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-111727-H7J5J7

Date of decision: 6 March 2023

Appellant: Mr. X

Public Authority: Forestry Appeals Committee [the FAC]

Issue: Whether the FAC was justified in refusing the request under articles 3(2) and 8(a)(iv) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner annulled the decision of the FAC and directed it to carry out a fresh decision-making process in respect of the records at issue.

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. On 17 June 2021, the appellant requested "[a]ll records relating to the engagement of the FAC in the drafting of the legislation which became the Forestry (Miscellaneous Provisions) Act 2020."
2. In its original decision of 29 July 2021 the FAC stated it was refusing access to six records of internal communications under article 8(a)(iv) of the AIE Regulations. It also made passing reference to article 9(1)(c). The appellant sought an internal review of that decision, following which the FAC affirmed its original decision on 16 August 2021.
3. The appellant appealed to this Office on 17 August 2021.
4. I am directed by the Commissioner to conduct a review of this appeal. I have now completed this review under article 12(5) of the Regulations. In doing so, I have had regard to the submissions made by the appellant and the FAC. 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').
5. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Preliminary Matters

6. As I have already mentioned, the FAC made brief reference to, but drew no conclusion on the application of, article 9, specifically article 9(1)(c) in its original decision. The FAC made no specific arguments regarding this exception in its internal review decision, and made no submissions to this Office on article 9(1)(c). Accordingly, I am satisfied that the FAC was not seeking to rely on that provision.
7. As mentioned above, the FAC relied on article 8(a)(iv) of the AIE Regulations in refusing access to the information at issue, citing sections 29(1)(a) and 31(1)(a) of the FOI Act 2014. During the course of this review, the FAC also sought to rely, in addition to article 8(a)(iv), on articles 3(2) and 9(2)(d) of the AIE Regulations.

Scope of Review

8. 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 affirm, annul or vary it. Where appropriate in the

circumstances of the appeal, this Office will require the public authority to make available environmental information to the appellant.

9. The scheme of the AIE Regulations, and of the AIE Directive, makes it clear that there is a presumption in favour of release of environmental information. Subject to that presumption, a public authority may refuse to release environmental information where an exemption under articles 8 or 9 applies, and the interest in maintaining that exemption outweighs the public interest in disclosure under article 10.

10. The scope of this review is confined to whether the FAC was justified in refusing access to the information sought by the appellant relating to the engagement of the FAC in the drafting of the legislation, which became the Forestry (Miscellaneous Provisions) Act 2020.

Analysis and Findings

Records identified by the FAC as within scope of the request

11. The manner in which the FAC identified and described the records it deemed to be within the scope of the appellant's request leaves much to be desired. As set out above, the FAC relied on article 8(a)(iv) and cited sections 29(1)(a) and 31(1)(a) of the FOI Act 2014 in refusing access to records at original and internal review decision stage. During the course of this review the FAC sought to also rely on articles 3(2) and 9(2)(d). The FAC identified six records at original and internal review stage but referred to those six records as one item in the corresponding schedule.

12. Upon acceptance of this appeal, the FAC provided records to this Office along with a new schedule. This second schedule listed 70 records as relevant to the request, as opposed to the six records identified at original and internal review decision stages.

13. The Investigator, in his request for submissions to the FAC, noted this discrepancy and requested an explanation. In a submission to this Office, the FAC explained that it had incorrectly identified the six records in the initial schedule, when in fact the six records in question were six emails, to which a number of further records were attached. It stated that in total there were 91 records. It then provided this Office with another schedule, the third schedule it had created since it received the appellant's request, in which it adopted a new numbering system which referenced the six email records originally identified.

14. From an examination of the FAC's third schedule of records, there appear to be more than 91 individual records listed. It is difficult to identify the exact number of records due to the confusing manner in which the records are listed in the third schedule and the new numbering scheme adopted by the FAC.

15. The records can be very broadly described as consisting of emails between staff of the Department of Agriculture, Food and the Marine (the Department) and members of the FAC and other parties, including the Office of the Attorney General (the AG's Office), along with various attached documents and copies of various drafts of legislation.

