

**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 2014
(the AIE Regulations)**

Case CEI/17/0014

Appellant: Mr Brendan Dowling (the appellant)

Public Authority: Galway County Council (the Council)

Issue: Whether the Council's decision to refuse the appellant's AIE request was justified. The Council refused the request under article 7(3)(a)(i) of the AIE Regulations on the basis that the requested information was publicly available in an easily accessible manner.

Summary of Commissioner's Decision: The Commissioner found that the Council was not justified in refusing the appellant's AIE request under article 7(3)(a)(i) of the AIE Regulations. In doing so, he stated that a request can only be granted under article 7(3)(a)(i). Nevertheless, he accepted that where a person does not request information in a particular form or manner, a public authority may grant access to an AIE request by directing the person to where the information is publicly available in an easily accessible manner.

However, in the circumstances of the case the Commissioner found that the Council had not taken adequate steps to identify and locate information covered by the appellant's AIE request. Accordingly, he found that the Council was not justified in refusing the appellant's AIE request. The Commissioner annulled the Council's decision in full and expressed his expectation that it would make a new decision on the request in accordance with the AIE Regulations.

Right of Appeal: As set out in article 13 of the AIE Regulations, 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. Such an appeal must be initiated not later than **two months** after notice of the decision is given to the person bringing the appeal.

Background

On 5 October 2016, the Council received an AIE request from the appellant. The appellant requested “all environmental” information held by the Council with regard to Coshla Quarries Limited. The appellant stated that information which should be readily available includes:

- “[1.] Water Discharge Licence; Flow rates and emission limit values, etc.
- [2.] Details of how and where concrete delivery trucks serving the facility are to be washed out.
- [3.] Details from the dust monitoring programme and dust suppression measures.
- [4.] Details of the monthly survey and monitoring programme of dust and particulate emissions.
- [5.] Details of noise levels measured from the noise sensitive locations.
- [6.] Details from the monitoring programme with regard to vibration levels from blasting.
- [7.] All details from the comprehensive monitoring programme referred to in condition number 17 of said planning permission.
- [8.] Details of the implementation of the road safety recommendations as set out in Junction Safety Assessment prepared by Tobin Consulting Engineers (received by An Board Pleanala on the 3rd of November, 2010) for the junction of the Cashla Road (L7109) with the R339 regional road.”

The requested information has been numbered in this decision for ease of reference.

On 2 November 2016, the Council wrote to the appellant stating that the Planning Section would respond by 1 December 2016. It wrote to the appellant on 30 November 2016 stating that all documents regarding compliance with the Planning conditions were available to view in its Planning Office or on its website at www.galway.ie. It also stated that the requested details concerning implementation of the road safety recommendations should be requested from the Roads Section. It added that it could confirm that the relevant planning condition relating to the road safety recommendations had been deemed to have been complied with.

The letter dated 30 November 2016 did not meet the standards required in order to be a decision in accordance with the AIE Regulations. It did not state whether the AIE request was being granted or refused nor did it inform the appellant of his right to an internal review and appeal in accordance with the AIE Regulations. Accordingly, a decision on the appellant’s AIE request fell due on 1 December 2016. As no such decision was made by that date a deemed refusal arose on 1 December 2016.

On 15 December 2016, the Council received a request from the appellant to have his request reviewed. The appellant did not receive a response to that request. Thus, a right of appeal to me arose on 14 January 2017. The appellant appealed to this Office on 2 February 2017. This Office wrote to the Council asking it to notify the appellant of the reasons for refusing his AIE request. On 3 March 2017, the Council notified the appellant that his AIE request was being refused under article 7(3)(a)(i) of the AIE Regulations. The appellant appealed that decision to this Office on 31 March 2017.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review a public authority's internal review decision and to affirm, annul or vary it. As the appellant's AIE request was deemed refused, the Council's decision dated 3 March 2017 is the subject of this appeal.

My review is concerned solely with the question of whether the Council's decision to refuse access to the environmental information was justified under the AIE Regulations. In conducting my review I took account of the submissions made by the appellant and the Council. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered. 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); and
- *The Aarhus Convention—An Implementation Guide* (Second edition, June 2014) (the Aarhus Guide).

