



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-115424-T4K5P6

Date of decision: 29 March 2023

Appellant: Mr B (on behalf of a client)

Public Authority: Office of Public Works (the OPW)

Issue: Whether the OPW was entitled to refuse the appellant's request on the basis of article 9(2)(a) of the Regulations

Summary of Commissioner's Decision: The Commissioner found that article 9(2)(a) of the Regulations did not provide grounds for refusal and remitted the matter to the OPW for fresh 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 9 August 2021, the appellant emailed the OPW to request the following information:
 - (i) All correspondence between the Office of Public Works and the staff of, including the members of the Executive of Roscommon County Council and/or the elected members of Roscommon County Council in the period from 1 January 2021 to the date of this request, concerning flooding and/or proposed flood relief works at Lough Funshinagh, County Roscommon;
 - (ii) All internal correspondence in the period 1 January 2021 to the date of this request concerning flooding and/or proposed flood relief works at Lough Funshinagh, County Roscommon;
 - (iii) All correspondence between the Office of Public Works and the Department of Public Expenditure and Reform, including the Minister of State Patrick O'Donovan and his office, in the period 1 January 2021 to the date of this request concerning flooding and/or proposed flood relief works at Lough Funshinagh, County Roscommon;
 - (iv) All correspondence between the Office of Public works and the Geological Survey Ireland (GSI) in the period 1 January 2021 to the date of this request, including correspondence concerning the analysis of future flood trends at Lough Funshinagh completed in April 2021;
 - (v) All correspondence between the Office of Public Works and the National Parks and Wildlife Service (NPWS) in the period 1 January 2021 to the date of this request concerning flooding and/or proposed flood relief works at Lough Funshinagh, County Roscommon.
2. The OPW responded to the appellant on 6 September 2021, to advise him that “due to the large number of records that it encompasses, it will not be possible to make a decision on your request within the standard one-month timeframe” and that it was availing of the extended two-month period provided for in article 7(2)(b) of the AIE Regulations. The correspondence also informed the appellant that “there may be fees associated with this request” which were estimated to be in excess of €750 for search and retrieval work. It asked the appellant to confirm whether he wished to proceed with the request by 13 September 2021 before noting that “the final cost of processing your request will be based on the actual amount of work undertaken in relation to the records actually released to you”.
3. On 20 September 2021, the OPW issued its decision on the request. It refused the request, having regard to article 9(2)(a) of the Regulations, noting that “the supply of such a large volume number of records, or an examination of the kind of records concerned would place an unreasonable demand on the Office of Public Works resources so as to cause a substantial and unreasonable interference with/and/or would disrupt the work of the Office of Public Works and its ability to perform its core functions”.
4. The appellant sought an internal review of the decision on 20 September 2021. He submitted that the original decision “fail[ed] to substantiate the refusal based on manifest unreasonableness”. He asked the OPW to indicate “how the request is manifestly unreasonable and would place an unreasonable demand upon the OPW” as well as “the extent of records found in relation to the five elements of the request”. He also noted that the request was temporally limited and that he had been informed by the Department of Public Expenditure & Reform, in response to a separate AIE request, that the Lough



Funshinagh project was being planned and executed by Roscommon County Council, and not the OPW. He submitted that, in those circumstances, he failed to see how the request imposed a manifestly unreasonable burden on the OPW.

