

**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/17/0039

Date of decision: 29 May 2019

Appellant: Mr. N

Public Authority: Kilkenny County Council (the Council)

Issues: Whether the Council was justified in refusing access to structural reports relating to the construction of a bridge over the River Nore as part of the Kilkenny Central Access Scheme (KCAS)

Summary of Commissioner's Decision: Having carried out a review in accordance with article 12(5) of the AIE Regulations, the Commissioner varied the Council's decision. He found that refusal of information on contractor designed temporary and permanent works was justified under article 9(1)(c). However, he required release of redacted versions of two Method Statements for the construction of cofferdams in accordance with article 10(5).

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:

The information the subject of this appeal relates to the Kilkenny Central Access Scheme (KCAS). This scheme provided for the construction of a new bridge across the River Nore in the city of Kilkenny. The construction of the KCAS Bridge (the bridge) followed a competitive tender process undertaken by the Council in early 2014. According to the Council, of the eight contractors that submitted tenders following a shortlisting process, two submitted variant tenders in accordance with the terms of the tender process. The successful tender was determined as being the variant tender submitted by a named third party (the Main Contractor). The Council described a variant tender as one where a contractor under the public works contract has an option to submit an alternative design for all or any element of the works for approval/rejection by the employer on the basis that there is a saving to both parties.

On 21 July 2017, the appellant made an AIE Request seeking all structural reports on the KCAS bridge held by or for Kilkenny County Council and or its agents (current or former), to include:

1. All Geophysical reports and all relating correspondence.
2. Geotechnical reports (other than those released via the internal review of FOI 34-17).
3. All reports, draft reports, memoranda, draft memoranda, emails, notes of visits, notes of phone calls relating to issues of concern/health and safety/ design features/ flaws/ 'statements of concern'/ problem areas/delays/ costs- between Kilkenny county council and its' agents on this project.
4. All reports of load bearing.
5. A copy of all audits on this project.

Both the initial decision on 22 August 2017 and the internal review decision on 23 October 2017 were issued after the one month period for a decision specified in the Regulations and therefore were both deemed refusals. Article 10(7) of the Regulations provides that where a decision is not notified to the applicant within the relevant period specified in article 7, a decision refusing the request shall be deemed to have been made by the public authority concerned on the date of expiry of such period. Here, the Council's failure to meet the timelines at both initial decision and internal review stage is not satisfactory.

On the 25 October 2017, the appellant appealed to my Office.

The appellant made a separate Freedom of Information (FOI) request to the Council seeking copies of all structural reports on the bridge, to include geotechnical and geological reports and load testing reports and all correspondence relating to those reports. This was refused and he sought a review of the Council's decision to the Office of the Information Commissioner (OIC). The decision in case [170375](#) (available on www.oic.ie) on 18 September 2018, directed release of 18 of 25 records. The Council's decision to refuse access to the remaining seven records was affirmed under section 36(1)(b) of the FOI Act 2014, which serves to protect commercially sensitive information. In response to a request from my Office in this current case, the Council provided the appellant with a schedule of the remaining seven records withheld. I therefore do not need to refer to them individually and will refer to them as "the seven records" for the purpose of this decision.

I have now completed my review under article 12(5) of the Regulations. During the course of this review, my Office invited submissions from the third party (the Main Contractor). In

carrying out my review, I have had regard to the submissions made by the appellant, the Council and the Main Contractor. I also 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); and *The Aarhus Convention—An Implementation Guide* (Second edition, June 2014).

What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

During the course of my review, the appellant significantly narrowed the scope of his appeal to the following withheld information:

- Two Method Statements titled “MS 003 Temporary Works Cofferdam Construction” (the Method Statements).
- The seven records refused under OIC case [170375](#).

Analysis and Findings

Definition of "environmental information"

In line with Article 2(1) of the AIE Directive, article 3(1) of the AIE Regulations defines "environmental information" as

"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 ... conditions of human life, cultural sites and built structures ...affected by the state of the elements of the environment...or through those elements, by any of the matters referred to in paragraphs (b) and (c)".

It is not in dispute for the most part in this case that the information at issue constitutes environmental information. For the sake of clarity, however, I am satisfied that the withheld information constitutes environmental information as defined by article 3(1)(c) of the definition. It is information on the construction of a bridge and therefore is information on a measure or activity likely to affect the landscape as in article 3(1)(a).

Whether the two Method Statements fall within the scope of the appellant's original request?

The Council's position was that any reports relating to the emplacement of limestone aggregate in the River Nore did not fall under the scope of the appellant's original request. In the course of this review it, nevertheless, conducted a number of searches and identified two Method Statements titled "MS 003 Temporary Works Cofferdam Construction", one dated 30 June 2014 and the other dated 29 April 2015. Having read both, I am of the view that they could reasonably be considered as structural reports on the bridge. They, therefore, fall within the scope of the appellant's original request and of my review. While both these documents have the same title and the Council submitted that they contain the same information, I am satisfied that their content is sufficiently different that release of one would not disclose the information contained in the other. Moreover, the Method Statements refer to two distinct periods of construction and therefore cannot be considered the same.

