

**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/15/0018

Date of decision: 2 November 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 information sought in the first part of the appellant's request did not fall within the definition of environmental information set out in article 3(1) of the AIE Regulations, and on the basis that the exception to disclosure under article 9(2)(b) applied to the second part of the appellant's request.

Summary of Commissioner's Decision: In accordance with article 12(5) of the AIE Regulations, the Commissioner reviewed the internal review decision of the Department. He found that the Department was justified in refusing access to the information sought in the first part of the request on the ground that it did not fall within the definition of environmental information set out in article 3(1) of the AIE Regulations. He found that the Department was justified in refusing the second part of the appellant's request on the ground that the exception under article 9(2)(b) applied, i.e. this part of the request remained formulated in too general a manner, notwithstanding the Department's invitation to the appellant to make a more specific request, as provided for under article 7(8). Accordingly, the Commissioner affirmed the Department's internal review decision in full.

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 served a Compulsory Purchase Order on the owner and on the occupier 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. In March 2011, the parties to the CPO agreed a compensation sum of three million euro.

Wicklow County Council made a number of applications to the Department to finance the Charlesland development. Concerns were raised by a number of elected representatives, including the appellant, on aspects of the development. In January 2012, a senior counsel, Seamus Woulfe SC, was appointed to carry out a review of the issues raised. 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 1 September 2014, current and former members of Wicklow County Council, including the appellant, submitted a file to the Minister for the Environment, Community and Local Government, relating to the findings of the Woulfe reports, and other matters concerning Wicklow County Council. This file was misplaced within the Department. The Minister's private secretary contacted the councillors to notify them of the loss. A replacement file was submitted to the Department by the councillors on 29 September 2014. The Department subsequently found the original file.

On 22 February 2015 the appellant made a request under the AIE Regulations to the Department. 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 first and second parts only).

The parts of the appellant's request which are the subject of this appeal are as follows:

- " 1. All information relating to the file submitted to the Minister for Environment, Community and Local Government Mr Alan Kelly T.D by Mr Barry Nevin on the 1st Sept 2014. All information including minutes of meetings, dates of meetings, emails both external and internal, letters, memos, records of phone or other conversations, reports of inquiries, all such information that is in your possession or procurement associated with the documents personally handed into your Department by Mr Nevin and later disappeared from the Minister's office and was the subject of an internal inquiry. All documents associated with the inquiry into the file's disappearance within the Department.
2. All information relating to documentation submitted to your department by *[a named third party]*. All letters sent and received, E mails external & internal, all memos, minutes and dates meeting, all records and notes of phone conversations and all such information

that is in your possession relating to *[the named third party's]* correspondence with your Minister and Department."

On 23 March 2015, the Department's decision maker wrote to the appellant and stated "...I consider that your request, as currently worded, does not contain sufficient particulars to enable the records sought to be identified. It may be refused on this basis, as permitted under Article 9(2)(b) of the AIE Regulations. I would like to invite you to make a more specific request in relation to the information you seek, such as the subject matter of the documents concerned and/or the dates between which the documents of interest would have been submitted"

The appellant replied to the decision maker by email on 2 April 2015, stating "I have given consideration to your letter dated March 23rd and it is my view that I have been quite specific in my request to you and the information that I have requested is contained therein those specifications as outlined in my request. The Information I am seeking all relate to environmental issues relating to a Flood Plain and the proposed building of a development on the said Flood Plain....The documents removed from the Minister's office and the investigation that followed, also the subject of my F.O.I request dealt with the issue of the Flood Plains as referred to above at the "Three Trout Stream".

In a decision of 16 April 2015, the Department refused the appellant's request for environmental information. The Department stated that information on the temporary loss of the file did not fall within the definition of "environmental information" contained in the AIE Regulations. With regard to the appellant's request for information submitted by the third party, the Department stated "as outlined in my previous letter, where a request has been formulated in too general a manner, a public authority may request that the applicant specify further details on the information sought. This is to enable the public authority to identify the records through reasonable steps. I regret that the second point of your request, as currently worded, is too general and does not contain sufficient particulars. While *[parts 3 and 4 of his request dealt with by the Department in a separate decision]* refer to specific matters (lands at Three Trout Stream, Charlesland, etc), these matters are not referenced in the second point of your request. It would be presumptive of me to conclude that the documentation...that is of interest to you concerns these same matters in the absence of clarification from the requestor." In this decision, the Department renewed its invitation to the appellant to make a more specific request.

