

**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/16/0029

Date of decision: 16 March 2017

Appellant: John Tierney

Public Authority: Dún Laoghaire-Rathdown County Council (the Council)

Issues:

1. Whether the Council was justified in refusing the request because the information requested is not environmental information
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 environmental information available to the appellant

Summary of Commissioner's Decision: The Commissioner found that the Council was not justified in refusing to provide the appellant with access to a map showing land it had acquired by compulsory purchase, and he required the Council to provide the appellant with a copy of that map

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

The appellant submitted an AIE request to the Council on 1 June 2016, seeking the following information:

“Copies of all records held by the County Council relating to the ownership of Balure Lane, Church Road, Killiney. A section of this laneway was acquired under a CPO [compulsory purchase order] in 1985 by the County Council for road-widening”.

The Council received the request on 3 June 2016 and replied by letter on the same day, saying that “the request was for access to certain Infrastructure & Climate Change Department records held by the County Council”. The letter said the request had “been deemed more appropriate as a request under the Freedom of Information (FOI) Act, 2014” and it named the officer who would be dealing with it.

The appellant replied by letter dated 7 June 2016 pointing out that his request was an AIE request, and he asked for it to be dealt with accordingly.

On 1 July 2016 the Council responded in a letter which said that it had deemed the AIE request to be outside of the scope of the AIE “Act”, and referred the appellant to a copy of article 3(1)(a) of the AIE Regulations which set out the definition of environmental information. It went on to say that it had refused his request under the FOI Act under section 37(1) of that Act. I regard this letter as notification of the Council’s decision to refuse the AIE request. The letter was accompanied by a document entitled “Freedom of Information Schedule of Records”. However, the purported schedule was nothing of the sort: it did not list records, or give any indication of what records were held, or how many pages they contained.

On 6 July 2016, the appellant delivered a request for an internal review of the decision to refuse his AIE request to the Council and asked it to note that he had not made an FOI request.

On 19 July 2016 the appellant sent a submission to the Council, for consideration by the internal-reviewer. He says that he received no acknowledgement of receipt of this submission. In it, he explained why he believed that the information which he requested is environmental information. He also quoted from the Minister’s Guidance, and he invited the Council to advise him if it felt that his request was too general and if a different form of wording would be more appropriate.

On 26 July 2016 he again wrote to the Council, asking for confirmation that his request for internal review had been received in time and also saying that he had not received any acknowledgment of receipt of his submission. He told my Office that he did not receive an acknowledgment of receipt of this letter either.

The Council did not notify the appellant of an internal review decision within the time required by the AIE Regulations. Accordingly, the appellant acquired a right of appeal to my Office on

month after the Council received the request for internal review, which (according to the Council's own account) was 8 July 2016. The appellant initiated an appeal on 10 August 2016.

On 12 August 2016, the Council wrote to the appellant saying that an internal-review had upheld the original refusal of the AIE request because the records sought were outside of the scope of the AIE Regulations. The decision-maker also informed the appellant that "records of land ownership reside with the Land Registry/Registry of Deeds" and provided contact details for same. She also informed the appellant that a schedule of roads "taken in charge" (but not owned) by the Council could be viewed in the Council's Office. She did not say, however, how such information might be relevant to the request.

The appellant appealed this decision to my Office on the same date.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is firstly to review the Council's 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).

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);

The decision under review

The Council's decision of 12 August 2016 was notified too late to be valid. However, it set out the Council's reason for refusal, in that it purported to uphold the original refusal of the AIE request because the records sought were outside of the scope of the AIE Regulations.

In a submission to my Office, the Council said that the request "was in regard to land ownership/title and not a request for environmental records". The Council explained that it had then treated the request as an FOI request "so as to keep the request alive" rather than refuse it out of hand.

My investigator asked the Council for copies of the relevant records and was given 6 records, along with a fresh schedule which listed the individual records. The Council had released two of the records to the appellant. The Council confirmed that its decision-maker had examined the contents of the other four records and formed the view that they did not contain environmental information.

The Council did not put forward any argument based on articles of the AIE Regulations as to why I should not require it to provide the appellant with access to any information within the withheld records that I find to be environmental information (if any). However, I note that it expressed concerns about the disclosure of personal information when it considered the request under the FOI legislation.

The appellant's position on the Council's decision

In a submission to my Office, the appellant cited the Minister's Guidance which says that

"The definition of environmental information is deliberately wide in scope and comprehends an extensive range of information. The definition is extended to include human health and conditions of human life".

He submitted that "land ownership" is a measure that is likely to affect elements of the environment. He argued that the owner of the land has the right to grant and refuse access to the

lane and this has environmental consequences. He also submitted that, in the absence of knowing who owns the lane, leaks in water-pipes in the lane go unattended for long periods. Finally, he submitted that the state of human health safety is also environmental information. He argued that there is a large tree in the lane which is threat to human safety, and that:

“There is a very real and present danger at the intersection of Balure Lane and Church Road especially for cyclists. The County Council have recently improved the cycle track markings and this is welcomed as it improves the situation by making the cycle lane more visible. However, it is the view of the residents of Balure Lane that proper signage is essential. For this to be instigated it is necessary to ascertain who owns the lane. A positive response may reveal the name of the owner and therefore potentially save lives.”