I will deal with both the seven records and the Method Statements in my decision. This is because I consider that most of the information in them is of a similar type and the exception argued is the same.

Article 9(1)(c)

The Council refused access to the seven records and the Method Statements under article 9(1)(c). Article 9(1)(c) provides that a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.

The Main Contractor submitted that information is commercially sensitive information as it includes particulars of how it derived a bespoke solution to fulfil the Council's requirements for a particular set of conditions.

The appellant submitted that no patent of any kind was registered by the Main Contractor relating to the works. He argued that if the withheld information is commercially sensitive, the Main Contractor would have registered its unique and innovative method of construction in order to protect it.

To find that article 9(1)(c) applies to information, I would need to be satisfied that:

1. The information at issue is commercially or industrially confidential.
2. The confidentiality of the information is provided for in national or Community law to protect a legitimate economic interest.
3. Disclosure would adversely affect that confidentiality.

I am prepared to accept in this case that the seven records and at least part of the Method Statements are commercial in nature. I accept also that the purpose of the confidentiality being protected in this case is the protection of the legitimate economic concerns of the Main

Contractor. I am taking it that the relevant national law is section 36 of the Freedom of Information (FOI) Act 2014.

Section 36(1) of the FOI Act provides that subject to subsection (2), a head shall refuse to grant an FOI request if the record concerned contains—

(b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation.

Section 36(2) provides that a head shall grant an FOI request to which subsection (1) relates if—

- (a) the person to whom the record concerned relates consents, in writing or in such other form as may be determined, to access to the record being granted to the requester concerned,
- (b) information of the same kind as that contained in the record in respect of persons generally or a class of persons that is, having regard to all the circumstances, of significant size, is available to the general public,
- (c) the record relates only to the requester,
- (d) information contained in the record was given to the FOI body concerned by the person to whom it relates and the person was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public, or
- (e) disclosure of the information concerned is necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment, but, in a case falling within paragraph (a) or (c), the head shall ensure that, before granting the request, the identity of the requester or, as the case may be, the consent of the person is established to the satisfaction of the head.

I have no information to show that any of the conditions set out in subsection (2) apply in this case.

The essence of the test in section 36(1)(b) is not the nature of the information but the nature of the harm which might be occasioned by its release. The harm test in the first part of section 36(1)(b) is that disclosure "could reasonably be expected to result in material loss or gain". I take the view that the test to be applied is not concerned with the question of probabilities or possibilities but with whether the decision maker's expectation is reasonable. The harm test in the second part of section 36(1)(b) is that disclosure of the information "could prejudice the competitive position" of the person in the conduct of their business or profession. The standard of proof to be met here is lower than the "could reasonably be expected" test in the first part of the exemption. However, as Information Commissioner, I have taken the view that, in invoking "prejudice", the damage which could occur must be specified with a reasonable degree of clarity.

While I am not bound to follow the decision in OIC case [170375](#), based on considering all of the arguments before me now, I am satisfied that section 36(1)(b) applies for the reasons set out in that decision. In summary, I accept that release of the Main Contractor's alternative design submitted as part of the variant tender could be an advantage to its competitors and

therefore disadvantage the Main Contractor in competing for future contracts. This could result in it incurring a material loss in the commercial advantage enjoyed by virtue of its particular knowledge and approach.

Therefore, I find that release of the seven records and most of the content in the Method Statements “could prejudice” the competitive position of the Main Contractor in its business and subject to the weighing of the public interest, article 9(1)(c) applies. I will deal separately below with those parts of the Method Statements, which I have not identified as coming within this exception.

Article 10(1)

Article 10(1) provides that 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.

In order for article 10(1) to effectively disapply article 9(1)(c), I would have to be satisfied that the information in the withheld documents relates in a sufficiently direct manner to emissions into the environment ([Case T-545/11 Stichting Greenpeace Nederland-v-Pesticide Action Network Europe](#)). This interpretation is supported by the Advocate General’s Opinion in a case concerning Article 4(2) of the AIE Directive. In [C-524/09 Ville de Lyon](#), Advocate General Kokott found that information on the sale of emission allowances was environmental information. However he also found that it was doubtful that "restriction of the exceptions to the right of access under the fourth sentence of Article 4(2) of the Environmental Information Directive is intended to encompass indirect information on emissions in exactly the same way as the definition of environmental information. The two provisions have different functions which preclude a uniform interpretation". He went on to say that if the exception regarding confidentiality of commercial or industrial information could not apply to information indirectly linked with emissions then the scope of that exception would be severely restricted as most environmental information can be linked indirectly with emissions.

