



**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 CEI/18/0014**

**Date of decision:** 26 June 2018

**Appellant:** Mr Q

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

**Issues:** Whether the Council was justified in refusing access to road safety audit reports on the basis that the information was not environmental information and that article 8(a)(iv) of the AIE Regulations applied to the reports; whether it was justified in refusing access to draft reports and correspondence; whether it was justified in refusing access to information relating to a meeting between Council staff and An Garda Síochána on the basis that the information was not held by or for the Council.

**Summary of Commissioner's Decision:** The Commissioner found that the Council was not justified in refusing access to the road safety audit reports. He found that they are environmental information under article 3(1)(c). He further found that refusal of access to the safety audit reports under article 8(a)(iv) of the AIE Regulations was not justified. Accordingly, he required the Council to release the reports. In addition, he found that as the Council had not carried out an adequate search for the draft reports and correspondence sought, it was not justified in refusing access to that information. He remitted that part of the request back to the Council and expressed his expectation that it would make a new decision on it, in accordance with the AIE Regulations. The Commissioner also found that the Council was justified under article 7(5) of the Regulations in refusing access to information relating to a meeting between Council staff and An Garda Síochána on the basis the information was not held by or for it. Accordingly, he affirmed the Council's decision on that part of 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 27 April 2018 the appellant requested access to the following:

1. A copy of four road safety review reports conducted by the Council in relation to the Kilkenny Central Access Scheme (the KCAS), including any draft reports and any internal Council and external correspondence regarding same.
2. A copy of notes taken by a Senior Engineer at the Council during a meeting with members of the Gardaí and any notes of the Senior Engineer the day before and subsequent to that meeting and the issue of road safety or any documents and/or records created as a result of the meeting both before and after it.
3. A copy of the traffic management plan for the KCAS.

On 16 May 2018 the Council made a decision on the appellant's request. In respect of part 1 of the request, the Council explained that the reports (referred to in the decision as 'safety audit reports') are road safety audits which are carried out as part of the design process for the road scheme. It said that safety audits 1 and 2 are completed at the design stage of the road project and that, in the case of this project, audits 1 and 2 are the same report. It explained that a fourth road safety audit is required for new national roads within a certain amount of time after a road has opened but that this is not applicable to this project as the KCAS is a non-national road. In summary, the Council confirmed that it held two safety audit reports. However, it refused access to them on the basis that, among other reasons, they were not environmental information. The Council refused part 2 of the request on the basis that it did not hold the information. In relation to part 3 of the request, the Council granted access to a preliminary traffic management plan but refused access to the remaining traffic management plans on the basis that the plans were in the ownership of the contractor who prepared them and that it would not be appropriate to release them to a third party.

On 24 May 2018 the appellant requested an internal review of the Council's decision. The appellant rejected the Council's determination that the information was not environmental information and noted that the Council had failed to consider the public interest that would be served by release or non-release of the information. He also cited and quoted from a previous decision of mine in Case [CEI/17/0034](#) (Mr. A and Kilkenny County Council), available at [www.ocei.ie](http://www.ocei.ie).

On 12 June 2018 the Council notified the appellant that three safety audits had been carried out. It stated, that in line with its original decision, the reviews were part of a deliberative process. It cited public interest factors in favour of both releasing and withholding the information. It concluded that the interest in safeguarding independent reviews outweighed the public interest served by releasing the reports. It also stated that the safety audit reports do not relate to factors that would cause affect to air, atmosphere, water, etc.

The appellant appealed to my Office on 13 June 2018 on the basis that the Council's internal review was flawed as it had not correctly applied the public interest test and that it had taken "a very narrow approach" to the environmental information.

My investigator wrote to the Council asking it to clarify which parts of the request the internal review decision related to and the basis on which the Council had refused access to the information sought. The Council stated that the internal review decision related to all 3 parts of the request. In relation to part 3 of the request, the Council also clarified that it had

refused access to the traffic management plans under article 8(a)(ii) of the AIE Regulations. However, it stated that the contractor who prepared them had since consented to their release to the appellant.

It was also unclear from the appellant's appeal to my Office to which part(s) of his request his appeal related. My investigator wrote to the appellant to clarify whether his appeal only concerned part 1 of his request or whether it related to all 3 parts of his request. The appellant clarified that his appeal related to all 3 parts of his request.

I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and the Council. 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 jurisprudence of the courts on the question of the definition of environmental information.

