



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

**Decision of the Commissioner for Environmental Information
on an appeal made under article 12(5) of the European Communities
(Access to Information on the Environment) Regulations 2007 to 2018
(the AIE Regulations)**

Case: OCE-142307-M4L4P5

Date of decision: 5 September 2024

Appellant: Protect East Meath Ltd. (PEM)

Public Authority: Tailte Éireann

Issue: Whether Tailte Éireann was justified in refusing the request under article 3 of the AIE Regulations

Summary of Commissioner's Decision:

The Commissioner found that the information at issue is “environmental information” within the meaning of article 3(1) of the AIE Regulations and that Tailte Éireann was not justified in refusing the information sought on that basis. The Commissioner also found that article 3(2) did not apply.

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

The Property Registration Authority and Tailte Éireann

1. The Property Registration Authority (PRA) was established on 4 November 2006 under the provisions of the Registration of Deeds and Title Act 2006, with functions including maintenance and operation of the Land Registry system and to promote and extend the registration of ownership to land.
2. It can be noted that the AIE request in this case was submitted to foi@prai.ie. It was subsequently processed by the public authority under email address foi@prai.ie and copied to foi@tailte.ie; however, without explicit reference being made to Tailte Éireann. The public authority's submissions to this Office were also received in the same manner.
3. However, pursuant to the Tailte Éireann Act 2022 (the Act), the PRA, as a body corporate, was dissolved on 1 March 2023 and all its function transferred to the new, merged organisation, Tailte Éireann which is a public body operating under the aegis of the Department of Housing, Local Government and Heritage and the Act. Therefore, I am satisfied that any references to the PRA in the body of this decision may be construed as Tailte Éireann.

The Land Registry system

4. The current Land Registry system dates from 1892. When title or ownership is registered in the Land Registry the deeds are filed in the Registry and all relevant particulars concerning the property and its ownership are entered on folios which form the registers maintained in the Land Registry. In conjunction with folios the Land Registry also maintains Land Registry maps. Both folios and maps are maintained in electronic form. (Source: <https://www.tailte.ie/en/registration/land-registry/>)
5. This appeal concerns a request for access to a copy of a “dealing”, which is an application for registration in the Land Registry. When a dealing is completed, the legal effect of the documents lodged is registered on the folio. The title documents are subsequently filed in the Land Registry in a file known as an “instrument”.
6. The Irish land register is a public record; any person may inspect the folios and maps, on payment of the prescribed fees. However, an instrument can only be inspected by the registered owner of the property, his/her personal representative and any person authorised by such persons, by court order or under [Rule 159 of the Land Registration Rules 2012](#).

The AIE Request

7. On 28 August 2023, the appellant wrote to the PRA with the following request:



“Please can you provide a copy of dealing number D2023LR032393T which is pending on folio MH44663F and all related record.”

8. The PRA responded to the appellant on 30 August 2023, as follows:

“Section 3(1)(a)-(f) defines “environmental information”. Property Dealing Applications of the Land Registry do not fall under the scope of the regulation and as such will not be released under the Access to Information on the Environment (AIE) Regulations 2007-2018. Consequently, access to Property Dealing Application D2023LR032393T is refused pursuant to Section 3(1)(a)-(f) of the Access to Information on the Environment (AIE) Regulations 2007-2018.”

9. On 30 August 2023, the appellant sought an internal review of the PRA’s decision, submitting:

“We respectfully disagree since the requested information is information that is about, relates to or concerns the state of land which is an element of the environment, in particular the state of the title to the land and or the state of ownership. We also think it relates to a measure affecting the environment, namely a transaction of some land for the purposes of development which brings it into 3(1)(c). Ownership and title issues arise under planning law, for example the identity of the owner of land is a factor that is relevant to a number of considerations in an application for planning permission as is the capacity of the applicant to develop the land. We would therefore ask for an internal review of the refusal.”

10. The PRA issued its internal review decision on 11 September 2023. The Internal Reviewer affirmed the original decision to refuse the request under article 3(1) of the AIE Regulations and by way of explanation stated:

“Property Dealing Applications of the Land Registry do not fall under the scope of the regulation and as such will not be released under the Access to Information on the Environment (AIE) Regulations 2007-2018.”

