



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-119755-L7K7K4

Date of decision: 20 July 2023

Appellant: Ms. W.

Public Authority: Department of Agriculture, Food and the Marine [the Department]

Issue: Whether the public authority has carried out adequate and reasonable searches to identify and locate information relevant to the request in accordance with Article 4(5) of the AIE Directive, implemented by 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, because 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 3 December 2021 the appellant made the following request to the Department of Agriculture, Food and the Marine (the Department) under the AIE Regulations:

“In response to S.I. No. 293 of 2021, the DAFM introduced revised public consultation procedures for projects that may affect European sites. Details of the new consultation processes introduced by DAFM were contained in Circular 10/2021, which was effective from 12 July 2021.

“With regard to Point 5 of Circular 10/2021 i.e. the decision to reduce the timeframe for lodging an appeal from 28 days to 14 days and in respect of the period from 1 January 2021 to 12 July 2021 (both dates inclusive) please provide, by email, all information held by or for DAFM that informed the decision to reduce the timeframe for lodging an appeal from 28 days to 14 days

“The information provided should include, inter alia:

- Internal and external correspondence (any media, including text and WhatsApp messages)
- Advice received, including legal advice, including drafts
- Any analysis, review or consideration etc of any material and / or draft proposals in relation to considerations to reduce the timeframe for lodging an appeal.
- Consultations
- Draft reports and final reports (including all appendices or annexes)
- Notes of all telephone conversations where any part of the conversation is relevant to the request
- Notes of all meetings (actual or virtual) where any part of the meeting is relevant to the request
- Investigations, either conducted internally, or externally by any third parties, that are relevant to the request”

2. On 21 December 2021, the Department issued its decision to part-grant the information requested. The information provided to the appellant comprised a number of emails contained within three email “threads” dated 27 November 2020-16 November 2021; 1 July 2021-2 July 2021; and 2 July 2021. The Department indicated that access to some of the information sought was refused in accordance with article 8(a)(i) of the AIE Regulations, on the basis that disclosure of information “would adversely affect the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information and where that confidentiality is otherwise protected by law.” It was the Department’s contention that the confidentiality of the records in question was otherwise protected by law under section 37(1) of the Freedom of Information Act 2014 (FOI). In its weighing the public interest served by disclosure against the interest served by refusal, in accordance with article 10(3) of the Regulations, the Department considered that the “factors in favour of withholding this information are right to privacy of persons who may be identified by releasing the information and the right to due process” and concluded that “on balance, the public interest in this case is best served by withholding this information.” The Department’s decision letter stated that “[a] full schedule of the records held on file is attached.” This schedule consisted of the following one-line entry in the “Description of document” column: “All documents relating to AIE 21/261” [the Department’s request reference].
3. By way of response, on 27 December 2021 the appellant requested a complete list of all information relevant to her request that had been refused either wholly or in part. The appellant



noted that six of the emails provided to her related to the implementation of, rather than to the informing of the decision to implement the change in respect of which she had requested information and indicated that four emails provided to her related to a different AIE request which she was ignoring for present purposes. Lastly, the appellant noted that some of the emails provided to her made reference to a meeting held on 2 July 2021 and also to a legal opinion, and requested clarification in regard to whether access to information on the meeting and on the legal opinion was being refused.

4. The appellant received a response from the Department dated 4 January 2022, in which the original decision maker stated that he had provided to the appellant all the information that had been provided to him regarding the request and that the appellant was free to request an internal review if she was not satisfied with his decision. It contained no reference to the appellant's questions.
5. On the same date, the appellant responded by repeating the request she had made in writing on 27 December 2021 for a "a complete list of all information relevant to this AIE request which has been refused either in part or in whole" and for clarification regarding whether access to information on a meeting held on 2 July 2021 and on a legal opinion was being refused.
6. The appellant received a reply on the same day stating that the schedule that she had received with the decision was "the standard format and no more details are provided." The decision-maker stated, in reference to the meeting of 2 July 2021 and the legal opinion, that he had "no information on either." He concluded the communication by telling the appellant that she was "well within [her] rights to request an internal review."
7. The appellant requested an internal review on 12 January 2022, noting that she had not been provided with any information pre-dating 1 July 2021, a date before which she contends the decision to reduce the timeframe for lodging an appeal contained in point 5 of Circular 10/2021 would appear to have been made and in respect of which she was seeking information that informed that decision. She repeated her intention to ignore the four emails she contends relate to a different AIE request. The appellant reiterated the questions posed to the Department previously in relation to a complete list of information that had been refused in whole or in part, and information on a meeting of 2 July 2021 and on the legal opinion.
8. The Department affirmed the original decision by way of an internal review decision issued to the appellant on 11 February 2022. No reference in the decision was made to any of her questions.
9. The appellant submitted an appeal to my Office on 21 February 2022.
10. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the AIE 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').
11. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

