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/15/0024

Date of decision: 20 December 2016

Appellants: Groundwork (an environmental non-governmental organisation)

Public Authority: The Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs (the Department)

Issues:

1. Whether the Department was justified in refusing access to information on the control or eradication of the invasive plant *Rhododendron ponticum* in Killarney National Park for the reasons given
2. If it was not justified, in whole or in part, whether it would be appropriate for the Commissioner to require the Department to make information available to the appellants

Summary of Commissioner's Decision: The Commissioner noted that the Department had provided the appellants with access to a large number of records, and he found that it was justified in refusing access to some of the withheld information. The Commissioner found that the Department was not justified in refusing access to certain information relating to correspondence between the Department and the European Commission and to certain records relating to tendering for works. Accordingly, he varied the Department's decision and required it to make that information available to the appellants.

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

The appellants are members of an environmental non-governmental organisation called Groundwork. Groundwork is involved in habitat conservation, and its website says that "most of

Groundwork's focus has been on the removal of the invasive plant *Rhododendron ponticum* from Killarney National Park, Co. Kerry".

Killarney National Park (the Park) is managed by the Minister for Arts, Heritage, Regional, Rural and Gaeltacht Affairs. The National Parks and Wildlife Service (NPWS) is the section of the Department which conducts the day-to-day management of the Park on behalf of the Minister.

In September 2014, the appellants submitted an AIE request to the Department, requesting information related to the control of Rhododendron at the Park. The Department assigned the reference 'AHG/AIE/2014/33' to this request.

Later that same year, Groundwork Conservation Volunteers (which is another name that the appellants use to describe their organisation) lodged a formal complaint with the European Commission (the Commission). The complaint alleged that Ireland was failing to comply with article 6(1)(2) of the Habitats Directive, by allowing oakwood habitat to deteriorate due to the spread of Rhododendron.

The AIE Request

On 8 June 2015, the appellants submitted another AIE request to the Department, this time seeking the following information:

> "All relevant information (not already released under request AHG/AIE/2014/33) regarding Rhododendron control and/or eradication in Killarney National Park in the period 1995 to June 2015 (inclusive) and to include information of relevance to future rhododendron control and/or eradication."

The appellants added that this "request should be read in conjunction with the attached documents". Attached was a letter, also dated 8 June 2015, from the appellants to the Department. It referred to the earlier AIE request, acknowledged the receipt of 256 documents in response to that request, and claimed that there was a large number of documents which had not been mentioned by the Department. The letter went on to identify examples of documents which it believed the Department held.

The Department responded on 3 July 2015 and provided access to approximately 300 additional records. The Department's decision-maker wrote that he did not believe that he could provide:

1. Records relating to correspondence with the Commission.
2. Records relating to 3rd parties or containing personal information.
3. Records of a commercial nature.

He pointed to where the appellants might obtain further information and offered to provide access to certain raw data, if required. The Department did not charge for any of the information provided.

On 31 July 2015, the appellants requested an internal review of the decision, saying that there was "still a large number of documents missing", and they listed 44 outstanding items.

On 28 August 2015, the Department gave notice of its internal review decision. It varied the original decision by providing access to some information which had been redacted by the

original decision-maker, provided redacted access to one additional document, and provided access to "copies of Ministerial correspondence with respect to Rhododendron". The decision-maker said that a fresh search had not identified any other documents. Otherwise, this decision affirmed the original decision. Notably, the internal review did not consider the status of records relating to correspondence with the Commission, because the decision-maker understood that the appellants had agreed to exclude such information from the scope of the review.

Dissatisfied, and believing there was a large amount of material that the Department was unwilling to release, the appellants appealed to my Office on 25 September 2015.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is: to review the Department's internal review decision; to affirm, annul or vary it; and (if appropriate) to require the Department to make environmental information available to the appellant.

