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 2018 (the AIE Regulations)

Case CEI/18/0010

Date of decision: 13 December 2018

Appellant: Áine Ryall

Public Authority: Department of the Taoiseach (the Department)

Preliminary Issues:

1. Whether the Department holds the requested information in a legislative capacity or as a public authority within the meaning of article 3 of the AIE Regulations
2. Whether the requested information constitutes or contains environmental information

Issues: Whether the Department is justified in withholding the requested information on the grounds of articles 8(b), 9(2)(c), or 9(2)(d) of the AIE Regulations, taking account of article 10

Summary of Commissioner's Decision: The Commissioner found that the requested information constitutes environmental information and the Department holds it as a public authority and not in a legislative capacity. He found that articles 8(b) and 9(2)(c) do not apply in this case. He found that article 9(2)(d) applies to most but not all of the requested information. Accordingly, he varied the Department's decision and required it to make specific environmental 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 appellant submitted an AIE request to the Department on 14 February 2018, seeking the following:

> "The memo prepared in the Department of An Taoiseach concerning proposals to limit court challenges/judicial reviews to planning consent for strategic infrastructure development. While no formal Government Press Release was issued at the time, it was reported in the media—*The Irish Times* 7 February 2018—that this matter had been considered by Cabinet on 6 February 2018. This is obviously a matter of enormous public interest."

The Department informed my Office that it received the request on 15 February 2018. Accordingly, notification of a decision fell due, at the latest, on 14 March 2018. In the event, no decision was notified within that timeframe. As a result, the AIE Regulations deem that a decision refusing the request was made on 14 March 2018.

The Department gave notice of its decision on 22 March 2018, i.e. eight days late. The decision-maker did not expressly acknowledge that the Department held the requested memo and dealt with the matter on a 'class' basis by saying:

> "With respect to Memoranda for Government it is considered that these should be withheld on the basis of Regulations 8(a)(iv), 8(b) and 9(2)(d) of the AIE Regulations in that disclosure would adversely affect the confidentiality of the proceedings of the Government and that the information sought concerns the internal communications of the Government, taking into account the public interest served by the disclosure… I consider that there is a greater public interest in preserving the confidentiality of the internal communications and deliberations and discussion of Government than in releasing these documents to the public."

On 23 March 2018 the appellant asked the Department to review its decision. The Department conducted a review and notified the appellant on 20 April 2018 that it had decided to affirm the original decision, for the same reasons. This decision implicitly acknowledged the existence of the requested memo when it said that "the memo sought should be withheld on the basis of Regulations 8(a)(iv), 8(b) and 9(2)(d) of the AIE Regulations". The appellant appealed to my Office on 27 April 2018.

My investigator invited the Department to review its position in light of the High Court judgment in *Right to Know CLG and An Taoiseach and Minister for Communications, Climate Action and Environment* [2018] IEHC 372, which was delivered on 1 June 2018. The Department did so and, on 4 September 2018, it altered its position in three ways:

- It withdrew its reliance on article 8(a)(iv) of the AIE Regulations.
- It introduced two new arguments by saying:
    a. "Cabinet discussions, consisting as they do of the views of the members of the Government, as opposed to factual information, do not fall within the scope of the definition of environmental information."
    b. Article 9(2)(c) applies to the request because it concerns material in the course of completion or unfinished documents or data.

Later still, on 2 October 2018, the Department raised yet another new argument when it argued that it is not a public authority in relation to the requested record because it holds it in a legislative capacity.

Scope of Review

In carrying out reviews I have regard to the submissions made by the parties. I also have 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') and the relevant jurisprudence of the courts.

The right of appeal to my Office arises from article 12(3) of the AIE Regulations. When an appeal has been made and accepted, my role is to review the refusal of the request. Article 11(5) of the AIE Regulations provides that:

> "In sub-article … article 12(3)(a), the reference to a request refused in whole or in part includes a request that has been refused on the ground that the body or person concerned contends that the body or person is not a public authority within the meaning of these Regulations".

While the Department did not *refuse* the request on this and only raised it after it had given its decisions on the request, it represents the Department's most fundamental argument now. I will therefore first consider whether the Department holds the memo as a public authority and, if it does, whether the memo constitutes or contains environmental information. I regard these questions as 'preliminary' because the answers I arrive at will determine whether I should consider the other grounds raised by the Department.

