



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-109587-X4V6N9

**Date of decision:** 16 May 2023

**Appellant:** Mr B

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

**Issue:** Whether the Department was justified in refusing the appellant's request on the basis that no information within the scope of that request is held by or for it

**Summary of Commissioner's Decision:** The Commissioner found that reasonable and appropriate searches had been undertaken to identify and retrieve environmental information within the scope of the appellant's request and affirmed the Department's decision.

**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. The Abbey Quarter Project (the Project) is a development project to regenerate the Abbey Quarter in Kilkenny City. The Abbey Quarter is an area that comprises a significant brownfield site, which the Council agreed to purchase in 2012 and adjacent lands (combined total of approximately 20 acres). Kilkenny County Council (the Council) is responsible for the public realm aspect of the Project and Kilkenny Abbey Quarter Development Limited (KAQDL) is responsible for the commercial development of the building plots. KAQDL was established through a 50:50 partnership between the Council the National Treasury Management Agency (NTMA) through the Ireland Strategic Investment Fund (ISIF).
2. The Project sought and was granted funding from the Urban Regeneration and Development Fund (URDF). The URDF is administered by the Department and aims to facilitate a greater proportion of residential and commercial development, supported by infrastructure, services and amenities, within the existing built-up areas of larger urban settlements. The Department also provides assistance to local authorities seeking to avail of funding by:
  - Putting in place for the URDF programme, specific guidance on the application of the Public Spending Code to ensure that the level of oversight and governance is appropriate to the type of project being delivered and its monetary value.
  - Addressing the staff resourcing issue which has been raised by local authorities through further engagement with each local authority on their staffing submission. ([Circular URDF 01/2023](#))
3. On 26 February 2021, the appellant made a request to the Department under the AIE Regulations, seeking access to records relating to the URDF and the decision making behind investing in the former brewery site in Kilkenny City for the Project for the period 3 August 2019 to the date of the request, specifically:
  - 1) Copies of any environmental reports and /or audits which may have been sought by or on behalf of the Department in order to inform the Department prior to making this investment decision and any related correspondence;
  - 2) Copies of environmental reports, audits, memos which the Department may have had reference to prior to making this decision;
  - 3) Records concerning environmental liabilities which were considered by the Department prior to making this decision and related correspondence; and
  - 4) Correspondence, memos, audits between the Department and Kilkenny County Council about historic pollution on this site and the brownfield nature of this site.
4. This request (the Current Request) follows a previous appeal by the appellant to this Office in [OCE-93480-F7W4P3](#) *Mr D and the Department of Housing, Planning & Local Government*. Parts 3 to 6 of the request which led to the previous appeal (the Previous Request) also sought the information referred to above. In [OCE-93480-F7W4P3](#), this Office found that the Department did not hold information relating to Parts 3 to 6 of the Previous Request at the time that request was made.



5. As part of the appellant's request to the Department on 26 February 2021, he referenced text from the decision in [OCE-93480-F7W4P3](#) as follows:

"I have also set out its explanation as to why it did not hold records relating to Parts 3 to 6 of the request at the time the request was made. The Department further explains that the Abbey Quarter Project is an on-going project and that further information will have been received, and sent, by it since the request was made. Such information does not fall within the scope of this review".

The appellant's Current Request sought to capture information received by the Department following the Previous Request of 2 August 2019.

6. The Department responded to the Current Request on 13 May 2021. It refused the appellant's request under article 7(5) of the AIE Regulations on the basis that the records sought were not held by or for the Department.
7. The Department's response also outlined that due to remote working arrangements, it was not possible to examine the relevant paper file that related to the Current Request. Therefore, it noted that examination of material for the purpose of the request was confined only to material saved in electronic form. Furthermore, the Department's response noted that under normal circumstances most correspondence would be by means of e-mail and that their electronic files generally cover all records, with the paper files being maintained for ease of access and use of the records involved. In relation to information that may be held on paper files, it noted the following: "while we are confident that our electronic files are comprehensive there is a remote possibility that there may be some correspondence/records that exist only in physical form on the paper file".
8. The Department's decision also reiterated correspondence to the appellant in respect of his Previous Request as follows: "the advancement of URDF supported projects is, in the first instance, a matter for the applicant, Kilkenny County Council in the case of the Abbey Quarter project. Therefore, any legal requirements, consultation processes, planning or other consents necessary for the advancement of the project are matters for Kilkenny County Council. This being the case, Kilkenny County Council may hold records of the type that you now seek and you are advised to consider contacting them in this regard".
9. The appellant sought an internal review in this case on 14 May 2021.
10. The Department issued its internal review outcome on 10 June 2021. It concluded that no grounds had been found to reverse the original decision and affirmed refusal of the Current Request on the basis of article 7(5) of the AIE Regulations. The Department also informed the appellant that a further on site search could be carried out once accessibility was considered safe for the relevant staff, if he wished to continue his request at that time.
11. The appellant brought an appeal to this Office on 25 June 2021.
12. I am directed by the Commissioner for Environmental Information to complete a review under article 12(5) of the Regulations. In so doing, I have had regard to the submissions made by the appellant and the Department of Housing, Local Government and Heritage. 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’).

