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-110723-R2S7B8

Date of decision: 16 December 2022

Appellant: Ms M

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

Issue: Whether the fee charged by the Department for the processing of the appellant's request complied with article 15 of the Regulations.

Summary of Commissioner's Decision: The Commissioner found that the fee charged by the Department was not reasonable within the meaning of article 15(1) of the Regulations.

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 12 April 2021, the appellant requested "a copy of the full file for CN83466 Drumgeaglom and Mackan, including a copy of all three Inspection Certifications i.e. certified 25/04/2019, 22/11/2019 and 04/12/2019". File CN83466 relates to an application for an afforestation licence made to the Department.

2. On 13 April 2021, a staff member in the Department emailed the appellant indicating that the file requested was "very large…due to the number of submissions and appeals made against it". The email advised the appellant that "the larger the request, the more likelihood there is that we will have to charge fees" and asked the appellant if, "in order to avoid this", she would be "agreeable to refining the request to leave out the correspondence between the submitters and the appellants". The appellant responded on the same date informing the Department that she wished to be provided with "a copy of the full file in case I miss some information". She indicated that she would be happy to receive all information in electronic format.

3. On 11 May 2021, the Department part-granted the appellant's request. It relied on article 8(a)(i) of the Regulations to refuse certain information contained in the file on the basis that it consisted of "personal information". It provided no further detail of the basis for such refusal. However, the decision informed the appellant that "the Regulations allow a public authority to charge a reasonable fee for the cost of supplying the environmental information". It went on to note that "the services of 1 staff member for 8.5 hours was required to efficiently complete the 'search, retrieval and copying' work on your request" and that "the prescribed amount chargeable for each such hour is €20.00 resulting in an overall fee of €170".

4. The appellant paid the fee requested on 24 May 2021. On 31 May 2021 she requested an internal review of the decision to impose the fee on the basis that the charges were unreasonable.

5. On 24 June 2021, the Department issued its internal review outcome in which it upheld the imposition of the €170 fee.

6. The appellant appealed to my Office on 22 July 2021.

Scope of Review

7. My review in this case is concerned with whether the Department's imposition of a fee was permissible having regard to article 15 of the Regulations.

Submissions of the Parties

8. In its original decision, the Department indicated that the €170 fee was charged for costs associated with "search, retrieval and copying work" carried out for 8.5 hours by a staff member at a cost of €20 per hour. The appellant, in her request for an internal review, indicated that she did not consider the fee imposed to be reasonable as her request related to a single licence case file. She submitted that any basic filing structure should have provided for the maintenance of all relevant information in an easily accessible manner and that it appeared "grossly inefficient" that

8.5 hours of work would be required in order to retrieve the relevant records. She also noted that she had been willing to travel to view the file but could not do so due to the restrictions on travel imposed as a result of the Covid-19 pandemic. In addition, she argued that the Department had not complied with its obligations under article 5(3) of the Directive as it had not brought to her attention the circumstances in which charges might be waived.

9. In its internal review, the Department indicated that the charges in fact related to the preparation of the file which consisted of checking each document for personal information "which must be carefully redacted before the documents can be released to a third party". It went on to inform the appellant that even if she had been able to travel to view the documents in the Department's Wexford office "the material would still require redaction, before being viewed by a third party. Therefore charges would be payable". The Department also informed the appellant that it sets out information on making AIE requests on its website "including the possibility of charges and…the scale of charges". It stated that neither the original decision-maker nor the internal reviewer "make any assumptions as to any requester's capacity to pay charges". The internal review outcome also pointed out that the appellant had been offered an opportunity to refine her request and noted that it was open to the appellant to contact the original Decision-Maker "to discuss the scale of your request, once you had received the decision letter setting out the charges". It is worth noting however that this was not made clear to the appellant in the original decision letter.

10. In its initial submissions to this Office, the Department confirmed that the charges imposed were incurred in respect of the redactions carried out to the information provided to the appellant. It submitted that the imposition of a charge in the circumstances was consistent with Recital 18 of the Directive which provides that a charge may be imposed in respect of the "actual costs of producing the material in question". It argued that in order to redact the documents in the file, new records had to be produced to redact personal information.

