down in Article 4(4) of the Aarhus Convention that the confidentiality of proceedings must be "provided for under national law", the European Union legislature clearly wanted an express provision to exist in national law with a precisely defined scope and not merely a general legal context"

88. It went on to observe that that specification cannot be interpreted as requiring all the conditions for application of that ground for refusing access to be determined in detail since by their nature decisions taken in that domain are heavily dependent on the actual context in which they are adopted. Nonetheless, public authorities should not be able to determine unilaterally the circumstances in which the confidentiality referred to in Article 4(2) of Directive 2003/4 can be invoked, which means in particular that national law must clearly establish the scope of the concept of proceedings of public authorities, which refers to the final stages of the decision-making process of public authorities.

89. There was much discussion at the hearing about the decision in *Flachglas* and its implications for certain questions, in particular Question D(2). However, given that an answer to Question D(2) is no longer being sought by the Commissioner, the principal constraint exercised by that decision appears to be that I must ensure that the answers I give are in conformity with the principles established by *Flachglas*. I am satisfied that they are. The provisions of the FOI Act relating to the confidentiality of proceedings of public authorities set out objective standards to determine whether the Act applies and may not be determined unilaterally by a public authority, both because the conditions for its application are transparent and also because there is an appeal against any decision, first internally within the organisation and then to the Commissioner.

90. People Over Wind relied upon the decision in *Flachglas* to resist the arguments of Coillte that the reference to the FOI Act in Regulation 8(a)(iv) created a new freestanding term of exempt records. But because I have rejected the argument that Regulation 8(a)(iv) creates any freestanding category of confidential information, I do not consider I need to determine this argument.

91. Reliance was placed by the Commissioner on the opinion of Advocate General Sharpston in *Flachglas*, where she held that there must be a national law which serves to independently establish a duty of confidentiality and that legal certainty excludes situations where the public authority had a discretion as to whether its proceedings were confidential or not. Again, I am satisfied that the provisions of the FOI Act relevant to the confidentiality of proceedings of public authorities are sufficiently certain in order to meet the requirements of legal certainty and do not afford an unconstrained discretion to public authorities as to whether their proceedings are confidential.

Response to Question A

92. For the above reasons, I conclude as follows:

Question A: *Do the exemptions in the FOI Act create protection for the confidentiality of proceedings of public bodies such that the FOI Act provides for legal protection of confidentiality for the purposes of Regulation 8(a)(iv) of the AIE Regulations?*

Answer: *The exemptions in the FOI Act create protection for the confidentiality of proceedings of public bodies where records sought to be disclosed are found to be exempt within the meaning of the FOI Act, such that the FOI Act protects the confidentiality of the proceedings of public authorities for the purposes of Regulation 8(a)(iv) of the AIE Regulations, (public authorities being defined in those Regulations).*

Question C

93. My conclusions on Question A means I should turn next to Question C. Question C has four parts. As noted at the start of this judgment, the Commissioner no longer requires an answer to Question C (4). Question C (1) to (3) is as follows:

"C. If the FOI Act does protect the confidentiality referred to in questions 1 and 2 for all purposes:

1. *Is such confidentiality protected in respect of "public bodies" only?*
2. *If the FOI Act protects such confidentiality in respect of public bodies only, to what extent does the term "public bodies" include partially included agencies or exempt agencies under Schedule 1 of the FOI Act?*
3. *If "public bodies" does not include partially included agencies or exempt agencies, to what extent does the fact of the exclusion of those bodies from the FOI Act indicate that the confidentiality of their proceedings is otherwise protected?"*

94. I have reformulated Question C by deleting the reference to "*for all purposes*" because my answer to Question A did not conclude that the FOI Act protected confidentiality referred

to in Regulation 8 for all purposes. I have also reformulated the question to address the specific situation of Coillte, given that I should seek to answer questions by reference to the concrete situation that necessitates the responses from the Court. For that reason, I see no reason to answer the question in relation to partially excluded agencies as it does not arise on the facts of this reference. I have merged Questions C(1) and (2) as the answer is clearer on the basis of that approach. Question C(3) did not require reformulation.

