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-124513-C1V0F9

Date of decision: 9 November 2023

Appellant: Ken Foxe

Public Authority: Data Protection Commission (DPC)

Issue: Whether the DPC is entitled to refuse access to information on the basis that (i) it is not "environmental information" within the meaning of article 3(1) of the AIE Regulations; or (ii) articles 8(a)(iv) and/or 9(2)(d) of the AIE Regulations provide it with grounds for refusal.

Summary of Commissioner's Decision: The Commissioner found that the information at issue was "environmental information" and that neither article 8(a)(iv) nor 9(2)(d) of the AIE Regulations provided grounds for its refusal. He directed release of the information on that basis.

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 29 March 2022, the appellant emailed the Data Protection Commission (DPC) seeking the following:

   (i) a copy of any application or inquiry by a local authority with regard to the use of CCTV for the purposes of targeting illegal dumping or environmental crime;
   (ii) the response that issued in each case from the DPC.

   He indicated that his request covered the period from 1 September 2021 to the date of his request.

2. On 1 April 2022, the DPC contacted the appellant requesting "further clarity in terms of what you are requesting in terms of 'any application' specifically as this office would not directly review applications relating to the above from local authorities". The appellant responded indicating that if there were no applications, he was "seeking inquiries, or cases where a council has looked for advice/opinion from the DPC".

3. The DPC issued its original decision on 28 April 2022. It identified information held by it which was "potentially relevant to the request" consisting of "communications between Laois County Council and the DPC on March 14 2022 where representatives from [the DPC] met the Laois County Council Joint Policing Committee". That meeting appears to have occurred following a request by Laois County Council to the DPC for advice on the use of CCTV to target crimes including illegal dumping.

4. The DPC refused the request on the basis that the information identified did not come within the definition of "environmental information" in article 3(1) of the AIE Regulations. Without prejudice to that position, it also indicated its belief that article 8(a)(iv) would provide it with grounds to refuse the information even if it were "environmental information". It also referred to articles 9(2)(c) and 9(2)(d) of the AIE Regulations although it "did not consider it necessary to set out…reasons in relation to these exceptions at this point, having regard to [the] principal decision that the request does not relate to environmental information and, without prejudice to this position, that the exceptions contained in article 8(a)(iv) of the AIE Regulations applies".

5. The appellant sought an internal review on 28 April 2022.

6. The DPC provided him with the outcome of its internal review on 30 May 2022 which affirmed its original decision that the information requested was not "environmental information" and that article 8(a)(iv) would, in any event, provide it with grounds for refusal of the information. The internal review decision made no reference to articles 9(2)(c) or 9(2)(d) of the AIE Regulations.

7. The appellant appealed to my Office on 3 June 2022.

8. 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 DPC. I have also examined the contents of the records at issue and the response received from Laois County Council to limited queries which were put to it by the Investigator. In addition, I have had regard to:

- the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance);
- Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
- the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
- the Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide');
- the judgments of the Superior Courts 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*) and *Right to Know v Commissioner for Environmental Information & RTÉ* [2021] IEHC 353 (*RTÉ*);
- 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-279/12 *Fish Legal and Shirley v Information Commissioner* (*Fish Legal*); C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat* (*Mecklenburg*), C-316/01 *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen* (*Glawischnig*), C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany* (*Flachglas*); C-60/15 *Saint-Gobain Glass Deutschland GmbH v European Commission* (*Saint Gobain*) and C-619/19 *Land Baden-Württemberg v DR* (*Land Baden-Württemberg*).

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

Scope of Review

9. The DPC has refused the information requested in this case on the basis that it does not consider it to be "environmental information" within the meaning of article 3(1) of the AIE Regulations.

10. In the course of the investigation, the Investigator also identified further information which she considered to come within the scope of the appellant's request. The DPC disagrees with this consideration and it is therefore necessary for me to determine whether this additional information comes within the scope of the request and, if so, whether this information along with the information identified by the DPC is "environmental information".

