



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-128164-Z1W0K0

Date of decision: 1 June 2023

Appellant: Dr. Fred Logue

Public Authority: Fingal County Council (the Council)

Issue: Whether the Council has complied with its obligations under article 7(3) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that article 7(3) of the Regulations did not apply in the circumstances of the case. He annulled the Council's decision and directed release of the requested information.

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 20 July 2022, the appellant contacted Fingal County Council (the Council) and requested the following information:
 - A list of all the currently approved local authority own developments in the Council's functional area that have yet to be commenced and in each case the date of approval; and
 - A list of all the currently approved local authority own developments in the Council's functional area that have commenced and yet to be completed and in each case the date of approval and the date of commencement.
2. On 23 August 2022, the appellant requested an internal review on the basis of the Council's deemed refusal of his request, as he had not received a response within the statutory timeframe.
3. The appellant submitted an appeal to this Office on 12 September 2022.
4. The Council were contacted by this Office's Support Unit in order to validate the appeal. The Council responded on 15 September 2022 and outlined that the request for internal review was received on 23 August 2022 with a response due date of 20 September 2022. It also informed this Office that it had issued a late response to the original request on 12 September 2022.
5. The late response issued by the Council on 12 September 2022 refused the appellant's request. It cited article 7(3)(a)(i) as the basis for refusal, and stated that the information was already publicly available online.
6. The Council issued its internal review decision on 20 September 2022. It affirmed the original decision and provided this Office with a copy of the internal review decision.
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 had regard to the submissions made by the appellant and Fingal County Council. 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

8. 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.

9. This review is concerned with whether the Council was justified, under article 7(3)(a)(i) of the Regulations, in refusing access to the information requested by the appellant in the form or manner requested by him.

Analysis and Findings

10. Article 6(1)(e) of the AIE Regulations provides that if an applicant desires access to environmental information in a particular form or manner, the request shall specify the form or manner of access desired. In this case, the appellant requested access to a list of the relevant projects (in the Council's functional area) with the date of approval for uncommenced projects, and the date of approval and date of commencement for projects that are currently being implemented but have yet to be completed. Accordingly, I am satisfied that that the appellant specified the form or manner of access desired in accordance with article 6(1)(e) of the AIE Regulations.
11. Article 7(3)(a)(i) of the AIE Regulations provides that where a request has been made to a public authority for access to environmental information in a particular form or manner, access shall be given in that form or manner unless the information is already available to the public in another form or manner that is easily accessible. Article 7(3)(a)(i) of the AIE Regulations seeks to transpose Article 3(4)(a) of the AIE Directive, which provides that where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless it is already publicly available in another form or format which is easily accessible by applicants. Article 7(3)(b) provides that where a public authority decides to make environmental information available in another form or manner it must set out the reason for that decision in writing.
12. The Council's original decision referred to article 7(3)(a) as a basis for refusal, stating that the information requested is publicly available and providing links to both the Council's [Planning Applications portal](#) and the [National Building Control and Market Surveillance Office](#) (BCMS). This decision was affirmed at internal review stage.
13. The appellant submitted that his request was for a list of the relevant projects with the date of approval for uncommenced projects and the date of approval and date of commencement for projects that are currently being implemented but have yet to be completed. He further submitted that the Council did not provide such a list or explain why it was refusing to do so.
14. The appellant argued, therefore, that the Council breached article 7(3)(a) by not providing access in the form requested (a list format). He submitted that the links provided by the Council do not contain the requested information, and argued that the Council's planning portal does not provide the public with a search functionality based on the type of application.
15. During the course of this investigation both the appellant and the Council provided submissions to this Office. The Investigator also communicated the appellant's assertions to the Council for further comment on 30 January 2023. In addition, the Council was asked to demonstrate where the



information requested by the appellant was available to the public in an easily accessible form or manner and to explain the basis on which it considered that access in an alternative form or manner was reasonable. It did not adequately address either of those questions in detail and provided the following as part of its response:

“the Council wishes to clarify that a list containing the exact information within the parameters outlined in the request does not exist within the Council, so where the vast majority of the information sought is available online, it is reasonable in order to use staff time and public money efficiently, to direct a requester to these sources, rather than creating lists of data in order to reply to a single AIE request which may never be required again.

[...]

The Council accepts that not all of the data exactly as requested is held in the portals recommended.

[...]

Fingal County Council accepts that none of the publicly available records sources to which the requester was directed in the response contained ALL the data covered by the original request.”