### **Scope of Review**

During the course of my review, the Council released the traffic management plans which the appellant had sought at part 3 of his request. The appellant confirmed to my investigator that as a result of the release of that information he was satisfied that the information sought at part 3 of his request had been released. Accordingly, the scope of this review is confined to the information sought at parts 1 and 2 of the request.

### **Definition of Environmental Information**

Article 3(1) 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)".

As noted above, the Council refused access to the safety audit reports on the basis that the reports are not environmental information.

The appellant submits that the safety audits, reports and correspondence regarding same are environmental information within the meaning of article 3(1)(c). He states that these "constitute a 'measure' which may have an affect 'on' the environment". By way of example, he states that if a safety audit or any relevant reports recommended a road closure or the continued use of a road, this would affect the emissions of noise and automobile exhausts into the environment, specifically in the area in question. He also submitted that any correspondence which may give insights into the decision making which led to decision to close the road or its continued use is also information "on" the environment.

The Council submits that the safety audit reports do "not refer to environmental information" and are "not environmental in nature". Therefore, they are not subject to release under the AIE Regulations. In its internal review decision, it stated that the safety audits are "not factors that would cause affect to air, atmosphere, water, soil, land etc." My investigator invited the Council to address further the issue as to whether the safety audit reports are environmental information. In doing so, she put the appellant's arguments that the information sought at part 1 is environmental information under article 3(1)(c) to the Council, and invited it to address the matter. The Council did not make any further submissions in relation to this matter during this review.

As the appellant submits that the safety audits and safety audit reports are "measures", I will start my analysis by considering whether the safety audit reports are environmental information under article 3(1)(c). My approach to determining whether information is environmental information within the meaning of the definition in the AIE Regulations is set out in previous decisions in Case CEI/15/0007 (Mr Ken Foxe, Raidió Telefís Éireann and the Department of Defence) and Case CEI/13/0013 (Mr Gavin Sheridan and An Garda Síochána), available at [www.ocei.ie](http://www.ocei.ie). Although I have not repeated that analysis, the same principles apply in this case.

Having examined the contents of the safety audit reports, I accept that they are measures within the meaning of article 3(1)(c). I note the Council's position in its internal review decision and submissions to my Office that the safety audit reports are an element of the design of the KCAS road project. In my view, the safety audit reports contain environmental information describing the site inspected, for example, the layout of the existing roads and junctions which is information on the state of the elements e.g. landscape. The main element of the safety audit reports identifies and describes potential road safety issues and recommendations to mitigate these. In essence, the purpose of the process was to identify potential safety issues with the KCAS and make recommendations so as to ensure that the design team would consider and incorporate measures to mitigate against those potential

risks. The recommendations make suggestions as to how the KCAS can be amended or altered to improve the safety of the road scheme. Those recommendations include making amendments to the existing landscape such as removing and erecting signage, removing barriers and extending cycle lanes. I consider that the recommendations are likely to affect the state of the elements such as landscape.

The Court of Appeal in *Minch -v- Commissioner for Environmental Information & Anor* [2017] IECA 223 (*Minch*), available at [www.courts.ie](http://www.courts.ie), considered the meaning of 'measures' in article 3(1)(c). It cited the following terms from article 3(1)(c) "plans" or "policies" "affecting or likely to affect the environment..." and stated that "[t]he wording here suggests that the document in question must have graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme". In my view, the safety audit reports are measures within the meaning of the Court of Appeal judgment in *Minch*. In that they comprise a definite plan or proposal for identifying and mitigating potential road safety risks in the design of the KCAS.

The Court of Appeal in *Minch* also stated that "the reference to 'likely to affect' the environment should really be understood in the sense of being 'capable' of affecting the environment". I note that in its initial decision the Council states that the safety audit reports are "used by the design team to formulate the final proposals". In particular, it states that "[t]he recommendations included in these audits are then considered by the scheme designers and client as to whether they should be, and/or are possible to incorporate into the project". While I note that the Council states that recommendations in the safety audit reports "may or may not be incorporated into the final design of the schemes", the Court of Appeal judgment in *Minch* stated that I am not "required to make a judgment as to whether the plan or policy is ever likely to be put into effect". I consider that the safety audit reports are capable of affecting the environment. Accordingly, I find that the safety audit reports are measures affecting or likely to affect elements of the environment, and therefore, are environmental information under article 3(1)(c).

