

**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/18/0034**

**Date of decision:** 22 August 2019

**Appellant:** Right to Know CLG

**Public Authority:** National Asset Management Agency (NAMA)

**Issue:** Whether NAMA was justified in refusing access to certain records relating to the 35 hectares of land in County Meath referred to on its website at <https://www.nama.ie/our-work/nama-residential-delivery/>.

**Summary of Commissioner's Decision:** The Commissioner found that NAMA was justified in refusing access to the information sought under article 8(a)(iv) of the AIE Regulations and affirmed its decision accordingly.

**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 10 August 2018, the appellant requested seven items of information relating to the 35 hectares of land in County Meath identified in the following link on NAMA's website: <https://www.nama.ie/development-funding/nama-residential-delivery-updates> (which has now been replaced with <https://www.nama.ie/our-work/nama-residential-delivery/>.) In a decision dated 6 September 2018, NAMA refused access to five of the requested items of information on the basis that they consisted of the confidential information of a NAMA debtor and article 8(a)(iv) of the AIE Regulations therefore applied. NAMA refused access to the remaining items of information sought on the basis that they did not meet the definition of environmental information under the Regulations.

On 7 September 2018, the appellant asked NAMA to conduct an internal review of its decision. On 26 September 2018, NAMA affirmed its original decision for reasons previously stated. The appellant appealed to my Office on 27 September 2018.

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 NAMA and the appellant. I have 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); and The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide').

## **Scope of Review**

My review in this case is concerned solely with the question of whether NAMA was justified in refusing access to the following items of information sought relating to the 35 hectares of land in County Meath referred to on its website at : <https://www.nama.ie/our-work/nama-residential-delivery/>:

1. The location (i.e. address) of each plot
2. The size of each plot
3. The folio number if the land is registered land
4. The name of NAMA debtor in each case
5. Details of the zoning of the land
6. Any assessments of viability of each plot for development and the barriers to development
7. Where there is enforcement the identity of the insolvency practitioner managing the land.

I note that NAMA forwarded 196 pages of documents containing the requested information to my Office for the purposes of my review. However, pages 1-2 consist of a copy of the request and internal emails created in response. As the internal emails were created after the request, they are outside the scope of this review.

### **Definition of “Environmental Information”**

My powers as Commissioner apply only with respect to “environmental information” held by or for a public authority. Therefore, I will first deal with the issue of whether the information requested is environmental information.

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)".

The request in this case relates to residential development land that is part of the security held by NAMA in respect of debtor loans. As NAMA’s website explains, NAMA is working with debtors and receivers to develop the land concerned for residential purposes, where commercially viable. In this case, it is not in dispute that the requested information, apart from items 4 and 7, qualifies as environmental information. However, NAMA considers that

the name of the NAMA debtors concerned and the identity of any insolvency practitioner managing the land where there is enforcement do not fall within the definition of environmental information definition.

In Case CEI/15/0007, Mr Ken Foxe, Raidió Telefís Éireann and Department of Defence (7 June 2016), available at [www.ocei.ie](http://www.ocei.ie), I found that an assessment of what is integral to a measure or activity under paragraph (c) is a useful test to employ when defining the scope of the definition of environmental information. I also explained that the phrase "any information . . . on" should be interpreted in a manner that includes information which supports the aims of accountability and transparency in decision-making within the definition. In this case, I am satisfied that the identity of a NAMA debtor who owns land that is subject to development in conjunction with NAMA is "information . . . on" a measure or activity affecting or likely to affect the land concerned and is thus environmental information within the meaning of article 3(1)(c) of the Regulations. It is my understanding that a statutory receiver acts on behalf of the debtor/owner concerned. Therefore, I consider that "the identity of any insolvency practitioner managing the land" is likewise environmental information.

### **Analysis and Findings**

The grounds for refusal of a request for environmental information are set out in articles 8 and 9 of the AIE Regulations, but any proposed refusal is subject to the provisions of article 10 of the Regulations. Article 10(1) states: "Notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment". Article 10(3) of the Regulations requires public authorities to consider each request on an individual basis and to weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest. I take article 10(4) to mean, in line with the Minister's Guidance, that there is generally a presumption in favour of the release of environmental information. In addition, I note that article 10(5) clarifies, in effect, that a request should be granted in part where environmental information may be separated from other information to which article 8 or 9 applies.

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). In this case, NAMA identifies the relevant proceedings as its internal operations or business proceedings in managing acquired bank assets. It considers that the relevant law providing for the confidentiality of its proceedings insofar as it relates to the information at issue is section 99 and section 202(2) of the

National Asset Management Agency Act 2009 (the "NAMA Act") as well as the contractual and common law duty of confidence that a bank owes to its customers.

The Aarhus Guide states:

"The Convention does not define 'proceedings of public authorities' but one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence."

However, while the Aarhus Guide is a very useful reference tool, it does not purport to be legally binding, as confirmed by the Court of Justice of the European Union (CJEU) in *Solvay v Région wallonne*, Case C-182/10 (16 Feb. 2012).

