

**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/15/0022**

**Date of decision:** 26 October 2016

**Appellant:** Colman O’Sullivan, RTÉ

**Public Authority:** The Office of Public Works (the OPW)

**Issue:** Whether the OPW was justified in refusing access to correspondence to or from the OPW relating to proposals by Disney/Lucasfilm to film at the Skellig Islands in County Kerry in September 2015 on the grounds of articles 8 and 9 of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that refusal to provide access to some of the information contained in the correspondence was justified because it was either outside of the scope of the request or is not environmental information. However, he found that some information is environmental information within the scope of the request and refusal to provide access to this information was not justified. Accordingly, the Commissioner varied the OPW’s decision and required the OPW to make this information available to the appellant.

**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 OPW is the State-body responsible for maintaining and operating Ireland’s most important heritage sites. One of those sites is the Skellig Islands (“the Skelligs”), which comprise two small rocky islands off the coast of County Kerry. The larger of the two islands is Skellig Michael (Sceilg Mhichíl, in Irish). Skellig Michael is a UNESCO World Heritage Site. It is also designated under the EU Birds Directive as part of the Skelligs Special Protection Area. The National Parks and Wildlife Service (NPWS) (a section of what was the Department of Arts,

Heritage and the Gaeltacht and is now the Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs) describes the Skelligs as one of the top five seabird sites in Ireland and as “a site of international importance”. The site is also a National Monument.

The Irish Film Board (IFB) is Ireland’s national film development agency. It was established by the Irish Film Board Act 1980.

Lucasfilm Ltd (Lucasfilm) is an American film and television production company based in the USA. It is owned by the Walt Disney Company (Disney). In the matters which are relevant to this case, it communicated with the Minister for Arts, Heritage and the Gaeltacht through a film production company based in the United Kingdom (Space Bear Industries (UK) Ltd). I will refer to these entities collectively as “the film company”.

In 2014, scenes from a *Star Wars* movie were filmed by Lucasfilm at Skellig Michael with the consent of the Minister for Arts, Heritage and the Gaeltacht. Afterwards, information freely available on the internet indicated that there were plans to make another *Star Wars* movie in 2015, although it was unclear if that might involve filming at Skellig Michael or, indeed, in Ireland. On 9 June 2015, the *Irish Times* newspaper published an article entitled “Star Wars filming may return to Skellig Michael—Irish Film Board refuses to deny discussions on use of UNESCO world heritage site in film”. On the same day, the appellant submitted an AIE request to the OPW, seeking the following:

“Any correspondence from or to the OPW on proposals to film on or around the Skellig Islands since the shoot by Disney Lucasfilm on Skellig Michael last year”.

On 6 July 2015, the OPW notified the appellant that it required a one month extension in which to give its decision, owing to the complexity of the records relating to the request.

The OPW gave notice of its decision to refuse access to the requested information on 4 August 2015. It provided the appellant with a schedule of 53 records to which it was refusing access.

On 18 August 2015, the appellant requested an internal review of the decision.

On 8 September 2015, the Minister for Arts, Heritage and the Gaeltacht publically confirmed that she had granted consent for Lucasfilm to film at Skellig Michael later that month. She said that specialist staff from her Department had been “in discussions with Lucasfilm since March of this year” and “months of preparatory work” had been done.

On 14 September 2015, the OPW affirmed its original decision. The following day, the appellant appealed to this Office.

On 1 December 2015, the OPW notified the appellant that, in light of the Minister’s announcement on 8 September 2016, it was in a position to vary its decision and it granted access to some of the requested information. On 15 December 2015, the OPW made a submission to my Office in which it presented its reasons for refusal to provide access to the remaining information.

My investigator asked the appellant if his interest was confined to filming by Disney Lucasfilm. The OPW corresponds with all parties wishing to film on the Skelligs, and the AIE request, as originally worded, captured correspondence relating to short films being made for heritage/tourism promotion purposes. The appellant agreed to limit his appeal to matters relating to Disney Lucasfilm. I thank him for that, since it allowed my Office to focus on a much smaller number of records and bring the case to closure sooner than would otherwise have been the case.

My investigator then asked the OPW for a fresh statement of its position, in light of the narrowed scope of the request and the passage of time. The OPW responded, saying that it had reconsidered the matter and concluded that its position was unchanged.

