



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

**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: OCE-93405-C8C1J5

Date of decision: 1 December 2021

Appellant: Association Y

Public Authority: Cork City Council (the Council)

Issue: Whether the Council is entitled to rely on article 9(2)(c) of the AIE Regulations in respect of its partial refusal of information relating to the Cork Docklands to City Centre Road Network Improvements Scheme under the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (as amended) (the “2011 Regulations”) and whether the Council is justified in refusing access to further environmental information falling within the scope of the appellant’s request, on the basis that no further relevant environmental information is held by or for it

Summary of Commissioner's Decision: The Commissioner found that the Council was had not justified its decision to refuse record 1 and part of record 3 under article 9(2)(c). He found that article 9(2)(c) applied to record 2 and part of record 3, but that the public interest favoured the release of those records, save for handwritten notes within record 3. The Commissioner found that the Council had not justified its decision to refuse further information on the basis that it had not provided evidence that it had conducted adequate searches.

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

1. This case arises from a request made by the appellant to the Council relating to the Cork Docklands to City Centre Road Network Improvements Scheme (the D2CC), which was progressed under Part 8 of the Planning and Development Regulations 2001. While the Council has been progressing the D2CC, it appears that the Office of Public Works (the OPW) is currently advancing flood relief measures in Cork City by way of the Lower Lee Flood Relief Scheme (the LLFRS). The appellant has stated that there is considerable public interest in the proposed flood relief measures in Cork City.
2. On 9 September 2019, the appellant submitted a five-part request to the Council concerning the Cork Docklands to City Centre Road Network Improvements Scheme. In summary, it sought the following:
 - A copy of any records of any meetings (including notes, diary records of attendees, official minutes and emails referring to the meeting) between the applicant, the Council, and the OPW and/or their agents for the LLFRS in relation to the D2CC.
 - A copy of any drawings transmitted between the applicant and any of the following parties: the agent for the applicant; the OPW; or agents for the OPW that include a reference to flood walls, flood defence height, and/or flood defence level as part of the above referenced scheme.
 - In the event that a reference to flood walls or flood defence level/ height have been removed from drawings ultimately submitted with the application, or where drawings with reference to flood walls have been omitted from the application altogether, the record of any decision referencing this removal or omission by email, phone call log, marked up drawing or other record transferred through any file sharing system.
 - A copy of any cross section drawing transferred by any method between the applicant and its agent or third party that indicates a build-up of ground at the quay edge, a cross fall in the quay between building line and river and a reference to flood defence level/ height.
 - A copy of the record of any decision to omit any drawing or cross section drawing with reference to a build-up in level at the quay.
3. On 9 October 2019, the Council notified the appellant of its decision to part-grant the request. The Council refused parts B, C and E of the request on the basis that no records existed. The Council identified four records falling under the scope of the request, of which it redacted personal information from one and granted full access to the remaining three.
4. On 1 November 2019, the appellant asked for an internal review of that decision in relation to parts B, C and E of its request. In that letter, the appellant noted that the documents released indicated that the Council had detailed discussions concerning the integration of the D2CC and the LLFRS. It argued that, on this basis, it was not plausible that no drawings indicating a flood defence wall or flood defence level exist.
5. The appellant pointed to the fact that the presentation to public representatives, which was released, contained excerpts from a drawing showing 'Flood Risk Management' for some of the proposed works. It outlined that the version of the drawing from which this excerpt was taken was not on the public planning file. The appellant argued that this constituted evidence that drawings or earlier versions of



published drawings exist which referenced flood works and a decision was taken to remove those references before the drawing were put on public display.