11. The appellant submitted an appeal to this Office on 13 September 2023.

12. I am directed by the Commissioner for Environmental Information to complete a review under article 12(5) of the Regulations. In doing so, I have had regard to submissions made by the appellant and by Tailte Éireann in this matter and I have examined the contents of records provided by Tailte Éireann to this Office. I also have had regard to:

- the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (‘the Minister’s Guidance’);
- Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;



- the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention');
- The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide');
- 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*; and
- the decisions of the Court of Justice of the European Union in C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat (Mecklenburg)*, and C-316/01 *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen (Glawischnig)*;
- the decision of the Supreme Court in *Zalewski v Workplace Relations Commission* [2021] IESC 24 (*Zalewski*) and of the Court of Appeal in *Walsh v Property Registration Authority* (Appeal No. 2014/1065)

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

Positions of the Parties

14. The appellant, through its solicitor, made submissions to this Office on 20 September 2023 in support of its appeal.
15. The appellant submitted that this appeal concerns a request for access to a copy of a “dealing” filed in the PRA in relation to a plot of registered land in County Meath. It submitted that “the plot in question is registered on folio MH44663F, part of which was sold by Shannon Homes to the Department of Education for the purpose of constructing a school”. It submitted that details of this transaction are publicly available and cited a number of internet articles which suggested that the Department had paid an excess amount for the site including an article from the Irish Examiner entitled: [“Department paid 2.5m more than initially budgeted for site of temporary school”](#).
16. The appellant submitted that no explanation was provided for the decision on its request and that the internal review outcome “purporting to be a new and separate decision, simply restated the conclusion of the first decision and did not engage at all with the arguments raised by PEM”.



17. The appellant submitted that “Ireland operates a system of registration of title for land. While clearly ownership is registered, a large number of other rights and obligations also form part of the register, which is publicly available. These are primarily set out in [Part III of the Registration of Title Act 1964](#) ... Many of the matters that may be registered concern the state of the elements or the factors of the environment”. Following on from this, the appellant submitted that “It is therefore clear that the land registry contains conclusive information in relation to the state of land and factors affecting land and other elements of the environment”.
18. The appellant submitted that “A dealing therefore contains information which supports the registration in the land registry of all of the matters set out in legislation. While a dealing is pending, the public has no knowledge of the subject matter to be registered. Equally once a dealing is registered, becoming an instrument, the supporting document is not actively published by the PRA”.
19. The appellant pointed to Rule 159(9) of the Land Registry Rules which provides for public access to documents filed in the Registry “in special circumstances”. It argued therefore, that “the principle of public access is set down in the legislation which governs the PRA... [and] by dint of the doctrine of equivalence, the PRA cannot refuse access to environmental information under the AIE Regulations when it is already in principle available under national law including Rule 159(9)”.
20. The appellant submitted that “Many of the matters that are subject to registration are also relevant in planning submissions and public participation, for example it is a requirement that an applicant for planning permission must be the owner of the land or alternatively have its consent. Issues such as rights of way, wayleaves for pipes and cables, forestry, wildlife and so on are all relevant for public participation in planning decisions and therefore the AIE Regulations should be interpret[ed] broadly so that dealings such as the dealing requested comes within the scope of the right of access”.
21. In addition, the appellant submitted that “the absence of a matter being registered is also environmental information. For example, the absence of a public right of way or a natural heritage order from a folio or a dealing is important information in relation to land and factors affecting land and biodiversity and the absence of such information is itself environmental information”.
22. Tailte Éireann provided submissions and a schedule of records to this Office on 26 October 2023 together with a copy of three (3) records identified as the subject of the appellant’s request, described by Tailte Éireann as follows:
 1. A copy of dealing application D2023LR032393
 2. A copy of the map for dealing D2023LR032393
 3. A blank Form 96



