



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-109192-Q3C0F2

Date of decision: 6 March 2023

Appellant: Mr. X

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

Issue: Whether records relating to the development of the Forest Licence viewer (FLV) meet the definition of Environmental Information under Article 3(1) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the Department was not justified in refusing access to the records sought under Article 3(1) of the AIE Regulations. The Commissioner annulled the decision of the Department and directed the Department to undertake a fresh decision making process in respect of the appellants request.

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 19 April 2021, the appellant requested “A copy of the technical specification provided to the developers of the Forest Licence Viewer (FLV) and related correspondence in terms of the functions, operability and operation of the FLV, including modifications to the specification, feedback from the developers, reports of errors, problems and queries”.
2. On 18 May 2021, the Department refused this request under Article 3(1) of the Regulations stating that the material sought did not appear to meet the definition of environmental information, while also referencing Article 9(1)(c) and (d) of the AIE Regulations.
3. The appellant requested an internal review on 19 May 2021. On 18 June 2021 the Department upheld its original decision to refuse the request, in the following terms: “I am refusing access to the records requested as the material does not meet the definition of environmental information under Article 3(1).”
4. The appellant submitted an appeal to this Office on 21 June 2021.
5. 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 of Agriculture, Food and the Marine. I have also examined the contents of the records at issue. 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’).
6. What follows does not comment or make findings on every argument advanced but all relevant points have been considered.

Scope of Review

7. In accordance with article 12(5) of the AIE Regulations, the role of this Office is to review the Department’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.
8. The powers conferred on the Commissioner for Environmental Information apply only in respect of environmental information held by or for a public authority. In accordance with this Office’s Procedures Manual, available at www.ocei.ie, the general practice in cases such as this, concerning



a question of the Commissioner's jurisdiction, is to limit the review to the preliminary matter of whether the information at issue is "environmental information", such that it falls within the remit of the AIE Regulations.

9. Accordingly, I am satisfied that it is appropriate to limit the scope of this review to whether the Department was justified in refusing access to relevant records on the basis that they do not constitute "environmental information" within the definition provided at article 3(1) of the AIE Regulations.

Analysis and Findings

Whether the information sought is environmental information

10. The appellant believes that the records at issue constitute "environmental information" in accordance with Article 3(1) of the AIE Regulations, and in particular, paragraph (c) of the definition. In the appellant's submission to this Office, he sets out that "Forestry licencing is a measure likely to have an impact on the environment. The FLV is an administrative measure designed to provide environmental information to the public on forestry licencing. The technical specification for the FLV relates to this. The technical specification for the FLV directly affects what and how environmental information is made available to the public".
11. In its submissions to this Office, the Department outlined its position that "While the FLV displays environmental information, to assist the public with participation in the decision-making process, the specifications and material in relation to this are not in themselves environmental information".
12. Article 3(1) of the AIE Regulations is the relevant provision to consider where the issue is whether information is "environmental information". In line with Article 2(1) of the AIE Directive, article 3(1) of the AIE Regulations provides that "environmental information" means:

"any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
- (d) reports on the implementation of environmental legislation,



(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c). "

13. The AIE Regulations transpose the AIE Directive, which had been adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive. The right of access under the AIE Regulations is to information “on” one or more of the six categories at (a) to (f) of the definition. According to national and EU case law on the definition of “environmental information”, while the concept of “environmental information” as defined in the AIE Directive is broad (*Mecklenburg* at paragraph 19), there must be more than a minimal connection with the environment (*Glawischnig* at paragraph 25). Information does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond* at paragraph 58; see also *ESB* at paragraph 43).
14. In his decision in *RTÉ*, Barrett J expressly endorsed the approach set out by the Court of Appeal of England and Wales in *Henney* to determine the “information on” component of the definition (*RTÉ* at paragraph 52). The first step is to identify the relevant category of the definition. In this case that is category (c), which refers to “measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements”. It is important to note that information may be “on” one measure or activity, more than one measure or activity or both a measure or an activity which forms part of a broader measure (*Henney* at paragraph 42). In identifying the relevant measure or activity that the information is “on”, one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned, and it may be relevant to consider the purpose of the information (*ESB* at paragraph 43).
15. It is clear that forestry licencing is a measure, which is likely to have an impact on the environment. The FLV is an interactive mapping application that displays forestry licence information to the public. Making available information on forestry licencing is also an activity with environmental impact as it leads to increased public access to environmental information which, as set out in Recital 1 of the Directive, contributes to a greater awareness of environmental matters and more effective participation by the public and, in turn, leads to a better environment. In addition, the FLV itself is an administrative measure, through which the Department carries out the activity of providing information to the public on forestry licencing. The viewer presents details on a number of relevant licence types including: afforestation, public woodland, clearfell and thinning. The technical specification for the FLV directly affects how this information is displayed to the public. It



is therefore information “on” the FLV which is a category (c) measure and information “on” the provision of forestry licence information to the public which is a category (c) activity.

16. Having considered the above, it is my view that the technical specification, and other information requested relating to this measure, sought by the appellant comes within the definition provided at article 3(1) of the AIE Regulations.

Additional issues raised by the Department

17. In correspondence with this Office, the Department raised a number of additional grounds for refusal of this request. The Department have outlined that “These documents represent the intellectual property of the Department and the developers under contract to the Department. The Department has the right to protect this intellectual property.”
18. In addition to this, the Department’s Information Security Manager and acting Cyber Security manager informed this Office’s investigator that the Department considered there to be an increased risk of cyber attack associated with the release of the information sought. The Department also contends that “the development of such a project must necessarily contain confidential information, which the Department is obliged to protect”.
19. These points were made by the Department without reference to any relevant provisions of the AIE Regulations. Having considered the additional arguments made, I do not find that they justify the refusal of the request under the AIE Regulations based on the information provided.
20. If the Department has concerns over information sought under AIE requests being used to undermine the security mechanisms or economic interests of the Department, it should consider whether the request should be refused under articles 9(1)(a) or 9(1)(c) of the AIE Regulations or any other relevant provision and reasons must be given for this refusal. The Department may also consider release of a redacted version of the information sought in line with article 10(5) of the AIE Regulations.
21. If the Department has concerns over the impact of disclosure of information on intellectual property rights of the Department or of a third party, the Department must justify the refusal under any relevant provisions of the AIE Regulations, such as article 9(1)(d).

Decision

22. 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 refusal of the information sought was not justified under Article 3(1) of the AIE Regulations and I annul the decision of the Department.
23. Given the additional issues raised by the Department during the course of the investigation, in particular the risk of cyber-attack, I do not consider it appropriate to direct release of the information sought at this time and I remit the request to the Department to carry out a fresh decision making process, taking into account my findings above.



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Appeal to the High Court

24. 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

6 March 2023