



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-118678-F2W1Q9

Date of decision: 19 January 2023

Appellant: Ms B

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

Issue: Whether the Department was entitled to refuse the appellant's request on the basis of article 9(2)(c) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the Department had not complied with the requirements of the AIE Regulations and remitted the matter to the Department directing it to undertake a fresh decision-making process.

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. This request relates to records about a specific Land Use Review. According to an Information Note provided by the Department to the appellant, the Land Use Review (LUR) is the result of a commitment in the Programme for Government: Our Shared Future (2020) to ensure that optimal land use options inform government decisions. It aims, among other things, to gather data and evidence in order to evaluate the environmental, ecological, social and economic characteristics of land cover, land use and land-based activities across Ireland and determine how these interact and influence each other. The stated aims of the LUR also include consideration of emissions to air and water, carbon sequestration and climate adaptation challenges. The LUR has been divided into two distinct phases. Phase 1 is an evidential review which is the principal data-gathering phase, the purpose of which is to determine the environmental, ecological and economic characteristics of land types across Ireland and to identify any gaps or mismatches in the available data and evidence. Phase 2 seeks to build upon the results of the evidential review and consider policies and measures in the context of the Government's wider economic, social and climate objectives. The LUR is also referred to in the Climate Action Plan 2021.
2. On 27 November 2021, the appellant requested all records of the Department, for the period 1 January 2019 to the date of the request, in relation to any part of the ongoing LUR referred to in the Climate Action Plan 2021.
3. The Department responded to the appellant's request on 9 December 2021. It relied on article 9(2)(c) of the AIE Regulations to refuse the request. It noted that the Department had had regard to the provisions of article 10 of the Regulations. It provided some detail on the factors it considered to weigh in favour of release which were the "public interest in the right of the public to have access to information" and the "public interest in the operations of the Government and public bodies being transparent". It identified the "public interest in ensuring that the release of information and material is complete and substantiated" as a factor in favour of withholding the information. It also considered that "the release of unfinished and draft material could lead to misperception and misinterpretation which would not be in the public interest". The Department concluded that, on balance, the public interest in the case was best served by withholding the information.
4. The appellant sought an internal review on 10 December 2021. She noted in her request that she did not consider it apparent from the original decision that articles 10(4) and 10(5) of the AIE Regulations had been complied with. She also argued that the release of information did not need to await the conclusion of the LUR process.
5. The Department issued its internal review outcome on 7 January 2022. It concluded that no grounds had been found to reverse the original decision and affirmed refusal of the information requested on the basis of article 9(2)(c) of the AIE Regulations. It also stated that "there [was] clearly an assessment of the request on an individual basis [in the original decision] and due consideration given to the weighting of the public interest served by disclosure versus the interest served by refusal". It acknowledged that articles 10(4) and 10(5) had not been "specifically



mentioned in the [original] decision” but confirmed that “in line with article 10(3), and with due consideration of articles 10(4) and (5) my deliberations have included weighing the public interest served by disclosure against the interest served by refusal”. The internal review decision went on to note that “the factors in favour of release/withholding of this information remain the same as outlined in the [original] decision letter”.

6. The appellant brought this appeal to this Office on 28 January 2022.

Scope of appeal

7. This appeal is concerned with whether the Department was justified in relying on article 9(2)(c) of the AIE Regulations to refuse access to the information sought by the appellant.

Analysis and Findings

8. I am directed by the Commissioner for Environmental Information to carry out a review of this appeal, which I have now completed under article 12(5) of the Regulations. In so doing, I have had regard to the submissions made by the appellant and the Department. 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);
 - the Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’);
 - the decisions of the High Court in *Right to Know v An Taoiseach* [2018] IEHC 372 and *M50 Skip Hire & Recycling Limited v Commissioner for Environmental Information* [2020] IEHC 430 (M50);
 - the decision of the Court of Appeal in *Redmond v Commissioner for Environmental Information* [2020] IECA 83 (Redmond);
 - the decision of the Court of Justice of the European Union (CJEU) in *C-619/19 Land Baden-Württemberg v DR*.

What follows does not make findings on each and every argument advanced but all relevant points have been considered.