12. 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. The scope of this review is confined to whether the Department has refused a request, in whole or in part, given the contention of the appellant that she has been provided with no information that is relevant to her request. A request which has been "refused" includes a request that has not been dealt with in accordance with article 7(5) of the AIE Regulations. This provision requires the public authority to take adequate steps to identify and locate information that is relevant to a request.
13. The Department contended in its original decision, confirmed in its internal review decision, that information had been withheld in accordance with article 8(a)(i) of the AIE Regulations. As it was not readily apparent to this Office what that information was, the Department indicated in subsequent correspondence, that the telephone number of a named official in one identified email had been redacted. Upon further inspection, the investigator assigned to the appeal discovered another email from the same official whose email signature lacked a telephone number. The investigator questioned the Department about whether this second email with no telephone number had also been redacted, but received no response. However neither of the emails falls within the date range of information sought by the appellant, namely 1 January 2021 to 12 July 2021, as they are dated 16 November 2020 and 27 November 2021, respectively. For this reason, I consider that there is no requirement for me to deliberate further on the matter of the information withheld by the Department under article 8(a)(i) of the AIE Regulations, as the two pieces of information in question fall outside the scope of the appellant's request.

Analysis and Findings

Preliminary matter - Schedule of Information

14. The original decision letter gives the impression that the Department released all information that was relevant to the appellant's request, except for information not disclosed under article 8(a)(i) of the AIE Regulations. However, upon further inspection, it is difficult to know whether the Department's partial withholding of some records relates only to information that has been released, or if it also covers information that has not been released. This is due to the fact that the schedule of records that accompanies the original decision letter fails to list any record, released or



not released. The only entry under the ‘Description of document’ column in the schedule merely states “[a]ll documents relating to AIE 21/261” [the Department’s request reference]. It also refers to article 8(a)(i) as the basis for “deletions”, namely “redaction of personal information.” In other words, it contains no list of each record granted, part-granted or refused. Despite the Department’s assertion that it is a full schedule of records, it is evidently not so. Moreover, the version of the schedule submitted to this Office with the Department’s submission letter, contains no reference to article 8(a)(i), to deletions or to the reason for said deletions. It should be apparent from a schedule of records, which information has been released in full, which has been released partially and which has been refused. The provision by public authorities of a schedule of records to a requester is recommended and welcome. However, if a schedule is provided, it should contain a complete list of records that are relevant to a request, otherwise it is of little or no use, as in the present case. The Department is encouraged in future to provide full, meaningful schedules to requesters of environmental information.

Positions of the Parties

15. Upon the request of this Office, the appellant made submissions on 2 April 2022, which can broadly be summarised as follows:
 - a) The information sought has not been provided.
 - b) The information provided to her is either not relevant to her request or relates to another request that she had submitted to the public authority.
 - c) The schedule of records that accompanied the original decision letter fails to indicate the records that have been released to her and the records that have not been released to her. Neither does it set out the records that she contends do exist but which have not been identified by the public authority.
 - d) Her question on whether she is being refused access to information relating to a meeting and to a legal opinion, both identified in some of the records released to her, has gone unanswered by the public authority.
16. This Office wrote to the Department on 31 March 2022 inviting it to make submissions in respect of this appeal and to request a complete schedule of records. Following an extension of time to submit the requested material, it delivered a submission letter on 12 May 2022 together with a document that it claimed to be a complete schedule of records. However, the schedule provided contained less detail than the version provided to the appellant with its original decision letter. The submission letter merely stated, in respect of the original decision, that “personnel were asked to provide any records they may hold in relation to the material sought”, reiterated the original and internal review decisions and indicated that one email [of those disclosed to the appellant] that had been redacted was included in unredacted form as well as the aforementioned schedule of the records held by the Department in relation to this request.
17. The investigator assigned to this appeal wrote to the Department on 7 March 2023 requesting further submissions and included a series of questions relating to the thoroughness of searches



that it had carried out in order to identify and locate information that was relevant to the appellant's request for information. No response from the Department was received.

