

10th November 2023

Right to Know CLG
25 Herbert Place
Dublin 2

By email: requests@righttoknow.ie

Re: AIE Request COSEC00201

Dear Sir/Madam,

I refer to your request dated 19th April 2019, 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 the following information:

- 1) A breakdown (in excel format) of all biomass imports from January 2017 to present, to include:
 - a. The country of origin;
 - b. The amount imported (in tonnage);
 - c. The companies from whom Bord na Móna have purchased the biomass;
 - d. The name of the grower (e.g. name of plantation, producer, etc.), miller and other known companies along the supply chain;
 - e. Documentation to show the biomass is purchased from certified sustainable sources.
- 2) The agenda, minutes (to include draft versions) and associated documents of any meetings with ESB and/or DCCAIE representatives at which imported and/or domestic biomass was discussed from June 2018 to present.
- 3) All correspondence (to include attached and/or associated documents) with the Minister for Climate Action and/or the Secretary General of DCCAIE that mention imported and/or domestic biomass from June 2018 to present.

Schedule of Records

The following records the subject of your request were located:

Category 1)

1. Inventory Spreadsheet 1st January 2017 – 19th April 2019
2. Data Chart Sales Cap Spreadsheet
3. Biomass Use at EPL 2008 – 2018 v1 25 Feb 19

4. Copy of Biomass Graph Apr 18 – Mar 20 3rd April

Category 2)

1. Copy of ESB BNM Biomass Steering Committee Action Log 11-12-2018
2. ESB/BNM Steering Group Meeting Presentation 29/01/2019
3. ESB Biomass Steering April 4 (002)

Category 3)

1. Letter from Mr. Geoff Meagher, Chairman Bord na Móna plc. to Mr. Denis Naughten TD, Minister for Communications, Climate Action and Environment, Chairperson's Comprehensive Report, 27th June 2018
2. Confidential Comparison of Policies Supporting Biomass Power in Europe and Asia, 16th October 2018
3. Letter from Mr. Mr. Geoffrey Meagher, Chairman Bord na Móna plc. to Mr. Richard Bruton TD, Minister for Communications, Climate Action and Environment, Chairperson's Interim Report, 30th November 2018
4. Letter from Mr. Tom Donnellan, Managing Director, Bord na Móna plc. to Mr. Richard Bruton TD, Minister for Communications, Climate Action and the Environment, 21st December 2018
5. Letter from Mr. Tom Donnellan, Managing Director, Bord na Móna plc. to Mr. Mark Griffin, Secretary General, Department for Communications, Climate Action and the Environment, 11th February 2019

Decision

Category 1)

It should be noted that following an asset purchase agreement in March 2021, the biomass business was purchased by a subsidiary of one of Bord na Móna plc.'s subsidiaries, Edenderry Power Limited. Accordingly, such records are now in the possession of Edenderry Power Limited. It is that company's position is that it is not a public authority for the purposes of the AIE Regulations

Edenderry Power Limited has advised that no spreadsheet exists that contains the entirety of the information requested. The spreadsheets located and identified as containing some information within the scope of the request also contain a considerable amount of information outside scope. In respect of the material within scope, Edenderry Power Limited have advised that such information is commercially sensitive, including information regarding the biomass source, supplier name, product type and volumes imported.

Therefore, the exemption under Article 9(1)(c) of the AIE Regulations (commercial or industrial confidentiality) is applicable. The international biomass market is highly competitive and the disclosure of such information in these records could be used by Edenderry Power Limited's competitors to target markets, sources and suppliers identified, resulting in a possible bidding war and consequent price increases or to undermine the competitiveness of Edenderry Power Limited's business, ultimately to its commercial detriment.

The confidentiality of commercially sensitive information is recognised in Regulations 49 and 47 of the Constitutions of Bord na Móna Biomass Limited and Edenderry Power Limited respectively, in respect of “*any confidential information or any books, documents or records relating to the business, affairs and accounts of the Company and its dealing with customers, suppliers and others*”. Such confidentiality is protected at law by Section 32(1) of the Turf Development Act 1998, which precludes unauthorised disclosure of confidential information by directors, members of staff, advisers or consultants of Bord na Móna plc. and its subsidiaries.

In addition, the relationship between the suppliers in question and Bord na Móna Biomass Limited at the time and now Edenderry Power Limited, is such as would give rise to an obligation of confidence. The information referred to with regard to biomass source, supplier name, product type and volumes imported would properly be regarded as confidential in the context of such contractual relationships and therefore attracting confidentiality at common law (*House of Spring Gardens v. Point Blank Limited* [1984] I.R. 611 and *Mahon v. Post Publications Limited* [2007] 2 I.L.R.M. 1.)

