



**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 OCE-93398-X5T7P3**

**(Legacy Reference: Case CEI/19/0050)**

**Date of decision:** 24 November 2020

**Appellant:** Mr Q

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

**Issue:** Whether the Council was justified in refusing access to correspondence regarding the road safety audit (RSA) reports for the Kilkenny Central Access Scheme (the KCAS) under article 8(a)(iv) of the AIE Regulations on the basis that the confidentiality of the Council's proceedings was protected by sections 29 and 30(1)(a) of the Freedom of Information Act 2014 (FOI Act)

**Summary of Commissioner's Decision:** The Commissioner found that the Council's refusal of access to the correspondence regarding the RSA reports for the KCAS under article 8(a)(iv) of the AIE Regulations was not justified. Accordingly, he required the Council to disclose the correspondence 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**

Directive 2008/96/EC on Road Infrastructure Safety Management provides that Member States must ensure that road safety audits (RSAs) are carried out for all infrastructure projects. Ireland transposed Directive 2008/96/EC through Statutory Instrument No. 472/2011 European Communities (Road Infrastructure Safety Management) Regulations 2011, available at [www.irishstatutebook.ie](http://www.irishstatutebook.ie). This statutory instrument defines a “road safety audit” as “an independent detailed systematic and technical safety check relating to the design characteristics of a road infrastructure project and covering all stages from planning to early operation”. It also provides that RSAs shall be carried out by road safety auditors. Transport Infrastructure Ireland describes the RSA process in its RSA Guidelines - Road Safety Guidelines GE-STY-01027 (December 2017) - available at [www.TII.ie](http://www.TII.ie).

This case is the second appeal to my Office arising from one request. On 27 April 2018, the appellant requested access to records, including a copy of four RSA reports conducted by the Council in relation to the Kilkenny Central Access Scheme (the KCAS), any draft of those reports and any internal Council and external correspondence regarding same (Part 1 of the request). The Council refused access to the information sought on the basis that, among other reasons, it was not environmental information within the meaning of article 3(1) of the AIE Regulations and that article 8(a)(iv) of the AIE Regulations applied to the reports. The appellant requested an internal review, at which point the Council affirmed its earlier decision. The appellant appealed to my Office under case reference [Case CEI/18/0014](#) (Mr Q and Kilkenny County Council), available at [www.ocei.ie](http://www.ocei.ie).

In a decision dated 26 June 2019, I found that the Council was not justified in refusing access to the two RSA reports that were before me in that case. As such, I varied the Council’s decision in relation to the two RSA reports and required it to make the reports available to the appellant. In relation to the draft RSA reports and correspondence regarding the RSA reports, I found that the Council had not carried out an adequate search for the information. I, therefore, annulled the Council’s decision on that part of the request and required it to make a new decision in relation to those records.

On 9 August 2019, the Council provided the appellant with copies of three safety audit reports: Road Safety Audit Stage 1 and 2 August 2017; Road Safety Audit Stage 3 May 2017; and Road Safety Audit Stage 3 August 2019. It apologised for the delay in sending the reports to the appellant and explained that it was waiting for the final report to be signed off. The Council provided him with a copy a fourth RSA report - Road Safety Audit Stage 1/2 August 2019 - on the 14 August 2019.

The appellant requested an internal review of the Council’s decision on 10 October 2019 on the grounds that he had not been provided with internal and external correspondence about the RSA audits, or with a copy of maps referenced within the Road Safety Audit 1 & 2.

On 17 October 2019, the Council notified the appellant of its internal review decision. It provided the appellant with a link where he could download pdf copies of the design drawings (maps) referenced within the Road Safety Audit 1 & 2. It refused access to internal and external correspondence regarding the RSA reports on the basis that disclosure of such correspondence would adversely affect the safety audit process, as the process would be seriously undermined by the disclosure of correspondence. It stated that disclosure of the correspondence would lead to auditors being hesitant to make comments during the safety audit process which would undermine and negate the effectiveness of that process. It explained that the auditors act as a fresh set of eyes on the complete road scheme. It stated that following discussion of the relevant works, a joint decision is taken by the auditors, designers and the client and the final RSA report is produced. It asserted that the final signed Safety Audit Report has pre-eminence in this process.

The appellant appealed to my Office on 18 October 2019.

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 have also examined the contents of the records at issue. In addition, I have 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').
- Sections 29 and 30 of the FOI Act and the Guidance of the Office of the Information Commissioner on those two sections.

### **Scope of Review**

In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it.

