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/16/0024

Date of decision: 15 June 2017

Appellant: Christina Murphy

Public Authority: Laois County Council (the Council)

Issues:

1. Whether the Council was justified in refusing to provide access to certain information on the grounds of articles 4 or 8(a)(iv) of the AIE Regulations.

2. If it was not justified, whether it would be appropriate for the Commissioner to require the Council to make environmental information available to the appellant.

Summary of Commissioner's Decision: The Commissioner found that refusal was not justified on the ground of article 4, but was justified on the ground of article 8(a)(iv). Accordingly, he affirmed the Council's decision and did not require it to make 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

On 15 March 2016 the appellant submitted an AIE request to the Council, asking for the

following:

1. A copy of the original submissions made to the 2011-2017 County Development Plan (CDP) Draft Development Plan and Draft Environmental report by -
    a) The Department of the Environment, Heritage and Local Government
    b) The EPA
    c) The Office of Public Works
    d) Caroline Goucher, Department of Communications, Marine and Natural Resources

2. A copy of the further original submissions made in relation to Addendum 2 and proposed amendments to the 2011-2017 CDP Draft Development Plan and Draft Environmental report by

    a) The Environmental Protection Agency (EPA),
    b) Minister for Communications, Marine and Natural Resources (DCMNR) and
    c) Minister for Arts, Heritage and the Gaeltacht (DAHG)

3. A list of all meetings held between wind developers and Laois County Council / Laois Planning Department from January 2008 – current date. Please include the dates of those meetings, the attendees, the minutes and all documents, including subsequent correspondences, arising from those meetings. Wind developers should be taken to include state bodies such as Coillte, Bord na Mona etc. as well as any others seeking to have land zoned as suitable for wind energy development or seeking to develop wind energy installations.

4. All correspondence between Element Power and Laois County Council / Planning Department in the time period from 01 January 2008 - present date. Please include all meetings, the dates of those meetings, the attendees, the minutes and all documents, including subsequent correspondences, arising from those meetings.

5. Copies of all submissions from the IFA to Laois County Council regarding wind power or zoning for wind development.

6. All correspondence from SEAI / Department of Energy / Department of the Environment to Laois County Council advising, requesting or instructing that areas should be zoned for wind energy development including any instructions/guidance on how this should be conducted, in the period 01 Jan 2008 - current date.

The Council acknowledged the request and informed the appellant that it had extended the time in which to make a decision. On 28 April 2016 the Council gave notice of its decision to part-grant the request. It informed the appellant that some relevant records were available for viewing at its office. It said that it had identified 22 other relevant records. It granted full access to 8 of these, saying that these constituted all 4 of its records relating to part 1 of the request, all 3 of its records relating to part 2 of the request, and its sole record relating to part 5 of the request. It refused access to 14 records related to parts 3 and 4 of the request, on the grounds of article 9(1)(c) of the AIE Regulations, because disclosure would adversely affect commercial or industrial confidentiality. It said that there was no correspondence of the type sought in part 6 of the request (meaning that no information relating to that part of the request was held).

On 24 May 2016 the appellant requested an internal review of the Council's decision. She

said that the Council had not explained how refusal was justified under article 9(1)(c), in that it had not identified the provision of national or Community law which protects the confidentiality of such information, and had not shown how and why an economic interest would be adversely affected by disclosure.

On 22 June 2016 the Council gave notice of its internal review decision. It varied its earlier decision and refused access to the 14 withheld documents on the grounds of articles 4(2) and 8(a)(iv) of the AIE Regulations.

The appellant appealed to my Office on 20 July 2016 and confirmed that her appeal concerns the decision to refuse access to the 14 withheld documents.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is firstly to review the Council's internal review decision in so far as it relates to the scope of this appeal 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 information at issue

The Council's schedule of records identified 14 withheld records, numbered 3.1 to 3.12 and 4.1 to 4.2. My investigator noticed that record number 4.2 post-dated the AIE request. When asked about this, the Council explained that it had created record 4.2 using information contained in three hand-written notes which pre-dated the request. Information in a record which post-dates an AIE request is not necessarily outside of the scope of a request (or subsequently, my review) provided that the same information was held by or for the public authority in a material form when the request was made. I considered that it would be best in this case if I regard the information in the form in which it was held when the request was made as the record at issue. I decided therefore to regard the three hand-written notes, taken together, as the true "record 4.2" and to disregard the later-created record. This brings the number of withheld records to 16.

