



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

**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-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, OCE-118025- F6J2Q5, and OCE-120045-S5B0Q

Date of decision: 12 July 2023

Appellant: Organisation XYZ

Public Authority: Kildare County Council (the Council)

Issue: Whether the Council was justified in refusing access to additional environmental information other than the information already identified relating to OCE-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, OCE-118025- F6J2Q5; in refusing access to environmental information relating to OCE-120045-S5B0Q; and in refusing access, under articles 8(a)(i) and 9(1)(c) of the AIE Regulations, to certain information contained within two records relating to OCE-118019-N9V3D1, OCE-118023-V5B1T8, and OCE-118025-F6J2Q5.

Summary of Commissioner's Decision: The Commissioner annulled the Council's decisions. He directed the Council to undertake a fresh decision making process in respect of the further relevant environmental information sought by the appellant and to undertake a fresh decision making process in respect of the information withheld from two of the records already identified.

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

1. This decision concerns eight requests made by the appellant to the Council on 12 July 2021 and one request made by the appellant organisation to the Council on 27 September 2021, seeking access to information about the Curragh Plains, including interactions between the Council and a named consultancy firm. A summary of these requests is set out in Appendix 1 to this decision.
2. For ease of reference, I will refer to the nine requests using this Office's reference numbers.
3. On 30 July 2021, the Council wrote to the appellant, informing it that, due to the volume of information sought in OCE-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE-118021-J1L3C9, OCE-118023-V5B1T8, OCE-118024-P1R4D1, and OCE-118025-F6J2Q5, it required an extension until 17 September in order to respond.
4. On 16 September 2021, the Council issued decisions in respect of each of the first eight requests, which are summarised as follows:
 - **OCE-118014-C9Z8S2** – The Council stated that “the information sought is exempt under Section3(a)(1) as the information is available on the E Tender’s website. Details of documents can be accessed on the e-tenders website as follows; [\[link provided\]](#)”. The Council also provided a list of the ten documents available on the eTenders website.
 - **OCE-118019-N9V3D** – The Council again stated that “the information sought is exempt under Section3(a)(1)...as the information is available on the E Tender’s website. Details of documents can be accessed on the e-tenders website as follows; [\[link provided\]](#)”
 - **OCE-118020-J7H3W9** – The Council stated that it was refusing access to the information requested under article 9(2)(c) of the AIE Regulations on the basis that the study is not complete.
 - **OCE-118021-J1L3C9** – The Council stated that it was refusing access to the information requested under article 9(2)(c) of the AIE Regulations on the basis that the study is not complete.
 - **OCE-118022-P3H2W7** – The Council stated that it was refusing access to the information requested under article 9(1)(c) of the AIE Regulations on the basis that the information is commercially sensitive.
 - **OCE-118023-V5B1T8** – The Council stated that it was refusing access to the information requested under article 9(1)(c) of the AIE Regulations on the basis that the information is commercially sensitive.
 - **OCE-118024-P1R4D1** – The Council stated that it was refusing access to the information requested under article 9(1)(c) of the AIE Regulations on the basis that the information is commercially sensitive.
 - **OCE-118025-F6J2Q5** – The Council stated that it was refusing access to the information requested under article 9(1)(c) of the AIE Regulations on the basis that the information is commercially sensitive.
5. On 25 September 2021, the appellant made internal review requests in respect of the first eight requests, which are summarised as follows:



- **OCE-118014-C9Z8S2** – The appellant indicated that it was unhappy with the list received, emphasising that it had asked for a list of “all” relevant information. It submitted its view that further relevant information should exist, which was not available regarding, for example, meetings with the Department of Defence and others, the decision to work with the Department of Defence, and the decision to pursue “Landscape Architect Lead Multi Disciplinary Project Team Services”.
 - **OCE-118019-N9V3D1** – The appellant indicated that it was unhappy with the information available on the eTenders website, emphasising that it had asked for copies of “all” relevant information. It submitted its view that further relevant information should exist, which was not available regarding, for example, meetings with the Department of Defence and others, the decision to work with the Department of Defence, and the decision to pursue “Landscape Architect Lead Multi Disciplinary Project Team Services”.
 - **OCE-118020-J7H3W9** – The appellant noted it was seeking access to a list of “all” relevant information and contended that the request did not concern material in the course of completion, nor unfinished documents or data. It highlighted that it included the Council’s considerations on the carrying out of a conservation study.
 - **OCE-118021-J1L3C9** – The appellant noted that it was seeking access to copies of “all” relevant information and contended that the request did not concern material in the course of completion, nor unfinished documents or data. It highlighted that it included the Council’s considerations on the carrying out of a conservation study.
 - **OCE-118022-P3H2W7** – The appellant noted that it was seeking access to a list of “all” relevant information. It contended that the Council had refused access to all relevant information on the basis that it was commercially sensitive and had not considered whether giving partial access would be possible, as required under the AIE Regulations.
 - **OCE-118023-V5B1T8** – The appellant noted that it was seeking access to copies of “all” relevant information. It contended that the Council had refused access to all relevant information on the basis that it was commercially sensitive and had not considered whether giving partial access would be possible, as required under the AIE Regulations.
 - **OCE-118024-P1R4D1** – The appellant noted that it was seeking access to a list of “all” relevant information. It contended that the Council had refused access to all relevant information on the basis that it was commercially sensitive and had not considered whether giving partial access would be possible, as required under the AIE Regulations.
 - **OCE-118025-F6J2Q5** – The appellant noted that it was seeking access to copies of “all” relevant information. It contended that the Council had refused access to all relevant information on the basis that it was commercially sensitive and had not considered whether giving partial access would be possible, as required under the AIE Regulations.
6. On 26 November 2021, the appellant made an internal review request in respect of the Council’s deemed refusal of the ninth request, OCE-120045-S5B0Q6, on the basis that the Council had not issued a response to its original request.



