

**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/14/0008**

**Date of decision:** 15 April 2016

**Appellant:** Stephen Dowds Associates on behalf of Derrybrien Development Society Limited

**Public Authority:** Galway County Council (the Council)

**Issue:** Whether the Council's decision to grant the appellant's request for access to environmental information failed to take into account all information held by or for the Council, and was therefore not made in accordance with the AIE Regulations.

**Summary of Commissioner's Decision:** Under article 12(5) of the AIE Regulations, the Commissioner reviewed the decision of the Council. Following the Commissioner's raising of issues concerning the Council's search and records management practice, the Council acknowledged the existence of relevant information which had not been considered at the time of the initial decision or internal review. Accordingly, the Commissioner annulled the decision of the Council, as it was inadequately answered under article 11(5)(b) of the AIE Regulations.

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

Section 177B of Part XA of the Planning and Development Act 2000 provides that where a planning authority becomes aware of a court judgment that a grant of planning permission was in breach of law or otherwise defective, the planning authority shall issue a notice to the person carrying out the development directing that they apply to An Bord Pleanála for substitute consent. On 12 October 2011, the Council issued a substitute consent notice to a number of companies connected with a wind farm at Derrybrien, County Galway, directing that the companies apply for substitute consent from An Bord Pleanála within 12 weeks, and requiring that a remedial environmental impact assessment and a remedial Natura impact statement be furnished with the application. The Council withdrew this substitute consent notice on 25 November 2011, following an exchange of correspondence with the operators of the wind farm.

On 31 March 2014, the appellant made a request to the Council under the AIE Regulations for access to "*any documentation relating to Part XA of the Planning and Development Act 2000*" in relation to Derrybrien wind farm. The Council refused the request in a decision of 30 April 2014. In a subsequent internal review decision of 16 June 2014, the Council purported to grant the request by disclosing two items of correspondence: a letter of 7 November 2011 from ESB Wind Development Limited to the Council concerning the substitute consent notice of 12 October 2011; and a letter of 29 November 2011 from ESB Business Services Centre to the Council, concerning the withdrawal of the substitute consent notice. Mr Dowds appealed the internal review decision to my office on the basis that not all information had been made available to him.

## **Scope of Review**

Article 7(5) of the AIE Regulations provides that where information requested is not held by or for a public authority, it must inform the applicant as soon as possible. Articles 11(5)(b) and 12(3)(a) provide that an applicant may appeal an internal review decision to my office where the request has been inadequately answered. In the present case, the Council purported to grant the appellant's request, implying that no further relevant information was held. The appellant disputed the adequacy of this answer. My approach to cases where a public authority states that all relevant information has been disclosed is to assess the adequacy of the searches for information, and to decide whether the decision-maker was justified in determining that access had been provided to all relevant environmental information held by or for the public authority. It is not normally my function to search for information.

This review is limited to an assessment of the adequacy of search efforts by the Council, and does not make any findings on whether information held is environmental information or the potential application of exceptions under articles 8 and 9 of the AIE Regulations.

## **Assessment of Search Adequacy**

In an e-mail of 31 July 2015 to my office, the Council stated that all relevant information had been provided to the appellant. In a submission to my office, the appellant contended that the substitute consent notice would have involved correspondence between the Council, the Department of Environment, Community and Local Government (the Department), and the operators and developers of the wind farm. In support of this, the applicant pointed out that

S.I. no. 609 of 2011, which modified the power to withdraw a notice under Section 177B, was signed by the Minister for Environment, Community and Local Government on 24 November 2011. The Council withdrew its substitute consent notice on 25 November 2011, the following day. The applicant submitted that the proximity in time between these two events was suggestive of a coordinated approach by the Council and the Department, which would have required communication between the parties. The applicant also submitted that a voluntary environmental review engaged in by Derrybrien wind farm following the withdrawal of the substitute consent notice would have required communication with the Council.

My Investigator wrote to the Council on 29 October 2015 requesting an account of the searches undertaken for the information, and referring to the apparent absence of correspondence between the Council and the Department. In November 2015 the Council acknowledged that a separate file on the substitute consent notices held by the Council's Law Agent had been overlooked at internal review stage. Copies of both the Law Agent's file and the planning section file on the Derrybrien substitute consent notices were provided to my Office in January 2016. On comparing the two files it was evident that the planning section file was incomplete as it did not reflect the full extent of internal and external correspondence on the subject of the substitute consent notices. The Law Agent's file contained a more comprehensive account of correspondence and documents exchanged between the parties.

My Investigator asked the Council on several occasions to account for its search efforts. The Council replied that it had asked individual staff members to search for relevant e-mails, and stated that its records are maintained in line with the National Retention Policy for Local Authority Records. The National Retention Policy for Local Authority Records contains guidance for files on planning matters, and includes an illustrative list of documents to be held in cases relating to unauthorised development, including "warning and enforcement notices, correspondence and legal advice". I note that the National Retention Policy for Local Authority Records makes the following general observations on e-mail correspondence:

"E-mails must be considered in the same light as correspondence by post. If an e-mail sent or received by a local authority contains information in relation to an action, transaction, decision or policy of the local authority, then it must be captured as a record. In the absence of an electronic records management system, e-mails should be printed and held on the relevant file."

In the present case, I can see no evidence that e-mails were systematically filed electronically or printed and held on the relevant file. At the time of the initial decision and internal review, search efforts do not appear to have revealed the full extent of correspondence on the substitute consent notice. I am advised that some documents were added to the planning section file in 2016 after their existence came to light on examination of the Law Agent's file. The Council also advised my office that some conversations between the Department and the Council may not have been recorded. I note that the National Retention Policy for Local Authority Records advises that "telephone conversations or informal meetings relating to decisions or actions taken by a local authority, should be recorded and filed. Records should include the date, subject, discussion, outcome and signature of participant" - the Council does not appear to have followed this practice. In light of the above, I find it difficult to accept the Council's statement that its records management practice was in line with national policy. The file maintained by the planning section fell short of the standard of records management

expected of a local authority, which has consequently delayed the appellant's request and unnecessarily engaged the resources of my office.

In February 2016, the Council advised my office that it is satisfied that all relevant documents and correspondence have now been identified. Notwithstanding this, I find that the Council's earlier internal review decision purporting to grant the appellant's request was inadequate for the purposes of article 11(5)(b), as it failed to consider all relevant information held by or for the Council. I do not consider that I should make a first instance decision in regard to records that a public authority has failed to consider under the AIE Regulations.

### **Decision**

On the basis of the foregoing, I annul the decision of the Council on the basis that the request was inadequately answered. In the light of this decision, should no appeal be made to the High Court in the time allowed by the AIE Regulations, the Council should process the appellant's request in accordance with the AIE Regulations having regard to the exceptions to disclosure under articles 8 and 9, and the public interest considerations under articles 10(3) and (4).

### **Appeal to the High Court**

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

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**Peter Tyndall**  
**Commissioner for Environmental Information**