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/18/0020

Date of decision: 12 December 2018

Appellant: Councillor David Healy

Public Authority: Office of the Ombudsman (the Office)

Issue: Whether the Office was justified in refusing to provide information to the appellant on the ground that it is not environmental information within the meaning of article 3(1) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that while some of the information sought was environmental information, this had been given to the appellant. He found that the remaining withheld information is not environmental information within the meaning of the AIE Regulations. Accordingly, he affirmed the Office's decision.

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 30 April 2018 the appellant submitted an AIE request to the Office seeking "a copy of all documents and records your office holds in relation to" a complaint that he had made to the Office concerning a decision by Dublin City Council to upgrade a roundabout on a public road.

On 28 May 2018 the Office issued a decision together with a schedule listing 56 documents. It refused the request in full on the basis of its finding that, with the exception of two records, the information is not environmental information within the meaning of the AIE Regulations. In relation to the two records referred to above, the Office said that one had been provided to it by the appellant and the other was available to be downloaded from the Council's website.

The decision also said that refusal would also be justified by article 8 of the AIE Regulations, as disclosure would adversely affect the confidentiality of its proceedings, and article 9 of the same Regulations, as the request concerned the internal communications of public authorities. It went on to say that the public interest in disclosure did not outweigh the interest served by refusal. The Office's article 8 argument cited section 9 of the Ombudsman Oct 1980 which limits the Office's freedom to disclose information obtained by the Office in the course of, or for the purpose of, a preliminary examination or investigation carried out by the Office.

The appellant requested an internal review of that decision on 13 June 2018, arguing that the withheld information is environmental information and that there was a clear public interest in its disclosure. He made no reference to the two records which the Office had refused to provide despite finding that they contained environmental information.

The Office conducted a review and affirmed its decision on 26 June 2018. The review decision stated that the review decision-maker was satisfied that the withheld information did not contain environmental information. The appellant appealed to the Office of the Commissioner for Environmental Information (OCEI) on 10 July 2018.

Preliminary matter

This was the first appeal received by the OCEI against a decision made by the Office of the Ombudsman. The first I knew of this complaint to the Office or the decision on it was when the appeal was brought to my attention in my capacity as Commissioner for Environmental Information. The OCEI notified the appellant of the situation in relation to the possibility of a perception of bias given my holding both roles. This notification drew attention to the fact

that the AIE Regulations do not make explicit provision for me to recuse myself and delegate the making of this decision to anyone else. The OCEI sought the appellant's view on my proceeding to conduct the review in reliance on the rule of necessity. The appellant confirmed that he was happy for the review to proceed under the circumstances.

The scope of the appeal

My investigator engaged with the appellant in order to clarify the scope of his appeal. The appellant said that he had no reason to doubt that the 56 records listed in the Office's schedule constituted all of the records held by that Office. He agreed to exclude from scope one document that he could access on the Council's website and all records that had been sent either by or to him. He maintained that all other documents, including draft documents, were within the scope of his appeal which meant that 23 records remained to be considered.

Scope of review

Although the Office's internal review decision relied solely on a finding that the withheld information is not environmental information, the Office later confirmed that if I find that any of the withheld information is environmental information, it endorses the findings of its original decision-maker with respect to refusal being justified by articles 8 and 9, after weighing the public interest in disclosure against the interests served by refusal.

I therefore planned to conduct my review by considering the following, in sequence:

- Whether the withheld records contain environmental information.
- If they do contain environmental information, was that information withheld from the appellant or was it otherwise made available to him?
- If the records contain environmental information that was within the scope of the appeal and withheld from the appellant, was that justified?

In carrying out my review I had regard to the submissions made by the appellant and the Office. I also 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); *The Aarhus Convention—An*

*Implementation Guide (*Second edition, June 2014) ('the Aarhus Guide'); and the relevant jurisprudence of the courts.

Whether the withheld records contain environmental information

The records

The 23 records at issue were numbered: 5, 8, 10, 12, 18, 19, 20, 21, 22, 23, 24, 27, 28, 31, 34, 38, 39, 43, 46, 48, 50, 53 and 54.

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).

It is clear from the case law that, to constitute environmental information, information does not have to be "intrinsically environmental" but it must fit within one or more of the six categories set out above.

The Office's position

The Office's position is as stated in its internal review decision:

> "The records are held on the Ombudsman's file dealing with your complaint about Dublin City Council. The records consist of internal notes and correspondence between the Office and yourself…. You say that the records are covered by 3(1)(c) and may be covered by 3(1)(a), (b), (d), (e) and (f). The records are concerned with whether the Ombudsman is permitted to examine your complaint, research notes on [the] Part 8 planning process, the Planning and Development Act, etc. The records are administrative in nature and I am satisfied that none of the records contain 'environmental information' as defined in the AIE Regulations."

