

**THE HIGH COURT**

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

**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**

**EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered 26 May 2023**

**Introduction**

1. This is an application by People Over Wind (“POW”) for their costs in these proceedings. None of the other parties are seeking their costs. POW is looking for its costs in the first instance against Coillte and looking to the Commissioner to pay any costs that Coillte is

not liable for. Both Coillte and the Commissioner oppose the application against them for costs. The State is not looking for any costs and no party seeks costs as against the State.

2. The principles in relation to costs are well-established. I must determine the application under s.168 and s.169 of the Legal Services Regulation Act 2015 as interpreted most recently in the decision of the Court of Appeal in *Higgins v IAA* [2020] IECA 277.
3. Helpfully, the parties have identified that although this was a case stated – and the first of its kind under the European Communities (Access to Information on the Environment) Regulations (“AIE Regulations”), nonetheless the position in relation to costs, by analogy with other cases stated, does not differ from the normal costs regime. They cited in support of that proposition *ELG v HSE*, [2022] IESC 26 a recent decision of the Supreme Court. The only material difference here, as compared with other case stated procedures, is the presence of Regulation 12(9)(b) of the AIE Regulations. This provides:

*“(b) The High Court or, on appeal from that Court, the Supreme Court, may order that some or all of the costs of an applicant or other person affected in relation to a reference under this sub-article be paid by the public authority concerned.”*

4. Helpful submissions were made about the impact of the decision in *Higgins* on the interpretation of s.169. As identified by Stack J. at paragraph 21 of *Hanrahan v Revenue Commissioners* [2022] IEHC 102, the starting point under the new regime is still to identify the winner. However, the way in which the “winner” is identified has altered. Rather than looking exclusively at the relief, the Court ought to look at breaking the issues in the action down in assessing which party has prevailed on which issue. At paragraph 16 of *Higgins*, Murray J. identifies that the correct approach is to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues. An approach decisively rejected is that the Court should examine the arguments advanced on each issue in assessing which party won which argument.

## **Application of principles**

5. Here the case stated arose because of an application by POW for documents from Coillte under the AIE Regulations. Coillte refused access and the matter was appealed to the Commissioner. It is important to consider the terms of the appeal by POW, exhibited in the grounding affidavit of Ms. McGoldrick of 15 September 2021. The appeal of POW was described in an email of 28 April 2020 from the Commissioner exhibited at A9 to the affidavit. It identifies that POW challenged Coillte's reliance on the Freedom of Information Act 2014 ("FOI Act") given that Coillte was not a public body. Other grounds were also included. However, there was no argument made that the FOI Act did not in fact identify an example of protection on the grounds of confidentiality and that no-one, irrespective of their status under the FOI Act, could rely upon it.
6. That issue only became part of the subject matter of the questions because it was raised by the Commissioner. In a letter of 20 July 2021 to the parties to the appeal, the Commissioner identified as follows:

*"As you know a decision in this appeal would require the Commissioner to reach a conclusion about the interaction between the AIE Regulations and the Freedom of Information Act 2014 (the FOI Act). In particular, the Commissioner would be required to decide:*

*(1) The extent to which the FOI Act provides protection for the confidentiality of the proceedings of public authorities and for commercial and industrial confidentiality; and*

*(2) The interaction between the AIE Regulations and the FOI Act, specifically the extent to which articles 8(a)(iv) and 9(1)(c) enable public authorities to rely on the FOI Act as 'law' protecting confidentiality."*

7. The form of questions referred to the Court also came from the Commissioner. Questions A and B reflect the Commissioner's concerns in this respect. Those questions are well known to the parties and have been recited in the substantive judgment given in this matter and therefore do not require to be recited again. However, both Questions A and B identify the Commissioner's concerns in relation to whether the FOI Act did in fact represent protection on the basis of confidentiality. It is important to stress that this line of enquiry did not come from POW, although it is certainly true to say that once the issue was raised by the Commissioner, POW made submissions on this topic both in writing and orally.
8. Coillte on the other hand made an argument that it was covered by the FOI Act regulations and that, even if it was not so covered, Article 8 of the regulations created a stand-alone species of confidentiality of proceedings that it could rely upon.
9. Those two lines of inquiry, raised by the Commissioner on the one hand and Coillte on the other, and argued by all the parties at the hearing, constituted the issues in this case that I had to decide.
10. In relation to the second issue i.e., whether Coillte could come under the FOI umbrella, whether as an FOI body or on a stand-alone basis, were comprehensively determined against Coillte. In my view costs should follow the event in the normal way in relation to that issue, and a costs Order should be made against Coillte for 50% of POW's costs on the basis that that issue took roughly half of the Court time.
11. On the other hand, the thesis first raised by the Commission i.e., that the protection afforded under the FOI Act might not be protection of a species of confidentiality at all, was rejected. Arguments have been raised by Coillte as to why the Commissioner should bear the costs of the entire proceedings and the Commissioner has explained why it does not agree.

12. I must reject the position of Coillte that the presumptive position is the Commission should bear the costs of a case stated. That position is not consistent with the case law cited above, that suggests that cases stated are not to be treated differently insofar as costs are concerned. Moreover, such an approach would act as a disincentive to a Commissioner in stating a case and is clearly contrary to the approach identified in Regulation 12, identified above, which makes it clear that an applicant's costs can be ordered to be paid by the public authority in question i.e. the body against whom the request is made.
13. However, nor should the Commissioner be treated as being immunised from a costs Order against him, either generally, or because in these proceedings he took what he described as a neutral position. Here, the issue in relation to whether the FOI Act exemption represented true confidentiality was an issue entirely generated by the Commissioner, first in correspondence and then in the questions referred to the Court.
14. The Commissioner clearly decided he required the assistance of the Court to resolve that issue but it was not an issue raised by POW. Nor was it an issue that would have come before the Court on the basis of Coillte's refusal to provide the documents had the Commissioner not specifically raised it. In those circumstances, although it is true that POW took up the point and made its own submissions on it, and was unsuccessful, in the sense that POW took a particular position that was not adopted by the Court, nonetheless it is not correct to characterise this as an issue generated by POW.
15. In those circumstances it seems that the correct approach is to require the Commissioner to pay the costs of the resolution of a question that it required to be answered. It is certainly true that the Commissioner was not advocating for a particular resolution at the hearing and therefore he cannot be said to have "lost" the issue in the traditional sense of the word. However, absent the raising of the issue by him, the issue would not have been before the Court. In those circumstances, I consider that the costs incurred by POW in responding to

those questions raised on this issue should be borne by the Commissioner. In those circumstances, I will make a costs Order directing the Commissioner to pay 50% of the costs of POW.