

**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/16/0028

Date of decision: 13 April 2017

Appellant: Donal O’Brolchain

Public Authority: Dublin City Council (the Council)

Issues:

1. Whether the Council was justified in refusing the request for the reason given.
2. If the Council was not justified in refusing the request in whole or in part, whether it would be appropriate for the Commissioner to require the Council to make information available to the appellant

Summary of Commissioner's Decision: The Commissioner found that the Council was not justified in refusing the request for the reason given. However, he accepted that the Council later established that it does not hold any environmental information of interest to the appellant. Accordingly, he affirmed the refusal decision, while varying the ground of justification to “information not held”.

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 AIE Request

On 12 May 2016 the appellant submitted an AIE request to the Council saying the following:

“Given the impact of traffic noise and traffic emissions on human health I seek, under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014, a list of all reports/studies (including draft report/studies) covering transport within the area of North Dublin City from Cabra/Navan Roads to Howth Road and inside the M50, done since July 1998 with the following details for each report/study

- Title e.g. Dublin Port Tunnel Environmental Impact Statement.

- Who commissioned the report: e.g. Dublin Corporation.
- Date of completion: e.g. July 1998.
- Who compiled the Report: e.g. Dublin Corporation, Geoconsult Arup Joint Venture.
- How many volumes in the report/study (including appendices to draft report/studies) e.g. 5 volumes”.

On 1 June 2016, the Council gave notice of its decision to refuse the request, as follows:

“This request would require the retrieval and examination of such a volume of records as to cause substantial and unreasonable disruption of work in this department [i.e. the Council’s Environment and Transportation Department], particularly at a time when there is considerable pressure on scarce resources. Also, much of the material sought has already been and is or was in the public domain. Much of the material i.e. Environmental Impact Statements in relation to LUAS, Metro North etc. fall within the remit of other bodies. Consequently I have no option but to refuse your request in its present format”.

The decision-maker went to say:

“As no actual list of the requested reports/studies exists, that we are aware of, it would be helpful if you could reformulate the request and clarify some issues e.g.

- Are you seeking information specific to the particular area outlined only or relating to Dublin transport in general, which would obviously include the outlined area?
- Does the request refer only to specifically commissioned reports and studies?
- Does the requested information include reports which may have formed part of the City Development Plan, Corporate Plans etc., in which case your request must be sent to other departments.

I would be obliged if you could contact me again to further discuss your requirements and we shall endeavour to assist you in reformulating your request.”

The decision-maker also notified the appellant of his right to seek an internal review of the refusal decision.

The appellant spoke by telephone with the decision-maker on 3 June 2016 and discussed his requirements. The decision-maker suggested that the appellant might send an email “to clarify matters” and said that this email would be forwarded to the Council’s Head of Technical Services, in case he might be able to help. (The decision-maker later told my Office that “the subject matter of the request is such that no other person currently employed in this department has adequate knowledge in this area, particularly as some of the surveys being requested would be up to 18 years old and there is no evidence that any such surveys were carried out”.)

The appellant followed this conversation with an email to the Council, providing further information of what he was seeking. He explained that he was puzzled by the emphasis on Fingal/Swords/Airport in a National Transport Authority draft study dated April 2002 and entitled *Study of Transport Corridors for Fingal Corridors in advance of Metro North*. He explained that he was trying to discover “if equivalent studies had been done for other more

densely populated areas e.g. Drumcondra, Santry and Coolock”. He did not reformulate his request.

On 21 June 2016 the appellant wrote to the Council saying:

“Further to my letter of 12 May last, the Dublin City Council refusal dated 1 June 2016, and my email of 3rd June 2016 ... I appeal this refusal

The Council acknowledged receipt of the request for internal review, named the official who would be dealing with it and said that a decision would be due not later than 22 July 2016.

I understand that the Council’s Head of Technical Services contacted the appellant by telephone on 1 July 2016 and later told colleagues that this conversation gave him a better understanding of the appellant’s requirements.