7. On 29 November 2021, the appellant submitted appeals to this Office in respect of the first eight requests, on the basis that the Council had not issued responses to its requests for internal review.
8. Following correspondence with this Office, the Council, on 15 December 2021, notified the appellant of its positions in respect of seven of the first eight requests, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE-118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, and OCE-118025-F6J2Q5, affirming its original decisions.
9. On 7 January 2022, the appellant confirmed that it wished to proceed with its appeals regarding the first eight requests, noting that an updated position had not issued in OCE-118014-C9Z8S2.
10. Also on 7 January 2022, the appellant submitted an appeal to this Office in respect of the ninth request, OCE-120045-S5B0Q6, on the basis that the Council had not issued any response.
11. On 28 January 2022, the Council provided its position in respect of the ninth request. It stated that the information is not held by the Council. It indicated that the Office of Public Works (OPW) and the National Parks and Wildlife Service (NPWS) were the appropriate authorities. It also provided the appellant with a link to a publication available on the NPWS website, which it considered to be relevant. Subsequently, the appellant confirmed to this Office that it also wished to proceed with its appeal regarding the ninth request.
12. I am directed by the Commissioner for Environmental Information to undertake a review under article 12(5) of the AIE Regulations. In so doing, I have had regard to the correspondence between the Council and the appellant as outlined above and to correspondence between this Office and both the Council and the appellant on the matter. I have also examined the content 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); and
 - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the Aarhus Guide)
13. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

14. During the course of this review, the Council made submissions in respect of the nine requests at issue, which are summarised below:
 - **OCE-118014-C9Z8S2** – Notwithstanding that a list had been provided to the appellant at original decision, the Council confirmed that its reference to Section 3(a)(1) of the AIE Regulations at original decision was a typing error and it should have referred to article 7(3)(a)(i) of the AIE



Regulations, which provides for giving access to environmental information in another form or manner than that specified by the requester. The Council also provided this Office with another list of ten records it had identified as relevant, which was slightly different to the list provided at original decision. It indicated that this list had also been provided to the appellant.

- **OCE-118019-N9V3D1** – The Council also provided this Office with a list and copies of twelve records it considered relevant to OCE-118019-N9V3D1. Ten of the records comprise the records available on the eTenders website. However, two of the records (records 11 and 12) comprise the completed tender submission provided by the Paul Hogarth Company to the Council and the letter of acceptance issued by the Council to the Paul Hogarth Company. The Council outlined that certain information had been withheld from records 11 and 12 on the basis that it is commercially sensitive information and personal information. The Council confirmed that its reference to Section 3(a)(1) of the AIE Regulations at original decision was a typing error and it should have referred to article 7(3)(a)(i) of the AIE Regulations, however it also indicated that copies of the ten records available on the eTenders website had in fact been provided to the appellant, in addition to the two redacted records and a copy of the list of the twelve records. The Council confirmed that the two redacted records were the only records it had identified as relevant, which were not available on the eTenders website.
- **OCE-118020-J7H3W9** – The Council provided this Office with a list of two records it had identified as relevant, comprising a discussion paper on the Curragh Plains and a next steps document created on foot of that discussion paper. The Council stated that this list had been provided to the appellant on 21 February 2022 and no longer referred to article 9(2)(c) of the AIE Regulations.
- **OCE-118021-J1L3C9** – The Council provided this Office with copies of the two records listed in OCE-118020-J7H3W9. The Council stated that these records had been released in full to the appellant on 21 February 2022 and no longer referred to on article 9(2)(c) of the AIE Regulations.
- **OCE-118022-P3H2W7** – The Council provided a list of the same ten records as for OCE-118014-C9Z8S2. The Council indicated that no information had been withheld from the list.
- **OCE-118023-V5B1T8** – The Council provided copies of the same twelve records as for OCE-118019-N9V3D1. The Council indicated that other than the information being withheld from two of those records (records 11 and 12) on the basis that it is commercially sensitive information and personal information, no further information was being withheld.
- **OCE-118024-P1R4D1** – The Council provided a list of the same ten records as for OCE-118014-C9Z8S2. The Council indicated that no information had been withheld from the list.
- **OCE-118025-F6J2Q5** – The Council provided copies of the same twelve records as for OCE-118019-N9V3D1. The Council indicated that other than the information being withheld from two of those records (records 11 and 12) on the basis that it is commercially sensitive information and personal information, no further information was being withheld.
- **OCE-120045-S5B0Q6** – The Council stated that the planning department does not have a list of records nor does it hold any records that state that the Curragh is an area of scientific interest. It noted that the appellant may think that such a reference was made during the construction of the



Kildare Town Bypass and, accordingly, the appeal needed to be referred to the Roads Department for reply.