The appellant's position

The following are the appellant's main arguments:

> The conclusion reached [in the Office's decision] seems to be based solely on the view that the relevant information is "administrative in nature". This is a misinterpretation of the concept of "environmental information" under the AIE Regulations. The concept of "environmental information" explicitly includes information on administrative measures that affect or are likely to affect the environment under category (c) and there is nothing in the definition which excludes administrative information on any of the other six categories. It seems that the requested information does not contain information that could be considered intrinsically environmental but that does not exclude it from the right of access under the AIE Regulations.
>
> The correct approach is to adopt the framework set out by the English Court of Appeal in *Department for Business, Energy and Industrial Strategy v. Information Commissioner and Alex Henney* [2017]EWCA Civ 844 (*Henney*) and the helpful summary of the approach in the subsequent UK Upper Tribunal case of DfT, DVSA and Porsche Cars GB Ltd v Information Commissioner and John Cieslik [2018] UKUT 127 (AAC) (*Cieslik*). In *Henney*, the English Court of Appeal cautioned at paragraph 52 that "one must guard against an impermissibly and overly expansive

reading that sweeps information which on no reasonable construction can be said to fall within the terms of the statutory definition". Thus, if there were a reasonable construction by which the requested information falls within the AIE Regulations, that construction must be favoured over any other construction that puts it outside the scope of the right of access.

The Court in *Henney* went on to hold that, in the case of information that is not intrinsically environmental, the line is drawn by reference to the purpose of the Aarhus Convention and the AIE Directive. Viewed through this prism, the information is environmental information. At the heart of the Smarter Travel Policy 2009 is the objective to minimise the negative impacts of transport on the local and global environment through reducing localised air pollutants and greenhouse gas emissions.

[The Office] concluded without giving any or adequate reasons that none of the records contain environmental information. An intrinsic part of the implementation of any administrative policy is an independent review by the Ombudsman and information regarding that review is information on the subject matter of the review and is precisely the type of information that should be accessible to the public under the Directive.

Applying a purposive interpretation, it is not a question of evaluating how direct or indirect the relationship is between the requested information and the question to be answered is, but whether access to the information advances the purposes of the Aarhus Convention and the AIE Directive (2003/4/EC). The relevant information would clearly support a clearer understanding of the Ombudsman's conclusion and the factors that he took into consideration and would strengthen public trust in the administration of transport policy. It is difficult to see how there could be no reasonable construction of the AIE Regulations and the Directive under which the requested information was not environmental information.

A complaint regarding the incompatibility of a road proposal with the stated objectives of another government policy that supports an environmentally sustainable transport solution (among others) must be environmental information as it is "information on" an investigation of the administration of environmental policy and thus falls within article 3(1)(c) of the Regulations at the very least.

The requested information is very much environmental information since it is the type of information – information on the investigation of a complaint relating to the implementation of transport policy (specifically cycling policy) by Dublin City Council – access to which advances the purposes of the Aarhus Convention and the AIE Directive. For example, it concerns decision making and the implementation of public policy relating to sustainable transport and in this case an allegation that Dublin City Council was guilty of maladministration in that regard. Equally transparency around how the Ombudsman handles complaints relating to environmental administration is important to strengthen access to justice in environmental matters and to ensure that the public has the greatest opportunity possible to utilise all of the administrative avenues available to it in ensuring that environmental policy is implemented by public authorities.

Transparency around the Ombudsman functions in environmental matters would also help strengthen public trust and acceptance of his investigations and lead to better outcomes overall. On the other hand, adopting a narrow, defensive definition of "environmental information" only serves to provoke doubt and suspicion as to why the Ombudsman wants to limit access to environmental information that his office holds. If he has nothing to hide he should have nothing to fear from public access to environmental information.

On a very reasonable construction of the law this type of information should be accessible to the public. For this not to be the case the Commissioner would need to show that there was no reasonable way that the requested information could be considered environmental information and that the right of access was been used in attempt to access information that was never contemplated by the legislature.

The Commissioner should interpret the definition of "environmental information" purposively.

