

Decision of the Commissioner for Environmental Information on an appeal made under article 12(5) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE Regulations)

Case CEI/15/0017

Date of decision: 20 October 2016

Appellant: Councillor Thomas Cullen

Public Authority: Department of Environment, Community and Local Government (the Department)

Issue: Whether the Department was justified in refusing the appellant's request on the basis that the information sought was not environmental information within the meaning of the AIE Regulations, and on the basis that the exception under article 8(a)(iv) applied to some of the information sought. Whether the appellant's request was, in part, manifestly unreasonable. Whether the internal review of the appellant's request failed to identify all information held by or on behalf of the Department.

Summary of Commissioner's Decision: In accordance with article 12(5) of the AIE Regulations, the Commissioner reviewed the Department's decision, and varied the decision in a number of ways. He found that the appellant's request was, in part, manifestly unreasonable with regard to volume and range under article 9(2)(a).

The Commissioner found:

- that the Department was justified in refusing to provide access to information on the appointment of a barrister to carry out a review, as that information did not fall within the definition,
- that the Department was not justified in deciding that information on a development at Charlestown, County Wicklow, did not fall within the definition of environmental information set out in article 3(1) of the AIE Regulations,
- that certain information requested by the appellant was environmental information under paragraphs (c) and (e) of the definition,
- that the exception to disclosure under article 8(a)(iv) applied to some of the environmental information held by the Department,
- that the Department had failed to consider certain information when making its internal review decision,

- that the Department was not justified in redacting information from records which were released to the appellant at internal review stage,
- that records released to the appellant at internal review stage were partially illegible, and he therefore required the Department to provide legible copies of this information to the appellant.

The Commissioner stated that the Department should now deal with the parts of the appellant's request found to be within the remit of the AIE Regulations, with the exception of environmental information covered by article 8(a)(iv).

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Background

On 6 December 2004, Wicklow County Council (the Council) served a Compulsory Purchase Order (the CPO) on the owner and on the occupier of 1.4022 hectares of land at Three Trouts, Charlesland, Greystones, County Wicklow. The purpose of the CPO was to acquire the land for social housing. A Notice to Treat in respect of the CPO issued in July 2006, requiring the parties involved to provide details of compensation sought. The owner and occupier respectively served their Notices of Claim in August 2006. In March 2011, the parties to the CPO agreed a compensation sum of three million euro.

In December 2006, the Council sought the Department's approval for capital funding of housing at the Charlesland site under the Social Housing Investment Programme. In August 2008, the Council sought sanction from the Department to borrow five million euro to purchase the land, pursuant to section 106 of the Local Government Act 2001. This application was approved in July 2009; however no loan was drawn down by the Council, and the sanction lapsed at the end of 2009. In July 2011, the Council made a second application to the Department for sanction to borrow three million euro to finance the CPO. This application was put on hold after concerns on aspects of the development were raised by a number of elected representatives, including the appellant. A senior counsel, Seamus Woulfe SC, was appointed to carry out a review of the issues raised (hereinafter referred to as the independent review). This independent review was carried out in two stages: the first stage examined the involvement of the Department, and the second dealt with the actions of the Council. Mr Woulfe produced two reports of 12 March 2012 and 8 February 2013, which were subsequently published by the Department.

On 22 February 2015 the appellant made a request under the AIE Regulations to the Department, relating to the CPO and other matters. The request contained four numbered sections. On 10 March 2015, the Department notified the appellant that his request would be processed in two separate parts (this appeal relates to the third and fourth parts only). No first instance decision was issued by the Department in the time allowed under the AIE Regulations.

The appellant requested an internal review and was notified of the Department's decision on 15 May 2015. On internal review, the Department disclosed four records to the appellant in redacted form, and contended that 167 other documents held did not fall within the definition of environmental information. The Department stated in the alternative that the exception to disclosure under article 8(a)(iv) applied to some of the information. The appellant subsequently appealed the internal review decision to my Office.