23. Tailte Éireann's correspondence stated that the appellant is not a party to the registration application nor are they the registered owner of folio number MH44663F. It confirmed that the application concerned is for a partial transfer of land by sale and a partial release of a burden and that it currently has a status of "queried".
24. Tailte Éireann submitted that dealing number D2023LR032393T does not fall under the scope of the definition of environmental information as provided in article 3(1)(a)-(f) of the AIE Regulations.
25. Tailte Éireann stated that when a dealing is pending, the lodging party is the data controller and when a dealing is completed, Tailte Éireann become the data holder and the file is then referred to as an "instrument". It submitted that access to instruments is governed by Rule 159 of the Land Registration Rules 2012 and that any person who is entitled to inspect an instrument may obtain a copy of the Instrument, on payment of the appropriate fee.
26. On 31 May 2024, the investigator assigned to this case wrote to Tailte Éireann seeking further rationale for its position that the information at issue is not captured by any of the definitions of environmental information contained within article 3(1) of the AIE Regulations. A summary of the appellant's submissions to this Office was also provided for consideration.
27. A further submission was received from Tailte Éireann on 11 June 2024, which referenced a total of ten (10) records contained in dealing number D2023LR032393T. Upon request by the investigator, a copy of these records were provided to this Office on 12 June 2024, described by Tailte Éireann as follows:
1. Form 17 (application form)
 2. Cover letter from Lodging Party
 3. Query Letter from Tailte Éireann to the Lodging Party
 4. Reply to query from the Lodging Party
 5. Certificate of incorporation
 6. Power of Attorney
 7. Partial release of a burden charge
 8. Revenue Stamp Certificate
 9. Deeds of Transfer
 10. Map outlining the property to be sold
28. Tailte Éireann noted that four (4) of the above records (1. – 4.) had not been included in documents as part of the original schedule and records provided to this Office on 26 October 2023. Tailte Éireann reiterated its position, that none of the material furnished contained information as defined in any of the paragraphs (a) – (f) of article 3(1) of the AIE Regulations.
29. On 28 June 2024, the investigator wrote again to Tailte Éireann providing a final opportunity for further comment or submissions. The investigator informed Tailte Éireann of her view that



the land transaction to which this dealing relates, i.e. the purchase of land by the Department of Education for the purpose of building a school, could be considered a measure within the meaning of paragraph (c) of article 3(1) of the AIE Regulations and also that paragraph (a) and (b) may be applicable to certain records where land is defined as an element of the environment.

30. On 11 July 2024, Tailte Éireann advised this Office that the “dealing” concerned was completed on 6 June 2024. It submitted that, “Prior to this date application number D2023LR032393T was pending registration and Article 3(2) should apply.” It also again outlined that a completed “dealing” is known as an “instrument” and it referred to arrangements for accessing instruments under by Rule 159 of the Land Registration Rules 2012.
31. The investigator queried the reference made by Tailte Éireann to “Article 3(2)”. In response, Tailte Éireann quoted paragraph 5.7 from the Minister’s Guidance which outlines, “Article 3(2) is very important and clarifies that the AIE Regulations will not apply to a public authority “when acting in a judicial or legislative capacity” [...]”. It submitted that, “When an application is pending registration the documentation lodged must be inspected to ensure compliance with Registration Rules. The application can be queried, rejected or abandoned at any stage... When an application is completed, Tailte Éireann is satisfied that the documentation lodged is in order for registration.”
32. At this point, the investigator asked Tailte Éireann to confirm whether it remained of the view that the information requested is not covered under the definition of “environmental information” in article 3(1). In response Tailte Éireann submitted, “in [its] view that only the second, third and fourth schedule in the Deed of Transfer could fall under the definition of “environmental information” in article 3(1)?” Lastly, Tailte Éireann submitted that, “A pending application for registration requires investigation therefore Article 3(2) applies and the information should not be released.”

Preliminary Matters

Duty to give reasons

33. The appellant notes that no explanation was provided by the public authority for the decision on its request and that similarly, the internal review provided no reasoning and also did not engage with PEM’s arguments. When this was raised with Tailte Éireann, it informed this Office that it did not comment on the arguments, “as the request for a copy of D2023LR032393T does not fall under the scope of the regulation”.
34. I do not consider that Tailte Éireann’s original decision or its internal review provided the appellant with sufficiently detailed reasons for its refusal of information within the scope of the request. Articles 7(4) and 11(4) of the AIE Regulations make it clear that a public authority



is required to provide reasoning for its decisions at original decision and internal review stage. Tailte Éireann's original decision and internal review simply informed the appellant that "Section 3(1)(a)-(f) defines "environmental information" ... [and] "Property Dealing Applications of the Land Registry do not fall under the scope of the regulation and as such will not be released under the [AIE Regulations]". The judgment of the High Court in *Right to Know v An Taoiseach* [2018] IEHC 371 makes it clear that "the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted cannot, to my mind, constitute a sufficient reason for the refusal".