[end of summary]

In a supplementary submission the appellant argued that a literal interpretation that would isolate individual elements of the withheld information would be at odds with a purposive approach to the definition of environmental information and inconsistent with the objectives of the AIE Regulations. He submitted that "individual records of data only partially

contribute" to his "understanding of the factors that the Ombudsman took into consideration when arriving at his decision" on his complaint. He added that:

> "it is the totality of the decision-making process and how it has been recorded that constitute the administrative measures as envisaged by article 3(1)(c) of the AIE Regulations. The withheld records may reveal whether there was maladministration in the decision-making process and the factors that the Ombudsman took in to consideration in reaching this decision. In addition, the information concerns the jurisdiction of the Ombudsman to consider complaints such as this and his analysis of planning law, both of which are clearly information on environmental decision-making and access to justice in environmental matters and therefore squarely within the definition of environmental information".

The appellant submitted that his request related to the Ombudsman's jurisdiction to handle complaints concerning the implementation of a road project and its compatibility with national cycling policy and said "this is clearly the type of information that should be accessible to the public under the AIE Regulations". He referred to the fact that my investigator (with the Office's consent) told him that the withheld information does not refer to the National Cycling Manual, the National Cycling Policy Framework or Smarter Travel. The appellant argued that "the absence of such references probably says as much as if there were references to them since it is an indication of the depth and nature of the Ombudsman's consideration of the complaint". He acknowledged that it "seems clear from the internal review [decision] that the [withheld] information refers to issues such as the Ombudsman's jurisdiction to investigate this category of complaints and information on planning law and practice". He added "how this cannot be considered to be environmental information is hard to understand".

Analysis

I examined the content of the withheld records in order to determine if it includes information that falls within any of the six categories of environmental information in the definition. In doing so, I disregarded the Office's view that the records are "administrative in nature" since whether they are "administrative in nature" or not would not assist me in determining whether they contain environmental information. Administrative records and environmental information are not mutually exclusive categories.

Environmental information of categories (a), (b) and (f)

I was readily able to establish that the withheld records do not include information that falls within categories (a), (b), and (f).

Environmental information of category (d)

I considered whether the withheld records contain information on 'reports on the implementation of environmental legislation' which would fall within category (d). As was stated in the Office's internal review decision, the withheld information included "research notes on Part 8 planning process and the Planning and Development Act". I therefore considered whether I should regard the Planning and Development Act 2000 as "environmental legislation". The long title of that Act shows that its purpose (amongst other things) is to provide, in the interests of the common good, for proper planning and sustainable development. My investigator drew my attention to *Fotovoltaic Energy SRL -v- Mayo County Council* [2018] IEHC 245 (available on www.courts.ie). In that judgment, the High Court considered the scope of 'environmental law'. While the Court did not find that that case 'engaged' the Aarhus convention or Directive 2003/35/EC (also known as 'the Public Participation Directive'), it approved (at paras. 63 and 64) of the guidance given by the Aarhus Convention Compliance Committee to the effect that a broad interpretation should be given to the ambit of 'environmental law'. Applying such a broad interpretation to the current case, I am satisfied that I should regard the Planning and Development Act 2000 as 'environmental legislation'.

I formed the view that the Planning and Development Act 2000 is a 'measure' within the meaning of the AIE Regulations. The withheld records contain information on section 179 of that Act and the role that section played in Dublin City Council's decision-making process. That particular information was contained in records numbered 24, 28 and 39. I considered the contents and context of this information and concluded that it could not reasonably be described as being a "report" or part of a report "on the implementation of environmental legislation". I therefore concluded that the withheld records do not contain environmental information that falls within category (d).

Environmental information of category (c)

I considered whether the withheld records contain information on any measure or activity affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition, or on measures or activities designed to protect those elements, so as to fall

within category (c). I concluded that the records do not contain information on any measure or activity designed to protect elements of the environment. I proceeded to consider whether they contain information on any measure or activity affecting or likely to affect relevant elements or factors.

The appellant argued that, because his complaint concerned the incompatibility of a road proposal with the stated objectives of another government policy that supports an environmentally sustainable transport solution, the withheld information must be environmental information, as it is "information on an investigation of the administration of environmental policy (specifically cycling policy)". He argued that it "thus falls within article 3(1)(c) of the Regulations".

Under section 4 of the Ombudsman Act 1980, the Ombudsman may delegate certain functions to his officers. In the current case, a "preliminary examination" of the complaint was conducted by a person to whom that power had been delegated. That person is described in the Office's records as a "caseworker". The purpose of a preliminary examination is to enable the caseworker to form a view as to whether the prerequisites for an "investigation" are present. In the current case, the caseworker formed the view that they were not and he therefore informed the appellant that the Office could not "be of assistance" to him. I understand that he meant by this that the Office had no power to conduct an "investigation" in the circumstances as they appeared to him on the conclusion of his preliminary examination.

