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-109717-K5Y2Z9

Date of decision: 28 October 2022

Appellant: Dr Fred Logue

Public Authority: Department of Public Expenditure and Reform (DPER)

Issue: Whether DPER has processed the appellant's request, and provided him with all environmental information within the scope of that request, in accordance with the requirements of the AIE Directive.

Summary of Commissioner's Decision: The Commissioner found that DPER had not complied with its obligations under the AIE Regulations when processing the appellant's request and remitted the matter to DPER for further consideration.

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 9 April 2021, the appellant wrote to the Department of Public Expenditure and Reform (DPER) seeking to be provided with the file for the decision taken by the Minister, on 12 March 2021, to approve the River Bride (Blackpool) Flood Relief Scheme. His request noted that he wished to view the file as soon as possible, citing a preferred date that month.

2. The appellant sent a follow up email on 10 April 2021 requesting a response "as soon as possible" as "the limitation period for judicial review is running and the public has an entitlement to inspect the project file during this time".

3. The appellant received a response from the Minister's Private Secretary on 14 April 2021. The response set out that information had been published on the DPER website and provided the appellant with a link to the relevant webpage. It went on to note:

> "It is not clear from your correspondence as to what legal basis you are seeking to view the file on this scheme. As you are aware, a person wishing to challenge the validity of this decision may do so by way of judicial review only."

4. The appellant responded to DPER on 15 April 2021 indicating that "all members of the public [were] entitled to inspect the application file to review it during the judicial review period" and citing the EIA Directive, the Habitats Directive, Public Participation Framework Directive and the Aarhus Convention. He also referred to the decision of the Court of Justice of the EU (CJEU) in C-280/18 *Flausch*. He noted that some information had been made available on DPER's website but submitted that the public was entitled to inspect "the entire original file". He also requested that he be provided with a response to his request by close of business that day along with a basis for any refusal of his request.

5. DPER responded the following day, on 16 April 2021. It advised the appellant that there were "two possible channels open to a member of the public in accessing information on file in this Department….a request under the Freedom of Information Act [or] pursuant to the [AIE] Regulations". It went on to advise him that "before a request can be considered a formal request either under FOI or the AIE Regulations should be made". It concluded by advising the appellant that "the key documentation, including the recommendations and detailed report made by independent environmental consultants, on which the Minister's decision was based, have been made available on the Department's website".

6. The appellant responded indicating that he "would like to inspect the file that was before the decision maker …based on the AIE Regulations…in situ next Monday before lunch". He also requested an email address for correspondence, as a "no-reply" email address had been used to contact him.

7. DPER responded to the appellant on 20 April 2021 acknowledging his request and providing him with the name and telephone number of the staff member responsible for dealing with it. The

response also informed the appellant that a final decision on his request would issue "as soon as possible or at the latest…by 14 May 2021". It advised the appellant that if it was not possible to make a decision on his request by 14 May 2021, he would be notified of an extension "as soon as possible and at the latest before 14 May 2021".

8. The appellant responded to the email asking DPER to confirm whether access would be provided as soon as possible. He noted that he had requested to view the file on the coming Monday and had previously requested to view it on 12 April 2021. He noted that "this file is the subject of a decision that is open to judicial review with the limitation fast approaching" and that "time is genuinely of the essence in relation to this matter". He also noted that DPER "has a legal obligation to provide access as soon as possible and in a timely fashion per [articles] 7(2)(a) and 7(10) of the AIE Regulations" and requested confirmation that DPER understood that obligation as well as "details of where and when [he could] view this file…as soon as possible".

9. Following a series of emails regarding contact details for the person responsible for dealing with the request, the appellant emailed DPER once again on 24 April 2021 noting that he had reviewed the documents published online and believed there were "crucial documents" missing. He identified three documents in particular and asked DPER to confirm where he could find them online or upload them "without delay":

   (i) A copy of the request for further information and a copy of the response to the request provided by the Commissioners in November 2020 (see page 40 of the CAAS EIAR review dated 8 December 2020);
   (ii) The EIAR addendum and other supplementary information identified at page 39 of the CAAS EIAR review report; and
   (iii) The NIS addendum identified at page 18 of the CAAS NIS review dated 8 December 2020.

10. The appellant noted that the information identified was "particularly important because the Minister's decision cannot be understood without reference to it" and indicated that he remained available to take a call from the staff member dealing with his request. That staff member emailed the appellant two days later, noting that he had been assigned as the decision-maker for the request on 21 April, was reviewing the file and would revert to the appellant "in due course". He also noted his belief that the appellant had "qualified [his] request" in his correspondence of 24 April.

11. The appellant responded to the decision-maker on the same day indicating that he had not narrowed his request but had "simply clarified the format in which [he] wish[ed] to receive certain documents". He also requested acknowledgement that DPER was aware that "access should be granted as soon as possible having regard to the timescale specified by [him]" and of the importance of that timescale in the circumstances of this request. He expressed concern that he had not received acknowledgment of this, despite previous requests, and asked the staff member to confirm when he would be in a position to provide an update.

12. On the same day, the appellant emailed the Minister's Private Secretary in response to their email of 16 April 2021. He again noted that despite the indication that the key documentation had been made available on DPER's website, he had identified a number of missing documents. He asked that DPER "point out precisely where [he could] find the information" he had identified as missing. The Minister's Private Secretary responded, noting that the appellant had submitted an AIE request and that the information he had requested "is publicly available online from the OPW's National Flood Information Portal" and that "all documentation in relation to the decision by the Minister, as required under Arterial Drainage legislation is also publicly available". It concluded by informing the appellant that he would be contacted directly regarding his AIE request but that "it is important to note that there is no facility to physically inspect relevant information in this office at present".