15. Taking account of the foregoing, the scope of this review concerns whether the Council was justified in refusing access to additional environmental information other than the information already identified relating to OCE-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, and OCE-118025- F6J2Q5; in refusing access to environmental information relating to OCE-120045-S5B0Q; and in refusing access, under articles 8(a)(i) and 9(1)(c) of the AIE Regulations, to certain information contained within two records relating to OCE-118019-N9V3D1, OCE-118023-V5B1T8, and OCE-118025-F6J2Q5.

Preliminary Matters

16. Before I consider the substantive issues arising, I wish to make a number of preliminary comments.
17. First, this decision concerns nine separate appeals submitted by the appellant to this Office. In the circumstances of these appeals, where they concern nine requests that were submitted by the same requester to the same public authority and have similar subject matter, I have decided that a composite decision is appropriate.
18. Second, a review by this Office is considered to be *de novo*, which means that it is based on the circumstances and the law as they pertain at the time of the decision.
19. Third, it is clear from the comments of the Court of Appeal in *Redmond & Another v Commissioner for Environmental Information & Another* [2020] IECA 83, at paragraph 51, that the nature of a review by this Office is inquisitorial, rather than adversarial in nature. The extent of the inquiry is determined by this Office, and not by the parties to the appeal.
20. Fourth, the Council has indicated that it is no longer relying on article 9(2)(c) of the AIE Regulations, which (subject to article 10) provides that a public authority may refuse to make environmental information available where the request concerns material in the course of completion, or unfinished documents or data. For the benefit of clarity, I wish to note that, when relying on that exemption, a public authority must consider the status of the records themselves and not the overall process to which the records relate. In addition, the mere status of a record as a draft alone does not automatically bring it under the exemption.
21. Fifth, it is outside the remit of this Office to adjudicate on how public authorities carry out their functions generally, including with respect to their environmental information management practices. This Office has no role in assessing how public authorities collect, maintain and disseminate environmental information. The role of this Office concerns reviewing appeals of requests for access to environmental information within the scope of a request, which is held by or for the relevant public authority and no more than that.
22. Finally, during the course of this review, the Council mentioned in passing that the information sought may not, in fact, be environmental information. It stated that the requests relate to procurement of consultants' services on a conservation management plan / report for the Curragh Plains. The Council expressed surprise that this Office had not dismissed the appeal, on the basis that there was "no



evidence or even any assessment that can relate this process to AIE.” The Council went on to elaborate on the history of the Curragh Plains project and the requirements for environmental screening being limited to certain statutory processes, and that no screening had taken place on the Curragh Plains project. It stated that there “should not be any AIE requests on [a process that] is only partially undertaken.”

23. The Council also indicated its view that the information withheld from two of the records concerned does not relate to the environment.
24. However, the Council made no further arguments in support of the position that the information sought may not, in fact, be environmental information. I would remind the Council that whether information is “environmental information” is one of the threshold issues to be considered when processing an AIE request. Accordingly, in cases where information has been released and exemption provisions have been relied upon it is unhelpful for a public authority to raise such an argument for the first time before my Office.

Definition of Environmental Information

25. For the avoidance of doubt, I consider that the information sought in each of the appellant’s requests, falls squarely within the definition of environmental information as provided for in article 3(1) of the AIE Regulations, in particular paragraph (c). Article 3(1)(c) of the AIE Regulations provides that “environmental information” means any information on 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) (i.e. the environment) as well as measures or activities designed to protect those elements.
26. In summary, the appellant sought access to lists and/or copies of all information relating to the procurement of the Paul Hogarth Company to carry out a study/(ies) of the Curragh Plains, the carrying out of and the Council’s consideration of a conservation study on the Curragh Plains, the contracts and business with the Paul Hogarth Company, and the Curragh “as an area of Scientific Interest pursuant to 92/3 EEC, as amended”. Given comments made by the Council, it is important to highlight that the requests do not solely relate to procurement and, although some are similar, they are not identical.
27. The Tender and Schedule document, which is publicly available on the eTenders website and was provided to this Office and released to the appellant, shows that there was a tender for the provision of “Multi Disciplinary Landscape Architect Lead Project Team Services for The Curragh Plains, The Curragh, Co. Kildare” for “The Delivery of a comprehensive Conservation Management Plan & an Interpretation/Branding Plan incorporating an Orientation and Wayfin[d]ing Strategy” (hereinafter “The Curragh Plains Project”) The Paul Hogarth Company was awarded the contract. The project website is www.curraghplains.ie. The Scope of Services – Curragh Plains document, which is also available on the eTenders website and was both provided to this Office and released to the appellant, states:

“Kildare County Council in collaboration with the Department of Defence wish to procure the services of a competent multi-disciplinary Landscape Architect Lead project team to deliver the following



- a comprehensive Conservation Management Plan, which will provide a framework for the future sustainable management of the Curragh of Kildare, having regard to the cultural significance of the Curraghs Military past and present, it will provide clear policies for the sustainable future of the plains.

- an Interpretation/Branding Plan informed by the Conservation Management Plan, to develop and design an overarching brand proposition and visual identity for the Curragh of Kildare, provide analysis, solutions and marketing expertise to further enhance the Curragh Brand incorporating all the integral identities associated with the Curragh Plains and the destinations surrounding them, including The Curragh Race Course, Kildare Retail Village, Japanese Gardens, Curragh Military Museum and Kildare National Stud. The brand will then be applied consistently across the Curragh of Kildare to reinforce its identity and profile. All this to feed directly into the delivery of an Orientation, Wayfinding and Interpretation Strategy for the Curragh Plains, including but not limited to unique gateway markers into the area, wayfinding that enhances the visitor experience and reduces challenges for the user in navigating and experiencing the environment.”

