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 CEI/18/0029

Date of decision: 18 December 2019

Appellant: Right to Know CLG

Public Authority: The Department of Culture, Heritage and the Gaeltacht (the Department)

Issue: Whether the Department was justified in refusing access to certain records concerning the impact of wildlife of the Heritage Bill providing for the reduction of the closed period for the cutting and burning of vegetation

Summary of Commissioner's Decision: Having carried out a review in accordance with article 12(5) of the AIE Regulations, the Commissioner varied the decision of the Department. He found that the Department was justified in refusing access to a record of legal advice under article 8(a)(iv) of the AIE Regulations on the basis of legal professional privilege. He found that article 8(a)(iv) was also applicable in part to two records containing Memoranda for Government but that both records and the related Government Decision at issue qualified as internal communications that were subject to refusal under article 9(2)(d) of the AIE Regulations. Taking into account the public interest served by disclosure, and also applying article 10 of the AIE Regulations, the Commissioner found it appropriate to make parts of the internal communications available to the appellant.

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

In a request dated 11 July 2018, the appellant sought access to all assessments, studies, advices, briefings or reports of whatever nature generated by the National Parks and Wildlife Service (NPWS) concerning the impact on wildlife of the Heritage Bill providing for the reduction of the closed period for the cutting and burning of vegetation. I note that the Heritage Bill 2016 was enacted a week later and became the Heritage Act 2018. Section 7 of the Heritage Act 2018 amended section 40 of the Wildlife Acts by providing that the Minister may make regulations allowing for the burning and cutting of vegetation during certain times within what is otherwise required to be the closed period for such activities in order to protect birds and wildlife during the nesting season.

In a decision dated 9 August 2018, the Department identified 18 records as relevant to the request and granted access to 14 of the records in full. A record (5) containing legal advice was refused on the basis of article 8(a)(iv) of the AIE Regulations in conjunction with section 31(1)(a) of the Freedom of Information (FOI) Act 2014. Access to the remaining three records (14, 15, and 17) was refused on the basis of article 8(a)(iv) of the Regulations in conjunction with section 28(1) of the FOI Act.

On 9 August 2018, the appellant requested an internal review of the Department's decision challenging the reliance on the provisions of the FOI Act and the failure to address the public interest. On 6 September 2018, the Department affirmed its original decision, but in doing so, it made the following comments regarding the public interest:

> "With regard to Record 5 and the public interest, I consider that there would have to [be] exceptional public interest factors at play before legal professional privilege could be set aside. Public interest factors in favour of release of this record include openness and transparency in matters of government and the ability of the public to understand the basis for decision making in matters affecting the environment. However public bodies need to be reasonabl[y] certain that they can seek and obtain legal advice in confidence and I do not think that the factors in favour of release are sufficient to justify the setting aside of legal professional privilege.
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> With regard to Records 14, 15 and 17 and the public interest, again I consider that there would have to be exceptional public interest factors at play before the exemptions around records relating to meetings of the Government could be set aside. Public interest factors in favour of release of these records would again include openness and transparency in matters of government and the ability of the public to understand the basis for decision making in matters affecting the environment. However Cabinet confidentiality is a key principle underpinning good governance and is essential in supporting the exercise of collective responsibility by Government. The factors in favour of release do not justify the setting aside of the exemption applied by the original decision maker in regard to these records."

The appellant appealed to my Office on 12 September 2018.

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 Department. I have also had regard to: the Guidance provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations; Directive 2003/4/EC, upon which the AIE Regulations are based; The Aarhus Convention: An Implementation Guide (Second edition, June 2014) [the Aarhus Guide] relating to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is more commonly known as the Aarhus Convention; and also the text of the Aarhus Convention itself.

Scope of the Review

My review in this case is concerned solely with the question of whether the Department was justified in refusing access to the following records, as identified in the Department's schedule of records:

- Record 5: Advice from the Department's legal adviser - May 2015
- Record 14: Draft Memorandum for Government - November 2015
- Record 15: Final version of Memorandum for Government - 17 November 2015
- Record 17: Government Decision - 24 November 2015.