The parts of the appellant's request which are the subject of this appeal are as follows (superscript letters and emphasis in bold added):

- "3. All **information relating to the appointment of Mr Seamus Woulfe S.C^a** to carry out a review of the C.P.O of lands at Three Trout Stream, Charlesland, Greystones by Wicklow Co Council. **All information** and documentation, letters, emails internal and external **relating to the review^b** including public representatives seeking and

investigation...[sic]**All information** including internal e mails and external e mails, all letters sent and received, all notes of phone conversations, memos, minutes and dates of meetings, all draft reports, amendments to the draft reports, all correspondence relating to queries, all correspondence between the Department and Wicklow Co Council and Wicklow County Manager **involved in the setting up^c of Mr Woulfes S.C review and findings^d**

4. All **information** and documents **relating to Wicklow Co Councils loan applications of both 2008 and 2009^e** for to purchase the lands the subject of the C.P.O at Three Trout Stream , Charlesland, Greystones. Including all letters, e mails internal and external, memos, minutes and dates of meetings, records and notes of telephone conversations, reports, and all communications with Wicklow Co Council. All communications with Mr Seamus Woulfe S.C. on these applications."

The appellant's request referenced many indicative types of records sought, which had the effect of making his request unclear and difficult to understand. I have added emphasis and superscript letters to the original text of the request to highlight what I understand to be the substance of the request, specifically:

- a. All information relating to the appointment of Mr Seamus Woulfe SC to carry out the independent review
- b. All information relating to the independent review
- c. All information on setting up the review
- d. All information on the findings of the review
- e. All information relating to loan applications by Wicklow County Council to finance the compulsory purchase of lands at Charlesland, County Wicklow, made in either 2008 or 2009.

The appellant's position

The appellant submitted that the independent review addressed proposals for the development of social housing at Charlesland, giving rise to the right of access to environmental information. In relation to his request for information on loan applications by the Council, the appellant submitted that these applications would have included planning and valuation reports with details of environmental issues pertinent to the site.

The Department's position

The Department submitted that 167 of the 171 relevant records it held did not contain environmental information, and were therefore not subject to disclosure under the AIE Regulations. The Department contended that it was justified in redacting parts of the records disclosed to the appellant on the basis that the redacted information was not environmental information.

The Department also contended in the alternative that eight specific records could not be released as they contain legal advice. The Department did not address the public interest under article 10 in this regard.

Scope of review

In the course of this review, I have considered whether the appellant's request was, in part, manifestly unreasonable with regard to volume and range under article 9(2)(a). I also considered whether the information requested falls within the definition of "environmental information" under article 3(1) of the Regulations. I considered whether the Department correctly interpreted the definition of environmental information when redacting records. I considered whether the exception under article 8(a)(iv) applied to ten records identified by the Department. Finally, I assessed the search for relevant information carried out by the Department when considering the AIE Request.

Directive 2003/4/EC (the Directive) implements the first pillar of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention"). The Directive is transposed into Irish law by the AIE Regulations. In making this decision I have had regard to the *Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) published by the then Minister for the Environment, Community and Local Government [the Minister's Guidance]; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide].

Analysis and findings

Search Issues

This appeal concerns a request for information on an independent review of a compulsory purchase of land by Wicklow County Council, and related matters. The appellant's request contained five substantive matters, set out above. The first four parts of the request refer to aspects of the independent review, and the last refers to information on loan sanction applications made to the Department by Wicklow County Council (which were also considered by the independent review).

The Department furnished my Office with 171 records in nine sets. These records ran to 800 pages and were provided to my Office out of chronological order. Records 4.1, 4.2, and 4.4 were furnished to my Office without their attachments. Records 2.11, 3.20, 4.3, 4.7, 4.8 and 4.11 were initially provided in redacted form. Records 6.17, 6.43 and 6.56 included references to other records not included in the 171 scheduled records. In light of the inadequacy of records provided, my Investigator repeatedly asked the Department to furnish my Office with a comprehensive set of relevant records to facilitate my review. The missing attachments and unredacted copies of records were provided to my Office following a series of requests. However, there are outstanding issues regarding failures by the Department to identify relevant information, which I discuss at the end of this decision.