I have considered the public interest in accordance with Articles 10(3) and (4) of the AIE Regulations. The public interest in ensuring the right of access to environmental information is not unlimited and the AIE Directive and in turn the AIE Regulations, recognise that there are situations where environmental information should not be disclosed in the public interest. There is a public interest in ensuring that commercially sensitive information that may be used by competitors of Edenderry Power Limited, (which company’s position is that it is not a public authority for the purposes of the AIE Regulations), to gain a commercial advantage not be disclosed and that such company be able to compete on international markets and generate profits without being unduly hindered by disclosure of information which may be used by competitors to place them at a commercial disadvantage.

Weighing up these competing public interests, I believe that the public interest in favour of retaining the confidentiality of the information outweighs that in favour of disclosure and disclosure of such records is therefore refused.

It should be noted that a single contract, EFET Confirmation of Individual Biomass Contract, 17th April 2017, was identified by Ms. Anna-Marie Curry, former Company Secretary and General Counsel, in correspondence to the Commissioner for Environmental Information during the course of the appeal before him, as having been located on Bord na Móna plc.’s shared legal electronic platform for the period the subject of the request. However, it is my view that such a contract, does not constitute, “*A breakdown (in excel format)*” and therefore, is not within the scope of your request.

Category 2)

The records at Nos. 1 and 2 contain a considerable amount of information which Edenderry Power Limited has advised is commercially sensitive with regard to strategy, sources, supply projections and forecasts.

Such information could be used by competitors of Edenderry Power Limited across the international biomass market to gain a commercial advantage, in terms of targeting sources or suppliers. Therefore, the exemption under Article 9(1)(c) of the AIE Regulations applies.

The confidentiality of such commercially sensitive information is protected at law by virtue of Regulation 49 and Regulation 47 of the Constitutions of Bord na Móna Biomass Limited and Edenderry Power Limited respectively and Section 32(1) of the Turf Development Act 1998. Further, the information was shared confidentially with the ESB in the context of commercial negotiations/agreements for the supply of biomass to ESB power stations. Therefore, it would properly be regarded as confidential in the context of such relationship and attract confidentiality at common law.

Weighing up the public interest in accordance with Articles 10(3) and (4) of the Regulations, I would re-iterate the position outlined in respect of Category 1) above regarding the public interest in retaining the confidentiality of commercially sensitive information that may be used by competitors of Edenderry Power Limited to its potential commercial detriment. When considered against the public interest in favour of the disclosure of environmental information, I am of the view that the public interest against disclosure and retaining confidentiality outweighs same. Therefore, the records at Nos. 1 and 2 in this category are refused.

I have determined that the record at No. 3 should be disclosed.

Category 3)

1. Letter from Mr. Geoff Meagher, Chairman Bord na Móna plc. to Mr. Denis Naughten TD, Minister for Communications, Climate Action and Environment, Chairperson's Comprehensive Report, 27th June 2018

This letter is a confidential report prepared by the Chairperson on foot of obligations under the Code of Practice for the Governance of State Bodies and Section 33(3) of the Turf Development Act 1998. It consists of confidential information communicated to the Minister regarding financial matters, commercially significant developments, internal control, corporate governance, legal matters, procurement policy and procedures, disposal procedures and audit opinion.

As such, the majority of the information contained within the letter is not environmental information and is thus not subject to the AIE Regulations. Environmental information is defined at Article 3(1) of the 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)”.*

It is quite clear that financial matters, internal control, corporate governance, legal matters, procurement policy and procedures, disposal procedures and audit opinion do not fulfil any of the criteria under (a) to (f) above. The only aspect of the letter that could be deemed environmental information is the discussion on commercially significant developments.

In respect of the aspects of this document which may be deemed within the scope of your request and which are environmental information, I am of the view that access ought to be refused firstly on the basis of Article 8(a)(iv) (adverse effect on the confidentiality of proceedings of a public authority, where such confidentiality is otherwise protected by law).

Article 8(a)(iv) was considered by Hyland J. in *Commissioner for Environmental Information v. Coillte* [2023] IEHC 227, wherein she stated (paragraph 104), that it envisaged 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.

