

3<sup>rd</sup> July 2023

Right to Know CLG  
25 Herbert Place  
Dublin 2

By email: [requests@righttoknow.ie](mailto:requests@righttoknow.ie)

## Re: AIE Request COSEC00410

Dear Sir/Madam,

I refer to the request you made under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (S.I. No. 133 of 2007, S.I. No. 662 of 2011, S.I. 615 of 2014 and S.I. No. 309 of 2018) (hereafter referred to as the AIE Regulations) for access to information held by Bord na Móna plc. relating to:

1. Outline the steps taken by Bord na Móna to implement the judgment of the High Court of 7<sup>th</sup> February 2023 in *Bord na Móna Plc. v. Commissioner for Environmental Information*.
2. Provide copies of materials used to communicate the judgment to the relevant staff internally within the Bord na Móna group.
3. Provide copies of all updated procedures, updated templates etc flowing from it.
4. Copies of all board documents and board minutes from Bord na Móna plc. and all wholly owned subsidiaries relating to the judgment.
5. Provide copies of all AIE refusal letters either at first instance or internal review since 7 February 2023, refusing access to environmental information on the basis that the requested information is held by a Bord na Móna subsidiary and therefore not held by or for Bord na Móna plc. (the requestor details can be redacted)

### Decision

As it is my decision that the majority of the categories of documentation requested are not environmental information and thus, not within the scope of the AIE Regulations, I will deal with the issue of what constitutes environmental information as a preliminary matter.

### Environmental Information

Environmental information is defined at Article 3(1) of the AIE Regulations as:

*“any information in written, visual, aural, electronic or any other material form on—*

- (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,*
- (b) *factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,*
- (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,*
- (d) *reports on the implementation of environmental legislation,*
- (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and*
- (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)."*

The categories of documentation requested, relating as they do to the implementation and internal communication of a decision of the High Court with regard to the interpretation of the AIE Regulations, procedures and templates updated as a result of that judgment and AIE decision refusal letters, very clearly are not material on the state of the elements of the environment in accordance with Article 3(1)(a) of the definition of environmental information, nor do they involve factors affecting or likely to affect the elements of the environment pursuant to Article 3(1)(b). Further, quite evidently such documentation is not captured by Article 3(1)(e) or (f), involving neither cost-benefit nor other economic analyses or assumptions, nor in any way concerning the state of human health and safety, conditions of human life, cultural sites or built structures.

Therefore, the only bases upon which such documentation could constitute environmental information is under Articles 3(1)(c) and (d). I will address these paragraphs in respect of the various categories of information requested below. In respect of Article 3(1)(c), as was made clear by Collins J. in the Court of Appeal in *Redmond v. Commissioner for Environmental Information* [2020] IECA 83, when considering this category, one needs in the first instance to examine the measure in question and not the information on that measure. Thereafter, the test for determining whether or not a measure or activity is likely to affect the environment is, "*if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly.*"

### **Category 1)**

There are no additional documents within this category, other than information captured by Categories 2), 3) and 4) of your request, save for privileged legal advice. In respect of the former, this will be dealt with in relation to those respective categories. With regard to privileged legal advice, the receipt by Bord na Móna plc. of legal advice regarding a High Court judgment is not a measure/activity in respect of which there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. It is simply advice as to the potential impact of a court judgment. Further, as it is “advice” it cannot be seen as a report on the implementation of environmental legislation, within the meaning of Article 3(1)(d).

Without prejudice, even if such privileged legal advice could be deemed to constitute environmental information, I would in any event be of the view that disclosure ought to be refused on the basis of Articles 8(a)(ii), 8(a)(iv) and 9(1)(b). Firstly, it would adversely affect the interests of Bord na Móna plc.’s legal advisers, who voluntarily and without being under or being capable of being put under a legal obligation to do so, supplied such advice solely for Bord na Móna plc.’s attention and consideration, and have not consented to its release. Secondly, it would adversely affect the confidentiality of the proceedings of Bord na Móna plc, where such confidentiality is otherwise protected by law. The confidentiality of such legal advice is protected under Irish law by legal professional privilege and its disclosure would adversely affect the confidentiality of communications between Bord na Móna plc. and its legal advisers. Thirdly, it would adversely affect the course of justice. Such legal advice arose in the context of legal proceedings and contains discussions about the merits of an appeal of a judgment of the court and therefore, is manifestly related to the course of justice.

I have further considered the public interest in favour of disclosure versus that served by refusal, in accordance with Articles 10(3) and (4). It is a matter of public interest generally, as recognised by the law on legal professional privilege, that legal advisers should be capable of furnishing open and frank legal advice without fear of such advice being potentially disclosable. This public interest outweighs whatever public interest there may be in favour of disclosing such legal advice, particularly whereby such legal advice, if it indeed constitutes environmental information, has only a very peripheral relationship to the environment and taking account of the fact that both Articles 8(a)(ii) and 8(a)(iv), are mandatory grounds for refusal.