My Investigator reviewed the 171 documents provided by the Department, and found that 24 of the 171 records were duplicates (a list of duplicate records is set out in Schedule 1 to this decision). Of the remaining 147 records, 8 documents did not relate to the development of the property at Charlesland, and were therefore out of scope (these records are set out in Schedule 2 below). Accordingly, only 139 of the records fell to be considered. The disorganised presentation

of records from the Department created a significant administrative burden for my staff, and caused significant delays in reviewing this case.

I wish to comment at this stage that, considering the volume of records and range of subject matters involved in the independent review, it would have been appropriate for the Department to invite the appellant to make a more specific request under article 7(8) of the AIE Regulations (particularly in respect of the appellant's request for all information relating to the review, which encompasses a very large amount of information created over many years). The AIE Regulations do not oblige public authorities to entertain overly general requests for information. However, the Department did not seek to refine the appellant's request, which added significantly to the complexity of this appeal.

Was the appellant's request manifestly unreasonable under article 9(2)(a) of the AIE Regulations?

The appellant's request contained five basic parts, all of which related to the proposed development at Charlesland. Four parts of the request are specific (information on the appointment of Seamus Woulfe, information on setting up the review, information on the findings of the review, and information on loan applications by the Council in 2008 or 2009). The appellant also made a very general request for "All information...relating to the independent review". Such a request encompasses everything considered in the course of the review, all processes and transactions considered by the review, all concerns raised leading to the establishment of the review, all administrative information relating to the review, and all information on the Department's subsequent response to the findings of the review. The review itself was carried out in two stages, and examined the actions of two separate public bodies. The events considered by the review took place between 2004 and 2011.

Article 6(1)(d) of the AIE Regulations requires that an AIE request must state, in terms that are as specific as possible, the environmental information that is the subject of the request. Article 9(2)(a) of the AIE Regulations provides that a public authority may refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought. I consider that the question of whether a request is manifestly unreasonable is preliminary to the question of whether the information held falls within the definition of environmental information. Having reviewed the records held by the Department, it is clear that the appellant's request for all information relating to the review is a very broad request for information on many different transactions and activities. It is also clear that voluminous records exist to meet this part of the appellant's request, with the limited records supplied to my Office running to hundreds of pages covering diverse matters across different sections of the Department as well as third parties. I am satisfied that the volume and range of information referred to in the broadest limb of the appellant's AIE request exceeds the amount of information that the Department could reasonably be expected to review in the course of an AIE request. My Investigator wrote to the appellant and invited him to make a submission on whether the request was, in part, manifestly unreasonable; however, no response was received.

I find that the appellant's request was, in part, manifestly unreasonable having regard to volume and range, to the extent that he requested "All information and documentation, letters, emails

internal and external relating to the review including public representatives seeking and investigation", and that refusal of this part of the appellant's request is justified under article 9(2)(a). Conversely, I find that the remaining parts of the appellant's request were sufficiently limited with regard to volume and range, and therefore fall to be considered.

Consideration of the public interest served by disclosure

Pursuant to article 10(3) of the AIE Regulations, I have considered the public interest in disclosure of information on the independent review, and I have weighed this against the interests served by refusal. In this instance, the public interests served by disclosure include the transparent application of national resources, and accountability of government and local government. The interests served by refusal are the effective and timely operation of the Department in carrying out its duties, and the integrity of the AIE regime. In the present case, I consider that the published reports of the independent review have contributed substantially to ensuring that the public interests in transparency and accountability are met. At the same time, I consider that processing the appellant's request to the fullest extent would make unreasonable demands on the resources of the Department, and would unduly prejudice the work of the Department. On balance, I find that the interests in disclosure do not outweigh the interests served by refusal, and therefore article 9(2)(a) applies to the appellant's request for "All information...on the review" notwithstanding article 10(3).

Does the information sought fall within the definition of environmental information?