During the course of this review, the Council provided my investigator with one additional record which had not been found in its earlier search. While it is regrettable that the earlier search had failed to locate this record, it is commendable that, when it was located, the Council took the appropriate action by providing my Office with a copy. This record is numbered record 4.3. I decided to regard it as also subject to the appellant's appeal, since she appealed against the decision to refuse her access to "the withheld records" which we now know includes record 4.3. The subject records therefore number 17 in all.

The decision under review

The Council's decision said that both article 4 of the AIE Regulations and section 38(1) of the Planning and Development Act 2000 applied to the withheld records and "therefore, in accordance with article 8(a)(iv) [of the AIE Regulations] I wish to advise you that your request for access to these records is refused". I examined this decision closely in order to fully understand it. I began by accessing the cited legislation:

Article 4 of the AIE Regulations

(1) "These Regulations apply to environmental information other than, subject to sub-article (2), information that, under any statutory provision apart from these Regulations, is required to be made available to the public, whether for inspection or otherwise.

(2) Notwithstanding—

(*a*) section 38 of the Planning and Development Act 2000 (No. 30 of 2000) and any regulations made thereunder,

(*b*) sections 10 and 31 of the Air Pollution Act 1987 (No. 6 of 1987) and any regulations made thereunder, and

(*c*) sections 6 and 89 of the Environmental Protection Agency Act 1992 (No. 7 of 1992)(as amended by the Protection of the Environment Act 2003 (No. 27 of 2003)) and any regulations made thereunder,

environmental information held by, or on behalf of, a public authority shall be made available in accordance with these Regulations."

Article 8 (a)(iv) of the AIE Regulations

"a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts)."

Section 38(1) of the Planning and Development Act 2000

"Where a planning authority gives its decision in respect of a planning application the following documents shall be made available within 3 working days for inspection and purchase by members of the public during office hours at the offices of the authority and may also be made available by the authority by placing the documents on the authority's website or otherwise in electronic form:

(a) a copy of the planning application and of any particulars, evidence, environmental impact statement, other written study or further information received or obtained by the authority from the applicant in accordance with regulations under this Act;

(b) a copy of any submissions or observations in relation to the planning application which have been received by the authority;

(c) a copy of any report prepared by or for the authority in relation to the planning application;

(d) a copy of the decision of the authority in respect of the planning application and a

copy of the notification of the decision given to the applicant; and

(e) a copy of any documents relating to a contribution or other matter referred to in section 34 (5)."

A straightforward reading of the Council's decision would not make sense. Information to which article 4 applies is not subject to the AIE Regulations. Therefore, if article 4 applied to the withheld records, article 8(a)(iv) could not be a relevant consideration. Articles 4 and 8(a)(iv) provide completely separate and unrelated grounds for refusal. The decision ought to be understood, therefore, as refusing access because the AIE Regulations do not apply to the requested information on account of article 4, or in the alternative, if that argument is not upheld, refusing access because disclosure of the requested information would adversely affect the confidentiality of the Council's development- management proceedings as per article 8(a)(iv).

Was refusal justified on the ground of article 4 of the AIE Regulations?

The effect of article 4 is that the AIE Regulations do not apply to information that, under any statutory provision apart from those Regulations, is required to be made available to the public, *except for* information falling under paragraphs (a), (b) and (c) – to which the AIE Regulations apply in the normal way. Paragraph (a) specifies section 38 of the Planning and Development Act 2000. The Council argued that section 38 applies to the requested information. Leaving aside for a moment the validity of that argument, even if it was correct, the effect would not be to remove the information from the reach of the AIE Regulations but to confirm that it was subject to the AIE Regulations in the normal way.

Finding: I find that refusal was not justified on the ground of article 4 of the AIE Regulations.

Was refusal justified on the ground of article 8(a)(iv) of the AIE Regulations?

For refusal to be justified on this ground, it must be the case that disclosure would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law. In this case, the relevant "proceedings" are the pre-planning processes followed by the Council in the context of carrying out its overall development-management function. Accordingly, three questions arise:

- Is the requested information held in confidence?
- Is the confidentiality of pre-planning proceedings "protected by law"?
- Would disclosure significantly adversely affect the confidentiality of those proceedings?

Is the requested information held in confidence?

