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-108934-T4M4T2

Date of decision: 20 October 2022

Appellant: Cian Ginty

Public Authority: National Transport Authority (NTA)

Issue: Whether: (i) the information requested is "environmental information"; (ii) the information requested has been supplied in an alternative form or manner such that article 7(3) of the Regulations applies; (iii) whether article 9(2)(c) of the Regulations provides the NTA with grounds to refuse the information requested; and (iv) whether the NTA is justified in refusing the information request on the basis of a licensing agreement with Ordnance Survey Ireland.

Summary of Commissioner's Decision: The Commissioner found that: (i) the requested information is "environmental information"; (ii) article 7(3) of the Regulations did not apply in the circumstances of the case; (iii) article 9(2)(c) of the Regulations did not provide grounds for refusal of the information as the public interest in disclosure outweighed any interest in refusal; and (iv) the existence of the licensing agreement with OSI did not provide grounds for refusal of the request.

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 16 March 2021, the appellant requested "the CAD files for BusConnects route CBC 12 Rathfarnham as per the last public consultation" from the NTA. My understanding is that Computer Assisted Design (CAD) files are those used by architects, engineers, construction professionals and designers to produce 2D drawings and documentation. The correspondence between the appellant and the NTA interchangeably refers to CAD and AutoCAD. As part of the public consultation to which the appellant's request referred (which I understand took place in November 2020), the NTA released pdf files which mapped preferred route options for the BusConnects project. Those pdf files were abstracted from AutoCAD drawings. The appellant's request noted that he wished to be provided with "the version of the CAD files from which the public pdfs were extracted" as he did not believe the pdf files provided information in "an accurate or accessible way" as they "did not have regular measurements shown" which made it impossible to evaluate the drawings.

2. On 19 April 2021, the NTA issued a decision in which it refused the appellant's request. It relied on article 9(2)(c) of the AIE Regulations which provides that a public authority "may refuse to make environmental information available where the request concerns material in the course of completion, or unfinished documents or data". It noted that, while the CAD files had been used to produce pdf files which had been made available as part of the public consultation, the CAD files continued to be part of the documents in the deliberative process and continued to be subject to change. It went on to state that the final version of the CAD files would form part of the submission to be made by the NTA to An Bord Pleanála, which was expected to occur in June or July 2021. It concluded that the information requested could therefore not be released and noted, in accordance with article 10(6) of the Regulations, that it expected the material to be completed around June or July 2021.

3. The appellant responded to the NTA on the same date seeking confirmation that the NTA had archived or otherwise maintained the version of the CAD files which he had requested. The NTA responded the following day informing the appellant that "the files are part of the deliberative process and therefore cannot be released". The appellant sought an internal review of the decision on 20 April 2021. He explained that he was not seeking future versions of the CAD files only the version which had been published in pdf format as "the pdfs seem to include sub-standard designs including narrow widths" and "did not include cross sections showing widths of different sections".

4. The NTA issued a decision on the internal review on 18 May 2021. It affirmed its reliance on article 9(2)(c) of the AIE Regulations to refuse the information requested. The internal reviewer confirmed that the AutoCAD drawings continued to be worked on as the design of the schemes was revised and amended and that the Ordnance Survey maps used as the basis for the drawings issued in pdf format were not sufficiently accurate to be released in AutoCAD format as the topographical surveys to be used to inform more detailed maps had yet to be completed. They also concluded that "release of this information has the potential to lead to mis-information being provided on aspects of the proposals, given the inaccuracies in the Ordnance Survey background maps at the level of detail that might be interrogated using the AutoCAD files" such that "abstracting information at a level of detail beyond what was intended at the level of development for the

public consultation stage would be misleading, give rise to misunderstandings and would not be in the public interest". The internal review outcome also noted that "the level of detail clearly desired as the basis of this request will be available at a later stage in the development process" and again confirmed that it was expected that the material would be completed around June or July 2021.

5. The internal review outcome also provided additional reasoning for the refusal. It stated, in the first instance, that it did not consider "CAD files" to fall within the definition of "environmental information" since "they represent a format of the information and the files themselves are not environmental information". It went on to note that even if the CAD files were environmental information, "the material is already available to the public in another form or manner that is easily accessible, namely the information provided as part of the third round of public consultation" such that article 7(3) of the Regulations applied.

6. The appellant appealed to my Office on 15 June 2021.

Preliminary Matters

7. Although it does not relate to the substance of the decision itself, I note that the correspondence from the NTA to the appellant referred to the entitlement to appeal a decision of a public authority to my Office, in accordance with the requirements of articles 7(4)(d) and 11(4)(b) of the Regulations. However, that correspondence noted that a fee of €150 is required in order to appeal to my Office with a reduced fee of €50 applicable in certain instances. These figures are incorrect and, in fact, a fee of €50 applies for the making an appeal to my Office with a reduced fee of €15 applying in certain circumstances. It is also open to my Office to waive the applicable fee where the decision of the public authority has not been issued in a timely manner. The NTA should ensure that such an error is not repeated in any future decisions issued by it, lest the incorrect information dissuade any potential appellants from making an appeal to my Office.

8. I must also express my disappointment at the manner in which the NTA engaged with my Office. The Investigator requested that the NTA provide submissions to my Office by 11 July 2022. No response of any kind was received from the NTA by that date and the Investigator therefore proceeded to draft her recommendation. Submissions were then received by the NTA on 30 July 2022. These contained no apology for the delay and merely noted that the author had been unable to provide submissions until now. While I understand that circumstances do arise which require that extensions of time be facilitated, the NTA is a large organisation which, had it not the resources to prepare responses in the author's absence, at the very least could have communicated with my Office at an earlier date and sought to be provided with an extension of time rather than simply providing responses almost three weeks after the deadline had passed. The NTA should take steps to ensure greater engagement with the AIE regime in the future.