6. On 29 November 2019, the Council issued its internal review decision and affirmed its original decision. It stated that it was not in possession of the drawings referred to in the request indicating a flood defence wall or flood defence level. It further stated that any drawings or documents referred to in the request, which may exist, would be unfinished documents and would be exempted records under the Regulations. In response to the appellant's comments, the Council stated that no earlier versions of published drawings referencing flood works existed, as the drawings released to the appellant were developed for presentation to the elected members after the Part 8 process.
7. On 20 December 2019, the appellant appealed to my Office for a review of the Council's decision.
8. During the course of the review, the Council sent a schedule of three further records falling under the scope of the request to the appellant and indicated that it was relying on article 9(2)(c) of the AIE Regulations in refusing access to those records. It stated that record 1 per the schedule (drawings of cycle lane options) fell within the scope of part D of the request, record 2 (a draft Treatment of Public Realm under the D2CC) fell within the scope of part B and record 3 (draft proposed road layout drawings and related emails) fell under the scope of parts B and D. In correspondence with this Office, the Council stated that the three records had been identified during the internal review process, but had been refused at that stage. It did not provide any further detail as to the basis on which it considered article 9(2)(c) to apply, nor did it provide any detail as to the public interest balancing exercise required under article 10(3) of the AIE Regulations or as to the estimated time needed for completion of the materials requested in accordance with article 10(6). The internal review decision made no reference to the three records and the appellant was not provided with the schedule at that stage.
9. In correspondence with this Office, the appellant stated that it was seeking an appeal of both the Council's reliance on article 9(2)(c) of the AIE Regulations and the Council's position that it holds no further records falling under the scope of the request. During the course of the review, the appellant made a submission and arguments in support of its position in this case.
10. My investigator wrote to the Council and asked if it wished to make a submission in support of its decision. In an email on 18 December 2020, the Council advised this Office that it would not be making a submission in this case. While the Council declined to make a full submission, it provided some information relevant to the review in correspondence with this Office.
11. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the correspondence between the appellant and the Council as outlined above and to communications between this Office and both the appellant and the Council on the matter. I have also examined the contents of the records at issue. In addition, I have 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’).

12. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

13. In accordance with article 12(5) of the AIE Regulations, my role is to review the Council's internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, I will require the Council to make available environmental information to the appellant.
14. This review is concerned with whether the Council is entitled to rely on article 9(2)(c) of the AIE Regulations in respect of its refusal of records 1 to 3 as above, and whether it was justified in refusing access to further information falling under the scope of the appellant’s request on the basis that it does not hold the information sought.

Analysis and Findings

Article 9(2)(c)

15. Article 9(2)(c) of the AIE Regulations provides as follows:

“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”.

16. This provision must be read alongside Article 10, which provides for certain limitations on the ability of a public authority to refuse to make environmental information as follows:

(3) The public authority shall consider each request on an individual basis and weigh the public interest served by the disclosure against the interest served by the refusal.

(4) The grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.

(5) Nothing in article ... 9 shall authorise a public authority not to make available environmental information which, although held with information to which article ... 9 relates, may be separated from such information.

17. Article 9(2)(c) of the Regulations applies to “material in the course of completion” or to “unfinished documents or data”. The AIE Regulations transpose the AIE Directive into Irish national law. The AIE Directive, in turn, aims to ensure that EU law is consistent with the provisions of the Aarhus



Convention, as noted in Recital 5 of the Directive. The Aarhus Guide sets out that “... the mere status of something as a draft alone does not automatically bring it under the exception. The words ‘in the course of completion suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the course of completion they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. ‘In the course of completion’ suggests that the document will have more work done on it within some reasonable timeframe.”

18. I note that the exceptions provided for in Article 4(1)(d) of the AIE Directive and article 9(2)(c) of the Regulations are wider than that contained in the Aarhus Convention. Both the Directive and the Regulations refer to “material in the course of completion or unfinished documents or data” whereas Article 4(3)(c) of the Convention refers only to “material in the course of completion”. As such, while the Aarhus Guide provides a useful starting point for my analysis, I must be mindful of the distinction between the Convention, the Directive and the Regulations. I am also conscious of the decisions of the Court of Justice of the European Union to the effect that while the Guide can be used an aid to interpretation, it is not binding (*Solvay and Others v Région Wallonne*, Case C-182/10, paragraph 27).
19. The Minister’s Guidance explains: “Public authorities are not obliged to make available material that is incomplete or in preliminary [or] other draft form; this might apply, in particular, to reports or studies. Normally, a public authority should also be able to withhold information until the completion of a normal periodic statement/summary of the data concerned. However, public authorities should consider the possibility in particular cases of releasing interim reports or results.” As this passage indicates, the relevant consideration when assessing the application of article 9(2)(c) of the AIE Regulations is the status of the documents themselves, and not the overall process to which the documents relate.