16. In its submission to this Office, the FAC stated that it was now of the position that two of these records, records 67 and 68, which were attachments to the fifth email originally identified to the

appellant and later numbered records 5(2) and 5(3) in the third schedule, were in fact outside the scope of the appellant's request. It made this argument on the basis that record 67 is an induction document post-dating the legislation at issue in the request, and that record 68 is a list of general issues, unrelated to the subject matter of the appellant's request.

17. Having examined records 67 and 68, I am satisfied that they are both outside the scope of the appellant's request, as they do not relate to the engagement of the FAC in the drafting of the legislation at issue.

18. However, the FAC also contended that a large number of other records were outside the scope of the appellant's request as they were not technically engagements of the FAC. In making this argument, it stated that under the Forestry Act 2014, the FAC, as a committee provided for in legislation, is only properly constituted when it consists of the FAC chair and at least two other members. The FAC also emphasised that the Director of Agricultural Appeals is not a member of the FAC and has no role or function within the FAC and that communications to the Director of Agricultural Appeals from other parties could not be considered engagements of the FAC.

19. Although the FAC did not provide detailed reasoning for its position in relation to specific individual records, it appears to me that the thrust of the FAC's argument was that some of the records did not amount to engagements of the FAC, as they were either not sent to or by the FAC chair and two FAC members, or they did not contain explicit engagements by the FAC chair and two FAC members.

20. This seems to me to be a very narrow reading of the appellant's request, which concerns "[a]ll records **relating** to the engagement of the FAC in the drafting of the legislation which became the Forestry (Miscellaneous Provisions) Act 2020" (my emphasis). The scope of the request is not limited to records of engagements by the FAC in that process, but rather all records relating to the FAC's engagement in the process of drafting the legislation at issue.

21. Accordingly, I am of the view that to interpret the request as requiring the fully constituted committee to have been included or referenced in all the records at issue, is an overly narrow reading of the request. Indeed, I note that to accept that interpretation would mean that the FAC has not been engaging with this Office for the purposes of this review, given that, unsurprisingly, the chair and two other members of the FAC have not corresponded with this Office directly. However, without any explanation, the FAC did not provide the records it deemed not to concern engagements of the FAC to this Office. Accordingly, without sight of the records I am unable to make a definitive finding on whether they are within the scope of the appellant's request.

22. In the third schedule provided, the FAC also stated that multiple records were in fact repeat or duplicates of other records. This is unsurprising given that many of the records consist of email chains. However, the scope of a request does not normally include duplicate information.

23. While there is no obligation on public authorities to provide a schedule of all relevant records considered with its decisions, it is best practice to do so. In this case, the schedule provided to the appellant at original decision stage listing six records is misleading. Neither the second schedule provided by the FAC to this Office listing 70 records, nor the third schedule listing more records, appear to have been provided to the appellant. In addition, the decisions make no specific

reference to the existence of further records. This suggests to me that the majority of the records provided to this Office had not been identified or examined at original or internal review stage.

24. In light of the above, I am not satisfied that the FAC carried out a proper assessment to determine what records and information it held falls within the scope of the appellant's request, and it therefore did not properly consider which records and information should be considered for release under the AIE Regulations.

Article 3 of the AIE Regulations

25. Whether the information is excluded from the AIE Regulations under article 3(2) in the manner contended by the FAC in its submissions to this Office is a matter going to the heart of the Commissioner's jurisdiction to carry out a review. Accordingly, before considering the FAC's reliance on articles 8(a)(iv) and 9(2)(d) of the AIE Regulations, I must first consider whether the information is excluded from the AIE Regulations in the manner contended by the FAC.

26. Article 7(1) of the AIE Regulations, which transposes article 3(1) of the AIE Directive, provides that:

> "A public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the applicant any environmental information, the subject of the request, held by, or for, the public authority."

27. Article 3(1) of the AIE Regulations provides that:

> "'environmental information held by a public authority' means environmental information in the possession of a public authority that has been produced or received by that authority;
>
> "'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".

28. This transposes the equivalent provision in articles 2(3) and 2(4) of the AIE Directive.

29. Article 3(1) of the AIE Regulations defines "public authority", which includes a range of public entities, some specifically defined, while also providing criteria for assessing whether or not a body falls within the remit of the AIE Regulations.