### **Scope of Review**

Under article 12(5) of the AIE Regulations, my role is to review the OPW'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, the OPW and the IFB. My investigator invited a representative of the film company which had corresponded with the then Minister for Arts, Heritage and the Gaeltacht to make a submission, but no submission was received. 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).

### **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 8(a)(i) provides that a public authority shall not make available environmental information in accordance with article 7 where disclosure of the information would adversely

affect the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law

Article 8(a)(ii) provides that a public authority shall not make available environmental information in accordance with article 7 where the interests of any person who, voluntarily and without being under, or capable of being put under, a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information,

Article 9(1)(c) provides that a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.

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.

Articles 8 and 9 are subject to article 10(3), which 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.

### **The Appellant's position**

The appellant argued that there is a strong public interest in public access to the requested information because of the status of the area as a UNESCO World Heritage Site containing sites of archaeological, historical and ecological importance which are fragile and vulnerable to disturbance. He said that concerns had been expressed by, among others, senior OPW staff, and the head of the OPW's Guiding Service on Skellig Michael. He said that UNESCO had asked to be notified in advance of any future filming on the Skelligs, so that it could provide advice. He argued that, in this context, there is a strong argument that as much information as possible should be released on any proposal to film before the filming takes place, so that the public (both in Ireland and around the world) could be informed. He said that:

“If the information is released only after the filming is completed, there can be no debate or informed discussion on the merits of the proposal or if adequate measures are being taken to protect this World Heritage Site until after the filming is over and is a fait accompli... It is in the public interest that any proposals for activities which could damage or degrade the environment on or around the islands be subject to the most public scrutiny possible before they take place.”

In relation to the reasons given for refusal, he quoted from the Minister's Guidance, which says:

“The fact that a person or company asks for information to be treated as confidential does not in itself establish it as such for the purpose of the (AIE) Regulations. The public authority must satisfy itself that real and substantial commercial interests are threatened.”

He argued that private companies do not have a right to do business with public bodies in secret. He said that much of the information about the previous year's filming had been released after filming was completed, and releasing it ahead of filming this year would be no more detrimental than that release after last year's filming.

He argued that the requested information is unlikely to contain any plot or other detail that could adversely affect the interests of the film-makers or be of benefit to their competitors (and, if they did, such information could be redacted).

He said that it is common practice to remove or redact inappropriate personal information such as email addresses and the identities of individuals from records released under the Freedom of Information Act or the Access to Information on the Environment Regulations.

### **The OPW's position**

The OPW's position is that the Minister for Arts, Heritage and the Gaeltacht was the authority who controlled commercial film-making at Skellig Michael. The OPW said that it is conscious of the role which it can play in making Ireland a film-friendly location for film and television productions and that it strives to maintain a good working relationship with the film production industry. It said that it is widely acknowledged that the Irish film industry depends heavily on the ongoing support of the OPW. It said that at the time the AIE request was made it was "not possible to acknowledge that a request had been made by a Hollywood company to film at Sceilg Mhichíl in 2015 due to commercial sensitivity surrounding the project... a decision on whether the project would be allowed to proceed could not be made until after the results of a bird survey were known and considered... the results of which were not available until late August".

The OPW submitted that its refusal to provide access to information in this case was justified under articles 8 and 9 of the AIE Regulations, following a public interest test. Specifically, the OPW said that refusal was justified because release of the information could: adversely affect the interests of persons who supplied the information; affect commercial or industrial confidentiality; lead to the inappropriate release of personal information; and because the request concerns the internal communications of public authorities.

The OPW submitted that the public interest factors in favour of release are "Accountability, Transparency and the Right to Know under the (AIE) Regulations". It decided that the public interest was best served by supporting the Irish film industry and in promoting Ireland as a destination for film-makers. It added that "this group generally expect a certain level of confidentiality in their dealings for low-budget documentaries as well as for more large-scale productions".

The OPW said that, when it considered the AIE request, the relevant third parties were consulted, as it was clear that the release of the information would adversely affect their interests. It said they had supplied the information voluntarily, and release of the information "would have jeopardised the project by disclosing confidential information relating to negotiations and investigations which were still at a development stage". It said that disclosure of the information which is now at issue "would result in material financial loss and prejudice the competitive position of the company".