Analysis

20. The Council’s description of the records refused under article 9(2)(c) is as follows:
 - Record 1 is a document dated 30 November 2018 relating to cycle lane options at Terence MacSwiney Quay containing existing and proposed cross-sections.
 - Record 2 is a 36-page document dated 2 April 2018 containing draft drawings of a treatment of the public realm as part of the D2CC.
 - Record 3 is a draft document dated 11 January 2019 containing proposed road layout drawings as part of the D2CC. Record 3 also contains email correspondence between the Council and its consultants enclosing the draft document.
21. The records are documents prepared in support of a planning application which was published in May 2019. I note that particulars of the proposal are available on the Council’s website, and were available for inspection at its offices between 23 May 2019 and 8 July 2019.



22. I am aware that on 10 March 2020 the Council advised the High Court that it consented to the setting aside of the Part 8 planning approval for the D2CC, due to an omission in the Part 8 public notice whereby the conclusions of the environmental screening exercise, while undertaken, were not referenced in the notice. The Council, on that date, advised that it would undertake a new planning process in respect of the D2CC.
23. While the Council declined to make a full submission in this case, in correspondence with this Office dated 28 January 2020, it stated that the documents comprising records 1 to 3 were created for discussion and review by the Council. It argued that the records formed part of ongoing deliberations to assist the Council to develop and progress the D2CC.
24. In a submission dated 28 January 2020, the appellant argued that the D2CC had been finalised and the relevant documents were no longer being actively worked on. The appellant argued that the Aarhus Guide notes that the status of something as a draft does not necessarily mean that it falls under this exception, which is intended to apply to individual documents that are actively being worked on. The appellant argued that once the documents are no longer in the “course of completion,” they may be released even if they were unfinished or comprised a draft.
25. In an email to this Office on 7 December 2020, the appellant stated that the Council had failed to comply with articles 10(3) and 10(6) of the AIE Regulations. With regard to article 10(6), the appellant argued that given that the D2CC application was finalised and submitted for public participation in May 2019, there was nothing to suggest that the materials were in the course of completion or were unfinished.
26. The appellant pointed to the fact that record 1 per the Council’s schedule appeared to comprise a finished document and was not referred to as a draft in the schedule. It also argued that the emails in record 3 could not constitute unfinished documents or material in the course of completion.
27. I have considered the Council’s arguments, in light of the wording of article 9(2)(c) itself, the Aarhus Guide and the Minister’s Guidance. It is my view that the relevant consideration in this case is not whether the documents form part of ongoing deliberations, but rather the status of the documents themselves.
28. Having carefully reviewed record 1, it appears to me to be a completed document. Although it contains “proposed” cross-sections of cycle lanes, there is nothing in the record to suggest that it is an unfinished document. The Council has not offered any arguments as to why it considers record 1 in particular to be material in the course of completion or unfinished. Accordingly, I find that article 9(2)(c) does not apply to record 1.
29. Having carefully reviewed record 2, I note that it contains a number of handwritten notes and repeated, presumably placeholder, text with some typographical errors. While the Council has not offered any arguments as to why it considers record 2 in particular to be material in the course of completion or unfinished, it is clear on the face of the document that it can be described as an unfinished document, rather than a complete draft. It appears from the document that some further



work was intended by the Council's consultants. Indeed, I note that the completed document is currently available on the Council's website.

30. I am of the view, therefore, that record 2 is an incomplete or unfinished document within the meaning set out at article 9(2)(c) of the AIE Regulations.
31. Having reviewed record 3, I note that it is distinct from the other two records refused by the Council. First, the record comprises an email thread between the Council and its consultants and an attachment containing draft drawings of the proposed road layout.
32. Having reviewed the email thread, it is clear that it does not comprise material in the course of completion, nor does it appear to me to be an unfinished document. I find, therefore, that article 9(2)(c) does not apply to the email thread contained in record 3.
33. With regard to the draft drawings, it is clear from the email enclosing same that it can be described as an unfinished document, rather than a complete draft. I note that in the email thread attaching the drawings, the Council's consultants stated that the document needed more work and in response, the Council marked up the document with comments for amendments. It is clear from the document that it was intended to be further worked upon by the Council's consultants. Indeed, I note that the completed document is currently available on the Council's website.
34. I am of the view therefore that the draft proposed road layout drawings is an incomplete or unfinished document within the meaning set out at article 9(2)(c) of the AIE Regulations.

