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The Freedom of Information Unit
Department of Education and Skills
Marlborough Street
Dublin 1

2016/324

Application for Internal Review under Section 21 of the Freedom of Information Act 2014, of a Decision taken by the Department of Education and Skills

Dear Sir

We request you to review, pursuant to Section 21 of the Freedom of Information Act 2014 (the Act) a decision taken on 8 November 2016 by the Department of Education and Skills (the DES).

1. The Request

On 5 September 2016, a request was made on behalf of our client [REDACTED] to the DES (attached at Annex 1) under Section 12 of the Act, seeking records created in connection with or which related to the designation by Dun Laoghaire Rathdown County Council (DLRCC) in the Sandyford Urban Framework Plan 2011-2016 (September 2011) and the Dun Laoghaire Development Plan 2016-2022 (16 March 2016) of sites in DLRCC's functional area for primary and post primary education facilities. The request was acknowledged by the DES by return email of 7 September 2016 and by letter dated 12 September 2016 the DES advised that the scope of the request be narrowed (attached at Annex 2). We replied to this in our letter dated 26 October 2016 (attached at Annex 3) and narrowed our request accordingly.

In a letter dated 8 November 2016, (attached at Annex 4) the DES denied access to the information sought. It cited three reasons for refusal: the documents relate to its deliberative processes (s.29 of the Act); the documents could reasonably be expected to disclose positions taken or to be taken in negotiations (s.30 of the Act), and the documents contain commercially sensitive information (s.36 of the Act) (the exemptions).

2. Appeal

We hereby request you to review the decision taken on 8 November 2016 by the DES to refuse our request under the Act. We have submitted an Electronic Fund Transfer (EFT) in the sum of €30 in payment of the fee for this review.

[illegible]

3. Background

The request ultimately relates to the designation in the Dún Laoghaire Rathdown Development Plan for primary and post-primary educational purposes of a site owned by our client. That designation, first made in the 2011 Sandyford Urban Framework Plan and retained in the 2016 Dún Laoghaire Rathdown Development Plan, has a significant adverse effect on our client's site. Our client's planning consultant made a submission on that development plan to the effect that the site was not suitable for educational purposes. That submission was considered by the Chief Executive of Dún Laoghaire Rathdown County Council (DLRCC), who disagreed with our client's submission in his report of August 2015 on public submissions, by reference to a submission from DES:

Submission No. B0473, received on behalf of DES states, that the Department,

"...would draw your attention to the existing site zonings under the current County Development Plan, LAPs, Framework Plans, etc and would request that all such zonings be maintained in any new plans, including the new County Development Plan 2016-2022"

The submission also highlights that:

"The Department always requests site reservations to be made as close as possible to community facilities such as sports facilities, libraries etc so that these can be shared between the school and community". The report of the Chief Executive of DLRCC then goes on to say:

"In this regard, DES identified the Holly Avenue [our client's] site as a suitable location for the provision of a school due to its positive locational attributes relative to: St. Olafs Primary School, St. Benildus-Post Primary School, St. Benildus Sports Grounds and the Stillorgan and Kilmacud Luas stations. In particular, the provision of a school in such close proximity to Stillorgan and Kilmacud Luas stations – with good pedestrian and cycle links – is considered a significantly positive factor."

Our client has been able to obtain from the planning file a copy of the DES' submission with reference number B0473, which contains the quoted extracts, but it does not contain anything in the terms set out in the final paragraph above (in italics). In correspondence, the DES has denied that it holds any records relating to our client's site that pre-date the Chief Executive Report, or indeed that pre-date 23 February 2016. The Chief Executive's Report gives the impression that the DES identified the Holly Avenue site as a suitable location for the provision of a school due to specific positive locational attributes. A person reading the report would very likely be left with the impression that the rationale for the identification of the Holly Avenue site, e.g. in terms of proximity to existing facilities, was one which had been put forward by the Department itself. However, these reasons do not appear in the DES submission from May 2015 and it is not clear from where the Chief Executive has obtained them.

Our client has also made a freedom of information (FOI) request in similar terms to DLRCC, which is under consideration by that body.

Our client is keen to understand the process by which DLRCC decided to retain the designation of its site in the 2016 Development Plan. That understanding is hindered by a discrepancy between the Chief Executive's description of the DES specifically identifying our client's site as suitable for educational

purposes and the DES' statement in correspondence to our client that it has no records relating to the site that pre-date the Chief Executive's Report. It is also inconsistent with the *Memorandum of Understanding for the Acquisition of School Sites dated 29 October 2015*, which allocates responsibility for the identification of sites to local authorities.

4. Basis for Review

By way of preliminary comment, the DES has not provided an adequate statement of reasons under section 13(2)(d)(i) for its refusal. It has merely stated, in relation to each record listed in its letter of 8 November, which section of the Act it relies in denying our client's FOI request. This has created great difficulty for us and our client in preparing this review, is inadequate for the purposes of the Act and is contrary to the requirements of natural and constitutional justice.

4.1. Refusal under Section 29

Section 29 exempts records relating to the deliberations of FOI bodies. To avail of this exemption, two requirements must be satisfied. The first is that the record must contain matters relating to the deliberative process of the FOI body; the second is that disclosure must be contrary to the public interest.

