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-127083-R3M4C1

Date of decision: 1 September 2023

Appellant: Mr A

Public Authority: Department of Agriculture, Food and the Marine (the Department)

Issue: Whether the information requested by the appellant is "environmental information" within the meaning of article 3(1) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the information requested was "environmental information" and remitted the matter to the Department for further consideration.

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 26 April 2022, the Minister for Agriculture, Food and the Marine provided the following response to a parliamentary question by Richard Boyd Barrett TD in relation to the publication of "weekly tables of active harvesting sites provided to his Department by Coillte in 2022":

> "*The Department inspectors carry out harvesting, post harvesting and reforestation inspections. With regard to harvesting and post harvesting inspections the focus is primarily on water quality related issues that may be caused by breaches of the licence resulting mainly by machine traffic when harvesting and extracting timber from the site.*
>
> *In relation to Coillte sites, harvesting site inspections have started in relation to the 2022 programme of inspections. In support of this work, Coillte now submit to the Department a weekly table of active harvesting sites from which the Department select a sample of forest areas to visit, either during or after harvesting has taken place.*
>
> *In the interests of commercial sensitivity of this information and specifically the security of valuable machinery and logs on harvesting sites I do not believe it is appropriate to publish the active list of Coillte's harvesting sites. I understand there have been many instances of log theft, diesel theft, machinery damage and parts stolen from active harvesting sites*".

2. On 29 April 2022, the appellant wrote to the Department of Agriculture, Food and the Marine (the Department) requesting "all information that has led the Minister to understand that there have been 'many instances of log theft, diesel theft, machinery damage and parts stolen from active harvesting sites' as a basis for his opinion that it is not appropriate to publish the active list of Coillte's harvesting sites".

3. The Department responded to the request on 27 May 2022 as follows:

> "The information "re theft of logs, diesel and parts, and vehicle damage, on harvesting sites was provided verbally from Coillte to me on 19 April 2022".

   The response also referred to a schedule of records being attached to the decision but no schedule was provided to this Office. The Department later clarified to this Office that the reference to a schedule was made in error.

4. The appellant requested an internal review of the decision on 20 June 2022. He submitted that some documentary evidence of the call must exist and queried whether the communication had been initiated by Coillte or the Department. He also queried whether it was appropriate for the decision-maker to have been appointed to deal with his request when he appeared to have been the individual in receipt of the relevant communication.

5. The Department issued its internal review decision on 5 August 2022. It informed the appellant that it was overturning the original decision to release information on the basis that the information requested was not "environmental information" within the meaning of the AIE Regulations.

6. The appellant requested a review of the Department's decision by this Office on 10 August 2022.

7. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the Regulations. In so doing, I have considered the submissions made by the appellant and the Department. I have also examined the information provided by the Department to this Office. In addition, I have had regard to:

    - 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*).

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

Scope of Review

8. The scope of this review is confined to whether the information requested by the appellant is "environmental information" within the meaning of the AIE Regulations.

Preliminary Matters

9. Regrettably, it must once again be said that the level of engagement by the Department with this Office during the course of this appeal has been disappointing. The Department was originally provided with a deadline of 13 September 2022 within which to provide a copy of the information at issue in this appeal along with submissions in support of its decision. No response was received by that date and three follow up emails were sent to the Department before a response was received on 17 October 2022. Further correspondence was required from this Office in order to have the information at issue in the appeal identified. The first of that correspondence, an email dated 18 October 2022 was responded to immediately. However, it was necessary to send a further request for clarification on 25 October 2022 and no response was received to this request until 4 April 2023.

10. I appreciate that the Department is dealing with a significant increase in AIE requests and acknowledge the increase in resources that it has recently put in place to deal with this. However, I must reiterate that the obligations provided for in the AIE Regulations are legally binding obligations and it is incumbent on the Department to ensure that it has sufficient resources in place to comply with those obligations and that the staff dealing with AIE requests are supported in carrying out their duties.

11. I also note in this regard that the submissions provided by the Department to this Office fall below what might be expected where a public authority has refused to provide information to an appellant on the grounds that it is not "environmental information". Those submissions, in essence, amount to a statement from the author that they do not believe the information requested does not come within the definition of "environmental information", even if that concept is to be interpreted broadly. They also refer to the definition of "environmental information" contained in the Aarhus Convention which, although similar to, is not the same as the definition contained in the AIE Regulations. I believe it is reasonable to expect that decision-makers nominated by the Department, which is not only a significant size but also deals with a significant amount of environmental information as part of its functions, would be familiar with the provisions and requirements of the AIE Regulations, as distinct from the Aarhus Convention, and also with the obligation to provide reasoning for decisions which is clearly outline in articles 7(4) and 11(4) of the Regulations and which the High Court has clearly indicated must involve more than simply invoking the statutory ground upon which the decision-maker seeks to rely (see *Right to Know v An Taoiseach* [2018] IEHC 372). For the avoidance of doubt, it should not be for individual decision-makers to inform themselves of the requirements of the AIE regime on receipt of a request. Such training and assistance should be provided by the Department as a matter of course and be made readily available to those staff members expected to deal with AIE requests.

Analysis and Findings

12. Article 3(1) of the Regulations 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).

13. 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.

14. 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.

15. 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 element of the definition to which the information in question relates.

16. In this case, the appellant is seeking information relating to a decision of the Minister to refrain from publishing weekly tables of active harvesting sites provided to the Department by Coillte. The Minister's response to a parliamentary question in the Dáil indicated that his decision was influenced by his understanding that "there have been many instances of log theft, diesel theft, machinery damage and parts stolen from active harvesting sites". The appellant is seeking to be provided with the information which led to that understanding on the part of the Minister.