Furthermore, it is possible for information to be environmental information in more than one manner under article 3(1). Article 3(1)(c) states that environmental information includes "any information...on" measures or activities affecting or likely to affect the elements and factors of the environment or measures or activities designed to protect those elements. In addition to the safety audit reports being environmental information in and of themselves, I consider that they are information "on" a measure under article 3(1)(c). The safety audit reports directly relate to the KCAS. The KCAS provided for improvement works to roads and junctions and the construction of a new bridge. I consider that the KCAS is in itself a measure and activity affecting or likely to affect the elements and factors of the environment such as land and landscape.

The Court of Justice of the European Union (CJEU) in C-316/01 *Glawischnig v. Bundesminister für soziale Sicherheit und Generationen (Glawischnig)*, available at [www.curia.europa.eu](http://www.curia.europa.eu), suggests that right of access is not unlimited, and only information which has more than a minimal connection with environmental factors falls within the definition of environmental information. I am satisfied that the safety audit reports have a more than a minimal connection to the state of the elements of the environment. For the reasons above, I am satisfied that the safety audit reports can be said to have a sufficient connection to the state of the elements of the environment. As noted above, the Council states that the safety audit reports are used by the design team to formulate their final proposals. I

am satisfied that the safety audit reports which feed directly into the design process for the road scheme are integral to the KCAS. Accordingly, I find that the safety audit reports are information "on" a measure i.e. the KCAS affecting or likely to affect the elements of the environment within the meaning of article 3(1)(c).

## **Analysis and Findings**

### **Part 1 of the request**

As noted above, the Council also refused access to the safety audit reports on the basis they were part of a deliberative process.

Article 8(a)(iv) of the AIE Regulations provides that 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 records which are exempt from disclosure under the Freedom of Information Act 2014 (FOI Act)). The Council contends that the safety audit reports are protected by the FOI Act and, thus, fall under the exemption in article 8(a)(iv) of the AIE Regulations.

### **Section 29 of the FOI Act**

Section 29(1) of the FOI Act provides that a head may refuse to grant an FOI request: (a) if the record concerned contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations, and the results of consultations, considered by the body for the purpose of those processes), **and** (b) the granting of the request would, in the opinion of the head, be contrary to the public interest. Section 29(1)(a) and (b) are independent requirements and both requirements must be met for the exemption to apply. Section 29(2) provides that section 29(1) does not apply in certain circumstances. For example, section 29(2)(b) provides that section 29(1) does not apply to a record in so far as it contains factual information and section 29(2)(e) provides that it does not apply to a report of a technical expert relating to his or her area of expertise unless the report is used or commissioned for the purposes of a decision made by the Council pursuant to any enactment or scheme.

A deliberative process can be described as a thinking process that refers to the way an FOI body makes decisions. It involves the gathering of information from a variety of sources and weighing or considering carefully all of the information and facts obtained with a view to making a decision or reflecting upon the reasons for or against a particular choice. The Council submits that the deliberative process to which the information relates is the safety audit process with independent observations on design and construction of the KCAS. I am not at all convinced that the safety audit reports relate to the Council's deliberative process. Even if I was satisfied that the safety audit reports relate to the Council's deliberative processes, an FOI body relying on section 29(1) for its refusal to grant access to information must also show that release of the information would be contrary to the public interest.

The Council submits that release of the safety audit reports would adversely affect the confidentiality of the safety audit process as conducted on all new road schemes. It says that an observation by a safety auditor does not necessarily mean that a safety issue exists and that this fact would be lost on non-technical readers of the reports. It contends that if a person

conducting an audit knew that their comments would be released to third parties, they may be reluctant to raise issues of concern knowing that their observations will be taken out of context by non-technical readers. According to the Council "thereby negating the principles of the safety audit process itself".

The appellant submits that the role of safety auditors is to give their professional opinion of a scheme or project. He states that it is "precisely the job of a Safety auditor to highlight and raise issues of concern". He notes that the risk identified by the Council is a purported harm. He submits that the Council has not shown how the harm it purports would result from release of the safety audit reports.