Preliminary Matters

As it has done in previous cases, the appellant objects to the policy of this Office not to provide for an exchange of submissions between parties to a review. However, the AIE Regulations, the AIE Directive, and the Aarhus Convention do not prescribe the procedures that are to be adopted by me or my Office. Thus, it is not an express requirement under AIE that I invite submissions from the parties to a review in the first instance. However, as I have previously explained, I am guided in my approach to my procedures by the experience of the Office of the Information Commissioner, as was no doubt expected by the Oireachtas when it decided to make the Commissioner for Environmental Information the person who holds the office of Information Commissioner. It is relevant to note that my approach as Information Commissioner to the exchange of submissions was upheld by the High Court in *The National Maternity Hospital v The Information Commissioner* [2007] 3 IR 643 (*The National Maternity Hospital*), available here, and *Grange v The Information Commissioner* [2018] IEHC 108 (*Grange*), available at www.courts.ie.

However, my procedures, which are set out in my Office's Procedures Manual (available at www.ocei.ie) provide for the parties to be notified of material issues arising for consideration in a review. In this case, no new material issues were raised by the submissions received by my Office, but my Investigator notified the appellant that article 9(2)(d) of the AIE Regulations may be relevant to my review in light of the findings of the High Court in *An Taoiseach v. Commissioner Environmental Information* [2010] IEHC 241 and *Irish Press Publications Ltd. v. Minister for Enterprise and Employment* [2002] IEHC 104. As article 12(5) of the AIE Regulations authorises me to require the public authority to make available environmental information to the applicant only "where appropriate", I consider that I must necessarily have regard to any relevant facts and circumstances that are before me in a review, including applicable reasons for refusal other than those expressly relied upon by the public authority in its decision.

I also note that the appellant objects to the incorporation of the FOI Act 2014 into article 8(a)(iv) of the AIE Regulations. Article 8(a)(iv) provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts). Noting that the FOI Acts 1997 and 2003 have now been repealed, the appellant states: "Neither the NPWS nor the Commissioner can make law and must only apply the law as is made by the EU and Irish legislatures." It also disputes that the FOI Act provides for the confidentiality of proceedings in any event.

I have accepted in numerous previous cases that article 8(a)(iv) effectively the imports the exemptions under the FOI Act into the consideration of whether the confidentiality of

proceedings of public authorities is otherwise protected by law, and I find no reason to depart from this approach. Section 26(2)(f) of the Interpretation Act 2005 provides: "Where an enactment ('former enactment') is repealed and re-enacted, with or without modification, by another enactment ('new enactment'), . . . a reference in any other enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read as a reference to the provisions of the new enactment relating to the same subject-matter as that of the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be disregarded in so far as is necessary to maintain or give effect to that other enactment." I take this to mean that article 8(a)(iv) should be read as referring to the FOI Act 2014 insofar as it contains provisions relating to the same subject-matter as that of the FOI Acts 1997 and 2003.

Moreover, I note that the FOI Act's counterpart on the European level is Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. The exceptions set out in Article 4 of Regulation (EC) No 1049/2001 have been incorporated into Regulation (EC) No. 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matter to Community institutions and bodies, though the grounds for refusal must be interpreted in a restrictive way, taking into account the public interest served by disclosure (see Case C-57/16 P *ClientEarth v. Commission*). In Case C-673/13 P *Commission v Stichting Greenpeace Nederland and PAN Europe* (*Stichting Greenpeace*), available here, the Court of Justice of the European Union (CJEU) accepted that the commercial interests exception in Regulation 1049/2001 applied to information that had been found by the General Court of the European Union to qualify as information on emissions into the environment. The CJEU stated at paragraph 81:

> "On the other hand, while, as set out in paragraph 55 of the present judgment, it is not necessary to apply a restrictive interpretation of the concept of 'information [which] relates to emissions into the environment', that concept may not, in any event, include information containing any kind of link, even direct, to emissions into the environment. If that concept were interpreted as covering such information, it would to a large extent deprive the concept of 'environmental information' as defined in Article 2(1)(d) of Regulation No 1367/2006 of any meaning. Such an interpretation would deprive of any practical effect the possibility, laid down in the first indent of Article 4(2) of Regulation No 1049/2001, for the institutions to refuse to disclose environmental information on the ground, inter alia, that such disclosure would have an adverse effect on the protection of the commercial interests of a particular natural or legal person and would jeopardise the balance which the EU legislature intended to maintain between the objective of transparency and the protection of those interests. It would also constitute a disproportionate interference with the protection of business secrecy ensured by Article 339 TFEU [the Treaty on the Functioning of the European Union]."