I next considered whether the four specific parts of the appellant's request fall within the definition of environmental information, and whether the Department was justified in finding that information held was not environmental information. As a preliminary matter, I consider that information on the development of social housing at Charlesland is information on a series of measures likely to affect the state of the elements of the environment (including the landscape) and therefore falls within paragraph (c) of the definition. I have addressed the scope of paragraph (c) of the definition of environmental information in previous decisions, and I am satisfied that information which describes the integral parts of a relevant measure or activity is environmental information, even where such information does not directly refer to the elements of the environment. It therefore remains for me to decide whether the four specific types of information sought by the appellant are integral to the measures under consideration, (or otherwise fall within the definition of environmental information).

Article 3(1) of the AIE Regulations defines "environmental information" 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 Aarhus Guide remarks at page 50 that the clear intention of the drafters was to "craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation."

I. Does information relating to the appointment of Seamus Woulfe S.C. fall within the definition of environmental information?

I note that the appendices to the second report of the independent review are published on the Department's website. Appendix 2 to the second report includes a letter of 16 November 2011 from the Secretary General of the Department to the Office of the Attorney General, requesting that the Office of the Attorney General nominate a senior counsel to carry out the review. This record is also held by the Department as record 1.3.

I have reviewed the information supplied to my Office relating to the appointment of Mr Woulfe. This information is clearly not environmental information under paragraphs (a), (b), (e) or (f) of the definition, and so I have considered whether such information falls within paragraphs (c) or (d) of the definition.

I first considered whether the two reports of the independent review are "reports on the implementation of environmental legislation" under paragraph (d). I am not satisfied that either of the two reports can be said to have the implementation of environmental legislation as their subject matter - rather I comprehend the reports of the independent review to be on specific transactions and practices engaged in by the Department and the Council to effect the compulsory purchase of land for development, and not an evaluation of legislative provisions. Although the reports address the statutory processes applied by the Department and the Council, and to a limited extent comment on possible reforms of legislative provisions, I am satisfied that

the primary subject matters considered by the reports of the independent review do not fall within paragraph (d) of the definition of environmental information. Accordingly, I find that the reports of the independent review are not reports on the implementation of environmental legislation for the purposes of paragraph (d), and information on the reports, such as information the appointment of Mr Woulfe to draft the reports, does not fall within this part of the definition

I next considered whether this information falls within paragraph (c) of the definition. I do not consider that the appointment of Mr Woulfe was, of itself, a measure affecting or likely to affect the matters set out in paragraphs (a) or (b), nor was his appointment for the purpose of protecting the elements of the environment. I am satisfied that the proposed housing development is a measure likely to affect the state of the elements of the environment, therefore falling within paragraph (c) of the definition. It remains for me to consider whether information on the appointment of a particular barrister to carry out a review should be regarded as an integral part of the development of social housing at Charlesland. In this instance, no integral aspect of the development has been specifically determined by the fact of Mr Woulfe's appointment. I am satisfied that details of how Mr Woulfe was appointed can only be regarded as incidental to the development of the property at Charlesland, and as a consequence, information on the appointment of Mr Woulfe does not fall within paragraph (c) of the definition of environmental information.

On the basis of the above, I found that information on the appointment of Mr. Woulfe does not fall within the definition of environmental information.

II. Does information on the setting up of the independent review fall within the definition of environmental information?

I have reviewed information supplied to this Office relating to setting up the independent review. This information is not environmental information under paragraphs (a), (b), (d), (e) or (f) of the definition. Information held by the Department on setting up the review includes information on the concerns raised by elected representatives. I accept that information on the concerns leading to the establishment of the independent review can be regarded as integral information on the development in question (notwithstanding the finding of the independent review that the "almost all of the concerns are not well founded or are misconceived"). The concerns, and corresponding findings of the reviews address fundamental questions about the propriety of processes and transactions involved in the Charlesland development. Such information therefore constitutes environmental information under paragraph (c) of the definition, as information on that development.

Nevertheless, I do not consider that every piece of information on the setting up of the independent review is environmental information - details of administrative aspects of the review do not fall within the definition, as they are incidental to the development in question. Applying this framework to the information supplied to my Office, I found that the records set out in Schedule 3 to this decision contain environmental information under paragraph (c) on the setting up of the independent review.

