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/15/0021

Date of decision: 4 November 2016

Appellant: Phillip Cantwell

Public Authority: Meath County Council (the Council)

Issue: Whether the Council was justified in refusing to provide access to information related to a road-realignment project because the information was either not held by or for it, or is not environmental information

Summary of Commissioner's Decision: The Commissioner found that the Council was justified in refusing to provide access to most of the requested information for the reasons given. He found that refusal to provide access to one letter was not justified. Accordingly, the Commissioner varied the Council's decision and required it to provide access to that letter.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal 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

This case concerns a project which saw the realignment of the R158 regional road linking Trim in County Meath to Kilcock in County Kildare. The project was completed in 2008. The appellant is a former Meath County Councillor, a former Trim Town Councillor, and the owner of land at Stokestown, County Meath.

On 26 May 2015, the appellant delivered an AIE request (later designated request 'B') to the Council. It was addressed to an individual Council officer and its heading was as follows:

> "Re: European Communities (Access to Information on the Environment) Regulations 2007 – 2014, Re: R158 Phase I and II Trim - Kilcock re disposal of all waste and or waste/surplus materials"

It said:

> "I refer to the above disposal of waste and or surplus materials from the Contract Phases I and II in the upgrade of the Trim to Kilcock R158 Regional Road. At the request from EPA's Environmental Enforcement, Meath County Council under your supervision and guidance carried out a Tier 1 Study of the waste/surplus materials, including contaminated tar products, on our lands at Stokestown, Trim.
>
> According to the front page of this Tier 1 Study dated July 2014, the Report was prepared by [the Council's] executive engineer and Environment Section.
>
> On the bottom of page 6 of this Tier 1 Study, [the executive engineer] stated:
>
> > "The unauthorised waste activity carried out on these lands at Stokestown would be representative of a typical authorised R10 'Land treatment resulting in benefit to agriculture or ecological improvement' as specified in the Waste Management Act 1996 as amended and permitted by the relevant Local Authority by way of a Certificate of Registration under the Waste Management (Facility Permit and Registration) Regulations 2007".

The appellant then listed 5 numbered parts to his request.

On the same day, he delivered another AIE request (later designated request 'C') to the Council. It was addressed to a different Council officer, and its heading was as follows:

> "Re: European Communities (Access to Information on the Environment) Regulations 2007 – 2014 – R158 Phase II Summerhill – Kilcock Final Account, as referred to in letter of 30 October 2008 – i.e. assemble all claims and payments for disposal of waste/surplus materials."

It said:

> "I wish to track disposal of R158 waste and surplus material ASAP – from its origin to final disposal. I attach a copy of letter of 30 October 2008, i.e. [the project's construction contractor] to [the project's consultant engineer] re Final Account of the R158 Contract.

He then listed 6 numbered parts to this request.

On the same date, he delivered another AIE request (later designated request 'D') to the Council. It was addressed to a different Council officer and it bore the following heading:

> "Your Ref: AIE-01/15 & AIE – 02/15 EU Access to Information on Environment on R158."

It said:

> "I wish to trace the waste/spoil material Phases 1 and 2 of R158 contract, its origin and excavation to its final destination, including the use of invoices/payments to check.
>
> I wish to continue using AIE for Phase 1 and Phase 2, however to reduce the work on your staff, please provide the following for Phase 1 now (Phase 2 documents at a later stage)."

He then listed 11 numbered parts to this request.

The following day, he delivered another AIE request (later designated request 'A') to the Council. It was addressed to a different Council officer, bore the same heading as request 'B', and it said:

> "I refer to [agent for construction contractor's] letters to you of 2-11-14 and 23-5-15 re the disposal of waste and or surplus materials from Meath County Council's R158 Contract which you forwarded to EPA's Environment Enforcement Department.
>
> In keeping with contents of [agent for construction contractor's] letters, please ask [the construction contractor] to provide the following information:"

It went on to list 10 numbered parts to this request.

On 5 June 2015, the Council informed the appellant that it intended to treat the four requests collectively, and to label them as requests A, B, C and D (as indicated above).