As is stated at Section 6, Business and Financial Reporting, in the Code of Practice for the Governance of State Bodies, the Chairperson’s Confidential Report to the relevant Minister is, “*a confidential letter from the Chairperson of the Board to the Minister of the parent Department.*”

Further, the Chairperson of Bord na Móna plc. owes duties not to disclose confidential information under statute, by virtue of Section 32(1) of the Turf Development Act 1998. In addition, the Chairperson, as a director, owes statutory fiduciary duties to the company under Section 228(1)(c) of the Companies Act 2014, to act in accordance with the company’s Constitution and exercise his powers only for the purposes allowed by law and at Section 228(1)(d), not to use the company’s property, information or opportunities for his own or anyone else’s benefit unless – (i) this is expressly permitted by the company’s

Constitution or (ii) the use has been approved by a resolution of the company in general meeting. Regulation 37 of Bord na Móna plc.'s Constitution imposes obligations of secrecy and confidentiality on *inter alia* the Chairperson in respect of, "*any confidential information or any books, documents or records relating to the business, affairs and accounts of the Company and its dealing with customers, suppliers and others*".

The import of these provisions is that disclosure of the confidential report is precluded by the Company Constitution and so in the absence of a board resolution, would constitute a breach by the Chairperson of his fiduciary duties.

Clearly the comprehensive report is a confidential communication between Bord na Móna plc. and the Minister as a shareholder and is acknowledged by the Department of Public Expenditure and Reform to be so in the Code of Practice for the Governance of State Bodies. Such confidentiality is protected under Section 32 of the Turf Development Act 1998 and by virtue of the provisions of Section 228(1)(c) and (d) of the Companies Act 2014.

Disclosure would adversely affect the confidentiality of the proceedings of Bord na Móna plc. The report contains a significant amount of information that is not in the public domain but which was communicated to the Minister in his role as a shareholder and pursuant to the Code of Practice for the Governance of State Bodies and Section 33(3) of the 1998 Act. The confidentiality of such information was recognised by the Department of Public Expenditure and Reform, by including same in what it terms a "*confidential letter*" from the Chairperson of a commercial semi-state company to the relevant Minister, rather than in the annual report, no doubt in recognition of the potential adverse effects of such information regarding commercial activities and strategy and surrounding the running and management of commercial semi-state companies being made public. Such companies are required to compete with private entities, which are not subject to the same disclosure requirements, thereby placing such semi-state companies at a disadvantage compared to their private counterparts.

In addition, the exemption under Article 9(1)(c) of the Regulations is applicable. The report contains commercially sensitive information relating to the running of and future strategy of the biomass business, which information could be used by competitors to undermine the competitiveness of Edenderry Power Limited, by targeting markets and sources identified in the report, placing such competitors at a commercial advantage to the potential detriment of Edenderry Power Limited. Further, the commercial sensitivity of such information is also recognised in Regulation 37 of Bord na Móna plc.'s Constitution (and Regulations 49 and 47 of the Constitutions of Bord na Móna Biomass Limited and Edenderry Power Limited respectively) and as such attracts protection under law by virtue of Section 32(1) of the Turf Development Act and Sections 228(1)(c) and (d) of the Companies Act 2014.

Finally, the exemption in Article 9(2)(d), which applies to internal communications of public authorities, taking into account the public interest served by the disclosure, also applies. The CJEU in *Land Baden-Württemberg* held that this exemption covers all information which circulates within a public authority and which, on the date of the request for access, has not left that authority's internal sphere, in recognition of the fact that public authorities

should have a protected space to engage in reflection and pursue internal discussions. The comprehensive report arises in the context of the Minister for Communications, Climate Action and Environment, being a shareholder in Bord na Móna plc. (pursuant to Section 12 of the Turf Development Act 1998) and in accordance with Section 33(3) of the 1998 Act and thus, constitutes an internal communication between the Chairperson and the Minister, as shareholder. The material contained therein in respect of the biomass business is information that had not left Bord na Móna plc.'s internal sphere at the time of the request and contained in a report required of the Chairperson by the Department of Public Expenditure and Reform and expressly recognised as confidential.

I have considered the public interest in accordance with Articles 10(3) and (4) of the AIE Regulations, noting that the Regulations recognise that there are situations where environmental information should not be disclosed in the public interest, including in relation to Article 8(a)(iv), which is a mandatory exemption subject to the application of the public interest test.

There is clearly a public interest in ensuring that confidential communications between a public authority which is a commercial semi-state company and a Minister for Government who is a shareholder in such company, remain confidential and not subject to disclosure, to ensure freedom of communication between the public authority and its Minister shareholder. Ultimately, it is in the interests of the public as a whole that Ministers are kept apprised of confidential matters regarding the running of and business strategy of commercial semi-state companies. In the event that such information was subject to disclosure it would have a chilling effect on such communications, with the public authority/commercial semi-state likely to be less forthright with regard to any written communications.