I note that, when the EU adopted the Aarhus Convention, it lodged a declaration clarifying that it would apply the Convention with the framework of the existing and future rules on access to documents. However, as the CJEU explained in Case C-612/13 P *ClientEarth v. European Commission*, this is because "the reference, in Article 4(1) of the Aarhus Convention, to national legislation indicates that that convention was manifestly designed with the national legal orders in mind".

Thus, it appears that the incorporation of exceptions or exemptions contained in freedom of information legislation is not considered by the CJEU to be incompatible with the AIE Directive, and, moreover, that the policy considerations of the relevant legislature may be regarded as relevant in interpreting AIE provisions. I further note that the CJEU indicated in Case C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany*, available here, that even a rule providing generally that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities may be sufficient for the purposes of Article 4(2)(a) of the AIE Directive, provided that the concept of "proceedings" is clearly defined under national law. In Ireland, the unauthorised disclosure of official information is prohibited under the Official Secrets Act 1963, as amended by section 51 of the FOI Act. Moreover, in *Mahon v. An Post Publications* [2007] IESC 15, Fennelly J indicated that the "private proceedings" or "internal workings" of any individual or organisation may generally be entitled to confidentiality. The FOI Act and AIE Regulations authorise disclosure of official information notwithstanding the Official Secrets Act and the general entitlement to

confidentiality that may otherwise apply but subject to the exemptions and exceptions specified. In essence, Ireland has preserved the confidentiality of "proceedings" that are covered by the FOI exemptions or otherwise by law, provided that the requirements for such protection are met, including in relation to the public interest. This is not to suggest that reference to national law may be used to interpret the Regulations in a manner that is inconsistent with the Directive. As the Supreme Court explained in *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (O'Donnell J.), the provisions of the Regulations "must be understood as implementing the provisions of the Directive 2003/4/EC (and indirectly the [Aarhus] Convention) and . . . ought not to go further (but not fall short of) the terms of that Directive." However, having regard to the terms of the Directive and the Convention in light of the relevant jurisprudence of the CJEU, I do not believe that it was generally the intention of the Directive or the Convention to undermine the protections afforded to confidentiality under national law.

Analysis and Findings

The grounds for refusal of a request for environmental information are set out in articles 8 and 9 of the AIE Regulations, but any proposed refusal is subject to the provisions of article 10 of the Regulations. Article 10(1) states: "Notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment". Article 10(3) of the Regulations requires public authorities to consider each request on an individual basis and to weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest. I take article 10(4) to mean, in line with the Minister's Guidance, that there is generally a presumption in favour of the release of environmental information. In addition, I note that article 10(5) clarifies, in effect, that a request should be granted in part where environmental information may be separated from other information to which article 8 or 9 applies.

Record 5

Record 5 is a note of legal advice, dated 8 May 2015, from the Department's legal adviser regarding section 40 of the Wildlife Act 1976 and section 70(2) of the Roads Act 1993. I am satisfied that the record contains a confidential communication for the purpose of giving legal advice and that it would be exempt from production in proceedings in a court on the ground of legal professional privilege.

I accept that legal professional privilege is the type of claim for confidentiality that is protected by law as envisaged in article 8(a)(iv). It is a common law rule that has also been incorporated into section 31(1)(a) of the FOI Act 2014 (previously section 22(1)(a) of the FOI Acts 1997 to 2003). In weighing the public interest served by disclosure against the interest served by refusal, I note the AIE regime recognises a very strong public interest in maximising openness in relation to environmental matters so that an informed public can participate more effectively in environmental decision-making. The strong public interest in openness and transparency is particularly relevant in this case given that the legislation concerned affects or is likely to affect land, landscape, biodiversity, as well as the state of human health and safety inasmuch as they may be affected by these environmental elements. On the other hand, I recognise that legal professional privilege is regarded as a cornerstone of the administration of justice. In Martin &

Doorley v. Legal Aid Board [2007] 2 IEHC 76, for example, the High Court held that "legal professional privilege exists and has been elevated beyond a mere rule of evidence to 'a fundamental condition on which the administration of justice as a whole rests'". Accordingly, I agree with the Department that there would have to be exceptional public interest factors at play, in favour of disclosure, before legal professional privilege could be set aside. In this case, I note that the Minister's review of section 40 of the Wildlife Acts included a public consultation period. The documents released by the Department include submissions and notes to the Minister discussing the background and reasons for the proposal to amend the legislation, including reference to concerns about road safety and the potential conflict with Roads Act. In light of the information that has been made publicly available by the Department regarding the amendment of section 40, including reference to concerns about road safety, I am satisfied that the public interest served by disclosure of the information protected by legal professional privilege does not outweigh the interest served by refusal and that article 8(a)(iv) therefore applies in full to the record 5.