On 22 June 2015, the Council gave its decisions. In summary, the decisions were as follows:

<u>Request A</u>

The Council noted that this request asked the Council to obtain information from a third party and it also noted that the AIE Regulations do not require public authorities to create records. Notwithstanding this, the Council proceeded to address each part of the request in turn. In relation to part 1 of the request, it noted that the appellant had previously been given certain relevant information from a third party. It said that it did not hold information meetings parts 2, 4, 5, 6, 7, 8 and 10. In relation to part 3, the Council said that it would take an estimated 25 hours to search for and retrieve the minutes of what it estimated to be 50 meetings, and said that this would be charged at a rate of €20 per hour (which would amount to €500). In relation to part 9, the Council said that the Bill of Quantities had already been made available to the appellant for inspection.

<u>Request B</u>

Part of this request concerned what are known as "R10 land treatments". "R10" is the Environmental Protection Agency's (EPA's) code for the authorised and ecologically beneficial application of waste materials to land. The Council said that details of all R10 land treatments in

County Meath are listed on the EPA's website and if the appellant indicated a specific file from this list the Council would endeavour to locate it, for a search and retrieval charge.

In relation to other parts of the request, the Council denied that cheques, receipts or details of a council official's professional qualifications constitute environmental information.

Request C

The Council denied that the requested information is environmental information.

Request D

The Council provided some of the requested information, while refusing access to other information because it is not environmental information. The Council said that it would charge for the retrieval of information relating to that part of the request which sought copies of the minutes of meetings and estimated that the fee would be €500.

Internal Review

The appellant requested an internal review on 20 July 2015, emphasising that all of "the missing information" should be provided to him. He added that "when requests are refused there is an onus to suggest alternative methods to get information – this was not done." He complained about the Council's collective treatment of his 4 requests, saying that it was "most confusing and not in keeping with EC AIE's intentions". He said that he had submitted 4 individual AIE requests because he intended forwarding the responses separately to various EU and Irish State Agencies. He also complained that a charge of €500 was being used to deny him access.

The Council affirmed its original decision on 17 August 2015. It rejected the appellant's complaint that the requests should not have been treated collectively, and observed that the layout of the original decisions reflected the structure of the requests. It stood over the €500 charge, and said it was based on a rate of €20 per hour for the retrieval and analysis of documents.

Appeal

The appellant appealed to my Office on 16 September 2015.

Between that date and the date of this decision there were some developments. The appellant attended the Council's office by invitation on 11 and 14 December 2015, where (the Council said) "any information that he deemed relevant was available to copy". It also said that it had retrieved the minutes of meetings and, in a change of position, had provided the appellant with access to all of the minutes which contained references to waste-disposal, without charge. Later, the Council allowed the appellant to have access to the other minutes of meetings which it held, notwithstanding that it regarded them as outside the scope of the request. As a result, the dispute about a document-search fee was settled.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review the Council's internal review decision and to affirm, annul or vary it.

In conducting my review I took account of the submissions made by the appellant and by the Council. I had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations; Directive

2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 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); and *The Aarhus Convention—An Implementation Guide* (Second edition, June 2014).

Relevant AIE provisions

Article 3(1) provides that "environmental information" means:

> 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);

Article 7(5) provides that where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it.

Article 7(6) provides that, where sub-article (5) applies and the public authority is aware that the requested information is held by another public authority, it shall as soon as possible—

> (a) transfer the request to the other public authority and inform the applicant accordingly, or
>
> (b) inform the applicant of the public authority to whom it believes the request should be directed.

Article 10(3) provides that a public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.

Preliminary issues

1. The making of 4 AIE requests in 2 days

   The appellant made 4 AIE requests over 2 consecutive days, addressed to 4 different officers in a single public authority. The requests all concerned the same road-project.

   The first point in relation to this is that applicants do not have the right under the AIE legislation to nominate the officials who are to deal with their requests.

   The second point is that applicants should consider the burden which AIE requests can impose on public authorities. While public authorities must respect the right of public access to environmental information, article 9(2)(a) permits the refusal of a request which is manifestly unreasonable having regard to the volume or range of information sought. In practice, applicants will often be unaware of the range and volume of information which might be held in relation to their requests. Similarly, public authorities will often be initially unaware of the range and volume of the information which they hold in relation to a newly received request. However, it can also be the case that a request is manifestly unreasonable at face value. The intention behind article 9(2)(a) is clearly to ensure that the AIE Regulations do not require public authorities to take on unreasonable burdens. In the current case, the appellant's delivery of four quite extensive AIE requests over two consecutive days might have been viewed by the Council as an abuse of process, in that the Council might have chosen to regard the four requests as an attempt to avoid a finding that "the overall request" was manifestly unreasonable by breaking it into 4 separate requests.