11. If I consider any of the information at issue to constitute "environmental information", it will then be necessary for me to consider whether article 8(a)(iv) or article 9(2)(d) provides the DPC with grounds to refuse that information. Although the DPC did not refer to article 9(2)(d) in its internal review decision, it relied on that article in submissions to this Office.

Analysis and Findings

12. Before I consider whether the information requested is "environmental information", I must consider whether additional information identified by the Investigator as potentially coming within the scope of the request, is in fact relevant information for the purpose of this appeal.

Information within scope

13. The DPC initially identified two documents as coming within the scope of the request. These documents were provided to this Office, along with submissions from the DPC, on 22 July 2022. As it is not the function of this Office to disclose information, I will not refer to the content of the information in detail but I will note that the first document consists of a query from a member of Laois County Council's Joint Policing Committee (Document 1) while the second consists of the response provided by the DPC to that query at a meeting of the Joint Policing Committee on 14 March 2022 (Document 2).

14. The Investigator queried whether the first document had been extracted from another document and whether any additional documentation was held by or for the DPC in relation to the meeting of 14 March 2022 including minutes of that meeting or any further correspondence relating to it.

15. The DPC responded on 26 April 2023, indicating that Document 1 had been extracted from a letter from Laois County Council (the Council) to the DPC informing it of the date, time and location of the meeting and attaching a list of questions submitted by members of the Joint Policing Committee for consideration in advance of the meeting. I will refer to this more complete document as the Complete Version of Document 1. The DPC submitted that only one of the questions contained in the Complete Version of Document 1 related to the use of CCTV for the purposes of targeting illegal dumping or environmental crime and that the remainder of the questions related to the use of CCTV generally meaning they were not within the scope of the request.

16. The DPC also provided an additional letter from the Council which contained the original invitation to attend the Joint Policing Committee meeting (Document 3). It argued that this letter did not fall within the scope of the request as it refers to a meeting regarding the use of CCTV footage in the prosecution of crime generally, with no reference to dumping or environmental crime.

17. I do not agree with the DPC's contention that the original invitation from the Council (i.e. Document 3) does not fall within the scope of the appellant's request. The appellant sought copies of inquiries by local authorities with regard to the use of CCTV for the purposes of targeting illegal dumping or environmental crime. He later clarified that this would include cases where a local authority sought advice or an opinion from the DPC. In this case, the Council sent the DPC a general invitation to discuss the use of CCTV for the prosecution of crime (which includes environmental crime). Following the DPC's acceptance, more specific queries were put forward which included a query in relation to the use of CCTV for prosecutions relating to illegal dumping. The initial invitation therefore provides context for the Complete Version of Document 1, which falls firmly within the scope of the request. The AIE Directive makes it clear that the objective is "to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information". In my view, this lends support to the position that the approach envisaged by the AIE Directive and Regulations is that requests should be interpreted broadly rather than narrowly. I also note that in *Fish Legal*, the Advocate General

expressed the view that, in light of the spirit of the Directive and its objective of promoting access to information held by public authorities in the broadest sense of the term, situations of uncertainty should always be resolved in favour of the requester (see paragraph 120). To exclude the initial invitation from the scope of the request would involve, in my view, an overly narrow approach to that request. I therefore consider that Document 3, falls within the scope of the appellant's request.

18. Similarly, the Complete Version of Document 1 should also be considered to fall within the scope of the request. While I accept that only one of those queries makes a specific reference to illegal dumping or environmental crime, the other queries relate to Community Based CCTV. The purpose of the Community Based CCTV Scheme is "to increase public safety" but also "to deter illegal or anti-social behaviour". Illegal or anti-social behaviour may include illegal dumping or environmental crime and I again consider it would be an overly narrow approach to the request to remove these queries from Document 1. The cover letter contained in the Complete Version of Document 1, similarly to Document 3, provides context for the queries put to the DPC by the Council.

19. I therefore consider the Complete Version of Document 1 and Document 3 to come within the scope of the request.

20. I must now consider whether Documents 1, 2 and 3 can be said to come within the scope of the definition of "environmental information" contained in article 3(1) of the AIE Regulations.

Environmental Information

21. Article 3(1) defines "environmental information" as "any information in written, visual, aural, electronic or any other 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).