While it is clearly the case that a "preliminary examination" is a less searching exercise than an "investigation" and the two are clearly different in the meaning of the Ombudsman Act 1980, I did not think that I should make too much of the appellant's use of the word "investigation". I understood his argument to be that the withheld records contain information on the administration of environmental policy, specifically cycling policy. I identified a number of measures that appear to be potentially relevant in this regard. They are the National Cycling Manual, the National Cycling Policy Framework, and Smarter Travel—A Sustainable Transport Future—a New Transport Policy for Ireland 2009 – 2020). I was satisfied that each of these is a measure that is likely (and, indeed, *intended*) to affect future developments and each is therefore likely to affect elements or factors referred to in paragraphs (a) and (b) of the definition of environmental information, not least, "streetscape",

as a sub-category of landscape. I therefore took the view that any information on those measures could be environmental information of category (c).

I searched the withheld records for information on any of the above cycling-related measures and found none. One may conclude from this that the records created by the Office in the course of its preliminary examination did not address cycling policy.

At the heart of this complaint was the development at the Point Roundabout that was proposed by the Chief Executive of Dublin City Council in Report No. 5/2016 ("the development"). It was clear that Dublin City Council's decision to undertake this development was a measure that was likely to lead to road works. Accordingly, I am satisfied that it was a measure that was likely to affect elements or factors referred to in paragraphs (a) and (b) of the definition of environmental information, not least, landscape. I therefore took the view that any information on the plan to upgrade the roundabout could be environmental information of category (c).

I searched the records for information on that measure. I found information in three records (records numbered 24, 28 and 39) that *describes* how the development decision came to be adopted by the Council. Other information records the caseworker's *opinion* that the decision-making process complied with all statutory requirements. I regard all of this information as environmental information of category (c).

I considered whether the Office's preliminary examination might itself have been a measure or activity meeting the requirements of article 3(1)(c) of the AIE Regulations. Such examinations are carried out for a specific statutory purpose, which is to enable a caseworker acting on behalf of the Ombudsman to decide if it appears to him or her that the prerequisite conditions for an investigation are present. They are not designed to protect "elements and factors" of the environment. It is possible that a preliminary examination could lead to an investigation that could in turn lead to the revelation of facts which could lead to a decision being taken to do something which affects elements and factors of the environment. However, I do not consider that this possibility means that it would be right for me to regard information on the preliminary examination of a complaint as a measure or activity qualifying under category (c) of the definition of environmental information.

Moreover, I do not see that the appellant's arguments about "transparency around the Ombudsman's functions in environmental matters" are relevant to the question of whether the withheld information is or is not environmental information. "Transparency around the

Ombudsman's functions in environmental matters" might be relevant if I were considering the public interest in the disclosure of environmental information, but it is not relevant to the question of whether specific information is environmental information to begin with. It does not expand any of the six already broad categories of environmental information or add a seventh category to the list.

Environmental information of category (e)

While I identified some information on "the development" as information on a measure within the meaning of category (c) of the definition of environmental information, I did not find any information in the withheld records that could be described as information on "cost-benefit and other economic analyses and assumptions used within the framework" of that measure.

Finding

I found some environmental information in the withheld records. Specifically, I found information that falls within category (c) of the definition in records numbered 24, 28 and 39. I regarded particular information in these records as environmental information because I was satisfied that the Council's decision to undertake certain roadworks was a measure likely to affect landscape and the information which I had identified is information on that measure.

Whether environmental information was withheld from the appellant

Conscious of the fact that the AIE regime concerns access to information and not to records *per se*, I turned my attention to considering whether the environmental information that I had identified in records 24, 28 and 39 had been withheld from the appellant.

Records numbered 24 and 28 are draft versions of documents numbered 25 and 29. The Office provided the appellant with complete copies of the latter documents. The contents of the draft versions were exactly the same, word for word, as those of records numbered 25 and 29. As that is the case, I am satisfied that the environmental information contained in documents numbered 24 and 28 was not withheld from the appellant.

Record number 39 was an internal Office note prepared in the course of the processing by the Office of an internal review of its 'preliminary examination' decision. It *describes* how the development decision came to be adopted by the Council and it records the caseworker's *opinion* that the decision-making process fully complied with all statutory requirements. I established that all of this information was given by the Office to the appellant in records

numbered 25 and 29. Accordingly, I concluded that the environmental information contained in record numbered 39 was not withheld from the appellant.

Finding

I find that the Office did not withhold environmental information from the appellant. Therefore, arguments based on articles 8 or 9 and the public interest in disclosure do not fall to be considered.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I find that the Office was justified in not providing information to the appellant on foot of his AIE request because the information which it withheld from him is not environmental information within the meaning of article 3(1) 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
12 December 2018