   I am completely satisfied that the appellant had no wrongful intent when he submitted his four requests. He appears to have mistakenly believed that he could require each request to be processed by an officer of his choosing. I note that he expressed concern for the burden imposed by one of his requests by asking for the phased provision of information "to reduce the work on … staff". He asked for information on Phase 1 "now" and on "Phase 2 at a later stage". However well intended, this wording would not have afforded much relief to the Council, since it would have been obliged to respond in full within the timeframe specified in the AIE Regulations. In any event, it appears that the appellant (due, no doubt, to a misunderstanding of the process) did not consider the overall burden imposed on the Council by his four requests taken as a whole. The Council could (rightly, in my view) have taken issue with how the AIE requests were made; to its credit, it did not.

2. The collective treatment of four AIE requests

   The appellant complained that the Council's collective treatment of his four requests was "most confusing" and a breach of "the spirit and intention of AIE".

   Article 10(3) of the AIE Regulations obliged the Council to consider each of the four requests individually.

   The Council gave notice of four original decisions on the four requests in a single letter. It dealt clearly and separately with each AIE request by labelling them from 'A' to 'D'. Far from causing confusion, this use of labelling served to avoid confusion, and I have followed it in my review. (I will refer to individual parts of requests by a combination of the letter indicating the request and a number indicating the part of the request. For example, request 'B' had 5 numbered parts: I will refer to these as requests B1 to B5.)

Each separate decision provided the name of the person who made it (which was the same person in all cases) and provided details of the right to internal review. I am satisfied that the Council met its obligation to consider each request individually.

On receipt of the original decisions, the appellant made a single request for internal review of "the format" of the Council's response and its "reply" to his four AIE requests.

The Council gave notice of the outcome of its internal review in a single letter which dealt collectively with the four requests and the appellant's complaints. The decision-maker stated that he had reviewed the decisions on each of the four requests, and made a single decision to affirm these. I am satisfied that the decision shows that each request was considered individually.

On receiving notice of the Council's internal review decision, the applicant made a single appeal to my Office.

3. Whether the Council was obliged to suggest alternative methods for obtaining the requested information.

   In his appeal, the appellant complained that the Council was obliged, on concluding that it did not hold some of the requested information, to suggest alternative methods of getting it. Article 7 of the AIE Regulations sets out the obligations of a public authority where a request is made for environmental information which is not held by or for it. Article 7(6) obliges a public authority to take certain action when it is aware that the information requested is held by another public authority. In this case, having told the appellant that it did not hold certain information, the Council suggested to him that he might ask a particular private third party. The Council maintains that this third party does not hold such information on its behalf. I accept this assurance, as I see no reason why a construction contractor would necessarily hold information on behalf of its client. In these circumstances, the Council not only met its obligations but exceeded them.

The Council's position

In response to a request from my investigator the Council provided an update of its position. In summary:

Request 'A'

This request had begun with "please ask [the construction contractor] to provide the following information:" The Council denied that this contractor holds any of the requested information on its behalf. It maintains that, in these circumstances, it is not obliged to ask for the information.

Request 'B'

Request B1 was a request for information which would identify landfill-sites which a Council official had referred to as "typical" when he made a particular statement. The Council denied that it holds such information.

Request B2 asked for details of the same official's qualifications. The Council denied that this is environmental information.

Request B3 asked whether "each and every possible piece of relevant information concerning 16,500 tons of contaminated waste on the appellant's lands for any potential risk to the

environment" had been included "in the Council's Tier 1 Study of July 2014". In response, the Council stated that the report had been prepared in accordance with the relevant EPA Code of Practice. I understand that the Council means by this that it does not hold a record which says whether "each and every possible piece of relevant information" was included.

Request B4 asked for copies of all cheques relating to particular matters. While maintaining that such records would not constitute environmental information, the Council said that it does not make copies of cheques, and, accordingly, no copies of such cheques are held by or for it.

Request B5 asked for copies of particular receipts. While maintaining that such records are not environmental information, the Council provided the appellant with copies of what it said were all of the relevant receipts which it held.

Request 'C'

Requests C1 and C2 asked for certain records of correspondence referred to in a letter of 30 October 2008. The Council acknowledged holding two records relevant to these parts. One of those is the letter dated 30 October 2008 itself, a copy of which the appellant had attached to this AIE request and therefore already holds. The Council denied that the second letter (dated 20 July 2007) is environmental information. While the internal review decision affirmed the refusal to provide access to this information, the Council now maintains that this letter was amongst the records later made available to the appellant when he inspected files at the Council's office.