The appellants assured my Office that they have no interest in obtaining commercial or personal information, and said that they told the Department this before the original decision was made. They said that they understand and accept the redaction of such information, but wanted my Office to check that those redactions (which were said to apply only to personal or commercial information) had not been applied to any other type of information. The appellants therefore voluntarily (and commendably) narrowed the scope of their request so that efforts could be focussed on the information in which they are interested.

In conducting my review I took account of the submissions made by the appellants and the Department. 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 (the Minister's Guidance); 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)(the Aarhus Guide).

The appellants' position

The appellants submitted that "there is much more information that has not been shared or actually searched for". They provided my investigator with a list of 44 items of information within the scope of their request which they expected to be held by the Department.

For example, they pointed out that (in their words):

1. In June 2014 Minister Deenihan announced "I have allocated a further €100,000 for the management of this plant" (i.e. Rhododendron). Information relating to how this additional €100,000 was spent tackling Rhododendron is missing.
2. No records of communication between Minister Humpreys or her office and NPWS were provided.

3. No records were provided from a certain previous Regional Manager who had responsibility for Killarney National Park, and only one record from another holder of that post was provided.
4. Just one record of communication between Voluntary Service International (VSI) and Killarney NPWS staff was released, despite these (i.e. VSI) being mentioned in numerous statements and press releases. No records of communications between the Killarney Nature Conservation Group and NPWS were released.
5. No habitat surveillance reports for the Killarney Oakwoods were released.
6. One record (number 278) released by the Department contained a statement made by a senior official of the Department saying that he had been unable, due to a lack of staff resources, to check for any relevant records on the electronic or paper files of a recently retired scientific officer (a woodlands specialist).
7. Record number 56 (which had been released in part-redacted form) was not redacted for the reason given by the Department. (The appellants described this as "a crude attempt to hide information which called into question how other redactions could be trusted to have been made for the reasons given".)

The Department's position

Information provided to the appellants

The Department said that it carried out extensive trawls to identify all relevant records and that, in response to an earlier request, this request, and a later request, taken as a whole, it has provided the appellants with over 600 records. It said that the overwhelming majority of these records were released in full.

In relation to record number 56, the Department said that the part-redacted version which it had given to the appellants had been given in error when it had been accidentally conflated with another record. The Department said that it had apologised to the appellants for this error and provided them with an unredacted copy.

With regard to the reference to a 'Rhododendron Status Report/Strategic Plan' in record number 129, the Department told my investigator that this relates to two reports (a 'Strategy for Rhododendron Control in Killarney National Park' and 'Site management – Killarney National Park Rhododendron Control strategy'). It said that both of these documents were provided to the appellants in response to the previous AIE request and the appellants were told this in the internal review response to the current request.

Information refused because it is outside the scope of the request

The Department provided the appellants with a heavily redacted copy of record number 232. It said that this document was prepared as a briefing for a new minister on all of the activities of the NPWS. It said that, since the redacted material does not relate to Rhododendron, it is therefore outside the scope of the AIE request. It said that the section within the report which is pertinent to the request was released in full.

The Department submitted that, while the appellants pointed to a lack of correspondence with other volunteer groups amongst the released records, any withheld records meeting this

description were deemed to be outside of the scope of the request since they do not deal with Rhododendron control.

The Department submitted that the appellants had agreed that information relating to correspondence with the Commission was outside the scope of the request.

Information redacted for other reasons

In its internal review decision, the Department provided access to 13 part-redacted records. One of these was the ministerial briefing document which was mentioned above. The Department said that information redacted in the remaining documents was personal or commercial information.

Information refused because it was not held

The Department provided my Office with a description of how it searched for relevant records. It said that searches had been conducted both at regional level and within the Department's office in Dublin and said that these were conducted through the relevant principal officers in each area. It assured my Office that the "records identified and released represent the extent of its holdings" with regard to the scope of the request.

My investigator put the appellants' list of 44 outstanding items of information to the Department. In its response, the Department did not address the list item by item but re-iterated that no further relevant records are held by or for it. By way of explanation, it said that:

> "the material sought dates back over 20 years, covering a period when the functions in relation to the National Parks and Wildlife Service have been housed in several different Departments. The material in question relates primarily to operational work … The nature of the work (being primarily fieldwork) and the upheaval caused by multiple transfers between Departments and systems over the course of more than two decades might account for what the appellants perceive as gaps in the records".

