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Mr X and Transport Infrastructure Ireland

CASE NUMBER: OIC-60202-R1V9R9

Whether TII was justified in refusing access to records concerning the selection of the preferred Metrolink route

15 April 2021

Background

The applicant's FOI request of 10 July 2019 sought access to various records concerning the preferred route for the Metrolink, particularly the proposed station at Tara Street. The request was broken into six bullet points, the first of which sought access to records supporting the analysis for the discounting of various other routes (item 1). In its decision of 27 August 2019, TII refused to grant access to the records covered by item 1 under section 29 of the FOI Act (deliberative process). TII referred the applicant to publicly available information in its response to other parts of his request, including a document named Appendix M of Metrolink: Preferred Route Design Development Report, which is dated March 2019 (Appendix M).

On 3 October 2019, the applicant sought an internal review, which clearly concerned the withheld item 1 records and also argued that TII should hold further records covered by that part of the request. However, the applicant also appeared to refer to TII's response to a query he had made about another part of his request. TII's internal review decision of 13 November 2019 noted its understanding that the internal review application was confined to its decision on item 1. It affirmed its application of section 29 to the withheld item 1 records. It did not address the applicant's contention that it should hold further records covered by item 1.

On 9 December 2019, the applicant applied to this Office for a review of TII's decision. At the outset of the review, TII confirmed that it had identified three records as covered by item 1, as detailed below. I apologise for the delays that arose. I have now completed my review in accordance with section 22(2) of the FOI Act and I have decided to conclude it by way of a formal, binding decision. In carrying out my review, I have had regard to the above exchanges and correspondence between this Office, TII and the applicant. I have also had regard to the contents of the records concerned and to the provisions of the FOI Act.

Scope of the Review

As explained to the applicant, this review is confined to whether TII's decision on the three item 1 records was justified under the provisions of the FOI Act. The three records are: (i) a document called "Tara Street Station Mined and Other Designed Options" (ii) a Jacobs IDOM report regarding Tara Street Station and (iii) an update to the Board of TII and the National Transport Authority (NTA). The review will also consider whether TII has taken all reasonable steps to locate records covered by item 1. This Office has no remit under the FOI Act to examine any other matter or to direct TII to clarify particular issues for the applicant.

Findings

Section 15(1)(a) – reasonable searches

Section 15(1)(a) provides that a request for access to a record may be refused where the record does not exist or where it cannot be found after all reasonable steps to ascertain its whereabouts have been taken. A review of an FOI body's refusal of records under this provision assesses whether or not it is justified in claiming that it has taken all reasonable

steps to locate all records of relevance to a request or that the requested records do not exist. It is not normally the function of this Office to search for records. Furthermore, this Office has no remit to examine, or make findings on, whether or not further records should have been created by TII or to examine its record management practices generally.

As stated above, TII's internal review decision did not answer the applicant's queries regarding whether or not further records existed relevant to his request. This effectively amounts to a refusal to grant access to further such records on the basis that they cannot be found after reasonable searches have been carried out for them (section 15(1)(a) of the FOI Act). TII says that its role in relation to the selection of the preferred location for Tara Street station was to facilitate deliberations within the project team and the approving authority i.e. the NTA. It says that its role involved making sure that the NTA officials were apprised of the status of the alignment options study, including the specific analysis underpinning the recommended option regarding Tara Street station in particular. It says that in so doing the only sort of records it would create are the Powerpoint presentations that comprise two of the withheld records. I note that the third record is a report prepared by a firm of consultant engineers.

TII says that records relating to matters the subject of the request are stored on its Project Sharefile system, MS Outlook and customer management system and that it has searched these databases. TII says that it, and the consultants for Metrolink, consulted their project design coordinators and project directors. It says that these and TII's administrative officer searched emails, project management software and contract management software. TII says that it has not destroyed any documents and its position is that it holds no further records covered by item 1.

This Office's Investigator put the above details to the applicant, who said that he had no comments to make. In the circumstances, I have no basis on which to further question the adequacy of TII's searches for records. I find that TII was justified in effectively relying on section 15(1)(a) on the basis that it has taken all reasonable steps to ascertain the whereabouts of further item 1 records.

Section 29 – deliberative process

It is relevant that the release of records under FOI is accepted generally to be the same as publishing them to the world at large.

Section 29 is a discretionary exemption, which provides that an FOI request may be refused if (a) it contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations, and the results of consultations), and (b) the granting of the request would, in the opinion of the head of the FOI body, be contrary to the public interest and, without prejudice to the generality of paragraph (b), the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make. The requirements of sections 29(1)(a) and (b) are independent and the fact that the first is met carries no presumption that the second is also met.