11. In her submissions to this Office, the appellant submitted that the fee imposed by the Department did not comply with the requirements of article 15 for the following reasons:

    (i) She accepted that she had been provided with an opportunity to refine her search however she submitted that it was impossible for her to do so without potentially excluding information with which she wished to be provided.
    (ii) She noted that the Department's fee policy, as outlined on its website, provided that "the fee may be waived where the cost is estimated at less than €100". She submitted that this amounted to a level-based threshold waiver rather than a means based waver which was not consistent with an assessment of the financial capacity of the requester to pay.
    (iii) She submitted that the Department had revised its position as to the basis on which fees were being imposed, suggesting in the first place that it was in respect of search, retrieval and copying and subsequently maintaining the fees covered work involved in carrying out redactions.
    (iv) She also noted that personal information had not in fact been redacted from a number of the documents provided to her.

(v) She noted that she had been charged for the provision of 88 copies of the same standard letter which were redacted electronically as well as the redaction of 26 files which were not redacted and for the provision of pdf versions of files which already existed in electronic format.

(vi) She argued that the 88 copies of the standard letter would have been generated electronically by the Department such that it should have been possible for the Department to use redaction software to make redactions easily. She submitted that the redactions appeared to have been carried out electronically and that even if this were not the case, the redactions involved removal of one name and should not have involved a significant time commitment on the Department's part. She also submitted that Guidance provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations provides that "a charge for compiling information may apply in situations where 'new records' must effectively be produced due to the need for substantial redactions" (emphasis added). She argued that the redactions carried out in this case could not be characterised as substantial.

(vii) She noted that some of the information provided to her had previously been provided to her on foot of an earlier AIE request and queried why she was being charged for provision of this information.

(viii) She argued that the Department had not complied with its obligations under article 15(2) of the Regulations as information on fees could not be found through navigation from the main page of the Department's website and instead had to be obtained by way of a specific Google search. She also noted that the fees section of the Department's website provides that "the fee may be waived where the cost is estimated at less than €100" but submitted that no information on the waiver of fees is contained in the Department's standard acknowledgment of requests.

(ix) In addition, she submitted that this level-based threshold waiver is not consistent with the Regulations as it does not take account of the capacity of the requester to pay the relevant fee. She relied on the decision of the Commissioner in CEI/18/0038 *Lar McKenna & Offaly County Council* in support of this position which in turn refers to the decision of the Court of Justice of the European Union in C-71/14 *East Sussex County Council v Information Commissioner & Ors*.

12. The Investigator wrote to the Department, on 30 September 2022, seeking further information. Her requests included:

(i) A request to provide further detail as to the basis on which the fees charged had been calculated.

(ii) A request for a copy of the Department's Document Management Policy and to outline whether steps were taken by the Department to disseminate information of the type requested proactively (i.e. without the need for individual AIE requests).

(iii) A request for comment on the appellant's arguments with regard to the Department's failure to take account of the economic situation of the requester when assessing the reasonableness of the fees imposed having regard to the decision of the Court of Justice in C-71/14 *East Sussex County Council v Information Commissioner & Ors*.

(iv) A request for further details as to the basis on which redactions had been made from the documents in the first instance having regard to the requirements of the Regulations. In this regard, the Investigator noted that the names of the applicants for the afforestation licence had been redacted from the information provided to the appellant despite the fact that those names would have presumably been a matter of public record since article 11 of the Forestry Regulations 2017 requires the applicants for such licence to place a public notice on the lands in respect of which the licence is sought which includes their name. She also asked the Department to explain why personal information had been redacted from some documents but not others.

(v) A request to explain the basis on which fees had been charged for the current AIE request when it appeared, from the information provided by the Department to this Office, that there had been a number of requests made to the Department for information in connection with file CN84366, including an AIE request which had been part-granted and a separate AIE request made previously by the appellant.