13. On 7 May 2021, DPER provided the appellant with its decision on his request. That decision first referred to the appellant's request "to inspect the file that was before the decision maker for the River Bride (Blackpool) Flood Relief Scheme based on the AIE Regulations". It noted that "all of the information in relation to the Minister's decision, as required under article 7F of the Arterial Drainage Regulations 2019" had been published on DPER's website. The decision went on to note that the appellant's "subsequent communications…on 24 and 26 April would appear to have refined [his] request". It noted that "there is no absolute requirement under article 7C of the Arterial Drainage Regulations 2019 for the Minister to make supplementary information publicly available, except where he/she considers such information contains significant additional information in relation to the effects on the environment" and that "therefore your request, as more specifically delineated in your correspondence of 26 April above, is being processed under the provisions of the AIE Regulations". The original decision-maker went on to deal only with the documents referred to in the appellant's correspondence of 24 and 26 April.

14. The decision-maker informed the appellant that two documents were already available online and provided him with a link to the relevant OPW webpage. He also informed the appellant that another of the requested documents would be uploaded to the DPER website shortly. Finally, he refused the appellant access to the submissions he had requested (which were submissions from the public and statutory consultees on the proposed Scheme), noting that a list of those who provided submissions had been made available online as well as information on the analysis and consideration of those submissions by external environmental consultants. The decision-maker concluded the letter with his explanation of why the public interest "would not be served" by release of those submissions.

15. On 9 May 2021, the appellant sought an internal review of the decision. He submitted that he had made it clear, in his email of 26 April, that his correspondence of 24 April did not amount to a narrowing of his request. He also disagreed with the outcome of DPER's public interest balancing test and requested that the internal review "be decided within a week given that the judicial review limitation period is running". DPER acknowledged the request on 12 May 2021 and provided the appellant with the name and contact details of the internal reviewer.

16. On 9 June 2021 the appellant emailed DPER seeking "the result of the internal review which was due at the latest today but far later than requested" as well as "an explanation for why the internal

review was not completed within a week as I requested". DPER provided the internal review outcome to the appellant on 10 June 2021. The internal review varied the original decision and concluded that the "individual emails with submissions to the public consultation" should be released "on the basis that the AIE regime recognises a very strong public interest in openness and transparency in relation to environmental decision-making and that there is generally a presumption in favour of the release of environmental information". It noted that "this record, subject to any necessary redaction of personal information, will be published on the Department's website". It noted that the records "consisted of 107 individual submissions" which DPER was currently reviewing and scanning for upload to its website. It informed the appellant that the records would be made available on the website "as soon as possible and no later than 30 June 2021" and that he would be notified directly once the records were available.

17. The internal reviewer apologised to the appellant for the delay in response. He also outlined that the records could not be provided to the appellant immediately as "the division responsible are in the process of reviewing, scanning and uploading the documents". The internal reviewer offered a further apology for this and advised the appellant that he was within his rights to consider this to be a deemed refusal as "this is not in keeping with the provisions of [the AIE Regulations]".

18. The appellant responded on 10 June 2021. He thanked the internal reviewer for the decision to upload the public responses but noted that the decision had not dealt with his request for in-situ access to the file. He noted that he assumed there could no longer be an objection to his viewing the file and asked DPER to let him know where and when he could do so. The internal reviewer responded to the appellant on the same date noting that he would make enquiries but that under the current Covid restrictions only essential staff were currently attending the office.

19. On 15 June 2021, the internal reviewer again emailed the appellant to advise him that DPER was unable to facilitate his request for in-situ access "as this is not a service that the Department provides for FOI/AIEs". The internal reviewer went on to note that DPER was "arranging for publication of all of the information relevant to [the] request as soon as possible" and that he was advised that "on completion this means that all information that the Department possesses pertinent to [the] request will have been made public".

20. On 25 June 2021, DPER published the submissions it had received as part of the public consultation with the contact details of many of the authors redacted.

21. The appellant appealed to my Office on 30 June 2021.

Scope of Review

22. The appeal to my Office is a broad appeal in relation to DPER's refusal to grant access to environmental information regarding the Minister's decision to approve the River Bride (Blackpool) Flood Relief Scheme. The appellant's initial grounds for appeal can be summarised as follows:

(i) that the Department failed to make the information he requested available in a timely manner;
(ii) that the Department failed to have regard to the timescales specified by him;
(iii) that the Department failed to comply with the Regulations by refusing to provide him with in situ access;
(iv) that the Department has failed to justify its redaction of the names and addresses of those individuals or entities which provided submissions as part of the consultation process on the Flood Relief Scheme such that it had no basis on which to make such redactions and that the information should be provided to him in full;
(v) that his request was improperly narrowed and the Department has defaulted in its obligation to provide public access to the file in its entirety.

23. As outlined below, the matters for consideration evolved throughout the course of this appeal in light of submissions made by DPER. This review is therefore concerned with:

(i) whether DPER has provided the appellant with all of the information held by or for it which comes within the scope of his request;
(ii) whether DPER has complied with the procedural requirements set out in the AIE Regulations in connection with the appellant's request; and
(iii) whether DPER's refusal to provide the appellant with information in the form requested (i.e. in situ access) is in compliance with its obligations under the AIE Regulations.

Submissions of the Parties

24. The appellant's submissions can be summarised as follows:

(i) He submitted that the main issue in this appeal was DPER's refusal to allow him to inspect the file in situ on the basis that "there is no facility to inspect relevant information" in its office at present. He submitted that this reason is not based on any provision of the AIE Directive or Regulations and that the establishment and maintenance of facilities for the examination of environmental information is one of the practical arrangements indicated in article 3(5)(c) of the Directive.
(ii) He submitted that the subject matter of his request is a planning file where DPER acts as a competent authority under the Arterial Drainage Act 1945. He noted that paper copies of all planning files are open for inspection in the offices of all planning authorities and An Bord Pleanála. He argued that the provision of inspection facilities in these offices consists of making available a room, table and chair and a staff member to bring the relevant files in. He submitted that the provision of such facilities is not onerous and noted that all planning authorities continued to provide such facilities during the Covid crisis. He further submitted that since the project is one which comes under the EIA Directive, DPER cannot provide more restrictive access than that generally provided under national law for similar files, based on the EU law principle of equivalence.
(iii) He submitted that DPER improperly narrowed the scope of his request and it was clear from his correspondence that he did not do so.