III. Does information relating to 2008/2009 loan applications by Wicklow County Council fall within the definition of environmental information?

I accept that information on the Council's financing of the Charlesland development is integral information on the measure in question, which is captured by paragraph (c) of the definition of environmental information as information on a measure likely to affect the elements of the environment.

Having reviewed the records provided to my Office by the Department, I found that the records set out in Schedule 4 to this decision contain environmental information under paragraph (c) of the definition, on loan sanction applications to finance the development.

IV. Does information on the findings of the independent review fall within the definition of environmental information?

The findings of the independent review were published in full as two reports, which are publicly available. It is reasonable to interpret this part of the appellant's request as seeking access to information held by or for the Department on the subject of the findings, including information referring to the findings.

I have reviewed the information held by the Department on the findings of the independent review. Inevitably, these documents substantially replicate the public reports of the independent review, and include detailed accounts of the development of the Charlesland site, with additional commentary. Some of this information is commentary on the reports as submitted by third parties. Insofar that some of these records include direct information on the primary measure at issue, I find that the records set out in Schedule 5 to this decision contain environmental information under paragraph (c) of the definition.

Consideration of the redacted material

The Department provided four records to the appellant at internal review stage, all of which were redacted to some extent.

In a submission to my Office, the Department stated that all of the redactions were carried out on the basis that the deleted information was not environmental information. No details were supplied to support this contention. The Department declined to provide any alternative grounds for these redactions. In fact, as I will discuss, all of the redacted information was environmental information for the purposes of the AIE Regulations, and was within the scope of the appellant's request. The Department relied on a narrow reading of the scope of environmental information, and in doing so failed to consider the exceptions under article 8 and 9, or the public interest under article 10(3).

Record 4.3 is an internal memo on proposed housing development at Charlesland. This record was released to the appellant with commercial information deleted. Record 4.7 is an email containing a list of queries raised by the Department with the Council on the proposed development at Charlesland. The Department disclosed this record with number of queries redacted, some of which relate to financial aspects of the development, and some of which are general queries on the

timeline of events. Record 4.8 is a copy of the content of a letter from the Council to the Department replying to record 4.7. Substantial parts of this record which disclose financial information on proposed housing development were redacted. Record 4.11 is a copy of a 2008 application for funding made to the Department by the Council under the Social Housing Investment Programme. The record was released to the appellant in redacted form, with financial and other contextual information on the development removed.

Paragraph (c) of the definition of environmental information is broad, encompassing any information on a measure likely to affect the elements of the environment. Paragraph (e) includes economic analyses and assumptions used within the framework of such a measure. Information does not need to directly reflect the state of the elements of the environment in order to fall within the definition. The proposed development of social housing is a measure likely to affect the elements of the environment at the Charlesland property. There was a clear thematic approach to redactions applied by the Department, with the deleted material primarily referring to cost estimates and financial assumptions for the proposed development. I consider that the likely cost of a measure is integral information on that measure, falling within paragraph (c) and (e) of the definition of environmental information. I also find that the non-economic redactions related to integral aspects of the proposed development, and are therefore environmental information under paragraph (c).

The AIE Regulations provide a system of mandatory and discretionary exceptions to disclosure, subject to a public interest test, which are the proper mechanisms by which a public authority can protect sensitive information. The Department's approach, in which documents have been parsed for "non-environmental" information is problematic, as it presupposes that environmental information is a narrow category of information which can be isolated from its wider context. I therefore annul the decision of the Department that the redacted information was not environmental information, and I find that the redacted information is environmental information within the scope of paragraph (c) and (e) of the definition set out in the AIE Regulations. The Department should deal with the appellant's request for access to the redacted portions of these records, taking into account articles 8 and 9, and the public interest test under article 10.

The appellant also brought to my attention the fact that copies of the four records provided to him at internal review were indistinct and illegible. Having compared the original records with the redacted versions provided to my Office, it appears that the Department employed a redaction process where records were copied, redacted by hand, and then re-copied, resulting in a noticeable reduction in quality and total loss of legibility of some parts of the records which were not otherwise intended to be redacted. It goes without saying that this administrative failure defeats the purpose of releasing information, which could legitimately be the subject of an appeal to my Office in its own right. The Department cannot rely on its decision to release information where that disclosure was incomplete.