13. The Department wrote to the Investigator on 10 October 2022 asking if she could provide it "with a reference for any decision(s) made by the Commissioner which supported fees applied". The Investigator responded on 11 October 2022 indicating that although she was not in a position to advise as to specific cases, previous decisions were available on the Office's website which allowed users to refine their search by article so that it was possible to find all relevant cases relating to article 15 of the Regulations, dealing with fees.

14. Further submissions were provided by the Department on 21 October 2022. The Department did acknowledge that its letter to the appellant did not refer to the circumstances in which fees might be waived and noted that it was taking steps to address this issue. However, it submitted that it was not relevant that the circumstances in which a waiver might be applied were not notified directly to the appellant as they did not apply in this case. It then confirmed that the appellant's request had been processed and the relevant information prepared before she was notified of the fee which would apply in order to access the information. It maintained that "the work had been carried out and the hours calculated based on search/retrieval and redaction".

15. In response to the Investigator's query as to the basis for the redactions, the Department submitted that "personal information is not environmental information and therefore redaction of personal information is required". It went on to note that "the Data Protection Commissioner has previously instructed the Department to remove applicants' names from felling site notices as the Commissioner expressed concerns about the applicants' right to privacy".

16. With respect to the previous release of similar information, the Department outlined that each AIE request is treated as a standalone request and folders are created containing the documents and decisions issued. It submitted that "if the same person was handling the previous AIE and remembered the details, the same documents may be able to be reissued, however the Department does not have the resources to examine each AIE request to ascertain whether details were already issued". With respect to the information released to the appellant as a result of her

previous AIE request, the Department submitted that if it had been made aware that the appellant had previously received information, this may have narrowed the scope and reduced the fees applied but it was not in a position to review each and every AIE request previously issued.

17. The Department did not refer specifically to the decision of the Court of Justice in *East Sussex*. It did note that "the Commissioner has previously said that the ability of a requester to pay fees should be taken into consideration" however it submitted that the Department "cannot assume to know a requester's ability to pay" and that it did not "have the authority to seek payslips/outgoings etc to determine a person's ability to pay". It argued that "parameters around a person's ability to pay would need to be set down in order for us to abide by them".

18. It then referred to the request "for examples where fees have been upheld" noting that it "was not provided with same and…could not find any instance whereby the Commissioner has upheld an appeal against fees". It submitted that "the hours of work that have been undertaken to handle this initial AIE request, internal review, appeal submission and subsequent submission has far exceeded the 8.5 hours' fee charged".

Analysis and Findings

19. I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and the Department. I have also examined the contents of the records at issue. 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 Superior Courts in *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*), *Redmond & Anor v Commissioner for Environmental Information & Anor* [2020] IECA 83 (*Redmond*) and *Right to Know v Commissioner for Environmental Information & RTÉ* [2021] IEHC 353 (*RTÉ*);
    - the Opinion of the Advocate General in C-217/97 *Commission v Germany*;
    - the decision of the Court of Justice in C-71/14 *East Sussex County Council v Information Commissioner* (*East Sussex*); and
    - the decisions of my predecessor in OCE-105379-F8L2B9 and OCE-106896-D5T5W5 *Mr X and Department of Agriculture, Food and the Marine* and CEI/18/0038 *Lar McKenna and Offaly County Council*, although I must emphasise that these decisions are not binding on me and I have considered the present appeal on the basis of its own facts.

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

20. Article 15 of the AIE Regulations transposes article 5 of the Directive and provides as follows:

> (1) (a) A public authority may charge a fee when it makes available environmental information in accordance with these Regulations (including when it makes such information available following an appeal to the Commissioner under article 12), provided that such fee shall be reasonable having regard to the Directive.
>
> (b) Notwithstanding sub-article (a), a public authority shall not charge a fee for access to any public registers or lists of environmental information pursuant to article 5(1)(d).
>
> (c) Notwithstanding sub-article (a), a public authority shall not charge a fee for the examination in situ of information requested.
>
> (d) Where an applicant examines information in situ and wishes to obtain copies of that information, a public authority may charge a fee, consistent with the list of fees specified under article 15(2) for the provision of such copies.
>
> (2) Where a public authority charges a fee pursuant to sub-article (1), it shall make available to the public a list of fees charged, information on how they are calculated and the circumstances under which they may be waived.