5. The OPW issued its internal review decision on 14 October 2021. It affirmed the original decision to refuse the request on the basis of article 9(2)(a) of the Regulations. It noted that the OPW had received no response to its letter of 6 September 2021. It informed the appellant that “the original decision maker...sought information from employees within the OPW relating to [the] request”, that “the search and retrieval included all letters, memos, emails etc” and that “as part of the search and retrieval process numerous members of staff reverted supplying hundreds of documents, many of which contain attachments”. It reiterated that “to assess each of the individual documents and related attachments, in order to verify whether they can be Granted, Part Granted or Refused would place an unreasonable demand on the OPW resources so as to cause a substantial and unreasonable interference with/and/or would disrupt the work of the OPW and its ability to perform its core functions”.
6. The appellant submitted an appeal to this Office on 5 November 2021.
7. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the AIE Regulations. In carrying out this review, I have considered the submissions made by the appellant and the OPW. 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); and
 - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’);
 - the judgment of the Supreme Court in *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (NAMA);
 - the decisions of the Court of Justice of the European Union in [T-2/03 Verein für Konsumenteninformation v Commission](#) (*Verein für Konsumenteninformation*) and [C-619/19 Land Baden-Württemberg v DR](#) (*Land Baden-Württemberg*); and
 - the opinion of the Advocate General in [C-217/97 Commission v Germany](#).

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. My review in this case is concerned with whether the OPW is entitled to rely on article 9(2)(a) of the Regulations to refuse the appellant’s request.



Preliminary Matters

9. I wish to apologise to the appellant for the delays experienced in the resolution of this appeal. I also wish to acknowledge that those delays occurred in circumstances where the appellant had drawn this Office's attention to the background of the requests and requested that the appeal be prioritised. We are aware of the need to ensure a more efficient and timely resolution of appeals, and this Office remains committed to addressing that need.

Analysis and Findings

10. Article 9(2)(a) of the 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". It transposes 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".
11. The OPW's submissions in support of its position that article 9(2)(a) provides it with grounds to refuse the request may be summarised as follows:
- (i) It explains that the response to the flooding situation at Lough Funshinagh is being led by Roscommon County Council in accordance with the provisions of the Local Authorities (Works) Act 1949. It notes that in 2021, the Council requested assistance from the OPW which agreed to act as Contractor for the works to provide resources to assist with the delivery of those works and also agreed to provide funding for the project.
 - (ii) It submits that having received the request, the original decision maker sought all correspondence from staff relating to the request which included "all letters, memos, emails etc". Staff were asked to make a return where they had any correspondence relating to the proposed flood relief works at Lough Funshinagh. In order to reduce duplication, responders were asked that only the person who sent the correspondence was to include it with their return, not those who received or were copied on the correspondence. Seventeen people made returns (some of which were combined section returns) supplying hundreds of documents, many of which contain attachments. According to the returns, the search and retrieval element of the work took over 40 hours. There were approximately 60 Folders associated with the return, which contained in excess of 389 documents. Many of these documents were emails containing additional documents.
 - (iii) It submits that it holds a considerable amount of information in relation to the request as the Funding Authority and Contractor for the proposed flood relief works at Lough Funshinagh which would require review to confirm whether they could be considered for release. It notes that the appellant was given the opportunity to refine his request but did not reply to correspondence from the OPW in that respect and as a result the request was refused based on its "voluminous nature".