I will not set out or comment on each and every argument advanced by the parties, but I will consider them in full.

Preliminary Issues

Whether the Department holds the memo in a legislative capacity as a public authority

The law

The meaning of the term "public authority" is defined in article 3(1) of the AIE Regulations and the Department accepts that it ordinarily falls under this definition. However, the Department now claims that article 3(2)(e), as amended by S.I. No. 309/2018, applies to it in the current case. That article provides that:

> "Notwithstanding anything in sub-article (1), in these Regulations "public authority" does not include any body when acting in a judicial or legislative capacity".

The Department's submission

The Department submitted that the memo "is being followed up on by the Minister for Housing, Planning and Local Government, who has initiated a body of work to arrive at firmed up proposals to be brought to Government before the Government approves a General Scheme of the Bill for wider Oireachtas and public scrutiny". It said that it is "actively engaged as a key participant in the process leading to approval for the General Scheme of the Bill".

The Department submitted that the Court of Justice of the European Union (CJEU) accepted in case C-204/09, *Flachglas Torgau GmbH vs Federal Republic of Germany* (*Flachglas*) that the option given to Member States by the AIE Directive to not regard 'bodies or institutions acting in … legislative capacity' as public authorities may be applied to ministries to the extent that they participate in the legislative process. It argued that it is acting in a legislative capacity in the circumstances of this case and that this position is supported by my decision in

case CEI/17/0023 (available at www.ocei.ie), in which I considered the role of Government departments in Ireland's legislative process.

The appellant's submission

The key points made by the appellant in her submission were:

- The memo led to the Cabinet, as the Executive, taking a policy decision. That decision was not part of the legislative process.
- In *Flachglas* the CJEU adopted a "functional interpretation" to the phrase "bodies or institutions acting in a … legislative capacity" in the AIE Directive. The Court accepted (at paragraph 51) that the option of not regarding "bodies or institutions acting in a … legislative capacity" as public authorities may be applied "to ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions". The Department is not participating in any legislative process. It has not tabled any draft laws or given any opinions in the course of a legislative process.
- CEI/17/0023 concerned a Bill which was going through the Houses of the Oireachtas, which is not the current case.
- Applying the "functional approach" and taking account of the legislative process as set out in the Cabinet Handbook (published by the Department and available at www.taoiseach.gov.ie), the Department is not acting in a legislative capacity in holding this particular memo.

New material issue raised in the course of my Office's investigation

My investigator became aware of a potentially relevant recent decision of the CJEU (Grand Chamber) in case C-57/16P *ClientEarth v Commission* (*Client Earth*, delivered on 4 September 2018 and available at: http://curia.europa.eu/). He invited the parties to submit their views on the relevance of this judgment, should they so wish. In the judgment the Court endorsed a finding of the General Court in the joined cases of T-424/14 and T-425/14 (also available at: http://curia.europa.eu/) which held (at paragraph 103) that:

> "It follows that, when preparing and developing a proposal for an act, even a legislative act, the [EU] Commission does not itself act in a legislative capacity, given that first, the process of preparation and development is of necessity one which precedes the actual legislative procedure itself, during which, moreover, the very nature of the act to be proposed must be determined and, second, it is the Parliament and the Council who exercise legislative functions".

The Department submitted that *ClientEarth* is not relevant because it concerned different legislative and regulatory frameworks.

The appellant submitted that, by analogy with the CJEU's approach, while the memo at issue could be equated broadly with the documents at issue in *ClientEarth*, there is no question of the legislative process having yet begun as there is no General Scheme of a Bill and no Bill. She argued that *ClientEarth* is a very robust and unequivocal ruling from the Grand Chamber of the CJEU in favour of disclosure.

Analysis

The concept of "acting in a legislative capacity" is not defined in the Aarhus Convention, the AIE Directive or the AIE Regulations. My decision in case CEI/17/0023 is distinguishable from the present case because the former concerned a Bill which was going through the Houses of the Oireachtas and the current case does not.