30. Article 3(2) of the AIE Regulations (as inserted by S.I. No. 309/2018 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2018) provides that:

> "Notwithstanding anything in sub-article (1), in these Regulations 'public authority' does not include—
>
> […]
>
> (e) any body when acting in a judicial or legislative capacity."

The FAC's position

31. In its submission to this Office dated 14 November 2022, the FAC stated that it was acting "at the behest" of the Department and the Department's Legal Services Division in the drafting of legislation that was to become the Forestry (Miscellaneous Provisions) Act 2020. The FAC stated

that it was its understanding that article 3(2) clarifies that the AIE Regulations will not apply to a public authority "when acting in a judicial or legislative capacity." The FAC went on to state that it considered "legislative capacity" to mean a public authority when involved in the preparation of legislative proposals for the Oireachtas, e.g. Government Departments and the AG's Office, and the making of secondary legislation, such as regulations, orders and bye laws, whether made by central Government or other public authorities.

32. The FAC argued that it was acting in a legislative capacity in this instance. It contended that, for the purposes of this specific request, the FAC was involved in the preparation of legislative proposals for the Oireachtas and accordingly, it was acting in a legislative capacity. On that basis the FAC argued that the information requested should be refused.

Analysis of the FAC's reliance on Article 3(2)

Relevant Provisions and Guidance

33. The AIE Directive, which the AIE Regulations transposed, has its origins in the Aarhus Convention. Article 2(2) of the Aarhus Convention defines "public authority" for the purposes of the Convention. The second sentence of article 2(2) of the Aarhus Convention provides that "[t]his definition does not include bodies or institutions acting in a judicial or legislative capacity".

34. As already noted above, article 2(2) of the AIE Directive defines "public authority" for the purposes of the Directive. The first sentence of the second paragraph of article 2(2) of the AIE Directive provides that "Member States may provide that [the definition of "public authority"] shall not include bodies or institutions when acting in a judicial or legislative capacity."

35. In accordance with the option given to Member States in the first sentence of the second paragraph of article 2(2) of the AIE Directive, Ireland opted to exclude bodies when acting in a legislative capacity from the definition of public authority when transposing the AIE Directive into national law. Article 3(2) of the AIE Regulations provides that "[n]otwithstanding anything in sub-article (1), "public authority" does not include any body when acting in a judicial or legislative capacity."

36. The Minister's Guidance at paragraph 5.7 states that:

> "Article 3(2) is very important and clarifies that the AIE Regulations will not apply to a public authority "when acting in a judicial or legislative capacity". … It is considered that "legislative capacity" will comprehend a public authority when involved in the preparation of legislative proposals for the Oireachtas, e.g. Government Departments and the Attorney General's Office, and the preparation and making of secondary legislation, e.g. regulations, orders and bye-laws whether made by central Government or other public authorities."

37. In summary, the Aarhus Convention excludes bodies or institutions acting in a judicial or legislative capacity from the definition of public authority. The AIE Directive gives Member States the option to exclude from the definition of public authority bodies or institutions "when acting in a … legislative capacity". Ireland opted to exclude bodies "when acting in a judicial or legislative capacity" from the definition of public authority in article 3(2) of the AIE Regulations and thus from the scope of the AIE Regulations.

When acting in a legislative capacity

38. The phrase 'when acting in a legislative capacity' is not defined in the AIE Regulations, the Aarhus Convention, or the AIE Directive. I note that the Minister's Guidance states that "legislative capacity" will include a public authority such as Government Departments when involved in the preparation of legislative proposals for the Oireachtas. I should make it clear here that while I have had regard to the Minister's Guidance, I do not necessarily agree in full with the position in the relevant paragraph.

Court of Justice of the European Union

39. In response to a preliminary reference from the German Federal Administrative Court, the Court of Justice of the European Union (CJEU) considered the meaning of the first sentence of the second paragraph of article 2(2) of the AIE Directive in C204/09 *Flachglas Torgau GmbH v. Federal Republic of Germany* (14 February 2012) (*Flachglas*).