(iv) He argued that it was apparent from the correspondence that DPER had no regard to the timescale specified by him and did not offer any reasons for this. He noted that the bringing of judicial review proceedings in respect of the Minister's decision was subject to a three-month limitation period and some of the information was only released after the limitation period had expired.

(v) He submitted that the redaction of names and addresses of observers has not been justified based on the AIE Regulations. He submitted that those names and addresses should be published, as this is not confidential information and there is no basis for making a confidential or anonymous submission under Ireland's planning code. He also noted that no such redactions are applied on other planning files published online.

(vi) The appellant also submitted that the subject matter of the request concerned a category of information that is actively disseminated by planning authorities. He argued that DPER had defaulted on its obligation to provide public access to the planning file for this matter, noting the importance of access to planning files when deciding whether or not to judicially review a decision. He also argued that ongoing access is important since the environmental information on the file may be relevant to assessing cumulative or in-combination effects in other projects.

(vii) In response to a request for further information from my Investigator, the appellant emphasised that his request was to inspect the original file and indicated that he was not satisfied that all of the information he requested had been made available to him.

(viii) He argued that DPER has an obligation to provide *in situ* access both generally under article 7 of the AIE Directive, specifically under the EIA Directive and finally, pursuant to his AIE request. He submitted that DPER's email to him of 15 June 2021 revealed that DPER has decided in advance that it will never provide *in situ* access for any AIE request. He submitted that this advance decision is clearly unlawful as it is a specific requirement of the AIE Directive and AIE Regulations to have a facility for *in situ* access to environmental information, in particular to avoid fees. He submitted that, in the context of the present case, access within a reasonable timeframe must be interpreted as access which would give the public time to review the information and issue proceedings within the three-month timeframe for judicial review and noted that in this case significant pieces of information were not published until after the limitation period had expired. He also submitted that DPER was required to interpret its obligation under article 7 of the AIE Directive to ensure that there is effective dissemination of information on planning files where it is the competent authority. In addition, he reiterated his position on the doctrine of equivalence. He submitted that although article 7 of the AIE Directive was inadequately transposed by article 5 of the AIE Regulations, the Commissioner must nonetheless interpret article 5 in a way which conforms to the greatest extent possible with the AIE Directive and the EIA Directive. He also submitted that the jurisdiction of my Office under article 12 of the Regulations must be interpreted in light of article 6 of the AIE Directive. The appellant believes that the Commissioner is fully entitled to make a finding of lack of compliance with the duty to actively disseminate environmental information under the AIE or EIA Directives if it is relevant to an appeal before him, which the appellant believes to be the case here.

(ix) He submitted, having regard to the specific circumstances of his request, that *in situ* access was required not only for reasons of efficiency but for reasons of access to justice.

(x) He further submitted that it was clearly not unreasonable to expect DPER to provide *in situ* access on what he considered to be a planning decision on a very significant project given that public access to paper copies of planning files was a routine and long-standing feature of the Irish planning system.

(xi) He also submitted that article 7(3) of the AIE Regulations provided for the right of access in the form or manner requested subject only to two exceptions. He argued in the first instance that neither of the exceptions applied as an exact copy of the entirety of the information on the original file had not been put online as of yet and was certainly not available online at the date of his request. He also argued that even if it had been he would be entitled to inspect the original file in order to verify this. Finally, he argued that the reason provided by DPER for its refusal to provide in situ access did not satisfy either of the exceptions set out in article 7(3) as DPER refused to provide *in situ* access on the basis that it does not provide such access at all.

(xii) With regard to the redactions made by DPER, the appellant argued that the redacted information was environmental information since it was on a planning file and was thus information on a planning decision. He noted that the name and address of an observer could be used to determine their level of expertise, the number of previous objections they had made and their proximity to the location of the development. Finally, while he considered them to be "environmental information", he noted that he did not have an objection to the redaction of personal phone numbers or email addresses from the information requested.

25. DPER's submissions can be summarised as follows:

(i) DPER submitted that the Minister confirmed the River Bride (Blackpool) Arterial Drainage Scheme under powers set out in the Arterial Drainage Act 1945 (as amended) and not under the Planning Regulations so that the issues raised by the appellant relating to the "planning file" were not relevant.

(ii) It submitted that there was no absolute requirement under article 7C of the Arterial Drainage Regulations 2019 to make supplementary information publicly available except where the Minister considers such information contains significant additional information in relation to the effects on the environment. It noted however that supplementary information had been made available by the OPW on its website.

(iii) It submitted that the appellant was informed that DPER does not have a facility for public access to view files under FOI or AIE responses and that, in line with its Corporate Support policy relating to public access, *in situ* access is not a requirement of article 7 of the 2019 Regulations on which the Minister's confirmation of the Scheme was communicated.

(iv) It submitted that section 7F of the Arterial Drainage Act 1945 sets out the specific information to be published in connection with the Minister's decision on an EIA drainage scheme, that DPER had fully complied with its statutory obligations in this regard and that there was no statutory requirement for the Minister to make the entirety of the file on a consent decision under the 1945 Act available for public access.

(v) In response to a request for further information from my Investigator (which included a request to confirm that all of the information within the scope of the appellant's original

request had been provided to him), DPER noted that the River Bride (Blackpool) Flood Relief Scheme had been the subject of judicial review proceedings which had recently been settled and that arising from the settlement agreement "all of the material that should have been in the public domain, as raised by the appellant to the OCEI will be the subject of further public consultation in the coming months".

(vi) It also noted that the appeal to this Office was taken due to a "technical refusal" on foot of a delayed response to the appellant at internal review stage and that, while this was unfortunate, the appellant was informed at that time that "all of the salient material was published online, further to the initial AIE request".

(vii) In response to queries on the redactions made to the submissions received by DPER as part of its public consultation on the Scheme, DPER submitted that email addresses were redacted on the basis of advice that these "constituted personal information and should be removed in line with GDPR".