28. While I note that the tender documentation available on the eTenders website relates to a tender process which was carried out in 2020, I also note that the two records identified as relevant to OCE-118020-J7H3W9 and OCE-118021-J1L3C9, comprising a discussion paper on the Curragh Plains and a next steps document created on foot of that discussion paper, are from 2018 and concern the Paul Hogarth Company. Accordingly and given the wording of the appellant’s requests, I am satisfied that the information sought is not confined to information relating to the Curragh Plains Project, as related to the 2020 tender, rather it relates to any and all information relating to the procurement of the Paul Hogarth Company to carry out a study(ies) of the Curragh Plains, the carrying out of and the Council’s consideration of a conservation study on the Curragh Plains, the contracts and business with the Paul Hogarth Company, prior to the date of the requests.
29. I understand that in referring to the Curragh “as an area of Scientific Interest pursuant to 92/3 EEC, as amended”, the appellant is meaning Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended (a consolidated version is available [here](#)), This is the Habitats Directive, which has been transposed into Irish law (see S.I. No. 477/2011 - European Communities (Birds and Natural Habitats) Regulations 2011). The Habitats Directive does not specifically include the term “area of scientific interest”, instead it refers to the Natura 2000 network (see [here](#) and [here](#)), which includes Sites of Community Importance (SCIs) (prior to designation), Special Areas of Conservation (SACs), and Special Protection Areas (SPAs). Another form of site designation in Ireland are Natural Heritage Areas (NHAs) (see Wildlife Act 1976, Wildlife (Amendment) Act 2000) and there are also non-statutory proposed NHA (pNHAs). There is a National Parks and Wildlife (NPWS) document “Stages in the Site Designation Process” (available [here](#)) which outlines that areas that have been or that may be proposed for nature conservation are identified in a number of ways, including using “[p]reviously existing knowledge, such as the list of Areas of Scientific Interest compiled in the 1970s”. Notwithstanding that the appellant referred specifically to the Habitat’s Directive, in all the circumstances, I am of the view that the appellant’s reference to “area of Scientific Interest” can be taken to include any form of conservation designation or proposed designation.



30. I am satisfied that the Curragh Plains Project, as well as any similar studies, and consideration of the Curragh as a (proposed) designated site whether formally or otherwise are measures or activities within the meaning of paragraph (c).
31. I note the Council's comments that the Curragh Plains Project is not yet at a stage which would require environmental screening/assessment and that the project is still ongoing. However, I also note that an overall aim of the project is to support sustainable management of the Curragh.
32. According to the European Commission's website ([here](#)), Natura 2000 is a European network of core breeding and resting sites for rare and threatened species, and some rare natural habitat types which are protected in their own right. The NPWS website [here](#) outlines that NHAs are the basic designation and are considered important for the habitats present or which hold species of plants and animals whose habitat needs protection. It also outlines that there are over 600 pNHAs which were published on a non-statutory basis in 1995, but have not since been statutorily proposed or designated. It states "[t]hese sites are of significance for wildlife and habitats. Some of the pNHAs are tiny, such as a roosting place for rare bats. Others are large - a woodland or a lake, for example. The pNHAs cover approximately 65,000ha and designation will proceed on a phased basis over the coming years."
33. In my view, there is a real and substantial possibility that the Curragh Plains Project, as well as any similar studies, and consideration of the Curragh as a (proposed) designated site whether formally or otherwise, regardless of any action taken or not taken as a result, will affect or are likely to affect the environment. There is no requirement for the Curragh Plains Project to be at environmental screening/assessment stage. I find therefore, that the Curragh Plains Project as well as any similar studies, and consideration of the Curragh as a (proposed) designated site whether formally or otherwise are measures or activities likely to affect the environment under Article 3(1)(c) of the Regulations.
34. As indicated above, the appellant, in summary, sought access to lists and/or copies of all information relating to the procurement of the Paul Hogarth Company to carry out a study(ies) of the Curragh Plains, the carrying out of and the Council's consideration of a conservation study on the Curragh Plains, the contracts and business with the Paul Hogarth Company, and the Curragh "as an area of Scientific Interest pursuant to 92/3 EEC, as amended". I am satisfied that any information coming within the scope of all of the information sought, including any pricing information, is information "on" the Curragh Plains Project, as well as any similar studies, or consideration of the Curragh as a (proposed) designated site whether formally or otherwise.
35. Accordingly, I find that all of the information sought is "environmental information" within the meaning of paragraph (c) of the definition in article 3(1) of the AIE Regulations.
36. I will now go on to consider the substantive issues arising in this review.

Analysis and Findings

Article 7(5)

37. Article 7(1) of the AIE Regulations requires public authorities to make available environmental information that is held by or for them on request. Article 7(5) of the AIE Regulations is the relevant



provision to consider where the question arises as to whether the requested environmental information is held by or for the public authority concerned. In cases where a public authority has effectively refused a request under article 7(5), this Office must be satisfied that adequate steps have been taken to identify and locate relevant environmental information, having regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances, a standard of reasonableness must necessarily apply. It is not normally this Office's function to search for environmental information.