40. The CJEU held that the first sentence of the second paragraph of article 2(2) of the AIE Directive:

> "must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities may be applied to ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions".

41. The CJEU stated at paragraph 43 that the purpose of that option is to allow Member States to set down rules to ensure the smooth running of the legislative process, taking into account the fact, that in various Member States, the provision of information to citizens is, usually, adequately ensured in the legislative process. The Court applied a functional interpretation to the phrase acting in a legislative capacity. In doing so, it stated at paragraph 49 that:

> "ministries which, pursuant to national law, are responsible for tabling draft laws, presenting them to Parliament and participating in the legislative process, in particular by formulating opinions, can be considered to fall within that definition [of "bodies or institutions acting in a … legislative capacity], within the meaning of and for the application of Directive 2003/4."

42. The CJEU went on to hold that the option given to Member States of not regarding bodies or institutions acting in a legislative capacity as public authorities "can no longer be exercised where the legislative process in question has ended". The Court stated at paragraph 55 that while making environmental information available during the legislative process could interfere with the smooth running of that process that is no longer the case when the process concludes.

43. The legislative process at issue in this case concerns, to quote the appellant's request, "drafting of the legislation which became the Forestry (Miscellaneous Provisions) Act 2020". I note from the Oireachtas' website that the Forestry (Miscellaneous Provisions) Act 2020 was signed into law by the President on 2 October 2020. Therefore, it is clear that the legislative process has ended.

44. Accordingly it is unnecessary for me to make any finding as to whether or not the FAC was acting in a legislative capacity in relation to the legislation at issue in this case, as, having regard to the

judgment of the CJEU in *Flachglas*, I am satisfied that even if it was, the FAC is unable to rely upon article 3(2) of the AIE Regulations to refuse the appellant's request in any event, as the legislative process ended over two years ago.

45. On the basis of the foregoing, I find therefore that article 3(2) does not apply.

Article 8(a)(iv) of the AIE Regulations

46. The FAC also relied upon article 8(a)(iv) to refuse access to the information sought, citing sections 29(1)(a) and 31(1)(a) of the FOI Act 2014, the former of which relates to the deliberative processes of FOI bodies and the latter of which relates to legal professional privilege.

47. Article 8(a)(iv) provides for refusal of environmental information "where disclosure of the information would adversely affect…the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts)". There are therefore a number of elements which must be satisfied before the question of refusal under article 8(a)(iv) arises:

    - the case must involve the "proceedings" of public authorities;
    - those proceedings must have an element of confidentiality;
    - that confidentiality must be adversely affected by the disclosure of the information requested; and
    - that confidentiality must be protected by law.

48. The wording of the article makes it clear that there must be some adverse effect on confidentiality of the proceedings of public authorities in order for the exception to apply. Consequently, when relying on article 8(a)(iv) the public authority must set out the reasons why it considers that the disclosure of the information at issue could specifically and actually undermine the proceedings of public authorities, where such confidentiality is otherwise protected by law as set out by the CJEU at paragraph 69 of *Land Baden-Wurttemberg v Deutsche Bahn*, Case C-619/19. The risk of the confidentiality being undermined must be reasonably foreseeable and not purely hypothetical.

49. Article 8(a)(iv) must be read alongside article 10 of the AIE Regulations which provides for certain limitations on the ability of a public authority to refuse environmental information. Article 10(1) states: "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". Article 10(3) of the Regulations requires public authorities to consider each request on an individual basis and to 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 shall be interpreted on a restrictive basis having regard to the public interest. 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 addition, I note that article 10(5) clarifies, in effect, that a request should be granted in part where environmental information may be separated from other information to which article 8 or 9 applies.

50. This essentially requires that a public authority must justify the refusal to release each record individually. It is not appropriate to apply the exemption in a blanket fashion to records identified as relevant to a request. Each individual record identified as relevant to the request must be examined to discern whether that record could be released without adversely affecting the course of justice.

51. In correspondence with this Office dated 29 September 2021 the FAC stated it had significant concerns regarding the disclosure of the information at issue, in particular due to the heavy involvement of the AG's Office in the drafting of the legislation at issue. It stated that the records identified consist of internal communications between members of the FAC and legal advisors, and included legal advice and consultations with legal advisors.