Records 14, 15, and 17

Record 14 is a draft Memorandum for Government dated November 2015 regarding the proposed amendment of section 40 of the Wildlife Act. Record 15 consists of internal cover notes, a further draft of the Memorandum for Government that was submitted to the Minister for approval and which refers generally to the Ministerial observations returned, and the final version of the Memorandum for Government dated 20 November 2015 that includes a restatement of the observations from other Cabinet Ministers. Record 17 is a record of the Government Decision dated 24 November 2015 that was made in relation to the Memorandum dated 20 November 2015.

In its submissions to this Office, the Department continues to rely on Cabinet confidentiality in refusing access to the records. It states that the confidentiality of Cabinet discussions under Article 28 of the Constitution was upheld by the High Court in *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241 (O'Neill J) and *Right to Know CLG v An Taoiseach* [2018] IEHC 371 (Faherty J). It considers that the Department was correct to apply article 8(a)(iv) of the AIE Regulations to the records, because it relates to the confidentiality of the proceedings of public authorities such as the Department in the context of information relating to meetings of the Government. It suggests, however, that article 8(b) of the AIE Regulations may have been "more appropriate" having regard to the 2010 High Court judgment. The Department acknowledges that openness and transparency may be factors supporting the public interest in releasing the records because of the understanding they would provide regarding the decision to amend section 40 of the Wildlife Acts. However, it maintains that Cabinet confidentiality is a key and fundamental responsibility of Government, including Decisions of Government, as reflected by the High Court judgments. It does not consider that there is sufficient justification for overriding the public interest in upholding Cabinet confidentiality in the circumstances of this case.

Confidentiality of proceedings

The judgment of the High Court in the 2010 *An Taoiseach* case involved consideration of a single document that recorded a discussion held at a Cabinet meeting on Ireland's greenhouse gas

emissions. In considering whether Cabinet meetings qualify for protection under article 8(a)(iv) and its equivalent provision under the Directive, Article 4(2)(a), O'Neill J stated:

> "Meetings of the government are but one aspect of its constitutional role and its many and varied functions as described briefly in the Constitution and set out in great details in a vast array of legislation. To describe meetings of the government as 'the proceedings' of the government as the public authority in questions seems to me somewhat artificial and strained. Applying the natural and ordinary meaning of these terms as used in Art 4.2[a] in the Directive, would in my opinion result in a conclusion that Art 4.2[a] did not and was not intended to apply to meetings of the government such as and in so far as these are provided for in our Constitution and laws."

However, he held that discussions at meetings of the Government are "internal communications" within the meaning of Article 4(1)(e) of the Directive. He explained:

> "On the other hand meetings of the government are the occasions when as provided for in Art 28.4.2 of the Constitution the members of the government come together to act as a collective authority, collectively responsible for all departments of State. Meetings ofthe government are the constitutionally mandated means or system of communication between its members for the purpose of discharging their collective responsibility. These meetings and their records are required by the Constitution to be private and confidential unless otherwise directed by the High Court under Art 28.3 of the Constitution. Whereas many aspects of the functions of the government are essentially public and external in nature, meetings of the government are quintessentially private and internal to the overall functions of the government. Thus in my judgment, this constitutionally mandated form of communication between members of the government can only be regarded as the internal communications of a public authority."