Records numbered 3.1 to 3.12 consist of standard forms used by the Council for recording "pre-planning meetings interaction" and "pre-planning registrations". The layout of these forms is clearly not confidential since (as the Council has submitted) such records are made publically available when required by section 38(1) of the Planning and Development Act 2000.

The completed "pre-planning meetings interaction" forms contain the following types of information: site address, the name(s) of the Council officer(s) who attended the meeting, the

date of the meeting, the proposed "building type" and the matters discussed. The latter includes notes of advice given, such as advice about the need for public consultation, environmental reports, etc. Completed "pre-planning registration" forms contain similar information, identify the "applicant", but do not record "matters discussed" or "advice given".

Record 4.1 contains the minutes of a pre-planning meeting: it shows who attended, and, in short note-form only, what was discussed regarding a possible development.

Record 4.2 consists of three hand-written notes of meetings, showing who attended and, very briefly, what was discussed.

Record 4.3 consists of the minutes of another pre-planning meeting, showing who attended and what was discussed. It also contained 6 maps copied from the Council's development plan and four pages of hand-written notes. I do not regard the maps as "withheld information", because the County Development Plan is publically available.

I am satisfied that the entries made on the above forms, along with the minutes and notes, contain information that was given in confidence to the Council and subsequently treated as confidential by the Council (unless a planning decision is made, in which case section 38(1) of the Planning and Development Act 2000 would require the information to be made publically available within three days). The Council has assured my Office that it has not received any planning applications in relation to the pre-planning meetings detailed in the withheld records. In these circumstances, I am satisfied that the withheld information is held in confidence.

Is the confidentiality of the Council's proceedings "protected by law"?

The Council argued that the confidentiality of its proceedings is protected by law from two sources: section 38(1) of the Planning and Development Act 2000 and section 30(1)(b) of the Freedom of Information (FOI) Act 2014.

<u>The section 38(1) of the Planning and Development Act 2000 argument</u>

The Council submitted that section 38(1) of the Planning and Development Act 2000 provides that certain documents must be made available for public inspection within three days of the making of a planning decision. The Council argued that the withheld records are covered by this provision.

However, section 38(1), by its own wording, applies only to cases where a planning authority has made a decision in respect of a planning application. Since the Council assures my Office that relevant planning decisions have not been made in this case, section 38(1) does not apply to the withheld records.

Moreover, the Council clearly believes that by stipulating that certain records must be made publicly available in certain circumstances, section 38 effectively protects the confidentiality of such records in all other circumstances. Section 38 does not expressly have that effect and I do not consider it necessary to imply that it has such an effect.

<u>Finding</u>: I find that section 38(1) does not apply to the withheld records. Even if it did, it would not provide for the legal protection of confidentiality. Accordingly, I find that refusal on the ground of article 8(a)(iv)—in reliance on section 38 of the Planning and Development Act—was not justified.

The Freedom of Information Act 2014 argument

Section 30(1)(b) provides that:

> "a head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to have a significant adverse effect on the performance of the FOI body of any of its functions relating to management".

Section 30 is a harm-based provision and the onus of proof lies on the public body. The Guidance Notes published by the Office of the Information Commissioner state that the word "management" can cover operational management. I therefore accept that "management" covers the Council's development-management functions in this case.

The Council made a detailed submission which I will not repeat in full here, although I have taken it fully into account. Its argument may be summarised as follows:

> Disclosure would have the following effects:
>
> - Many potential applicants for planning permission would no longer engage in a meaningfully way with the pre-planning consultation process and this would have a negative impact on the quality of planning applications submitted.
> - This would increase the workload in the Council's Planning Section—owing to a reduction in the quality and appropriateness of planning applications, on account of them having been prepared without the benefit of the Council's advice.
> - Other members of the public would seek access to similar records and that would lead to an increase in the workload associated with managing the submissions and observations that would inevitably follow. There is no formal/ legal process for the making of public submissions/observations in relation to pre-planning consultation consultations. Much of this extra work would arise in connection with development "ideas" that never lead to a planning application.
> - Members of the public who are interested in a particular development might "miss out" on the actual planning application that is finally submitted or make uninformed decisions based on preliminary or draft proposals considered at the pre-planning stage. Pre-planning consultations are open-ended and may continue for a considerable period of time and might or might not result in a planning application being submitted.
> - In 2016 the Council spent €1,720,651 on its Development Management function. This resulted in a cost per capita of €21.36. Should information on pre-planning meetings be made public as proposed by the appellant, it would increase the amount of resources required for the Planning Department to deal with the various issues arising. This would result in increase in the cost per capita of the Development Management function.
> - Many pre-planning meetings concern enquiries by landowners interested in determining the potential uses of their landholdings. Many people view pre-planning meetings as opportunities to confidentially identify their options.
> - Prematurely making information about such meetings publically available could stunt growth or development in an area.
> - In some instances, disclosure might result in potential applicants not engaging

with pre-planning consultations at all, particularly for the most potentially contentious developments, i.e. those which would have benefited the most from the Council's advice at the pre-planning stage.