21. The question to be addressed in this appeal is whether the fee of €170, imposed by the Department in this case, complies with the requirements set out in article 15 above. The main issue is whether the fees imposed by the Department were reasonable as per the requirements of article 15(1) of the Regulations. However, before examining that question in detail, it is necessary to address certain issues raised by the Department's correspondence with my Office.

22. The Department concluded its submissions by noting that it was "hesitant to spend any more time on defending applying fees which I feel will be overturned regardless". In my view, this statement can either be taken as a suggestion that the Department is of the view that my Office has pre-judged the matter or as an admission that the Department's imposition of fees is not compliant with the requirements of the Regulations and the Directive. If the latter meaning was intended, then it is concerning that the Department seeks to maintain its entitlement to impose a significant fee of €170 so that a requester can access information under the AIE regime. If it is the former, this is a most serious allegation. I am compelled therefore both to reject any such suggestion in the strongest terms and to note that no basis has been put forward to justify any allegation of pre-judgment on the part of my Office. Indeed, the purpose of my Investigator's request was to provide the Department with a further opportunity to clarify and explain its position and it is most disappointing that the Department has indicated an unwillingness to engage further in this manner.

23. I also think it necessary to address the Department's submission that it had not been provided with examples of cases where fees had been upheld by my Office despite its request and that the work involved in the processing of the AIE request and in dealing with the appeal to my Office had "far exceeded the 8.5 hours' fee charged". I accept that the handling of AIE requests and engagement with my Office in respect of appeals requires the use of resources on the part of the Department. I also acknowledge the considerable increase in AIE requests and appeals experienced by the Department, and indeed many other public authorities, over the past year. However, the function of my Office is to review the decision taken by the public authority which is the subject of the appeal in order to determine whether that decision complies with the requirements of the AIE Regulations. It is for the Department to ensure it has sufficient resources to comply with its legal obligations, which include its obligations under AIE. It is not the function of my Office to provide the Department with the type of assistance requested in this case and indeed it would be inappropriate to do so as this might compromise the independence and impartiality of the review as required under article 6 of the Directive.

24. Before setting out my conclusions as to the reasonableness of the fees imposed in this instance, I consider it useful to set out some of the case-law of the Court of Justice of the European Union in relation to fees.

25. In his Opinion in *Commission v Germany* which concerned Directive 90/313/EEC (the predecessor of the current AIE Directive), Advocate General Fennelly considered that the notion of what is "reasonable" must be interpreted in light of the general scheme and purpose of the Directive. In light of this, "the question of whether the charges for the supply of information are 'reasonable' must be judged from the perspective of the member of the public requesting the information, rather than that of the public authority" (paragraph 23). His view was that, unlike most other categories of publicly held information, the likely cost will inevitably have a direct bearing on the extent to which the public will use the right of access. He considered that "requiring the individual seeker of information to bear what is effectively the entire cost of processing the request would amount to restricting the enjoyment of the right of access, in practice if not in law, to those who have a direct interest in the information, contrary to the clear exclusion of the need for such an interest" (paragraph 25). He also noted that "since access to environmental information is in the public interest, it follows that public authorities, and, ultimately, the general public through the State budget, should bear that part of the burden of making this information available which is represented by the time and effort of public officials" (paragraph 24). He was "of the opinion that Article 5 should be interpreted as allowing Member States to charge either a standard scale of fees, which need not be based directly on the direct costs, or a charge based directly on such costs" but that "in neither case may the fee or the charge exceed an amount which is equivalent to reasonable, direct costs, or be such as to permit the charging out of part of the cost and time of a public authority in performing a public duty" (paragraph 32).