My investigator invited the OPW to expand on its view of the public interest test. He asked it to take into account the following: any decision to allow or refuse filming would be an environmental decision; members of the public have a right of access to environmental information in order to be able to participate in environmental decision-making; it appeared in this case that members of the public had not been made aware that this environmental decision was going to have to be made.

The OPW, in its subsequent submission, made no reference to the right of the public to access environmental information for the purpose of participating in environmental decision-making. It did not deny that the Minister's decision would be an environmental decision, and it did not deny that the public had not been made aware that such a decision would have to be made. It submitted that Supreme Court jurisprudence requires that, for a public interest to outweigh the interests served by refusal, it would have to be "a true public interest recognised by means of a well-known and established policy, adopted by the Oireachtas or by law". The OPW added that "such a public interest has not been identified to us in the present case". It said that:

"any advantages in terms of openness and accountability in fully disclosing the records are heavily outweighed by the real and tangible risk of commercial harm to the film-company, the IFB and the Irish film-making industry. The potential negative impact on the Irish film-making industry and consequently the Irish tourism industry is not in the public interest. We do not see that any public interest in this case is served by disclosing the specified records... disclosing records, even this long after filming, in the absence of compelling public interest arguments to do so and in the face of submissions (to the OPW) from the third parties stating that release could prejudice their competitive position, both in present and in future ventures, contravenes film industry norms and could potentially have an adverse impact on the Irish film industry".

Accordingly, the OPW submitted, the public interest was best served by refusing to grant the request.

## **Analysis**

### **Identifying the environmental information which is at issue**

The OPW initially provided my Office with 53 records listed in a schedule attached to the original AIE decision. I wish to put on record my appreciation for the OPW's provision of such a schedule to accompany its original decision. Although the AIE Regulations do not expressly require the provision of a schedule of records, doing so is best practice. I have seen how schedules facilitate greater clarity of communication in the processing of internal reviews and how they assist the processing of appeals made to my Office.

Following the narrowing of the scope of review by the appellant, I established that there were 25 still-relevant records to consider.

I considered whether these appeared to contain all of the records which might be expected to be held in the circumstances. I noted that they did not include any records of correspondence between the OPW and the NPWS, or between the OPW and the Minister for Arts, Heritage and the Gaeltacht. My investigator queried the OPW about this and was assured that the records were complete. It is likely that there were communications, prior to the granting of permission to film, between the Minister and the relevant sections of her Department (including the NPWS and the National Monuments Service (NMS) and the IFB (which also comes under the aegis of her Department). I am mindful that records of such communications were not necessarily shared with the OPW. I therefore accept the OPW's assurance that I have been provided with all of the relevant records.

I examined the 25 records. I took the view that correspondence "from or to" the OPW would not include internal OPW correspondence. For this reason, I regarded 10 of the records as being

outside of the scope of the request. That left 15 records. Eight of these are clearly records of correspondence to or from the OPW within the scope of the request. The others are copies of documents which were (presumably) supplied to the OPW, although in some cases details of who supplied them to the OPW, and when, are absent. Nonetheless, I am satisfied that they are within the scope of the request as having been included in correspondence to the OPW. The 15 records to be considered were those numbered 30, 31, 33, 36, 37, 38, 39, 40, 41, 46, 47, 48, 49, 50 and 51 in the schedule. I noted that records 39 and 41 are duplicates of record 37 and may therefore be disregarded. Accordingly, there are 13 records to consider further.

I considered whether any of the 13 records contain environmental information within the meaning of the definition provided in article 3 of the AIE Regulations. I found that they do not include information within the meaning of paragraphs (a), (b), (d), (e) or (f) of the definition in article 3.

I considered whether they contain information within the meaning of paragraph (c) of the definition. I was satisfied that the Minister's decision to permit filming did not constitute the adoption of a "measure designed to protect elements of the environment", even though it was likely to have been made subject to conditions which were designed for that purpose. I formed the view that the Minister's decision to permit filming constituted the adoption of "a measure affecting or likely to affect elements of the environment", while the activities of the film company on-site, when filming, would constitute "activities affecting or likely to affect elements of the environment". There is no requirement arising from the AIE Regulations for me to establish whether any effects might be either adverse or significant: it suffices that effects are "likely". I understand that I should consider effects to be "likely" if the possibility of effects occurring cannot be ruled out. Since the Minister granted consent with "strict conditions" which included a requirement that representatives of her Department would be present on-site "with the power to shout stop" if they had any concerns, I am satisfied that the possibility of undesired effects had not been ruled-out by the Minister.

