



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-114766-J4X0Y7

Date of decision: 20 March 2023

Appellant: Uisce Domhain Water World Europe CLG

Respondent: The Paul Hogarth Company

Issue: Whether the Paul Hogarth Company was justified in refusing the appellant's AIE request on the grounds that it was not a public authority within the meaning of the definition in article 3(1) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that the Paul Hogarth Company is not a public authority within the meaning of the definition in article 3(1) of the AIE Regulations. Accordingly, the Company was not obliged to process the appellant's request for access to environmental information. The Commissioner has no further jurisdiction in relation to this matter.

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. The Paul Hogarth Company (the Company) is a Landscape Architecture company. At the relevant time, Kildare County Council (the Council) and the Department of Defence (the Department) had jointly commissioned a project, the purpose of which was to highlight the significance of the Curragh Plains and to develop policies and management actions for, inter alia, the conservation, management and branding of the area. The Company was engaged to lead on the delivery of certain elements of the project, being the Conservation Management Plan and the Interpretation/ Branding Plan.
2. On 12 July 2021, the appellant requested information from the Company in relation to its role in the Curragh plains project. The Company replied to the appellant on 30 July 2021 setting out that it was under no obligation to provide the information requested, as it is not a public authority.
3. The appellant submitted an appeal to this Office on 17 October 2021.
4. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the AIE Regulations (the Regulations). In doing so, I have considered the submissions made by the appellant and the Company. 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’).
5. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

6. Article 12(3) of the AIE Regulations provides for a right of appeal to this Office where a decision by a public authority has been affirmed under article 11, i.e. on internal review. Article 11(5)(a) of the Regulations clarifies that a decision to refuse a request, which may in turn be appealed to this Office, includes a request that "has been refused on the ground that the body or person concerned contends that the body or person is not a public authority within the meaning of these Regulations". Accordingly, the scope of this review is limited to the question of whether the Company is a public authority within the meaning provided for by the AIE Regulations.



Analysis and Findings

Definition of "public authority"

7. Article 3(1) of the AIE Regulations provides that;

"'public authority' means, subject to sub-article (2)-

(a) Government or other public administration, including public advisory bodies, at national, regional or local level,

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and

(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),

and includes-

(i) a Minister of the Government,

(ii) the Commissioners of Public Works in Ireland,

(iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),

(iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),

(v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),

(vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,

(vii) a company under the Companies Acts, in which all the shares are held-

(I) by or on behalf of a Minister of the Government,

(II) by directors appointed by a Minister of the Government,

(III) by a board or other body within the meaning of paragraph (vi), or

(IV) by a company to which subparagraphs (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information".

8. The appellant submits that the Company should be considered a public authority within the meaning of the AIE Regulations on the basis that it is carrying out works "on behalf of the State". The appellant believes that the Company should therefore process the original request.

9. The Company has reiterated its understanding to this Office that it does not meet the definition of a public authority, as set out under the Regulations. It has also informed the appellant that he should contact the Company's two client organisations in order to obtain relevant environmental information.

10. As noted above, the definition of public authority comprises three distinct categories contained at paragraphs (a), (b) and (c). As noted by the Supreme Court in *National Asset Management Agency v*



Commissioner for Environmental Information (NAMA) [2015] IESC 51, the decision of the Court of Justice of the European Union (CJEU) in [C-279/12 Fish Legal and Emily Shirley v Information Commissioner & Ors \(Fish Legal\)](#), provides an authoritative interpretation of the Directive with regard to the definition of “public authority” contained at article 2 of the Directive (which is identical in its terms to that contained at article 3(1) of the Regulations). I consider it useful to look to that judgment for guidance.