26. In its response to my Investigator's request for further information, DPER requested a phone call to discuss the appeal. That call took place on 2 February 2022. My Investigator explained to DPER that while it appeared from its correspondence that its position was that access to all relevant information had been provided online such that the access issue was substantially resolved, the appellant was seeking a decision on whether *in situ* access to the requested information should be provided to him in accordance with the AIE Regulations. She explained to DPER that the appellant's position was that *in situ* access was not the same as viewing the material online as a hard copy file might include handwritten notes, appendages, an index of the information and information on who had viewed the file.

27. DPER reiterated its position that it was not a planning authority, that it was carrying out a very specific function under the Arterial Drainage Act and that the facility to provide *in situ* access simply did not exist. It also submitted that it had engaged with the appellant on a number of occasions including as part of the settlement of judicial review proceedings brought by the appellant's clients. My Investigator informed DPER that although her views were preliminary and not binding on me, it appeared to her that a significant issue to be considered in this appeal was whether the appellant was entitled to be provided with access to the information requested in the form or manner specified by him in accordance with article 7(3) of the Regulations. She noted that the Regulations provided that access could only be provided in a different form or manner to that requested if this was reasonable or if the information had already been provided in a different form or manner. DPER indicated that its position would be that it had provided the requested information in another form or manner, which was reasonable. My Investigator noted that it would be useful for DPER to set out its position in writing and that she would follow up with a written request for further information in that regard.

28. She also noted that my Office would need to be provided with access to the original file and that a copy of that file would need to be available for my examination as part of my decision-making process. DPER indicated that this would most likely involve a significant, and perhaps unreasonable, amount of work on its part and noted that it could be argued that putting the information online in fact made it more accessible. The staff member with whom my Investigator spoke also indicated

that he did not consider that there would be additional handwritten notes on the file as the work had been largely been carried out remotely by DPER officials. DPER queried what the next steps in the investigation would be and my Investigator noted that the matter would proceed to a decision unless the appeal was withdrawn. She noted that if DPER was minded to consider the provision of *in situ* access, the appellant might be willing to withdraw his appeal. She explained that while it was not her role to recommend that course of action to either DPER or the appellant and it was ultimately a matter for DPER and the appellant to decide their own position, the OCEI Procedures Manual provided for the facilitation of a settlement by an Investigator in appropriate cases. She noted that she would follow up on the call with a written request outlining her further queries and that DPER could provide any additional information which it wished to put before the Commissioner in its response.

29. My Investigator sent a request for further information to DPER on 8 February 2022. This included a request to provide my Office with the original file and to confirm whether DPER's position was that all of the information requested was available online at the time of the appellant's request and/or was currently available. DPER's response dated 4 March 2022 to that request may be summarised as follows:

(i) It noted that the appeal "seems predicated in large part on a belief that there is an 'original' hard copy file which was submitted to the Minister, which is retained in the Department's offices and would be capable of inspection". It went on to note that no hard copy of the file was maintained as the information submitted to the Minister was presented electronically both as a result of the pandemic and also in line with DPER's "general paperless approach to conducting business". It submitted that "accordingly, a lot of the [appellant's] points on the request, in particular the request for 'in situ' inspection, fall away" as "*in situ* access is not possible where the file does not exist in hard copy".

(ii) It submitted that the requested information was available at https://www.gov.ie/en/collection/dad77-river-bride-blackpool-flood-relief-scheme/ but acknowledged that "not all of it was uploaded online at the time of the decision".

(iii) DPER further noted that there were two documents which remained unpublished: (a)an e-submission to the Minister; and (b) a letter sent to the Minister by the OPW when submitting the original scheme documentation in 2018. It submitted that the neither document was required to be published under section 7F of the Arterial Drainage Act but "for completeness, in terms of the material presented electronically to the Minister at the time of the consent decision…the Department can make this document available to the requester on foot of this appeal…facilitated by way of an informal settlement".

(iv) Having been asked to comment on the appellant's arguments with regard to his entitlement to *in situ* access, DPER submitted that article 7(3)(a)(ii) of the AIE Regulations provides that access can be provided in another form or manner where such access would be reasonable. It submitted that it was absolutely reasonable for it to provide access to the records in some other manner than the *in situ* access requested and that, once the objective of the AIE Directive and Regulations was fulfilled through the provision of access to the documents, there should be no reason to find it unreasonable for DPER to refuse inspection in its offices. It submitted that it was not similar to other bodies "who operate in

this area" such as An Bord Pleanála as it did not have viewing rooms or facilities for such exercises and the matter at issue was "quite unique in the context of [its] core role and remit".

(v) It submitted that neither the EIA Directive nor the AIE Directive required that *in situ* access be provided. It submitted that article 7 of the AIE Directive did not require *in situ* access but, rather, provided for a general requirement to disseminate environmental information and, in fact, encouraged the electronic dissemination of information by referring to dissemination "in particular, by means of computer telecommunication and/or electronic technology, where available". It submitted that article 6(3) of the EIA Directive likewise requires that certain information is made available to the public but does not specify how or require that such access must be provided *in situ*.

30. My Investigator wrote again to DPER on 7 March 2022 seeking an explanation as to why my Office, and the appellant, had not been informed in the course of previous engagements with DPER, that a hard copy of the file requested did not exist. She also asked DPER to confirm that its position was that the information requested was reviewed by the Minister in electronic format only, that none of the documents were printed for the purpose of the Minister's review and that no annotations were made to, or in respect of, those documents in the course of the Minister's review. She also noted that while she would raise the matter of informal settlement with the appellant she could not guarantee that he would be amenable to such an approach and she asked DPER to confirm whether immediate provision of the additional information to the appellant was conditional on an informal settlement being reached.

31. DPER responded on 22 March 2022 noting that it was willing to provide the information to the appellant immediately, pending resolution of the appeal, whether or not a settlement was reached. In response to the query as to why it had not previously mentioned that no hard copy of the requested information existed, it noted that "in previous correspondence with the appellant and [my Office], this Department communicated that viewing files in situ could not be facilitated as staff were working remotely during the pandemic". It continued that "the fact that there is no physical file was inferred but not explicitly stated" since "by working remotely, all documentation is processed and stored electronically in soft copy". It did not confirm that no information had been printed or annotated in the course of the Minister's review but did attach "a screen shot of the electronic view of the submission that the Minister would have viewed in making his decision" which demonstrated that "the Minister has commented on the submission itself electronically, along with the action log of officials at various levels of the process".