A deliberative process involves the consideration of various matters with a view to making a decision on a particular matter. It would, for example, include some weighing up or evaluation of competing options or the consideration of proposals or courses of action.

The public interest test at section 29(1)(b) is a stronger public interest test than the public interest test in many other sections of the Act (which require that, on balance, the public interest would be better served by granting than by refusing to grant the request). The public interest test in section 29(1)(b) requires the FOI body to show that the granting of the request would be contrary to the public interest.

While there is nothing in the section 29 exemption itself which requires the deliberative process to be ongoing, the question of whether the process is ongoing or at an end may be relevant to the issue of the public interest. Furthermore, section 29 specifically requires consideration of whether the requester would, by the release of the record(s), become aware of a significant decision that the FOI body proposes to make.

It is noted that, in The Minister for Communications, Energy and Natural Resources and the Information Commissioner & Ors, [2020] IESC 5 (the eNet judgment), the Supreme Court said that "it is the FOI body that must explain and justify a conclusion that the records are

exempt by reference to the relevant provisions of the Act, and equally, it is the FOI body that must explain why the public interest does not justify release in the public interest." The eNet judgment issued during this review. Although the Investigator invited both TII and the applicant to make further comments in light of it, no such comments have been received.

I also note that, in the Supreme Court case of Sheedy v the Information Commissioner ([2005] 2 I.L.R.M. 374, [2005] 2 IR 272, [2005] IESC 35) Kearns, J. made it clear that a general prediction without any supporting evidence is not sufficient to satisfy the requirement that access to the record could reasonably be expected to result in the outcome envisaged. He stated that "[a] mere assertion of an expectation of [prejudice] could never constitute sufficient evidence in this regard".

Section 29(1)(a) – deliberative process

TII says that the records represent the collective technical and professional opinions of the project team at a point in time. It says that these may change as further technical, health/safety, environmental and commercial information becomes available, so as to ensure the selection of the most appropriate route. It says that it published details of the preferred route and carried out public consultations to obtain relevant views, concerns and suggestions. It says that approximately 8,000 submissions were received and that these have been distributed across TII's design and environmental teams for analysis, which will further inform the key decisions to be made in relation to the final chosen route.

It seems to me that the process of deciding on the most appropriate route for the Metrolink is deliberative in nature. I also note that the applicant does not argue otherwise. The withheld records relate to such a deliberative process and I find that the first requirement of section 29(1), as set out at section 29(1)(a) of the FOI Act, has been met in this case.

Section 29(1)(b) – contrary to the public interest

In considering section 29(1)(b), I must consider whether release of the records at this point in time is contrary to the public interest.

On the matter of the public interest, I have had regard to the comments of the Supreme Court in The Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v The Information Commissioner [2011] 1 I.R. 729, [2011] IESC 26) ("the Rotunda case"). It is noted that a public interest ("a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law") should be distinguished from a private interest.

The applicant says that the preferred route contemplates the demolition of the only public leisure centre/swimming pool facility in the City Centre, which was only recently renovated. He says that only vague promises have been made to replace the pool. He says that it is also proposed to demolish a 70 unit apartment complex and 8 townhouses where the elderly live, in the middle of a housing crisis. He says that a number of suitable sites, which at the time were vacant but are now being developed, were deemed unsuitable for the station. He says that the records should be released so that the TII's actions can be held up to scrutiny and to ensure that its decision on the preferred route was made in the best interest of the general public, as well as those affected by the threat of demolition and the removal of the leisure facility/pool. He says that there is a potential for a developer to benefit from the development area above the station at ground level and notes that the building height restriction is no longer in place.

TII says that no final decision on the Metrolink route has been made and deliberations remain ongoing, including in relation to the proposed station at Tara Street. It says that once these have concluded, it intends to make details of the final route publicly available and, subject to Government approval, then apply to An Bord Pleanala for a Railway Order. Interested parties will be able to make submissions to An Bord Pleanala and the authors of the relevant reports and experts will give evidence and be available for questioning. TII says that it intends to release the records at issue once the Railway Order has been published.

TII says that Metrolink is the most ambitious infrastructure project in the history of the State. It says that decisions relating to the project must achieve maximum value for the many hundreds of millions of taxpayers' money that it will cost, and also provide a fit for purpose scheme in the shortest possible timescale. It says that the key decisions it makes will have significant impacts on local residents, businesses and social services. It says that the

development of the project to date has attracted considerable interest from the public as well as controversy and that release of the records will inevitably generate further input from the public, the media and public representatives. It says that such input would contaminate the decision making process by preventing the design team from reviewing all relevant data and making key decisions on the optimum route of the scheme without undue intrusion. Essentially, TII's position is that the public interest in granting the request is adequately served by the public availability of Appendix M and that releasing the records at this point in time i.e. before the final decisions are made on the route and design of the project, would be contrary to the public interest.

