

**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/18/0019

Date of decision: 13 February 2019

Appellant: Patrick Costello

Public Authority: Department of Housing, Planning and Local Government
(the Department)

Issues: Whether the Department was justified in refusing a request for a copy of a report entitled “A review into certain planning matters in respect of Donegal County Council” (the Report) on the basis that the information did not fall within the definition of “environmental information” within the meaning of article 3(1) of the AIE Regulations.

Summary of Commissioner's Decision: In accordance with article 12(5) of the AIE Regulations, the Commissioner reviewed the decision of the Department and found that the Report constitutes “environmental information”. He did not, however, require release of the Report as refusal was justified under article 8(a)(i) of the AIE Regulations.

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 8 May 2018, the appellant made an AIE Request to the Department seeking a copy of any reports relating to planning issues in County Donegal. In a phone call between the appellant and the Department it was clarified that the request was for a report completed by Rory Mulcahy S.C. and delivered to the Department in June 2017. This Report is entitled “A review into certain planning matters in respect of Donegal County Council”.

On 25 May 2018, the Department in its decision stated that the information requested does not constitute environmental information as defined in the AIE Regulations. On 27 May 2018, the appellant made an internal review request. On 22 June 2018, the Department affirmed its original decision.

On 4 July 2018, the appellant appealed to my Office.

I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review I have had regard to the submissions of the parties and 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).

It should be noted that, while I am required by article 12(5)(b) of the AIE Regulations to specify the reasons for my decision, I also need to take all reasonable precautions to prevent disclosure of withheld information in my decisions. This constraint means that the detail that I can give about the Report and the extent to which I can describe certain matters in my analysis is limited. I do not intend to discuss all of the arguments put forward in the submissions from the appellant and the Department but I have had regard to them where relevant.

Scope of Review

The Department maintained throughout the course of the appeal that the Report does not constitute environmental information. In its submissions to my Office it also identified, without prejudice to that position, a number of exceptions under articles 8 and 9 of the Regulations, which would justify refusal, if I were to find the Report constituted environmental information. My review in this case is concerned with both positions.

Analysis and Findings

Does the Report or information in the Report come within the definition of environmental information?

Under article 12(5) of the AIE Regulations, my role is to review the internal review decision and to affirm, annul or vary it. In this instance, I am first concerned with the question of whether the Department was justified in its decision to refuse the appellant's request on the basis that the Report does not fall within the definition of environmental information within the meaning of article 3(1) of the AIE Regulations.

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)".

The [Aarhus Implementation Guide](#) provides at page 50 that deciding what environmental information is requires a degree of interpretation by the public authority in a particular case. It goes on to say that in defining environmental information, the clear intention of the drafters was to "craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation." For information to qualify as environmental information it must be information on one of the six categories set out in article 3(1).

The appellant submitted that the Report contains environmental information under article 3(1)(c) of the AIE Regulations. He argued that the implementation of planning regulations and policy, and any reviews of same are likely to affect the elements and factors referred to in paragraphs (a) and (b) and are clearly measures or activities designed to protect those elements, and therefore should be considered environmental information.

The Department submitted that the Report is a review into administrative and governance matters in Donegal County Council and that at no juncture did the Report attempt to address

matters in relation to the state of the environment. It argued that the Report does not fit into any of the six categories in article 3(1) of the Regulations. The Department considered that any interpretation of the AIE Regulations which would regard the Report as coming within the definition would stretch the meaning of the AIE Regulations and the Directive beyond the intentions of the drafters.

It cited cases [*C-316/01 Glawischnig v Bundesminister für Sicherheit und Generationen*](#) and [*C-297/12 Fish Legal and Emily Shirley v. Information Commissioner*](#) in support of its position. In *Glawischnig* the CJEU held that, notwithstanding the broad interpretation that must be given to the definition of environmental information, it was not intended:

“to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned To be covered by the right of access it establishes, such information must fall within one or more of the ... categories set out in that provision.”