With regard to record number 278 and the difficulty experienced in checking for relevant records held in the files of a retired scientific officer, the Department said that this problem had been overcome and those files were searched for relevant records: No further relevant records were found.

<u>Analysis - was refusal justified by the reasons given?</u>

Information withheld by redaction because it was outside the scope of the request

I compared the Ministerial briefing document with the redacted version provided to the appellants and I am satisfied that the information which was redacted falls outside of the scope of the AIE request. I therefore find that refusal to provide access to this information was justified for the reason given.

Information withheld by redaction for other reasons

I examined the other redactions made to the released records. I note that the appellants accept the redaction of personal or commercial information, effectively putting it outside the scope of this review. I find that redactions were made for the reasons given. Accordingly, it is not

necessary for me to determine if refusal to provide access to this information was justified under the AIE Regulations.

Other information which was said to be outside of scope by agreement.

The Department told my investigator that it holds 15 records relating to the complaint which the appellants lodged with the Commission in late 2014. The Department submitted that these records were not included in the scope of the AIE response, by agreement with the appellants. My investigator contacted the appellants to confirm this. They denied that they had agreed that such information fell outside of their request. They said they had accepted in good faith that the Department's decision-maker (in stating that he did not believe that he could provide such information) was following correct procedure and had correctly excluded this information. They added that, if the decision-maker "was incorrect in excluding this information", they "would expect all of this information to be supplied as a result of the appeal process". Such information is not of a class of information which is necessarily outside the reach of AIE.

In circumstances such as this, where the parties disagree about the history of their dealings, I have to rely on the written record. While the Department maintains that agreement had been voluntarily (albeit orally) given, it put forward no record which would show that the appellants had unambiguously agreed to drop this part of their request. I must therefore rely on the written record and regard this information as remaining within the scope of review.

Accordingly, I must find that failure to provide access to information relating to correspondence with the Commission was not justified by the reason given.

Information not held

The Department assured my Office that rigorous and thorough searching has not resulted in the identification of further records. I note that the Department offered an explanation which, it says, "might account for what the appellants perceive as gaps in the records". I share the appellants' perception of gaps in the records.

My investigator probed the Department's insistence that certain records are not held. In the resulting dialogue, the Department explained that:

- In relation to the €100,000 allocated for works, the Department said that its original decision-maker has discussed the associated tender documentation with the appellants as part of the scoping of the query. It said that the appellants had agreed its exclusion on the basis of the commercially sensitive and third party information contained therein and indicated that it was the Department's administration and management files they were interested in. At the request of my investigator, the Department provided my Office with copies of the tender documents. While much of these contain commercially sensitive information, the "invitation for tender" does not, and it provides information about what works were to be done to control Rhododendron, and how they were to be done (for example, what herbicide was to be used). This information is clearly of interest to the appellants and is neither personally not commercially sensitive.

- In relation to the absence of records of communication between Minister Humpreys or her office and NPWS, the Department says that "this would be normal" and such communication would generally be oral.
- In relation to the absence of relevant records from a certain Regional Manager who previous had responsibility for Killarney National Park, and only one record from another incumbent, the Department maintains that no such records were found—with the implication being that the upheaval caused by multiple transfers of NPWS along with changes of email-systems—during the relevant period might account for this.
- In relation to the absence of habitat surveillance reports for the Killarney Oakwoods carried out in order to meet Ireland's obligations under article 11 of the Habitats Directive, the Department explained that such reports are prepared for habitats on a national, rather than a local, basis. Accordingly, there was no "article 11 report" on oakwoods in the Park. The Department had provided the appellants with links to further information on this subject in its original decision, but, for technical reasons, these were not accessible to the appellants. The appellants said as much in their internal review request, but this point was not addressed in the internal review decision, having been apparently overlooked by the Department. Following the intervention of my investigator, the Department provided access to this information.