95. The reformulated Questions C(1) and (2) are as follows:

> ***"****Having regard to the response to Question A, is the confidentiality protection under the FOI Act identified in Regulation 8(a)(iv) available to Coillte, given its status as an exempt body under the FOI?"*

96. This question arises in circumstances where, as noted earlier in this judgment, Coillte is not subject to the FOI Act. Section 6(1) provides that "[*s*]*ubject to this section, each of the following shall be a public body for the purposes of this Act*" and there are then listed various types of bodies. This includes *"(b) an entity established by or under any enactment (other than the Companies Acts); (c) any other entity (other than under the Companies Acts) or appointed by the Government or a Minister of the Government, including an entity established by the Minister (other than under the Companies Acts) by a Minister of the Government under any scheme; (d) a company (within the meaning of the Companies Acts) a the majority of the shares in which are held by or on behalf of a Minister of the Government*". Coillte is a body established under the Forestry Act 1988 and as such comes under s.6(1). However, at s.6(3), it is provided that *"[a]n entity specified in Part 2 of Schedule 1, a subsidiary of such an entity or a body directly or indirectly controlled by such an entity shall not be a public body for the purposes of this Act.*". Coillte is listed at Part 2 of Schedule 1 under the heading "*Exempt Agencies*". It was explained at the hearing

that the justification given when the Act was passed for the exclusion of these bodies was that they were all commercial semi-State bodies.

97. In the Commissioner's Supplemental Statement of Facts, he found that Coillte was an exempt agency and therefore not subject to the requirements imposed on public bodies by that Act. That finding flows inexorably from the terms of s.6(3). Coillte is therefore not subject to the regime established by the FOI Act. It is brought in as a public body by s.6(1) and then explicitly excluded as a public body for the purposes of the Act by s.6(3).

98. Indeed, this reality is reflected in the way in which Coillte decided upon the request for environmental information. It considered whether the factual circumstances identified in s.30 and s.31 applied but did not apply the balancing test under the FOI Act either in the original decision of 20 February 2020 or in the review decision of 26 March 2020. That was presumably because it did not take the view that it should consider the request from the standpoint of an agency subject to the FOI regime. Rather, it took the approach that it takes now in these proceedings i.e., that the categories of exemption in the FOI Act have been imported into the AIE Regulations by the reference to the FOI Act and create new categories of confidentiality in that way, rather than treating Coillte as if it were a public body subject in full to the regime established by the FOI Act.

99. However, despite the clear wording of s.6(3), Coillte makes an argument in these proceedings to the effect that it is indeed a public body for the purposes of FOI Act on the basis of an argument that it comes within the definition of a public body in s.6(1). As counsel for the Minister points out, s.6(1) is explicitly subject to s.6(3) which excludes *inter alia,* bodies treated as exempt bodies from being public bodies. The meaning could hardly be plainer. In those circumstances, I am quite satisfied that the FOI Act does not apply to Coillte and it cannot assert an entitlement before the Commissioner to invoke exemptions under the Act as if it were a body subject to the Act.

Coillte's "Importation" Argument

100. That brings me to the question as to whether, despite my conclusions above, Coillte can nonetheless avail of the exemptions provided for in the FOI Act. Counsel for Coillte argued that the natural and ordinary meaning of the words of the Regulation did not require that a body be subject to the FOI Act. Rather, a public authority could refuse to make disclosure in circumstances where the confidentiality of the proceedings is otherwise protected by law, although there was no necessity that the public authority seeking to rely upon the existing confidentiality provision in national law could itself rely upon it. In other words, if a protection existed in national law that could be availed of by some public authorities, that would be enough even if it was not available to the public authority in question.

101. Counsel for Coillte identified four reasons that made his interpretation the probable one. The first was that the reference to public authorities made it more likely that there was a focus on the type of record as opposed to the requirement that they should be held by an FOI body. The second argument was what was described as the purposive argument. The point was made that the purpose of exempting Coillte and the other bodies listed was to make their records more secure from production than they would have been if they had been subject to the FOI Act. He observed that the agencies in Part 2 of Schedule 1 are largely bodies falling within the definition of public body but are of a commercial nature. It was argued that it would not make sense that a public authority exempted from the provisions of the FOI Act and thus entitled to more protection, would end up with less protection because of the interpretation advanced by the Minister. It was submitted that this was a perverse result, since Coillte would have less protection than that provided to a

public body subject to the FOI Act. Applying the principles of interpretation as identified in *Heather Hill*, it was submitted that I should look at the purpose of the AIE Regulations without the need to first identify some ambiguity. Finally, it was said that a purpose of Article 4(2)(a) was to provide a measure of protection for the proceedings of public authorities and that purpose would not be advanced if Coillte's interpretation was not accepted.

