



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-126112-P7B4F7

Date of decision: 17 May 2023

Appellant: Mr X

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

Issue: Whether the Department was justified in refusing access to the requested environmental information on the basis that no relevant environmental information was held by or for it.

Summary of Commissioner's Decision: The Commissioner found that the Department had not established that reasonable and appropriate searches had been conducted to identify and retrieve environmental information within the scope of the appellant's request 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 25 March 2022, the appellant contacted the Department to request “all felling and afforestation applications submitted to Forest Service by Coillte in 2004 in relation to Co. Leitrim, a copy of the letter from Leitrim County Council to Forest Service in relation to each application” under the AIE Regulations.
2. The Department responded to the request on 22 April 2022. It refused the appellant’s request on the basis that the “document [he had] requested does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken.” No further information was provided to the appellant in this decision.
3. The appellant sought an internal review of the decision on 23 April 2022. He also requested that the Department schedule “in detail, all steps taken to ascertain the records requested.”
4. On 16 June 2022, the appellant received a new decision affirming the previous decision, using the same wording as the original decision maker had used. The Department also pointed out that the “records in question go back 18 years” and, had they been available, could be considered manifestly unreasonable in accordance with article 9(2)(a).
5. The appellant appealed to this Office on 7 July 2022, at which stage submissions were requested from the Department.
6. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the Regulations. In doing so, I have had regard to the submissions made by the appellant and the Department of Agriculture, Food and the Marine. 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.

Preliminary Matters

7. I consider it important to express my views on some preliminary matters, which arise in this case. I do not consider the Department’s responses to be in accordance with the duty to give reasons, which arises not only by virtue of the AIE Regulations and Directive, but 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.

8. As such, the manner in which the Department has dealt with this request is unacceptable. The absence of any evidence to show that the Department meaningfully engaged with the request at either original decision stage, or at internal review stage is most disappointing. Where a public authority refuses a request on the basis that it does not hold information within the scope of that request, it should be in a position to set out clearly, the steps it has taken to identify and retrieve relevant information. As outlined below, in this case, the Department acknowledged on appeal that it had refused the request without undertaking any searches. Even when asked by this Office to do so, the Department's summary of the steps it had taken were vague at best. The Department should review its procedures for searching for environmental information, and take account of the requirement under article 5(1)(b) of the AIE Regulations for it to make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible.

Scope of Review

9. 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 public authority may be directed to make available environmental information to the appellant.
10. This review is concerned with whether the Department was justified in its decision to refuse the appellant's request, on the basis that it does not hold the information sought.

Analysis and Findings

Is the information held by or for the public authority

11. 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. This Office's approach to dealing with cases where a public authority has effectively refused a request under article 7(5) is that it 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.



12. The Department explained that their means of storage have changed their ways of storing information the past 12 years. It said that information was “stored on paper files, located in different facilities”. It also said that “some elements of older files are located on computer systems, which in many cases are not searchable in the format being requested”.
13. On 4 August 2022, the Department contacted this Office and asked whether the appellant would consider the following:
 - i. Would he be willing to reduce the scope of his appeal to “particular sites”, as it would “better assist them in providing you [the appellant] with access to the information”.
 - ii. Could he contact Leitrim County Council as they may be in a better position to supply him with the information relating to them.
14. The appellant responded saying he wished to continue with our review of the Department’s decision.
15. The Department was invited to make a further submission in this case to provide further details of the steps taken to search for relevant information relating to the request. This request included a number of specific queries as to the locations searched, the search methods used and the individuals consulted in the Department.
16. In response to the search questions, the Department submitted the following:
 - It submitted that letters relating to county councils are not destroyed, but are “potentially located in numerous facilities and in various ways”.
 - In response to queries relating to locations/areas which were searched for the information sought in the case, the Department submitted that “the searching was done electronically on our systems”.
 - It submitted that the administrative staff who process files were consulted to ascertain where old copies of letters may be located.
 - The Department reiterated its internal review position that “records could not be found after reasonable steps were taken”. It also stated that the Department does not destroy records of licences or associated documentation, but that these “may be stored in a number of ways”.
 - The Department also requested within its submission that the appellant contact Leitrim County Council for such letters if he requires them.
17. As part of the request to the Department for a submission to provide further details on the steps taken to search for relevant information, the Investigator explained to the Department that this Office applies a standard of reasonableness in determining whether the steps taken are adequate in the circumstances. In its responding submissions, the Department asked what ‘level of reasonableness was expected from requesters’. While the reasonableness of a request may be relevant to the issue of whether article 9(2)(a) provides grounds for refusal of that request, as outlined above, the review in this case is not concerned with the application of article 9(2)(a). The standard of reasonableness of



relevance to the application of article 7(5) relates to the question of whether adequate reasonable steps have been taken by a public authority to locate any information held by or for that body.