The Department has conceded that the unredacted parts of these four records contain environmental information, but has failed to properly provide access to this information. I therefore require the Department to provide the appellant with legible copies of the unredacted parts of records 4.3, 4.7, 4.8, and 4.11.

Consideration of article 8(a)(iv) and legal professional privilege

The Department contended that none of the withheld information fell within the definition of "environmental information". The Department provided an alternative ground for refusal in respect of 10 records, on the ground that legal professional privilege applied to these records. Of the ten records referred to, record 1.10 is a duplicate of record 3.5, and record 3.20 is a duplicate of record 4.9.

Article 8(a)(iv) of the AIE Regulations provides that, subject to article 10, a public authority shall not make available environmental 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 (including the Freedom of Information Act). The Minister's Guidance states "In effect, this provision means that if information about the proceedings of public bodies would, were an FoI request to be made seeking discovery of it, be capable of being protected under the FoI Acts, a public authority must not release this information under these Regulations." In her decision in case CEI/08/0012, my predecessor found that legal professional privilege provides for confidentiality of proceedings of public authorities under common law and under the Freedom of Information Act. The Department also contended that section 31(1) of the Freedom of Information Act 2014 applied to these records, as records which could not be disclosed as they would be exempt from production in proceedings in a court on the ground of legal professional privilege.

Legal professional privilege includes legal advice privilege and litigation privilege. The Department stated that legal advice privilege applied to the 10 records identified, and made no submission on litigation privilege. I examined the content of the records to ascertain whether they relate to the provision of advice by the Department's professional legal advisors. Record 1.4 is an internal memo addressed to the Secretary General of the Department, summarising legal advice obtained. Record 1.5 is a letter of advice from the Office of the Attorney General to the Department. Record 1.6 is an email exchange, including discussions of legal advice received by the Department. Records 1.10 and 3.5 are duplicate copies of a letter sent by the Department to the Office of the Attorney General seeking legal advice. Record 1.11 is an internal departmental email chain, with handwritten annotations, containing preparatory information for the Department's request for advice sent to the Attorney General's Office. Record 1.12 is the same exchange of emails as 1.11, without handwritten annotations, and includes a copy of legal advice on the Charlesland CPO prepared by the Department's legal advisor. Record 3.11 contains legal advice from the Office of the Attorney General to the Department, enclosing the opinion of a senior counsel. Record 3.20 is a redacted version of record 4.9, and contains an internal exchange of emails by staff of the Department from June 2009. This email exchange discusses the Charlesland CPO, but does not discuss legal advice relating to Charlesland. Record 6.1 is correspondence between the Department's legal advisor and Seamus Woulfe, enclosing terms of reference for the first stage of the independent review. The email contains a headnote stating that legal professional privilege applies to the email. I consider that this email does not contain any legal advice or references to legal advice, rather its subject matter is limited to discussion of the terms of references and the sequence of how the independent review was to be carried out.

Based on my examination of the records, I found that records 1.5, 1.10, 3.5, 1.11, 1.12 and 3.11 attract legal professional privilege.

Records 1.4 and 1.6 contain references to legal advice, but also contain separate information on the Charlesland development. I am satisfied that the parts of these two records which contain information on legal advice could be separated from other environmental information.

Record 3.20 is a redacted version of record 4.9. The redacted portion of record 3.20 refers to legal advice on an unrelated matter, which is outside the scope of the appellant's request, and can be redacted on this basis. I find that the unredacted parts of record 3.20 do not contain legal advice, and should be considered in light of the appellant's request.

Although record 6.1 was prepared by the Department's legal advisor, and contains what appears to be a pro forma assertion of legal professional privilege, this record does not contain legal advice and was addressed to an external third party. I therefore find that the exception under article 8(a)(iv) does not apply in the manner suggested by the Department with regard to record 6.1.

