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/19/0020

Date of decision: 22 November 2019

Appellant: Mr. X

Public Authority: University College Dublin (UCD)

Issue: Whether UCD was justified in refusing access to certain correspondence relating to a named professor and his findings on climate science

Summary of Commissioner's Decision: The Commissioner found that the requested correspondence was held in the professor's personal capacity and not by or for UCD and thus article 7(5) of the AIE Regulations applied.

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 21 December 2018, the appellant requested access to certain correspondence relating to a named professor and his findings on climate science. He specified that he sought five categories of correspondence to/from any of the professor's email address(es) for the time period of 1 January 2018 to the date of his request. On 17 January 2019, UCD extended the deadline for making its decision on the basis of article 7(2)(b) of the Regulations. UCD subsequently issued a decision on 18 February 2019 in which it identified 131 emails or email chains as falling within the scope of the request, as outlined in a schedule of records accompanying its decision, but found that the correspondence was "not conducted in an administrative capacity on behalf of the University". It found that the records did not therefore fall within the definition of environmental information under the Regulations. It also refused access to the records under articles 8(a)(i) and (ii) of the Regulations. In addition, it refused access to draft reports attached to the emails under article 9(2)(c) of the Regulations. However, it granted access to seven attachments to the emails consisting of final reports or publications by the professor.

On 19 February 2019, the appellant requested an internal review of UCD's decision. On 9 April 2019, UCD affirmed its original decision. On the same day, the appellant appealed to my Office.

I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the appellant's statement of appeal and to the submissions made by UCD. I note that on 25 September 2019, my Office invited the appellant to make submissions in support of his appeal. On 30 October 2019, my Office wrote to the appellant again for the purpose of updating him on UCD's position on the matter in light of its submissions. The appellant was given a further period of two weeks, i.e. until 13 November 2019, in which to make any comments that he considered may be relevant to my review. To date, however, no submissions from the appellant have been received. I now consider it appropriate to bring this matter to conclusion by way of a formal, binding decision.

Scope of Review

This review is concerned solely with the question of whether UCD's decision to refuse access to the withheld emails and attachments identified in its schedule of records was justified under the AIE Regulations.

Analysis and Findings

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. Article 3(1) of the Regulations defines "environmental information held by a public authority" to mean "environmental information in the possession of a public authority that has been produced or received by that authority". It states that "'environmental information held for a public authority' means environmental information that is physically held by a natural or legal person on behalf of that authority".

In this case, UCD has clarified in its submissions to this Office that it does not consider that the correspondence at issue is held by or for it. It has explained that the professor holds an honorary position in the University and that the requested records relate to private work that he has undertaken in his personal capacity, independent of the University. UCD states: "While [the professor] used his UCD email account to carry out this work, the work itself was held by [the professor] in his personal capacity. It was not produced or received for or on behalf of the university and the fact that the records are held on a UCD email account does not mean that the university holds information to support the Professors [sic] views."

Having examined the emails, which were forwarded to my Office for the purposes of my review, I find no basis to dispute UCD's claim that they are not held by or for it for the purposes of the AIE Regulations. As this Office explained to the appellant in its invitation for submissions, the correspondence is concerned with such matters as the arrangements for the publication of the professor's reports, meetings, and interviews. The correspondence also includes messages of a private nature with individual farmers. It is apparent that the correspondence was conducted in the professor's personal capacity rather than in an official capacity as a staff member of the University. I further note that the professor is listed as an Emeritus Professor on UCD's websitehttp://www.ucd.ie/mathstat/mcc/people/.

In the circumstances, I accept that the correspondence was not produced or received by UCD and that it is not held on behalf of UCD. While I am not bound by the decisions of the United Kingdom's Upper Tribunal, I find support for this conclusion in the case of *Holland v The Information Commissioner & Anor* [2016] UKUT 260 (AAC), available here. Having regard to the *traveaux preparatoires* [preparatory materials] for Directive 2003/4/EC (the AIE Directive), the Tribunal found that physical possession of information is not itself sufficient to satisfy the test of whether information is held by a public authority. Accordingly, the Tribunal found that information in the possession of the University of Cambridge that was produced by a serving member of staff on behalf of the Inter-Governmental Panel on Climate Change (IPCC) did not fall within the scope of the Environmental Information Regulations 2004.

In his statement of appeal, the appellant suggested that the professor should not be doing work "as a private citizen" using a UCD email address. However, it is not within my remit to consider challenges to the arrangements that universities may enter into with retired professors who are awarded honorary titles. I also note that there are many circumstances in which even a serving staff member of a public authority may produce or receive information in a personal or private capacity through the public authority's email server. The Tribunal referred to a number of examples in paragraph 47 of its decision. As the Tribunal acknowledged, there are cases in which the question of whether information in a public authority's possession is held by or for it is not a straightforward matter. However, as the Tribunal explained:

> "A factual determination is required as to how the information has come to be in the possession of the authority. The question is whether the information was produced or received by means which were unconnected with the authority, for example by an individual in their personal or other independent capacity; or

> whether it was produced or received by means which were connected with the authority, for example by someone acting in their professional capacity in relation to the authority (such as an employee of the authority). The connection must be such that it can be said that the production or receipt of the information is attributable to ('by') the authority."

A similar approach was taken by the Irish Supreme Court in relation to Freedom of Information (FOI) legislation in *Minister for Health v Information Commissioner* [2019] IESC 40 (affirming O'Neill J in his judgment at [2014] IEHC 231). The Court agreed with O'Neill J that lawful, physical possession of a record is not sufficient to find that it is "held" by a public body for the purposes of the FOI Act; rather, the record must be lawfully in the possession of the public body in connection with or for the purpose of the business or functions of the public body. The correspondence at issue in this case was conducted by the professor in his personal capacity and independently of the university. I am therefore satisfied that article 7(5) of the Regulations applies.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I affirm UCD's decision in this case on the basis that article 7(5) applies to the information sought.

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
22 November 2019