The appellant made a request for an internal review of this decision. In making his request, the appellant indicated his dissatisfaction with the first instance decision, but did not take up the Department's second invitation to make a more specific request.

In an internal review decision of 15 May 2015, the Department affirmed its decision of 15 April. The Department included in the internal review decision an alternative ground for refusal of the second part of the request, stating that the matters referred to were the subject of an ongoing deliberative process which would be adversely affected by disclosure of information.

Scope of review

Under article 12(5) of the AIE Regulations, my role is to review the internal review decision of the public authority and to affirm, vary or annul it. My Office contacted both parties on 7 July 2015, and invited their submissions on the appeal.

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 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].

The appellant's position

The appellant submitted that his request dealt directly with environmental issues with regard to a proposal by Wicklow County Council to build houses on land that the appellant characterised as a "flood plain".

With regard to part 1 of his request, the appellant submitted that the file addressed environmental issues, and that as a result, he had a right to access to information with regard to the disappearance of the file from the Minister's office, and any subsequent investigation that followed its disappearance.

With regard to the second part of his request, the appellant submitted that the correspondence sought related to the development of the site at Three Trouts, and that, as a Councillor, he had a right to access this information.

The Department's position

The Department notified the appellant that the information sought in the first part of his request did not fall within the definition of Environmental Information. The Department refused the second part of the appellant's request on the basis that the exception under article 9(2)(b) applied. The Department clarified the circumstances of the loss and subsequent recovery of the file submitted on 1 September 2014.

Analysis and findings

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

I first considered whether information referred to in the first part of the request falls within the definition of "environmental information" set out in the AIE Regulations.

Article 3(1) of the 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 in defining environmental information, 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."

The first part of the appellant's request refers to a hard-copy file submitted to the Minister for Environment, Community and Local Government on 1 September 2014, which was misplaced within the Department and subsequently found. The request refers repeatedly to the loss of the file, efforts made to locate the file, and an inquiry into the loss. I consider that it is reasonable to read this part of the Appellant's request as referring only to information on the circumstances of the loss of the hard-copy of a file, submitted to the Minister on 1 September 2014.

The Department clarified to my Investigator that the file submitted to the Minister on 1 September 2014 was misplaced as it was inadvertently incorporated with other material. The persons who supplied the file were notified of this, and a substitute file was provided to the Minister. The Department stated that searches for the file did not lead to the creation of records and there was no inquiry into the loss. I accept the Department's statements in this regard. The Department furnished my Office with records discussing the loss of the file, containing exchanges of emails between the Department, the office of the Minister for Social Protection, and the appellant. Some of these records included copies of media reports on the loss of the file and internal discussion of these reports. These emails date from 15 September 2014 to 2

December 2014, and contain references to the lost file. To the limited extent that these records discuss the loss of the file, I am satisfied that they do not fall within the definition of environmental information. I consider that the loss of the file was an incidental administrative episode which had no material impact on the Department's consideration of the matters raised in the file and does not fall within the six categories of environmental information set out in the definition.

I therefore find that the Department was justified in refusing to provide access to information on the loss of the file, as it does not hold information on an inquiry in this regard, and because the information it holds referring to the loss of the file does not fall within the definition of environmental information.

Consideration of the second part of the appellant's AIE request and article 9(2)(b) of the AIE Regulations

Article 7(8) of the AIE Regulations provides that, where a request is made in too general a manner, the public authority shall, as soon as possible and at the latest within one month of receipt of the request, invite the applicant to make a more specific request and offer assistance to the applicant in the preparation of such a request. Article 9(2)(b) provides that a public authority may refuse to make environmental information available where the request remains formulated in too general a manner, taking into account article 7(8).