I find that, insofar as I have identified information to which legal advice privilege applies above, the exception to disclosure under article 8(a)(iv) applies to some of the information withheld by the Department, subject to the public interest test under article 10(3).

Consideration of the public interest served by disclosure

Article 10(3) of the AIE Regulations requires that a public authority must "consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal". In this instance, the public interests served by disclosure include the transparent application of national resources, and accountability of government and local government. The interest served by refusal is the confidentiality of discussions between the Department and its legal advisors. I consider that a very strong interest exists in maintaining legal advice privilege, as it facilitates frank discussions of legal matters with legal advisors, which in turn contribute to better decision making on the part of public authorities. I also consider that the two reports of the independent review substantially meet the public interest in transparency and accountability with regard to this matter. I therefore find that the public interest in disclosure does not outweigh the interest served by refusal in this case, and that the exception under article 8(a)(iv) applies to the information I have identified, notwithstanding article 10(3).

Information not considered by the Department when considering the appellant's request

The Department's decision was based on the assumption that it held 171 records relevant to the appellant's request. In the course of this review, it became evident that more records existed which had not been considered by the Department in making its decision. Record 6.17 refers to drawings and maps held by the Department which were made available to Seamus Woulfe in the course of his review. The Department acknowledged that it continues to hold such maps, and provided my Office with a supplemental schedule of 12 records relating to these drawings and plans. These records were not considered by the Department initially. Record 6.43 is a letter from Seamus Woulfe to the Department of 26 April 2012, in which he refers to papers he retained relating to the

independent review. The Department did not obtain or review these papers in the course of considering the appellant's AIE request. Record 6.56 is a letter of 31 July 2012 sent by Mr Woulfe to the Department. This letter refers to an earlier letter he received from the Department, dated 18 July 2012. The letter of 18 July was not included in the Department's schedule, and to date the Department has not confirmed whether it holds this information.

It is not normally my function to search for information on behalf of a public authority. Based on the omissions I have identified, the Department was not justified in stating that it had considered all information relevant to the appellant's request. The Department should now deal with any outstanding information relevant to the appellant's request in line with the AIE Regulations. The Department need only consider outstanding information to the extent that it falls within the three valid parts of the appellant's request, which I have identified above.

Decision

Under article 12(5) of the AIE Regulations, I reviewed the decision of the public authority on the appellant's request, and I vary the Department's decision as follows. As a preliminary matter, I find that refusal of the appellant's request for "All information...relating to the review" is justified under article 9(2)(a) of the AIE Regulations, as this part of the request was manifestly unreasonable with regard to volume and range.

I find that the Department was justified in refusing to provide access to information relating to the appointment of Mr Seamus Woulfe S.C. to carry out the independent review, as this information does not fall within the definition of environmental information set out in article 3(1) of the AIE Regulations. I find that the Department was not justified in refusing to provide access to certain records relating to the setting up of the independent review, loan sanction applications made by Wicklow County Council in 2008 and 2009, and the findings of the independent review. I find that these records contained environmental information within the meaning of paragraph (c) of the definition. I have specified which of the Department's records I found to contain environmental information in Schedules 3, 4 and 5 to this decision. Accordingly, I annul the Department's decision in respect of the records contained in Schedules 3, 4 and 5.

I find that the Department was not justified in refusing access to redacted parts of four records disclosed to the appellant at internal review stage. I find that the redacted information was environmental information within the meaning of paragraphs (c) and (e) of the definition of environmental information. I annul the Department's decision in respect of the redacted parts of records 4.3, 4.7, 4.8, and 4.11.

I find that the unredacted parts of records 4.3, 4.7, 4.8, and 4.11 were disclosed to the appellant in a partially illegible format. I require the Department to provide the appellant with clearly legible copies of the unredacted parts of records 4.3, 4.7, 4.8, and 4.11.