35. The duty to give reasons for the refusal of requests arises not only by virtue of the AIE Regulations and Directive but is also recognised generally as a core principle of administrative law and a fundamental element of constitutional justice (see, for example, *Meadows v Minister for Justice* [2010] IESC 3 and *Balz & Anor v An Bord Pleanála & Ors* [2019] IESC 90). Both of these judgments, in the same way as the AIE Regulations, make it clear that where a requester has all or part of a request refused, they are entitled to be provided with clear reasons for that refusal. This duty arises so that the requester can take a view as to whether they consider refusal justified, or whether they wish to exercise their entitlement to have the refusal reviewed, whether at internal review stage or through an appeal to this Office.
36. It can also be noted that the submissions provided by Tailte Éireann to this Office essentially amounted to a reiteration of the wording contained in paragraphs (a) – (f) of article 3(1) and did not provide any clear basis for its conclusion that the information requested did not meet the definition of "environmental information". In addition, in response to queries from the investigator probing Tailte Éireann's approach to the application of article 3(1), it also sought to invoke article 3(2) of the Regulations to justify refusal of information. Article 3(2) was not mentioned to the appellant by Tailte Éireann at original decision or internal review stage and it is not satisfactory for public authorities to seek to add additional grounds of refusal at appeal stage. The fundamental purpose of the duty to provide reasons, as outlined above, is, in my view, significantly undermined if a public authority seeks to invoke additional reasons for refusal throughout the course of an appeal to this Office.

Information at Issue

37. As outlined above, Tailte Éireann initially provided three (3) records to this Office on 26 October 2023 for the purposes of the Commissioner's review. In respect of the "Form 96", it can be noted that this is an "Application to inspect or obtain a copy of an Instrument under Rule 159 of the Land Registration Rules, 2012". I do not consider this record as constituting information relevant to the appellant's AIE request. In respect of the documents contained in dealing application D2023LR032393T itself, it can be noted that ten (10) records were provided to this Office on 12 June 2024, which I consider supersede the partial records provided on 26 October 2023.



38. Having reviewed the material provided on 12 June 2024, I am also of the view that four (4) of these records (3. – 6. inclusive, described at point 27. above) may be considered outside of scope of this appeal, which only concerns dealing D2023LR032393T as at the date of the AIE request.
39. I am satisfied that the following information, contained in dealing D2023LR032393T as at 28 August 2023, falls to be considered in this appeal:
- (i) Form 17 (application form)
 - (ii) Cover letter from Lodging Party
 - (iii) Partial release of a burden charge
 - (iv) Revenue Stamp Certificate
 - (v) Deeds of Transfer
 - (vi) Map outlining the property to be sold

Scope of Review

40. As outlined above, Tailte Éireann initially relied on article 3(1) of the AIE Regulations in refusing access to the information at issue. During the course of this review, it also sought to rely on article 3(2) of the AIE Regulations.
41. In accordance with article 12(5) of the AIE Regulations, the role of this Office is to review Tailte Éireann's internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, the Commissioner will require the public authority to make available environmental information to the appellant.
42. The powers conferred on the Commissioner for Environmental Information apply only in respect of environmental information held by or for a public authority in accordance with the AIE Regulations. In line with this Office's Procedures Manual, available at www.ocei.ie, the general practice in cases such as this, concerning a question of the Commissioner's jurisdiction, is to limit the review to the preliminary matter of whether the information at issue falls within the remit of the AIE Regulations.
43. Accordingly, I am satisfied that it is appropriate to limit the scope of this review to whether Tailte Éireann was justified in refusing the request, under article 3 of the AIE Regulations.
44. It should be noted that, while I am required by article 12(5)(b) of the AIE Regulations to specify reasons for my decision, I must also be careful not to disclose withheld information in my decisions. This means that the detail that I can give about the content of the record(s) and the extent to which I can describe certain matters in my analysis is limited.



Analysis and Findings

Article 3 of the AIE Regulations

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

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

46. Article 3(1) of the AIE Regulations, in line with article 2(1) of the Directive, provides that "environmental information" means:

"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) ".