38. During the course of this review, this Office's Investigator asked the Council to respond to a number of queries regarding its record management practices and the searches undertaken to identify and locate relevant environmental information regarding each of OCE-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, OCE-118025- F6J2Q5, and OCE-120045-S5B0Q6. In response the Council outlined the following:
- Documents related to projects undertaken are stored electronically on the mapped drive for the relevant department – the project concerned is one of approximately 60 projects undertaken by the Strategic Projects and Public Realm Department of the Planning Directorate.
 - Documents relating to funding, agreements, tenders, and correspondence with Government Departments are stored in accordance with best practice for document management.
 - Documents are stored electronically and all relevant file shares are scanned and thoroughly searched. Many projects also have hard copies of records which are commonly used, however no additional information is held in hard copy.
 - The project is in the sole ownership of the Strategic Projects and Realm Department – no other Department has been involved to date.
39. The Council gave no further detail regarding the specific electronic and hard copy records/files searched in respect of any of the nine requests. It also gave no indication of the search terms used to carry out those searches (e.g. by name, by date, by keywords or by reference number etc). Furthermore, it gave no detail of any relevant individuals within the Strategic Projects and Realm Department consulted or the particular searches they carried out.
40. Regarding OCE-120045-S5B0Q6 specifically, this Office's Investigator noted to the Council that it had indicated in its correspondence to this Office on 21 March 2022, that "[the] Planning Department does not have a list of records/ documents nor hold any records which state that the Curragh is an area of Scientific Interest. Having read the appeal, it appears that [the appellant] may think that there was such a reference made in relation to the Curragh during the construction of the Kildare Town Bypass. Accordingly this AIE appeal now needs to be referred to Roads [Department] for reply..." On this basis, the Investigator asked the Council whether the Roads Department did subsequently carry out searches. In response, the Council stated "[t]he response to this query was that no such works or research were in the possession of [the Council]. The Roads Department...is a service area concerned with the provision, maintenance and upkeep of the transport network in Kildare and not engaged in studies of this nature." Notwithstanding this response, it is unclear whether the Roads Department did carry out searches.



41. As indicated above, during the course of this review, the Council provided this Office with lists of the ten records it considered relevant to OCE-118014-C9Z8S2, OCE-118022-P3H2W7, and OCE-118024-P1R4D1. The Council also provided this Office with lists and copies of the twelve records it considered relevant to OCE-118019-N9V3D1, OCE-118023-V5B1T8, OCE-118025- F6J2Q5. This Office's Investigator noted that, having examined the lists, there appeared to be one record listed for OCE-118014-C9Z8S2, OCE-118022-P3H2W7, and OCE-118024-P1R4D1 – "3. Project Particulars" – which had not been listed or provided for OCE-118019-N9V3D1, OCE-118023-V5B1T8, and OCE-118025- F6J2Q5. Additionally, she noted that there appeared to be three records listed and provided for OCE-118019-N9V3D1, OCE-118023-V5B1T8, and OCE-118025- F6J2Q5 – "8. Appellant's Personal Situation Declaration", "9. Appendix B1", and "10. Certificate of Satisfactory Deliver of Service" – which were not listed for OCE-118014-C9Z8S2, OCE-118022-P3H2W7, and OCE-118024-P1R4D1 (however, I note that they were listed in the original decision for OCE-118014-C9Z8S2).
42. Given the wording of OCE-118014-C9Z8S2 and OCE-118019-N9V3D1, OCE-118022-P3H2W7 and OCE-118023-V5B1T8, and OCE-118024-P1R4D1 and OCE-118025- F6J2Q5, where through each pairing the appellant sought access to "lists" of information under the first reference and "copies" of the same information under the second reference, the Investigator asked the Council to clarify why the same records were not listed and/or provided for both references in the pairing. In response, the Council stated, "[g]iven that both requests are for the same information it is considered by Kildare County Council that the list of records are complete." In my view, it is difficult to make sense of this response. It is the case that the pairs of requests sought access to "lists" and "copies" of the same information and, accordingly, it seems to me that the same lists should have been provided for the responses to both references in each pairing, with copies of the records also provided with the response to the second reference, however this did not occur.
43. Additionally, this Office's Investigator noted her understanding that there would have been interactions involving the Council, the Department of Defence and/or the Paul Hogarth Company regarding the Curragh Plains study(ies) carried out. She asked the Council to provide background detail regarding these interactions and the role of the Council etc. She also asked the Council to provide background detail to the appellant's requests generally, including detail regarding the procurement process, the study(ies) carried out, the relationship between the Council and the Department, and the relationship between the Council and the Paul Hogarth Company etc. In response, the Council stated:
- "When an application was being submitted to The Department of Rural and Community Development (DRCD) the Department of Defence (DOD) were asked if they supported such a plan being put in place which received a positive response. Given that most of the area in question is in the control of the DOD it was considered best practice to seek their support. The only [Council] staff involved in the proposed tender were from the Strategic Projects and Public Realm Department a sub-department of the Planning Directorate. The only background I can provide on the appellants requests were that ten or so requests came under AIE requests which in the view of this department could probably have been dealt with in a single request. The only relationship that exists between the consultants and the Council was that the consultants were the successful tenderers in an open competition"