9. Not only did the NTA provide submissions beyond the deadline provided without requesting or being granted an extension of time, the submissions provided also introduced a new material issue. The NTA submitted that it could not release the information requested by the appellant, not only

for the reasons referred to in above, but also because copyright in the maps on which the AutoCAD drawings were based vested in Ordnance Survey Ireland (OSI) and release would breach the terms of the licensing agreement between OSI and the NTA. The additional submissions made no reference to any article of the Regulations on which refusal might be based nor did it contain any indication that the NTA had carried out a public interest test as required by article 10 or indeed, had contacted OSI to ascertain its position. It is unacceptable that such an argument would be raised by the NTA at this point.

10. In the first instance, this issue should have been flagged by the NTA when communicating its decision to the appellant on his request. As article 10(3) sets out, the application of grounds for refusal must be considered on an individual basis and as article 10(4) provides, grounds for refusal must be interpreted restrictively. Articles 7(4) and 11(4) of the AIE Regulations require a public authority to provide reasons for refusal both at decision and internal review stage and the judgment of the High Court in *Right to Know v An Taoiseach* [2018] IEHC 372 makes it clear that compliance with these obligations requires a public authority to go beyond a mere invocation of one of the grounds set out in articles 8 and 9 of the Regulations. The fundamental purpose of such a duty to provide reasons is so that a requester can properly understand the basis for refusal.

11. In this case, however, the NTA has not only attempted to make my Office the communicator of a decision which should have been communicated by it in the first instance, it has failed to even invoke the statutory basis for refusal. It has also failed to set out the adverse impact it considers might arise from disclosure and the basis on which such impact would outweigh the public interest in disclosure in this case. By invoking the copyright of a third party without making any attempt to contact that third party, the NTA has also acted in a manner which is contrary to the spirit of the AIE Regulations and Directive, which make it clear there is a presumption in favour of disclosure and grounds for refusal are to be interpreted strictly. This is not acceptable and the NTA should take steps to ensure such conduct is not repeated.

Scope of Review

12. My review in this case is concerned with:

(i) whether the information requested by the appellant is "environmental information" within the meaning of article 3(1) of the AIE Regulations;
(ii) whether the information requested by the appellant has been provided to him in another form or manner such that article 7(3) of the Regulations applies; and
(iii) whether article 9(2)(c) of the Regulations provides the NTA with grounds to refuse the appellant's request;
(iv) whether the NTA is justified in refusing the appellant's request having regard to the terms of its licensing arrangement with OSI.

Analysis and Findings

13. 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 the NTA. I have also examined the contents of the records at issue. In addition, I have had regard to:

    - the judgments in *Minch v Commissioner for Environmental Information* [2017] IECA 223 (*Minch*), *Redmond & Anor v Commissioner for Environmental Information & Anor* [2020] IECA 83 (*Redmond*), *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 (*ESB*), *Right to Know v Commissioner for Environmental Information & RTÉ* [2021] IEHC 353 (*RTÉ*) and *M50 Skip Hire & Recycling Limited v Commissioner for Environmental Information & Ors* [2020] IEHC 430
    - the judgment of the Court of Appeal of England and Wales in *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (*Henney*) which is referenced in the decisions in *Redmond*, *ESB* and *RTÉ*;
    - the decisions of the Court of Justice of the European Union in C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat* (*Mecklenburg*), C-316/01 *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen* (*Glawischnig*) and C-619/19 *Land Baden-Württemberg v DR* (*Land Baden-Württemberg*);
    - the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance);
    - Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
    - the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
    - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide').

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

14. As outlined above, there are three issues to be considered as part of this appeal. I will consider each of the issues in turn.

Are the CAD files "environmental information" within the meaning of article 3(1)(c) of the Regulations?

15. The NTA argues that the CAD files do not fall within the definition of "environmental information" contained in the AIE Regulations. It accepts that they may contain environmental information but argues that they represent a format of the information and the files themselves are not environmental information.

16. The appellant submits that the purpose of his request was to obtain a clearer picture of the cycle tracks shown in the drawings made available as part of the November 2020 public consultation. He

argues that details about cycle tracks and their standards are "environmental information" within the meaning of article 3(1) of the AIE Regulations given the impact of such infrastructure on human health and safety, emissions and environmental policy. He notes in this regard that a number of Government policies have referred to cycling infrastructure as a method of acting on climate change. The appellant further submits that that the NTA's argument that the CAD files are not environmental information but merely represent a "format of information" amounts to an argument that a high-resolution paper drawing does not fall under the definition because a low-resolution drawing is already available. He argues that the pdf drawings which are publicly available suggests that the cycle lanes as planned do not meet the NTA's Greater Dublin Area Cycle Network Plan target width nor do they meet the BusConnects target width of 2 metres and that the information is therefore "environmental information" as it demonstrates whether environmental policy is being adhered to.

17. Article 3(1) of the AIE Regulations defines "environmental information" as any information in any material form on:

    (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
    (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
    (c) measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
    (d) reports on the implementation of environmental legislation,
    (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and
    (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

18. The AIE Regulations transpose the AIE Directive at national level and the definition of "environmental information" in the Regulations, mirrors that contained in the Directive. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information and enable an informed public to participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive.