- There is no other forum or opportunity whereby potential applicants can disclose the type and level of information that would be sufficient to enable the Council to give adequate or relevant advice.
- In 2016 the Council refused just 2% of valid planning applications. Anything which reduced the confidentiality of pre-planning consultations and led to less usage of that facility would be very likely to lead to an increase in refusals, with all of the extra work that this would bring (due to the need to process successive re-applications).
- The resulting extra work would result in a need for extra resources. If such resources were not available, the existing limited resources would come under further pressure and the quality of work done would be likely to suffer.

The Council submitted that it is reasonable to expect that the harms outlined above would arise and that they would significantly adversely affect the Council's development management proceedings. It also submitted that disclosure would impact on its performance in areas outside of the planning function, such as economic development, social infrastructure and physical infrastructure delivery.

In her submission the appellant argued strongly in favour of disclosure but did not acknowledge that disclosure might have any adverse effects.

Having considered the matter, I am satisfied that the Council has shown that the requirements of section 30(1)(b) are met. However, that is not the end of the matter because section 30(2) of the FOI Act provides that:

> "Subsection (1) shall not apply to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the FOI request concerned".

While the Council referred in its decision to the public interest in relation to article 10(3) of the AIE Regulations, it did not refer to the test described in section 30(2) of the FOI Act. I note that these tests are not the same: the FOI public interest test requires a weighing of the public interest in both disclosure and refusal, while the AIE public interest test requires a weighing of the public interest served by disclosure against the interest served by refusal, without specifying that the latter is confined to the public interest.

In so far as the Council made any reference to the public interest in its decision, it said that disclosure would not be in the public interest because:

1. It would be premature and might not contain sufficient details to give an accurate description of a proposed development.
2. It might include personal information, known only to the applicant.
3. It might include commercially sensitive information.

It added:

> "Therefore … the public interest in making this information available is outweighed by Laois County Council's obligation not to disclose premature and/or commercially sensitive information and to comply with the requirements of the Planning and

Development Act 2000 and the Freedom of Information Act 2014 as outlined."

The Council did not explain how or why the disclosure of information which might not give an accurate description of a proposed development would be contrary to the public interest.

In her request for internal review, the appellant argued that, since article 10(5) of the AIE Regulations 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 articles 8 or 9 relates, may be separated from such information… this would indicate that if the public interest test was correctly applied there is no reason why other aspects of the information could not be released."

In relation to article 10(5), it is my view that if information which might be properly withheld under article 8 was redacted from the withheld records there would be no remaining environmental information to be released. For that reason, I do not consider article 10(5) to be an important factor to consider when weighing the public interest in this case.

At the invitation of my investigator, the appellant made a detailed submission on the public interest. It can be summarised as follows:

1. One of the objectives of the Planning and Development Act 2000 is "to provide, in the interests of the common good, for proper planning and sustainable development". The common good is not served by keeping information which the council must collect on pre-planning meetings secret.
2. Such secrecy also breaches section 247 of the Planning and Development Act, which provides that the holding of preplanning meetings should make no difference to the planning process and which establishes the obligation for pre-planning meetings to be recorded as part of the development file. This section shows that pre-planning meetings are not proceeding which are intended to be confidential.
3. Access to the notes on pre-planning meetings is necessary for transparency. The public has a right to see whether notes are being taken at all and what information they contain.
4. If a planning application is made, the notes have to be released as part of the planning process. This demonstrates that such information is held in the public interest without an expectation of confidentiality.
5. If a planning application is never made, there is no legal provision for withholding the notes—they still form part of the planning file which is managed in 'the interest of the public good' as stated by the Act. There is still a public interest in releasing such notes in order to ensure transparency in how public servants conduct such matters.
6. There is a particular public interest in understanding the how the planning process deals with windfarms.
7. The purpose of public participation is to provide members of the public with information so that they can make educated contributions. If the public are limited in what they are allowed to access, that would limit their ability to participate. The Minister's Guidance says that "Public authorities are reminded that the objective of the [AIE] Regulations is to facilitate access to environmental information to the greatest possible extent, consistent with the provisions of the [AIE] Regulations

generally".