18. In this case, I cannot find the Department was justified in refusing access to the requested environmental information on the basis that no relevant environmental information was held by or for it. I have come to this conclusion based on the following:
 - The Department stated that some of the records sought are “potentially located in numerous facilities and in various ways” but has not explained any further steps taken by it to locate or identify where information pertaining to the records would be stored. There is no reference to any particular location of where such ‘facilities’ would be nor is there any indication as to the ways this could be stored i.e in hardcopy or electronic form, onsite or archived elsewhere.
 - The Department has merely stated that “searching was done electronically on our systems” in response to queries relating to locations/areas which were searched for the information sought. There is no reference to any particular search terms, key words or reference numbers used to attempt to locate any relevant information, or any specified date range applied to searches on their systems.
 - The Department’s statement that it does not destroy records of licences or associated documentation, but that they “may be stored in a number of ways” is not supported by any further details as to any potential methods of storage or any indication of searches for records that may be stored.
19. As referenced above, article 7(4)(c) of the AIE Regulations requires a public authority to specify the reasons for refusal of a request. The Department ought to be aware of the requirements placed on it by the AIE Regulations, and by the requirements of fair procedures, to provide reasons for its decisions. Neither of its decisions contained any justification for its conclusion that the records did not exist or could not be found. The absence of such explanation is magnified by the appellant’s specific request that the steps taken to search for documents should be set out in the internal review decision. This disregard for its obligations by the Department is unacceptable.
20. The Department’s submission to this Office was the first stage at which it indicated that complete searches had not been carried out for the requested information.
21. Taking all of the above into account, the Department has not demonstrated that it carried out sufficient searches to justify its stance that the requested environmental information is not held by or for it.
22. I am not satisfied that the Department has taken adequate steps to identify and locate all relevant environmental held by it. As such, I cannot find the Department was justified in refusing access to the requested environmental information on the basis that no relevant environmental information was held by or for it.

Article 9(2)(a) of the AIE Regulations



23. In addition to stating that the requested information cannot be found or does not exist, the Department also sought to rely on article 9(2)(a) of the AIE Regulations, in the event that relevant information was found to exist. Article 9(2)(a) of the AIE Regulations provides that a public authority may refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought. This provision seeks to transpose Article 4(1)(b) of the AIE Directive, which provides that Member States may provide for a request for environmental information to be refused if the request is manifestly unreasonable, and, in turn, is based on part of Article 4(3)(b) of the Aarhus Convention.
24. When considering whether a request is manifestly unreasonable, it is necessary to examine the impact on the public authority of dealing with the request. In particular, I must examine whether responding to the request would involve the public authority in disproportionate cost or effort, or would obstruct or significantly interfere with the normal course of its activities. In light of the findings of the Court of Justice of the European Union in T-2/03 Verein für Konsumenteninformation v. Commission, at paragraphs 101-115, I consider that the exception in article 9(2)(a) is only available where the administrative burden entailed by dealing with the request is particularly heavy.
25. The AIE Regulations do not specifically provide that the burden of proof rests with the public authority in relation to justifying a refusal to make information available. However, I am satisfied that the scheme of both the AIE Regulations and the AIE Directive make it clear that there is a presumption in favour of release of environmental information. As such, if a public authority wishes to refuse a request on the grounds that it is manifestly unreasonable, that public authority must clearly demonstrate the actual and specific impact that dealing with the request would have on the public authority's normal activities.
26. The Department's statement that the request is manifestly unreasonable is followed by responses to queries put to the Department relating to searches. It is my view that the Department is undermining its own assertion that the request is manifestly unreasonable by also seeking to assert that it has carried out searches for the information but has not found any relevant information such that refusal is justified under article 7(5). The Department's argument is that it does not hold the information requested but, if it did, it would be manifestly unreasonable to expect it to provide that information to the appellant.
27. As matters stand, in circumstances where the Department has not identified any information that it holds relevant to the request, I see no basis to find that the Department is entitled to refuse the request on the basis that it is manifestly unreasonable within the meaning of article 9(2)(a) of the AIE Regulations.

Conclusion

28. In the circumstances, I am of the view that the most appropriate course of action is to annul the decision of the Department in its entirety, the effect of which is that the Department must consider the



appellant's request afresh and make a new, first instance decision in accordance with all relevant provisions of the AIE Regulations.

29. If further searches identify information within the scope of the appellant's request, then a decision on disclosure should be reached in accordance with the provisions of the AIE Regulations. If it is the case that, having taken reasonable and adequate steps to identify and retrieve information within the scope of the request, the Department remains of the view that no relevant information is held by or for it, it should advise the appellant of this and set out the steps taken by it in conducting those searches.
30. Furthermore, should the Department wish to rely on article 9(2)(a) in processing a new decision, I would remind it that the Minister's guidelines provide that should a public authority seek to refuse a request under article 9(2) of the AIE Regulations, it should first assist the appellant to reformulate the request as appropriate. I would suggest, in this case, that the Department and the appellant liaise with a view to fully processing the request as efficiently as possible.

Decision

31. 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 that, after all reasonable steps to ascertain its whereabouts were taken, the information requested does not exist or cannot be found. I remit the matter to the Department who should process the appellant's request in accordance with the AIE Regulations.

Appeal to the High Court

32. 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 McGoldrick

on behalf of the Commissioner for Environmental Information