AIE legislation provides a right of access to environmental information that is held in a material form. My role requires me to consider whether a public authority which says that it does not hold certain information has conducted a sufficiently thorough search before concluding that the information is not held by or for it. Where I am satisfied that information is not held, I have no role in enquiring into why that is the case. Accordingly, while public authorities are not obliged to explain to my Office why they do not hold certain information, it is helpful when they do so, as it assists me in my task of determining whether or not I am satisfied with their assurances.

I considered the Department's explanation for the absence of certain records:

1. <u>The nature of the work, being primarily fieldwork</u>

I am not clear on what exactly the Department's point is here: it could be suggesting that some records are not made in the field, or are not subsequently transferred to office-based records, or are not retained over time. I cannot accept that these are relevant considerations: People engaged in many outdoor professions/occupations (such as land-surveyors and foresters) do not appear to have any difficulty in making or retaining field-records. I have no reason to believe that NPWS outdoor staff or contractors are any less competent with regard to the making or safe-keeping of field records. In any case, the records which the appellants regard as most notable by their absence are not the kind of records which one would expect to be made in the field.

2. <u>The upheaval caused by multiple transfers over more than two decades</u>

The AIE request concerns records created between 1995 and June 2015. I understand that the NPWS has been "without a permanent home" during this period. The Department said that

> "During the circa 20 year period of the request, the functions and staff of the Heritage Service [including the NPWS] have transferred between the Office of Public Works, the Department of Arts, Heritage , Gaeltacht and the Islands, the Department of Environment, Heritage and Local Government and the present day Department of Arts,

> Heritage, Regional Rural and Gaeltacht Affairs. Each change would have been accompanied by much upheaval and changes in systems, including IT arrangements, and often changes in personnel on the administrative side."

I understand that most sections of the NPWS did not physically move during these changes, and I would expect that copies of many relevant records would be kept at the Park's Offices throughout the relevant period. Nonetheless, I accept that such frequent organisational changes are not conducive to good record-management. Moreover, in response to a query from my investigator, the Department confirmed that:

> "The Department of Arts, Heritage, Gaeltacht and the Islands [1997-2002] and the current iteration of the Department (Arts, Heritage and Gaeltacht Affairs [2011-2016] and Arts, Heritage, Regional, Rural and Gaeltacht Affairs [2016 onwards]) - did not have a formal document-management (or document-retention) policy in place."

(The official who spoke to my investigator added that he understood that the corporate governance wing of the Department currently has a project underway to develop such a policy.)

I accept that this information helps to explain gaps in the records.

I acknowledge also that some of the items referred to by the appellants in their list presume the existence of records which might never have existed. For example, one Departmental record said: "We will need to discuss further … with a view to preparing a submission for the Parks and Reserves Unit" [of the NPWS]. The appellants asked for a copy of that submission, but it has not been established that it ever existed.

In light of all of the above, I accept the Department's assurance that it holds no further relevant information. That means, for example, that I accept that the Department does not hold copies of relevant herbicide licences. It is not for me to say whether the Department ought to have held such licences, and, if it did hold them, whether it ought to have retained them. The appellants and any other interested parties are entitled to judge for themselves whether they consider this to be a satisfactory state of affairs. My role concerns access to environmental information which *is* held and no more than that. I am pleased to note, however, that the Department is preparing a document management/retention policy.

Conclusion on the justification of the internal review decision

I find that refusal to provide access to redacted information and to information that was "not held" was justified by the reasons given.

I am not satisfied that refusal to provide access to information relating to correspondence with the European Commission was justified, because the Department has not provided any written evidence to show that the appellants had agreed that such information was excluded from the scope of the request. I am also not satisfied that refusal to provide access to the request for tender was justified. Accordingly, I proceeded to consider whether it would be appropriate for me to require the Department to make such information available to the appellants.