In relation to the first ground, this exemption is not available to the DES for three reasons, as follows. First, the records do not relate to any deliberative process on the part of the DES. Rather, the relevant decision-maker was DLRCC as statutory planning authority. The only deliberative process which might, in theory, be engaged would be that of DLRCC. It is the body charged with making, and securing the objectives of, the development plan. The DES has no statutory decision-making function in this regard. The DES submissions to the planning authority are thus analogous to the submissions referred to in Case 030830 in the Office of the Information Commissioner's Guidance Note on "*Section 29 – Deliberations of FOI Bodies*". We note that the Information Commissioner's decision to release same was upheld by the High Court on appeal.¹

Secondly, even insofar as the planning authority is concerned, it does not appear that there is any ongoing deliberative process in progress. In particular, the decision-making process under Part II of the Planning and Development Act 2000 has concluded: the development plan was formally adopted by DLRCC in or about 8 April 2010. The exemption would thus appear to be spent.

Thirdly, the nature of the records is such that even if the decision-making process was still ongoing—which it is not—the records would not be exempted under section 29. In particular, the records would be excluded on the basis of section 29(2)(b) and/or (e). Most, if not all of the records, sought represent reports of a technical nature, and, at most, represent part of the factual basis on which DLRCC made its decision to adopt the development plan and/or form part of the materials which it might have regard to under section 15 of the Planning and Development Act 2000. The section 29(2) exemptions are consistent with the jurisprudence of the Court of Justice of the European Union and other Member States (relative to the environmental information access provisions of the Aarhus Convention) which indicates that a "deliberative process" exemption should only apply to "*the deliberation process as such, namely the actual reflection process, to the exclusion of information forming the factual basis for the decisions taken, which is protected only if it allows clear conclusions to be drawn regarding the*

¹ *The National Maternity Hospital v The Information Commissioner* [2007] 3 I.R. 643, [2007] IEHC 113

deliberation process."² Given that section 29 is expressly referred to under the EC (Access to Information on the Environment) Regulations 2007, it must be interpreted in a manner consistent with EU law, and the Aarhus Convention.

Turning now to the second aspect of section 29, namely the public interest requirement, it is submitted that the DES has also failed to meet this requirement. It has neither shown nor explained how disclosure of the information sought would be *contrary* to the public interest. It has asserted that disclosure would be harmful, but this has not been substantiated by facts or evidence. The DES has not illustrated how producing the documentation sought would prejudice its ability to ensure site suitability and educational provision in the area concerned.

4.2. Refusal under Section 30(1)(c)

Section 30(1)(c) is designed to protect positions taken for the purpose of any negotiation carried on by or on behalf of the Government or a public body. The DES did not identify any negotiations, proposals or information created for the purpose of negotiations which should be protected. Instead, it has used this provision as a blanket cover to refuse disclosure and to avoid the need to explain the harmful effect of disclosure of the record, as required under s.30(1)(a) and (b). With respect, in the absence of any identified negotiations, this exemption is not available.

4.3. Refusal under Section 36(1)(c)

Section 36(1)(c) permits a refusal where the disclosure of information contained in the record could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates. There are two requirements that need to be satisfied for this exemption to apply. First, the DES must show that contractual or other negotiations were in train or were reasonably foreseen which might be affected by the disclosure; and secondly, it must explain how exactly the disclosure could prejudice the conduct or the outcome of such negotiations. The DES has shown neither. It has not demonstrated how it would be at a disadvantage in future negotiations if this information was revealed, nor has it explained how this information would be of real relevance in future negotiations.

4.4. Strict interpretation of the exemptions

The DES relies on the exemptions provided for under the Act and claims that the information sought would harm its deliberative processes and disclose commercially sensitive information. It asserts this without any examination or explanation as to how this harm would occur. While the Act provides for exemptions, their application should be narrowly construed. To do otherwise would be to undermine the Act's purpose, notably, its emphasis on opening up the workings of government and administration to scrutiny. The Act was designed to replace the presumption of secrecy with one of openness and in circumstances where a public body refuses access to records, it is required to explain, why, on balance, the public interest is better served by refusing rather than releasing information. The DES has not in this case explained how the public interest is better served by refusing disclosure.

4.5. The public interest in disclosure of the information sought

² Advocate General's Opinion in Saint-Gobain Glass (Case C-60/15)

There is both a general and specific public interest which favours disclosure in the case at hand. In the first instance, there is a general public interest in creating transparency and allowing scrutiny of decisions which relate to the suitability of sites for educational purposes to be acquired with public money. The public has a right to know that an open and carefully considered process has been followed in the allocation of sites for such projects.

In the second instance, there is a specific public interest in ensuring that individuals whose land is designated for public purposes are able to verify that the process for acquisition is conducted in a proper and lawful manner. Disclosure of this information protects property owners against arbitrariness in decision-making processes and makes it more likely that such outcomes will be respected as fair and transparent. In that regard, we have identified at the outset of this letter a specific lacuna in the site selection process (as appearing from the public record) that our client hopes to resolve through this FOI request (and the request in similar terms to DLRCC).

This application is also set against a wider movement towards transparency in local authority planning decisions. The Oireachtas, on the recommendation of the Tribunal of Inquiry into Certain Planning Matters & Payments, is considering the creation of a Planning Regulator with the power to review, evaluate and assess local authority development plans, including designations of the kind affecting our client's site.³ This demonstrates clearly the public interest in allowing greater scrutiny of how DLRCC (with or without input from the DES) reached its decision on the designation of this site for educational development and any consequent decision on its acquisition to ensure that the process was fair, rigorous and comprehensive.

We trust that this application is in order and we look forward to hearing from you as soon as possible.

If you have any queries, please contact [redacted] this firm by telephone or [redacted] by email on [redacted]

Yours faithfully

[redacted]

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³ Planning and Development (Amendment) Bill 2016 (No 1 of 2016)