There is an additional public interest in ensuring that commercially sensitive information that may be used by competitors of a public authority (or its subsidiaries) to gain a commercial advantage not be disclosed, having regard to the fact that commercial semi-states pay dividends to the Exchequer if profitable and thus, it is in the public interest that their ability to generate profits is not unduly hindered by disclosure of information placing them at a commercial disadvantage. Further, as recognised in *Land Baden-Württemberg*, there is a public interest in public authorities having space to think in private, such that internal communications on confidential matters, such as the comprehensive report to the Minister, are not routinely disclosed.

Overall, when weighing the competing public interests in the balance, I am of the view that the public interests against disclosure and in favour of maintaining the confidentiality of the information outweigh that in favour of disclosure. This document is therefore refused.

2. Confidential Report, Comparison of Policies Supporting Biomass Power in Europe and Asia, 16th October 2018

This report was commissioned by way of an independent benchmarking exercise to compare the ability of Bord na Móna Biomass Limited to pay for international biomass. It

is specifically designated as commercially sensitive and confidential and was furnished to the Minister in confidence, in the context of the Code of Practice for the Governance of State Bodies (having been referred to in the Chairperson's Interim Report of 30th November 2018, referred to at (3) below) and further, in the context of the Minister's role as shareholder in Bord na Móna plc. and pursuant to Section 33(3) of the Turf Development Act 1998.

Having regard to the nature and purpose of this report, the information contained therein is highly confidential and sensitive, comparing financial strategies and supports for biomass internationally across various countries and analysing the biomass paying ability and revenues generated, of Bord na Móna Biomass Limited when compared to various other utilities internationally. It also contains generation and logistics costings. This information is inherently commercially sensitive, which would be hugely valuable to competitors in the highly competitive international biomass market and could be used to outbid Edenderry Power Limited for biomass sources from suppliers going forward.

Therefore, I am refusing this report on the basis of the commercial confidentiality exemption in Article 9(1)(c) of the Regulations. This report was communicated in confidence to the Minister and pursuant to Bord na Móna plc.'s obligations under Section 33(3) of the Turf Development Act 1998. The confidentiality of commercially sensitive information is recognised in Regulation 37 of Bord na Móna plc.'s Constitution and as such attracts protection under law by virtue of Section 32(1) of the 1998 Act and Sections 228(1)(c) and (d) of the Companies Act 2014, as referred to above.

Further, as this report is an internal communication that had not left Bord na Móna plc.'s internal sphere at the time of the request, the exemption under Article 9(2)(d) of the AIE Regulations is also applicable. Disclosure of this report to the Minister was in the context of the Code of Practice for the Governance of State Bodies, the Minister's role as shareholder in Bord na Móna plc. and pursuant to Section 33(3) of the 1998 Act and thus, remained within Bord na Móna plc.'s internal sphere. As will be discussed below, the public interest in favour of disclosure must be counterbalanced by the strong public interest that such highly commercial sensitive material remains confidential.

In considering the public interest in accordance with Articles 10(3) and (4) of the AIE Regulations, I have had regard to the public interest in favour of the disclosure of environmental information. However, this has to be counterbalanced by the public interest in favour of maintaining the confidentiality of this report. This report contains highly confidential and commercially sensitive information, regarding Bord na Móna Biomass Limited's ability to pay, revenue generation capability versus international competitors and logistics and generation costings, which would place Edenderry Power Limited (which purchased the biomass business of Bord na Móna Biomass Limited), at a huge commercial disadvantage were such information to get into the hands of its competitors, potentially allowing it to be outbid for sources. Ultimately, as commercial semi-states pay dividends to the Exchequer, it is in the public interest that the ability of group companies to generate profits is not unduly hindered by disclosure of information placing them at a commercial disadvantage.

Further, the Department of Public Expenditure and Reform recognised the public interest in communications in reports of this nature to the Minister remaining confidential and expressly deemed them as such. It is in the interests of the public as a whole that Ministers are kept apprised of confidential matters regarding the running of and business strategy of commercial semi-state companies. If such information was subject to disclosure it would have a chilling effect on such communications, with commercial semi-states likely to be less forthright in any written communications.

When weighing the competing public interests in the balance, I believe that the public interests against disclosure and in favour of maintaining the confidentiality of the information outweigh that in favour of disclosure. This record is therefore refused.

3. Letter from Mr. Mr. Geoffrey Meagher, Chairman Bord na Móna plc. to Mr. Richard Bruton TD, Minister for Communications, Climate Action and Environment, Chairperson's Interim Report, 30th November 2018

This letter is similar to (1.) in that it is an interim confidential report prepared by the Chairperson on foot of obligations under the Code of Practice for the Governance of State Bodies. It contains information regarding financial matters, AGM, dividend, industrial relations and pensions, which are clearly not environmental information.