Under the NAMA Act, NAMA is required to acquire eligible bank assets from participating institutions and to manage them with the aim of obtaining the best achievable financial return for the State. The appellant disputes that the requested information in this case relates to NAMA's internal operations. The appellant notes that NAMA's role in relation to the residential development land relates to its primary task of enhancing the value of acquired assets, which it regards as "substantive proceedings" in NAMA's area of competence. The appellant also disputes that "proceedings of public authorities" may include "business proceedings", because it considers that "if that were the case all of NAMA's confidential information would in principle engage the exception and this is not what was intended by the European legislature".

I do not believe that trying to differentiate between "internal operations" and "substantive proceedings" is a meaningful exercise in the context of this case. The requested information concerns NAMA's functions under the NAMA Act with respect to acquired bank assets. Confidentiality has not claimed in an arbitrary fashion to protect all information relating to NAMA's proceedings or operations but rather its proceedings in managing these acquired bank assets.

Section 99 of the NAMA Act imposes on NAMA all of the obligations owed by the participating institution to the debtor concerned, including the duty of confidentiality. Section 99(1) provides, in pertinent part, that after acquiring a bank asset, NAMA is bound by all of the obligations of the participating institution from which the bank asset was acquired in relation to (i) the bank asset, (ii) the debtor concerned and any guarantor, surety or other person concerned. Section 99(2) specifies that the obligations referred to in subsection (1) include a reference to the obligations derived from the bank asset and arising under any law or in equity or by way of contract.

Section 202 of the NAMA Act states that, except as otherwise provided or authorised by the section or another enactment, a person shall not, unless authorised by NAMA, and NAMA group entity or the NTMA or authorised or obliged by law to do so, disclose confidential information as defined in subsection (1) of that provision.

Section 202(1) defines "confidential information" to mean-

"(a) information relating to the commercial or business interests of a participating institution or of a person who is or has been in a relationship with a participating institution,

(b) information that is subject at law or in equity to a duty of confidentiality,

(c) information that, if it were contained in a document, would have the result that a person could not be compelled to disclose the document in evidence,

(d) information the disclosure of which would tend to place NAMA, a NAMA group entity or the NTMA at a commercial disadvantage, or

(e) information about proposals of a commercial nature and tenders submitted to NAMA, a NAMA group entity or the NTMA."

Having examined the records at issue, I am satisfied that they relate to debtors whose land is held as security by NAMA. It is well established that a common law duty of confidence generally exists in relation to the banking information of individual borrowers (*see, e.g., Walsh v. National Irish Bank Limited* [2007] IEHC 325; [2008] 2 ILRM 56. As section 99 of the NAMA Act imposes on NAMA all of the obligations of the participating institution from which a bank asset was acquired, I accept that NAMA is bound by a duty of confidentiality to the debtors concerned in relation to the identity of the debtors and their interests concerning the acquired bank assets, i.e. the land, that NAMA holds as security for their loans. I further accept that sections 99 and 202 of the NAMA Act protect the confidentiality of NAMA's proceedings in relation to debtors and their assets and that such proceedings qualify for protection under article 8(a)(iv) of the Regulations.

The appellant states that "information on land is generally in the public domain that there is no expectation of privacy or confidentiality around such information". It is true that there are other sources of information available regarding residential land development, but I do not agree that this means that no expectation of privacy or confidentiality in relation to debtor information held by NAMA exists. I am satisfied that disclosure of the requested information in this case would adversely affect the confidentiality of debtor information

that is protected under sections 99 and 202 of the NAMA Act and that, subject to the public interest, article 8(a)(iv) applies.

In weighing the public interest served by disclosure against the interest served by refusal, I note that the AIE regime recognises a very strong public interest in maximising openness in relation to environmental matters so that an informed public can participate more effectively in environmental decision-making. However, I also note that the courts have recognised a public interest in maintaining the right of confidentiality in certain relationships, including between banker and customers. I accept that this public interest extends to the relationship between NAMA and its debtors. I also accept that there is a strong public interest in protecting the privacy rights of NAMA debtors. Moreover, in enacting the NAMA Act, the Oireachtas has recognised a public interest in permitting NAMA to discharge its functions in an expeditious and efficient manner.

As the appellant has suggested, “information on land is generally in the public domain”. The request itself reflects that NAMA publishes general information about its residential delivery progress on its website. Moreover, as the website indicates, any such progress is subject to zoning and planning laws. The planning process in particular allows for transparency in relation to residential development plans. I consider that the publicly available information satisfies the public interest in openness and transparency in relation to NAMA’s residential development plans to a large extent. I am therefore satisfied that the public interest served by disclosure of information in this case does not outweigh the interest served by refusal. I am also satisfied that it is not reasonably practicable to apply article 10(5) in the circumstances of this case.

In its submissions to this Office, NAMA indicated for the first time that it may also wish to invoke articles 8(a)(i) and 9(1)(c) as grounds for refusal. However, as I am satisfied that article 8(a)(iv) applies in full to the requested information, I do not consider it necessary to address the question of whether articles 8(a)(i) and 9(1)(c) may also apply.

### **Decision**

Having carried out a review under article 12(5) of the AIE Regulations, I affirm NAMA’s decision in this case on the basis that article 8(a)(iv) 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 August 2019**