The Council assured my Office that it had conducted a thorough search but had not found any records relevant to requests C3, C4, C5 or C6.

Request C5 asked for copies of particular cheques and inter-bank payments. The Council said that such information is not environmental information and added that it does not, in any case, make copies of cheques.

Request 'D'

Request D1 asked for the "original letter of tender from main contractor to Meath County Council re R158 Contract Phase 1". The Council provided the appellant with the tender form submitted by the contractor.

The Council provided the appellant with access to its records relating to request D2.

In relation to requests D3 to D9, the Council said that the information in such records is not environmental information: these included invoices, monthly financial statements, letters/claims for interim payment, requisitions for cheques or inter-bank payments and copies of cheques and inter-bank payments.

Requests D10 and D11 sought copies of the minutes of meetings, and the Council said that all minutes which mention waste disposal had been provided to the appellant. Later, the Council provided the appellant with access to all of the minutes of meetings, including those which do not mention waste disposal.

The appellant's position

My investigator asked the appellant for a fresh statement of his position in relation to the 32 parts of his 4 requests. In response, the appellant indicated that:

- He had been provided with information meeting 3 parts of his requests (requests D1, D2 and D3).
- He believed that he was being wrongly denied access to information relating to 29 specific parts of his requests, as well as an outstanding letter relevant to request D1.

Since that statement, the Council provided the appellant with access to information relevant to request B5 (receipts related to waste permits) and requests D10 and D11 (the minutes of meetings). That left 26 parts of requests to be considered, along with an allegedly outstanding letter related to request D1.

In relation to records which the Council says that it does not hold, the appellant submitted that this project involved a sealed contract, and therefore all contract/tendering/related documents must (by law) be retained securely by the parties for 12 years. He also referred to the National Retention Policy Report for Local Authority Records (published by the Local Government Management Services Board in 2002), as support for his belief that relevant records should be available.

Analysis and Findings

Request D1

This asked for the "original letter of tender from main contractor to Meath County Council re R158 Contract Phase 1". The Council provided the appellant with a copy of the tender form submitted by the contractor. The appellant informed my investigator that what he really wanted was any covering letter which accompanied the tender form. While a covering letter might be attached to a tender form, I am not satisfied it would itself constitute an "original letter of tender". Also, it has not been established that there ever was a covering letter. I note that the layout of the tender form reflects the layout of a complete letter, making the use of a covering letter unnecessary. I am satisfied that the tender form provided is a fully complete original letter of tender.

Accordingly, I am satisfied that the appellant received what he asked for in request D1.

Whether refusal of request 'A' was justified

I accept the Council's assurance that the construction contractor does not hold any of the information asked for in this request on behalf of the Council. In such circumstances the Council was not obliged by the AIE Regulations to ask the contractor for the information. I therefore find that the Council was justified in refusing this request. This finding relates to all 10 parts of request 'A', which left 16 parts of 3 requests to be further considered.

Whether refusal was justified because information is not environmental information

The Council maintains that records which relate to the following 10 parts of the requests do not constitute environmental information:

- A particular Council official's qualifications (request B3).
- Copies of cheques and inter-bank payments (requests B4, C5 and D8).
- Invoices (request D4).

- Monthly Financial Statements (request D5).
- Letters/claims for interim payments (request D6).
- Requisitions for cheques or inter-bank payments (requests C4 and D8).
- Letters acknowledging inter-bank payments/cheques (request D9).

I considered whether any of these records constitute or contain environmental information within the meaning of the definition provided in article 3(1) of the AIE Regulations.

I found that they did not constitute or contain environmental information within the meaning of paragraphs (a), (b), (d), (e), or (f) of the definition.

I considered whether they constitute or contain environmental information within the meaning of paragraph (c) of the definition on account of being information related to the road-realignment project. I am satisfied that the project was a measure which affected elements of the environment. I therefore considered if the information at issue constitutes "information on" the project so as to qualify as environmental information.

I set out my approach to answering this type of question in my decision in the case of Ken Foxe and the Department of Defence (case CEI/15/0007—which is available on my Office's website: www.ocei.ie). I applied similar reasoning when conducting this review. I formed the view that the information at issue under this heading is not information which is integral to the project. Information which would show an official's qualifications (in these circumstances), or information which would show whether, when or how the contractor was paid would not tell a reader anything of substance about the project, nor would it have determined whether the project went ahead or the manner in which it was conducted. I am mindful that the cost of the project is a matter of public record. I took special care to examine the invoices to see if, in addition to requests for payment, they included any information which is integral to the project. I found that they did not. Accordingly, I find that the information which the Council said was not environmental information in the above list is not environmental information. That left 6 parts of the requests to be addressed.