In total the Council has provided the appellant with access to four RSA reports to the appellant:

- Road Safety Audit Stage 1 & 2 August 2017
- Road Safety Audit Stage 3 May 2017
- Road Safety Audit Stage 3 August 2019
- Road Safety Audit Stage 1/2 August 2019

Having reviewed Road Safety Audit Stage 1 & 2 August 2017 and Road Safety Audit Stage 3 May 2017, I am satisfied that they are the two reports that were before me in Case CEI/18/0014 which I required the Council to make available to the appellant. While the Council did not submit in that case that the two reports before me were draft reports, having examined that reports during the course of this review, I am satisfied that the two reports are draft reports. I note that the footers to the two reports refer to the fact that the reports are drafts. As the Council as provided the appellant access to the two draft reports they are outside the scope of my review. I also note that Road Safety Audit Stage 3 August 2019 and Road Safety Audit Stage 1/2 August 2019 post-date the AIE request, and therefore, are outside the scope of my review.

Having considered the matter carefully, I am satisfied that the records at issue in this case are the correspondence regarding the RSA reports. The Council has provided my Office with nine records which comprise the correspondence that it refused access to in its internal review decision in this case. Six of the nine records withheld by the Council post-date the appellant's AIE request, and therefore, are outside of the scope of my review. Accordingly, the question at issue in this case is whether, with the exception of the personal data, the Council was justified in refusing access to the remaining three records that comprise the correspondence regarding the RSA reports.

My investigator notified the appellant that the records the Council provided to my Office may contain a small amount of personal data of third party individuals. In response, the appellant clarified that he was not seeking access to the personal data of third party individuals in the correspondence. Having examined the three records within the scope of my review, I am satisfied that the correspondence contains personal data relating to identifiable natural persons. Accordingly, the third party personal data falls outside the scope of the appellant's AIE request, and therefore, outside the scope of my review.

For the sake of clarity, I would like to confirm that personal data in the records falling outside the scope of my review are: the names of natural persons who are not officials of the Council. Their names appear in the header of the email, the first part of their email addresses where their name forms part of their email address e.g. [name]@[organisation].ie, the greeting in emails sent to them e.g. Hi [name], and their sign off in emails they sent e.g. Regards [name]. Once the name is redacted from the email address I am satisfied that the latter part of the email address e.g. [organisation].ie does not amount to personal data.

### **Analysis and Findings**

#### **The Council's position**

The Council submits that article 8(a)(iv) of the AIE Regulations applies to the correspondence regarding the RSA reports. It is clear from the Council's position in this case

that it considers that the relevant proceedings are its proceedings in relation to the RSA process for the KCAS, and that the confidentiality of those proceedings and records relating to them are protected by law by the FOI Act, specifically sections 29 and 30(1)(a) of the FOI Act. In effect, the Council's position is that disclosure of the correspondence would adversely affect the RSA process as that process would be seriously undermined by the disclosure of correspondence. It relies on the reasoning set out in its internal review decision, as set out above, in support of its position.

In relation to the public interest test under section 29 of the FOI Act, the Council submits that the factors it took into account in favour of disclosure were:

- The right of the public to access to information.
- The disclosure of information will reveal the reasons for decisions.
- The accountability of administrators and the scrutiny of decision making processes.
- The need for the public to be better informed and more competent to comment on public affairs.
- The information will make a valuable contribution to the public debate on an issue.

It submits that the public interest factors it took into account in favour of maintaining the exception were:

- The need to preserve confidentiality having regard to the subject matter and the circumstances of the communications.
- The disclosure of the records would impair future decisions.
- Broader community interests must be considered, as distinct from those of the appellant and the subject of the record.

In relation to the public interest test more generally, the Council submits that the factors it took into account in favour of disclosure were:

- The accountability and objectivity in the decision-making processes.
- The public interest, favouring disclosure, of a particular matter to a particular applicant in a particular case, as opposed to disclosure to any person.
- The need to be accountable in terms of the spending of public monies.
- The public interest in ensuring that investigations into events are thorough and that robust procedures are used and followed.

It submits that the public interest factors it took into account in favour of maintaining the exception were:

- The need to protect the efficient and effective management of an FOI body.
- Ensuring FOI is not used to the detriment of the equitable treatment of individuals.

Having balanced the above factors, it states that it considers that the public interest in preserving the confidentiality of the records involved outweighs the public interest that would be served were the records to be disclosed to the appellant.

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

The appellant is of the view that the correspondence of auditor's in relation to the work they are contracted to carry out on a public engineering project does not automatically fall under the heading of the confidential proceedings of a public authority within article 8(a)(iv). In support of his position that the correspondence is not considered to be the confidential proceedings of public authorities he cites the Court of Justice of the European Union's judgment in Case C-60/15 P *Saint-Gobain Glass Deutschland GmbH v European Commission*.