47. Article 3(1) of the AIE Regulations also defines “public authority”, which includes a range of public entities, some specifically defined, while also providing criteria for assessing whether or not a body falls within the remit of the AIE Regulations.
48. Article 3(2) of the AIE Regulations (as inserted by S.I. No. 309/2018 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2018) provides that:
- “Notwithstanding anything in sub-article (1), in these Regulations ‘public authority’ does not include— [...] (e) any body when acting in a judicial or legislative capacity.”

Article 3(1) – “Environmental Information”

49. The Aarhus Guide, at page 50, notes the following:

“Article 2, paragraph 3 [of the Aarhus Convention], does not attempt to define “environmental information” in an exhaustive manner but rather breaks down its scope into three categories and within each category provides an illustrative list. These lists are likewise non exhaustive, and so they require a degree of interpretation on the part of authorities in a given case. The clear intention of the drafters, however, was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation”.

50. The right of access under the AIE Regulations is to information “on” one or more of the six categories at (a) to (f) of the above definition. According to national and EU case law on the definition of “environmental information”, 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 the CJEU.
51. Tailte Éireann generally disputes that the information concerned falls within the meaning of any of the definitions contained in paragraphs (a) – (f) of article 3(1) of the AIE Regulations. However, at the latter stage of this review, Tailte Éireann does appear to accept, or at least suggest, that some information in Record (v) (Deed of Transfer) could fall under article 3(1), however it does not elaborate as to which paragraph(s) it considers may apply. The appellant’s arguments refer to paragraph (a) and paragraph (c) of article 3(1).
52. The Minister’s Guidance on the implementation of the AIE Regulations issued under article 14 of the AIE Regulations in May 2013 states (at paragraph 5.2) that, “paragraphs (a), (b) and (c) include information on the state of the different environmental media, matters which are



likely to affect them, and measures, plans or programmes which might affect the environmental media directly or indirectly”.

53. I am of the view that paragraphs (a), (b) and (c) are relevant in this case. I will consider paragraphs (a) and (b) of the definition first before turning to paragraph (c).

Paragraphs (a) and (b) of article 3(1)(c)

54. The definitions in paragraphs (a) and (b) provide that “environmental information” means:

“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 [...].”

55. Tailte Éireann contends that paragraphs (a) or (b) do not apply to the “dealing” concerned, in that no document contained within application D2023LR032393T details the state of the elements of the environment listed in paragraph (a) or factors, affecting or likely to affect such elements. However, the test is not whether the document *details* the state of the elements of the environment, but whether the document *contains* any information on those elements.

56. On the other hand, the appellant submits that the land registry contains conclusive information in relation to the state of land and factors affecting land and other elements of the environment, including ownership and other rights and obligations that may be registered as set out in Part III of the Registration of Title Act 1964, including:

- Mines, minerals and mining rights (Section 73)
- Land improvement charges and drainage charges (Section 72(1)(b))
- Rights of the public or of any class of the public (Section 72(1)(f))
- Customary rights, franchises and liabilities arising from tenure (Section 72(1)(g))
- Easements and profits à prendre (for example rights of way, fishing and hunting rights, turf cutting rights etc) (Section 72(1)(h) and Section 69(1)(j) and (k))
- Wayleaves under the Gas Act 1976 and Energy Act 2016 (Section 72(1)(hh))
- A burden to which Section 54 of the Forestry Act 1946 applies (i.e. replanting or preservation conditions attached to a limited felling licence) (Section 69(1)(m))
- Rights of a local authority to lay pipes (Section 69(1)(n))



- An agreement under section 18 of the Wildlife Act 1976 (agreement ensuring that the management of land shall be conducted in a manner which will not impair wildlife or conservation) (Section 69(1)(rr))
- An order under Section 18(1) of the Wildlife (Amendment) Act 2000 (Natural Heritage Area Order) (Section 69(1)(rrr))

57. Since I am not making a decision regarding disclosure, I must be careful not to disclose any information that may be exempt. However, having reviewed the records concerned, it is the case that some information in record (v) is clearly information on the state of the elements of the environment contained in paragraph (a), in particular, land. It is also the case that the Deed of Transfer includes easements, rights and privileges granted to the “Sold Land and any building thereon” and covenants of the vendor which can be said to protect the land and the aims of the purchaser. I am satisfied that this is information on factors, affecting or likely to affect elements of the environment, in particular to protect, and prevent damage to these elements. In addition, record (vi) is a map which delineates the sold land comprised in folio MH4463F.