44. It is most unfortunate that the Council failed to provide further detail relating to its interactions and relationship with the consultants and the Department of Defence regarding the procurement process and the study(ies) carried out. No background detail regarding any meetings, correspondence, discussions etc. was provided. A brief examination of the documents released indicates that there must have been some form of interaction and engagement between the parties. It would also have been relevant for the Council to, for example, set out the steps that had been taken during the lead up to the tender, during the tender process, and during the carrying out of the project to the date of the request.
45. This Office's Investigator further noted to the Council that it appeared that of the twelve records identified as relevant to OCE-118019-N9V3D1, OCE-118023-V5B1T8, and OCE-118025-F6J2Q5, only the two redacted records are not publicly available and all relate to the tender process. She put it to the Council that the appellant's requests relate to the procurement of the Paul Hogarth Company generally, the carrying out of the study, and the contract(s) with the Paul Hogarth Company etc. She asked the Council whether it was of the view that any information, other than the records already identified, regarding OCE-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE-118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, and OCE-118025-F6J2Q, does not exist (e.g. meeting minutes, contract(s), emails etc.). The Council did not specifically respond to this query other than to say that "this has been answered at length above in earlier sections of this letter". However, in light of the information provided and discussed above, I do not consider this to be the case.
46. This Office's Investigator noted that article 7(5) refers to information "held by or for" a public authority. Article 3(1) of the AIE Regulations provides that "'environmental information held for a public authority' means environmental information that is physically held by a natural or legal person on behalf of that authority."
47. The Investigator asked the Council whether it had consulted the Paul Hogarth Company regarding OCE-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE-118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, and OCE-118025-F6J2Q, to ascertain whether it holds any information relevant to the appellant's requests. In response, the Council stated:
- "The records referred to documents related to the procurement by Kildare County Council of consultants and all interaction with the Paul Hogarth Company was based on the eTenders platform...The company would not have any access to Kildare County Council documents except where directly related to the official tender process and all of these are already supplied".
48. As indicated above, the tender identified as relevant to OCE-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE-118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, and OCE-118025-F6J2Q, was for the provision of "Multi Disciplinary Landscape Architect Lead Project Team Services for The Curragh Plains, The Curragh, Co. Kildare" for "[t]he Delivery of a comprehensive Conservation Management Plan and an Interpretation/Branding Plan incorporating an Orientation and Wayfin[d]ing Strategy". The Paul Hogarth Company was awarded the contract.
49. It is my view that information which a third party contracted by a public authority holds, if and in so far as it relates to the services being provided by that third party on behalf of the public authority, can be deemed to be held for the public authority. It is clear that the Paul Hogarth Company was contracted



by the Council to provide services in connection with the Curragh Plains Project, on foot of the tender. I am satisfied that information relating to those services which is in the possession of the Paul Hogarth Company may be held on behalf of the Council. I also am satisfied that at least some of the information sought in OCE-118020-J7H3W9, OCE-118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, and OCE-118025-F6J2Q can reasonably be described as relating to those services. Accordingly, it is my view that the Council should have consulted the Paul Hogarth Company in respect of OCE-118020-J7H3W9, OCE-118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, and OCE-118025-F6J2Q.

50. Finally, I would also note the Council's comments throughout its submissions to the effect that the appellant's requests relate to the "procurement of consultants". However, I would highlight that although two of the requests do relate to the procurement of the Paul Hogarth Company to carry out a study(ies) of the Curragh Plains, the requests also relate to the carrying out of and the Council's consideration of a conservation study on the Curragh Plains, and the contracts and business with the Paul Hogarth Company. As noted above, they also are not confined to information concerning the Curragh Plains Project, as related to the 2020 tender.
51. In all the circumstances, I am not in a position to find that the Council has taken adequate steps to identify and locate all relevant environmental information coming within the scope of OCE-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE-118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, OCE-118025-F6J2Q5, and OCE-120045-S5B0Q6. I cannot find that article 7(5) applies in these cases.
52. I consider that the most appropriate course of action to take at this stage is to annul the Council's decisions refuse access to additional environmental information coming within the scope of OCE-118014-C9Z8S2, OCE-118019-N9V3D1, OCE-118020-J7H3W9, OCE-118021-J1L3C9, OCE-118022-P3H2W7, OCE-118023-V5B1T8, OCE-118024-P1R4D1, and OCE-118025-F6J2Q5, and to refuse access to environmental information coming within the scope of OCE-120045-S5B0Q6. On behalf of the Commissioner for Environmental Information, I direct the Council to undertake a fresh decision making process in respect of the further relevant environmental information sought by the appellant regarding each of the requests.

Articles 8(a)(i), 9(1)(c), and 10 of the AIE Regulations

53. The Council refused access to all of the information withheld from two of the records identified as relevant to OCE-118019-N9V3D1, OCE-118023-V5B1T8, and OCE-118025-F6J2Q5, on the basis that it is personal information and commercially sensitive information. The redacted records concerned are records 11 and 12, as numbered on the lists provided to this Office. Record 11 is the completed tender submission provided by the Paul Hogarth Company to the Council and record 12 is the letter of acceptance issued by the Council to the Paul Hogarth Company.
54. Article 8(a)(i) of the AIE Regulations provides that a public authority shall not make available 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. This



provision seeks to transpose Article 4(2)(f) of the AIE Directive, which in turn is based on Article 4(4)(f) of the Aarhus Convention.