For information to be "information on" a measure or activity so as to constitute environmental information of that type, it must say something of substance about that measure or activity. The information must be integral to the measure, and not merely of peripheral value. Integral "information on" the project which was the subject of the Minister's decision would constitute environmental information within the meaning of paragraph (c) the definition.

I examined the 13 records to see what, if any, information they contain that might properly be described as being "information on" that project. Most of the records were short emails concerned with how and when reconnaissance visits to Skellig Michael might be arranged. I do not regard such information as conveying "information on" the measure within the meaning of the definition. These are records 30, 31, 33, 36, 40, 46, and 47. Two other records concern the risk-assessment for such reconnaissance visits (records 48 and 49). Two other records concern insurance cover for reconnaissance visits (records 50 and 51). I regard none of these as containing environmental information. That leaves records 37 and 38.

Record 37 is an email which was copied to the OPW by the IFB. The first sentence in the first paragraph and the first sentence in the seventh paragraph show that there had been a proposal by a certain date for Lucasfilm to film at the Skelligs in mid-September 2015. I regard information on this initial proposal for the adoption of a measure as information on that measure: It says something important about the measure, in that it shows how much time was available between

the initial proposal and the eventual decision—time which would be available for information-gathering, consultation and deliberation. I do not regard the other information in that record as environmental information.

Record 38 was attached to record 37. It is a letter sent to the Minister for Arts, Heritage and the Gaeltacht from a representative of the film company. It informed the Minister that the film company “would like to formally request permission to stage a film-shoot” on Skellig Michael in September 2015. Although the letter went on to clarify that the company was not at that stage seeking the Minister’s consent, it nonetheless served to indicate that a decision would have to be taken in due course on whether to allow the proposed activity. As with record 37, I regard this as information on the measure and I regard it as environmental information for that reason. I do not regard the remaining information in the main body of the letter as environmental information. A document attached to the letter sets out, in 3 pages, “the approach” which the company “intends for pre-shoot research, scientific data collation, and mitigation of any concerns over the interaction of our project and the wildlife of the island”. I regard this as containing detail on the proposed measure. In light of the Minister’s subsequent adoption of the measure, I regard the information in these 3 pages as constituting environmental information of type (c) in the definition. I say this notwithstanding that details may have changed between what was initially proposed and what was eventually approved by the Minister.

I note that the environmental information in record 37 post-dates and is less extensive than that which is in record 38. I therefore take it that I may regard the environmental information that is in record 38 as constituting the entirety of the environmental information that is at issue in this review. Record 37 contains no environmental information that is not contained in record 38.

In conclusion on this point, I have found that the environmental information at issue in this review consists of 2 parts:

Part 1: the information in record 38 which would tell a reader that there was, on a certain date, a proposal from Disney/Lucasfilm, to the Minister for Arts, Heritage and the Gaeltacht, for filming at Skellig Michael in September 2015.

Part 2: The information contained in the 3-page attachment to record 38.

I checked the information which was released to the appellant by the OPW on 1 December 2015 to see if included this information and found that it did not.

I understand from the AIE request that the information showing that there had been a proposal to return to film at the site was the key information which the appellant had sought. He might have also been interested in internal OPW discussions about this proposal, but he did not ask for that. He might have been interested in communications involving archaeologists and ecologists, or any communications with UNESCO. However, I am assured by the OPW that it holds no such records. It seems reasonable to take it that any such communications might have involved the Minister and/or her Department and/or the IFB, but did not lead to the creation of records held by or for the OPW.

### **The IFB’s position on the environmental information which is at issue**

The IFB said, in September 2016, that the information (which I have identified as environmental information within the scope of the request) was provided to it (and subsequently given by it to the OPW) on the understanding that it was commercially sensitive and that it would not be



released to the public when it could have an effect on the release of the film or give an insight into the script location or story development before the film is released. It said that the information was contained in a “submission for assistance” and that such submissions are fundamental to the work of the IFB. It added that release could discourage production companies from providing the necessary information to the IFB in the future. It submitted that this would have a severely negative affect on the IFB fully performing its function in promoting “inward productions”.