I find that the Department was justified in refusing access to information contained in eight records on the basis of article 8(a)(iv) and legal professional privilege. I find that article 8(a)(iv) applies to all information contained in records 1.5, 1.10, 3.5, 1.11, 1.12 and 3.11. I find that records 1.4 and 1.6 contain environmental information, some of which falls within the exception under article

8(a)(iv). I find that the parts of records 1.4 and 1.6 which contain information covered by legal professional privilege can be separated from other environmental information. I affirm the Department's decision to refuse to provide access to information to which article 8(a)(iv) applies. I annul the Department's decision to refuse to provide access to environmental information contained in records 1.4 and 1.6 which can be separated from information to which article 8(a)(iv) applies. I annul the Department's decision to refuse to provide access to information contained in records 3.20 and 4.9 on the basis that article 8(a)(iv) applies to these records, insofar that parts of these records are within the scope of the appellant's request.

Finally, I find that in making its internal review decision the Department failed to identify and review all information it holds (or information held on its behalf) relevant to the appellant's request. The Department should now carry out appropriate searches to identify whether this information is held (or is held on its behalf), and where it holds such information, it should consider whether it should be disclosed to meet the valid parts of the appellant's AIE request.

I have found that the appellant's request was in part unreasonable with regard to the volume and range of information requested. Notwithstanding this, I have identified where specific information falls within the remit of the AIE Regulations. With the exception of information to which article 8(a)(iv) applies and information which is out of scope, (and where no appeal to the High Court is made) the public authority should now deal with the valid parts of the appellant's request in accordance with the AIE Regulations.

This appeal is an unfortunate example of a public authority failing to engage with a requester to clarify a confusing and overly general request. The Department's approach was to take a narrow view of the scope of environmental information, where it would have been more appropriate to consider the grounds for refusal under article 9(2)(a) and (b). In conducting this review, unacceptable demands were placed on the resources of my Office as a result of the disorganised and at times unresponsive attitude of the Department. It is not acceptable that partial, duplicate and out of scope records should be furnished to my Office for review in the expectation that my Office will resolve matters which should be addressed at first instance.

I have afforded the appellant significant leeway when interpreting his original AIE request. It occurs to me that all parties involved in this matter would benefit from a clear restatement of what information is now requested, bearing in mind my decision. In the absence of an appeal to the High Court, and prior to engaging with the many complicated strands of this request as it stands, the Department may wish to engage with the appellant to ascertain his current attitude to his request, and to clarify his information requirements. The parties may redefine and clarify the request on an informal basis by agreement, or as provided for under article 7(8) of the AIE Regulations.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Peter Tyndall
Commissioner for Environmental Information
20 October 2016

Schedule 1 - Duplicate records

Record Number	Duplicate record(s)
4.11	4.5
3.13	5.4
3.19	5.2
3.20	4.9
3.1	4.10
1.18	3.3
1.19	3.2
1.8	3.10
1.10	3.5
2.3	3.8
2.5	6.22
2.6	6.23
2.4	6.26
2.7	6.28
1.23	6.39
8.1	6.40
2.8	2.37
1.21	6.42, 8.2
2.9	6.47
2.10	6.48
2.30	6.49
2.11	6.53
9.1	7.1

Schedule 2 - Out of scope records

Record Number
2.31
2.35
2.17
2.16
2.15
2.14
2.12
2.13

Schedule 3 - Environmental information on the setting up of the independent review

Record Number
1.1
1.3
1.4
1.5
1.6
1.7
1.9
2.7
1.10
1.11
1.12
1.13
1.14
1.15
1.18
1.19
1.20
2.1
2.11
2.2
2.3
2.32
2.4
2.5
3.11
3.4
3.6
3.7
3.9
6.1
6.13
6.14
6.17
6.25
6.27
6.45
6.46
6.5
6.50
6.51
6.54
6.6

Schedule 4 - Environmental information relating to 2008/2009 loan sanction applications by Wicklow County Council

Record Number
1.6
3.12
3.13
3.14
3.15
3.17
3.18
3.19
3.20
3.21
5.1
5.3
5.5
5.6
5.7
5.8
6.21
6.33
6.34
6.35
6.36

Schedule 5- Environmental information on the findings of the independent review

Record Number
1.21
1.22
2.10
2.22
2.38
2.8
2.9
3.23
6.41
7.2
8.1
8.3
9.1
9.2
9.3