19. According to national and EU case law on this matter, while the concept of "environmental information" as defined in the AIE Directive is broad (*Mecklenburg* at paragraph 19), there must be

more than a minimal connection with the environment (*Glawischnig* at paragraph 25). Information does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond* at paragraph 58; see also *ESB* at paragraph 43). However, a mere connection or link to the environment is not sufficient to bring information within the definition of environmental information. Otherwise, the scope of the definition would be unlimited in a manner that would be contrary to the judgments of the Court of Appeal and CJEU.

20. The right of access to environmental information that exists includes access to information "on" one or more of the six categories at (a) to (f) of the definition. In his decision in RTÉ, Barrett J expressly endorses the approach set out in Henney to determine the "information on" element of the definition of "environmental information" (*RTÉ* at paragraph 52). The first step is to identify the relevant element of the definition to which the information in question relates.

21. In this case, the information requested (i.e. the CAD files) relates to the BusConnects project as it shows proposed routes for Core Bus Corridor (CBC) 12 of that project which connects Rathfarnham to the city centre. Those routes, as planned, will include both bus lanes and cycle lanes. As the appellant argues, the CAD files therefore also relate to the NTA's policy on cycle lanes as contained, *inter alia*, in its Greater Dublin Area Cycle Network Plan.

22. Paragraph (c) of the definition of "environmental information" refers to information on "measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements". A measure or activity is "likely to affect" the elements and factors of the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. While it is not necessary to establish the probability of a relevant environmental impact, something more than a remote or theoretical possibility is required (*Redmond* at paragraph 63). Information may be "on" one measure or activity, more than one measure or activity or both a measure or activity which forms part of a broader measure (*Henney* at paragraph 42). In identifying the relevant measure or activity that the information is "on" one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned, and it may be relevant to consider the purpose of the information (*ESB* at paragraph 43).

23. The Aarhus Guide notes that the Aarhus Convention expressly includes "administrative measures, environmental agreements, policies, legislation, plans and programmes" when referring to "measures" and "activities" likely to affect the environment in the context of its definition of "environmental information". Similar wording is used in article 2(1)(c) of the AIE Directive and article 3(1)(c) of the AIE Regulations. The Aarhus Guide notes that the use of these terms suggests that some degree of human action is required. The Guide also describes the terms "activities or measures", as referring to "decisions on specific activities, such as permits, licences, permissions that have or may have an effect on the environment". The Court of Appeal in *Minch* was of the view that the reference to "plans" and "policies" in article 3(1)(c) is significant, and suggests that the "measure" or "activity" in question must have "graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however

tentative, aspirational or conditional such a plan or policy might be – which, either intermediately or mediately, is likely to affect the environment" (paragraph 39). Hogan J went on to explain that this requirement for there to be a plan or something in the nature of a plan, curtails a potentially open-ended or indefinite right of access to documents (paragraph 41). If this were not the case, then virtually any information held by or for a public authority referring, either directly or indirectly, to environmental matters would be environmental information. This would run contrary to the CJEU's judgment in *Glawischnig* (paragraph 21; see also *Glawischnig* at paragraph 25).

24. The CJEU in *Mecklenberg* stated at paragraph 20 of its judgment that "the use in Article 2(a) of the Directive of the term 'including' indicates that 'administrative measures' is merely an example of the 'activities' or measures' covered by the directive". It noted that "as the Advocate General pointed out in paragraph 15 of his Opinion, the Community legislature purposely avoided giving any definition of 'information relating to the environment' which could lead to the exclusion of any of the activities engaged in by the public authorities, the term 'measures' serving merely to make it clear that the acts governed by the directive included all forms of administrative activity".

25. Barrett J remarked in *RTÉ* that "the European Court of Justice [in *Mecklenberg*] could not have taken a more expansive view of what comprises an administrative measure for the purposes of the 1990 directive" (paragraph 19). He also noted that Recital 2 of the current AIE Directive should be borne in mind when approaching case-law, such as *Mecklenberg*, which is concerned with Directive 90/313/EEC, the predecessor to the current AIE Directive (*RTÉ*, paragraph 7). Recital 2 of the AIE Directive provides as follows:

> "Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment initiated a process of change in the manner in which public authorities approach the issue of openness and transparency, establishing measures for the exercise of the right of public access to environmental information which should be developed and continued. This Directive expands the existing access granted under Directive 90/313/EEC…."

26. Barrett J considered the reference to the current AIE Directive having "initiated a process of change" to be noteworthy and concluded that "what had been in play over the course of the lifetime of [the previous AIE] directive and its more recent successor is an evolutionary process", the consequence being that "one must approach the current directive as being not just expansive but increasingly so" (*RTÉ*, paragraph 8). He also stated that it was "difficult to conceive of how the Community legislature could have taken a more expansive approach to the scope of the concept of "environmental information", having regard to Recital 10 of the current AIE Directive (*RTÉ*, paragraph 9).

27. The BusConnects project is a plan or programme which aims to ensure "sustainable transport for a better city". It is described as "the [NTA]'s programme to greatly improve bus services in Irish cities" and as "a key part of the Government's policy to improve public transport and address climate change in Dublin and other cities across Ireland" (see: www.busconnects.ie). It is therefore,

a measure which is likely to affect the environment and, given that one of its objectives is to address climate change, one which is also designed in part to protect the environment.