The Public Interest

35. Article 10(3) of the AIE Regulations provides that the public interest served by disclosure of the information at issue in this case must be weighed against the interest served by its refusal. Article 10(3) of the Regulations and Article 4 of the Directive make it clear that the public interest must be considered on the basis of the individual circumstances of each case. Further, it is important to note that a review by my Office is considered de novo and therefore it is based on the circumstances of the case at the time that I carry out my review. This approach has been endorsed by the courts.
36. In considering the public interest served by disclosure, I am mindful of the purpose of the AIE regime, as reflected in Recital 1 of the Preamble to the Directive, which provides that "increased public access to environmental information and the dissemination of such information contribute to greater public awareness of environmental decision-making and, eventually, to a better environment." As such, the AIE regime recognises a very strong public interest in openness and transparency in relation to environmental decision-making. There is undoubtedly a strong public interest in transparency as to how public authorities, such as the Council, carry out their functions with regard to environmental factors.
37. That being said, the AIE regime also acknowledges that there may be exceptions to the general rule of disclosure of information, as noted in Recital 16 of the AIE Directive, which provides that "public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases". One such case is in respect of unfinished documents or material in the course of



completion. The general public interest in such an exception is evident from the Commission's Explanatory Memorandum on the AIE Directive which notes that "it should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account". This was reiterated by the Court of Justice in *Land Baden-Württemberg v. DR* (Case C-619/19, paragraph 44).

38. As set out above, record 2 contains draft drawings of a treatment of the public realm as part of the D2CC, while record 3 contains draft drawings prepared by the Council's consultants, as well as handwritten notes for amendment added by the Council.
39. The appellant, in its submission to this Office argued that there is controversy over the inclusion of elements of the LLFRS in the D2CC. It argued that this raises project splitting issues under the Environmental Impact Assessment Directive, as the LLFRS was under consideration by another public authority, while the Council appeared to be discussing incorporating elements of the LLFRS in the D2CC. The appellant argued that there is a public interest, therefore, in the greatest access to information around the incorporation of flood relief works from the LLFRS into the D2CC project so that the public can see whether or not there is in fact project splitting.
40. I acknowledge that the release of the draft treatment of the public realm and the draft proposed road layout, along with the handwritten notes for amendment, would provide insight into the Council's preparation of its planning application for the D2CC. I also acknowledge that the release of the draft documents would assist the public's understanding of the progression of the D2CC project. I accept that there is a strong public interest in such insight.
41. On the other hand, the draft documents are unfinished versions of now completed documents. Record 3 in particular contains notes for amendment. The documents were prepared for the purpose of informing the public as to the proposed works contained in the Council's planning application. There is thus a public interest in having such documents completed to a high standard, which in many cases will necessitate detailed discussions with consultants preparing such documents for the Council. There is therefore a strong interest in allowing a public authority the necessary space in private to consider its amendment and completion of documents in support of such a planning application, which, once completed, will be made publicly available and subject to a public consultation process.
42. In my view, the draft proposed road layout drawings contained in record 3 can be described as containing two elements. One being the draft drawings as provided by the Council's consultants, and the other being the handwritten notes for amendment.
43. While record 2 also contains handwritten parts, I do not consider that these form a separate element of the document, as they can more reasonably be described as placeholder text, rather than notes for amendment. In my view, these do not reveal elements of consultation or particular consideration on the part of the Council.



44. With regard to the draft drawings in records 2 and 3, I am of the view that there is a public interest in disclosure of this information, as it provides further insight into the progression of the D2CC project. While the documents are unfinished, it is clear to me from the publication of the planning application in May 2019, that the Council will not revisit these documents for further deliberation. I consider that disclosure of the draft drawings, would not undermine the maintenance of the “private thinking space” which the exemption in article 9(2)(c) is designed to protect. As such, the public interest in disclosure of the draft drawings outweighs the interest in withholding the information and they should be disclosed.
45. With regard to the handwritten notes on the draft drawings in record 3, it is my view that these notes are a clear example of the deliberative space which article 9(2)(c) is designed to protect. I acknowledge that there is a public interest in providing insight into the progression of the D2CC project. I am, however, of the view that this interest is satisfied to a large extent by the release of the draft drawings, in circumstances where the finalised drawings are available on the Council’s website.
46. In addition, as I have already outlined, there is also a recognised interest in allowing public authorities a safe space in which to deliberate and this is explicitly recognised by the inclusion of the exception contained in article 9(2)(c) of the Regulations and article 4(1)(d) of the Directive. In this case, I am satisfied that requiring the Council to make the handwritten notes publicly available may impede the provision of robust feedback and the conducting of detailed deliberations with regard to the preparation of documents in support of planning applications. I am also of the view that the handwritten notes are not necessary in order to understand or make sense of the draft proposed road layout drawings, particularly in circumstances where the completed drawings are available on the Council’s website, and changes which have occurred between both versions of the drawings will, for the most part, be evident through a comparison of the two versions.