The judgment in *Flachglas* found that the option to not regard bodies or institutions acting in a legislative capacity as public authorities "may be applied to ministries to the extent that they participate in the legislative process". It also endorsed a 'functional interpretation' of the phrase "bodies or institutions acting in a legislative capacity" and established that a government department can act in a legislative capacity despite not being part of the Legislature. The appellant's arguments would suggest that a department can only act in that capacity when a legislative process is ongoing before the Legislature, which is not currently the case. The judgment in *Flachglas* is silent on this point. The Court in that case held (at paragraph 38) that the derogation "may not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure and the scope of the derogation which it lays down must be determined in the light of the aims pursued by the [AIE] Directive". The same judgment held (at paragraph 43) that the purpose of the [derogation] "is to allow Member States to lay down appropriate rules to ensure that the process for the adoption of legislation runs smoothly, taking into account the fact that … the provision of information to citizens is, usually, adequately ensured in the legislative process".

In *ClientEarth* the CJEU recognised (at paragraph 88) that the European Commission "is a key player in the legislative process". I acknowledge that the case before the Court concerned a different legislative and regulatory context. Nonetheless, notwithstanding the

key role played by the Commission in bringing forward legislative proposals, the Court in *ClientEarth* did not accept that the Commission's work in preparing legislative proposals was 'legislative' work. I conclude from this that when a Member of the Cabinet prepares and presents a legislative proposal, they do so "upstream of the legislative procedure" in the strict sense, before any legislative process has commenced.

Finding

I am satisfied that the memo at issue is not held by the Department in a legislative capacity. I therefore find that the Department holds the memo as a public authority within the meaning of the AIE Regulations.

Whether the memo constitutes or contains environmental information

The law

Article 3(1) of the AIE Regulations 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 Department's position

The key points made by the Department were as follows:

- The requested memo includes Cabinet discussions. Cabinet discussions do not come within the definition of environmental information.
- While the definition clearly extends beyond hard information on the state of the environment and factors affecting the environment in subparagraphs (a) and (b), to policy material in subparagraphs (c) and (d), cabinet discussions, consisting as they do of the views of members of the Government, as opposed to factual information, do not fall within the scope of the definition.
- The judgment in *Attorney General v. Hamilton* [which I took to mean the judgment in *Attorney General v Hamilton (No. 1)* [1993] 2 IR 250] made it clear that the protection afforded by article 28 of the Constitution in relation to Cabinet discussions is to facilitate "full, free and frank discussions between members of the Government prior to the making of decisions". This is very different from the "measures… policies, legislation, plans, programmes" in the definition which clearly refer to outcomes rather than the process of decision-making.

The appellant's position

The appellant submitted that:

> "Plainly, the memo is environmental information. Just because the Cabinet discussed the memo cannot convert it into something other than environmental information."

Analysis

The Department's website (www.taoiseach.gov.ie) explains the function of 'Memoranda for Government' in 'the process of achieving the communication and co-ordination required for Government business':

> "The Memorandum to Government is the central policy co-ordination mechanism, requiring as it does Departments to consult with other interested Departments well in advance of Government consideration and to include in the Memorandum their views and a response."

The Department declined to elaborate to my investigator on its statement that "Cabinet discussions, consisting as they do of the views of the members of the Government, as opposed to factual information, do not fall within the scope of the definition of environmental information". The appellant submitted that "there is absolutely no merit in that argument". I find myself in agreement, for a number of reasons. First, any discussion can involve the exchange of both 'factual information' and opinions. Second, the Cabinet is obviously free to discuss environmental information and such information could not cease to be environmental information as a result of being so discussed. Third, 'environmental information' is not confined to 'factual' information.

'Environmental information' is a technical legal term which cannot be equated with 'information on the environment'. The case law on the interpretation of the definition makes it clear that information does not have to be 'intrinsically environmental' to be environmental information, but it must fall within one or more of the six categories set out in the legislation.

Of the 6 categories, I am satisfied that the memo does not fall under 5 of the categories, i.e. categories (a), (b), (d), (e) and (f). In considering category (c), I must decide if the memo is a 'measure', and, if I decide that it is, I must determine if it is a 'measure affecting or likely to affect the elements or factors' referred to in the definition of environmental information.