22. The DPC argues that the information in question "comprises correspondence between local authorities and the DPC referencing the usage of CCTV for the purposes of targeting illegal dumping or environmental crime" and consists of "a response from the DPC to Laois County Council in relation to a range of matters mainly relating to decisions issued previously in relation to the unlawful usage of CCTV systems where data protection issues were breached". It therefore submits that "the focus and purpose of the records concern/relate to data protection and personal data processing and not environmental matters or environmental effects".

23. It submits that the records do not contain information on the state of the environment, or on any environmental factors coming within the scope of categories (a) and (b) of the definition contained at article 3(1) of the Regulations. It also submits that the records do not contain any information on measures affecting or likely to affect the elements and factors referred to at categories (a) and (b) of the definition, including measures designed to protect those elements or otherwise coming within the scope of category (c) of the definition. It refers to the decision of the Court of Appeal in *Minch* and submits that the Court found in that case that a record must "be a 'policy', 'plan' or 'programme'" in order to come within the scope of category (c) of the definition of environmental information. It notes that the Court in *Minch* also found that "likely to affect" may be considered equivalent to "capable of affecting" the environment and held that a test of remoteness was applicable. It submits that the application of a "remoteness test" was confirmed in the case of *Redmond* and that such a test was applied by the Commissioner in OCE-93480-F7W4P3 *Mr D and Department of Housing, Planning and Local Government*.

24. It submits that the Court of Appeal in *Redmond* found that a mere connection or link to the environment is not sufficient to bring information within the definition of environmental information as 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 the Court of Justice of the European Union. It submits that the Court of Appeal stated that the essential question is whether the measure or activity is one affecting or likely to affect the environment and that this will be the case "if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly". The Court of Appeal found that "while it is not necessary to establish the probability of a relevant environmental impact, something more than a remote or theoretical possibility is required".

25. The DPC goes on to note that the Court of Appeal in *Redmond* found that where the measure or activity has the requisite environmental effect, one must go on to consider whether the information is "on" that measure or activity. It submits that information that is integral to the relevant measure or activity is information "on" it, while information that is too remote from the measure or activity does not qualify as environmental information and it refers to the decision of the High Court in *ESB*. It also refers to the decision of the Court of Appeal of England & Wales in *Henney* which found that, when 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 the AIE Directive. It also refers to the decision of this Office in CEI/16/0043 *Shell and Topaz Aviation Ireland Limited and daa plc*. It submits that whilst the use of CCTV for the prevention of illegal dumping might be considered a measure within the meaning of category (c) of the definition, the key issue for determination in relation to the request is whether the information in question constitutes "environmental information" and the DPC argues that it does not. It submits that the relevant records do not relate to the state of the environment

or environmental factors. It argues that whilst the particular CCTV systems in question were being put in place to monitor illegal dumping, the purpose of the communications with the DPC cannot be said to be information "on" an environmental measure in circumstances where the information solely concerned privacy matters and the assessment of data protection requirements in respect of CCTV systems in accordance with the DPC's powers under article 58(3)(b) of the GDPR to provide opinions to public bodies on any issue related to the protection of personal data as supplemented by the Data Protection Act. It submits that, applying the remoteness test advocated by the Court of Appeal in both *Minch* and *Redmond*, it is the DPC's position that the policy decisions in respect of local authorities in respect of CCTV use, which may impact environmental factors, are not determined by the data protection considerations and that the DPC's considerations relate to the lawful processing of personal data flowing from such decisions. It submits, on that basis, that the information cannot be said to have an effect on the environment and is not capable of having any such effect as it does not form an integral part of local authorities' policies on the use of CCTV.

26. The appellant argues that the DPC has adopted an overly narrow interpretation of the term "environmental information" which does not comply with a number of recent decisions of this Office (including OCE-100993-X1G6Q1 *Ken Foxe, Right to Know CLG and Coillte*) and of the Superior Courts (including the *RTÉ* case). He submits that the information requested is clearly environmental as it relates to the use of CCTV for dealing with environmental crime and illegal dumping.

27. 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.

