

**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- 133114-POTOJ1**

**Date of decision:** 31 August 2023

**Appellant:** Mr. Fintan Kelly (Irish Environmental Network)

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

**Issue:** Whether the Department has complied with its obligations under article 7(5) of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that the request was not dealt with in accordance with article 7(5) of the Regulations, as the Department:

- a) failed to provide the appellant with information relevant to the request;
- b) provided no evidence that it conducted an adequate and reasonable search to enable it to identify and locate information relevant to the request, in accordance with Article 7(5) of the Regulations.

The Commissioner therefore annulled the Department's decision and remitted the matter for fresh consideration by the Department.

**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 22 July 2022 the appellant submitted a request to the Department requesting information under the AIE Regulations, for the following information:

“For the period 01/01/18 to 25/07/22,

- A copy of all the information, including documents, files, database records, letters, internal notes, memos, emails, drafts held by the Department, sent, received or held by the Department in respect of:
  - All information held by the Forest Service of the Department of Agriculture, Food and the Marine in relation to the Irish Hen Harrier Winter Survey. Such information also to include:
  - Details of all meetings, including un-minuted meetings, and is to include details of attendees, durations, location and agenda, matters discussed, items reviewed and/or circulated.
  - All items attached to paper files, paper files, documents, “post-it” type notes, notes, inclusions etc.
  - All items attached to electronic files and emails, including file attachments, forwarded documents, associated replies or originating queries, database records and files referred to, and the content of URLs referenced if not publicly available”

The appellant further requested that the information be provided via electronic copy sent by email(s) as the preferred format for the requested information, with a covering index note.

2. On the 19 August 2022 the Department wrote to the appellant outlining the decision to refuse access to the information sought on the basis that the, “document you requested does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken”.
3. On the 22 August 2022 the appellant wrote to the Department seeking an Internal Review of the Departments Original Decision on the basis that:
  - the refusal states that the “document” requested could not be found whereas the appellant had sought “all information” held by the Forest Service of the Department of Agriculture, Food and the Marine in relation to the Irish Hen Harrier Winter Survey.
  - the appellant found it, “extraordinary that the department as the "public authority" within the meaning of the EC (Birds and Natural Habitats) Regulations 2011 (the 2011 Regulations), with duties in relation to Nature Conservation has no information pertaining to the Irish Hen Harrier Winter Survey (IHHWS)”.
4. The Department issued its Internal Review Decision letter to the appellant on 11 November 2022, confirming its decision to refuse the request, “under Article 7 (5) as the information does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken”. In this letter the Department also confirmed that telephone conversations had taken place between the IHHWS and the Department. It did not provide any further detail on those conversations. The Department also indicated that after the appellant’s initial request had been received, it was agreed that a Memorandum of Understanding (MOU) between the Department and the IHHWS would be “produced” with the potential to be released subject to the decision maker recommendation.

5. On 9 December 2022, the appellant submitted an appeal to this Office.
6. 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 had regard to the submissions made by the appellant and the Department. In addition, I have had regard to:
  - the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister’s Guidance);
  - Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
  - the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
  - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’).

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

### **Scope of Review**

7. In accordance with article 12(5) of the AIE Regulations, the role of this Office is to review the public authority’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.
8. As the Department has indicated its reliance on article 7(5), the scope of this review is confined to whether the Department was justified, under article 7(5) of the AIE Regulations, in refusing access to the information requested by the appellant.

### **Preliminary Matters**

9. I wish to express my regret that there has been a delay in the resolution of this appeal, which was due to a combination of factors.
10. This Office has been unable to carry out a thorough review in this case. This Office’s Investigator attempted to clarify certain issues regarding the scope of the request and provided the Department with deadline extensions for submissions. However, there was little engagement with the substantive matters at issue here, as set out below.
11. The conduct of the Department in this regard has been unacceptable. I acknowledge that the Department continues to increase its resources to deal with the huge increase in AIE requests and appeals that it has experienced over the past year. However, that is of little consolation to the appellant in this case, whose request was not answered adequately at original or internal review decision stage. This Office expects the Department to continue to review how it meets its obligations under the AIE Regulations.

## **Analysis and Findings**

12. When considering an appeal where a public authority has effectively refused a request under article 7(5) of the AIE Regulations, this Office must be satisfied that adequate steps have been taken to identify and locate relevant records, having regard to the particular circumstances.
13. In determining whether the steps taken are adequate in the circumstances, the Commissioner considers that a standard of reasonableness must necessarily apply. Therefore, during the course of investigations, public authorities are required to detail the steps taken to search for relevant records in their submission to this Office.
14. The evidence in "search" cases generally consists of the steps actually taken to search for the information along with miscellaneous other information about the records management practices of the public authority insofar as those practices relate to the information in question.
15. As previously stated, it is the contention of the appellant that information on the subject matter should exist as the Department act as the "public authority" within the meaning of the EC (Birds and Natural Habitats) Regulations 2011 and as such has certain duties in relation to nature conservation.
16. The investigator in this case highlighted the contentions of the appellant to the Department when seeking submissions on this case while also asking the Department to specify the steps taken to search for the relevant subject matter information, in addition to details of guidelines, practice, procedures and arrangements in relation to the storage, archiving, retention and destruction of the type of information sought in this request. A detailed description of the searches carried out to cover the possibility of misfiled or misplaced records and a description of the records that would typically be created in a case such as this were also requested.
17. As outlined above there was no response to any of these requests which is both disappointing and unacceptable.
18. When contacted by the investigator in this case (via email), the Department responded that staff dealing with this case understood that the appellant had agreed to wait for the aforementioned MOU. In a subsequent phone call with the Investigator this position by the Department was rejected by the appellant. The Investigator informed the relevant staff in the Department of the appellant's position and upon request granted the Department a further extension period for the submission of relevant information to this Office in support of its Decision to withhold information as requested. No further communication was received from the Department on this case.
19. In the absence of engagement with this Office's requests for information, I am not satisfied that reasonable searches have been carried out to locate the information requested. It is not the role of this Office to adjudicate on what information ought to be held by a public authority. However, in this case, I simply do not know if the information sought exists, nor is it possible to know its content. If such information exists, it may comprise third party information, the release of which those third parties have not been afforded an opportunity

to make comments. Therefore, because of the nature of the information sought, I am not in a position to direct release of the information.

### **Decision**

20. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I annul the decision of the Department on the basis that I am not satisfied that reasonable and appropriate searches have been conducted to identify and retrieve environmental information within the scope of the appellant's request.
21. I direct the Department to carry out a fresh decision-making process. While doing so, the Department must take reasonable steps to identify and retrieve any environmental information held by or for it within the scope of the appellant's request and to set out in detail to the appellant the steps it has taken, as required by the AIE Regulations.

### **Appeal to the High Court**

22. 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