The definition in the AIE Regulations describes a 'measure' in a broad fashion, along with a non-exhaustive list of examples ("*such as* policies, legislation, plans, programmes, environmental agreements") and it states that measures include 'administrative measures'. In my view, when a public authority takes a formal administrative step aimed at 'making something happen', the taking of that step amounts to the adoption of a measure. I therefore regard the bringing of the memo to Cabinet by Taoiseach as the taking of such a 'step aimed at making something happen'. Accordingly, although I recognise that the memo itself does not constitute or contain any Cabinet decision, I am satisfied that it is a 'measure' within the meaning of the AIE Regulations.

Mindful of the jurisprudence of the courts on the meaning of the word "likely" in this context (including, in particular the ruling of the Court of Appeal in *Stephen Minch and the Commissioner for Environmental Information* [2017] IECA 223), it is my view that if a measure is likely to lead to the construction of new structures in the landscape it is likely to

affect at least two elements of the environment, namely land and landscape. I will therefore consider whether the memo is likely to lead to the construction of such structures.

It seems to me that, if the bringing forward of the memo is likely to result in the adoption of other measures which make it more difficult for people to challenge planning decisions which could affect major infrastructure projects to the point where they are delayed and abandoned, more projects of that type could reasonably be expected to be proposed and completed. Any such building projects would affect elements of the environment such as land and landscape. Having examined the actual contents of the memo, I am satisfied that the memo is a measure that was both intended to and likely to lead to the construction of developments that might not otherwise be undertaken. Such developments would inevitably affect elements or factors referred to in the definition of environmental information. Moreover, I regard all of the information in the memo as 'information on' the measure.

For completeness, I am satisfied that the information in the memo does not constitute information on measures or activities 'designed to protect' elements or factors referred to in the definition of environmental information.

Finding

I conclude that the information in the memo as a whole constitutes environmental information within the meaning of category (c) of the definition in article 3(1), in that it is information on a measure likely to affect elements of the environment, such as land and landscape. As that is my finding, there is no need for me to consider whether the information in the memo is information on an 'activity' affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition.

Having found that the Department holds the memo as a public authority and that the memo constitutes environmental information, I will next consider whether the information in the memo should be released.

Whether the memo should be released

The Department cited article 8(b) of the AIE Regulations, which provides that:

> "a public authority shall not make available environmental information in accordance with article 7 where disclosure of the information, to the extent that it would involve the disclosure of discussions at one or more meetings of the Government, is prohibited by Article 28 of the Constitution".

The memo was completed before being brought to the Cabinet meeting. Having regard to this fact and to the content and context of the memo, I am satisfied that article 8(b) does not apply in this case.

The Department cited article 9(2)(c), which provides that a public authority may refuse to make environmental information available where the request concerns material in the course of completion, or unfinished documents or data. I am satisfied from its content and context that the requested memo is not an unfinished document and it does not consist of, or contain, "unfinished data". Accordingly, I am satisfied that article 9(2)(c) does not apply in this case.

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

The Cabinet Handbook sets out the requirements of every Memorandum for Government at paragraph 3.2. These include:

- A prominent indication of the decision sought.
- The observations of the Ministers consulted.
- The presentation of factual information so that it can be easily extracted for Freedom of Information purposes.

As one would expect, the memo at issue includes such information. Information that, under the Freedom of Information Act would be regarded as "factual" information is included along with information on opinions in section 2 of the memo, which sets out the background for the proposal. Of this, I regard the information in the second paragraph of section 2 of the memo as "factual information" that could be readily separated from the other information in the memo.

The Department submitted that the memo is 'the internal communications of public authorities' and whether it should be released would depend on the required public interest test.

The appellant submitted that what constitutes internal communications has not yet been determined by the CJEU. She suggested that if I have any doubt on this point I should refer a question to the courts. I do not think that will be necessary. The memo was communicated to the Cabinet. The Cabinet is a public authority (the High Court's judgment in *Right to*

Know CLG and an Taoiseach and the Minister for Communications, Climate Action and Environment [2018] IEHC 371 —available at www.courts.ie—refers). The memo was communicated by the Taoiseach who is a member of the Cabinet. I am therefore satisfied that the requested memo was internally communicated within a public authority.