9. Article 9(2)(c) of the AIE Regulations provides that a public authority “may refuse to make environmental information available where the request...concerns material in the course of completion, or unfinished documents or data”. Article 10 however provides for certain limitations on the ability of a public authority to refuse to make environmental information available as follows:



“(3) The public authority shall consider each request on an individual basis and weigh the public interest served by the disclosure against the interest served by refusal.

(4) The grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.

(5) Nothing in article...9 shall authorise a public authority not to make available environmental information which, although held with information to which article...9 relates, may be separated from such information”.

10. The first question to be considered, therefore, is whether the exception contained in article 9(2)(c) can be relied on at all in the circumstances. Article 10(4) makes it clear that a restrictive approach to that question is necessary. The decision of the CJEU in *Land Baden-Württemberg* also makes it clear that “...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” and that “the risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical”. The CJEU also noted that the purpose of the exception concerning material in the course of completion or unfinished documents is “to meet the need of public authorities to have protected space in order to engage in reflection and to pursue internal discussions” (paragraph 69).
11. The issue in this case, however, is that the Department, as outlined in submissions to this Office, has decided to refuse the appellant’s request on the basis that it is “not in the public interest to release this material as it relates to a project that is in the course of completion and as of yet unfinished”. As the appellant has argued, the status of the LUR (i.e. the project to which the information relates) is not the factor to be assessed when considering whether the grounds for refusal contained at article 9(2)(c) may be relied upon by the Department. It is the information requested which must be examined when assessing whether article 9(2)(c) applies, rather than the decision-making process to which the information relates. The question is whether the information requested “concerns material in the course of completion or unfinished documents or data” and not whether the decision-making process in respect of which the information has been generated is incomplete.
12. The Aarhus Guide supports the view that the expression “in the course of completion” contained in article 9(2)(c) relates to the process of preparation of the information or document. It does not relate to any decision-making process for the purpose of which the information at issue has been prepared. This aligns with the clear wording of article 9(2)(c) which refers in no uncertain terms to “materials in the course of completion” and “unfinished documents or data”, and not to any decision-making process. (my emphasis)
13. The Department has provided 425 documents to this Office, which it considers to be within the scope of the appellant’s request. I have reviewed some, but not all of the documents. It is clear that



many of these documents are not incomplete or unfinished. For example, 289 documents are emails which have been sent in connection with the LUR. Those emails cannot be said to amount to incomplete or unfinished documents. While some other documents provided to this Office by the Department are marked draft or contain gaps to be completed, the Department has not identified the interest it considers would be undermined by release of those documents. Even if one were to assume that the interest it seeks to protect is the private thinking space around the LUR, the Department has not identified how that interest would be specifically and actually undermined by release of the relevant information.

14. Instead, the Department has relied on the fact that the LUR itself was ongoing at the time of the appellant's request to apply article 9(2)(c) of the AIE Regulations in a blanket manner to all 425 documents identified as being within the scope of the request.
15. In doing so, it has not complied with the obligation set out by the CJEU in *Land Baden-Württemberg* to identify a reasonably foreseeable risk that an identified interest would be undermined by release. Nor has the Department complied with the duty to give reasons which the High Court made clear exists in *Right to Know v An Taoiseach*. As Faherty J held at paragraph 106 of her judgment: "In light of the adjudicatory processes in which a decision-maker is required to engage pursuant to Articles 10(3) (4) and (5) and 11(4) of the AIE Regulations, the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted cannot, to my mind, constitute a sufficient reason for the refusal".
16. Recital 16 to the AIE Directive provides that "the right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases". Article 10(4) of the AIE Regulations provides that grounds for refusal of a request must be interpreted on a restrictive basis, having regard to the public interest served by disclosure. It is this Office's view therefore that the scheme of the AIE Regulations and the AIE Directive makes it clear that there is a presumption in favour of release of environmental information. In circumstances where the Department does not appear to have engaged with the information, before seeking to rely on article 9(2)(c) of the AIE Regulations, it is not clear to me how it could have reached the conclusion that release of the information would undermine an interest which that article seeks to protect, thereby rebutting the presumption in favour of disclosure. Neither is it clear how the Department could have weighed all relevant factors as required in order to determine whether the public interest in disclosure of the relevant information outweighed any interest served by its refusal. I am therefore not in a position to find that the Department complied with its obligations under articles 10(3) and 10(4) of the Regulations. In addition, it appears to me to be almost impossible for the Department to comply with its obligations under article 10(5) of the Regulations without considering the information itself.
17. As the Court of Appeal has made clear in *Redmond*, proceedings before this Office are "inquisitorial rather than adversarial in character" and "the extent of the inquiry is determined by the



