



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-118975-C8L3Z6

Date of decision: 20 January 2023

Appellant: Ms Y

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

Issue: Whether the Department was justified in refusing the appellant's request on the basis that no environmental information within the scope of that request is 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. By way of context for this appeal, putting in place “instruments aimed at protecting, managing and/or planning the landscape” is a commitment contained at article 6E of the European Landscape Convention (the ELC) to which Ireland is a party and which entered into force in Ireland on 1 March 2004.
2. On 7 December 2021, the appellant requested “all policy guidance adopted by the Forest Service [...] for the protection, management and/or planning of landscapes impacted by forestry” from 1 March 2004 to the date of the request.
3. The Department responded to the request on 20 December 2021. It refused the request on the basis that the information “does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken”.
4. The appellant sought an internal review of the decision on 27 December 2021. She noted that the Forest Service of the Department had a role in granting consents, which have the capacity to impact significantly on landscapes. She also provided a number of file references for felling licences granted by the Forest Service with replanting conditions in circumstances where the local council had objected to replanting on landscape grounds. She argued that it was not credible that the Forest Service had produced no policy guidance aimed at protecting, managing and/or planning the landscape.
5. The Department issued its internal review decision on 26 January 2022. It affirmed the original decision noting that “while the material requested does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken, you should note local authorities are prescribed referral bodies and will be contacted in relation to forestry licence applications and are free to provide information on landscape issues should they wish”.
6. The appellant brought an appeal to this Office on 7 February 2022.
7. 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. 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. This review is concerned with whether the Department is entitled to refuse access to the information requested by the appellant on the basis that no information within the scope of the request is held by or for it.

Preliminary Matter

9. Before setting out the substantive findings of this review, I wish to apologise to the appellant for the delays experienced in the resolution of this appeal. This Office has been dealing with resource constraints which it has taken steps to address; however, this process has been accompanied by a significant increase in appeals to the Office, which has minimised the impact of those resource increases in reducing delays. This Office is aware of the need to ensure a more efficient and timely resolution of appeals and remains committed to addressing that need.

Analysis and Findings

10. 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. In cases where a public authority has effectively refused a request under article 7(5), this Office 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.
11. In her submission to this Office, the appellant noted that the Department had not provided any information as to the steps it had taken to locate the information requested. She again argued that it was not credible that the Department had taken all reasonable steps to locate information within the scope of her request.
12. She submitted that some information should exist, as some policy must be applied by the Forest Service when performing activities within its remit. She referred to the Environmental Protection Agency (EPA) Report entitled: '[Ireland's Environment: An Integrated Assessment 2020](#)' which notes (at p 119) that "the Department of Agriculture, Food and the Marine has produced forestry-related landscape guidance since 2000". She also referred to the [Progress Report from WG1\(Backlog\) to the Forest Policy Group dated November 2021](#) which notes that 419 afforestation applications and 2739 felling applications were submitted to the Forest Service during the year ending 10 September 2021. She submits that it is not credible that no landscape guidance is being applied by the Forest Service to any of those 3,158 forestry applications, because the Forest Service does not know where to find the landscape guidance. She noted the Department's position, as set out in its



internal review decision, that “local authorities are prescribed referral bodies and will be contacted in relation to forestry licence applications and are free to provide information on landscape issues should they wish”. She submitted that not all afforestation applications are required to be referred to the relevant Local Authority under the European Communities (Forest Consent and Assessment) Regulations 2010 and 2012. She referred to the Forestry Standards and Procedures Manual which sets out the circumstances in which referral is required. She also noted that the Regulations were not enacted until 2010, over six years after the European Landscape Convention came into force in Ireland.

13. In its initial submissions to this Office, the Department noted that the Forest Service was “unable to provide any material in relation to this request”. It also submitted that a “trawling exercise” through individual applications would not be possible as the Department received thousands of forestry licence applications annually. It provided an email from a member of the Department’s Corporate Services team to the Forest Service, which notified the Forest Service of the appellant’s original request of 7 December 2021. This email was proceeded by an email from one staff member of the Forest Service to another which read: “Did you get any notification on this AIE? I have nothing in my inbox for this one.”
14. As the basis on which the Department had concluded that no information was held by or for it within the scope of the request was unclear, this Office’s Investigator wrote to the Department on 8 December 2022 seeking further information. In particular, she asked the Department to outline the steps it had taken to identify and retrieve information within the scope of the request. She asked the Department to confirm whether the Forest Service follows any policy or procedure when assessing applications for licences or permissions for activities, which may affect landscapes impacted by forestry and to provide detail on any existing policy. She also noted that the appellant’s submission referred to a Forestry Standards and Procedures Manual. She informed the Department that such a Manual could arguably come within the scope of the appellant’s request for “policy guidance adopted by the Forest Service since 1 March 2004 for the protection, management and/or planning of landscapes impacted by forestry” and asked the Department to explain why it did not make reference to the Manual when responding to the appellant’s request.
15. No further information was submitted by the Department in response to the request of 8 December 2022. There is therefore no evidence before me that the Department has taken reasonable and adequate steps to ensure that no information within the scope of the appellant’s request is held by or for 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.
16. The most appropriate course of action to take at this stage 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 the provisions of the AIE Regulations. As part of its fresh decision-making process, the Department should bear in mind the requirements of articles 7(4) and 11(4) of the Regulations which require it to provide reasons for refusal at both decision and internal review stage. As the High Court has made clear in its decision in *Right to Know v An Taoiseach* [2018] IEHC 371 the mere invocation of a ground for refusal is not



a sufficient reason. As noted by the Courts on a number of occasions, the reasons given must be sufficient to “disclose the essential rationale on foot of which the decision is taken” (see *Meadows v Minister for Justice, Equality & Law Reform* [2010] IESC 3) so that, among other things, the appellant is in a position to ascertain whether that rationale should be challenged. I appreciate that remitting the case back to the Department causes further delay for the appellant. However, I do not believe that there is an appropriate alternative course of action to take in this instance.

Decision

17. 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. I remit the case to the Department for further consideration.

18. 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.

Appeal to the High Court

19. 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 January 2022