The Department stated that it cannot be argued that this Report is information 'on' any measure or activity that will affect, or is capable of affecting, the material components of the environment.

It proceeded to distinguish the Report in this case from the Report that was considered by the Court of Appeal in [*Minch v Commissioner for Environmental Information & Anor \[2017\] IECA 223*](#). The Court of Appeal found that a report entitled “Analysis of Options for potential State Intervention in the Roll Out of Next Generation Broadband” was environmental information within the meaning of article 3(1)(e) of the Regulations. The Department argued that it was of significant importance that the Court of Appeal did not consider that report to fall within the definition of environmental information contained in article 3(1)(c) of the AIE Regulations because in itself, it could have no implications for the environment.

It is clear to me that the Report before me now is concerned with planning matters and with specific planning decisions taken in Donegal. It contains information on planning and specific land use including planning reference numbers and site location. The Department in its submission argued that in order for information to be considered environmental information within the meaning of article 3(1)(c) of the AIE Regulations, it must be on a measure that is capable of affecting the elements and factors identified in paragraphs (a) and (b) or be a measure designed to protect those elements. I consider that the Report contains information on and is primarily concerned with information on specific planning applications that were approved and/or where construction was undertaken. Any development and construction of that kind will have some effect on the landscape.

I conclude that the Report as a whole constitutes environmental information within the meaning of part (c) of the definition in article 3(1), in that it is information on measures (i.e. planning permissions) affecting elements of the environment, such as land and landscape. It is now necessary for me to consider whether I should require release of the Report.

Whether the cited exceptions under articles 8(a)(i), 8(a)(ii), 8(a)(iv) and 9(1)(b) justify refusal.

Article 8(a)(i)

Article 8(a)(i) provides for the refusal of environmental information where disclosure of the information would adversely affect the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law.

Section 37(1) of the Freedom of Information (FOI) Act 2014, subject to other provisions of section 37, provides for the mandatory refusal of a request if access to the record concerned would involve the disclosure of personal information relating to an individual or individuals other than the requester. For the purposes of the Act, personal information is defined as information about an identifiable individual that (a) would, in the ordinary course of events, be known only to the individual or their family or friends or, (b) is held by a public body on the understanding that it would be treated by it as confidential. The Act details fourteen specific categories of information that is personal information, without prejudice to the generality of the foregoing definition, including "(iii) information relating to the employment or employment history of the individual", "(vi) information relating to any criminal history of, or the commission or alleged commission of any offence by, the individual," "(xii) the name of the individual where it appears with other personal information relating to the individual or where disclosure of the name would, or would be likely to, establish that any personal information held by the public body concerned relates to the individual" and "(xiv) the views or opinions of another person about the individual".

Having regard to the definition of personal information as set out above and to the provisions of the FOI Act in relation to certain exclusions where an individual is employed by or contracted to an FOI body, I am satisfied that the Report contains information that is personal information. I consider that disclosure of the Report would adversely affect the confidentiality of personal information relating to natural persons as disclosure under the AIE Regulations is disclosure to the world at large. I am further satisfied that confidentiality of this information is protected by EU and national data protection law.

I find that, therefore, article 8(a)(i) applies to the Report subject to the application of article 10 of the Regulations.

The Public Interest – article 10(3)

Section 37 of the FOI Act is subject to a public interest balancing test at section 37(5).

Further, article 10(3) provides that a public authority shall consider each request on an individual basis and 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 for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure. 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. However, this is subject to the strong protection afforded to the right to privacy under European and Irish law.

The appellant argued that the public interest in release of this Report must be understood in the context of the background to the Report and the concerns raised in relation to the abuse of planning regulations in Donegal which date back a number of years. He argued that the Report was born out of a whistle blower's disclosure and that the issues raised in relation to planning in Donegal have been before the Courts and were deemed to be of significant public interest. He also cited the difficult history that this country has had with issues relating to planning in general. He referred to the revelations and findings of the Mahon Tribunal and stated that similar concerns are dealt with by this Report and therefore there is a strong public interest in release of the Report to the public.