In respect of the aspects of this document referring to biomass, which may be deemed environmental information, I am of the view that access ought to be refused on the basis of Articles 8(a)(iv), 9(1)(c) and 9(2)(d) of the AIE Regulations for the reasons outlined at (1) above, which are equally applicable to this document. It should be noted that the letter is expressly stated to be commercially sensitive. The information contained therein with regard to the biomass business involves details of commercial negotiations with a third party, business strategy and viability.

The public interest considerations outlined at (1) above are similarly applicable to this document. Accordingly, disclosure is refused.

4. Letter from Mr. Tom Donnellan, Managing Director, Bord na Móna plc. to Mr. Richard Bruton TD, Minister for Communications, Climate Action and the Environment, 21st December 2018

This letter details Bord na Móna plc.'s initiatives to help the government reach its decarbonisation targets set out in the proposed All Government Plan and therefore contains commercially confidential material disclosed to the Minister pertaining to future strategy of Bord na Móna plc. and its subsidiaries.

In such circumstances, I am of the belief that the exemption in Article 9(1)(c) of the AIE Regulations applies. The future strategy plans of Bord na Móna plc. and its subsidiaries are matters which are of their nature commercially sensitive. Knowledge of such future plans, together with information regarding the timeline for steps in the process to achieve desired objectives could be used to the potential commercial disadvantage of Bord na

Móna plc. and its subsidiaries by competitors in the various markets involved. Any such commercial disadvantage ultimately impacts upon the Government and the Exchequer, where Bord na Móna plc. pays dividends to the Exchequer on profits.

The confidentiality of this material is protected by law by virtue of Section 32(1) of the Turf Development Act and Sections 228(1)(c) and (d) of the Companies Act 2014, in conjunction with Regulation 37 of Bord na Móna plc's Constitution.

Further, Article 9(2)(d) is also applicable as the letter is an internal communication to the Minister, a shareholder in Bord na Móna plc. In such circumstances, the letter had not left Bord na Móna plc.'s internal sphere at the time of the request.

As required, I have weighed the public interest in favour of disclosure of the information against that in favour of maintaining its confidentiality and refusing disclosure, in accordance with Articles 10(3) and (4) of the Regulations. Disclosure of Bord na Móna plc. and its subsidiaries' future plans and timelines for such plans has the potential to be used by competitors to gain a commercial advantage, to the ultimate detriment to the profitability of Bord na Móna plc. and its subsidiaries, which is contrary to the public interest. Further, it is also in the public interest that Ministers are kept apprised of confidential matters regarding the business strategy of commercial semi-state companies. Disclosure of such information would likely have a chilling effect on the nature and extent of such communications with Ministers, with commercial semi-states likely to be less forthright in any written communications, to the ultimate detriment of the public interest.

Having regard to the potential negative consequences associated with disclosure, I am therefore of the opinion that the public interest is best served by refusal of this record.

5. Letter from Mr. Tom Donnellan, Managing Director, Bord na Móna plc. to Mr. Mark Griffin, Secretary General, Department for Communications, Climate Action and the Environment, 11th February 2019

This letter sets out Bord na Móna plc.'s input into the Government's New Statement of Strategy 2019 – 2021, and in this context sets out matters pertaining to the future strategy of Bord na Móna plc. and its subsidiaries.

Having regard to the position of the Minister for Communications, Climate Action and the Environment as a shareholder in Bord na Móna plc, this communication to the Secretary General of the Department may be considered as an internal communication. The matters outlined therein would not have left Bord na Móna plc.'s internal sphere at the time of the request. Therefore, the exemption in Article 9(2)(d) of the Regulations applies.

Applying the public interest test in Articles 10(3) and (4) of the Regulations, I have considered the public interest in favour of disclosure of this letter. However, there is also a public interest in free and forthright communications between the Minister/Department and a public authority, whereby matters can be communicated in confidence without fear of disclosure. Such free communication is in the interests of fostering close working

relationships between the Minister/Department and the public authority, which overall is in the interest of the public.

Therefore, balancing the competing public interests, I believe the public interest against disclosure outweighs that in favour of disclosure. Disclosure of this record is accordingly refused.

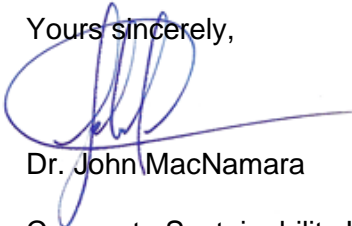
Right of Review

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, 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 if you require any assistance in relation to your request.

Yours sincerely,



Dr. John MacNamara

Corporate Sustainability Lead