Whether the Department should be required to provide access to information relating to correspondence with the European Commission

As mentioned in the 'Background' section to this decision, the appellants submitted a complaint to the Commission in late 2014, alleging that Ireland was failing to comply with the Habitats

Directive by allowing oakwood habitat in the Park to deteriorate due to the spread of Rhododendron.

On being informed by my Office that information relating to correspondence with the Commission remains within the scope of review, the Department acknowledged holding 15 relevant records, and provided my Office with copies of those records, along with a numbered schedule.

The Department submitted that if it had been aware that these records were within the scope of review, it "would have refused/redacted" these records in reliance on:

- Article 8(a)(iv) to protect the confidentiality of the proceedings of public authorities.
- Article 9(1)(b) because disclosure would adversely affect the course of justice.
- Article 9(2)(d) because the request concerns the internal communications of public authorities, taking into account the public interest served by disclosure.
- Section 30 of the Freedom of Information (FOI) Act (which concerns records related to the functions and negotiations of FOI bodies).

In support of its article 9(1)(b) argument, the Department cited the Minister's Guidance at paragraph 12.3, which states:

> "Environmental information relating to anything which is the subject matter of any legal proceedings, or of any formal inquiry (whether past or present), or any preliminary investigation, may be refused. Examples would include … information relating to preliminary or other proceedings instituted by the European Commission."

The Department submitted that "many TFEU (Treaty on the Functioning of the European Union) infringement proceedings are initiated following the receipt of a Formal Complaint by the Commission. Accordingly, Formal Complaints often form part of the beginning of a process that leads to a Letter of Formal Notice, Reasoned Opinion, and referral of the matter to the Court of Justice by the Commission".

The Department submitted that since the European Commission now views the EU Pilot Process as encompassing infringement proceedings, this implies that that formal complaints should also be viewed as forming part of infringement proceedings.

In addition, the Department submitted that "the release of documents which may form part of infringement proceedings may adversely affect the course of justice, given that infringement proceedings form part of a potential legal process which may be referred to the Court of Justice".

The relevant records largely consist of emails and email-chains, along with a number of attachments. Counting each email or attachment as an individual document and disregarding all duplicates I found that, while the schedule lists 15 records, there are in fact 46 documents.

I checked the dates when these documents were created and found that 13 emails were created after the date of the AIE request: these are therefore outside of the scope of the request and this review.

Of the remaining 33 records, I find that 15 do not contain environmental information. These are typically one or two line emails saying things of no more importance than "have you anything to

add?" While attachments to such emails might contain environmental information, the emails themselves do not.

The 18 records which I regard as containing environmental information include 3 documents produced by the appellants, i.e.

- Their complaint to the European Commission.
- The "Killarney Oakwoods Project report" to the NPWS, 2006.
- The report entitled "Observations of Rhododendron in Killarney Oakwood areas cleared and maintained by Groundwork Conservation Volunteers in the period 1981 – 2005"

I am satisfied, from communications between the appellants and my investigator, that the appellants are not seeking copies of the above documents. Accordingly, I did not consider them further.

That left 15 records containing environmental information within the scope of the request. The earliest of these is an email from the Commission notifying the Department of the complaint. The environmental information in this document lies in the appellants' complaint, which it quotes. Since I am satisfied that the appellants are not seeking a copy of their own complaint, I did not consider this record further. The latest-dated document is the Department's three- record response to the Commission on the complaint (i.e. a response and two attachments).

In between these records (in time) are 11 records of internal communications relating to the coordination of the Department's response to the complaint.

Course of Justice

Article 9(1)(b) provides that a public authority may refuse to make environmental information available where disclosure would adversely affect the course of justice.

In case CEI/14/0002 I found that records created for the purpose of preparing a response to formal complaint proceedings brought by the European Commission could be refused on "course of justice" grounds. I therefore accept that refusal by the Department to release such information in this case, when acting in response to a live complaint of this nature, could be justified in order to allow the Department (as I said in my decision in the earlier case) to "prepare … in confidence in a similar manner as when litigation before the courts is contemplated".