The Cabinet Handbook sets out how a memo for Government is prepared. The process involves the sponsor circulating a proposal to other Members of the Cabinet, inviting their observation and recording the observations received. While this is essentially a 'consultation' process, I can see that it is also a form of 'one to one' discussion', i.e. a somewhat limited written discussion between the sponsor and the other Cabinet Members individually. I am satisfied that this information is itself information on internal communications between public authorities. For clarity I should say that I would not regard such one-to-one communications between Cabinet Members as constituting discussions 'at Cabinet', as I regard the latter term as applying only to discussions at actual meetings of the Cabinet.

As I am satisfied that the request concerns the internal communications of public authorities, I will next consider how much weight to give the interest served by refusal on this ground. This is necessary because I must go on to weigh this interest against the public interest served by disclosure.

The appellant submitted that media reports provide a sense that the memo contains factual information, background material and specific proposals for approval by Cabinet. She submitted that this state of affairs, if correct, does not support a conclusion that the material in this memo is in any way sensitive.

The appellant submitted that any arguments based on the public authority needing 'a safe space' in which to develop ideas or a claim that disclosure would have a 'chilling effect' on the exchange of opinions do not apply here because the Government has already made its decision. I do not agree that such arguments are irrelevant here. While it would not set a precedent if I were to require the disclosure of information in a memo for Government on this occasion, it could nonetheless have a chilling effect on the full, free and frank exchange of ideas when such memos are being prepared in the future. I have considered this request on an individual basis as required by article 10(3), but I do not consider that this means that I should be blind to the likely future implications of my decision.

While this memo does not reveal what was said at a meeting of Government (which had not yet been held when it was prepared) the information in the memo is not unrelated to later oral discussions at such a meeting. The Cabinet Handbook explains (at para.2.4) that:

> "Proposals requiring a Government decision should be the subject of a memorandum from the responsible Minister. At Government, Ministers normally make a short oral presentation, based on the memorandum".

I take this to mean that by reading the memo I have received a strong indication of the kind of information that the sponsor of the memo would be likely to have presented orally to his colleagues at the relevant Cabinet meeting: i.e. what was proposed, why it was proposed and how Cabinet colleagues had responded to the invitation for observations on the proposal. Accordingly, I take the view that while disclosure of the memo could not reveal exactly what was said at the relevant Cabinet meeting, it would reveal the views held by Members of Cabinet when the oral discussions commenced. I therefore accept that the information in the memo is closely related to the later Cabinet discussions. I recognise the very significant public interest in maintaining the confidentiality of such oral discussions at meetings of the Cabinet, due to the desirability of Cabinet Members feeling able to exchange their views in a full, free and frank manner during the process of preparing the memo, before the oral discussion at a Cabinet meeting where collective decisions are to be made.

Mindful that the access to environmental regime concerns access to recorded environmental information rather than to records per se, I regard information on the opening views of Cabinet Members, before any discussion at Cabinet took place, as lying on the more sensitive end of the scale of 'internal communications' and I regard factual background information as lying at the less sensitive end of that scale. To be specific, I regard the information in the second paragraph of section 2 of the memo as factual information of the latter kind and all of the other information in the memo as falling into the former category. I conclude that I should assign a significant weight to the interest served by refusal of access to all of the information in the memo except in relation to the information in the second paragraph of section 2, to which I assign less weight.

I will now turn to the public interest served by disclosure

The parties agree that disclosure would contribute to the realisation of the aims of the AIE Directive by providing transparency regarding how the Government does its work. The

appellant submitted both general and case-specific arguments on the public interests served by disclosure. Her general arguments apply to the public interest served by providing public access to environmental information in every case, such as the right of access being a fundamental right and the strong presumption in favour of disclosure. There is no need for me to recite those arguments here as they apply in all AIE appeals when the public interest must be weighed. I am mindful that the fact that these are general arguments that apply in all cases does not take from their weight.