17. 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 or 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. 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 issue with which the information is concerned, and it may be relevant to consider the purpose of the information (*ESB*, paragraph 43).

18. 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 its 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 described 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 *Glawischnig* (see paragraphs 21 and 25).

19. 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 the public authorities, the term 'measures' serving merely to make it clear that the acts governed by the directive included all forms of administrative activity".

20. 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…"

21. 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).

22. In my view there are at least two measures/activities at issue here. The first is the decision to refrain from publishing the weekly tables of active harvesting sites made available to the Department by Coillte. As the Minister's response explains, the purpose of the harvesting tables is to assist the Department in carrying out harvesting and post-harvesting inspections. The Minister notes that it is those tables "from which the Department select a sample of forest areas to visit, either during or after harvesting has taken place". Those Department inspections have an environmental impact, as their purpose is to ensure compliance with licences granted by the Department. As the Minister's response also notes "the focus is primarily on water quality related issues that may be caused by breaches of the licence resulting mainly by machine traffic when harvesting and extracting timber from the site". As Coillte is "Ireland's largest forest manager" and "custodian of 440,000 hectares or 7% of Ireland's land" which is "primarily forested land", compliance by Coillte with licence conditions applying to harvesting has a "real and substantial possibility" of environmental impact. In turn, the Department's inspections have a similar impact as does the decision of the Department to rely on tables provided by Coillte as a basis on which to decide which sites should be inspected for compliance. In turn, the decision to refrain from publishing those sites also has more than a remote possibility of environmental impact. By way of, perhaps an extreme but nonetheless possible, example, if Coillte supplied the Department with a list of active sites which omitted sites, that would impact the Department's ability to ensure those sites were being managed in accordance with the conditions of the applicable licence. Publication of the active lists would mitigate that risk as interested members of the public might be able to point out discrepancies in the list or point to sites which they considered to be actively harvested which had not been included.

23. The second is the instances of "log theft, diesel theft, machinery damage and parts stolen from active harvesting sites", referred to in the Minister's response. Although this is not an activity carried out by the Department or by Coillte, it is nonetheless an activity with environmental impact since the theft of logs, diesel and machinery parts all carry more than a remote possibility of environmental impact including the potential impact incurred through replacement of those resources, through their perhaps improper or inappropriate use by persons not subject to the same statutory obligations as Coillte to consider the environmental impact of their activities and through the impact on the harvesting itself. For example, if harvesting does not occur because machinery has been damaged or replaced that has an environmental impact or if more harvesting needs to occur because logs have been stolen that also has an impact.

24. The next question to consider is whether the information requested by the appellant is information "on" those measures. Again, *RTÉ* (paragraph 52) endorses the approach set out in *Henney*. 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).

25. *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 and give an indication of how the very broad language of the text of the provisions in the Convention and 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).

26. The guidance provided by the Courts therefore suggests that there is 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).

27. The Minister and his Department are engaged in an act of environmental decision-making when making a decision as to whether or not to publish lists of active harvesting sites sent to them by Coillte. In addition, publication of these lists might enable greater awareness of the Department's inspection activities and Coillte's harvesting activities, both of which are environmental matters. The "instances of log theft, diesel theft, machinery damage and parts stolen from active harvesting sites" referred to by the Minister are, according to the Minister, a key factor in his decision-making process and are therefore information which is critical or integral to that decision. Information on the thefts which the Minister understands to have taken place is therefore information on that decision which, as I have already found above, is a measure within the meaning of category (c) of the definition. It is information which would enable the public to better understand the decision to refrain from publishing lists of active harvesting sites and to engage in a more informed debate about whether the interest in the publication of that information should outweigh any interest in guarding against the risk of theft identified by the Minister.

28. In addition, I have found that the instances of log theft, diesel theft, machinery damage and parts being stolen from active harvesting sites themselves are activities with environmental impacts and information on those instances is therefore quite clearly information on that activity.

29. I am therefore satisfied that the information requested by the appellant in this case falls within the definition of "environmental information" contained in article 3(1)(c) of the AIE Regulations. On that basis, I am remitting the matter to the Department for further consideration in accordance with the provisions of the AIE Regulations.

30. I note in this regard that a dispute arose between the appellant and the Department as to the extent of the information held by or for the Department within the scope of his request. The Department, in its original decision, informed the appellant that the information "re theft of logs, diesel and parts, and vehicle damage, on harvesting sites was provided verbally from Coillte to [a member of staff at the Department] on 19 April 2022". That member of staff is not clearly identified, nor is any indication given as to the information provided to them or as to whether any note of the call was recorded.

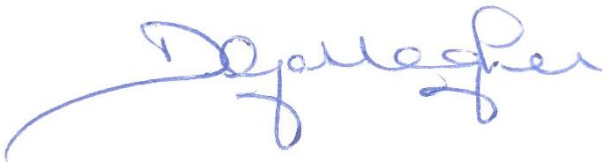
31. I would remind the Department that in order to process the request in accordance with the provisions of the AIE Regulations, the Department must take reasonable and adequate steps to search for and identify any information within the scope of the appellant's request. If no further information is retrieved as a result of those searches, the Department should write to the appellant advising him of this and setting out the steps taken by it in conducting those searches and the basis on which it has reached any conclusion that no further information within the scope of the request is held by or for it.

Decision

32. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I annul the Department's decision and direct that the request be remitted to the Department for further consideration in accordance with the provisions of the AIE Regulations.

Appeal to the High Court

33. 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.



Deirdre Gallagher

on behalf of the Commissioner for Environmental Information

1 September 2023