28. Similarly, the NTA's Greater Dublin Area Cycle Network Plan is aimed at "ensuring that cycling as a transport mode is supported, enhanced and exploited in order to achieve strategic objectives and reach national goals" and to ensure "that investments are focused in an efficient manner" in order to ensure "continuity of route networks across…administrative boundaries" in the Greater Dublin Area (see: Greater Dublin Area Cycle Network Plan). At the time the Cycle Network Plan was established, those objectives and goals were contained in the National Cycle Policy Framework (NCPF), the overall aim of which was to promote a culture of cycling in Ireland so that 10% of all trips to work would be made by bike by 2020, which, according to the NCPF would "mean an extra 125,000 people commuting to work by bike" (see: National Cycle Policy Framework). The NCPF, which expired in 2020, was replaced by the National Sustainable Mobility Policy, a key target of which is to protect and maintain existing cycling networks, develop cycle network plans and expand cycle options. The purpose of the National Sustainable Mobility Policy is "to set out a strategic framework to 2030 for active travel and public transport to support Ireland's overall requirement to achieve a 51% reduction in carbon emissions by the end of this decade". The Policy makes specific reference to investment in road networks including "retrofitting the road network for more sustainable transport use, for example through the provision of bus lanes and cycle tracks". The Policy does not explicity make reference the NTA's Greater Dublin Area Cycle Network Plan but it does refer to the NTA's National Cycle Manual (see: National Sustainable Mobility Policy).

29. The National Cycle Manual, according to the Sustainable Mobility Policy, "has guided the design of cycle infrastructure since 2011". It is therefore clear that policies relating to the putting in place of cycle lanes and the promotion of cycling as a mode of active transport are likely to impact the environment and are designed to protect the environment by contributing to broader climate change mitigation policy. It is also clear that policies by the National Transport Authority which guide the design of cycle infrastructure and are designed to ensure consistency with regard to cycling networks are policies i.e. measures affecting or likely to affect the environment. In my view, both the BusConnects project and the NTA Greater Dublin Area Cycle Network Plan fit the definition at paragraph (c) i.e. "measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements".

30. The next question to consider is whether the information requested by the appellant is information "on" one, or any, of those measures. Again, *RTÉ* (see paragraph 52) endorses the approach set out by the Court of Appeal of England and Wales in *Henney*. The Court in *Henney* found that "information is "on" a measure if it is about, relates to or concerns the measure in question" but "'simply because a project has some environmental impact, it does not follow that 'all information concerned with that project must necessarily be environmental information'" (see para 37 and 45). The Court found that:

> "…the way the line will be drawn is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line the information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information on the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments.
> My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at para 15 above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed to provide a framework for determining the question of whether in a particular case information can properly be described as on a given measure" (paras 47 and 48).

31. *Henney* suggests that, in determining whether information is "on" the relevant measure or activity, it may be relevant to consider the purpose of the information such as why it was produced, how important it is to that purpose, how it is to be used, and whether access to it advances the purposes of the Aarhus Convention and AIE Directive (paragraph 43; see also *ESB* at paragraph 42). Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be "on" the relevant measure or activity (*Redmond* at paragraph 99). As the Court noted in *Henney*, the recitals of both the Aarhus Convention and the AIE Directive refer to the requirement that citizens have access to information to provide for a greater awareness of environmental matters, to enable more effective participation in environmental decision-making and to facilitate the free-exchange of views with the aim that all of this should lead, ultimately, to a better environment. They give an indication of how the very broad language of the text of the provisions in the Convention and Directive may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as on a given measure (see *Henney* at paragraph 48 and RTÉ at paragraph 52). Finally, as the High Court noted in *ESB* information that is integral to the relevant measure or activity is information "on" it (see paragraphs 38, 40 and 41) while information that is too remote from the relevant measure or activity does not qualify as environmental information (*ESB* at paragraph 43).

32. The guidance provided by the Courts therefore suggests that there is a sliding scale, with information integral to a measure at one end (in the sense that it is quite definitively information "on" a measure) and information considered too remote from the measure on the other end (in the sense that it is not). The example referred to in *Henney* noted that a report on PR and advertising strategy might be considered information "on" the Smart Meter Programme "because having access to information about how a development is to be promoted will enable more informed participation by the public in the programme". However, information relating to a public authority's procurement of canteen services in the department responsible for delivering a road project would likely be considered too remote (see paragraph 46). *Henney* also makes it clear that the definition should be applied purposively having regard to matters such as "the purpose for

which the information was produced, how important it was to that purpose, how it is to be used and whether access to it would make the public better informed above, or to participate in, decision-making in a better way" (see paragraph 43).

33. The CAD files requested by the appellant show proposed routes along CBC 12 of the BusConnects programme. This includes the proposed location of the bus lane, bus stops, footpaths, cycle tracks, carriageways and pedestrian priority zones. This information is clearly integral to the BusConnects programme, the purpose of which is to improve bus services by amending the physical infrastructure for the bus network. Given that it includes information on proposed cycle infrastructure, the information is also integral to the National Sustainable Mobility Policy which specifically envisages that investments in road networks will include sufficient provision for bus and cycle infrastructure and to the NTA's policies on cycling which include the National Cycle Manual and the Greater Dublin Area Cycle Network Plan. In addition, access to the information contained in the CAD files would clearly advance the purposes of the AIE Directive as it would enable more informed participation by the public in discussions surrounding the BusConnects programme generally, and the development of cycling infrastructure specifically.

34. The same can be said for the pdf files which show similar (albeit it less detailed) information. The information contained in both the pdf and the CAD files is integral to the BusConnects project, the National Sustainable Mobility Policy and the NTA's policies on cycling meaning that both are environmental information. The NTA has sought to argue that while the CAD files may contain environmental information, they represent a format of the information and the files themselves are not environmental information. It argues that the road layouts on the AutoCAD drawing are identical to the published pdf information brochure drawings and it is simply the format of the presentation that differs. It therefore submits that while the drawings contain, or relate to, environmental information, the format of the drawings should not be categorised as environmental information. The point being made by the NTA is not clear.