52. The FAC restated its reliance on article 8(a)(iv) and contended that the information was exempt under sections 29 and 31(a) of the FOI Act respectively as it concerned a deliberative process and as the records contained information which it considered under legal privilege. It argued that the records at issue formed part of the deliberative process and that it was not in the public interest to share such internal communications in any form. The FAC also argued that the provision of such information could be used to deliberately undermine and attack the process. It contended that public officials must be given the space to work with their legal counsel free from any concerns that their internal communications may be shared with the public and used to attack their decisions. The FAC went on to argue that in the circumstances there is limited environmental value to the public in having sight of the information requested.

53. In a submission to this Office dated 14 November 2022, the FAC stated that the proceedings at issue was the formation of primary legislation. It stated that the drafters of that legislation were the Legal Services Division of the Department and the AG's Office and that the FAC was involved in those bodies' professional consultative process on the legislation. The FAC argued that as it was not the drafter of the legislation it could not disclose any communications it had engaged in with the Department or the AG's Office. The FAC also described the proceedings as deliberations by the FAC with both the Department and ultimately the AG's Office in their drafting of what was to become primary legislation for appeals to the FAC.

54. This Office's Investigator asked the FAC to address why it considered the release of the information at issue could specifically and actually undermine the interest protected by the exceptions relied upon, making specific reference to the decision of the CJEU in *Land Baden-Württemberg*, already referenced above.

55. The FAC's submissions and correspondence with this Office did not explain or expand on how or why release of the information concerned would undermine or lead to attacks on the process at issue. It provided no further details on this or any other specific adverse effect that would occur if the information sought was released. The FAC also did not take the opportunity to carry out an individual consideration of the records as required under article 10(5) of the AIE Regulations. Rather it discussed, in general terms, the provisions of articles 3(2) and 4 of the AIE Regulations and several paragraphs of the Minister's Guidance. In summary, the FAC restated that public authorities do not come within the remit of the AIE Regulations when acting in a judicial or legislative capacity, and information that is otherwise available as a right to the public is not discoverable under the AIE Regulations.

56. I have already found that article 3(2) does not apply in this case. With regard to whether information that is otherwise available as of right to the public can fall to be released under the AIE Regulations, the FAC's argument, in the context of this case, is very unclear. The FAC did not expand on this point in the remainder of its submission, and I do not see the relevance of this argument in the circumstances of the appellant's request, particularly given the content and context of the records identified by the FAC during the course of this review.

57. I find that there are two main issues with the manner in which the FAC refused access to the information concerned under article 8(a)(iv). First, the FAC did not set out any specific potential adverse effect on the confidentiality of the proceedings it purported were at issue in this case in its initial decision or internal review decision. It again failed to do so when offered the opportunity to make submissions by this Office, apart from making the general argument that release of the information at issue could be used to undermine and attack the integrity of the legislative drafting process. The FAC did not explain how or why release would threaten the integrity of the process, merely asserting that it would. It also cited articles 3(2) and 4(1) of the AIE Regulations; however, these provisions do not explain or identify any adverse effect that would arise if the information sought was released. Articles 3(2) and 4(1) are not relevant to this case. The FAC did not provide any evidence that the release of information would affect the proceedings it had identified in the manner it described.

58. Secondly, it is clear from the FAC's decisions, its submission to and its correspondence with this Office, along with the manner in which it belatedly identified further records as relevant to the appellant's request, that the FAC sought to apply the exemption at article 8(a)(iv) in a blanket manner. Indeed, in its submission to this Office, the FAC stated that in deciding on the AIE request it had considered the information in a collective manner, in light of the content and what it described as the deliberative nature of the information concerned. It also stated that it considered the involvement of the Department and the AG's Office in the matter.

59. The FAC failed to assess each record individually to consider whether partial disclosure might have been possible, as required by article 10(5). Given that the FAC failed to correctly carry out these two steps in applying the exemption, the question of considering the interest in refusing or granting the request does not arise. I therefore find that the FAC's refusal to release the records under article 8(a)(iv) was not justified under the provisions of the AIE Regulations.