Having examined the safety audit reports and the Council's submissions, I am satisfied that, even if the information relates to the Council's deliberative process, the Council has not demonstrated how its release would be contrary to the public interest. In my view, the factors identified by the Council are mere assertions, which are not supported by evidence before me. The Council has not shown precisely how the release of the information might impair its ability to complete its deliberative process. In my view the possibility of information being misunderstood is not a good enough reason to refuse access to information under the AIE Regulations. I also agree with the appellant that it is the role of safety auditors to give their professional independent observations on a scheme or project. Therefore, I am not satisfied that the requirements of section 29(1)(b) of the FOI Act have been met in relation to the safety audit reports. In light of this finding, it is not necessary to consider whether any of the exceptions to section 29(1) which are contained in section 29(2) apply to the records.

For the reasons above, I find that the Council's refusal of access to the safety audit reports under article 8(a)(iv) of the AIE Regulations on the basis that the confidentiality of the reports are protected by the FOI Act is not justified.

#### Draft safety audit reports and correspondent sought at part 1 of the request

I note that part 1 of the request also sought any draft reports and internal and external correspondence relating to the safety audit reports. The Council's decisions on the request do not state whether such information is held by or for it. My investigator asked the Council to clarify whether it had searched for other information falling within the scope of part 1 of the request, and, if so, what steps were taken to search for it. The Council did not address this query in its submission. As a result, I cannot be satisfied that the Council has completed a reasonable and adequate search for all relevant information falling within the scope of part 1 of the request. Accordingly, I find that the Council's refusal of access to the draft reports and correspondence is not justified.

#### **Part 2 of the request**

The Council refused access to the information sought at part 2 of the request on the basis that it does not hold the information sought. Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested information is held by or for the public authority concerned. This Office's approach to dealing with cases where a public authority has effectively refused a request under article 7(5) is set out in previous decisions such as case CEI/13/0015 (Mr. Lar McKenna and EirGrid plc) and Case CEI/11/0009 (Ms. Rita Canney and Waterford City Council), available at [www.ocei.ie](http://www.ocei.ie). As these decisions explain, I must be satisfied that adequate steps have been taken to identify and

locate relevant records, 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 information.

The Council states in its initial decision on the request that meetings between the Gardaí attached to the traffic division and the Council's road engineers occur routinely and that the meeting referred to in this part of the request was informal in nature. It states that no notes were made prior to, during or subsequent to the meeting and that no other records relating to the meeting exist. I note that the initial decision maker appears to be the Council's engineer whom the appellant states in his request attended the meeting with the Gardaí. In response to a query from my investigator regarding its efforts to search for information relating to part 2 of the request, the Council states that it asked the engineer who attended the meeting if any notes had been taken. He advised that the meeting was informal in nature and that he had not made any notes prior to, during or subsequent to the date in question and that no other records relating to the meeting existed. The Council explained that the type of records which would ordinarily be created in a case such as this would include an agenda for and minutes of the meeting but that this would apply to a scheduled meeting between An Garda Síochána and the Council's road section which would normally be held at head office. It says that this was not the case here as the meeting was held on-site. The Council states that, in addition to asking the Council's staff who attended the meeting if there was any information, a check was carried out of staff members' on-site records for relevant information in case the staff members were mistaken in their recollection of the meeting.

In the absence of any evidence to the contrary, I accept the written explanations given by the Council as to how it satisfied itself that no information relevant to part 2 of the request is held by or for it. I conclude that the Council has taken adequate steps to identify and locate any information relevant held within the scope of part 2 of the request in this case. Accordingly, I find that the Council's decision to refuse access to part 2 of the request was justified under article 7(5) of the AIE Regulations.

### **Decision**

Having carried out a review under article 12(5) of the AIE Regulations, I find that the Council was not justified in refusing access to the safety audit reports on the basis that the information was not environmental information and that article 8(a)(iv) applies to the reports. Accordingly, I vary the part of the Council's decision on the safety audit reports and require it to make the reports available to the appellant.

I find that the Council did not carry out an adequate search for the draft reports and correspondence sought at part 1. Accordingly, I annul that part of the Council's decision. I expect the Council to make a fresh decision on that part of the request in accordance with the AIE Regulations. I further expect that the Council would make its fresh decision at the earliest possible date and, in any case, within the statutory period.

In relation to part 2 of the request, I find that the Council's decision to refuse the appellant's request for access to information relating to the meeting between staff members at the Council with members of An Garda Síochána on the basis the information was not held by or for it is justified under article 7(5) of the Regulations. Accordingly, I affirm that part of the Council's decision.

### **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**  
26 June 2019