- (iv) In response to a query from the Investigator, the OPW explained its correspondence is primarily through email or hard copy letter. It noted that various types of documents were returned as part of the request including, but not limited to, emails, soft and hard copy letters, photographs, excel documents and pdfs. It advised that each of the OPW sections from whom returns were received save documents in a specified location accessible to staff in that area and not in a central OPW repository. It went on to note that due to Covid-19 restrictions in place at the time, all returns were issued to the original decision-maker electronically and all files were stored on a central platform in folders specific to the AIE request which are searchable by key words. The submission however, goes on to say that “the most efficient method to assess whether a return meets the requirements of the request is to manually open each document and ensure all emails and attachments are reviewed in full”.
 - (v) It submitted that it had identified approximately 100 records within the scope of part (i) of the request, 300 within the scope of part (ii), none within the scope of part (iii) and part (v) and 5 within the scope of part (iv).
 - (vi) In response to a request to estimate the number of hours and staff which might be required to process the request, relative to the number of staff and other work of the OPW, it submitted that over 40 hours had been allocated to the search and retrieval element of the request. It noted that its previous experience of requests indicated that the search and retrieval element takes a shorter length of time than that required to assess the documentation to confirm whether it could be considered for release and anticipated that it would take two staff members 50 hours in total to process the full request.
12. Following receipt of the OPW’s submissions, the Investigator received submissions from the appellant in relation to a separate AIE request, which had been made to the Department of Public Expenditure & Reform (DPER). That request also related to the Lough Funshinagh project and was broadly similar to the request in this appeal. The appellant’s submissions in the DPER appeal referred to two press releases issued by the OPW, one of which quoted the Minister of State at DPER, with responsibility for the OPW as stating that he had “instructed the OPW to provide whatever resources are required in terms of labour or equipment to facilitate the Council’s preventive flood mitigation works”.
13. The Investigator wrote to the OPW to clarify its submission of 10 December 2021, which indicated that it had not identified any records within the scope of part (iii) of the appellant’s request (for “all correspondence between the Office of Public Works and the Department of Public Expenditure and Reform, including the Minister of State Patrick O’Donovan and his office, in the period 1 January 2021 to the date of this request concerning flooding and/or proposed flood relief works at Lough Funshinagh”). She asked the OPW to confirm the form of the instruction to which the Minister’s statement in the press release referred. She also asked it to set out the steps it had taken to identify and retrieve information within the scope of parts (iii) and (iv) of the request, before concluding that no records relevant to those parts of the request could be identified.
14. The OPW’s response to this request is, in my view, confusing. It noted in the first instance that “there was no requirement for OPW to correspond with [DPER] in relation to this project”, as the estimated



Lough Funshinagh project costs were between €1 million and €10 million. This means that the Commissioner for Flood Risk Management was the Approving Authority for the project. The requirement for DPER to act as the Approving Authority only arises where the estimated capital cost is greater than €100 million. The response went on to note that “the OPW submission to your Office of 10 December 2022 confirms... there were no documents returned to the decision maker [for the element of the request which sought any correspondence between the OPW including Minister O’Donovan’s office in OPW and the Department of Public Expenditure and Reform]...as no correspondence met these parameters”.

15. In response to the Investigator’s request to “explain the OPW’s position that it holds no records comprising correspondence with Minister of State Patrick O’Donovan and his office in relation to flood relief works at Lough Funshinagh”, the OPW stated that it “did not indicate that there was no records to meet the information outlined above”. It submitted that “the original request sought correspondence between the OPW and the staff of, including the members of the Executive of Roscommon County Council and/or the elected members of Roscommon County Council (the Council) in the period from 1 January 2021 to 9 August 2021”.
16. I am concerned that the OPW has not properly interpreted the appellant’s request and that the impact of its interpretation is to inappropriately narrow the scope of that request. However, if it is the case that the OPW is entitled to refuse the request as it has interpreted it, on the basis of article 9(2)(a), then the question of whether the request should be interpreted more broadly does not arise. In other words, if responding to the request on the basis of a narrowed scope could be seen as manifestly unreasonable, a requirement to respond to an even broader request would presumably also be so unreasonable. Therefore, before I address this issue, I will consider the application of article 9(2)(a) of the AIE Regulations.
17. The question of what constitutes a “manifestly unreasonable” request must be approached teleologically, having regard to the purpose of the AIE Directive (see *NAMA*, paragraph 10). The AIE Directive makes it clear that its purpose is to ensure “increased public access to environmental information and the dissemination of such information” and that “the disclosure of information should be the general rule” such that “public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases” with grounds for refusal interpreted “in a restrictive way” (see Recitals 1 and 16).
18. In addition, articles 7(2)(b) of the AIE Regulations and 3(2)(b) of the Directive envisage the processing of voluminous and complex requests and provide for extensions to the one-month timeframe within which a public authority is normally required to issue a decision on a request. It is clear therefore that a request is not necessarily covered by the “manifestly unreasonable” exception just because it is voluminous or complex.
19. Article 7(1) of the Directive imposes an obligation on Member States to ensure that public authorities organise environmental information which is relevant to their functions, and held by or for them, with a view to its active and systematic dissemination while article 3(5) provides for a duty to support the public in seeking access to information and to put practical arrangements in place to ensure the