He also submits that the RSA reports, including correspondence regarding the reports prior to their formal completion, are paid for with public funds. He asserts that auditors have tendered for the work and that the terms and conditions include that information may be disclosed in accordance with the FOI Act. He states that private bodies or companies should not expect an automatic right of privacy in relation to their correspondence with private bodies. He contends that such a situation would be contrary to the public interest as relevant dealings could be considered under the heading of correspondence and could be used by public bodies to avoid their obligations under the FOI Act and AIE Regulations.

He states that a very good reason would be needed in order for an auditor's views not to be disclosable, and that the Council has not provided one. He also states that the Council has not sufficiently assessed or shown how disclosure of the correspondence would lead to the harm claimed or how likely it is the harm would occur.

In relation to the public interest factors cited by the Council in favour of disclosure, the appellant submits as follows:

- The communications are about a measure which effected the environment, therefore they must be disclosed under the AIE Regulations.
- He rejects that the disclosure of the records would impair future decisions.
- While not relevant to my review, the appellant states that he has no personal interest in the records and that his interests correspond with those of the broader community and general public of having access to public information.
- That the courts consider the disclosure of information under AIE or FOI as release to the world, therefore, the public interest factor put forward in favouring disclosure by the Council in relation to a particular matter to a particular applicant in a particular case, as opposed to disclosure to any person is moot.

Regarding the factors cited by the Council in favour of maintaining the exception, he submits that at no point has the Council argued that his request was manifestly unreasonable, therefore, it could not have damaged the efficiency of a public body. He also queries how the detriment of the equitable treatment between individuals using FOI could possibly arise.

The appellant rejects that the Council properly balanced the factors relevant to the public interest test.

He further submits that I should rule as I did in Case CEI/18/0014. He states that the correspondence regarding the RSA reports, which concerns environmental information about a public civil engineering project with an important safety dimension and cost, is at the core of the RSA process and therefore the Council should be open and transparent in relation to it.

The parties made broadly similar arguments with respect to the RSA reports in Case CEI/18/0014, and as noted directly above the appellant relies on my decision in that case in support of his position on his appeal in this case. I am not bound to follow previous decisions; I conducted a fresh review of all aspects of this appeal and decided it on its own merits.

#### **Article 8(a)(iv)**

Article 8(a)(iv) 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 the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts).

#### **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.

I understand from the Council's submissions that the deliberative process to which the correspondence relates is the RSA process. The records at issue are two email chains and one email between the Council and its consultant engineers and contractors relating to the RSA for the KCAS. The Guidance Note published by the Office of the Information Commissioner on Section 29, available at [www.oic.ie](http://www.oic.ie), states that a deliberative process may be described as a thinking process that refers to the way an FOI body makes decisions. The process 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. It is the Council's position that the confidentiality of this deliberative process is protected by section 29 of the FOI Act.

I am not convinced that the correspondence relates to the Council's deliberative process. While it would not be appropriate for me to describe the content of the records in detail, the two email chains relate to two separate questions from the Council's engineer to the consultant engineers who were the scheme designers for the KCAS. The third email is from the scheme designers for the KCAS to the construction contractors appointed by the Council for phase 2 of the KCAS and officials at the Council providing an update on the RSA process. I would not characterise the correspondence as the gathering of information from a variety of sources or as weighing or considering carefully information and facts with a view to making a decision on the KCAS or aspects of the KCAS or reflecting on the reasons for or against a particular choice relating to the KCAS. Accordingly, I am not satisfied that the requirements of section 29(1)(a) of the FOI Act have been met in relation to the correspondence.

Having examined the records at issue, I am satisfied that, even if the information relates to the Council's deliberative process, the Council has not demonstrated how its disclosure would be contrary to the public interest as per section 29(1)(b). 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 how the disclosure of the information might impair its ability to complete its deliberative process, either the process at the centre of this case *i.e.* the KCAS or future decisions relating to the RSA process for other new road schemes. The mere possibility that disclosing the correspondence could lead to auditors being reluctant to participate in the RSA process is not a sufficient reason to refuse access to the correspondence. In addition, as I note above, two of the email chains are between the Council and the consultant engineers who were the scheme designers for the KCAS and the third email is from the scheme designers to the construction contractor for phase 2 of the KCAS and the Council. None of the correspondence at issue is from or to the independent engineering company that the Council tasked with conducting the KCAS safety audits *i.e.* the auditors for the KCAS.

Furthermore, I note that TII's Road Safety Guidelines for RSAs provide that the RSA audit team should be independent of the design team. Given the independent role that road safety auditors play in the RSA process, it is reasonable to expect that if the correspondence is disclosed, RSA auditors will continue to identify any potential safety issues within road schemes requiring a RSA, and that they will continue to make recommendations to the designers to minimise potential road safety issues, in accordance with the law and Guidelines governing the RSA process. Thus, in the circumstances of this case, I am not satisfied that the Council has shown that disclosure of the correspondence would operate contrary to the public interest by impairing the RSA process. Consequently, I am not satisfied that the requirements of section 29(1)(b) of the FOI Act have been met in relation to the correspondence.