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

### **Scope of Review**

13. In accordance with article 12(5) of the AIE Regulations, the role of this Office is to review the public authority’s internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, the Commissioner will require the public authority to make available environmental information to the appellant.
14. This review is concerned with whether the Department is entitled to refuse access to the information requested by the appellant on the basis that no information within the scope of the request is held by or for it.

### **Analysis and Findings**

15. The Department, at both original decision and internal review stage, refused access to the information requested on the basis that that the information did not exist or could not be found. 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.

### **Article 7(5) of the AIE Regulations**

16. This Office’s approach to dealing with cases where a public authority has effectively refused a request under article 7(5) of the AIE Regulations is to assess whether 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.
17. In his appeal to this Office, the appellant outlined that he believed the “[Department’s] decision is flawed as indicated in the decision the hardcopy, paper file was not reviewed at the main office



buildings, and so it is possible that undiscovered records remain held by or for the Department in relation to this request”.

18. The appellant also took issue with the Department’s position that no searches were carried out on the physical file due to remote working arrangements during Covid-19. He commented that the “roll out of the AIE Regulations” is essential work and that the timeline of his request was when Covid numbers had improved.
19. The appellant also submitted that he found it unusual that no information within the scope of his Current Request had been created since the Previous Request of 2 August 2019, despite the Project being an ‘on-going project’. He also submitted that there was a high likelihood that further information, relevant to his Current Request, may have been received and/or sent since the Previous Request.
20. The Department provided an initial submission to this Office on 27 August 2021 wherein it noted that for much of the period relevant to the appellant’s Current Request (26 February 2021 to 13 May 2021), the State was at the highest level of restrictions. While a phased easing of restrictions began on 12 April, the public health advice was to continue to work from home unless it was absolutely necessary to attend in person.
21. It stated that in refusing the request at original decision, it noted that the examination of material was confined to material saved in electronic form and that it had not been possible to examine the relevant paper file, due to the remote working arrangements in place.
22. The Department submitted that it had moved to an electronic document management system (eDocs) in 2018 and the default position for the transmission, receipt and storage of material is now electronic. It explained that the decision noted that paper files are maintained for ease of access and use of the records involved but that most correspondence is electronic. It was in this context that the possibility of there being some correspondence / records that exist only in physical form was described as remote. The Department stated that while the internal review affirmed the original decision, it also made it clear that an on-site search could be conducted, as soon as access was considered safe. The Department stated that in dealing with the request as it did, there was no intention on its part to circumvent obligations under the AIE Regulations.
23. The Department submitted that it considered itself to have been fully open and transparent in the decision-making process around this request and implemented a balanced and reasonable approach to the full application of the legislation.
24. The Department also stated that following an update to public health advice, arrangements were made for the physical part of the file to be reviewed. It confirmed that there were no additional records on file beyond those already considered.
25. During the course of the review the Investigator requested that the Department provide further details of the steps taken to search for relevant information relating to the request. This included a number of specific queries as to the locations searched, the search methods used and the individuals consulted in the Department.



26. The Department responded by providing a further submission on 12 October 2022, wherein it outlined that its position as to why it does not hold the records sought in the Current Request remains the same as it was for the Previous Request. It submitted that the Department has not sought or received the type of information sought in both AIE requests. In relation to the records sought it submitted the following:

- The advancement of URDF supported projects, and the wider Abbey Quarter project through the various stages of development, is, in the first instance, a matter for the applicant - in this case Kilkenny County Council. Therefore, any legal requirements, consultation processes, planning or other consents (including environmental consents or consultations) necessary for the advancement of these projects are a matter for Kilkenny County Council.
- There has been no correspondence between the Department and Kilkenny County Council in relation to any matters identified nor has the Department been copied on any correspondence with the Council containing the information sought. Therefore, there are no such records on either the paper or electronic Project File.
- All electronic records concerning the Project were transferred from the Department's network to eDocs at the start of 2020.
- It explained that in normal circumstances, most correspondence is by email only and so the electronic files generally cover all records; the paper files are maintained for ease of access and use of the records involved. In the event that any correspondence was submitted by post, it was scanned to the electronic file and the original placed on the paper file. The remote working arrangements that were in place from March 2020 onwards meant that all correspondence for URDF projects had to be submitted by email only. As a result, all records and correspondence on URDF projects since March 2020 are on the electronic files only. The paper files on URDF projects will continue to be kept in secure filing cabinets in the URDF office for ease of access and use of the records involved, but the paper files will no longer be updated.
- The Department explained that the change in working arrangements together with the Department's move to eDocs meant it was reasonable for the Department's decision letter of 13 May 2021 to describe the chance of there being records or correspondence that existed only on the paper file as remote.
- It submitted that a search of the paper file for the Project was conducted once it was considered safe to do so in line with public health advice at that time. Details of how this search was conducted were provided to this Office. No records or information relevant to the Current Request were found on the paper file. Therefore, it stated that the type of information requested has not been sought or received by the Department.
- The Department outlined that the URDF team consisted of 6 members at the time of the request in 2021, and staff in the Planning Division providing technical advice on URDF projects. It noted that two of the URDF team members dealt directly with Kilkenny County Council and one team member provided support to the URDF team as a whole.



- All team members and the technical advisors were informed of the AIE request and asked to search for any records they might have concerning the Abbey Quarter project from 3 August 2019 to 26 February 2021 and report back to the staff on the team dealing with the AIE request. This involved the search of individual mailboxes and the shared mailbox used by the URDF team to correspond with local authorities for any correspondence with Kilkenny County Council regarding Abbey Quarter within the timeframe specified. Any of the records identified by the other team members and technical staff were already saved to the electronic file for Abbey Quarter. The Department submitted that no new records were identified.
  - In addition, it submitted that the eDocs electronic file for the Abbey Quarter project was searched comprehensively for the information requested. Any documents or correspondence on the Abbey Quarter eDocs electronic file from 3 August 2019 to 26 February 2021 were searched for any reference to environmental matters or liabilities, references to the brownfield nature of the site, environmental reports, pollution. This involved both reading through each of the records and searching for key words – brownfield, pollution, environment, risk, liability and audit. The Department stated that none of the records on the Abbey Quarter eDocs electronic file contain the type of information sought.
  - In order to rule out the possibility of any records being misfiled/misplaced on eDocs, a comprehensive search was conducted of eDocs for all records concerning Abbey Quarter. This only identified the records which were already on the project file and none of these contain the type of information requested. There were no records found on eDocs concerning Abbey Quarter that were misfiled/misplaced.
  - The Department also submitted that the URDF application or assessment process did not at any point seek to address particular matters that relate to the state of the environment. It explained that the marking scheme used in assessing the application did not include environmental details and consists of criteria such as compatibility with national plans, commitment, collaboration, innovation and viability. In addition, it explained that the assessment process was not based on and did not affect environmental elements or factors and was not connected to the environmental impact of the project. As such, it submitted that there was no reason for it to have received or sought the type of information requested.
27. The appellant was provided with a summary of the above submission from the Department but did not wish to make any further submission in this case.
28. Having considered the details of the searches and the explanations given by the Department above, I am satisfied that it has taken adequate steps to identify and locate all relevant environmental information held by it in respect of the information requested.
29. I have had regard to the appellant's submissions in relation to the Department's failure to carry out searches on the physical file due to remote working arrangements during Covid-19. A question arises as to whether the Department was correct to conclude that a search of the physical file was



not appropriate as a result of those restrictions. However, a review by this Office is considered to be de novo, which means that it is based on an assessment of the circumstances at the time of the decision.

30. As such, I must acknowledge that the Department has since carried out a physical file search. It has provided further information on the searches conducted in order to ascertain if the information requested is held by or for it. In those circumstances, I do not think it is necessary for me to consider the issue of the timing of searches any further.
31. While it would have been preferable for more detailed information on searches carried out to have been provided to the appellant prior to the appeal process before this Office, I am satisfied that, as matters now stand, the Department has taken reasonable steps to locate relevant information.
32. Taking all of the above into account, it is my view that the Department has demonstrated that it carried out sufficient appropriate searches for the requested environmental information. On behalf of the Commissioner for Environmental Information, I find, therefore, that article 7(5) of the AIE Regulations applies.

### **Decision**

33. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I find that the Department carried out adequate searches on the appellant's request. I therefore affirm the Department's decision.

### **Appeal to the High Court**

34. 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.

**Deirdre McGoldrick**

**on behalf of the Commissioner for Environmental Information**