A request made by a private individual for a private purpose does not necessarily mean that it was made in the public interest. As the applicant has been informed, I cannot treat any private interests that he may have in obtaining the records as a public interest for the purpose of the FOI Act. I also note the applicant's description of how the Tara Street community would be considerably affected by the selection of the preferred route as the final route. While in such circumstances I can appreciate why a large number of members of the public would wish to obtain the records, this also does not necessarily comprise a public interest to which I can have regard for the purposes of the FOI Act. In addition, it is not appropriate for me to direct that access be granted to the records because of any dissatisfaction there may be with the preferred route or how it was arrived at.

The records contain information about the various matters considered at a point in time in relation to the preferred location for the Tara Street station, including the mined and other design options, traffic, transport and environmental assessments, as well as some high-level costs estimates. An analysis of the information could show the consideration given to matters relevant to this particular matter, including its impact on potentially affected communities and the public purse, and how the resulting preferred location was determined. In other words, release of the records would give an insight into the TII's performance of its functions in the context of this particular element of the Metrolink project.

I recognise that such insight has been provided to some extent by the publication of Appendix M to the published Preferred Route Design Development Report. Appendix M is based on the withheld records and contains an overview of the salient issues in relation to

the assessment of Tara Street station. However, a greater insight into the relevant issues would be gained by disclosure of the records at issue.

Generally speaking, it is in the public interest to ensure that the State can provide fit for purpose public transport infrastructure at a prudent cost to the Exchequer. I accept that considering and selecting the final Metrolink route is a complex process and that the relevant bodies must have appropriate time and space to engage in deliberative processes in order to achieve such outcomes. I also accept that, in general, undue or unreasonable interference with those processes would not serve the public interest. However, it does not automatically follow that it is contrary to the public interest to release all records relating to an ongoing deliberative process. It is clear from the eNet judgment that TII must explain why release of the records is contrary to the public interest. I am not satisfied that its submissions do so.

I note that, when inviting TII's submissions, the Investigator noted that the Jacobs IDOM report is largely similar to and in some aspects less detailed than the information published as Appendix M. The Investigator noted that Appendix M also reflects the other two records. She asked TII to identify the differences between Appendix M and the records at issue and to describe the impact of the disclosure of those differences on the deliberative processes that remain in relation to the Metrolink and/or Tara Street Station. TII's submissions did not address these matters.

Much of the information in the records is in the public domain. While certain further information, including high level cost estimates, may not have been published, TII has not explained how disclosure of such information could impact on the remaining deliberative processes. Accordingly, following close examination of the records and the submissions made to this Office, I have no basis on which to find that disclosure of the records at this point in time would be contrary to the public interest.

Finally, TII's decisions include references to that part of section 29(1)(b) which requires consideration of whether granting the request would be contrary to the public interest by reason of the fact that the requester concerned would become aware of a significant

decision that the body proposes to make. I have no reason to consider that granting the request would be contrary to the public interest because the requester would become aware of a significant decision that TII proposes to make.

I find that the second requirement of section 29(1), as set out at section 29(1)(b) of the FOI Act, has not been met in this case. I find that TII is not justified in withholding the records under section 29(1) of the FOI Act.

Section 40(1)(b) – undue disturbance of the ordinary course of business

When inviting TII's submissions, the Investigator told it that if it wished to rely on other sections of the FOI Act, it should show how the requirements of the relevant exemption(s) are met in this case. TII's submission alludes to the possible relevance of section 40(1)(b) of the FOI Act, which is concerned with the premature disclosure of information that could reasonably be expected to result in undue disturbance of the ordinary course of business generally or any particular class of business. An FOI body relying on section 40(1)(b) should (i) identify the harm that might arise; and (ii) consider the reasonableness of any expectation that the harm will occur. The exemption also requires consideration of the public interest. However, TII made no arguments in this regard. It has not identified the differences between Appendix M and the records at issue or described how disclosing such details (whether high level cost estimates or other details) could reasonably be expected to result in undue disturbance of the ordinary course of business generally or any particular class of business.

In the circumstances, I have no basis to find that section 40(1)(b) applies in this case. In the circumstances, the most appropriate decision for me to make is to annul TII's refusal to grant access to the records at issue and to direct it to release them.

Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby vary TII's decision. I annul its refusal to grant access to the three item 1 records and I direct it to release them. I affirm TII's refusal to grant access to further item 1 records on the basis that section 15(1)(a) applies.

Right of Appeal

Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated not later than four weeks after notice of the decision was given to the person bringing the appeal.

Deirdre McGoldrick

Senior Investigator