58. Therefore, records (v) and (vi) clearly contain “environmental information” within the meaning of paragraphs (a) and (b) of article 3(1).

Paragraph (c) of article 3(1)(c)

59. Paragraph (c) provides that “environmental information” means:

“any information in written, visual, aural, electronic or any other material form on –
[...] (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”

60. Paragraph (c) requires the identification of a relevant measure or activity, which the information sought is “on”. Information may be “on” more than one measure or activity (*Henney* at paragraph 42). In identifying the relevant measure or activity, one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned (*ESB* at paragraph 43). The list of examples of measures and activities given at paragraph (c) is not exhaustive, but it contains illustrative examples (*Redmond* at paragraph 55). The CJEU stated in *Mecklenburg* that the term ‘measure’ serves “merely to make it clear that the acts governed by the directive included all forms of administrative activity” (*Mecklenburg* at paragraph 20, emphasis added), and a similarly expansive approach should be taken to the term ‘activity’ (*RTÉ*, at paragraph 19).

61. Tailte Éireann contends that paragraph (c) does not apply to the “dealing” concerned, in that no document contained within application D2023LR032393T details 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.

62. The appellant understands that the relevant measure is the land transaction for the purpose of development, bringing it within paragraph (c). I similarly consider that the information contained in D2023LR032393T relates to the transaction whereby the Department of Education purchased the delineated land in folio MH4463F. Moreover, as outlined in the appellant's submissions to this Office, and as highlighted to Tailte Éireann, the purpose of this transaction is known to be for a proposed school development on the land concerned. On 23 February 2024, the Department of Education published its intention to apply for planning permission for a new 1,000 pupil school on the site at Mill Road, Colpe West, County Meath. (See [File 24/60133](#) for further details.)
63. As such, I find that this purchase of land by the Department of Education for the purpose of building a school can clearly be considered a "measure", within the meaning of paragraph (c) of article 3(1) of the AIE Regulations. This measure is taken by the Department and not Tailte Éireann, but there is nothing in the AIE Regulations that states that the information has to be on a measure taken by the public authority holding the information for it to be covered by the definition. It would be contrary to the aim of the Directive for a public authority to argue that only information on a measure that it carried out is covered by the definition.
64. 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).
65. I consider that the land transaction to which this "dealing" relates, i.e. the purchase of land for a school development, will self-evidently have an environmental impact. Major development projects are normally subject to an Environmental Impact Assessment (EIA) in accordance with the requirements of the relevant EU Directives. It can clearly be envisaged that the development of the new school as describe above, is likely to affect the elements and factors as set out in paragraph (a) and (b) of article 3(1). Therefore, the final question for me to consider is whether the information is "on" that measure.
66. As "any information ... on" a measure or activity affecting or likely to affect the environment is prima facie environmental information, the information at issue does not, in itself, have to affect or be likely to affect the environment in order to constitute information "on" such a measure (*Redmond* at paragraphs 57 and 59). As the High Court outlined in its decision in *ESB*, information that is integral to the relevant 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 (see paragraphs 38, 40, 41 and 43).



67. The Court in *Henney* (paragraph 37) found that “information is “on” a measure if it is about, relates to or concerns the measure in question”. Further, in paragraph 43, the Court suggests that, in determining whether information is “on” the relevant measure, 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.
68. The AIE request in this case sought information concerning registration of a plot of land in County Meath consequent to the purchase of same by the Department of Education. Registration of land purchased in County Meath is compulsory as per Compulsory Registration of Ownership (Carlow, Laoighis and Meath) Order 1969 ([S.I. No. 87 of 1969](#)), enacted under section 24 of the Registration of Title Act 1964. In addition, section 23(1)(b) of the 1964 Act states that registration of the ownership of freehold land shall be compulsory where the land is acquired by a statutory authority (as defined under section 3(1) of that Act).
69. [Section 25 of the Registration of Title Act 1964](#) states that a person shall not acquire an estate or interest in land where registration is compulsory under section 23 or 24. Thus (the Minister for) the Department of Education must actually become the registered owner before the relevant interest in the land is actually taken to be transferred, and therefore registration must take place before the relevant estate or interest can be said to have fully passed to the purchaser.
70. As previously described, a “dealing” is an application for registration in the Land Registry, or in this case an application to change the registered title as result of a transfer on sale. The “dealing” must be made in the prescribed form as per the relevant legislation and the Land Registry Rules.
71. In light of the above, I am satisfied that the information is “on” a measure which has an environmental impact and that records (i) – (vi) inclusive can be considered “environmental information” within the meaning of paragraph (c) of article 3(1) of the AIE Regulations, as all said documents comprise the “dealing” requested.