The appellant argued that her position "is supported by the Government's *Development Management, Guidelines for Planning Authorities* , June 2007" and by a submission made by the Irish Planning Institute to the Department of the Environment in March 2014.

I note that the Oireachtas judged that the common good is sufficiently served by the requirement in section 38 of the Planning and Development Act 2000 for records of pre-planning meetings to be made publically available within 3 days of a decision being made on a planning application. I also note that the Oireachtas did not see fit to make specific provision for access to information on windfarms when it specified the circumstances in which information on pre-planning meetings must be made publically available. I do not consider that the legal provisions cited by the appellant mean what she argues that they mean; those provisions are not inconsistent with the Council's position. Neither do I see that the appellant's position is supported by the document *Development Management, Guidelines for Planning Authorities* , June 2007 or by the submission made by the Irish Planning Institute. As for the argument that there is no justification for refusal of this request, that is precisely what my review must determine.

Weighing the public interest as required by section 30(2) of the FOI Act

There is a public interest in the openness, transparency, and accountability of the planning system. When a decision is made on a planning application, records of any pre-planning consultations must be made available to the public within 3 days. In cases where pre-planning meetings do not lead to a planning decision, this is not required under the planning laws. While I appreciate that many members of the general public might be interested in knowing what took place in such meetings, that does not necessarily mean that there is a public interest in access to such information. However, I accept that there is a public interest in the accountability of the pre-planning consultation system and that this interest would be served by disclosure in this case.

Weighing against that interest would be the public interest in the efficient and effective management of development. I note that the Oireachtas, in passing the Planning and Development Act 2000, implicitly judged that the public interest is adequately served by section 38(1) of that Act making it a requirement that records of pre-planning consultations must be made publically available within three days of the making of a planning decision.

While the protection of commercially sensitive information and personal information both serve private interests, they also serve the public interest. The FOI Act was designed to increase openness and transparency in the way in which public bodies conduct their operations. It was not designed to expose private enterprises to public scrutiny. In any case, the Council has not argued that the protection of section 35 of the FOI Act (which relates to information obtained in confidence), or section 36 of the FOI Act (which relates to commercially sensitive information), or article 9(1)(c) of the AIE Regulations (which relates to commercial of industrial confidentiality) apply in this case.

Taking account of the above considerations, I conclude that the public interest in refusal outweighs the public interest in disclosure. I find that the public interest would be better served by refusing rather than by granting the request.

Finding: I find that the confidentiality of the Council's pre-planning proceedings is provided

for in law by section 30(1)(b) of the FOI Act.

Would disclosure significantly adversely affect the confidentiality of the Council's proceedings?

Disclosure to the appellant (as in every AIE case) would be akin to releasing the subject information "to the world". I understand that the withheld records are the sole records of the proceedings.

Findings: I find that disclosure would significantly adversely affect the confidentiality of the relevant proceedings. Accordingly, I am satisfied that the requirements of article 8(a)(iv) have been met.

Weighing the public interest in disclosure against the interests served by refusal

Article 10(3) of the AIE Regulations requires me to consider whether the public interest served by disclosure would outweigh the interest served by refusal. I have already identified the public interest in disclosure, and the interest served by refusal would be the public interest in protecting the confidentiality of the Council's pre-planning proceedings.

Findings: On balance, I find that the public interest served by disclosure would not outweigh the interest served by refusal. Accordingly, I find that refusal to provide access to the withheld information on the ground of article 8(a)(iv) was justified.

As that is my finding, it would not be appropriate for me to require the Council to make environmental information available to the appellant.

Decision

Having reviewed the Council's internal review decision in relation to the withheld records, I find that the decision was not justified on the ground of article 4 but was justified on the ground of article 8(a)(iv).

Under the power given to me by article 12(5), I therefore affirm the Council's decision to refuse the request on the ground of article 8(a)(iv) of the AIE Regulations.

Appeal to the High Court

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

Peter Tyndall
Commissioner for Environmental Information
15 June 2017