35. In any event, the definition contained at article 2 of the Directive and article 3(1) of the Regulations provides that environmental information is "any information is written, visual, electronic or any other material form" (emphasis added). The existence of information in one format does not therefore preclude another format of that information from coming within the definition of "environmental information" contained in the Directive and the Regulations. I am satisfied therefore that both the pdf files and the CAD files are "environmental information" within the meaning of article 3(1) of the Regulations.

36. Rather than seeking to apply a definition of "environmental information" based on the format of the information, the provision to be used where a public authority does not consider it necessary to provide information in response to an individual AIE request in the specified form because it considers that information to be already available in another form or manner, is article 7(3) of the Regulations. I will go on to consider whether it can be said that article 7(3) applies in the circumstances of this case.

Does article 7(3) apply in the circumstances of this case?

37. Article 7(3) of the Regulations provides:

> "Where a request has been made to a public authority for access to environmental information in a particular form or manner, access shall be given in that form or manner unless-
>
> (i) the information is already available to the public in another form or manner that is easily accessible, or
> (ii) access in another form or manner would be reasonable".

38. In this case, the appellant has requested CAD files and the NTA has refused to provide those files as it has made pdf files publicly available in the form of concept drawings which were abstracted as pdfs from the AutoCAD drawings. As I have outlined above, while the Regulations do not explicitly provide that the burden of proof rests with the public authority in relation to justifying a refusal to make information available, I consider that the scheme of the Regulations, and of the AIE Directive on which the Regulations are based, makes it clear that there is a presumption in favour of release of environmental information. My view in this regard is reinforced by article 7(3)(b) of the Regulations which provides that "where a public authority decides to make available environmental information other than in the form or manner specified in the request, the reason therefore shall be given by the public authority in writing". It is, therefore, in my view, for the NTA to establish that the information requested by the appellant is already available to the public in another form or manner that is easily accessible or that providing access in another form or manner would be reasonable.

39. The appellant has made it clear in his correspondence to the NTA, that he does not consider the pdf files to provide him with the information he is seeking. In his original request, he notes that "the pdf files do not contain the information in an accurate or accessible way but the CAD files are likely to" and that "the public consultation [i.e. the pdf] drawings did not have regular measurements shown and such makes it impossible to fully evaluate the drawings and if they are within standards". In his request for an internal review, he submitted that "the pdfs did not include cross section showing widths of different sections" and stated that he was requesting the CAD files "because the pdfs seem to include sub-standard designs including narrow widths". In his submissions to my Office, the appellant stated that he was seeking "a more detailed…higher-resolution…version of drawings…mainly with the goal of confirming the extent of sub-standard cycle tracks shown in the last round of BusConnects public consultation drawings". He compares the difference in the pdf and CAD files to that which exists between "a low resolution map printed on A4 when the details needed can only be viewed on a map printed on A0 format".

40. The NTA has stated that the information sought by the appellant is already publicly available in pdf format. It has also noted that those pdf drawings include a scale bar which provides reference dimensional detail allowing measurement of distance by reference to the scale. However, its submissions to my Office also appear to recognise that the AutoCAD files contain more information

than that contained in the pdf files and note that "releasing AutoCAD files of such designs enables a level of measurement interrogation that is incompatible with the purpose of consultation drawings". The NTA go on to argue that as the CAD files requested were works in progress they were inappropriate for detailed measurement analysis. However, this appears to me to be a different point from the argument that the appellant had already been provided with the same information in a different form. That point is more appropriately considered as part of the NTA's arguments on the application of article 9(2)(c) and appears to me to undermine the NTA's argument that the information being sought by the appellant is already publicly available.

41. One of the things the appellant is seeking is additional information on the proposed dimensions or measurements of the cycle lanes. The information sought by the appellant is therefore not already available to him. Therefore, the circumstances outlined in article 7(3)(a)(i) do not apply. Nor does it appear to me to be reasonable to grant access to the appellant in another form or manner than that requested by him in circumstances where the alternative form of access does not provide him with the information he is seeking. I am therefore satisfied that neither the criteria outlined in article 7(3)(a)(i) nor 7(3)(a)(ii) have been satisfied and it is not open to the NTA to rely on article 7(3) in the circumstances of this case.

42. I must therefore go on to consider whether article 9(2)(c) of the Regulations provides the NTA with grounds to refuse the information requested.

Does article 9(2)(c) provide grounds for refusal?

43. Article 9(2)(c) of the AIE Regulations provides that "a public authority may refuse to make environmental information available where the request…concerns material in the course of completion, or unfinished documents or data".

44. Article 10 however provides for certain limitations on the ability of a public authority to refuse to make environmental information available which are as follows:

> "(3) The public authority shall consider each request on an individual basis and weigh the public interest served by the disclosure against the interest served by the refusal.
>
> (4) The grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by the disclosure.
>
> (5) Nothing in article…9 shall authorise a public authority not to make available environmental information which, although held with information to which article…9 relates, may be separated from such information."

45. There are therefore three principal issues I must address:

(i) whether or not the CAD files constitute "material in the course of completion, or unfinished documents or data" within the meaning of article 9(2)(c) of the AIE Regulations, having regard to the restrictive test mandated by article 10(4);
(ii) if so, whether the interest served by refusal of the requested information outweighs the public interest in its disclosure;
(iii) if so, whether there is any material contained in the CAD files which can be separated from the information subject to the article 9(2)(c) exception, in respect of which partial disclosure could be made.