On 11 July 2016 the nominated internal-review decision-maker wrote to the appellant. He noted that the appellant had further contact with the original decision maker “following the refusal decision” and with the Head of Technical Services. He expressed his regret at the delay in the case and included a paragraph setting out how the appellant could appeal “this decision” to my Office. He also said that he hoped that the matter would be concluded to the appellant’s satisfaction as soon as possible after 25 July 2016.

The Council wrote again to the appellant on 27 July 2016 and informed him that the Head of Technical Services had not been able to find any information or evidence of further reports or surveys relevant to the request, other than those which the appellant was already aware of.

Dissatisfied with this, the appellant appealed to my Office.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is firstly to review the Council’s internal review decision and to affirm, annul or vary it. If I find that refusal was not justified for the reasons given in that decision, my role is to decide whether it would be appropriate for me to require the Council to make environmental information available to the appellant.

In conducting my review I took account of the submissions made by the appellant and 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 (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 decision under review

The appellant took the Council’s letter on 11 July 2016 as its internal-review decision: It was signed by the person who the Council told him would be conducting the internal review; it was delivered within the decision-notification timeframe set out in the AIE Regulations; and it notified the appellant of his right to appeal “this decision”.

The Council later told my investigator that its letters of 11 July 2016 and 27 July 2016 were both in response to the request for internal review. However, the letter dated 27 July 2016 was outside

of the time allowed by the AIE Regulations for a response to a request for an internal review and for that reason could not constitute a valid notification of a review decision. For this reason I am satisfied that the Council's letter dated 11 July 2016 contains the decision that I am to review.

While that letter includes details of how "this decision" might be appealed, I find it difficult to identify any decision within it. It informed the appellant that he would have to wait longer than the time allowed by the AIE Regulations for satisfaction. I conclude that I ought to characterise this letter as giving notice of a decision to refuse the request because the Council was not able to complete its search for relevant information within the time-scale provided in the AIE Regulations.

The appellant's position

In a submission to my Office, the appellant explained in detail why he was seeking the information which he requested. However, he did not present any argument as to why I should find that the Council had wrongly withheld environmental information from him. He said that: "If I could be sure that Dublin City Council made all of their reports available to the public, as a matter of routine, I would not feel it necessary to seek information under Access to Information on the Environment Regulations. I do not see any reason that DCC cannot make a list of all reports that they are aware of and issue it to me, as I requested. Without such a list, how can I be sure that DCC is not withholding any relevant information from me?"

Analysis of the justification of the refusal

I am satisfied that the request sought environmental information, and that it was refused because the Council had not been able to complete its search for relevant information within the required timescale.

I appreciate that staff in public authorities are often under considerable pressure of work, and that it can often be the case that the "corporate memory" is held, if at all, in the minds of a small number of officials with long service. I note that article 5 of the AIE Regulations obliges public authorities to make all reasonable efforts to maintain environmental information in a manner that is readily reproducible and accessible by information technology or by other electronic means. This requires the adoption of systems of information-management that do not rely on human memory and I appreciate that achieving this goal will take time and other resources. However, my review-role requires that I consider whether refusal was justified under the provisions of the AIE Regulations.

Finding: Unless a public authority invokes the provisions of the AIE Regulations which deal with requests which are manifestly unreasonable, it does not have a discretion to refuse a request simply because it is unable to complete its search for records within the time allowed. I therefore find that the internal-review decision was not justified by the reason given.

Whether it would be appropriate for me to require the Council to provide the appellant with access to withheld information

The Council informed the appellant in a letter dated 27 July 2016 that, having completed its internal enquiries, it had established that it held no relevant information, other than those reports

and surveys of which the appellant was already aware. It told my investigator that the appellant had told it by telephone that he did not wish to receive information on reports and surveys of which he was already aware. However there was no written confirmation of this conversation and no list of the surveys and reports which might be ruled out of scope as a result. (This is a recurring problem: it would be far better if a public authority engaging with an AIE applicant by telephone would always follow up by creating a record of any agreement made - or concessions given by the applicant - and promptly sharing that record with the applicant.)