55. Article 9(1)(c) of the AIE Regulations 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 European law to protect a legitimate economic interest. This provision seeks to transpose Article 4(2)(d) of the AIE Directive, which, in turn, is based on Article 4(4)(d) of the Aarhus Convention. The Minister's Guidance, in considering article 9(1)(c) of the AIE Regulations, states:
- “The fact that a person or company asks for information to be treated as confidential does not of itself establish it as such for the purpose of the Regulations, and the public authority must satisfy itself that real and substantial commercial interests are threatened. In addition, the fact that the release of information (for example, in relation to a pollution incident) might damage the reputation of a company is not of itself adequate reason for withholding it.” (paragraph 12.4).
56. Articles 8(a)(i) and 9(1)(c) must be read alongside article 10 of the AIE Regulations. Article 10(1) of the AIE Regulations provides that notwithstanding articles 8 and 9(1)(c) of the AIE Regulations, 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 AIE Regulations requires a public authority to consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) of the AIE Regulations provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest served by disclosure. Article 10(5) of the AIE Regulations 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.
57. When relying on article 8(a)(i) of the AIE Regulations a public authority must show that the information at issue is personal information relating to a natural person, who has not consented to its disclosure; that the personal information has an element of confidentiality, that the confidentiality of that personal information is provided by law; and that the disclosure of the information at issue would adversely affect that confidentiality. The public authority must demonstrate a clear link between disclosure of the information that has actually been withheld and any adverse effect. The risk of the confidentiality being undermined must be reasonably foreseeable and not purely hypothetical.
58. In its submissions to this Office, the Council stated that the information which it “considers to be commercially sensitive can also be defined as a breach in GDPR in that it relates to individuals in the employment of the company, their relevant qualifications and when achieved (including copies of certificates) work experiences with this and other companies, [d]ate of birth, [p]lace of birth, their salary scales, and the charges of each of these against the contract in question...” It also indicated that individual's hourly rates are considered to be personal information.
59. The Council contended that any information stored by a public authority which relates to a natural person is protected under the General Data Protection Regulation (GDPR) and the adverse effect on disclosure is also defined in the GDPR. The Council made no specific reference to any provision of the GDPR nor did it attempt to demonstrate a clear link between disclosure of the specific information concerned and any adverse effect.



60. It is important to note that data protection legislation does not prohibit public authorities from processing AIE requests where the records sought contain personal data. Article 86 of the GDPR provides that personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to the GDPR. Section 44 of the Data Protection Act 2018 provides that, for the purposes of Article 86 of the GDPR, personal data contained in environmental information may be disclosed where the information is made available under and in accordance with the AIE Regulations pursuant to an AIE request. It is clear that the GDPR and the Data Protection Acts do not provide for a blanket prohibition on the disclosure of personal data as part of an AIE request. It also appears to me that the AIE Regulations seek to reconcile public access to official documents with the right to the protection of personal data in the manner envisaged by the GDPR. They do so by providing that refusal is only permissible in circumstances where disclosure would adversely affect the confidentiality of personal information.
61. When relying on article 9(1)(c) of the AIE Regulations, a public authority must show that the information at issue is commercial or industrial in nature; that the commercial or industrial information has an element of confidentiality; that the confidentiality of that commercial or industrial information is provided for in law to protect a legitimate economic interest; and that the economic interest, and thereby its confidentiality, would be adversely affected by disclosure of the information at issue. Again, the public authority must demonstrate a clear link between disclosure of the information that has actually been withheld and any adverse effect. The risk of the confidentiality being undermined must be reasonably foreseeable and not purely hypothetical.
62. In its original decisions regarding OCE-118023-V5B1T8 and OCE-118025-V5B1T8, the Council merely referred to article 9(1)(c) of the AIE Regulations, and in its internal review decisions it stated that it was affirming its original decisions. In its submissions to this Office regarding OCE-118019-N9V3D1, OCE-118023-V5B1T8 and OCE-118025-V5B1T8, the Council outlined that it considered the information at issue to be commercially sensitive “as per the tender submission”. It stated that it relates to “the actual pricing of works” and “turnover of the company and other financial records. Evidence of participation of the company and successful competitions from a client list has been provided along with financial records which would not or could not be shared with rival companies”. It also stated that individual’s hourly rates and their charges on a contract, in addition to being personal, are considered confidential.
63. The Council provided no detail as to where the confidentiality of the commercial information concerned is provided for in law to protect a legitimate economic interest, nor did it identify any law upon which it was relying. Furthermore, the Council made no attempt to demonstrate a clear link between disclosure of the particular information at issue and any adverse effect.
64. As indicated above, both articles 8(a)(i) and 9(1)(c) of the AIE Regulations must be read alongside article 10 of the AIE Regulations. Articles 7(4) and 11(4) of the AIE Regulations require public authorities to provide reasons for refusal at both original and internal review decision stage, consistent with Article 4(5) of the AIE Directive. In this regard, the High Court in *Right to Know v An Taoiseach* [2018] IEHC 372 noted, in particular, that “in light of the adjudicatory processes in which a decision-maker is required to



engage pursuant to [a]rticles 10(3), (4) and (5) and 11(4) of the AIE Regulations, the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted cannot, to my mind, constitute a sufficient reason for the refusal” (paragraph 106). The Court held that in an absence of any indicator in the review decision that the balancing exercise mandated by articles 10(3) and (4) had been carried out, suggested that no balancing exercise had, in fact, been undertaken and that the same was true in respect of the mandatory obligation set out in article 10(5) of the AIE Regulations (paragraph 87).