Is article 9(2)(c) applicable in this case?

46. Article 9(2)(c) applies to "material in the course of completion" or to "unfinished documents or data". In its original decision, the NTA stated that the CAD files "continue[d] to be part of the documents in the deliberative process" and "continue[d] to be subject to change" and anticipated that the final version would be complete between June and July 2021. It did not provide any further detail as to the application of article 9(2)(c) nor did it refer to the public interest balancing test required by article 10 of the Regulations.

47. The NTA provided further detail in its internal review outcome, noting that "the drawings issued as part of the third round of public consultation for the BusConnects Dublin Core Bus Corridors were in the form of concept drawings which were abstracted as pdfs from AutoCAD drawings…superimposed on Ordnance Survey background maps". It noted that the existing Ordnance Survey background maps were "not accurate enough" and that it was necessary "to combine the details of…topographical surveys with adjustments to the Ordnance Survey information in order to derive mapping that is fully accurate". It went on to note that the "work of combining the Ordnance Survey information and the localised survey information is ongoing at present and will not be complete until June/July". It also noted that "while the drawings were abstracted as pdfs at a point in time for the purpose of producing the public consultation documents, those AutoCAD drawings continued to be worked on in terms of revising and amending the design of the schemes".

48. As I have outlined above, while the Regulations do not explicitly provide that the burden of proof rests with the public authority in relation to justifying a refusal to make information available, I consider that the scheme of the Regulations, and of the AIE Directive on which the Regulations are based, makes it clear that there is a presumption in favour of release of environmental information. Recital 16 of the Directive provides that "the right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases". It also makes it clear that "grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal" and that the public authority must provide reasons for its decision to the requester.

49. Article 9(2)(c) of the AIE Regulations transposes the exception contained at article 4(1)(d) of the Directive. The AIE Directive, in turn, aims to ensure that EU law is consistent with the provisions of the Aarhus Convention, as noted in Recital 5 of the Directive. The Aarhus Guide sets out that "… the mere status of something as a draft alone does not automatically bring it under the exception. The words 'in the course of completion suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the course of completion they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. 'In the course of completion' suggests that the document will have more work done on it within some reasonable timeframe."

50. However, I note that the exceptions provided for in article 4(1)(d) of the AIE Directive and article 9(2)(c) of the Regulations are wider than that contained in the Aarhus Convention. Both the Directive and the Regulations refer to "material in the course of completion or unfinished documents or data" whereas article 4(3)(c) of the Convention refers only to "material in the course of completion". As such, while the Aarhus Guide provides a useful starting point for my analysis, I must be mindful of the distinction between the Convention, the Directive and the Regulations. I am also conscious of the decisions of the Court of Justice of the European Union (CJEU) to the effect that while the Guide can be used an aid to interpretation, it is not binding (C-182/10 *Solvay and Others v Région Wallonne*, para 27).

51. It does appear that at the time of the appellant's request, the CAD files were in the course of completion. However, as the High Court has made clear in the *M50* case, my decision is made on a *de novo* basis and is therefore based on the circumstances of the case at the time I carry out my review. The NTA's initial submissions to this Office indicated that finalised drawings would be complete in September or October 2021. Its most recent submissions state that completion has taken longer than expected and is expected to occur in Q4 of 2022. It does therefore appear that the information requested by the appellant remains in the course of completion.

52. In addition, the exception contained at article 9(2)(c) of the Regulations and 4(1)(d) of the Directive also applies to "unfinished documents or data". The appellant also made it clear that what he was seeking was the unfinished CAD files, stating in his internal review request that he was "not seeking future versions of the CAD file – just the version which was published in pdf format". The appellant is therefore not seeking the final version of the CAD files, what he is seeking is the draft version in existence at the time of the November 2020 public consultation. I am satisfied therefore that the request relates to an unfinished document and the next step is to consider whether the interest served by refusal of the CAD files outweighs the public interest in their disclosure.

<u>Does the interest served by refusal of the CAD files outweigh the public interest in their disclosure?</u>

53. The fact that the requested information remains in the course of completion and concerns unfinished documents or data does not justify refusal in and of itself. As the CJEU made clear in *Land Baden-Württemberg* it is not enough for a public authority to simply refer to one of the exceptions provided for in article 4(1) of the AIE Directive. Instead "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 being relied upon". The CJEU also held that "the risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical" (para 69).

54. The interest sought to be protected by the exception provided for in article 9(2)(c) is set out in the European Commission's Explanatory Memorandum on the AIE Directive which notes:

> "It should…be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account" (see: Proposal for a Directive of the European Parliament and of the Council on public access to environmental information (COM/2000/0402 final - COD 2000/0169, Official Journal C 337 E, 28/11/2000, p.156 – 162).

This was reiterated by the CJEU in *Land Baden-Württemberg* in which it noted that "the exception concerning material in the course of completion or unfinished documents [and] the exception permitting access to internal documents to be refused [are] intended to meet the need of public authorities to have a protected space in order to engage in reflection and to pursue internal discussions" (see para 44).

55. In its internal review outcome, the NTA stated that "release of the information has the potential to lead to misinformation being provided on aspects of the proposals, given the inaccuracies in the Ordnance Survey background maps at the level of detail that might be interrogated using the AutoCAD files, which is contrary to the objective of the AIE Regulations". It went on to note that "the details at public consultation stage are meant to be indicative" and that "abstracting information at a level of detail beyond what was intended at the level of development for the public consultation stage would be misleading, give rise to misunderstandings and would not be in the public interest". The NTA repeated this position in submissions to my Office but did not provide any further reasoning for its submissions that release of the CAD files would be "contrary to the objective of the AIE Regulations" or "not in the public interest".