102. The third point was in relation to exempt records i.e., that the records of exempt bodies may be described as exempt records, and as such Coillte comes within the FOI Act. The fourth point is that, on its face, Coillte is a public body within the meaning of the FOI Act and should be treated as such. I have already dealt with that argument above.

103. It is necessary to closely look at the meaning of Regulation 8(a)(iv) to assess those arguments. Regulation 8(a)(iv) starts with identifying the obligation of the public authority not to make available information where disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities where such confidentiality is otherwise protected by law. Counsel for Coillte emphasises the use of the plural – public authorities – rather than the singular and argues that this suggests that there is no necessity that the public authority seeking to rely on the FOI Act is itself subject to it. Counsel for the Minister takes the point of view that there is no significance to the use of the plural. He argues that the plural is employed solely because it is adopting the language of the Directive.

104. Given the interpretative obligation i.e., the obligation to construe national implementing provisions in a manner that advances the aims of the Directive unless, *inter alia*, it is *contra legem*, it is necessary to consider the purpose of Regulation 8. Regulation 8(a)(iv) envisages an entitlement to refuse a request where two cumulative requirements are met (a) disclosure would adversely affect the confidentiality of the proceedings of public

authorities and (b) the confidentiality of those proceedings is provided for by law. Accordingly, if the law already protects the confidentiality of proceedings, that protection can be used in resisting disclosure under the AIE Regulations. On the other hand, if the "law" does not provide for the confidentiality of proceedings, then public authorities in the Member State cannot raise the confidentiality of their proceedings as a ground for subjecting the disclosure request to a balance of interest test.

105. The meaning advanced by Coillte would require me to treat Regulation 8 as meaning that where there is no provision "by law" protecting the confidentiality of proceedings of public authority A, but there is a confidentiality provision applying to public authority B, then that confidentiality provision can be used to justify nondisclosure by public authority A. In my view, that interpretation would make a nonsense of the provisions of Article 4(2)(a). The purpose of the reference to confidentiality being provided for by law, not just in relation to the proceedings of public authorities but also in relation to the confidentiality of commercial or industrial information and of personal data, suggests the approach of the Directive is that it is intended to afford to a person enjoying protection from disclosure obligations on the basis of confidentiality, a similar protection where the request is made pursuant to AIE. If the interpretation suggested by Coillte is correct, a person not enjoying protection of confidential material could piggyback onto another person's enjoyment of that protection in the context of the AIE Regulations. In this way, the AIE Directive would extend protection from disclosure to categories of persons not previously protected by law, exclusively in the context of a request for environmental information. For example, a public authority who could not avail of protection on the grounds of confidentiality under its own legal system against a general obligation to disclose its proceedings would be able to plead confidentiality to resist disclosure of those proceedings when an AIE request was made. That result would be entirely contrary to the obligation under Article 4 that the

grounds for refusal shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. It would be contrary to Recital 16 of the Preamble which identifies that the disclosure of information should be the general rule. It would be contrary to the whole scheme of the AIE Directive, described earlier in this judgment.

106. A purposive argument was made by Coillte to the effect that the purpose of Article 4, and in turn Regulation 8(a)(iv) was to provide public authorities with protection from disclosure. I cannot agree. The purpose of the Directive is to ensure wide access to environmental information held by or for public authorities. As noted in Recital 16, although Member States should be permitted to refuse a request in specific and clearly defined cases, disclosure should be the general rule and grounds for refusal should be interpreted in a restrictive way. The balancing exercise identified by Article 4 requires that the public interest served by disclosure should be weighed against the interest served by the refusal. None of that suggests that a purpose of the Directive was to provide a measure of protection for authorities against disclosure of environmental information, but rather that the Directive recognised that in certain clearly defined circumstances authorities should be permitted to refuse a request. For the reasons I have outlined above, the Directive requires me to interpret Regulation 8 so as to facilitate access to environmental information, rather than limit it. In the circumstances, I cannot accept the purposive interpretation argument advanced by Coillte.