Relevant AIE provisions

Article 4

Article 4(1) of the AIE Regulations provides as follows:

“These Regulations apply to environmental information other than, subject to sub-article (2), information that, under any statutory provision apart from these Regulations, is required to be made available to the public, whether for inspection or otherwise.”

Article 4(2) provides that:

“Notwithstanding—

(a) section 38 of the Planning and Development Act 2000 (No. 30 of 2000) and any regulations made thereunder,

(b) sections 10 and 31 of the Air Pollution Act 1987 (No. 6 of 1987) and any regulations made thereunder, and

(c) sections 6 and 89 of the Environmental Protection Agency Act 1992 (No. 7 of 1992)(as amended by the Protection of the Environment Act 2003 (No. 27 of 2003)) and any regulations made thereunder,

environmental information held by, or on behalf of, a public authority shall be made available in accordance with these Regulations.”

Article 7

Article 7(3) provides as follows:

“(a) Where a request has been made to a public authority for access to environmental information in a particular form or manner, access shall be given in that form or manner unless—

(i) the information is already available to the public in another form or manner that is easily accessible, or

(ii) access in another form or manner would be reasonable.”

The public authority’s position

The Council refused the appellant’s AIE request under article 7(3)(a)(i) of the AIE Regulations. The Council stated that the requested information was publicly available on its Online Planning Register (the Register) on its website. The Council later clarified to my investigator that items one to seven of the request were refused under article 7(3)(a)(i). It stated that item eight of the AIE request was dealt with separately by the Roads Section.

The appellant’s position

The appellant appealed on the basis that he had made extensive searches for the information and had not been able to find it. He maintained that the information is not easily accessible. He also submitted that Coshla Quarries Limited is legally required to submit the requested information to the Council in order to comply with the planning conditions for the quarry development. He

further stated that the Council has a statutory duty to make the requested information available to the public.

The appellant also stated that the information available on the Register is not up-to-date. I emphasise, as I have had to do in other cases, that it is outside my remit as Commissioner to adjudicate on how public authorities carry out their functions generally. I have no role in assessing how public authorities collect, maintain and disseminate environmental information.

Preliminary issue concerning Article 4 of the AIE Regulations:

As noted above, the appellant submitted that the Council has a statutory duty to make the requested information available to the public.

Before proceeding with the appeal, I first considered whether the appeal fell under article 4 of the AIE Regulations. If the Council is required to make the requested information available to the public under a statutory provision, other than the statutory provisions listed in article 4(2), the appeal would have been outside the scope of the AIE Regulations. Accordingly, I would not have had jurisdiction to review the decision.

In order to be satisfied that I had jurisdiction to proceed with the appeal, my investigator asked the Council to identify any particular statutory provision(s), if any, under which the Council was required to make the information available to the public, whether for inspection or otherwise. The Council confirmed the information relating to the planning permission for Coshla Quarries Limited is made publicly available pursuant to section 38 of the *Planning and Development Act 2000* (as amended) (the 2000 Act). As the AIE request falls under article 4(2)(a) of the AIE Regulations, I am satisfied that I have jurisdiction to review the appellant's appeal.

Analysis of the justification of the internal review decision

As noted above, the Council refused items one to seven of the appellant's AIE request under article 7(3)(a)(i) on the basis that the information is publicly available in an easily accessible manner on the Council's website. The appellant stated that he has made extensive searches for the information on the Council's website and that the information he requested is not there.

Granting an AIE request under article 7(3)(a) of the AIE Regulations

Article 7(3)(a) requires access to information to be given in the form or manner requested by the applicant, subject to the exceptions in sub-paragraphs (i) and (ii). Article 7(3)(a)(i) provides that

where the requested information is publicly available in an easily accessible manner access can be given in a different form or manner to that requested by the person making the AIE request. Rather than providing a ground for refusing an AIE request, article 7(3)(a)(i) provides for the granting of access to information in an alternative form or manner to that which has been requested.

In this case the appellant did not request the information in a particular form or manner. In addition, as I have stated article 7(3)(a)(i) provides for the granting of information in an alternative form or manner and not a ground for refusing an AIE request. Therefore, I am not satisfied the Council was justified in refusing items one to seven of the appellant's AIE request under article 7(3)(a)(i).