However, in the current case the Commission closed its complaint file (without making a finding) in July 2016. In these circumstances, I find that article 9(1)(b) cannot justify the withholding of this information, since there is no longer any "course of justice" in progress.

The internal communications of public authorities

Article 9(2)(d) provides that a public authority may refuse to make available environmental information where the request concerns internal communications of public authorities, taking into account the public interest served by the disclosure.

This ground of refusal is discretionary and subject to a public interest test. The Minister's Guidance says that this ground should not be resorted to as a simple expedient to protect all internal communications in circumstances where it would be unreasonable. It says that public

authorities would not be expected to invoke this protection unless there are good and substantial reasons – not otherwise available in articles 8 and 9 – for doing so.

As mentioned above, the records include 11 internal communications. Two of these principally concern personal information relating to the health of a member of staff involved in controlling Rhododendron in the Park. Having examined these records, I do not consider that the personal information could be separated from the other information in these records without compromising the confidentiality of the personal information. I am therefore satisfied that there is a good and substantial reason for access to these records to be withheld. While the AIE Regulations include provisions which might more obviously apply to such information (such as article 8(a)(i) which deals with personal information or article 8(a)(ii) which deals with the interests of a person who supplied information), I am satisfied that article 9(2)(d) also applies in these circumstances. I am mindful that the appellants made it clear that they do not wish to access personal information, and I am satisfied that the interest served by refusal is not outweighed by any public interest that would be served by disclosure. I therefore find that it would not be appropriate for me to require the Department to provide access to this information.

Three of the internal communication records are drafts of the response prepared for the Commission. All of the environmental information which is in these drafts is also contained in the Department's eventual response to the Commission. Since such environmental information was therefore communicated externally to the Commission, it is no longer capable of being protected on internal communications grounds.

Four of the internal communication records contain information about Rhododendron-control work undertaken in late 2014. These contain some environmental information that is not contained in the response given to the Commission. Two other records concern the setting of conservation objectives for the oakwoods of Killarney National Park Special Area of Conservation: this environmental information is not included in the response to the Commission. I cannot see why the Department would wish to refuse access to the information in these six records simply because the request concerned its internal communications. Even if I were satisfied that a case for refusal on this ground had been established, I consider that the public interest in disclosure of this information would outweigh the interest served by refusal. Accordingly, I find that withholding the information in the latter six records would not be justified on internal communications grounds.

<u>The confidentiality of the proceedings of public authorities</u>

The Department submitted that access to the relevant information should not be provided, on the grounds of article 8(a)(iv) of the AIE Regulations and Section 30 of the Freedom of Information (FOI) Act. The FOI Act cannot be a basis for the refusal of an AIE request in itself: it can only be relevant in so far as it supports a refusal based on an article of the AIE Regulations; in this case, article 8(a)(iv).

Article 8(a)(iv) provides that a public authority shall not make environmental information available where disclosure would adversely affect the confidentiality of proceedings of public authorities, where such confidentiality is otherwise protected by law.

Section 30 concerns the functions and negotiations of FOI bodies and the Department is an FOI body. Since the complaint to the Commission has been closed, the question of "negotiations" (between the Department and the Commission) does not arise.

The most obvious Departmental "proceedings" to consider are its "preparation for infringement proceedings". While the Department did not identify which provision in section 30 it believed should apply, it raised section 30 in the context of its belief (at the time) that the complaint to the Commission was still "live". It referred to European case law relating to the release of documents which form part of infringement proceedings where release would undermine the protection "of the purposes of inspections, investigations and audits". These are matters provided for in sub-section 30(1)(a). This is a harm-based provision, which requires the decision-maker to identify the potential harm feared and consider the reasonableness of any expectation that such harm will occur. In the present circumstances, the threat of infringement proceedings has been withdrawn, thus eliminating any potential harm. I therefore find that withholding the information on this ground would not be justified.