107. Bearing in mind the purpose of Article 4(2)(a), I turn now to consider the wording of Regulation 8(a)(iv). Even absent the interpretative obligation, the natural meaning of Regulation 8(a)(iv) is, in my view, that a public authority shall not make available environmental information (subject to the balancing exercise) where disclosure would adversely affect the confidentiality of their proceedings, provided that confidentiality is

otherwise protected by law. I place emphasis on the word "that", before the word "confidentiality". The presence of the reference to "that" confidentiality necessitates an inquiry into the identity of the owner of the confidentiality over proceedings in a context other than an AIE request. It is only if they otherwise enjoy protection of their confidentiality in a non AIE context that they can deploy that protection to resist disclosure in the AIE context.

108. On this approach, any inquiry is commenced by considering the protection enjoyed by the public authorities the subject of the request in a non AIE context. If they do not enjoy protection, the inquiry is at an end. Contrary to Coillte's argument, the question is not whether the confidentiality of any public authorities is otherwise protected by law but whether the public authority looking to be protected from an AIE request already enjoys protection in another legal context. If that interpretation is not adopted, the mischief that I have identified in the context of the discussion of the Directive would operate with equal force here i.e., the Regulation would be extending confidentiality protection only in the context of the AIE regulation. That result is so obviously contrary to what the Directive is seeking to achieve that it is only if the implementing words were overwhelmingly clear that I could adopt such an interpretation. But that is far from the situation here: the ordinary meaning of the words suggests the interpretation described above. Nor is there anything in the wording that supports the argument of Coillte that the provisions of Regulation 8(a)(iv) focus on the type of record, as opposed to the requirement that they should be held by an FOI body. As I hope the analysis above makes clear, there is a clear focus on the protection enjoyed by the public authority in question. The question of the identity of the body and the nature of its protections cannot be ignored.

109. The question of the type of record is emphasised by the specific reference to the FOI Act in parenthesis in Regulation 8(a)(iv). But contrary to the observations of Coillte, that

reference supports the conclusion I have reached above. The words in parenthesis read as follows: *("including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts"*). That is because the only situation in which a body can benefit from the protection afforded by the FOI Act is where the records are deemed to be exempt within the meaning of that Act. An exempt record is defined as:

> *"(a) a record in relation to which the grant of an FOI request would be refused pursuant to Part 4 or by virtue of Part 5, or*
>
> *(b) a record that is created for or held by an office holder and relates to the functions or activities of—*
>
> *(i) the office holder as a member of the Oireachtas or a political party, or*
>
> *(ii) a political party;"*

A record cannot be exempt unless a request has been made pursuant to the Act to a public body within the meaning of the Act, the records are of a type covered by the Act, and the public body relies upon an exemption in Part 4, carries out the balancing of public interest test and concludes that the public interest in disclosure is outweighed by the public interest in refusal. It is only after that process has been gone through that a record may be described as an "exempt record" within the FOI scheme. Counsel for Coillte argued that this wording did not limit the ambit of Regulation 8(a)(iv) to public bodies actually covered by the FOI Act but rather referred in an abstract fashion to the type of records protected by law. However, the wording envisages the protection under that Act, being the protection that is afforded to a record that is deemed to be exempt, having gone through the processes of the Act. It is difficult to accept that that description would be used entirely divorced from its context and that it is simply there to make reference to a situation where protection is given to public bodies in respect of confidentiality of records, but it is immaterial that this protection is not one enjoyed by Coillte.

110. For those reasons, I reject the interpretation advanced by Coillte. It cannot rely upon any of the provisions of the FOI Act to justify refusal of environmental information on the grounds of confidentiality of the proceedings of public authorities. Naturally, that does not prevent it from relying on any other provision of law that protects them from disclosing their proceedings on grounds of confidentiality, for example s.33 of the Forestry Act 1988.

Response to Question C

111. For the above reasons, I conclude as follows:

Question C(1) and (2): *Having regard to the response to Question A, is the confidentiality protection under the FOI Act identified in Regulation 8(a)(iv) available to Coillte, given its status as an exempt agency under the FOI?*

Answer: *The FOI Act only protects the confidentiality of proceedings of public bodies where records sought to be disclosed are found to be exempt within the meaning of the FOI Act. Records are only exempt where the public body seeking to withhold access is a body subject to the FOI Act, as defined by section 6 of the FOI Act, and where (if applicable), both limbs of the test for exemption are met: the records come within an exemption protecting the confidentiality of proceedings of public bodies and the public interest does not warrant disclosure. As Coillte is an "exempt agency" under the Act, the confidentiality protection under the FOI Act identified in Regulation 8(a)(iv) is not available to Coillte.*