Analysis of the justification of the Council’s decision

Identifying the information at issue

Balure Lane meets the larger Church Road at a ‘T’ junction. The Council provided my Office with copies of 6 records, along with a schedule which it said lists all of the relevant documents which it holds. All of those records relate to a small parcel of land at Balure Lane (0.049 acres net, 0.07 acres gross) which was acquired by the Council for the purpose of widening Church Road.

The Council provided the appellant with copies of two records, both of which were short letters. One letter identified the person who was believed (by the Council) to own the lane at the time it was written, and it provided the name of a solicitor who might know if the lane had since been sold. The other letter was later in time and it came from that solicitor: he confirmed that the lane was no longer owned by the person the Council had previously named. The Council maintains that it holds no further information on who owns the lane now.

The Council’s schedule listed 4 withheld records. When asked by my investigator about records of the Council’s own local land ownership, the Council provided a further record labelled “extract from CPO map”. This map shows the portion of land which the Council had acquired in the vicinity of Balure Lane. The Council said that the map and schedule for the CPO would have been available for viewing by the public in 1985, but are no longer available. Since the request was for copies of *all* records held by the County Council relating to the ownership of Balure Lane, the “extract from CPO map” document is also a “withheld record” within the scope of the request: it brings the total of withheld records to 5.

Whether the 5 withheld records contain environmental information

The Council submitted that “the request was in regard to a land ownership/title query and not a request for environmental records”. The request was for “copies of all records held by the County Council relating to the ownership of Balure Lane”. Since it was clearly an AIE request, it ought to have been understood as a request for any and all environmental information in

records held by the County Council which relate to the ownership of Balure Lane. It ought to have been obvious that such records *could* potentially contain environmental information, for example information about the state of mature trees on the land.

I do not agree with the appellant's argument that land ownership is, in itself, "a measure likely to affect elements of the environment". However, I am satisfied that the adoption of a decision by a public authority to purchase land for the purpose of facilitating a road-widening scheme is the adoption of a measure likely to affect elements of the environment. I would regard information which says something of substance about such a measure, i.e. information that is integral and not merely peripheral or incidental to such a measure, as environmental information.

With this in mind, I examined the records in detail. The information in scheduled records 1 to 4 concerns only the root of title of the person from whom the land was purchased by the Council. I do not see that this is environmental information: the Council was going to purchase the land from whoever held title regardless of how they came to hold it.

The fifth record is the "extract from CPO map". This shows the location and extent of the land acquired by the Council for road-widening: I regard this as environmental information.

When asked by my investigator, the Council said that the land it acquired in 1985 was used to widen Church Road and it no longer forms part of Balure Lane. Be that as it may, I am satisfied that information about this land-purchase falls within the scope of the request because the land purchased was *at the time* part of Balure Lane and nothing in the AIE request confined it to information about a particular time period.

Finding

I find that the "extract from CPO map" (as more fully described in the appendix to this decision) is environmental information within the scope of the request and was withheld from the appellant.

As that is my finding, I must find that the Council's failure to provide access to this record was not justified for the reason given.

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

I note that the "extract from CPO map" does not contain personal information and I have found that it contains environmental information within the scope of the AIE request. I am therefore satisfied that it would be appropriate for me to require the Council to provide the appellant with a copy of that map.

Decision

Having reviewed the Council's decision, I find that it was justified in refusing access to the documents listed as withheld in the schedule of records. However, I found that it was not justified in failing to provide access to the "extract from CPO map". Under the power given to

me by article 12(5), I vary the Council's decision and require it to make available to the appellant the information set out in the appendix to this decision.

Comment

This AIE request was mishandled by the Council. In a submission to my Office dated 3 October 2016, the Council said that:

“On 8 July, the Council received a letter from [the appellant] stating that he wanted to appeal the decision made under the FOI Act 2014 but that he wanted to appeal it under the AIE Regulations. In light of the situation the Council made the decision to waive the usual appeals fee in this regard and subsequently proceeded to review the decision made under the FOI Act”.

I do not quite understand that paragraph. It appears to mean that, notwithstanding that the appellant had been at pains to insist that he had not made an FOI request and wanted a review of the refusal of his AIE request, the Council nonetheless chose to review its FOI decision.

While a public authority is free to suggest that an FOI request might be more appropriate than an AIE request, the choice rests with the applicant.

Having said that, I accept that the Council was well-intentioned and I trust that it will not repeat this error. I note that it provided access to the information in its possession on the private ownership of the lane. If it had respected the fact that the appellant had made an AIE request and if it had been as forthcoming about the extent of its own ownership as it was about private ownership, this appeal might not have been necessary.

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
16 March 2017

**Appendix to decision of the Commissioner for Environmental Information in
case CEI/16/0029**

The document to be provided by the Council to the appellant is a single page bearing a map marked as follows:

“Extract from CPO map”, drawing number BS 1400/106/2, dated August 1985, map ref no 17, townland: Kilbogget, headed “Proposed Main Road from Sallynoggin Cross to Wyattville Road/Bray Road Junction – stage 2”.

In correspondence with OCEI the Council referred to such a map as “a serving map”.

Ends