effective exercise of the right of access to environmental information. Article 5 of the Regulations seeks to implement these provisions and provides, *inter alia*, that public authorities must “make all reasonable efforts to maintain environmental information held by or for [them] in a manner that is readily reproducible and accessible by information technology or by other electronic means”. In his opinion in *Commission v Germany*, Advocate General Fennelly observed that “Article 7, which requires periodic publication of general information on the state of the environment, appears to indicate that individual requests should, in principle, be on questions of detail” (see paragraph 30). This indicates that the mere fact that a request is detailed does not mean it is necessarily unreasonable.

20. 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 substantially interfere with the normal course of its activities. In light of the findings of the CJEU in *Verein für Konsumenteninformation* (see paragraphs 101-115) I consider that the exception in article 9(2)(a) is only available where the administrative burden in dealing with the request is particularly heavy. The burden is on the public authority to demonstrate the unreasonableness of the task entailed by the request. In that regard, the test set out by the CJEU at paragraph 69 of its decision in *Land Baden-Württemberg* should be borne in mind:

“...[A] public authority which adopts a decision refusing access to environmental information must set out the reasons why it considers that the disclosure of that information could **specifically and actually** undermine the interest protected by the exceptions relied upon. The risk of that interest being undermined must be **reasonably foreseeable and not purely hypothetical**” (emphasis added).

21. The European Commission’s First Proposal for the AIE Directive ([COM/2000/0402 final - COD 2000/0169](#)) envisaged that the exception in article 4(1)(b) would cover requests “variously described in national legal systems as vexatious or amounting to an *abus de droit*”. It went on to acknowledge that “compliance with certain requests could involve the public authority in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities” before noting that “authorities should be able to refuse access in such cases in order to ensure their proper functioning”. The interest which the “manifestly unreasonable” exception seeks to protect therefore is the interest in ensuring a public authority is not overburdened by a request, to the extent that this interferes with its ability to perform its other tasks and duties.
22. That being said, it is also important to bear in mind the duties imposed on public authorities by article 7 and 3(5) of the AIE Directive. The extent to which the obligations contained in articles 3(5) and 7 have been transposed by the Regulations has not been fully explored. It is clear from the jurisprudence of the CJEU, in cases such as *C-188/89 Foster v British Gas plc*, that these obligations can have a direct effect on public authorities to the extent they can be considered emanations of the state. I accept that the jurisdiction conferred on this Office by article 12 of the AIE Regulations relates to decisions on individual access requests, and not directly to the obligations relating to proactive dissemination. However, the requirements contained at article 7 are relevant to the obligation to interpret the AIE Regulations teleologically, having regard to the purpose of the Directive, when performing the



functions provided for by article 12 of the AIE Regulations. This flows from the NAMA judgment set out above, and the doctrine of indirect effect. The exception in article 9(2)(a) of the Regulations is not intended to endorse any failure by public authorities to comply with their duties to organise and disseminate information. This means that when considering the workload imposed by a request, it is important not to allow for a situation where a failure to comply with the obligations imposed by articles 7 and 3(5) of the Directive and article 5 of the Regulations, increases the chances that a public authority will be able to successfully rely on the “manifestly unreasonable” exception. This would lead to a perverse situation whereby failure to comply with certain obligations under the Directive and Regulations would effectively be rewarded by the application of less onerous standards by this Office on review of requests under article 12.