32. My Investigator wrote to the appellant on 24 March 2022 to update him as to DPER's position and to ascertain whether DPER had provided him with the additional information identified, whether he wished to continue with his appeal and, if so, whether the grounds of appeal summarised at paragraph 22 above still represented the issues he wanted my Office to consider.

33. The appellant responded on 3 May 2022 and his response can be summarised as follows:

(i) He acknowledged that it seemed that the entire contents of the file in electronic format had now been released but submitted that the fact that the decision and remaining parts of the file were only identified and released following an appeal to my Office and successful judicial review proceedings in the High Court which had resulted in the Minister's decision being quashed "speaks volumes about the lack of appreciation by DPER of its legal obligations".

(ii) He submitted in the first instance that DPER appeared to be completely unaware that it had a statutory responsibility under article 9(1) and 9(2) of the EIA Directive to publish the decision of the Minister granting development consent, which included all of the information which formed the essence of the decision. He referred in this regard to the opinion of the Advocate General in C-121/21 *Commission v Poland* in which he found that Poland had violated article 9(1) and 9(2) of the EIA Directive by failing to communicate its decision to authorise continued mining at an area near the Polish-Czech border "in intelligible form" since it had omitted the documents which constituted the essence of the authorisation and had only published a document announcing the extension of the duration of the previous authorisation. The appellant submitted that the lawfulness of a decision in the Irish system is reviewed in relation to the entire file that was before the decision-maker, which meant it was necessary for the entire file to be made publicly available.

(iii) He also submitted that DPER seemed to be completely unaware of its statutory responsibility, under article 7 of the AIE Directive, to actively disseminate environmental information and that this obligation overlapped with and reinforced its obligations under article 9(1) and 9(2) of the EIA Directive. He again relied on the remarks of the Advocate General in C-121/21 *Commission v Poland* in this regard. The Advocate General noted in that case that since the mining activity was one "likely to affect the elements of the environment" it came within the scope of the AIE Directive and that since the authorisation was one which had "a significant impact on the environment", it came under article 7(2)(f) of the AIE Directive and the obligation to make it available and disseminate it under article 7 applied. The Advocate General went on to note that "article 9(1) and (2) of the EIA Directive and article 7(2)(f) of the [AIE Directive] must be interpreted as meaning that they seek to achieve the same objective, that is to say that of guaranteeing the right of the public to be informed in the clearest and most complete manner possible, in particular in the event of extension of a mining authorisation". The Advocate General went on to say that the objectives of the AIE Directive "militate in favour of the dissemination of environmental information which takes due account of the high standards of transparency and cooperation imposed by the EIA Directive".

(iv) He argued that, despite its obligations under article 9(1) and (2) of the EIA Directive, DPER had forced him to file an AIE request to get access to information it was obliged to publish.

(v) He also indicated that he was "deeply sceptical" about DPER's "late revelation" that a paper file had not been maintained for the scheme. He queried why he had not been told of this "fairly obvious piece of information" when he originally sought access to the file but was instead told that facilities for *in situ* inspection did not exist. He queried whether DPER had followed its rules of procedure in relation to file management in relation to the scheme.

(vi) He requested my Office to make findings that his request was wrongfully refused, inadequately answered and not dealt with in accordance with the provisions of article 3 of the Directive.

34. Having considered the appellant's further submissions, my Investigator wrote again to DPER on 10 May 2022 with a number of further queries. DPER's response to the request can be summarised as follows:

(i) It submitted that it had adopted a paperless approach to conducting business in keeping with the Public Service IT Strategy and in accordance with its own Records Management Policy and Procedures. It enclosed a copy of the Records Management Policy and noted that section 4.2 of the Policy states that "staff should work with records in their electronic format to the maximum extent possible and avoid printing or holding large amounts of documents".

(ii) It noted that in practice, the primary and default method of engagement between the Minister and officials regarding the type of case in question, is the eSubmissions platform. It submitted that all documents which formed the basis of the Minister's decision, including a briefing and a recommendation, were submitted to him via the eSubmissions platform and that the Minister conveyed his decision on the matter electronically via the platform. It submitted that this was standard practice for making submissions to the Minister across all functions of the Department and that such submissions are considered to be records covered by the Records Management Policy and Procedure.

(iii) It stated that its position was that the file had been reviewed by the Minister in electronic form only, that none of the documents were printed or otherwise made available in hard copy for the purpose of the Minister's review and that no annotations were made to, or in respect of, those documents, in the course of the Minister's review. The author of the submissions stated that "having made enquiries to relevant divisions of the Department, to the best of my knowledge, there is no indication that a physical file was created for the Minister during this process and consequently, no annotations were made to any relevant documents in the course of the review in question". The submissions went on to note that "in an event where a 'convenience copy' of a digital record was created, it would be in keeping with the Department's Records Management Policy and Procedures to dispose of such a copy after use, although I have no knowledge that such occurred in this particular case".

(iv) Finally, DPER noted that "in addition to the general adoption of a paperless approach to conducting business in recent years, one must also consider the context of the time in which the decision process took place". It submitted that at the time of the Minister's decision in March 2021, significant restrictions on workplace attendance were in force due to the Covid-19 pandemic and that "as a result, officials across all functions of the Department were conducting the vast majority of business on a remote basis, further negating the use of hard copy documentation generally".

Analysis and Findings

35. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and DPER. 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);
    - the Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide'); and
    - the decision of the Supreme Court in *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*) and of the High Court in *M50 Skip Hire & Recycling Limited v Commissioner for Environmental Information* [2020] IEHC 430 (*M50*).