11. The first question to consider is whether the Company is part of “government or other public administration” for the purposes of article 3(1)(a). At paragraph 51 of its decision in *Fish Legal*, the CJEU held that “entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/4”. It also noted: “this first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve”. It is clear that the Company is not a public authority within the meaning set out at article 3(1)(a) of the Regulations, as the Company is not established by the State, nor is it governed by public law. It is therefore not a government or other public administration including a public advisory body within the meaning of paragraph (a).
12. The second category to consider is that set out at paragraph (b) of the definition, which provides that a “public authority” includes any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment. The test set out in *Fish Legal* for a category (b) public authority is as follows:

“The second category of public authorities, defined in article 2(2)(b) of Directive 2003/4, concerns administrative authorities in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services in the public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law”.
13. The Company was engaged by the Council and the Department to provide services in connection with the Curragh Plains Project, having been awarded a contract following a public procurement process. I have reviewed all relevant documents relating to the procurement process and the contract in full. I am satisfied that the Company has not been entrusted with the performance of services within the public interest. Instead it has been contracted to provide services to the Council and the Department, so that those entities can perform certain public administrative functions.
14. In addition, there is no evidence before me that the Company has been vested with any special powers beyond those which result from the normal rules applicable in relations between persons governed by private law for the purpose of performing services for the Council and the Department. It is therefore clear that the Company is not authorised by law to perform a public function within the meaning of paragraph 3(1)(b) of the definition of public authority.
15. Therefore, the only issue remaining is whether the Company meets the definition of a public authority under paragraph 3(1)(c) of the Regulations.



16. There are three elements to consider when determining whether a body is a public authority within the meaning of article 3(1)(c) of the AIE Regulations, all of which must be met for a body to constitute a public authority. They are:
1. Does the body have public responsibilities or functions or provide public services?
 2. Do those public responsibilities, functions or services relate to the environment?
 3. Is the body under the control of a public authority falling under paragraphs (a) and (b) of the definition e.g. government or other public administration body or any natural or legal person performing public administrative functions under national law?
17. As outlined above, the Company undertook the project in question on behalf of the Council and the Department. I am satisfied that the Council, through a public procurement process, obtained the professional services of the Company in order to enable the Council to carry out its functions. I have examined the procurement process and relevant contracts. I have found no evidence in the course of this review to suggest that the responsibility of providing a wider public function, or service to the public, has been outsourced to the Company.
18. There is a distinction between the delegation of public services to private persons or bodies, and public procurement. Through public procurement, a public authority can purchase works, goods or services in order to meet its own operational needs. This can be contrasted with the delegation of public services, where a public authority delegates the actual provision of public services, which are provided to members of the public by another body.
19. I am not satisfied in the circumstances of this case that the Council delegated its public service obligations or functions to the Company.
20. In any event, I cannot see how the company can be said to be under the control of the council as it is merely a private company in a contractual relationship with a public authority.

Summary

21. I do not regard the Company as government or other public administration, including a public advisory body under article 3(1)(a) of the Regulations. Neither do I regard the Company as a natural or legal person performing public administrative functions under national law under article 3(1)(b) of the Regulations. Therefore, I must find that the Company is not a public authority within the meaning of the definition at article 3(1)(a) or (b) of the AIE Regulations.
22. In addition, I do not regard the Company as "having public responsibilities or functions" or as "providing public services" within the meaning of the definition at article 3(1)(c) of the AIE Regulations. As I have not found that the Company have any public responsibilities or functions or provide public services, I must therefore find that the Company is not a public authority under article 3(1)(c) of the Regulations.



Further observations

23. Although I have found that the Company is not a public authority within the meaning of article 3(1) of the AIE Regulations, it was contracted by the Council, which is a public authority, to provide professional services. As a result, the Company may have been acting on behalf of the Council. Article 3(1) provides that ““environmental information held for a public authority” means environmental information that is physically held by a natural or legal person on behalf of that authority”. The effect of this is that if environmental information exists, and is held for a public authority by another person or body, the public authority should make that environmental information available in the normal way.
24. Therefore, there is a possibility that the environmental information the Company may possess in relation to those services is held for the Council. Without prejudice to any AIE request that might be made to the Council and any subsequent appeals to me, it is open to the appellant to make an AIE request to the Council for information relating to the project in question which may be held by the Company on behalf of the Council. This would be without prejudice to the use by the Council of any of the grounds for refusing access to information set down in the AIE Regulations.

Decision

25. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I find that the Paul Hogarth Company is not a public authority within the meaning of the definition in article 3(1) of the AIE Regulations. Accordingly, the Company was not obliged to process the appellant’s request for access to environmental information and the Commissioner has no further jurisdiction in relation to this matter.

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 McGoldrick

On behalf of the Commissioner for Environmental Information

20 March 2023