Article 9(2)(d) of the AIE Regulations

60. Despite making no reference to article 9(2)(d) in its substantive submission to this Office, it appears from Appendix 2 of that submission that the FAC also sought to rely on article 9(2)(d) to refuse access to the same information it had refused under article 8(a)(iv).

61. Article 9(2)(d) provides that a public authority may refuse to make environmental information available where the request concerns internal communications of public authorities, taking into account the public interest served by the disclosure. This exception was considered by the Court of Justice in C-619/19 *Land Baden Württemberg v DR.* The CJEU noted in particular, at paragraph 69 of its judgment:

> "As the Advocate General has observed in point 34 of his Opinion, [the] obligation to state reasons is not fulfilled where a public authority merely refers formally to one of the exceptions provided for in Article 4(1) of Directive 2003/4. On the contrary, a public authority which adopts a decision refusing access to environmental information must set out the reasons why it considers that the disclosure of that information could specifically and actually undermine the interest protected by the exceptions relied upon. *The risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical*." (my emphasis)

62. The FAC has given no indication as to how the interest sought to be protected by article 9(2)(d) would be undermined by release of the information requested. It did not even go so far as to contend that the same arguments it made in relation to article 8(a)(iv) were relevant to its reliance on article 9(2)(d). There is nothing before me to suggest any likelihood – even a hypothetical one – of such an interest being undermined and I do not consider article 9(2)(d) to provide grounds for refusal in this case.

Conclusion

63. This Office has recently referred a series of questions to the High Court on the interplay between the AIE Regulations and the provisions of the Freedom of Information Act. If I were satisfied that the conditions set out in article 8(a)(iv) (as identified in paragraph 47 above) had been satisfied, it would perhaps have been necessary for this Office to put the decision in this case on hold pending the outcome of those proceedings. However, in circumstances where the FAC has failed to show how all of the required conditions are fulfilled, I do not believe it is necessary for me to await the outcome of the High Court proceedings in order to reach a decision in this case.

64. Having regard to all of the above, it appears to me that the FAC adopted a "blanket approach" to its refusal of the information identified by failing to properly assess whether the information actually falls within the scope of the appellant's request, by relying on articles 8(a)(iv) and 9(2)(d) of the AIE Regulations, regardless of the nature or content of the records and by failing to give adequate consideration to article 10. 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 stages, consistent with article 4(5) of the AIE Directive. It is clear that the FAC did not provide adequate reasons for refusal in this case. It is most disappointing that the FAC does not appear to have fully engaged with its obligations under the AIE Regulations.

65. In the circumstances of this case, particularly in light of the amount of information involved and the lack of clarity regarding the information that actually falls to be considered for release, I do not believe that it is appropriate to direct the release of information at this point. I acknowledge that this will come as a disappointment to the appellant, especially given the length of time that has now passed since the request, for which I apologise.

66. I consider that the most appropriate course of action to take is to annul the FAC's decision in its entirety and direct it to undertake a fresh decision-making process in respect of the appellant's request. In doing so, it is imperative that the FAC undertake very careful consideration of what information it considers to fall within the scope of the appellant's request, and set out its

understanding of the scope of the request. The appellant will have the appropriate appeal rights, including a right to a review by this Office. If the FAC wishes to rely on any exceptions within the AIE Regulations to refuse access to records, it must provide detailed reasoning as to why the exceptions claimed apply with reference to each individual record.

67. Finally, I note that in the third schedule of records the FAC provided to this Office, the FAC indicated that it was open to granting access to a small number of records. It is unclear whether the FAC has actually released those records to the appellant. If it has not, it is a matter for the FAC to decide, when undertaking the fresh decision-making process outlined above, whether it wishes to release these records. If it decides not to release these records the FAC must provide clear reasoning, grounded in the appropriate provisions of the AIE Regulations.

Decision

68. 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 FAC's decision in this case. I find that article 3(2) does not apply to the FAC in the circumstances of this case and I direct the FAC to undertake a fresh decision making process in respect of the appellant's request.

Appeal to the High Court

69. 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

6 March 2023