36. It is clear from the background and submissions sections above that the appellant's request was not properly handled by DPER. In fact, this case is a prime example of how failure to engage sufficiently with an appellant and provide reasons for a decision can lead to an inefficient use of the resources both of the public authority concerned, the appellant and of my Office. Had DPER simply responded to the appellant at an early stage indicating that it could not provide him with *in situ* access to the file as the file only existed electronically, many of the issues which I have now had to consider as part of this appeal may have been avoided. Instead, the attitude taken by DPER was completely contrary to the spirit of the AIE regime which is designed to achieve "increased public access to environmental information and the dissemination of such information" in order to "contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment". At the very least, DPER's handling of the request demonstrated a lack of understanding of its obligations under the AIE regime and, at worst, it bordered on obstructive.

37. DPER's handling of the appeal gives rise to a number of issues, some of which are more complicated than others. I will therefore deal with what I consider to be the most straightforward matters first.

Timeframe of Decision-Making

38. In the first instance, it is quite clear to me that DPER breached its obligations under article 7(10) of the AIE Regulations. Article 7 sets out the actions a public authority must take in response to an AIE request. Article 7(10) provides that in the performance of its functions under article 7, a public authority "shall…have regard to any timescale specified by the appellant". A public authority is not required to comply with the timeframe specified by the appellant however and the mandatory provisions in relation to the timing of a response to a request are set out at article 7(2) of the AIE

Regulations. An exception to the one-month deadline stipulated at article 7(2) may be applied in specific circumstances, provided that notice is given to the appellant in writing as to why it is not possible to abide by the usual one-month timeframe and that a decision is provided no later than two months from the date on which the request was received. The Regulations therefore provide that a public authority should respond to a request within one month (and in exceptional cases within two) at the latest but should "have regard" to the timeframe specified by the appellant.

39. In this case, the appellant wrote to DPER on 9 April 2021 requesting *in situ* access to the relevant file on 12 April 2021. He received a response on 14 April 2021. He again indicated the urgency of his request on 15 April 2021 albeit at that stage he had not technically requested the information under AIE. However, when he made a formal AIE request, on 16 April 2021, he again sought *in situ* access on 19 April 2021 and again referred to the judicial review limitation period. DPER did not make any reference to the timeframe he had specified in its acknowledgment of his AIE request and the appellant emailed again, on 21 April 2021, referring specifically to the obligations set out at articles 7(2) and 7(10) of the Regulations and seeking confirmation that DPER understood its obligations in this respect. This was followed by toing and froing relating to the provision of the contact details of the AIE decision-maker and, on 24 April 2021, the appellant wrote again to DPER asking it to identify the location of specific documents online or make those documents available without delay. Only on 26 April 2021 did the appellant receive a response which, again, failed to acknowledge his request to be provided with the information within a specific timeframe, merely noting that he would receive a response in "due course", and instead, concluded that his correspondence of 24 April 2021 had narrowed his request. The appellant responded on the same date both to clarify that he had not narrowed his request and to again seek confirmation that DPER was aware that "access should be granted as soon as possible having regard to the timescale specified by [him]". Again, no acknowledgment was provided by DPER. It provided the appellant with its original decision on 7 May 2021 which dealt only with "[his] request, as more specifically delineated in your correspondence of 26 April" despite his clear indication that such correspondence had not narrowed his request.

40. The appellant again specified a timescale in his request for an internal review of 9 May 2021 asking that in internal review "be decided within a week given that the judicial review limitation period is running". While article 11 of the Regulations, which deals with the internal review procedure, does not contain a similar provision to article 7(10), the obligation to have "regard to any timescale specified by the appellant" contained in article 3(2) of the Directive is more general. Article 3(2) of the Directive provides:

> "Subject to Article 4 [exceptions] and having regard to any timescale specified by the applicant, environmental information shall be made available to an applicant:
>
> (a) as soon as possible or, at the latest, within one month after the receipt by the public authority referred to in paragraph 1 of the applicant's request; or
> (b) within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to in (a) cannot be complied with. In such cases, the applicant shall be informed as soon as

possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it".

41. While that obligation has been transposed largely through articles 7(2) and 7(10) of the AIE Regulations, the provisions of article 11 of the AIE Regulations (which provide for a one-month timeframe for the issuing of an internal review) must also be interpreted with this requirement in mind. This approach is supported by the observations of the Supreme Court in *NAMA* in which it found that the Regulations must be interpreted "so far as possible, teleologically, in order to achieve the purpose of the directive" (see para 10). However, not only did DPER fail once more to acknowledge or have regard to the timescale specified by the appellant, it also failed to provide him with an internal review outcome within the one-month timeframe provided for in article 11(3) of the Regulations.

42. While DPER did provide its original decision within the one-month timeframe envisaged by article 7(2) of the Regulations, it is questionable whether it can be said that it made that decision "as soon as possible". The original decision dealt only with a portion of the appellant's request. It did not deal with a number of the issues raised by him (in particular his request for *in situ* access and that this be provided within a specified timeframe) and, ultimately, refused to provide certain additional information and provided a web link to other information. It is difficult to understand how this could not have been provided to the appellant sooner having regard to his repeated assertions that the matter was urgent.

43. In my view, the obligation contained in article 7(2) must be interpreted having regard to the purpose of the AIE Directive, article 3(5) of which makes it clear that arrangements should be put in place to ensure that "officials are required to support the public in seeking access to information" and that "the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised". The actions of DPER in this case lean more towards the obstructive as opposed to the supportive end of the scale. I am satisfied therefore that DPER failed to comply with its obligations under articles 7(2), 7(10) and 11(3) of the AIE Regulations.

Interpretation of Request and Obligations under the AIE Regulations

44. DPER's original decision explicitly provides that it relates to the appellant's request "as more specifically delineated in your correspondence of 24 April". The appellant's email of 24 April noted that the appellant had reviewed the information made available online by both DPER and the OPW and was of the view that "crucial documents are missing". It went on to identify a number of documents and asked DPER "to identify the online location of [that] information" or to ensure it was "uploaded without delay". Although this does not, in my view, suggest that the appellant wished to narrow his request, DPER's decision-maker responded to the appellant noting that he had "qualified [his] request in [his] most recent correspondence of 24 April". The appellant immediately responded to indicate that he had not narrowed his request but this does not appear to have been acknowledged by the decision-maker.