However, that does not mean that when a person does not request information in a particular form or manner that a public authority cannot grant access by directing that person to where the requested information is publicly available. Recital (9) of the preamble to the AIE Directive emphasises of importance for public authorities making available and disseminating environmental information to the "widest extent possible", in particular through the use of information and communication technologies (ICT). This is reflected in article 5(b) of the AIE Regulations which provides that a public authority must "make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily producible and accessible by information technology or by other electronic means". Where an AIE request does not request access to the information in a particular form or manner, I accept that a public authority may grant access to it by directing the requester to where the information is publicly available in an easily accessible manner.

Granting access to information by directing a person to where it is already publicly available

In cases where a public authority grants access to information by directing a person to where the information is already publicly available, it must first satisfy itself all of the requested information is actually available. In order to be satisfied that all the information is publicly available, the public authority must first search for and identify information covered by the AIE request held by or for it.

In CEI/13/0015 (Mr Lar McKenna and EirGrid plc) (available at www.ocei.ie/en/Decisions/), I stated that I must be satisfied that adequate steps have been taken to identify and locate relevant records, having regard to the relevant circumstances. In determining whether the steps taken are adequate in the circumstances, I consider that a standard of reasonableness must necessarily apply. Although the approach set out in that case was in the context of article 7(5) of the AIE Regulations, given that a public authority must be satisfied the information requested is in fact publicly available I am satisfied the same approach applies in this case.

Accordingly, in this case I considered whether the Council took adequate steps to identify and locate information held by or for it falling under the scope of the appellant's AIE request.

Items one to seven of the AIE request

Noting the potential volume and range of information sought in the appellant's AIE request for "all environmental information" held by the Council concerning Coshla Quarries Limited, my investigator asked the Council to outline the steps taken to search for the information requested, including any search within the Roads Section.

The Council stated that a "detailed search" had not been carried out for the information at items one to seven of the AIE request. The Council explained that as AIE request referenced the planning permission reference for Coshla Quarries Limited at the top of the request, the request was processed on the basis that the information requested at items one to seven was available on the planning register. As the appellant's AIE request quoted the planning permission reference for Coshla Quarries Limited, I recognise that the Council's understanding of the scope of the AIE request was not entirely without basis. However, I find it difficult to understand why the Council failed to consider the enforcement or compliance file and any other information held within the scope of the request that it is not obliged to make public under the 2000 Act. Apart from anything else, it seems likely that monitoring programmes, surveys and measurements could give rise to the creation of records which might go beyond what is required to be made available on the planning register.

It seems to me that if the information requested was on the Register then the appellant should not have needed to make an AIE request for it. The Council confirmed that it did not check with the appellant if his AIE request related solely to information on the Register. As a result, there remained the possibility that the appellant referred to the planning permission reference so there

would be no doubt as to which quarry his AIE request related to, and not to narrow the scope of his request to information on the Register. Therefore, I do not accept that the Council was correct in assuming the AIE request related solely to the information on the Register.

Given the potential breadth of the scope of the appellant's AIE request, my investigator asked the Council if it holds additional files relating to Coshla Quarries Limited. The Council confirmed that it also holds an enforcement file. It is implicit from the Council's submission that it did not search this enforcement file for information captured by the AIE request. Accordingly, I am not satisfied that the Council was justified in concluding that all information covered by items one to seven of the appellant's AIE request are publicly available on the Register.

In summary, the Council processed items one to seven of the appellant's AIE request on the assumption that information within the scope of the request was publicly available in the entry for Coshla Quarries Limited in its Register. The Council did not carry out a detailed search to identify information covered by items one to seven of the appellant's request. As a result, I am not satisfied that adequate steps were taken to identify and locate information held by or for it falling under the scope of items one to seven of the appellant's AIE request.

Item eight of the request

Regarding the records of the Roads Section, I am particularly concerned at the Council's handling of this aspect of the AIE request. The Council in its letter dated 30 November 2017 stated that the road safety recommendations should be requested from the Roads Section. I see no basis whatever under the AIE regime for the Council's position that the applicant should make a separate or further request to one of its sections. If the information requested at item eight was not held by or for the Council then it should have clearly stated this in its decision. I have brought this to the attention of the Chief Executive of the Council and would expect that steps would be taken to ensure through training etc. that decision makers comply with the requirement of the AIE Regulations.