In response to requests C1 and C2, the Council refused access, in its internal review decision, to an 8-page letter dated letter 20 July 2007 (headed: "Re: Projected Final Account") on the grounds that is not environmental information. The letter describes a long list of issues which were causing the project to overrun in time and in cost. I regard this letter as constituting environmental information because the information which it contains is information which is integral to the progression of the road-realignment project, as both a measure and activity affecting the environment. I find that the Council was not justified in refusing access to this letter for the reason given.

The Council now maintains that this letter was amongst the records which were later made available to the appellant when he inspected files at the Council's office. When my investigator put this to the appellant, he said that there was "no correspondence to the Council or their Consultants from [the construction contractor] amongst files made available to me". I note the absence of any record which would show that the letter had been made available to the appellant. In the circumstances, while I accept the Council's good faith, I cannot be fully satisfied that access to this letter was provided.

This leaves 4 parts of the requests (i.e. those relevant to requests B1, B3, C3 and C6) to be further considered. The Council maintains that it is not withholding information relating to these parts, because such information is not held by or for it.

Whether refusal was justified because information is not held

The Council provided my Office with an account of its search efforts. It said that it obtained all relevant records from each of its departments. It said that it had also asked the project's consultant engineers to forward to it all relevant information from their hard and soft files. The Council says that copies of all of the withheld information had been provided to my Office and no further information is held by or for the Council. The appellant told my investigator that, when he attended the Council's office, he was "given access to 20 to 24 A4 lever arch files and about 12 storage clips containing A1/A0 site maps".

Request B1 asked for details of the lands which a Council official was referring to when he made a statement about "typical" R10 land treatment sites. I am not surprised that the Council says that it does not hold such a record; I would not expect such a record to be held.

Similarly, request B3 asked for information which would show whether "each and every possible piece of relevant information" concerning contaminated waste on particular land had been included in a particular report. I am not surprised that the Council does not hold such a record; I would not expect such a record to be held.

Request C3 asked for copies of the minutes of meetings, i.e. those meetings which were mentioned in a letter dated 30 October 2008 concerning the project's final account. The Council assured my Office that its search had established that it does not hold copies of such minutes. The letter itself begins "Recent meetings and discussions regarding the above refer". One might expect that minutes would have been made to record what was discussed and decided at those meetings. However, I note that the letter of 30 October 2008 did not refer to any minutes, which leaves open the possibility that no minutes were made. However, I would only resort to exercising that power in extraordinary circumstances. In this case, mindful of the opportunity provided for the appellant to inspect the Council's files, I accept the Council's assurance. That would be my conclusion even if the retention of such records (if they exist, and they have not been shown to have existed in this case) is recommended under the National Retention Policy Report for Local Authority Records. It is not my function to investigate or rule on compliance by public authorities with that document, or with requirements for sealed contracts. I note that the contents of the letter dated 20 July 2007 (headed "Re: Projected Final Account"), which I have found was wrongly withheld by the internal review decision, provide considerable detail about matters which were likely to have been addressed in discussions about the final settlement of account.

Request C6 asked for "copies of all documents between Meath's County Manager, Officials or Consultants re R158 to Dept. of Environment, Department of Transport, National Roads Authority re Final Account of 21 Million Euro". The Council also assured my Office that its search established that it does not hold copies of such documents. I accept this assurance.

Accordingly, I find that refusal to provide environmental information for the reason that it is not held by or for the Council was justified.

I am satisfied that I have dealt with all parts of the four requests which were the subject of this review.

Decision

Having reviewed the Council's internal review decision, I find that, with one exception, the Council was justified in refusing access to information which is not held by or for it or because it is not environmental information. I found that a letter dated 20 July 2007 and headed "Re: Projected Final Account" contains environmental information, and refusal to provide access to this letter was not justified.

Accordingly, I vary the Council's decision to reflect my findings. Under the power provided by article 12(5)(a) of the AIE Regulations, and notwithstanding that the Council maintains that it has already provided access to the letter dated 20 July 2007, I require the Council to make a copy of that letter available to the appellant, in order to bring closure to this matter.

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.

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Peter Tyndall
Commissioner for Environmental Information
4 November 2016