Article 3(2) – “When acting in a judicial or legislative capacity”

72. Article 2(2) of the AIE Directive defines “public authority” for the purposes of the Directive. The first sentence of the second paragraph of article 2(2) of the AIE Directive provides that “Member States may provide that [the definition of “public authority”] shall not include bodies or institutions when acting in a judicial or legislative capacity.”
73. Article 3(2) of the AIE Regulations transposed this part of the AIE Directive into national law, providing that “Notwithstanding anything in sub-article (1), “public authority” does not include any body when acting in a judicial or legislative capacity.” The Minister’s Guidance offers the following (non-legally binding) interpretation of article 3(2) at paragraph 5.7:



“... It is suggested that “judicial.... capacity” refers, for example, to processes of determination (normally statutory in nature) which are open to the hearing of submissions from different parties, and where the authority concerned is required to act in a judicial manner. It is considered that “legislative capacity” will comprehend a public authority when involved in the preparation of legislative proposals for the Oireachtas, e.g. Government Departments and the Attorney General’s Office, and the preparation and making of secondary legislation, e.g. regulations, orders and bye-laws whether made by central Government or other public authorities.”

74. Tailte Éireann contends that a pending application for registration requires investigation and therefore it should not be considered to hold the requested information as a public authority within the meaning of article 3(2). Tailte Éireann has not indicated, in this regard, whether it considers itself to be acting in a “judicial” and/or “legislative” capacity. However, as the information at issue clearly does not involve any legislative processes, I consider that Tailte Éireann’s submission can only be taken to imply that it is acting in a “judicial capacity” in deciding to grant or refuse an application.
75. A functional interpretation of what constitutes “judicial capacity” was considered by the Supreme Court in *Zalewski*. In that case, O Donnell J noted that “repeated attempts to establish a more precise definition of the judicial power and the concept of justiciability” proved “a dispiriting (if revealing) exercise” which “resulted in a series of negative conclusions” (para 41). O’Donnell J went on to quote the remarks of Lord MacDermott, the Lord Chief Justice of Northern Ireland in his lectures on *Protection from Power under English Law* which “acknowledged the difficulty of drawing any clear line” but suggested that “a judicial decision implies the presentation of their case by the parties to a dispute, the ascertainment of the relevant facts and of the relevant law and a decision which is reached by applying the relevant law to the relevant findings of fact”. He also referred to the remarks of the “noted constitutional scholar” Geoffrey Marshall who asserted that “it is not possible to construct from judicial materials a single set of reasonably unambiguous criteria for calling a procedure ‘judicial’. Moreover, many of the tests historically enunciated by the courts are now insufficiently precise to discriminate within a large *penumbra* of doubtful cases” (para 42). The Supreme Court was therefore of the view that the criteria in *McDonald v Bord na gCon* [1965] IR 217 which had traditionally been applied “as a canonical checklist” had to be applied “as part of a general approach to the issue”, to be considered “alongside, rather than replacing, the observations in *Lynham v Butler (No 2)* and those in *State (Shanahan)*” and to be applied “with an understanding of the substance it is meant to determine...and as indicating general features which tend to show the administration of justice, rather than as a definitive and prescriptive test” (paras 75 and 92). It is worth nonetheless recalling the criteria set out by Kenny J in the *McDonald* case, in order to give a general indication of whether Tailte Éireann can be said to have been acting in a judicial capacity in the circumstances of this case:

- (i) a dispute or controversy as to the existence of legal rights or a violation of the law;



- (ii) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
- (iii) the final determination (subject to appeal) of legal rights and liabilities or the imposition of penalties;
- (iv) the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;
- (v) the making of an order by the Court which as a matter of history is an order characteristic of Courts in this country.