The second part of the appellant's request referred to "all information relating to documentation" submitted to the Department by a named third party. Apart from the identity of the third party, this part of the request was very general. The appellant did not specify any relevant subject matter, did not identify any relevant time span for such correspondence, and did not indicate which function of the Department the correspondence related to.

The Department made two invitations to the appellant to make a more specific request under article 7(8) of the AIE Regulations, including a request that he identify specific subjects and dates of interest. I consider that these invitations were warranted in the circumstances. The appellant's response of 2 April was contradictory. On the one hand, he stated that he had been "quite specific" in making his request, and disputed the premise of the invitation under article 7(8). In the same email, the appellant stated that all of the information he requested related to a flood plain at Three Trouts Stream, Greystones, County Wicklow. In fact, it was not the case that all of the information requested related to the Three Trouts site, as other subject matters were clearly captured by the wording of this part of his request. I can say also that the named third party had contacted the Department in relation to a number of matters. This left the Department in a difficult position, as the appellant had formally refused the invitation to alter his request, while at the same time appearing to limit his request to matters concerning the Three Trouts site. I am satisfied that the appellant's email of 2 April 2015 did not clarify the subject matters sufficiently. The Department declined to interpret the appellant's statement as modifying or restricting his initial request, and refused this part of the appellant's request under article 9(2)(b). At internal review stage, the Department affirmed this decision.

The AIE Regulations do not oblige public authorities to process overly general requests for information. Requests must be reasonably limited with regard to subject matter. In some cases, it may not be evident to a member of the public that a particular subject has discrete subdivisions. It may be in the interests of all parties to establish at the outset if a more specific request can be made. In the present case, it is possible the appellant had a particular subject matter in mind when he asked for information on documentation submitted by a third party. However, the wording of his request did not provide any assistance in identifying this subject. The wording of an AIE request should not require a public authority to read between the lines, or to guess at the precise subject the requester has in mind. Indeed, it would not be appropriate for a public authority to depart from an objective reading of a request without proper clarification from a requester.

In the present case, the Department provided the appellant with an opportunity to clarify his request, pursuant to article 7(8). The appellant did not engage with this invitation, and his request remained too general as a result. I therefore find that the Department was justified in refusing the second part of the request under article 9(2)(b) of the AIE Regulations.

Consideration of the public interest in disclosure

Pursuant to article 10(3) of the AIE Regulations, I have considered the public interest in disclosure of the information requested, and I have weighed this against the interests served by refusal. In cases where a request is formulated in too general a manner, it can prove difficult to accurately identify a precise public interest in favour of disclosure. Notwithstanding this, I consider that the interests of transparency and accountability of Government Departments are engaged in this case. The interests served by refusal include protecting the ability of the Department to carry out its core functions and maintaining the integrity of the request mechanism under the AIE Regulations. I am satisfied that the Department provided sufficient assistance to the appellant to meet the public interest in accountability and transparency. On balance, I do not consider that the public interest in disclosure outweighs the interests served by refusal. Therefore, the exception to disclosure under article 9(2)(b) applies to the appellant's request for information on documentation furnished to the Department by a named third party, notwithstanding article 10(3).

Decision

In accordance with article 12(5) of the AIE Regulations, I have reviewed the internal review decision of the Department. My Investigator examined a number of alternative grounds for refusal and examined records held by the Department. At times, the Department was slow to respond to correspondence from my Office, which has delayed the conclusion of my review. Ultimately, it has not been necessary to examine alternative grounds for refusal, as I am satisfied that the reasons for refusal provided at internal review were sufficient, and the Department's response to the request was appropriate.

I find that the Department was justified in refusing access to the information sought in the first part of the appellant's request on the ground that it 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 justified in refusing the second part of the appellant's request on the ground that the exception under article 9(2)(b) applies, i.e. this part of the request remains formulated in too general a manner, notwithstanding the Department's invitation to the appellant to make a more specific request, as provided for under article 7(8).

Accordingly, I affirm the Department's internal review decision in full.

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