It is clear to me from having examined the information, that there are no references to emissions or anything that could be reasonably considered to be information directly relating to emissions into the river or atmosphere. The appellant argued that the information in the seven records is fundamental to understanding the scale and level of emissions into the river as a result of the construction of the bridge. He submitted that knowing which type of rotary bore pile or piling method was used, would indicate the levels of emissions created. However, I am not convinced that the information before me, including plans and specifications for the construction of the bridge, relates in a sufficiently direct manner to emissions into the environment for article 10(1) to apply in this case.

The Public Interest

I am mindful that the public interest balancing test in section 36 of the FOI Act is not identical to the requirement of article 10(3) of the AIE Regulations. However, for the purposes of this case, the relevant factors to be considered are common to both and I will deal with them together. I considered the current request on an individual basis, in accordance with article 10(3), and I reflected on the weighting that I should give to the public interest in disclosure of the information at issue, in all of the circumstances.

Article 10(3) of the AIE Regulations 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. In considering the public interest served by disclosure under AIE, it is also important to have regard to the purpose of the AIE regime as reflected in Recital (1) of the Preamble to the Directive: "Increased public access to environmental information and the dissemination of such information contribute to greater public awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment." Thus, 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.

I am mindful also that section 11(3) of the FOI Act requires public bodies to have regard to the need to achieve greater openness in their activities and inform scrutiny, discussion, comment and review by the public of their activities. I consider this to be relevant to my assessment under section 36(3) as to whether it would be contrary to the public interest to release financial information. On the other hand, both the AIE regime and the FOI Act recognise a public interest in restricting access to certain information. Competing interests must be assessed in order to weigh the public interest in favour of disclosure against the potential harm that might result from that disclosure.

The appellant made a number of public interest arguments in favour of release. While I have had regard to them, I will not repeat them all here. In summary, they centred around the use of public money in the construction of the bridge and the impact of this on the local environment, including the River Nore which is a special area of conservation (SAC).

I consider that there is a significant public interest in achieving, as far as possible, openness, transparency and accountability in public authorities, particularly where the use of public funds is concerned. The release of information relating to the expenditure of public funds by public authorities acts as a significant aid in ensuring the effective oversight of public expenditure and bringing transparency to the principle of ensuring value for money. The appellant submitted that there is a public interest in the public knowing the details of a large scale public civil engineering project which ran over budget. In this case, the amount of expenditure involved on the KCAS bridge project is significant and the public interest in release is, according to the appellant, particularly strong.

The Council argued that it would not be in the public interest, and would undermine the integrity of the tender process, if commercially sensitive information in relation to companies tendering for work from public bodies were to be released. I must also weigh the public interest in openness and accountability against the effect that release of these records could have on the commercial interests of the third party. In particular, there is a legitimate public interest in commercial entities being able to conduct commercial transactions with public bodies without fear of suffering commercially as a result. In its submission the Main Contractor argued that release of the records at issue would substantially benefit any competitor contractor seeking to determine its particular working methods and therefore release of these records would not be in the public interest.

I do not believe that the disclosure of the particular information at issue would serve to allow for such a level of oversight of public expenditure that the public interest would be better

served by release, to the detriment of the commercial position of the Main Contractor. I accept that the release of the records would be of benefit to competitors, given the level of detail involved, and such that release could unduly prejudice the commercial position of the Main Contractor.

I agree with the appellant that there is a strong public interest in the release of reports relating to the emplacement of limestone as part of the construction process. I consider that the public interest here is substantially satisfied by the Council's assurances that all reports on the emplacement of limestone in the river have been made publicly available, apart from the two Method Statements. I also note that the Council was directed by the National Parks and Wildlife Service, under Regulation 27(9)(b) of the European Communities (Birds and Natural Habitats) Regulations 2011 ([S.I. no. 477 of 2011](#)), to carry out a follow-up monitoring survey and report on the existence of deposits of aggregate at the bridge location and to determine whether rehabilitation efforts are required. I understand that monitoring was carried out and the Council has recently submitted a report to the National Parks and Wildlife Service. I take into account also my finding below that sections of the Method Statements, which are not commercially sensitive can be released.

I am therefore satisfied that the public interest served by disclosure of the seven records and the two Method Statements does not outweigh the interest served by refusal.

Article 10(5)

Article 10(5), which 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 relates, may be separated from such information.

During the course of my review the Main Contractor identified the particular sections of the Method Statements that it considered commercially sensitive. The Council or the Main Contractor did not cite any other exceptions relating to the Method Statements. It is therefore practicable to apply article 10(5) in the circumstances.

I therefore require release of the Method Statements with the following sections redacted or removed:

- In the 2014 Method Statement (MS-003 Rev 1), sections 2.10, 2.11, 5.2, 7.0 and appendix C.
- In the 2015 Method Statement (MS-003 Rev 8), sections 2.16 through 2.24, 7.0 and appendices C and F.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I find that refusal of the seven records and sections of the Method Statements found to be within the exception, was justified under article 9(1)(c) of the AIE Regulations having weighed the public interest in accordance with article 10(3). However, I vary the Council's decision as I require the release of the two redacted Method Statements.

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
29 May 2019