My investigator asked the appellant if this account of a telephone conversation is true and he confirmed that it is. Since there was no record of the titles of the surveys and reports discussed, my investigator suggested to the Council that it would be helpful if it would list those documents so that I could put the list to the appellant with a view to confirming what should be excluded from the scope of my review. The Council undertook to pass this suggestion to the appropriate member of staff and apologised for the delay. After some further delay, the appellant took the initiative and drew up a list of the reports and studies of which he is aware and gave it to my investigator, who put it to the Council. The Council then confirmed that it did not hold any other relevant information.

My investigator asked the appellant if there is any reason why I should not accept the Council's assurance. The appellant replied that he is not convinced by the Council's assurance and he alluded to various documents which he knew to have been held by the Council without having been made public. However, he did not point to the existence of any withheld records relevant to this review and he did not persuade me that I should not accept the Council's assurance on this occasion. I therefore accept the Council's assurance that it does not hold any information within the scope of the request which is of interest to the appellant.

Decision

Having reviewed the Council's decision, I find that refusal was not justified for the reason given. However, I accept that the Council does not hold environmental information that is both within the scope of the request and of interest to the appellant. In these circumstances, it would not be appropriate for me to require the Council to make environmental information available to the appellant. Accordingly, I affirm refusal of the AIE request while varying the ground of justification to "information not held".

Comment

Some aspects of this case are worthy of comment for the benefit of public authorities and future applicants for AIE. The AIE request in this case asked for "a list" and the Council's original decision-letter said that no list of that type existed, but without citing this as a reason for refusal. The decision under review in this appeal was the Council's internal-review decision, which did not rely on a finding that the requested list was not held.

When an AIE request specifically seeks a "list" and such a list is not held by the public authority, it presents a difficulty. AIE requests must ask for environmental information and, where this is desired to be provided in a particular form or manner, this should also be specified in the request. Requests for lists create difficulty for public authorities (and for my Office, on appeal) because they require a determination as to whether the requested list is the information requested or merely the form in which access to the information is requested. For example, this difficulty could have been avoided in the current case if the AIE request had been worded as follows:

“I request the following environmental information:

- The titles of all reports/studies (including draft report/studies) covering transport within the area of North Dublin City from Cabra/Navan Roads to Howth Road and inside the M50, done since July 1998, e.g. Dublin Port Tunnel Environmental Impact Statement.
- Who commissioned the report: e.g. Dublin Corporation.
- Date of completion: e.g. July 1998.
- Who compiled the Report: e.g. Dublin Corporation, Geoconsult Arup Joint Venture.
- How many volumes in the report/study (including appendices to draft report/studies) e.g. 5 volumes.

I would like this information in the form of list”.

In such a request there would be clear distinction between the information requested and the form of access requested. It would not be appropriate for a public authority to refuse such a request simply because it did not hold such a list. If, for argument’s sake, the public authority was justified under article 7(3) of the AIE Regulations in refusing to provide the information in the requested form, it could meet the request in some other reasonable way such as, for example, by providing copies of the first two pages of each report/study held where these contained the requested information.

In contrast, in my earlier decision in case CEI/16/0003 (S. Coombs and the Environmental Protection Agency) I found that refusal to provide access to a particular list was justified because it was not held. In that case the requester emphatically sought *a list* of “all correspondence/documentation/pieces of paper that in any way related to” a particular topic. In that case I was satisfied that such a list was the requested information, and not merely the preferred form of access.

In the current case, I formed the view that the “list” ought to be understood as the requested form of access, and not the requested information, as such. It is to the Council’s credit that it did not refuse the request because it did not hold a list of the type sought. I acknowledge that there is no clear test to guide public authorities or my Office on how to deal with requests for lists in the future. It might be helpful for me to repeat what I said in my decision in CEI/16/003:

“There is no requirement for a member of the public to make an AIE request (i.e. a request pursuant to article 6) in order to ask a public authority for information about where its registers or lists of environmental information can be found. A request for access to such registers or lists would not have to conform to the technical requirements of an AIE request. In particular, such a request would not have to be a request for ‘environmental information’. I would encourage those interested in seeking access to environmental information to consider first asking public authorities for details of where they can find registers or lists of environmental information held pursuant to article 5. This could lead to the public subsequently making more focused AIE requests for specific information which is actually held.”

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
13 April 2017