28. 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*, paragraph 19) there must be more than a minimal connection with the environment (*Glawischnig*, paragraph 25). Information does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond*, paragraph 58; see also *ESB*, paragraph 43). However, a mere connection or link to the environment is not sufficient to bring information within the scope of the definition of environmental information. Otherwise, the scope would be unlimited in a manner that would be contrary to the judgments of the Court of Appeal and the CJEU.

29. The right of access to environmental information encompasses access to information "on" one or more of the six categories set out at (a) to (f) of the definition. In his decision in *RTÉ*, Barrett J expressly endorses the approach set out by the Court of Appeal of England and Wales in *Henney* to determine the "information on" element of the definition of "environmental information" (*RTÉ*, paragraph 52). The first step is to identify the relevant category of the definition to which the information in question relates.

30. In this case, the appellant is seeking information relating to inquiries made by local authorities on the use of CCTV to target illegal dumping and environmental crime and to the responses given by the DPC to those inquiries.

31. 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 and 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. As noted by the DPC in its submissions, 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*, 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*, 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 measure with which the information is concerned, and it may be relevant to consider the purpose of the information (*ESB*, paragraph 43).

32. 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 the 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 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 *Glawishnig* (see paragraphs 21 and 25).

33. Although the scope of what constitutes a "measure" or "activity" for the purposes of category (c) of the definition is limited, it is nonetheless wide. 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 public authorities, the term 'measures' serving merely to make it clear that the acts governed by the directive included all forms of administrative activity".

34. 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 of 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…"

35. 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).

36. The proposed use of CCTV by the Council to target illegal dumping and environmental crime is, in my view, a sufficiently concrete plan to come within the threshold set down by Hogan J in *Minch*. It is more than an "academic thought experiment" and had reached a sufficiently concrete stage by the time of the appellant's request that the opinion of the DPC on its operation was being sought by the Council. It is also a plan which carries more than a remote possibility of environmental impact since its presence is likely to be a dissuasive factor for those contemplating illegal dumping or environmental crime in an area. There is a belief that individuals will be less likely to carry out illegal dumping and environmental crime in areas where CCTV cameras are present. I am therefore satisfied that the proposed use of CCTV by the Council to target illegal dumping and environmental crime is measure within the meaning of paragraph (c) of the definition. I also note that the DPC itself has accepted that the use of CCTV for the prevention of illegal dumping might be considered a measure within the meaning of category (c) of the definition.

37. The next question to consider is whether the information requested by the appellant is information "on" that measure. Again, *RTÉ* (paragraph 52) endorses the approach set out in *Henney*, a case also referred to by the DPC in its submissions. 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 paragraphs 37 and 45). The Court explained 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 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 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" (paragraphs 47 and 48)

38. *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 the AIE Directive (paragraph 43; see also *ESB*, paragraph 42). Information that does not advance the purposes of the Aarhus Convention and the AIE Directive may not be "on" the relevant measure or activity (*Redmond*, 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 by the public 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. Those recitals give an indication of how the very broad language of the text of the provisions of the Convention and the Directive may have to be assessed and provide a framework for determining the question of whether information is on a particular measure. Finally, as the High Court noted in *ESB*, information that is integral to a measure or activity is information "on" it while information that is too remote from the relevant measure or activity does not qualify as environmental information (*ESB*, paragraphs 38, 40, 41 and 43).

39. The guidance provided by the Courts therefore suggests that there is a sliding scale with information integral to a measure at the 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 (the measure at issue in that case) "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 (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 about, or enable it to participate in, decision-making in a better way" (see paragraph 43).

40. While the DPC acknowledges that the use of CCTV for the prevention of illegal dumping might be considered a measure within the meaning of category (c) of the definition, it argues that its views on the data protection implications of such use do not amount to information "on" that measure as "the policy decisions in respect of local authorities in respect of CCTV use, which may impact

environmental factors, are not determined by the data protection considerations". It submits on that basis that the information cannot be said to have an effect on the environment and is not capable of having any such effect as it does not form an integral part of local authorities' policies on the use of CCTV.