Therefore, the legal advice which forms part of this category is refused in the first instance on the basis that it is not environmental information and without prejudice, in accordance with Articles 8(a)(ii), 8(a)(iv) and 9(1)(b).

### **Category 2)**

Material used to communicate the judgment internally to staff of Bord na Móna plc. is in my view, not environmental information within the meaning of either Articles 3(1)(c) or (d). It is not a measure in the sense of being a policy, legislation, plan, programme, or environmental agreement. At most it constitutes an activity by way of informing staff of the decision of the High Court. I fail to see how notifying/informing staff of the contents of a decision of a judge of the High Court, could have a real and substantial possibility of affecting environmental elements or factors. Similarly, in no sense can it be deemed a “report” on the implementation of environmental legislation, being no more than the imparting of information with regard to the determination of the High Court.

This category is accordingly refused on the basis that it does not constitute environmental information.

### **Category 3)**

Although conceded that updated procedures in respect of AIE requests are most likely environmental information within the meaning of Article 3(1) of the AIE Regulations, having regard to Article 5(2), same are currently in the process of being reviewed and updated and are not complete. It should be noted that there are no updated template letters arising out of the decision of the High Court.

In circumstances where the AIE procedures are incomplete, in initial draft format and have not been subject to review/sign-off, Article 9(2)(c) applies. Given the absence of staff from the Lean Centre legal team on long-term leave and the summer vacation period, it is not anticipated that such updated procedures will be complete until September 2023.

As required by Articles 10(3) and (4), I have considered the public interest in favour of disclosure against that served by refusal. There is a public interest in ensuring that information released by a public authority is accurate and up to date, as acknowledged in Article 5(1)(c). Releasing information that is incomplete, in draft format and subject to change would only serve to confuse the public, when such information ultimately may not actually reflect the procedures adopted by Bord na Móna plc. Therefore, the public interest in favour of refusal is greater than whatever public interest there may be in disclosing incomplete information.

This category is refused on the basis that it concerns material in the course of completion or unfinished documents or data, pursuant to Article 9(2)(c).

### **Category 4)**

Documents furnished to the Board informing them of the judgment are in a like position to communications to staff in Category 2). I am not of the view that any such documents, relating as they do to the notification/informing of the Board of the contents of a decision of the High Court, could have a real and substantial possibility of affecting environmental elements or factors. Further, such documentation could not be deemed a “report” on the implementation of environmental legislation, being no more than the imparting of the decision and reasoning of the High Court, together with privileged legal advice received.

Minutes of Board meetings relating to the judgment do not constitute a measure within the meaning of Article 3(1)(c) of the definition of environmental information. Inasmuch as they may amount to an activity, the activity involved, namely the recording of information relating to the judgment communicated to the Board, there is not a real and substantial possibility of this affecting environmental elements or factors, whether directly or indirectly. Further, the minutes are not a “report” on the implementation of environmental legislation within the meaning of Article 3(1)(d), involving simply a record of information communicated regarding the contents of the High Court decision and the privileged legal advice received.

Therefore, this category is refused on the basis that it is not environmental information.

## **Category 5)**

AIE refusal letters are not a measure within the meaning of Article 3(1)(c). Inasmuch as a decision refusing AIE requests may constitute an activity, the activity involved, namely the answering of an AIE request is not such as could have a real and substantial possibility of affecting environmental elements or factors. Further, AIE refusal letters do not constitute a “report” on the implementation of environmental legislation, simply involving responses to AIE requests, rather than a report on such requests received by Bord na Móna plc.

Accordingly, this category is refused on the basis that it does not constitute environmental information.

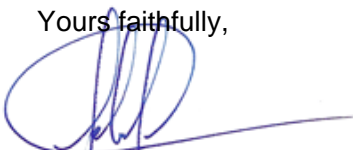
## **Right of Review**

Under Article 11 of the AIE Regulations you have a right to request an internal review of this decision. An internal review involves a complete reconsideration of the matter by a member of the staff of Bord na Móna plc, unconnected with the original decision, of the same or higher rank than the original decision-maker, who may affirm, vary or annul the original decision.

If you wish to request an internal review, you can do so in writing to [InformationOfficer@bnm.ie](mailto:InformationOfficer@bnm.ie), referring to this decision and quoting the AIE reference number. This request must be made within one month of the date of receipt of this decision. The decision of an internal review will be communicated to you within one month of receipt of your request for an internal review.

You can contact [InformationOfficer@bnm.ie](mailto:InformationOfficer@bnm.ie) if you require any assistance in relation to your request.

Yours faithfully,



John MacNamara  
Corporate Sustainability Lead