26. In *East Sussex*, the Court of Justice found that all of the factors on the basis of which the amount of the charge is calculated must relate to the actual costs of supplying the requested information. This may include the costs attributable to the time spent by the staff of the public authority concerned on answering an individual request for information, including the time spent on searching for the

information and putting it in the form required. The Court made it clear however that "it…follows from Article 5(1) in conjunction with Article 3(5)(c) of the Directive that the Member States are obliged not only to establish and maintain registers and lists of environmental information held by public authorities or information points, and facilities for the examination of that information, but also to provide access to those registers, lists and facilities for examination free of charge" thus serving to "delimit the concept of 'supplying' environmental information within the meaning of Article 5(2) of the directive, which may be subject to a charge" (paragraphs 34 and 35). In addition, the Court found that the expression "reasonable amount" in the AIE directive does not include any amount that may have a deterrent effect on persons wishing to obtain information or that may restrict their right of access to information. The Court found that "in order to assess whether a charge…has a deterrent effect, account must be taken both of the economic situation of the person requesting the information and of the public interest in the protection of the environment. That assessment cannot therefore relate solely to the person's economic situation but must also be based on an objective analysis of the amount of the charge. To that extent, the charge must not exceed the financial capacity of the person concerned, nor in any event appear objectively unreasonable" (paragraph 43).

27. The Department, in its submissions, made it clear that it had not had any regard to the appellant's ability to pay and that "parameters around a person's ability to pay would need to be set down in order for us to abide by them". I do not accept the Department's position that it is not possible for the Department to take account of a requester's economic situation. Administrative fee structures commonly take the economic situation of members of the public into account in a relatively simply way, without enquiring into the personal circumstances of members of the public. For example, article 15(4) of the AIE Regulations provides that the fee for an appeal to my Office is reduced from €50 to €15 in respect of an appeal by a holder of a medical card or their dependent. The fee imposed in this case therefore clearly falls foul of the first limb of the test set out by the Court of Justice in *East Sussex*.

28. Turning then to the question of the "objective analysis" of the charge, there are a number of factors which undermine the reasonableness of the charge. In the first instance, the Department has not clearly set out, despite being explicitly asked to do so by the Investigator, the basis on which the charge was calculated. It is clear that the appellant was charged a fee of €20 per hour for 8.5 hours' work. It is not clear however what that work involved. In its original decision, the Department suggested the work had involved search, retrieval and copying of information. The internal review referred only however to redaction of the information, explicitly stating that "charges would be payable" even in the event of in situ access as "the material would still require redaction". The internal review also undermines any suggestion that search and retrieval work of any significant level was undertaken as it notes that "there was only one file in relation to this request". The suggestion that the work charged for involved anything other than redactions is also undermined by the Department's communication to the appellant of 13 April 2021 in which the Department suggested that were the appellant "agreeable to refining the request to leave out the correspondence with submitters and appellants" this would avoid the need to charge fees. The Department's initial submission to my Office noted that the costs were "connected to compiling, copying and redacting the information requested" but went on to note that even if in situ access

could have been facilitated "the records would still have to be redacted, which is where the charges were incurred". The Department was asked by the Investigator to address this apparent inconsistency but did not do so. Instead it stated that "the work had been carried out and the hours calculated based on search/retrieval and redaction before the letter issued". Article 15(2) of the Regulations makes it clear that a public authority which seeks to impose a fee under article 15(1) must make information available as to how those fees are calculated. I note that the information in relation to fees on the Department's website provides that charges of €20 per hour are charged for the search, retrieval and copying of records. However, in circumstances where it is not clear that the work involved in fact amount to searching, retrieving or copying records and where the Department has not provided detail as to how the 8.5-hour timeframe was arrived at, it cannot rely on this singular statement to demonstrate compliance with its obligations under article 15(2) of the Regulations. In circumstances where the Department cannot set out the basis on which the fees have been calculated, it is difficult to conclude that the fee is "reasonable having regard to the requirements of the Directive" as required by article 15(1).