The key points made in the appellant's case-specific public interest arguments were:

- Media reports indicate that at the Cabinet meeting held on 6 February 2018 the Government decided to implement new restrictions to the right of access to judicial review. Months have since elapsed without official confirmation of what was decided and why.
- There is an obvious public interest in ensuring proper planning and sustainable development. The courts play the main oversight role via judicial review. Any attempt to restrict the right of access to justice in environmental matters is therefore a matter of very significant concern and enormous public interest.
- Planning decisions go to the heart of sustainable development and environmental protection, especially now, given the challenges of climate change, biodiversity loss and the environmental degradation. Environmental quality has a direct impact on public health.
- It is essential that there is robust scrutiny of the basis for any proposal to restrict access to judicial review in environmental matters. The public must have access to the Government's justification for its decision so that they are in a position to consider, comment on and challenge the decision in an informed manner.
- Section 28 of the Freedom of Information Act 2014 confirms that there is a significant difference between a record submitted to the Government for its consideration (where a head 'may' refuse access) and a record containing a statement made at a meeting of the Government (where a head 'shall' refuse access). The memo at issue falls within the first category. Therefore (she submitted), the case for denying access to it is much weaker when compared with a request for access to a statement made at a meeting of the Government.

- Where the public interest lies in this case must be determined by reference to the nature and content of the specific document in this particular case (i.e. the memo). It is not sufficient to conclude that there is an important or overriding public interest in maintaining the confidentiality of meetings of the Government generally, and she cited guidance from the United Kingdom's Information Commissioner's Office in support of this argument.

The Department submitted that there is already a substantial amount of material in the public domain regarding the Government's views on the reform of judicial review of strategic infrastructure projects. It clearly believes that this lessens the public interest in disclosure in this case. The appellant submitted that, on the contrary, there is a complete absence in the public domain of any official, verifiable source setting out the Government's intentions and the rationale/evidence base behind them. She added that no Press Release followed the relevant Cabinet meetings and explained that this was the reason for her AIE request.

Analysis

The appellant made it clear that her request did not seek information on emissions into the environment and I am satisfied that is the case.

I accept the arguments advanced by the Department in favour of the public interest in disclosure. I also accept, of course, the appellant's arguments in favour of the disclosure of environmental information that apply in every case. I also accept her specific arguments about the importance of the planning system, the role of the courts and the acute need to address climate change, biodiversity loss and environmental degradation.

I understand that the essence of the appellant's public interest argument is this: the public interest in the public having an opportunity to participate in an informed way in any legislative process that could restrict access to justice in environmental matters outweighs the interests served by refusal in this case.

In considering whether I agree with this, I am mindful of the fact that the legislative process, if and when it formally commences in relation to this issue, will provide opportunities for public scrutiny through its usual processes. I therefore see the question to be decided in the following terms: does the public interest served by disclosure of the information in this memo, <u>at this point in time</u> (which is *before* the Cabinet has approved any General Scheme of a Bill and *before* any legislative proposal has been put to the Oireachtas), outweigh the

interest served by maintaining the confidentiality of the proposals and opinions expressed by Members of the Cabinet to Cabinet colleagues and recorded in the memo?

Finding

In relation to most of the information in the memo, which I would characterise as 'proposal and opinion' information, I am not satisfied that the public interest in disclosure at this point in time outweighs the interest served by refusal. In relation to a small part of the information in the memo which is not information on proposals or opinions, I am satisfied that the interest served by applying article 9(2)(d) does not outweigh the public interest in its disclosure.

I am satisfied that I have applied a weighing test in accordance with article 10(3) of the AIE Regulations. I am also satisfied that my findings comply with

- Article 10(4), which requires a restrictive interpretation of a ground for a refusal, and
- Article 10(5), which provides that nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I find as follows:

1. The requested information is environmental information.
2. In holding it, the Department is not acting in a legislative capacity.
3. The Department holds the information as a public authority.
4. Articles 8(b) and 9(2)(c) of the AIE Regulations do not justify the withholding of the information.
5. Article 9(2)(d) applies to all of the withheld information except for the information contained in the second paragraph in section 2 of the memo. The public interest in disclosing the information other than that in the second paragraph of section 2 does not outweigh the interest served by withholding it.
6. While the information in the second paragraph of section 2 is both environmental information and part of the internal communication of a public authority, the public interest in disclosure of this information outweighs the interest served by withholding it.

Accordingly, I vary the Department's decision to rely on article 9(2)(d) alone and I apply that exception to all of the information in the memo except for the information in the second

paragraph of section 2. I require the Department to make the latter available to the appellant, together with the date and title of the memo, as these are necessary items of contextual information.

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
13 December 2018