41. Submissions from the DPC to this Office indicate that advice was sought from and provided by the DPC in this case on the basis of Article 57(1)(c) of the GDPR. Article 57 sets out the tasks to be carried out by a national supervisory authority and provides, inter alia, that each supervisory authority shall "advise, in accordance with Member State law, the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to processing". The DPC's submissions also pointed to Article 58 of the GDPR which, it submits, provides powers to the DPC to enable it to perform its tasks. This includes the power, under Article 58(3)(b) to "issue, on its own initiative or on request, opinions to the national parliament, the Member State government or, in accordance with Member State law, to other institutions and bodies as well as to the public on any issue related to the protection of personal data" and the power, under Article 58(2) to take corrective actions including the issuing of warnings, reprimands and orders to data controllers and processors. With respect to the DPC, I cannot accept that advice from the DPC on the use of CCTV would not influence the Council's policy in that respect. This would be the case, in my view, whether or not the advice considered the proposed use to be compliant with data protection law. However, I consider that were a local authority to be advised by the DPC that its proposed use of CCTV did not comply with the requirements of data protection law, this would be a particularly influential factor in that local authority's decision as to the policy to be adopted with regard to such use. As I have outlined above, a decision by a local authority to place CCTV in a particular area is likely to minimise the occurrence of illegal dumping, environmental crime and indeed other types of crime as an individual minded to commit any such acts will fear they may be more likely to be identified and punished. There are therefore potential benefits to such a policy or measure from an environmental perspective. On the other hand, increased use of CCTV in public spaces has implications from a privacy perspective which may not be considered desirable. It is therefore important to ensure that a sufficient balance is struck between the data protection implications of such a policy and the potential environmental benefits. Failure to comply with data protection laws results not only in adverse implications for the privacy of individuals but also for the local authority in question which may find itself subject to sanctions were it to be found non-compliant. Data protection considerations are, therefore, in my view, a critical or integral factor in the proposed use of CCTV to target illegal dumping and environmental crime. This means that inquiries to the DPC about potential data protection considerations pertaining to the use of CCTV to target illegal dumping and environmental crime constitute information "on" the measure I have identified at paragraph 36 above.

42. Similarly, I am of the view that the responses given by the DPC to those inquiries are information "on" the use of CCTV to target illegal dumping and environmental crime. Those responses are critical to the measure since a response from the DPC indicating significant data protection concerns arising from such use is likely to be a significant obstacle to the introduction of the measure which, as I have found above, could have a dissuasive effect on the carrying out of illegal dumping and environmental crime.

43. I am therefore satisfied that Documents 1, 2 and 3 fall within the definition of "environmental information" contained at article 3(1) of the AIE Regulations.

44. The next question for me to consider is whether articles 8(a)(iv) and/or 9(2)(d) of the AIE Regulations provide the DPC with grounds to refuse any or all of those documents.

Article 8(a)(iv)

45. Article 8(a)(iv) of the AIE Regulations provides for refusal of environmental information "where disclosure of the information would adversely affect…the confidentiality of 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)".

46. There are a number of elements which must be satisfied before the question of refusal under article 8(a)(iv) arises:

    (i) the case must involve "proceedings" of public authorities;
    (ii) those proceedings must have an element of confidentiality;
    (iii) that confidentiality must be adversely affected by the disclosure of the information requested; and
    (iv) that confidentiality must be protected by law.

47. The Court of Justice in *Flachglas* has made it clear that "the concept of 'proceedings'" referred to in article 4(2)(a) of the Directive (transposed by article 8(a)(iv) of the Regulations) "refers to the final stages of the decision-making process of public authorities" (para 63). A similar conclusion was reached by the Court of Justice in the *Saint-Gobain* case. Although that case dealt with Regulations 1049/2001 and 1367/2006 rather than the AIE Directive, it considered the provisions of the Aarhus Convention on which both the Directive and the Regulations are based. Indeed, the Advocate General, when referring to the ground for refusal at issue in *Saint Gobain* noted that "the same ground for refusal is laid down in article 4(2)(a) of [the AIE Directive]" before concluding that "the concept of 'proceedings' must be understood as covering only the deliberation stage of decision-making procedures" (see para 51). The Court of Justice found that "as observed by the Advocate General at point 76 of his Opinion, Article 4(4)(a) of the Aarhus Convention provides that a request for environmental information may be refused where disclosure of that information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law, and not the entire administrative procedure at the end of which those authorities hold their proceedings" (see para 81).