In light of my finding that section 29(1) of the FOI Act does not apply to the correspondence, it is not necessary for me to consider whether any of the exceptions to section 29(1) contained in section 29(2) apply to the records.

As I am not satisfied that the requirements of section 29(1)(a) and 29(1)(b) of the FOI Act have been met, I am therefore not satisfied that section 29 of the FOI Act protects the confidentiality of the proceedings concerned for the purposes of article 8(a)(iv) of the AIE Regulations.

For the reasons above, I find that the Council's refusal of access to the correspondence under article 8(a)(iv) of the AIE Regulations on the basis that the confidentiality of the proceedings of the Council are protected by section 29 of the FOI Act is not justified.

### Section 30 of the FOI Act

The Council also submits that the confidentiality of the RSA process is protected by section 30 of the FOI Act.

Section 30(1)(a) provides that an FOI body may refuse access to a record if it considers that access could reasonably be expected to prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of an FOI body or the procedures or methods employed for the conduct thereof. The Guidance Note published by the Office of the Information Commissioner on Section 30, available at [www.oic.ie](http://www.oic.ie), states that section 30(1)(a) is a harm-based provision which requires the decision-maker to identify the potential harm feared and consider the reasonableness of any expectation that such harm will occur. Where an FOI body relies on section 30(1)(a), it should identify the potential harm to the functions covered by the exemption that might arise from disclosure and, having identified that harm, consider the reasonableness of any expectation that the harm will occur. To establish the reasonableness of the decision, it is necessary for the FOI body to explain how and why it believes disclosure of the particular records at issue will give rise to the harm envisaged. Section 30(1) is subject to a public interest test under section

30(2), which provides that section 30(1) shall not apply where in the opinion of the head of the FOI body the public interest would, on balance, be better served by granting than by refusing to grant the request.

I understand from the Council's submissions that it considers that disclosure of the correspondence relating to the RSA reports would harm the effectiveness of the RSA process, as it would undermine that process. Having considered the matter carefully, I am not satisfied that the Council has shown how disclosure of the correspondence could reasonably be expected to harm the effectiveness of the RSA process, either the RSA for the KCAS or the RSA process more generally as conducted on other new road schemes. As noted above, the Council contends that disclosure of the correspondence would lead to auditors becoming reluctant to make comments during the safety audit process which would undermine and negate the effectiveness of that process. It has not shown or described by reference to the contents of the records at issue how disclosure of the correspondence could prejudice the effectiveness the RSA process for the KCAS or the RSA process more generally.

I have described the nature of the records at issue in this case. Having regard to the contents of the correspondence, I note that there is no detailed discussion in the correspondence relating to any safety issues (or lack of) in respect of the KCAS. In addition, as I note above, the emails at issue were between the Council and the scheme designers for the KCAS and construction contractors and not the auditors for the KCAS's RSA. I further note from the RSA reports for Stages 1, 2 and 3 for the KCAS, which the Council provided copies of to my Office, were signed off by persons on behalf of the designers, auditing team and the Council in August 2019. This suggests to me that the RSA process for the KCAS has effectively been completed. In such circumstances, it is not clear to me how disclosure of the correspondence at this stage could reasonably be expected to prejudice the effectiveness of RSA process for the KCAS. In addition, I note that any person or body undertaking a project for the construction of new road infrastructure or a substantial modification to the existing road network which affects the traffic flow must ensure that a RSA is carried out for the project.

As I state above, I consider it reasonable to expect that auditors will continue to play an independent role in the RSA process, in accordance with the law and Guidelines governing the RSA process. Thus, I do not see how disclosure of the correspondence relating to the KCAS could reasonably be expected to prejudice the effectiveness of RSA process more generally. In the circumstances of this case, I am not satisfied that the requirements of section 30(1)(a) of the FOI Act have been met in relation to the correspondence.

In light of my finding that section 30(1)(a) of the FOI Act does not apply to the records at issue, it is not necessary for me to consider the public interest test in section 30(2) of the FOI Act.

As I am not satisfied the requirements of section 30(1)(a) of the FOI Act have been met, I am therefore not satisfied that section 30(1)(a) of the FOI Act protects the confidentiality of the proceedings concerned for the purposes of article 8(a)(iv) of the AIE Regulations.

For the reasons set out above, I find that the Council's refusal of access to the correspondence under article 8(a)(iv) of the AIE Regulations on the basis that the confidentiality of the proceedings of the Council are protected by section 30(1)(a) of the FOI Act is not justified.

### **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 correspondence relating to the RSA reports on the basis that article 8(a)(iv) of the AIE Regulations applies.

I require it to make the three records falling within the scope of the appellant's request available to the appellant.

### **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**  
24 November 2020