The Council in its letter dated 30 November 2017 also stated that it could confirm that the relevant planning condition relating to the recommendations at item eight had been deemed to have been complied with. The Aarhus Guide at page 80 states that rather than summaries or excerpts, public authorities must provide copies of the records containing the information requested. It goes on to explain that "[t]he requirement that copies of actual documents should be

provided ensures that members of the public are able to see the specific information requested in full, in the original language and in context”. Therefore, when a person requests information under the AIE Regulations she or he should be given access to that information. The confirmation by the Council that the relevant planning condition had been complied with is not sufficient access to information for the purposes of the AIE Regulations.

In the course of this review, the Council confirmed that the records of the Roads section had been searched. The Council stated that an officer spoke with the Area Engineer in Athenry/Oranmore and that the records in the office were searched. It explained that no written records concerning the carrying out of the works would exist, as the process for carrying out those works would have involved a verbal instruction to a staff member to arrange for the works to be carried out.

The Council provided this Office with correspondence confirming that certain works had been carried out to the satisfaction of its Roads and Transportation Unit. The Council subsequently provided a link to where that correspondence is available on the Register for Coshla Quarries Limited. As noted above, the Council initially clarified in this appeal that only items one to seven were refused on the basis the information was publicly available. Thus, it can be understood that the “roads” correspondence had not been identified and was not considered by the decision makers when making their decisions on the appellant’s AIE request. If it had been identified at that time, the Council would presumably have refused items one to eight on the basis that the information was publicly available. In addition, as with items one to seven of the AIE request, I am satisfied that there is a possibility the enforcement file or other files for Coshla Quarries Limited may contain information covered by item eight. Accordingly, I take the view that adequate steps were not taken to identify and locate information held by or for the Council falling under the scope of item eight of the appellant’s AIE request.

Directing people to publicly available information and the scheduling of records

The AIE Directive, which the Regulations transposed, has its origins in the Aarhus Convention. The Aarhus Guide at page 81 states that access to information should be “effective in practice”. It goes on to say that “[t]o be effective, “publically available” means that the information is easily accessible to the member of the public requesting the information”. For this reason I

consider that where a public authority grants access to information on the basis it is already publicly available, it is not sufficient to merely direct the person to the relevant website.

In order to ensure that access to the information is effective in practice, the public authority should provide sufficient detail to enable the requestor to actually access the information. Where access is being granted on the basis that the information is publicly available on-line, it is not enough to say the information is available on a website. The relevant public authority should provide something further such as under which section of the website or on which webpage the information is available on.

As noted above, in this case the Council simply stated the information was available on its website at www.galway.ie. It did not provide the appellant with any further details to enable him to locate the information he requested. There are many different sections and webpages on the Council's website. In the Register for Coshla Quarries Ltd none of the documents were clearly labelled. A requester would have to read every record in order to find out whether it contains the information requested. In view of that, even if all the information the appellant requested is available on the Register, I am not satisfied that the Council would have granted the appellant access to the information he requested within the meaning of the AIE Regulations.

As I stated in CEI/16/0022 (Mr K and the Commissioner for Energy Regulation) (available at www.ocei.ie/en/decisions/) neither the Regulations nor the Minister's Guidance provide that public authorities should prepare a schedule of the records considered in the course of making an AIE decision. However, I went on to say that I consider it to be best practice for public authorities to include with a decision a schedule of the records considered in the course the decision. A schedule of records in this case specifying which items of the appellant's AIE request the Council holds, either itself or on behalf of it, accompanied by details on which specific webpages on its website the information can be found at may have granted the appellant access to the information he requested.

Finding

For the reasons outlined above I find the Council was not justified in refusing the appellant's AIE request on the basis the requested information was already publicly available in an easily accessible manner.

I went on to consider whether it would be appropriate for me to require the Council to make information available to the appellant. As the Council had not completed a thorough search for all relevant records, I do not have a copy of all the information covered by the AIE request. In the circumstances it would not be appropriate for me to require the Council to release the information to the appellant. I regret the delay caused to the applicant by the handling of this case. I do not see it as my role to make a first instance decision on the release of information that the Council failed to consider.

Decision

Having reviewed the Council's decision, I find that its refusal was not justified by the reason given. Accordingly, I annul the Council's decision. In light of my decision, I expect the Council to process the appellant's AIE request in accordance with the AIE Regulations. I also expect that the Council would make its fresh decision at the earliest possible date and, in any case, within the statutory period.

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

27 November 2017