48. When considering whether an adverse impact has been established, it is useful to consider paragraph 69 of the CJEU's decision in *Land Baden-Württemberg* which makes it clear that:

> "…[A] public authority which adopts a decision refusing access to environmental information must set out the reasons why it considers that the disclosure of that information could specifically and actually undermine the interest protected by the exceptions relied upon. The risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical".

49. If those elements are satisfied then the next question to be addressed is whether the interest to be protected by reliance on article 8(a)(iv) to refuse the environmental information requested, outweighs the public interest in disclosure of that information.

50. Leaving aside the question of whether there are "proceedings" at issue here which fit the requirements of *Flachglas* and *Saint Gobain*, the main issue, as I see it, is that the DPC, when asked to identify the basis on which it considered that the release of the information at issue in this appeal would adversely impact the confidentiality of the "proceedings" it had identified, submitted that release of the information at issue "would fundamentally adversely impact the confidentiality of [the proceedings] as it would result in the key information exchanged in those proceedings losing their confidential nature". However, the DPC has also indicated to this Office that the response it provided to the Council's queries as to the data protection implications of its proposed use of CCTV to target crime (including illegal dumping and environmental crime) was presented orally at "an open event attended by Joint Policing Committee members, council officials and members of the public".

51. The Investigator wrote to the DPC indicating that her understanding was that the meeting at which the DPC had provided its view in relation to the use of CCTV for the prosecution of crime was held in public with attendance being open to members of the public generally. The DPC responded to indicate that the meeting had been organised by the Council and that the Deputy Commissioner who attended the meeting on behalf of the DPC was not aware whether ordinary members of the public had been in attendance but that he was aware that at least two reporters from local newspapers were present in the chamber throughout his presentation and, on that basis, his understanding was that the event was not a closed session.

52. The Investigator then wrote to the Council to ascertain whether the meeting of the Joint Policing Committee was open to the public. The Council responded confirming that the meeting was attended by Committee members, council officials and journalists and that "the meeting, as always, is open to the public to attend but not to participate in the meeting".

53. In circumstances where the information contained in Document 2 was read aloud at a public meeting of Laois County Council's Joint Policing Committee, it cannot be said that that information is confidential. In addition, Document 3 consists merely of an invitation to the DPC to attend the meeting for the purpose of providing advice on the use of CCTV generally, while Document 1 contains reference to more specific queries on that topic which were provided to the DPC once it had accepted that invitation. It is not clear to me how knowledge of the fact that the DPC had been invited to attend a meeting of the Joint Policing Committee (which, indeed, could be deduced from the attendance of a representative of the DPC at that meeting which was held in public) could adversely impact the confidentiality of any deliberation process by the DPC which led to the provision of the advice delivered to the Council at the meeting of 14 March 2022. The adverse impact put forward by the DPC (i.e. that the information exchanged in its proceedings would lose its confidential nature) simply cannot occur in circumstances where the information in question was disclosed at a public meeting of the Joint Policing Committee and thus cannot be characterised as confidential.

54. In circumstances where I am not satisfied that any adverse impact on the confidentiality of proceedings has been established, article 8(a)(iv) cannot be said to provide grounds for refusal of the information requested and it is not necessary for me to make any further findings as to whether the remaining conditions required by article 8(a)(iv) have been fulfilled or to consider the public interest balancing test.