### **Whether refusal to provide access to the environmental information which is at issue was justified**

While the OPW did not cite subarticles of the AIE Regulations, it said refusal was justified because: release could adversely affect the interests of persons who supplied the information; lead to the inappropriate release of personal information; because the request concerns the internal communications of public authorities; and because disclosure would affect commercial or industrial confidentiality. These grounds correspond with those provided by subarticles 8(a)(ii), 8(a)(i), 9(2)(d) and 9(1)(c ).

#### Article 8(a)(ii) - the interests of the suppliers of the information

This article mandates refusal where disclosure would adversely affect the interests of a person who voluntarily supplied the information without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of that information, subject to a public interest test in accordance with article 10(3).

The information at issue was provided to the OPW by the IFB, which had received it from the film company. I first considered the interests of the film company. I accept the OPW’s assurance that the film company did not consent to release of the information. Clearly, the film company was not legally obliged to supply the information to the IFB, but did so in order to advance its aims. I noted that the company did not make any submission to my Office stating that disclosure would affect its interests. Given that the internal review decision to refuse access was made after the Minister’s announcement, I cannot see how disclosure of part 1 of the environmental information, at that stage, could have adversely affected the company’s interests. As for part 2 of the environmental information, I do not see any potential in the withheld information to disclose elements of a film-storyline. Accordingly, I am not satisfied that disclosure could adversely affect the interests of the film company.

I next considered the interests of the IFB. I accept that it did not consent to release of the information. It was not legally obliged to provide the information to the OPW but thought it “important” to do so. Disclosure of part 1 of the environmental information after the Minister’s announcement would have only contained one piece of information which the Minister had not disclosed: that is the date of the initial letter to the Minister. Since the Minister had publically stated that, before she granted consent, her officials had been working on the matter since March 2015, I cannot see how revealing this date could adversely affect IFB’s interests. Part 2 of the information contains other details which were not included in the Minister’s announcement. I noted the IFB’s preference for keeping planning details, in these circumstances, “under wraps” (to use its own expression).

The Minister’s Guidance says that article 8(a)(ii) is intended to safeguard informal or voluntary communications between public authorities and third parties which are essential to good public

administration generally. I understand that it is intended to safeguard the passage of information by members of the public to public authorities, where such communication is desirable in the public interest, and where without such a safeguard, such communication might be deterred. The Aarhus Guide says, at page 89, that “this exception is meant to encourage the voluntary flow of information from private persons to the government”. A good example would be the supply of information to a public authority by a person who is motivated by a sense of civic duty to report information about potential wrong-doing which the public authority might wish to investigate. Such a person’s interests could clearly be adversely affected if their position as informant was revealed. It occurred to me that the situation in the current case is somewhat akin to a planning application. No-one is legally obliged to make a planning application, but they must do so, in most cases, if they wish to achieve their development goals. Leaving aside the specific laws which require the planning process to be an open process, it would be absurd for anyone to make a planning application and then expect details of their application to be kept from the public because disclosure might adversely affect their interests. I am therefore not satisfied that the interests of a public authority which reports information on a filming proposal to another public authority can properly qualify for the kind of protection this article was intended to provide. Accordingly, I find that refusal to provide access to the withheld information was not justified on this ground.

#### Article 8(a)(i) - the confidentiality of personal information

The OPW cited this ground in relation to all 53 records listed in its schedule. There is no personal information in what I have identified as the environmental information at issue in this review. Accordingly, I find that refusal to provide access to the withheld environmental information was not justified on this ground.

#### Article 9(2)(d) - where the request concerns the internal communications of public authorities

The Minister’s Guidance says:

“Article 9.2(d) provides that information included in the internal communications of a public authority may be protected from release. This could include internal minutes or other communications, between officials or different public authorities, or between officials and Ministers. Public authorities should bear in mind that the use of this exception is discretionary. It should not be resorted to as a simple expedient to protect all internal communications in circumstances where it would be unreasonable to do so (see also sub-articles 10(3) and 10(4)). Normally, public authorities would not be expected to invoke this protection for information unless there are good and substantial reasons – not otherwise available in Articles 8 and 9 – for doing so”.