16. In order for article 7(3) to apply, one of two conditions must be satisfied. Either the information requested by the appellant must be already available to the public in another, easily accessible, form or manner, or the provision of access in another form or manner must be reasonable.
17. Article 7(3) of the AIE Regulations clearly provides that where a request is made in a particular form or manner “access shall be given in that form or manner” unless one of the conditions set out in that article are fulfilled. It is, therefore, in my view, for the Council to establish that the information requested by the appellant is already available to the public in another form or manner that is easily accessible or that providing access in another form or manner would be reasonable. My view in this regard is reinforced by article 7(3)(b) of the Regulations which provides that “where a public authority decides to make available environmental information other than in the form or manner specified in the request, the reason therefore shall be given by the public authority in writing”.
18. The first question to be addressed is whether the information requested by the appellant is already available to the public in another, easily accessible, form or manner. The appellant was directed by the Council to the Planning Portal and BCMS online systems for his request of lists of all the currently approved local authority own developments in the Council’s functional area. However, the Council’s submissions suggest that it is aware that it has not disclosed all of the information requested to the appellant.
19. Additionally, article 7(3) only applies where a public authority provides an appellant with the information requested but in a different form or manner than that requested. It cannot be used as a means for a public authority to provide online links as they contain a “vast majority” of information sought. Nor is it permissible to use article 7(3) of the Regulations as a basis for refusal



of information which the Council believes it does not need to provide on the grounds of the information being manifestly unreasonable.

20. Accordingly, it is my view that the Council erred in citing 7(3) as an exemption. Consequently, I do not consider it necessary to further analyse in detail the dispute between the parties in relation to the form and manner of access.
21. Taking all of the above into account, I am therefore satisfied that neither the criteria outlined in article 7(3)(a)(i) nor 7(3)(a)(ii) have been satisfied and it is not open to the Council to rely on article 7(3) in the circumstances of this case.
22. The Council's submission also says that it "should have either refused the request under [article] 9(2)(a) as manifestly unreasonable, or reverted to the requester advising him of voluminous and unreasonable nature of his request and engaged in a refinement process with him". However, the Council did not engage with the appellant to refine his request, nor did it make any reference to article 9(2)(a) of the AIE Regulations before it was asked to provide focussed submissions to this Office.
23. It is not clear what the Council seeks to achieve by informing this Office of what it now believes should have been done at an earlier stage regarding the appellant's request for access to information. However, its submission that it should have relied on article 9(2)(a) of the AIE Regulations, rather than article 7(3), not only undermines its reliance on article 7(3) in the first instance, it also fails to comply with its duty under articles 7(4) and 11(4) of the AIE Regulations to provide reasons for a refusal to release environmental information, both at original decision and internal review stage. The fundamental purpose of such a duty to provide reasons (i.e. so that a requester can properly understand the basis for refusal) is, in my view, significantly undermined if a public authority continually amends those reasons throughout the course of an appeal to my Office.
24. The duty to give reasons, which arises not only by virtue of the AIE Regulations and Directive, is recognised generally as a core principle of administrative law and a fundamental element of constitutional justice (see, for example, *Meadows v Minister for Justice* [2010] IESC 3 and *Balz & Anor v An Bord Pleanála & Ors* [2019] IESC 90). Both of these judgments, in the same way as the AIE Regulations, make it clear that where a requester has all or part of a request refused, they are entitled to be provided with clear reasons for that refusal. This duty arises so that the requester can take a view as to whether they consider refusal justified, or whether they wish to exercise their entitlement to have the refusal reviewed.
25. Having reviewed the Council's submission in relation to the potential application of article 9(2)(a) of the AIE Regulations, I am of the view that the Council has not shown that the appellant's request is manifestly unreasonable. The type of information requested here appears to me to be of a sort that one would reasonably expect the Council to be capable of producing.
26. The Council did not quantify the amount of staff time that would be required to collate a list for the purposes of the request. As set out above, it stated that it did not consider the deployment of staff to answer a (potentially) one-off AIE request to be an effective use of its resources. In the absence of reasons, this is not a satisfactory explanation for refusing the request.



27. It is therefore my view that the Council has not provided adequate reasons in its responses to the appellant or this Office to justify its refusal of access to the information requested.
28. In such circumstances where I have considered whether article 7(3) of the AIE Regulations provides grounds for refusal of the information requested, it is open to this Office to consider directing release of the environmental information to which I do not consider the exemption to apply. Alternatively, I can remit the matter to the Department so that a fresh decision-making process can be undertaken.
29. In this instance, I am of the view that the most appropriate course of action to take is to annul the decision of the Council and direct release of the information requested. This is due to the limited nature of the information sought by the appellant and the fact that much of it is already in the public domain. The Aarhus Convention recognises the importance of access to information as part of the right of citizens to fully participate in environmental decision-making. Remittal would serve to delay access to this information where the Council already had two opportunities to advance arguments in relation to exemptions. It failed to do so and remittal would allow it further opportunities to advance arguments it should have already made. This might act as an incentive to public authorities to delay access to information and defeat the important purposes of the AIE regime.

Decision

30. 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 Fingal County Council and direct release of the information requested.

Appeal to the High Court

31. 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