Conclusion

47. As such, I consider that in the particular circumstances of this case, the interest served by the refusal of record 2 on the basis of article 9(2)(c), does not outweigh the public interest in the disclosure of that information. I also consider that the interest served by the refusal of record 3 on the basis of article 9(2)(c), outweighs the public interest in the disclosure of that information, in respect of the handwritten notes, but not in respect of the draft drawings.
48. I find that the Council was not entitled to rely on article 9(2)(c) in respect of record 1 in this case. I also find that the Council was not entitled to rely on article 9(2)(c) in respect of the email thread contained in record 3.

Article 7(5)

49. Article 7(1) of the AIE Regulations requires public authorities to make available environmental information that is held by or for them on request. Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested environmental information is held by or for the public authority concerned. My approach to dealing with cases where a public authority has effectively refused a request under article 7(5) is that I must be satisfied that adequate steps have been taken to identify and locate relevant environmental information, having



regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances, I consider that a standard of reasonableness must necessarily apply. It is not normally my function to search for environmental information.

50. The Council, in correspondence with this Office, stated that it does not hold further records falling under the appellant's request. As it declined to make a submission to this Office, I am not privy to the searches the Council conducted in an effort to identify relevant records. I note that in its internal review decision, the Council stated that it was not in possession of drawings referred to by the appellant in its internal review request, before going on to state that any drawings/documents or data to which the appellant referred and which may exist are materials which were/are unfinished.
51. In correspondence with this Office, the Council stated that it did not hold records relevant to parts B, C and E of the request. In the same email, dated 22 January 2021, the Council indicated that records 2 and 3 contained information relevant to part B of the request.
52. In correspondence with the Council, and with this Office, the appellant made arguments as to why it believed further records ought to exist.
53. In its internal review request, the appellant noted that the documents released indicated that the Council had detailed discussions concerning the integration of the D2CC and the LLFRS. It argued that on this basis it was not plausible that no drawings indicating a flood defence wall or flood defence level exist. It also pointed to the fact that the presentation to public representatives, which was released, contained excerpts from a drawing showing 'Flood Risk Management' for some of the proposed works. It outlined that the version of the drawing from which this excerpt was taken was not on the public planning file. The appellant argued that this constituted evidence that drawings or earlier versions of published drawings exist which referenced flood works and a decision was taken to remove those references before the drawings were put on public display.
54. In its submission to this Office, the appellant pointed to part of the minutes of the meeting, which were released, which indicated that drawings relating to the D2CC were to be prepared before the end of November 2018 and issued by 7 December 2018 and drafts were to be issued as they developed.
55. Having reviewed the records released to the appellant, as well as the records withheld under article 9(2)(c), it is not clear to me that the Council has identified all relevant records falling under the scope of the request. I note, for example, that an email to the Council from its consultants dated 9 November 2018 attached minutes of a meeting which took place the previous week. That same email attached updated drawings of proposed geometry. It is not clear that these attachments were considered when responding to the appellant's request.
56. Given the lack of search details provided by the Council, the contents of the records released thus far and the Council's unclear position in its internal review decision, I am not in a position to find that the Council has taken adequate steps to identify and locate all relevant environmental information held by it. As such, I cannot find that section 7(5) applies in this case.



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57. I consider that the most appropriate course of action to take at this stage is to annul the decision of the Council in its entirety, the effect of which is it must consider the appellant's request afresh and make a new, first instance decision. In processing the request afresh, the Council must conduct proper searches to identify all relevant information that comes within the scope of the appellant's request and consider all of the information for release in line with the provisions of the AIE Regulations.

Decision

58. Having carried out a review under article 12(5) of the AIE Regulations, I hereby vary the Council's decision. I direct release of records 1 and 2 as per the Council's schedule and I also direct release of record 3, save for the handwritten comments. I annul the Council's decision to refuse access to further information on the basis that it does not hold the information sought and direct it to conduct a fresh decision-making process to identify all relevant records coming under the scope of the appellant's request.

Appeal to the High Court

59. 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

1 December 2021