56. It did note in its submissions to my Office, however, that the BusConnects Dublin Programme will be acquiring land by way of compulsory purchase order from approximately 900 properties and that the NTA had been "at pains to avoid confirming exact measurements of the extent of the land take to individual land owners until the design work is fully complete and [it is] satisfied that the background mapping is fully accurate" in order to avoid "the type of misunderstandings and incorrect expectations that would occur with the early release of (likely) inaccurate information". The NTA submitted that release of AutoCAD drawing files prematurely was "certain to lead to misinterpretations of the level of land acquisition proposed in particular locations" as "AutoCAD file provision allows detailed measurements to be abstracted from drawings that haven't been prepared to a level of accuracy to support such interrogation". The NTA further submitted that "acquisition of private property by way of a compulsory purchase order is one of the significant powers that the State has, and enabling the dissemination of information that gives rise to

misunderstandings in such a fundamental exercise of power has to be avoided" as "it is quite conceivable that the circulation of such premature and incomplete information regarding likely land take may lead ultimately to the failure of the compulsory purchase order". The NTA therefore concluded that "the release of incomplete and unfinished designs and drawings in formats allowing interrogation beyond the purpose of the drawings at that point in time, is incompatible with the proper progression of public infrastructure projects and is not in the public interest".

57. As outlined above, the NTA was requested to provide additional information to my Office. This included a specific request to explain the basis for the NTA's position that release of the CAD files would be "contrary to the objective of the AIE Regulations" as well as a request to explain how release of the AutoCAD files "may lead ultimately to the failure of the compulsory purchase order". The request for submissions reminded the NTA of the test set out by the CJEU in *Land Baden-Württemberg* and asked it to set out in further detail why it considered it reasonably foreseeable that release of the AutoCAD files would specifically and actually undermine the CPO process, particularly if the NTA made it clear that the AutoCAD files were in draft form and did not represent finalised measurements. The response received from the NTA repeated its previous assertions that release of the AutoCAD drawings undermines the compulsory acquisition process as it runs the risk of incorrect conclusions being drawn as to the ultimate impact of the proposed acquisition. It submitted that compulsory acquisition can be both controversial and emotive and for this reason, the undertaking of compulsory acquisition has to be a "sensitively and carefully managed process". It explained that "the process used by the NTA and other public bodies is to provide an appropriate level of information at the different stages" such that "at the early stages of scheme development only indicative information can be provided". The submission continued as follows:

> "Providing AutoCAD drawings that allow millimetre interrogation of designs that haven't been developed to that level of accuracy, creates the potential for incorrect conclusions to be drawn from the preliminary layouts. To take an example, in urban areas where every millimetre of space counts, people may conclude, through interrogation of an AutoCAD drawing, that there is insufficient space for a car to be parked in a driveway. The issue may only be a matter of millimetres and is likely to be resolved with the availability of more accurate mapping information or further design refinement. However, the level of detail, and premature reaching of conclusions can identify impacts that simply won't ultimately occur and, consequently, engender a level of opposition to the proposal that prevents it from being further advanced.
>
> Ultimately, the premature release of such information would be likely to change the process of consultations, particularly where compulsory land acquisition is involved. Instead of early stage consultation, which currently is a very valuable part of the development and consultation process, public bodies would be likely to, instead, defer consultation until more developed and completed designs are prepared. This, in my view, would have a detrimental impact on public infrastructure development – the loss, or diminution, of early stage consultation would prevent key public input in shaping proposals.

While we do communicate with landowners at early stage consultations, that we are not in a position to confirm exact measurements of land acquisitions, the release of AutoCAD drawings undermines that position and runs the risk of incorrect conclusions being drawn as to the ultimate impact of the proposed acquisition."

58. I note, with some degree of concern, the NTA's suggestion that release of the requested information in this case "would be likely to change the process of consultations, particularly where compulsory land acquisition is involved". The NTA submitted that "instead of early stage consultation, which currently is a very valuable part of the development and consultation process, public bodies would be likely to, instead, defer consultation until more developed and completed designs are prepared" which "would have a detrimental impact on public infrastructure development" as "the loss, or diminution, of early stage consultation would prevent key public input into the shaping of the final proposals". To be clear, the entitlement to access environmental information does not depend on the existence of a public consultation process. If environmental information is held by or for the NTA as part of its preparations for the BusConnects project, a member of the public is entitled to request that information under the AIE regime whether or not the NTA has decided to engage in public consultation in connection with that project. It is concerning that the NTA appear to be suggesting that it, or others, might refrain from engaging in public consultation were it required to release the information requested under AIE however this appears to be based on a mistaken assumption that this would mean it would not be required to provide access to environmental information on projects which were not subject to such consultation. Access to environmental information may only be refused in circumstances where the limited grounds for refusal set out in the AIE Regulations and Directive apply and the interest to be protected by the refusal outweighs the public interest in disclosure. Not only do the NTA's assertions fail to meet the test set out by the CJEU in *Land Baden-Württemberg*, which requires that any risks to the interest sought to be protected must be reasonably foreseeable rather than purely hypothetical, those assertions would appear to be based on a fundamental misunderstanding of the requirements of AIE.