He cited the preamble to the [Aarhus Convention](#) which recognises that:

“ [I]n the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns”

Releasing the Report would, he argued, help ensure transparency, promote awareness of issues affecting the environment in Donegal and would allow the public the opportunity to express their concerns. He argued that, in particular, there is a strong public interest in releasing any parts of the Report concerning systemic failure, procedural weakness or ways of addressing any wrongdoing.

The Department made a number of public interest arguments in favour of non-disclosure of the Report. For the reasons I have outlined above, I will not list them all here. It stated that the public interest in this case is not served by violating the trust and assurances of confidentiality by disclosing information provided in good faith and in the spirit of co-operation by both the complainant and other individuals. It also highlighted the potential adverse impacts arising for individuals from disclosure of information.

The right to privacy and the right to protection of personal data are fundamental rights under articles 7 and 8 of the [Charter of Fundamental Rights of the European Union](#) (the Charter). The right to privacy has also been recognised by the Irish courts as an unenumerated right under article 40.3 of the Constitution of Ireland. I consider that there is a very significant public interest in upholding individuals' right to privacy. I have outlined my position on the disclosure of personal information and application of the public interest test in my recent decisions [CEI/17/0024](#), [CEI/17/0036](#) and [CEI/18/0012](#) (available on www.ocei.ie). In this particular case, I consider the potential adverse effects on individuals were I to require release of their personal information to be significant.

I accept in principle the appellant's argument that, as the Report was submitted to the Department in June 2017, there is a strong public interest in release of any wider recommendations that could be applicable to the planning system as a whole. However, having read the Report, I am satisfied that its content does not contain significant “wider” recommendations. Further, my remit as Commissioner for Environmental Information does

not extend to examining the manner in which the Department or the Minister perform their functions generally.

In the circumstances of this case, the interests in favour of maintaining the exception in article 8(a)(i) outweighs the public interest in disclosing the personal information of individuals.

Article 10(5) – Separation of Environmental Information

Article 10 (5) provides that nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information.

The appellant stated that he was happy to limit his request to parts of the Report that either do not contain information that would identify individuals or that can be redacted to remove personal information. He believed such a separation is both possible and not unduly onerous on the Department.

The Department submitted that it does not consider it possible to limit release of the Report to certain sections or to redact the Report so as to remove any identifiable personal information. Among its arguments were the fact that there is significant information on the allegations in the public domain, which combined with information released, could be used to identify individuals. It also argued that the required redaction of the Report would be so extensive as to render the remaining parts unintelligible. It went on to argue that the release of the Report in a heavily redacted manner could result in extracts being taken out of context or any conclusions contained in it being misconstrued.

Identifying information for separation and release is not a straightforward matter in this case. I gave careful consideration in this case in particular to whether conclusions and recommendations from the report could be released. I have considered the contents of the Report in detail and find that disclosure of even parts of the Report would adversely affect individuals either directly identified in the Report or those who could easily be identified. Information on individuals is so intertwined with other parts of the Report that, for the most part, it is not possible to separate it. In relation to conclusions and recommendations, I consider that while it would be possible to release some of these without disclosing personal information, having them released outside of the context of the main body of the Report, would be misleading.

Moreover, procedural fairness requires that any third parties who would be adversely affected by the disclosure of environmental information would have to be consulted. In this case, that requirement would necessitate contacting a large number of parties and considering their submissions. The Department stated that over 100 individuals would need to be contacted. In the circumstances of this case, I do not consider that it would be appropriate or proportionate for the Department or my Office to contact the third parties in order to carry out the necessary consultation.

I have concluded that it is not feasible to require that access to sections of the Report be provided in the circumstances of this case.

In summary, I find that article 8(a)(i) applies to the entire Report. It is therefore not necessary for me to consider whether articles 8(a)(ii), 8(a)(iv) and 9(1)(b) apply.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I affirm the Department's decision but vary the reasons for refusal. I find that refusal of access is justified under article 8(a)(i) of the AIE Regulations.

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
13 February 2019