

**Decision of the Commissioner for Environmental Information  
on an appeal made under article 12(5) of the European Communities  
(Access to Information on the Environment) Regulations 2007 to 2014  
(the AIE Regulations)**

**Case CEI/16/0047**

**Date of decision:** 12 October 2017

**Appellant:** Dermot Nally Stone Limited

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

**Issue:** Whether the Council was justified in deciding that it held no further information within the scope of the AIE request

**Summary of Commissioner's Decision:** The Commissioner found that the Council was not justified in deciding that it held no further information within the scope of the AIE request. He expressed his expectation that the Council will undertake a fully adequate search for relevant information and make a fresh decision on the request.

**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**

On 7 September 2016 the appellant company sent an AIE request to the Council saying:

“Offaly County Council has designated various lands in the townlands of Carrowkeel and Clonfinlough as Areas of High Amenity (AHAs), and some of these AHAs are in or adjacent to lands owned or leased by this company. We have been unable to access any

information which explains or provides a scientific/environmental rationale for the location of the specific boundaries.

Under the Access to Information on the Environment Regulations, we hereby seek all written reports, internal memos, maps etc. prepared by or on behalf of Offaly County Council that explain how and why the boundaries of the Areas of High Amenity were determined”.

On 3 October 2013 the Council gave notice of its decision to grant the request and gave the appellant a copy of a document entitled “Proposed Amends AHAs – 26 June 2008”. I will refer to this as “the AHA document”. The Council said that this document details the scientific/environmental rationale for the location of AHA boundaries.

On 14 October 2016 the appellant asked for an internal review, saying that the disclosed document “is not fully explained, in that it is not attributed to an author. It is merely referred to as a “manager’s report”. He argued that the Council must hold further relevant information. He said that he had great difficulty in accepting that the Council could not produce any written reports, internal memos, maps etc. as he had asked for in this request. He said that “it is inconceivable that the Council would accept the definition of AHAs by external agents without written records of formal acceptance/recommendation, with subsequent ‘sign-off’ by senior staff, before recommending acceptance to the Elected Members of the Council”.

On 4 November 2016 the Council gave notice of its decision to affirm its initial decision, explaining that “having examined the file and the response from our Planning Section ... the document released to you ... is the only document on file in relation to the scientific / environmental rationale for the location of AHA boundaries”.

The appellant appealed to my Office on 17 November 2016. He said that he was strongly of the opinion that the Council had not been thorough in its search for relevant information.

### **Scope of Review**

Under article 12(5) of the AIE Regulations, my role is firstly to review the Council’s internal review decision and to affirm, annul or vary it. If I find that refusal was not justified for the reasons given in that decision, my role is to decide whether it would be appropriate for me to require the Council to make environmental information available to the appellant.

In conducting my review I took account of the submissions made by the appellant and the Council. I had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister’s Guidance); Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and *The Aarhus Convention—An Implementation Guide* (Second edition, June 2014).

### **The Council’s position**

The Council’s position is that it provided the appellant with a copy of a document entitled “Proposed Amends AHAs – 26 June 2008” and this is the only record held by or for the Council

that is captured by the request. In other words, the Council maintains that it has not withheld any information from the appellant.

### **The appellant's position**

In appealing to my Office, the appellant's representative said that he doubted that the document provided by the Council is the only relevant record held by it. In support of this view he made four points:

1. He had "personally made representations on the matter dated 28 April 2008 for the Development Plan Review of 2009".
2. In response to a previous identical AIE request, he had been given an email from the Council which stated (in relation to that earlier AIE request) that "planning staff did not produce any of the documentation to which" he had referred.
3. The request was not confined to the files/records of the planning section or planning staff.
4. It is "inconceivable" to him that the Council "would accept the definition of the AHAs by external agents without written records of formal acceptance/recommendations, with subsequent 'sign-off' by senior staff, before recommending acceptance to the Elected Members of the Council".

### **Analysis**

I began by considering the scope of the AIE request, as it was clear that the parties understood it differently.