45. I am satisfied that the appellant's request was improperly narrowed by DPER, despite his clear indications to the contrary, which unfortunately added to the confusion of an already complicated case.

46. DPER's understanding of its obligations under the AIE Regulations as exhibited both in correspondence to the appellant and in its submissions to my Office is concerning. Its submissions to my Office in particular made repeated references to its obligations under the Arterial Drainage Act and noted that it "had complied with its statutory obligations". Those submissions fail to appreciate that the obligations of public authorities to provide environmental information held by or for them are separate and distinct obligations and it is not open to a public authority to say that because it has provided certain information it is required to provide under another Act, it is not obliged to provide any further information under the AIE Regulations. The "environmental information" to be provided under AIE is to be determined on the basis of an applicant's request and a public authority can only refuse to provide environmental information requested under the AIE Regulations in accordance with the provisions of those Regulations. Thus, while DPER has submitted on numerous occasions that *in situ* access is not a requirement of article 7 of the Arterial Drainage Regulations 2019 and that there is no statutory requirement for the Minister to make the entirety of the file on a consent decision under the Arterial Drainage Act 1945 available for public access, this does not absolve DPER from its obligations under the AIE Regulations.

47. It is also extremely unsatisfactory that despite DPER's repeated assertions that access to all relevant information had been provided through online publication, additional information was provided to the appellant only after intervention by my Office. In this case, DPER only revealed that further information was in fact held by it in the course of the appeal, having been asked to do so on two occasions by my Office. When advising my Office of that additional information, DPER made repeated assertions that this information "was not required to be published under the Arterial Drainage Act" and was being provided to the appellant "for completeness".

48. An appellant is entitled to be provided with environmental information held by or for a public body unless a basis for refusal exists and it should not be necessary to appeal to my Office in order to have such an entitlement vindicated. It is also entirely irrelevant whether or not the information provided to the appellant in the course of this appeal was required to be published under the Arterial Drainage Act. What is relevant in this case is the terms of the appellant's request and as environmental information was held by DPER within the scope of that request, this additional information should have been provided to the appellant or he should have been provided with a reasoned decision as to why it was appropriate to refuse it under the AIE Regulations.

Provision of Information in Requested Form or Manner

49. The same is true in respect of DPER's refusal to provide the appellant with in situ access under the Regulations. The appellant's request made it clear that he was seeking to examine the information requested in situ. Article 7(3)(a) provides that a requester shall be provided with environmental information in the form or manner requested unless the information is already available to the public in another form or manner that is easily accessible (article 7(3)(a)(i)) or it is reasonable to

provide access in another form or manner (article 7(3)(a)(ii)). Article 7(3)(b) provides that where a public authority decides to make environmental information available in another form or manner it must set out the reason for that decision in writing.

50. In this case, DPER has admitted that all of the information within the scope of the appellant's request was not publicly available at the time of his request. It is therefore not possible for it to rely on the provisions of article 7(3)(a)(i) of the Regulations. In fact, it remains unclear whether all of the information within the scope of the appellant's request has been provided to him. As outlined above, DPER identified further information within scope during the course of the appeal and provided that information to the appellant on 1 April 2022. However, while the Department provided some responses to the Investigator's queries, it has not provided adequate responses to queries from my Office seeking confirmation that none of the information provided to the Minister electronically was printed or annotated in any way during the course of his review nor has it provided assurances that reasonable and adequate steps were taken to ensure that no additional information is held by or for it.

51. Neither can it be said that the provision of access in an alternative form or manner was reasonable in the circumstances. As outlined above, all of the information requested by the appellant was not provided to him. In addition, no attempt was made to explain to the appellant that *in situ* access was not possible because the relevant file did not exist in hard copy form. As the appellant has made clear, one of the reasons he sought *in situ* access to the file is that he wanted to review the information which was before the Minister at the time he made the decision to approve the River Bride Flood Relief Scheme for the purposes of deciding whether to initiate judicial review proceedings and a three-month limitation period applied to the initiation of those proceedings. Rather than explain to the appellant that a hard copy of the information did not exist and that the file had been put before the Minister electronically, DPER took five days to respond to his initial email seeking prompt access to the file (responding on 14 April 2021 to a request to view the information on 12 April 2021). Once it had been informed by the appellant that time period for judicial review was running such that a decision on access was of the essence, it then engaged in a toing and froing about the basis on which the appellant sought access to the information which, although technically permissible given the requirements of article 6 of the Regulations, was somewhat unhelpful. DPER:

    - continued to ignore the appellant's requests to have the matter dealt with as quickly as possible,
    - engaged in a further toing and froing in response to his request for the contact details of the decision maker,
    - narrowed the appellant's request despite his clear indication that he did not wish to do so,
    - failed to deal with his request for *in situ* access at all at either original decision or internal review stage,
    - provided a response to his internal review outside the one-month timeframe provided for in the Regulations, in spite of his request that it be provided within a week,
    - failed to provide the additional information released as part of the internal review within the timeframe provided by the Regulations, and

- failed to notify the appellant at all when this information was published, despite advising him that it would do so.

52. It would therefore be difficult to describe DPER's actions as reasonable nor were those actions in compliance with its obligations under article 7(3)(b) of the Regulations. DPER did not provide any reasons for its refusal to grant *in situ* access in its original decision or internal review outcome. Instead, it inappropriately narrowed the appellant's request and ignored his repeated requests for *in situ* access. It eventually informed the appellant that it would not provide *in situ* access because "there is no facility to physically inspect relevant information". It appears however that this was not in fact the reason for its failure to provide access to the file requested *in situ* and in subsequent submissions to my Office DPER instead asserted that "a paper file was not presented to the Minister in physical format" and that "in situ access is not possible where the file does not exist in hard copy".