I interpreted the AIE request as not including a request for internal OPW correspondence. I noted the OPW’s reliance on other grounds available in articles 8 and 9, and especially in article 9(1)(c), and noted that the Minister’s Guidance would appear to disapprove of the OPW’s reliance on article 9(2)(d) in these circumstances.

The withheld information was conveyed by a representative of a film company to a Minister. That communication was not an internal communication within a public authority or between public authorities. The same information was then passed by the IFB, unedited and unaltered, to an entirely separate public authority: the OPW.

I considered whether, since it relates to information passed from one public authority to another, this request “concerns” the internal communications of public authorities. In my view, it is stretching the scope of this article to claim that, when the IFB passed-on a notification of a film-making proposal to the OPW, the information contained in the notification (as distinct from any comments which the IFB might have sent to accompany the notification) acquired a degree of protection as an “internal communication”. The Aarhus Guide (which is non-binding) says at page 85 that “once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an internal communication”. The information at issue in this case was received by the IFB from a private company and later disclosed by the IFB to a completely separate third party. In my view, article 9(2)(d) is intended to provide a discretion to refuse access to the records of the kind of communications which flow within organisations, when there are real grounds for believing that disclosure of such records would discourage the frank internal expression of views. After giving this matter careful consideration, I am not satisfied that the information at issue, given the context in which it was communicated, is suitable for the protection from disclosure provided for in article 9(2)(d). I therefore find that refusal was not justified on this ground.

Article 9(1)(c) - where disclosure would adversely affect commercial confidentiality

In my analysis up to this point I have found that part 1 of the withheld environmental information (minus the date of the letter) entered the public arena on 8 September 2015, when the Minister announced her decision. This information was therefore no longer confidential information when the OPW made its internal review decision on 14 September 2015. Although the Minister had not revealed the date of the letter, she had publically stated that preparatory work had been ongoing in her Department since March 2015. I therefore take the view that disclosure of the exact date of the letter could not adversely affect commercial confidentiality. Accordingly, I am satisfied that refusal to make part 1 of the information available was not justified on this ground.

Part 2 of the environmental information has not yet, as far as I know, become public knowledge. This information set out the film company’s proposals “for pre-shoot research, scientific data collation, and mitigation of any concerns over the interaction of our project and the wildlife of the island”. These proposals go some way towards describing what the company wanted permission to do. It is therefore clearly information which is integral to the proposed measure.

The OPW put forward the following reasoning as justification for refusal on this ground:

1. Disclosure of the information would adversely affect commercial or industrial confidentiality, by revealing confidential and commercially sensitive information provided by third parties in the context of various discussions and negotiations.
2. Such confidentiality is protected by section 36 of the Freedom of Information Act 2014.

Section 36(1) provides that:

Subject to subsection (2), a head shall refuse to grant an FOI request if the record concerned contains—

- (b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the

competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or

(c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

Section 36(2) provides that:

(2) A head shall grant an FOI request to which subsection (1) relates if—

(a) the person to whom the record concerned relates consents, in writing or in such other form as may be determined, to access to the record being granted to the requester concerned,

(b) information of the same kind as that contained in the record in respect of persons generally or a class of persons that is, having regard to all the circumstances, of significant size, is available to the general public,

(c) the record relates only to the requester,

(d) information contained in the record was given to the FOI body concerned by the person to whom it relates and the person was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public, or

(e) disclosure of the information concerned is necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment,

but, in a case falling within paragraph (a) or (c), the head shall ensure that, before granting the request, the identity of the requester or, as the case may be, the consent of the person is established to the satisfaction of the head.

I have no information to show that any of the conditions set out in subsection (2) apply in this case.

Section 36(1) provides protection for the benefit of the person to whom the information relates. The film company is clearly the person to which the information relates in this case. My investigator invited the film company to make a submission setting out how disclosure would affect its interests, but it did not make any submission. I accept that part 2 of the withheld environmental information was commercially sensitive information. However, I am not persuaded that, following the Minister's announcement, it was still so sensitive that disclosure could prejudice the competitive position of the film-company, or cause it to suffer a material financial loss. I noted that the film company made no argument to that effect. I therefore find that refusal on this ground, for reasons concerned with the film company's interests, was not justified.