With respect, I note that Article 10.4 of the Treaty of the Functioning of the European Union (TFEU) provides: "The proceedings of the meetings [of the Governing Council of the European System of Central Banks (ESCB)] shall be confidential." Thus, it does not seem to be inconsistent with EU law for the term "proceedings" to apply to the meetings of a governing body. However, the Governing Council of the ESCB is not same as the Government of a Member State such as Ireland. In any event, in the 2018 judgment of the High Court in *Right to Know v An Taoiseach*, Faherty J did not disagree with O'Neill J's conclusion that article 8(a)(iv) of the AIE Regulations did not apply to Government discussions. Therefore, while record 17,

which a record of an actual Government meeting, would qualify for exemption in full under section 28(1)(b) and at least in part under section 28(2) of the FOI Act, I find that it does not fall within the ambit of article 8(a)(iv) of the AIE Regulations.

However, both judgments of the High Court were concerned with discussions held at Cabinet meetings, not the process of preparing for such meetings as set out in the Cabinet Handbook. I accept that the process undertaken by a Department of State in preparing Memoranda for Government in accordance with the Cabinet Handbook may qualify as "the proceedings of public authorities" for the purposes of article 8(a)(iv) of the Regulations and Article 4(2)(a) of the Directive. The confidentiality of Memoranda for Government, including Memoranda in preliminary or draft form, is protected under section 28(1) of the FOI Act and also under Article 28.4 of the Constitution insofar as disclosure could undermine the collective responsibility of the Government or the confidentiality of discussions at meetings of the Government. I will address the public interest as required under article 10 of the Regulations below.

Although the term "Government records" is often used in a manner that encompasses Memoranda for Government, a Memorandum for Government is not itself a "record of the Government" in the sense of a record that is generated at a meeting of the Government or on foot of such a meeting. Memoranda for Government reflect the positions that were taken by the Ministers prior to the relevant Cabinet meetings, but they do not record the actual discussions that subsequently took place, nor for the most part do they contain information that reveals, or from which may be inferred, the substance of the whole or part of any statement that was made at the actual meetings. Such records are described by Maeve McDonagh in her book, *Freedom of Information Law* (2d ed., 2006), at p. 167, as relating to the "pre-deliberative stage of the Cabinet process, that is, the part of the Cabinet process leading up to the making of a Cabinet decision". The distinction between a Memorandum for Government and a record of the Government is reflected in section 28 of the FOI Act itself, with Memoranda being exempt under subsection (1)(a) whereas records of the Government are exempt under subsection (1)(b) and, depending on the contents and circumstances, may also be subject to mandatory, indefinite refusal under section 28(2). Thus, a Memorandum for Government does not have the same constitutional implications as, and is generally entitled to less protection than, the type of Government record that was at issue in the 2010 High Court judgment.

Section 28(3) reflects the determination by the Oireachtas that it is constitutionally permissible to disclose factual information relating to a decision of the Government that has been published to the general public or records relating to a decision of the Government that was made more than 5 years before the receipt of the FOI request concerned, provided that the record concerned is not subject to the mandatory, indefinite exemption provided for under section 28(2) for statements made at a meeting of the Government. While I take it that the reference to "FOI request" may be read as referring to the AIE request concerned in the context of considering whether section 28 applies by virtue of article 8(a)(iv) of the AIE Regulations, I note that the request in this case was made less than three years after the relevant decision of the Government was made. However, it is a matter of public record, of course, that the Government decided to amend section 40 of the Wildlife Acts, and indeed the amendment was effected by section 7 of the Heritage Act. I therefore find that article 8(a)(iv) of the Regulations does not apply to the Memoranda for

Government at issue in this case, i.e. records 14 and 15, insofar as they contain factual information.

Internal communications

For the sake of clarity, I also note that I do not accept that article 8(b) applies in this case as the records at issue would not disclose "discussions" at a meeting of the Government *per se*. However, given the Department's stated wish on internal review and in its submissions to withhold the records on the basis of Cabinet confidentiality, and having regard to the guidance provided by the High Court in the 2010 and 2018 judgments, both of which the appellant is aware of, I consider it appropriate also to consider whether article 9(2)(d) of AIE Regulations applies in this case. Both judgments reflect the view of the Court that article 8(b) may be viewed as a subset of article 9(2)(d), which provides that a public authority may refuse to make environmental information available where the request concerns internal communications of public authorities, taking into account the public interest served by the disclosure.