23. The request in this case is detailed and the submissions of the OPW indicate that it covers hundreds of records. However, it is also time-bound, covering a period of six months, and is specific in terms of the subject matter of the correspondence it seeks as well as the senders and recipients of that correspondence.
24. The requested information relates to flood relief works, which are likely to have a significant environmental impact. Article 6(1)(b) of the Aarhus Convention notes that such activities should be subject to public participation requirements. I am therefore satisfied that the information at issue in this case is the kind of information that should be organised by public authorities in a manner that facilitates its dissemination to the public, whether that dissemination is proactive or in response to an AIE request. This includes advance consideration by the public authority of whether exceptions would apply to any of the information if requested and whether the information to which any such exceptions apply may be separated from other information, in accordance with articles 8, 9 and 10 of the AIE Regulations. Had the OPW carried out such an exercise in this case, it would not now be in the position of having to expend staff time now reviewing the information following receipt of an AIE request for it.
25. In addition, the CJEU’s guidance, along with the wording of the Regulations and the Directive makes it clear that it is for the OPW to clearly demonstrate the actual and specific impact that dealing with the request would have on the public authority’s normal activities. The OPW’s submissions estimate that “it would take two staff members 50 hours in total to process the full request”. The OPW is a relatively large organisation and dedicating two staff members to spend less than one working week each on the processing of a request is unlikely, in my view, to significantly interfere with the normal course of its activities or incur disproportionate costs or effort.
26. On the facts of this case, and taking all of the above into account, my view is that the threshold for a request to be manifestly unreasonable has not been met. Accordingly, I do not consider the OPW to have been justified in refusing the request on the basis of article 9(2)(a) of the AIE Regulations.
27. I consider that the most appropriate course of action to take at this stage is to annul the decision of the OPW in its entirety, the effect of which is that it must consider the appellant’s request afresh and make a new, first instance decision in accordance with the provisions of the AIE Regulations. I acknowledge, as mentioned above, that there has been a significant delay in the issuing of my decision



in this case and that remitting the case may cause further delay. However, I do not believe there is an appropriate alternative course of action to take in this instance in circumstances where the information has not yet been reviewed by the OPW.

28. I also consider that remittal is necessary in circumstances where the information provided to this Office by the OPW, as to the searches conducted by it, suggests that it has not taken reasonable and adequate steps to identify and locate relevant environmental information.
29. In the first instance, as outlined above, I consider that the OPW may have adopted an overly narrow interpretation of the appellant's request. My conclusion in this respect is based on the OPW's submission, referred to above, where it stated that it had not indicated that it held no records comprising correspondence with Minister of State Patrick O'Donovan and his office in relation to flood relief works at Lough Funshinagh (despite appearing to have so indicated in previous submissions). It may be that the OPW considers correspondence relating to Minister O'Donovan to be "internal correspondence" captured by part (ii) of the appellant's request, but it has not made its position in this regard clear. Instead, in response to a request for clarification from the Investigator, it submitted that "the original request sought correspondence between the OPW and the staff of, including the members of the Executive of Roscommon County Council and/or the elected members of Roscommon County Council (the Council) in the period from 1 January 2021 to 9 August 2021". The request for correspondence between the OPW and Roscommon County Council is, however, only one part of the appellant's five-part request.
30. In addition, the OPW, in its submissions to this Office, provided detail as to the search terms it had used to identify relevant information. None of those terms relate to the Minister of State specifically named in the appellant's request and it is therefore not clear to me how correspondence concerning or relating to the Minister could have been captured in the OPW's searches. It cannot be said, in my view, that reasonable and adequate searches have been conducted in circumstances where the request clearly states that it includes a request for correspondence of or with "the Minister of State Patrick O'Donovan and his office...concerning flooding and/or proposed flood relief works at Lough Funshinagh" and no search terms relating to the Minister were used. In addition, I note that many of the terms used are acronyms and may not therefore capture correspondence with or to the relevant bodies, which use or refer to the full titles of those bodies.
31. I am therefore directing that the request be remitted to the OPW who should ensure that reasonable and adequate searches are carried out to identify and retrieve all information held by or for it within the scope of all five parts of the appellant's request. If the searches do not identify information relating to the relevant Minister, the OPW should explain to the appellant why this is the case in circumstances where its own press release appears to indicate that such correspondence exists.

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 decision of the OPW. I remit the matter to the OPW and



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

direct it to engage in a fresh consideration of the request in accordance with the requirements of the AIE Regulations and having regard to my comments above.

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 McGoldrick

On behalf of the Commissioner for Environmental Information

29 March 2023