I accept that any future dealings by the IFB could be somewhat adversely affected by disclosure on this occasion, as result of a perception of a loss of confidentiality of information given to it in "submissions for assistance". However, I am not satisfied that the IFB is itself a "person to whom the information relates" so as to qualify for consideration under section 36 of the FOI Act.

Although it was not brought to my attention by the IFB, I noted that section 18 of the Irish Film Board Act 1980 provides that:

A member or officer or servant of the Board or a member of a committee established by the Board shall not disclose any information obtained by him in the performance of his functions except in so far as may be necessary for the performance of those functions.

I am prepared to accept that this provision provides for the protection of commercial and industrial confidentiality of information obtained by the IFB and that its purpose is to protect legitimate economic interests. The IFB argued that disclosure of the information at issue would adversely affect commercial or industrial confidentiality, by revealing confidential and commercially sensitive information provided by third parties in the context of various discussions and negotiations. I accept this argument. At the same time, I would assign a lower weighting to the commercial sensitivity of part 2 of the information in the aftermath of the Minister's announcement of her decision to grant consent.

I proceeded to weigh the public interest served by disclosure against the interest served by refusal. I accept that the IFB's interests could be somewhat affected in relation to the level of detail which might be provided to it by those making film-making proposals in the future. The IFB's argument seems to be that the disclosure of the information which it received in a submission for assistance could never, as a class of information, be justified, because of the harm that would be caused to the IFB's ability to carry out its function. It would be shocking if the IFB was claiming, in effect, that Ireland's successful positioning in the competitive market of international film-making depends on Irish citizens being kept in the dark about important environmental decisions which ministers are being asked to make. However, I do not believe that this is what the IFB is saying; it appears to be saying that its communications should be protected from disclosure because of its role, while not expressing opposition to the public receiving appropriate information from other sources, such as, perhaps, the department with responsibility for the arts. While I believe that I understand the IFB's position, I must consider the environmental information contained in records which emanated from the IFB in the same way that I consider all other information: it is not, as a class of information, exempted from the AIE Regulations.

I therefore confined my consideration to disclosure of the information which is actually at issue in this case, in its full context, including the fact that the Minister had already made her decision to grant consent public. I accept that the basic ingredients which might justify refusal under article 9(1)(c) have been made out for part 2 of the environmental information. In other words, I accept that disclosure of that information would adversely affect the commercial confidentiality of information obtained by the IFB, and that such confidentiality is provided for in the Irish Film Board Act 1980 to protect a legitimate economic interest. This finding is subject to a public interest test.

Up until the time when the Minister had made a decision on the matter, in my view, there would have been a strong public interest in access to the withheld information for the purpose of facilitating public participation in the decision-making process. The AIE Directive makes it clear that the right of access to environmental information exists not just to facilitate the transparency and accountability of decisions already made, but also to enable the public to participate, in an informed way, in environmental decision-making. The public cannot participate in the making of an environmental decision if, as appears to have been the case in this instance, they are not made aware that such a decision falls to be made in the first place.

However, once an environmental-decision is made, the public interest in facilitating participation in that particular decision expires. We are then left with the public interest in: the openness and accountability of the decision which was made; in access to information which could be of use when challenging such a decision; and in access to information which could be of use when similar decisions fall for consideration in the future. Clearly the opportunity to challenge the current decision has passed, but the other public interest arguments remain. After considering all of the above issues, I find, on balance, that the public interest in access to this information outweighs the interest served by refusal. I therefore find that the OPW's refusal to provide access to part 2 of the environmental information was not justified.

### **Decision**

Having reviewed the OPW's internal review decision, I vary it by finding that:

1. Refusal to provide access to most of the information in the records was justified because it is either not within the scope of the request or is not environmental information.
2. The date of the letter in record 38 and the information contained in the 3-page attachment to that letter is environmental information within the scope of the request, and refusal to provide access to this information was not justified. In accordance with article 12(5)(c) of the AIE Regulations, I require the OPW to make this information available to the appellant.

### **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**  
26 October 2016