59. It is not clear to me that there are any reasonably foreseeable risks to the interests sought to be protected in this case by refusal of the CAD files. While I accept that the exception contained at article 9(2)(c) of the Regulations and article 4(1)(d) of the Directive recognises the importance of affording public authorities the necessary space to think in private, where appropriate, pdf documents showing similar information were made available for public consultation i.e. for the specific purpose of obtaining feedback from the public on the proposed design of the BusConnects project. Again, I accept that the CAD files contain more detailed information than that contained in the pdf files but I consider that any adverse impact on the project along the lines suggested by the NTA could be mitigated by making it clear that the drawings were not final and that topographical surveys had yet to be undertaken such that the measurements outlined in those drawings were not fully accurate. Indeed, this was already being done by the NTA in relation to the pdf files and I note that in its internal review outcome, the NTA drew the appellant's attention to the fact that the index map in the public consultation document specifically notes that "the Preferred Route shown on the following drawings is indicative only and is subject to change following consultation and as part of the design development process". The Public Consultation Brochure for the Rathfarnham

Corridor also explicitly states that "the attached Maps in this Brochure indicate Proposed New Boundaries (Possible Land Acquisition) represented by broken red lines. These boundaries are indicative of potential areas for permanent CPO, and are not yet finalised. As detailed plots are finalised the designers will be continuing to seek to meet those with an interest in the impacted areas". Indeed, it is arguably implicit that plans being put to public consultation are not finalised plans. Neither am I satisfied, on the evidence before me, that there is a reasonably foreseeable risk that release of the information requested would undermine the CPO process as suggested by the NTA.

60. On the other hand, there would appear to be a clear public interest in releasing the CAD files. It is interesting that the NTA noted, in its internal review, that the AutoCAD drawings continued to be worked on in terms of revising and amending the design of the schemes as "design details have been, and continue to be, revised both in response to feedback from the consultation submissions and as a central part of the design development process". This suggests, as one would assume, that one of the purposes of the public consultation is to obtain feedback from the public on the proposed design of the BusConnects project so that this feedback can be considered and incorporated if that is appropriate or desirable. Although the appellant is not obliged to state his interest in the information, he has made it clear that one of the reasons he wished to be provided with the CAD files was to obtain further information on the proposed measurements of cycle lanes so that he could ascertain whether these were in line with the target widths which he submits were set out in the BusConnects programme and the NTA's Greater Dublin Area Cycle Network Plan. This is entirely in line with the purpose of the AIE Regulations and the Directive which, as set out in Recital 1 of the Directive, recognises that "increased public access to environmental information and the dissemination of such information 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". The AIE regime recognises a very strong public interest in openness and transparency in relation to environmental decision-making. There is undoubtedly a strong public interest in transparency as to how public authorities, such as the NTA, carry out their functions with regard to environmental factors and I consider that public interest to be the outweighing factor in this case.

61. I am therefore satisfied that article 9(2)(c) does not provide the NTA with grounds to refuse the information requested and it is therefore unnecessary for me to consider the question of partial disclosure.

Is the NTA justified in refusing the appellant's request having regard to the terms of its licensing arrangement with OSI?

62. In its most recent submissions to my Office, the NTA submits that it cannot release the requested information to the appellant as to do so would breach its licensing agreement with OSI in relation to the mapping information provided on the drawings. It explains that the drawings of the proposed BusConnects scheme contain mapping information which provides details of roads, footpaths, boundaries, buildings and various other features inherent in the mapping. This mapping

information comes from data provided by OSI. It submits that this information is provided by OSI under licence and that OSI are the copyright owners. It goes on to submit that under the terms of the licence, NTA is permitted to use printed versions of the maps for certain purposes but is not permitted to provide the digital mapping information to third parties except in very restricted circumstances.

63. As I have outlined above, a refusal to provide environmental information must be based on one of the grounds for refusal contained in the Regulations and the Directive. No provisions of the Regulations or Directive have been cited by the NTA. However, article 9(1)(d) of the Regulations does provide that "a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect…intellectual property rights". The NTA has however made no attempt to demonstrate the basis on which it considers the intellectual property rights of OSI would be adversely impacted or to set out the basis on which it considers that preventing such adverse impacts outweighs the public interest in disclosure of the information sought.

64. Nor indeed did the NTA provide a copy of the licensing agreement or make any attempt to seek the views of OSI before submitting that it was precluded from releasing the information. It was therefore left to my Office to notify the OSI of the NTA's position and seek its views as to the potential release of the information. The OSI responded to my Office indicating that it did not believe that release of the OSI files in this case would adversely affect the Government of Ireland or OSI's copyright in the information requested, provided that those files were released with a clear statement that release was without prejudice to copyright. It also noted that it "does not regard the release of the files in question by NTA as a result of a legal obligation falling on it as a licence holder, on foot of a statutory decision made by the Commissioner which requires release, as a breach of any condition of the licence agreement between OSI and the NTA".

65. In circumstances where the OSI does not object to the release of the information sought and where the NTA has not complied with its obligations under article 9(1)(d) and article 10 to establish a "reasonably foreseeable" risk of any adverse impact to intellectual property rights and to establish that the interest in refusal outweighs the public interest in disclosure, I am satisfied that there is no basis for a finding that refusal of the information requested is justified on the basis of article 9(1)(d) of the Regulations.

Decision

66. Having carried out a review under article 12(5) of the AIE Regulations, I annul the NTA's decision and direct release of the information requested. I also direct the NTA to ensure that release of the information is accompanied by a clear statement that such release is without prejudice to the OSI's copyright.

Appeal to the High Court

67. 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.

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Ger Deering
Commissioner for Environmental Information

20 October 2022