76. In *Lynham v Butler (No 2)* [1933] IR 74, Kennedy CJ noted that “the judicial power is exercised in determining in a final manner, by definitive adjudication according to law, rights or obligations in disputes between citizen and citizen, or between citizens or the State, or between any parties whoever they be and in binding the parties by such determination which will be enforced if necessary with the authority of the State” (see *Zalewski*, para 53). Kennedy CJ also quoted the statement of Griffith CJ in the Australian High Court in *Huddart, Parker & Co v Moorhead* (1908) 8 CLR 330 in which he noted that “the exercise of [judicial power] does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action” (see *Zalewski*, para 54).
77. In *State (Shanahan) v Attorney General* [1964] IR 239, Davitt P suggested that “there can be gleaned from the authorities certain essential elements of the [judicial power]” which include “1, the right to decide as between parties disputed issues of law or fact, either of civil or criminal nature or both; 2, the right by such decision to determine what are the legal rights of the parties as to the matters in dispute; 3, the right, by calling in aid the executive power of the State, to compel the attendance of the necessary parties and witnesses; 4, the right to give effect to and force such decision, again by calling in aid the executive power of the State. Any tribunal which has and exercises such rights and powers seems to me to be exercising the judicial power of the State” (see *Zalewski*, para 70)
78. In this case, what is at issue is a decision by Tailte Éireann on an application for registration in accordance with the relevant legislation and Land Registry Rules. Based on the materials before me, that decision did not involve the consideration of a dispute between other parties involving disputed issues of law or fact nor did it involve the final determination of legal rights or liabilities or the enforcement of those rights or liabilities or the imposition of a penalty by the court. Although the Supreme Court have indicated that the *McDonald* criteria are only indicative, the fact that none of them are satisfied in this case indicates that the function carried out by Tailte Éireann, at least so far as this application is concerned, was a purely routine administrative function rather than a judicial one and did not involve any adjudication upon the respective rights of the parties. My conclusion in this regard is strengthened by the fact that I do not consider any of the criteria referred to by the Courts in *Lynham* and *State (Shanahan)* to have been fulfilled in this case either. I am therefore not satisfied that Tailte Éireann can be said to have been acting in a judicial capacity in regard to the information at issue.



79. I have also had regard to the decision of Hogan J. in *Walsh v Property Registration Authority* (Appeal No. 2014/1065), which related to an application for costs against the PRA. In that case, the PRA sought to argue that as it was exercising a quasi-judicial function, it should enjoy immunity from costs. Hogan J. held “It is accordingly clear the Authority did not, in fact, exercise any power of adjudication in the present case as between the rival claims of both Mr. Walsh and Coillte. In these circumstances the argument that the Authority should therefore enjoy some sort of quasi-immunity from costs because it *might* in *other* circumstances have been exercising quasi-judicial powers of adjudication in respect of disputes concerning land ownership simply evaporates. No principled basis for such an immunity can be advanced in a case of this kind” (para 19). It is clear from the above that while in some circumstances Tailte Éireann may exercise quasi-judicial functions, it does not do so in the case of an uncontested registration.

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

Conclusion

81. In conclusion, I find that the information sought is environmental information within the meaning of the definition in article 3(1) of the AIE Regulations. I also find that article 3(2) cannot be said to apply in the circumstances of this case.

82. On that basis, I am remitting the matter to Tailte Éireann for consideration of release of the information requested in accordance with the provisions of the AIE Regulations. In this regard, Tailte Éireann should take note that it will not be sufficient to simply argue that non-disclosure is authorised in certain circumstances, i.e. under Rule 159 of the Land Registry Rules 2012. The scheme of the AIE Regulations, and of the AIE Directive, makes it clear that there is a presumption in favour of release of environmental information. Subject to that presumption, a public authority may refuse to release environmental information only where an exemption under articles 8 or 9 applies, and the interest in maintaining that exemption outweighs the public interest in disclosure under article 10.

Decision

83. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I hereby annul Tailte Éireann’s internal review decision in this case and I direct it to provide the appellant with a new internal review decision in respect of the request.

Appeal to the High Court



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

84. 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.

Julie O'Leary
On behalf of the Commissioner for Environmental Information
5 September 2024