55. However, I would note that it does not appear to me that there are "proceedings" at issue here which fit the requirements of *Flachglas* and *Saint Gobain*. The Investigator asked the DPC to set out the "proceedings" it considered to be at issue in the case having regard to the remarks of the Court of Justice in *Flachglas* and *Saint Gobain*. The DPC pointed to Article 57 of the GDPR which, it explained, sets out a number of tasks designated to the DPC as the national supervisory authority for data protection in Ireland, including the obligation set out in Article 57(1)(c) "to advise, in accordance with Member State law, the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to processing". It also pointed to Article 58 of the GDPR which, it submits, provides powers to the DPC to enable it to perform its tasks. This includes the power, under Article 58(3)(b) to "issue, on its own initiative or on request, opinions to the national parliament, the Member State government or, in accordance with Member State law, to other institutions and bodies as well as to the public on any issue related to the protection of personal data". It submits that the tasks set out in the GDPR are supplemented by the Data Protection Act 2018, section 12(6) of which provides that the DPC may "disseminate, to such extent and in such manner as it considers appropriate, information in relation to the functions performed by it" while section 12(8) provides that the DPC shall regulate its own processes. The DPC also notes that section 26 of the 2018 Act provides that the disclosure of confidential information is an offence and provides the DPC with authority to designate information as confidential. It therefore considers that "its interactions with the Council which are relevant to this appeal were "proceedings" of the DPC pursuant to the above tasks and powers, whereby the DPC was advising the Council as to issues relating to the protection of personal data in connection with the use of CCTV to prosecute crime" and that "these interactions were the final stages of a decision-making process, as they consisted of the question to be considered, and the DPC providing its response to the Council's question".

56. I am doubtful as to whether the provision of advice and interactions with the recipient of such advice comes within the "deliberation stage of decision-making procedures" or the "final stages of the decision-making process" as required by the CJEU in *Flachglas*. For example, including the initial queries posed by the Council within the scope of the final stages of a decision-making process would appear contrary to the guidance provided both in *Flachglas* and in *Saint Gobain* in which the CJEU specifically outlined that "information may be refused where disclosure of that information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law, ***and not the entire administrative procedure at the end of which those authorities hold their proceedings***." (paragraph 81, emphasis added).

57. The final stages of the process whereby the DPC considered whether the Council's proposed use of CCTV to target crime (including illegal dumping and environmental crime) might be said to amount to "proceedings" of a public authority in that they involve the final stages of a deliberation as to whether the DPC considers those proposals to be in accordance with the Council's obligations under data protection law. What the DPC appears to be arguing however is that the provision of

information to the Council amounts to "proceedings" within the meaning of article 8(a)(iv) of the Regulations.

58. There is no information before me to suggest that release of information, which has already been made public by its delivery at a public meeting, would adversely impact the final stages of the DPC's decision-making process with regard to the information to be provided to the Council on its proposed use of CCTV. I am therefore satisfied that article 8(a)(iv) does not provide grounds for refusal of the appellant's request.

Article 9(2)(d)

59. Article 9(2)(d) of the AIE Regulations 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. It transposes Article 4(1)(e) of the AIE Directive which provides that Member States may provide for a request for environmental information to be refused if the request concerns internal communications, taking into account the public interest served by disclosure.

60. The internal communications exception was considered in further detail by the CJEU in its decision in *Land Baden-Württemberg*. The CJEU found, at paragraph 53 of its decision, that "the term 'internal communications' covers all information which circulates within a public authority and, which, on the date of the request for access, has not left that authority's internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received".

61. The information at issue in this case consists of a letter from the Council to the DPC inviting it to attend a meeting at which the potential use of CCTV in order to target crime was to be discussed (Document 3), a follow up letter attaching questions to be addressed to the DPC at that meeting (the Complete Version of Document 1) and the text of a response delivered by an officer of the DPC at that meeting (Document 2). None of these documents can be said to have circulated within the DPC without leaving its internal sphere. The first two documents were sent from the Council to the DPC. The third, while prepared internally by the DPC, left the internal sphere of the DPC and was delivered as a response to those present at the meeting of 14 March 2022, which was open to the public to attend.

62. Documents 1, 2 and 3 are therefore not "internal communications" within the meaning of article 9(2)(d) and that article cannot therefore provide grounds for their refusal.

Decision

63. Having carried out a review under article 12(5) of the AIE Regulations, I annul the decision of the DPC and direct release of Documents 1, 2 and 3 in their entirety to the appellant.

Appeal to the High Court

64. 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.

Ger Deering
Commissioner for Environmental Information
9 November 2023