The Memoranda for Government, records 14 and 15, were communicated within the Department and to the Cabinet Ministers. As the High Court recognised in *Irish Press Publications Ltd. v. Minister for Enterprise and Employment* [2002] IEHC 104, such Memoranda would have formed the basis for the discussion held at the relevant meeting of the Government. Both the draft and final versions of the Memoranda include information about certain proposals that the Minister intended to make at the meeting in reference to the Attorney General and the Office of the Attorney General (AGO). Record 15, as noted above, includes information about the observations made by other Government Ministers. Record 17 is a record of the actual meeting and includes information about statements made at the meeting. In the circumstances, I find that all three records qualify as internal communications that are subject to refusal under article 9(2)(d).

In relation to the public interest, I agree that exceptional factors favouring release would need to be present in order for the disclosure of any information that could undermine the collective responsibility of the Government or the confidentiality of discussions at meetings of the Government to be regarded as appropriate. As I stated in Case CEI/18/0010 (Áine Ryall and the Department of the Taoiseach) in relation to a Memorandum for Government:

> "I take the view that while disclosure of the memo could not reveal exactly what was said at the relevant Cabinet meeting, it would reveal the views held by Members of the Cabinet when the oral discussions commenced. I therefore accept that the information in the memo is closely related to the later Cabinet discussions. I recognise the very significant public interest in maintaining the confidentiality of such oral discussions at meetings of the Cabinet, due to the desirability of Cabinet Members feeling able to exchange their views in a full, free and frank manner during the process of preparing the memo, before the oral discussion at a Cabinet meeting where collective decisions are to be made."

However, as I indicated in Case CEI/18/0010, "internal communications", including those related to Cabinet discussions, can span a spectrum in terms of the sensitivity of the material, with "factual background information lying at the less sensitive end of that scale". As noted above, the Memoranda for Government at issue in this case include factual information that would be subject to release under section 28(3) of the FOI Act. The Aarhus Guide also suggests that the internal communications refusal ground should not usually be applied in relation to "factual materials". Moreover, apart from the information highlighted in the paragraph above (the proposals in relation to the AGO, the Ministerial observations, the information about statements made at the meeting), the contents of the Memoranda for Government have in essence been disclosed in the other records released by the Department in response to the appellant's request, albeit in a different format. I refer here, for instance, to record 13 (Submission to Minister - Oct 2015) and the information it provides regarding the background to the proposed amendments, the review of section 40, and the conclusions and recommendations discussing the changes proposed and the intended engagement with stakeholders. I also do not see that any information of a confidential or otherwise sensitive nature has been included in the cover notes contained in record 15.

I further note that the Minister made an announcement on 23 December 2015, available here, about the relevant legislation that she intended to include in the Heritage Bill. Certain information about the Government approval sought in relation to the intended legislation has also been disclosed in the records already released. It has now been almost four years since the Heritage Bill was published and over one year since it was enacted. In the circumstances, it does not seem to me that disclosure of the text of decision sought by the Minister and made by the Government in November 2015 could undermine the collective responsibility of the Government or Cabinet confidentiality. Weighing in favour of disclosure is the very strong public interest in openness and transparency in relation to the decision to amend a very significant piece of environmental legislation. While the partial release of the records would not undermine Cabinet confidentiality, it would give a true insight into the working of government in relation to environmental decision-making. Therefore, taking into account the public interest served by disclosure and also applying article 10 of the Regulations, I consider it appropriate to require the Department to make parts of records 14, 15, and 17 available as follows:

Record 14
- Heading to "life during the nesting season";
- Sections 2 to 6 apart from the concluding paragraph of section 4.

Record 15
- The cover notes;
- The stamp;
- Section 1 of the draft: Decision Sought to "life during the nesting season";
- Sections 2 to 6 of the draft Memorandum apart from the concluding paragraph of section 3(a);
- Heading of the final to "life during the nesting season";
- Sections 2 to 6 of the final version of the Memorandum apart from the concluding paragraph of section 3(a).

Record 17: Heading to "the nesting season; and".

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I vary the Department's decision in this case as follows:

- I find that the Department was justified in refusing access to record 5 under article 8(a)(iv) of the Regulations;
- I find that article 8(a)(iv) is also applicable in part to the Memoranda for Government at issue (records 14 and 15);
- I find records 14, 15, and 17 qualify as internal communications that are subject to refusal under article 9(2)(d) but that the records should be released in part in the public interest as set out above.

Appeal to the High Court

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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Peter Tyndall
Commissioner for Environmental Information
18 December 2019