65. In respect of its application of article 10 in the context of both articles 8(a)(i) and 9(1)(c), the Council in its submissions to this Office, regarding article 10(1), indicated that the request did not relate to information on emissions into the environment and, regarding article 10(5), that partial disclosure had occurred. However, regarding article 10(3) and 10(4), which require a weighing of the public interest served by disclosure against the interest served by refusal and for the grounds for refusal to be interpreted on a restrictive basis having regard to the public interest served by disclosure, it gave no indication of any factors for or against release considered or any detail regarding any balancing exercise carried out. Separately, I would also note that while it is very clear that the information refused includes third party information, no third parties appear to have been consulted or notified by the Council when processing the request.
66. In light of all of the above, I do not consider that the Council’s reliance on articles 8(a)(i) and 9(1)(c) of the AIE Regulations is justified. Given the Council’s failure to engage properly with articles 8(a)(i), 9(1)(c) and article 10 of the AIE Regulations, and the presence of third party information, I do not consider it appropriate to simply direct release of the information concerned. Accordingly, I direct it to undertake a fresh decision-making process in respect of that information in accordance with the AIE Regulations.

Decision

67. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I hereby annul the Council’s decisions in these cases. I direct the Council to undertake a fresh decision making process in respect of the further relevant environmental information sought by the appellant regarding each of the requests and to undertake a fresh decision making process in respect of the information withheld from two of the records already identified.

Appeal to the High Court

68. 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.



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Deirdre Gallagher
On behalf of the Commissioner for Environmental Information
12 July 2023



Appendix 1:

- **OCEI Reference: OCE-118014-C9Z8S2; Council Reference: AIE PD 01; Appellant Reference: 2003/4 EC-KCC 1** – “...a list, of:- all correspondence/documentation/pieces of paper generated, and all information known by you that in any and all ways relate to your procurement of the services of Hogarth Consultants including but not limited to for any and all ‘Curragh Plains Consultancy Study...’ (and/or studies,- as the case maybe-).”
- **OCEI Reference: OCE-118019-N9V3D1; Council Reference: AIE PD 02; Appellant Reference: 2003/4 EC-KCC 2** – “...copies, of:- all correspondence/documentation/pieces of paper generated, and all information known by you that in any and all ways relate to your procurement of the services of Hogarth Consultants including but not limited to for any and all “Curragh Plains Consultancy Study...” (and/or studies,-as the case maybe-).”
- **OCEI Reference: OCE-118020-J7H3W9; Council Reference: AIE PD 03; Appellant Reference: 2003/4 EC-KCC 3** – “...a list of:- all correspondence/documentation/pieces of paper generated, and all information known by you that in any and all ways relate to the carrying out of a conservation study on the Curragh Plains including but not limited to any and all considerations by you for same...”
- **OCEI Reference: OCE-118021-J1L3C9; Council Reference: AIE PD 04; Appellant Reference: 2003/4 EC-KCC 4** – “...copies of:- all correspondence/documentation/pieces of paper generated, and all information known by you, that in any and all ways relate to the carrying out of a conservation study on the Curragh Plains including but not limited to any and all considerations by you for same...”
- **OCEI Reference: OCE-118022-P3H2W7; Council Reference: AIE PD 07; Appellant Reference: 2003/4 EC-KCC 7** – “...a list of:- all correspondence/documentation/pieces of paper generated, and all information known by you that in any and all ways relate to Contracts you have with/for your procurement of the services of Hogarth Consultants including but not limited to for any and all for the ‘Curragh Plains Consultancy Study...’ and ‘...conservation study on the Curragh Plains...’ (and/or studies, -as the case maybe-)
- **OCEI Reference: OCE-118023-V5B1T8; Council Reference: AIE PD 08; Appellant Reference: 2003/4 EC-KCC 8** – “...copies of:- all correspondence/documentation/pieces of paper generated, and all information known by you that in any and all ways relate to Contracts and inclusive of Contract/s you have with/for your procurement of the services of Hogarth Consultants including but not limited to for any and all for the ‘Curragh Plains Consultancy Study...’ and ‘...conservation study on the Curragh Plains...’ (and/or studies, -as the case maybe-)
- **OCEI Reference: OCE-118024-P1R4D1; Council Reference: AIE PD 09; Appellant Reference: 2003/4 EC-KCC 9** – “...a list, of: all correspondence/documentation/pieces of paper generated, and all information known by you that in any and all ways relate to your contracts/arrangements/business with Kildare Co. Council that evidentially concluded to date with your procurement of the services of Hogarth Consultants including but not limited to for any and all ‘Curragh Plains Consultancy Study...’ and ‘...conservation study on the Curragh Plains...’ (and/or studies, -as the case maybe-).”



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- **OCEI Reference: OCE-118025-F6J2Q5; Council Reference: AIE PD10; Appellant Reference: 2003/4 EC-KCC 10** – “...copies of:- all correspondence/documentation/pieces of paper generated, and all information known by you, that in any and all ways relate to and inclusive copies of your contracts/arrangements business with Kildare Co. Council that evidentially concluded to date with your procurement of the services of Hogarth Consultants including but not limited to for any and all ‘Curragh Plains Consultancy Study...’ and ‘...conservation study on the Curragh Plains...’ (and/or studies, -as the case maybe-)...”
- **OCEI Reference: OCE-120045-S5B0Q6; Council Reference: AIE PD06; Appellant Reference: 2003/4 EC-KCC 11** – “a list, of all correspondence/documentation/pieces of paper generated, and all information known by you, that in any and all ways relate to the Curragh of Kildare as an area of Scientific Interest pursuant to 92/43 EEC as amended”