29. In addition, having reviewed the information at issue, I note that 44 of the records provided to the appellant consist of the same standard form submission acknowledgment letter. Each of the 44 records provided redact the recipient's name and address, bar one, which also acknowledges receipt of submissions in respect of other forestry applications made by the recipient. It does not therefore seem reasonable to charge the appellant for time spent redacting information from 44 documents when the provision of one sample letter along with an indication that it was sent to 44 different recipients would have achieved the same result. The same can be said of the standard form approval letter which appears to have been sent by the Department to any person who made a submission in respect of the application. As the names and addresses of each recipient have been redacted from the 44 records provided to the appellant, the only detail which varies from one letter to another is the reference to the date on which the Department received a submission from the recipient. Again, it does not seem reasonable to charge the appellant for time spent redacting 44 of these documents.

30. Another factor of relevance here is the suggestion that the work carried out by the Department which resulted in the imposition of a fee may have been duplicated. The appellant herself has submitted that she had previously made an AIE request for the same file in January 2020 and had been provided with copies of six records which were provided to her again as part of the request at issue in this case. The information provided by the Department to my Office also indicates that a further AIE request was made for the information at issue in this case and part-granted. Many of the submissions made to the Department in respect of application CN83466 also request that the Department provide the author with a hard copy of all documentation and maps associated with the application. I acknowledge the Department's position that it cannot be expected to have regard to every previous AIE request before it makes a decision on a request. However, article 15(1) makes it clear that the question of what is a reasonable fee must be approached having regard to the requirements of the AIE Directive. Article 3(5) of the Directive requires Member States to ensure that "officials are required to support the public in seeking access to information" and that "the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised". Article 7(1) seeks to ensure that public authorities are

required "to organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available". The Department was asked to provide a copy of its Document Management Policy and to confirm whether it disseminated information of the type requested by the appellant proactively (i.e. without the need for individual AIE requests). It did not provide a response to those queries. In the circumstances, I do not think it would be reasonable to allow the Department to rely on its own failure to adequately organise its information to justify the imposition of a charge on the appellant in respect of work which arguably would not have been required had proper document management arrangements been in place. To find otherwise would result in a situation where public authorities would effectively be incentivised not to comply with their obligations under articles 3(5) and 7 of the Directive as costs associated with that work could be transferred to those making individual requests under the AIE regime.

31. Furthermore, although it is not clear exactly how much of the work the Department attributes to redactions, it is clear that it considers this to have accounted for a significant volume of the hours charged. This position is evidence from its statement that fees would have been charged even if the appellant could have examined the information in situ as redactions would still have been required. The Department has not disputed the statement made by the Investigator in her request for submissions that its position was that "a significant amount of the fee charged was in respect of time taken to redact information from the records provided". The appeal in this case does not raise the issue of whether the Department was entitled to make such redactions, having regard to the requirements of the AIE Regulations. However, I consider that question to be relevant in this case since it would seem difficult to reach the conclusion that the imposition of fees was reasonable if the activities in respect of which those fees were charged did not comply with the requirements of the AIE Regulations and the Directive. My view in this respect is supported both by the wording of article 15(1) of the Regulations which provides that a fee charged must be "reasonable having regard to the requirements of the Directive". It is further supported by the decision of the Supreme Court in *NAMA* that "th[e] specific obligation undertaken by Ireland as a member of the EU" requires that "the interpretation of legislation…implementing a directive" is approached "so far as possible, teleologically, in order to achieve the purpose of the directive" (paragraph 10).

32. The Investigator asked the Department to provide details of the grounds for refusal which it considered to apply as well as details of the public interest test carried out by the Department which it considers to justify such redactions. The Department submitted that "personal information is not environmental information therefore redaction of personal information is required". It noted that "the Data Protection Commissioner has previously instructed the Department to remove applicants' names from Felling site notices as the Commissioner expressed concerns about the applicants' rights to privacy". It argued that "as a Department we have an obligation to protect a persons' personal information and a disclaimer would be required for us to release that information".