Question C(3)*: If "public bodies" does not include exempt agencies, to what extent does the fact of the exclusion of those bodies from the FOI Act indicate that the confidentiality of their proceedings is otherwise protected?*

Answer: *The exclusion of Coillte from the definition of public body and accordingly from the FOI Act has no implications for the confidentiality of their proceedings in any other context.*

Question B

112. Question B asked in substance whether Regulation 9(1)(c) of the AIE Regulations contains an implicit reference to the FOI provisions, in particular sections 30, 31, 35 and 36 of the FOI Act such that these sections provide for legal protection of commercial or industrial confidentiality under national law. Because the answer to Question C confirms that Coillte cannot rely on the provisions of the FOI Act, any answer to Question B could make no difference to the resolution of the appeal. I have therefore decided I should not answer Question B since to do so would be answering a hypothetical question, the answer to which would have no concrete application.

Response to Question D

113. The answer to Question D(1) ((Questions D(2-4) having been withdrawn) flows from my conclusions in respect of Questions A and C. I conclude as follows:

Question D(1): *If the FOI Act does not protect such confidentiality, does Regulation 8(a)(iv) of the AIE Regulations create a new species of confidentiality of proceedings, by reference to the FOI Act, for the purpose of refusal of access to environmental information?*

Answer: *The reference to the FOI Act in Regulation 8(a)(iv) is for the purpose of identifying one instance in domestic law where the confidentiality of the proceedings of public authorities is otherwise protected by law. It does not create law; it simply recognises existing law. As such it does not create a new species of confidentiality of proceedings for the purpose of refusal of access to environmental information.*

Further Orders

114. I will list the matter on a date to be agreed between the parties and notified to the Registrar for costs and any other Orders. The parties are not required to lodge written submissions on costs in advance of the hearing.

Annex 1 - Original Questions referred by the Commissioner

A. Article 8(a)(iv) of the AIE Regulations allows for a refusal of access to environmental information where disclosure would adversely affect "*the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts)*". The Freedom of Information Act 2014 ("the FOI Act") creates a number of exemptions to the right of access to records under the Act. Do the exemptions in the FOI Act create freestanding protection for the confidentiality of proceedings of public bodies for all purposes such that the FOI Act provides for legal protection of confidentiality for the purposes of article 8(a)(iv) of the AIE Regulations? Alternatively, are the exemptions in the FOI Act merely exceptions to the duties of disclosure under that Act, having regard to section 11(8)?

B. Article 9(1)(c) of the AIE Regulations allows for a refusal of access to environmental information where disclosure would adversely affect "*commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest*". Do sections 30, 31, 35 and 36 of the FOI Act create freestanding protection for commercial or industrial confidentiality, such that these sections provide for legal protection of commercial or industrial confidentiality under national law for the purposes of article 9(1)(c) of the AIE Regulations? As above, alternatively, are these exemptions in the FOI Act merely exceptions to the duties of disclosure under that Act, having regard to section 11(8)?

C. If the FOI Act does protect the confidentiality referred to in questions 1 and 2 for all purposes:

    1. Is such confidentiality protected in respect of "public bodies" only?

2. If the FOI Act protects such confidentiality in respect of public bodies only, to what extent does the term "public bodies" include partially included agencies or exempt agencies under Schedule 1 of the FOI Act?
3. If "public bodies" does not include partially included agencies or exempt agencies, to what extent does the fact of the exclusion of those bodies from the FOI Act indicate that the confidentiality of their proceedings is otherwise protected?
4. What are the boundaries of that confidentiality? For example, to what proceedings does it apply; what are the limits of the confidentiality protection?

D. If the FOI Act does not protect such confidentiality for all purposes:

1. Does article 8(a)(iv) of the AIE Regulations create a new species of confidentiality of proceedings, by reference to the FOI Act, for the purpose of refusal of access to environmental information?
2. If yes:

(i) Is the creation of a new species of confidentiality of proceedings in the AIE Regulations within the Minister's vires under section 3 of the European Communities Act 1972, having regard to Article 15.2.1 of the Constitution?

(ii) Is the creation of a new species of confidentiality of proceedings compatible with the Directive, having regard to Article 4(2)(a)

(iii) If the creation of a new species of confidentiality of proceedings is intra vires and compatible with the Directive, what are the boundaries of that new species of confidentiality of proceedings? For example: to whom does it apply; to what proceedings does it apply; and what are the limits of the confidentiality protection?