Commissioner, not by the parties” (paragraph 51). In addition, the High Court in the *M50* case has confirmed that the Commissioner “enjoys a wide jurisdiction to conduct a *de novo* consideration of a request for access to environmental information”. It is therefore open to this Office to consider each of the 425 documents to consider whether article 9(2)(c) of the AIE Regulations might provide grounds for refusal for any of them and direct release of those documents to which I do not consider the exemption to apply. Alternatively, I can remit the matter to the Department so that a fresh decision-making process can be undertaken.

18. There are a number of competing factors to consider when deciding the appropriate course of action in this case. The Department has failed to adequately consider the information in question and the applicability of article 9(2)(c) to each document identified. In circumstances where it has adopted a blanket approach to refusal, the Department cannot be said to have complied with the requirements, set out in articles 10(3) and 10(4), to consider the individual circumstances of the request, to interpret grounds for refusal restrictively and to weigh the public interest served by disclosure against the interest served by refusal. It has also failed to consider the question of partial disclosure in accordance with article 10(5) of the Regulations. Finally, it has failed to comply with its obligations under article 10(6), which requires the Department to inform the appellant of the name of the authority preparing the material in the course of completion and the estimated time needed for completion. Were this Office to use its inquisitorial functions to carry out a *de novo* review of the application of article 9(2)(c) to the information requested, this would effectively amount to carrying out the tasks, which the Department has failed to carry out, on its behalf. This risks allowing the Commissioner’s inquisitorial functions to be exploited in a manner contrary to the public interest, particularly in circumstances where the number of appeals being received by this Office is increasing dramatically. On the other hand, the appellant’s request to the Department was made over 12 months ago and it is not desirable that the remittal of this case to the Department would add to the delay she has already experienced.
19. In the particular circumstances of this case, a *de novo* review for the purposes of deciding whether the information should be withheld or released would require the review of 425 documents by this Office, many of which do not appear to have been reviewed in the first instance by the Department. I also note, having reviewed some of those documents, that they refer to the involvement of a significant number of other parties in the LUR process but none of those third parties appear to have been consulted or notified by the Department when processing the request. It would therefore be necessary to consider the interests of those third parties and whether consultation with those parties is necessary as part of the review, again in circumstances where this does not appear to have been considered in the first instance by the Department. I consider that those particular circumstances tip the balance in favour of remittal to the Department. While I understand that the appellant is likely to be disappointed given the delays she has experienced thusfar, I do not consider it an efficient use of the resources of this Office to carry out functions which should have been carried out by the Department in the first instance. I also note that if this Office were to carry out a more in depth review, further information would be required from the Department, which would result in further delays before a decision could be reached in any event. I



consider that the most appropriate course of action to take is to annul the Department's decision in its entirety and direct it to undertake a fresh decision-making process in respect of the appellant's request. The appellant will have a right to an internal review and a review by this Office if she is not satisfied with the Department's decision. As part of the fresh decision-making process the Department should:

- (i) Set out clearly, having regard to the information requested, the basis on which it considers any of the grounds for refusal to apply, bearing in mind the requirements of article 10(4) and the decision in *Land Baden-Württemberg*;
- (ii) Set out clearly, the factors it considers to weigh in favour of refusal and release and the basis on which it considers that the interest in refusal outweighs the public interest in disclosure, in accordance with the requirements of article 10(3);
- (iii) Assess whether any information can be separated from the information to which it considers grounds for refusal apply, so that such information can be released to the appellant in accordance with the requirements of article 10(5);
- (iv) Consider whether the interests of any third parties might be affected by disclosure and consult with those third parties as appropriate.

Decision

20. 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 and direct the Council to undertake a fresh decision making process in respect of the appellant's request.

Appeal to the High Court

21. 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

19 January 2023