53. I am mindful that my review under article 12(3) of the Regulations should be carried out on a *de novo* basis (see *M50*). While it did not make its position known at the time it refused the appellant's request, DPER has since submitted that it does not possess a hard copy of the information requested. The question therefore arises as to whether it would be reasonable to expect a public authority to provide *in situ* access to information which it only holds electronically. As article 4(1)(a) of the Directive makes clear, a public authority is permitted to refuse a request to access environmental information which is not held by or for it. I am not making a binding decision on this point but if a physical copy did not exist it would most likely be unreasonable, in the circumstances of this case, and contrary to the requirements of the Regulations and the Directive to expect DPER to compile one and provide the appellant with *in situ* access to it. If DPER only holds the requested information in electronic form, it might be in a position to rely on article 7(3)(a)(ii) of the Regulations. The question then arises as to whether DPER has taken sufficient steps to establish that it does not hold the information requested in hard copy form.

54. When considering whether it is reasonable to refuse a request on the basis that no relevant information is held by or for a public authority, my approach is to consider whether I am satisfied that the public authority in question has taken reasonable and adequate steps to identify and locate all information within the scope of the request. The author of DPER's most recent submissions to this Office has indicated:

> "After having made enquiries to the relevant divisions of the Department, to the best of my knowledge, there is no indication that a physical file was created for the Minister during this process and, consequently, no annotations were made to any relevant documents in the course of the review in question. In an event where a "convenience copy" of a digital record was created, it would be in keeping with the Department's Record Management Policy and Procedures to dispose of such a copy after use, although I have no knowledge that such occurred in this particular case".

However, DPER has not provided sufficient detail as to the basis on which those conclusions were reached (i.e. the steps taken to search for such hard copy information and satisfy itself that none existed).

55. There is therefore insufficient evidence before me to conclude that reasonable and adequate steps were taken by DPER to ensure that no further information within the scope of the appellant's request is held by or for it. It would be open to my Office to write once more to DPER to make further enquiries as to whether such steps have in fact been taken but I consider that, given the time which has elapsed in this matter to date, and given the numerous exchanges of correspondence which have already taken place, it is preferable to bring this matter to a conclusion with a direction to DPER to carry out such searches.

Redaction of information provided

56. Another issue which has arisen in this case, and which weighs in favour of a remittal of this appeal, is that DPER has made redactions to information provided to the appellant (i.e. the submissions received as part of its public consultation) without relying on any of the grounds for refusal contained in the Regulations or demonstrating that it has carried out the public interest balancing exercise required under article 10 of those Regulations. The appellant has confirmed that he has no objection to the redaction of personal phone numbers or email addresses from the submissions received as part of the public consultation. However, he does wish to be provided with the names and addresses of those making the submissions as he considers this information to be relevant to the decision made by the Minister on the Scheme. While the names of those who have made submissions are included in the submissions which have been published on DPER's website, it is not clear whether the addresses of individuals have been redacted along with email addresses and phone numbers. DPER, in submissions to my Office, stated that email addresses were removed "in line with the GDPR" as they "constituted personal information". It also indicated in separate submissions that "personal contact/address details" had been redacted from those submissions. However, it did not provide unredacted copies of the submissions, as requested by my Investigator, and it is therefore not possible for me to verify whether information other than personal phone numbers and email addresses have been removed from the published submissions. In addition, where a public authority is refusing to provide information in response to an AIE request it must provide reasons for that refusal. Those reasons must be based on the grounds for refusal outlined in the AIE Regulations and, where appropriate, must set out the public interest test carried out by the public authority and the basis on which it considers the interest in refusal to outweigh the public interest in disclosure of the information. While DPER did refer to emails being redacted "in line with GDPR" in submissions to my Office, that alone is not sufficient to establish grounds for refusal under the AIE Regulations nor did DPER set this out in its internal review. I am therefore remitting this matter to DPER so that it can confirm to the appellant whether any information other than email addresses and personal phone numbers have been redacted from the published version of the submissions and, if so, provide him with the basis on which such redactions have been made.

Decision

57. Having carried out a review under article 12(5) of the AIE Regulations, I annul DPER's decision on the basis that it failed to comply with its obligations under the AIE Regulations and Directive as follows:

    (i) DPER failed to have regard to the timeframe specified by the appellant contrary to its obligations under article 7(10) of the Regulations and article 3(2) of the Directive;
    (ii) It failed to provide the decision "as soon as possible" in accordance with article 7(2) of the Regulations and article 3(2) of the Directive;
    (iii) DPER improperly narrowed the appellant's request despite clear indications from him to the contrary and thus did not make a decision on his actual request as required by article 7(2) of the Regulations and article 3(2) of the Directive;
    (iv) DPER improperly refused to provide the appellant with access to the information requested in the form or manner requested by him as its refusal did not comply with the requirements of article 7(3) of the Regulations and article 3(4) of the Directive;
    (v) DPER redacted information from the information provided to the appellant without complying with its obligations under the AIE Regulations and Directive to set out the grounds for that refusal and carry out the public interest balancing exercise.

58. I am directing DPER to conduct reasonable and appropriate searches to ensure that no information within scope of the appellant's request exists which has not already been published. For the avoidance of doubt, this would include a document which had been published online which has been printed and annotated. Once those searches have been carried out, DPER should advise the appellant whether any additional information has been retrieved as a result of those searches. Again, for the avoidance of doubt, additional information would include additional information in electronic form, additional information in hard copy form and information in hard copy which has only been provided to the appellant in electronic form. This communication should also set out whether access is to be provided to any such additional information *in situ* and, if not, the basis on which in situ access is being refused having regard to the requirements of the AIE Regulations. If no additional information is retrieved as a result of those searches, DPER should write to the appellant advising him of this and setting out the steps taken by it in conducting those searches.

59. I am also directing DPER to confirm to the appellant whether it has redacted any information from the public submissions other than the personal phone numbers and email addresses of individuals. If it has redacted any further information from those submissions, then it must provide the appellant with reasons for those redactions in accordance with its obligations under the AIE Regulations.

Appeal to the High Court

60. 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

Ger Deering
Commissioner for Environmental Information

28 October 2022