Article 7(5) – adequate searches

18. Article 7(1) of the AIE Regulations requires public authorities to make available environmental information that is held by or for them on request. Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested environmental information is held by or for the public authority concerned. In cases where a public authority has effectively refused a request under article 7(5), this Office must be satisfied that adequate steps have been taken to identify and locate relevant environmental information, having regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances, a standard of reasonableness must necessarily apply. It is not normally this Office's function to search for environmental information.
19. It is the contention of the appellant that information should exist, between 1 January 2021 and 12 July 2021, which informed the decision to reduce the timeframe within which to lodge an appeal under the terms of the Department's Circular 10/2021. This constitutes the appellant's request for information. She contends that the information provided to her relates to the implementation of the reduced timeframe rather than to the informing of the decision to reduce the timeframe. Excluding the emails that are out of scope for the purposes of this appeal, it appears to me from a review of the remaining emails, that the appellant's contention is correct.
20. My view is supported by the fact that in two of the emails provided to the appellant, both dated 2 July 2021 and therefore within the scope of the request, reference is made both to a "meeting" and to a "legal opinion". Specifically, in emails sent at 13.15 and 17.56, respectively, reference is made to "the meeting this morning" and to "the meeting earlier". In this latter email, mention is made also of "the AG's [Attorney General's] office [having] cleared this as the policy now". A separate email of the same date, sent at 09.37, has a reference to "legal opinion on the implementation of Si 293", the statutory instrument from which derived public consultation procedures that gave rise in time to the Department's Circular 10/2021 and the reduced timeframe within which to lodge an appeal, the subject matter of this appeal to my Office.
21. These references lead me to the conclusion that it is likely that the Department does, indeed, hold further information that is relevant to the request. I also see how, as the appellant submits, the legal opinion may form part of the information that is relevant to her request, as it may have had a direct bearing on some or all features of the statutory instrument [SI 293], the implementation of which became the Department's Circular 10/2021, including the reduction in the appeal timeframe which is the core of the appellant's request for information. Further, as the appellant also points out, if there is a possibility that the meeting of 2 July 2021 was concerned with the implementation of the circular rather than with its formulation, any inputs into the decision to reduce the timeframe having likely been made prior to that date, then it is legitimate to consider whether meetings were not also held to discuss and deliberate on those inputs. It is certainly possible that meetings and conversations did take place and that information on those meetings and conversations does exist and is held by the Department. It is difficult to conceive of a scenario



where no meetings or conversations were held and where records of, and information on, such meetings and conversations are not in the possession of the Department. For these reasons, I am of the view that further information relevant to the appellant's request might exist but which has not been identified or has not been considered appropriate by the Department to release to the appellant.

22. In his request for submissions to the Department, the investigator assigned to this appeal set out a comprehensive, detailed list of questions with a view to determine if, and how reasonable any searches by the Department had been conducted in order to identify all and any information within the scope of the appellant's request. It is only with a clear knowledge of the searches carried out by a public authority that I can determine whether they meet a standard of reasonableness. It is also possible that a public authority, pursuant to a reasonable search, finds that it does not hold information relevant to a request. However, as the Department, in its original decision and internal review decision letters gives no detail as to the searches carried out to identify information relevant to the appellant's request, nor has it responded to the investigator's queries, I conclude that reasonable searches do not appear to have been carried out by the Department. It is simply not sufficient for the Department to assert, as it does in its submission to this Office, that "personnel were asked to provide any records they may hold in relation to the material sought."
23. In the circumstances, I find that the Department has not taken adequate steps to identify and locate all relevant environmental information held by it.
24. I consider that the most appropriate course of action to take now is to annul the decision of the Department, the effect of which is that the Department will have to consider the appellant's request afresh and make a new, first instance decision in accordance with the provisions of the AIE regulations. I appreciate that remitting the case back to the Department causes further delay for the appellant. However, I do not believe that there is an appropriate alternative course of action to take in this instance.

Decision

25. Based on the foregoing, on behalf of the Commissioner for Environmental Information, I annul the Department's decision on the appellant's request and remit the matter for fresh consideration by the Department. I expect that this fresh decision-making progress shall culminate in a decision which complies with the requirements of the AIE Regulations and the AIE Directive.



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Commissioner for Environmental Information

Appeal to the High Court

26. 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

20 July 2023