33. Insofar as the Department seeks to suggest that "personal information" is automatically excluded from the definition of environmental information, I do not agree that this is the case. If it were, there would be no need for the exception contained at article 8(a)(i) of the Regulations which permits refusal of environmental information where disclosure would adversely affect "the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law". I note that this position is also a departure from the position communicated to the appellant, which indicated that redactions were carried out on the basis of article 8(a)(i) of the Regulations.

34. Having examined the records, I am satisfied that the information which has been redacted is "environmental information" within the meaning of article 3(1) of the Regulations. The decision to grant an afforestation licence is a measure or activity which is likely to affect the environment within the meaning of paragraph (c) of the definition as there is a real and substantial possibility that it will affect the environment in line with the test set out by the Court of Appeal in *Redmond* (see paragraph 63). The identity and address of individuals making submissions to the Department in respect of that decision as well as appeals to the Forestry Appeals Committee is information "on" the measure as access to such information would make the public better informed about the decision-making process and enable better participation in that process in accordance with the test set out by the Court of Appeal in England and Wales in *Henney* which was approved by the High Court in *RTÉ*. For example, whether the submissions are made by those with expertise in a particular area or by those in a geographic area which might be more significantly impacted by the measure or activity to which the decision-making process relates are matters which would make the public better informed about the decision-making process and enable improved participation in that process. It is arguable that details such as an individual's phone number or email address are too remote to constitute information "on" the measure and therefore not environmental information. It is not necessary to consider this point in further detail however as it is clear that at least some of the information redacted and charged for by the Department is environmental information.

35. That being the case, it is necessary for the Department to engage in a detailed consideration as to whether redaction of environmental information is permissible having regard to the grounds for refusal provided for in the Regulations. As noted above, article 8(a)(i) does allow for refusal of environmental information which would adversely affect the confidentiality of personal information in certain circumstances. Again, this appeal has not raised the issue of whether article 8(a)(i) permits redactions directly but that issue is indirectly relevant to the question of whether the fees charged are reasonable. The observations of the Data Protection Commission referred to by the Department in its submissions are, of course, relevant to the consideration of whether the grounds for refusal set out in the Regulations which apply to personal information might be considered to apply but they do not exempt the Department from the requirement to satisfy the requirements of the AIE Regulations. In circumstances where the Department has not demonstrated that the confidentiality of the information redacted is protected by law nor that release would have an adverse impact on the confidentiality of that information such that the interest in release outweighs the public interest in disclosure, it has not established that the redactions were carried out in accordance with the requirements of the AIE Regulations. It is

therefore not reasonable, in my view, for the Department to impose fees in respect of those redactions. That being said, the appeal made to my Office only raises the issue of redactions insofar as those relate to the imposition of fees. It does not take issue with the Department's reliance on article 8(a)(i) and I will not therefore engage in a *de novo* consideration of whether the grounds for refusal contained in that article can be considered to apply in this case.

36. Finally, although it is not a decisive factor in this appeal, as the restrictions in place due to the Covid-19 pandemic would have prevented in situ examination in any event, for the avoidance of doubt, I wish to address the Department's submission that fees would have been chargeable even if it had been possible for the appellant to view the information requested in situ. This position is clearly contrary to the requirements of article 15(2) of the Regulations which provides that notwithstanding article 15(1)(a), which permits the imposition of reasonable fees, a public authority shall not charge a fee for the examination in situ of information requested. The fact that article 15(2) prohibits the charging of fees in connection with in situ access is made clearer by the explicit statement in article 5(1) of the Directive that "examination in situ of the information requested shall be free of charge".

Decision

37. Having carried out a review under article 12(5) of the AIE Regulations, I annul the Department's decision, insofar as it relates to the imposition of fees for the processing of the request and direct a refund of the fee charged to the appellant. As outlined above, the scope of this review is limited to whether the Department's imposition of a fee was permissible having regard to article 15 of the Regulations. I have not engaged in a *de novo* consideration as to whether article 8(a)(i) of the Regulations permits the making of the redactions to the information requested and I am not making any direction in relation to the redactions.

Appeal to the High Court

38. 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.

_____

Ger Deering
Commissioner for Environmental Information

16 December 2022