In the aftermath of the removal of the threat of legal proceedings, the Department did not argue that any other proceedings are in progress. As mentioned above, two of the records concern the setting of conservation objectives for the oakwoods of Killarney National Park Special Area of Conservation. The records showed that the Department was is the process of establishing "site-specific conservation objectives" for Special Areas of Conservation. It appeared to me that information on this process would be information on Departmental "proceedings". I therefore considered whether refusal to provide access to the information in these two records would be justified because disclosure would adversely affect the confidentiality of such proceedings (if such confidentiality is protected by law). The Department has not made any submission on this matter and I am unaware of whether the confidentiality of such proceedings is protected by law. Even if I were satisfied that it is, I would then have to consider if disclosure would *adversely affect* the confidentiality of such proceedings. On examining the records, I see that all that a reader would learn from them would be (if they did not know already) that such proceedings were ongoing. There is no suggestion that the very fact that such proceedings are underway ought to be kept from the public: I cannot see how informing the public of the existence of such proceedings could adversely affect any confidentiality involved in the actual progress of those proceedings. I therefore find that article 8(a)(iv) would not justify the withholding of environmental information in these circumstances.

<u>Conclusion</u>

Of the 46 documents relating to correspondence between the Department and the Commission, I find that it would be appropriate for me to require the Department to provide the appellants with access to records about Rhododendron work undertaken in late 2014, records about conservation objectives, and the Department's response to the Commission on the appellants' complaint.

I also considered whether any of the issues raised would justify the withholding the "request for tender" document from the appellants and concluded that they would not.

Decision

Having reviewed the Department's internal review decision, I find that the Department was justified in not providing access to redacted information and to information which it does not hold.

I find that refusal to provide access to certain records relating to correspondence with the Commission, and to a tender document, was not justified by the reason given.

Under the power given to me in article 12(5) of the AIE Regulations, I vary the Department's decision and require it to provide the appellants with access to the environmental information in the following records (see further details in the attached Appendix):

- Four emails which contain information about Rhododendron work undertaken in late 2014.
- Two emails which contain information about the setting of conservation objectives for the oakwoods of Killarney National Park Special Area of Conservation.
- The Department's three- document response to the Commission.
- The "Request for Tender" document issued by the Department in late 2014.

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 December 2016

Appendix to OCEI Decision in case CEI/15/0024

The records referred to in OCEI's Decision

1. The four emails which contain information about Rhododendron work undertaken in late 2014 are:
    a. Email of 1 December 2014 at 15:42 hrs, from Frank McMahon to Philip Buckley (in record 10 of the Department's second schedule).
    b. Email of 1 December 2014 at 16:13 hrs from Philip Buckley to Frank McMahon (in record 10 of the Department's second schedule).
    c. Email of 2 December 2014 at 22:26 hrs from John Fitzgerald to Philip Buckley (in record 11 of the Department's second schedule).
    d. Email of 3 December 2014 at 12:19 hrs from Frank McMahon to John Fitzgerald (in record 11 of the Department's second schedule).
2. The two emails which contain information about the setting of Conservation Objectives for the oakwoods of Killarney National Park Special Area of Conservation are:
    a. Email of 12 November 2014 at 21:28 hrs from Philip Buckley to Ciaran O'Keeffe (in record 2 of the Department's second schedule).
    b. Email of 13 November 2014 at 10:19 hrs from Ciaran O'Keeffe to Philip Buckley (in record 2 of the Department's second schedule).
3. The Department's response to the Commission, consisting of the three documents sent by John Fitzgerald to the Commission by email at 17:08 hrs on 21 November 2014 (i.e. a four-page letter plus a map and a list of capital works contracts 2005 – 2013, in record 15 of the Department's second schedule).
4. The "Request for Tender" document consists of a covering sheet entitled "Request for Tenders, Department of Arts, Heritage and the Gaeltacht, Rhododendron Clearance Killarney National Park", along with 8 pages of text, a one-page "Schedule", five maps/air photographs, plus Appendix 1: "Approved Methodologies".