The request sought "all written reports, internal memos, maps etc. prepared by or on behalf of Offaly County Council that explain how and why the boundaries of the AHAs were determined". In response to queries from my investigator, the appellant explained that the AHA boundaries were "determined" when they were "designated" by the adoption of the County Development Plan. In other words, the appellant sought records that would tell any part of the story of how the AHA boundaries came to be depicted as they were in the County Development Plan.

The Council, however, understood that the request sought only scientific/environmental information. The wording of the request created the potential for misunderstanding when it said that "We have been unable to access any information which explains or provides a scientific/environmental rationale for the location of the specific boundaries". A reader who focussed on that sentence could be forgiven for thinking that the request sought only scientific or environmental information. For this reason I recognise that the Council's understanding of the scope of the request was not entirely without any basis and I accept that it acted in good faith.

However, in my view, the request as a whole asked for scientific/environmental information and/or *any other kind of information* (prepared by or on behalf of the Council and including records of an administrative and/or political nature) which would explain or help to explain why the boundaries of the AHAs appear as they are depicted in the County Development Plan. It is clear to me that the appellant was open to the idea that the boundaries might not have been determined by scientific/environmental considerations alone. I therefore conclude that the Council failed to appreciate the true scope of the request. This misunderstanding appears to lie at the heart of the parties' disagreement.

In relation to the four points made by the appellant's representative:

1. Any records of representations made to the Council would not be captured by the AIE request because they would not be records prepared by or on behalf of the Council. However, any records created by or on behalf of the Council in the course of addressing those representations would be captured by the request if they help to explain how/why the boundaries of the AHA were fixed—even if those records proposed changes to the AHA boundaries which were not adopted.
2. In relation to the appellants' previous identical AIE request and the Council's email which said that "planning staff did not produce any of the documentation to which" that request had referred, I take that to mean only that the Council's planning staff did not identify any records other than the AHA document which explained how the AHA boundaries appeared in that document. I do not take it to mean that planning staff had identified other relevant records but failed to "produce" or deliver them to the Council's AIE-decision-maker.
3. It is the case that the AIE request was not confined to seeking records held by the Council's planning section or planning staff alone. I think that the Council understood this, but believed that only the planning section actually held relevant information. A good record-search would *test*, rather than rely on, such a belief.
4. In relation to the appellant's strong doubt that the Council would accept "the definition of the AHAs by external agents without written records of formal acceptance/recommendations, with subsequent 'sign-off' by senior staff, before recommending acceptance to the Elected Members of the Council", I note the following: When asked by my investigator if there had been any representations made on proposals relating to AHAs, the Council replied that: "In the adoption of the final County Development Plan 2009, [a named councillor] proposed to 'delete or remove' an esker from the AHA map outside Ferbane. The esker was proposed by the Council to be represented exactly the same as all of the others, i.e. from Geological Survey of Ireland maps. However, the members resolved to remove this one from the AHA map". This indicates that the appellant's doubt was well founded and further relevant records are held, albeit that the Council did not realise that such records fall within the scope of the request.

Finding: I find that the Council's decision that it held no further information within the scope of the AIE request was not justified because the scope of the request was wider than the Council understood it to be.

**Whether it would be appropriate for me to require the Council to make environmental information available to the appellant**

I do not have a copy of all of the withheld information and the Council itself has not completed a thorough search for all relevant records. In the circumstances it would not be appropriate for me to require the Council to release information to the appellant.

The most appropriate next step would be for the Council to reprocess the AIE request in the light of what I have found the AIE request to mean. The Council could start by engaging with the appellant in order to obtain any necessary further clarity on the scope of the request. It would be open to the appellant to narrow, but not broaden, that scope. In conducting a search for relevant

records, the Council should direct enquiries to any section of the Council where information might be held and not confine its search-efforts to the Planning Section.

### **Decision**

Having reviewed the Council's internal review decision, I find that it was not justified because the Council misunderstood the true scope of the request.

I expect the Council to undertake a thorough search for relevant information and to make a fresh decision on the request.

The Council should inform the appellant as to when it should expect to receive a decision. Notification of that decision should be accompanied by notification of the right to request an internal review. The appellant would, in due course, acquire the right to appeal to my Office once again, if dissatisfied.

### **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**  
12 October 2017