



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-100065-V5F5W9

Date of decision: 21 October 2022

Appellants: Organisation X and Organisation Y

Public Authority: National Standards Authority of Ireland (NSAI)

Issue: Whether NSAI was justified in giving access to ten harmonised standards by way of in-situ examination free of charge subject to the acceptance of terms.

Summary of Commissioner's Decision: The Commissioner annulled NSAI's decision to give access to the standards at issue by way of in situ examination free of charge subject to the acceptance of terms under article 7(3)(a)(ii) of the AIE Regulations on the ground that NSAI did not, in either the original decision or the internal review decision, follow the process as set out in the AIE Regulations. He directed NSAI to undertake a fresh decision-making process in respect of the appellants' request in accordance with the AIE 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. All references to the appellants in this decision can be taken to refer to the appellants and/or their solicitor as appropriate.
2. NSAI is Ireland's official standards body and operates under the National Standards Authority of Ireland Act (1996). NSAI has explained to my Office that harmonised standards are formulated following a request from the European Commission to the recognised European Standardisation Bodies (of which the European Committee for Standardisation (CEN) is one). NSAI outlined that the standards at issue in this case were developed at global level by the International Organisation for Standardisation (ISO) before being adopted in Europe by CEN following requests issued by the European Commission and, having been adopted by CEN, they were thereafter transposed by NSAI as identical national standards. Harmonised standards are referenced by the European Commission in the Official Journal of the European Union.
3. On 25 August 2020, the appellants sought access to copies of the Irish transposition of ten European harmonised standards (the Standards) relating to the environment. In summary, they sought access to the following:
 - 1) I.S. EN ISO 14001:2004 Environmental management systems - Requirements with guidance for use (ISO 14001:2004)
 - 2) I.S. EN ISO 14001:2015 Environmental management systems - Requirements with guidance for use (ISO 14001:2015)
 - 3) I.S. EN ISO 14004:2010 Environmental management systems - General guidelines on principles, systems and support techniques (ISO 14004:2004)
 - 4) I.S. EN ISO 14004:2016 Environmental management systems - General guidelines on implementation (ISO 14004:2016)
 - 5) I.S. EN ISO 14015:2010 Environmental management - Environmental assessment of sites and organizations (EASO) (ISO 14015:2001)
 - 6) I.S. EN ISO 14064-1:2012 Greenhouse gases - Part 1: Specification with guidance at the organization level for quantification and reporting of greenhouse gas emissions and removals (ISO 14064-1:2006)
 - 7) I.S. EN ISO 14064-2:2012 Greenhouse gases - Part 2: Specification with guidance at the project level for quantification, monitoring and reporting of greenhouse gas emission reductions or removal enhancements (ISO 14064-2:2006)
 - 8) I.S. EN ISO 14064-3:2012 Greenhouse gases - Part 3: Specification with guidance for the validation and verification of greenhouse gas assertions (ISO 14064-3:2006)
 - 9) I.S. EN ISO 14065:2012 Greenhouse gases - Requirements for greenhouse gas validation and verification bodies for use in accreditation or other forms of recognition
 - 10) I.S. EN ISO 14065:2013 Greenhouse gases - Requirements for greenhouse gas validation and verification bodies for use in accreditation or other forms of recognition (ISO 14065:2013)
4. The appellants contended that harmonised standards, the references to which have been published in the Official Journal of the European Union, form part of EU law and, as a corollary, such standards and their transposition into Irish law form part of Irish law. The appellants also contended that the standards should be freely accessible based on the concept of the rule of law



and, because they are to be considered as EU and Irish legislation relating to the environment, NSAI's obligation to actively disseminate them under Article 7(2)(a) of the AIE Directive.

5. On 23 September 2020, NSAI issued a decision wherein it granted the appellants' request. The decision did not refer to any of the exemptions provided for in the AIE Regulations. NSAI outlined its view that the appellants had requested that the Standards be provided in electronic form. NSAI explained that ISO and CEN play a fundamental role in the development of the standards that form the basis of the nationally adopted standards provided by NSAI and, as a licensee of those standards, NSAI must adhere to terms imposed on it in respect of their dissemination. NSAI outlined that the Standards are accessible from NSAI in the following ways:
 1. "Register of Standards – Available on a register of standards which can be viewed on the NSAI webstore free of charge – see <https://shop.standards.ie/> ;
 2. Review at NSAI Premises - the full contents of Standards can be viewed free of charge in the Library of Standards held at NSAI Headquarters in Swift Square, Santry, Dublin;
 3. Electronic Access - the Standards (including any standards that have been superseded) can be purchased (in paper form or electronic download) through the NSAI standards webstore (<https://shop.standards.ie/>)..."
6. NSAI cited article 7(3) of the AIE Regulations, which provides, at paragraph (a), "[w]here a request has been made to a public authority for access to environmental information in a particular form or manner, access shall be given in that form or manner unless— (i) the information is already available to the public in another form or manner that is easily accessible, or (ii) access in another form or manner would be reasonable" and, at paragraph (b), "[w]here a public authority decides to make available environmental information other than in the form or manner specified in the request, the reason therefore shall be given by the public authority in writing". NSAI stated that, in accordance with those provisions, it was granting access to the Standards by directing the appellants to the NSAI webstore where the information is already available for downloading by members of the public. It also stated that, should the appellants wish to view the Standards in the NSAI standards library free of charge, it was open to them to email and arrange a mutually convenient date and time.
7. On 29 September 2020, the appellants stated that while they welcomed NSAI's decision to grant access to the Standards and were happy to accept electronic copies, they were not satisfied with the form and manner proposed. They requested that "unencumbered" pdf copies of the Standards be provided by email, with any technical restrictions and/or password protections removed. The appellants noted that if NSAI was not prepared to agree with the foregoing, it was to treat their correspondence as a request for internal review based on a number of contentions, which are summarised here:
 - NSAI is the public authority tasked with the transposition into Irish law of European harmonised standards, the references to which have been published in the Official Journal of the European Union and, as such, NSAI has a statutory obligation to publish the Standards which do not constitute documents that NSAI has acquired voluntarily under licence.
 - The Standards form part of Irish and EU law and, as such, must be made freely available based on the concept of the rule of law and under Article 7(2)(a) of the AIE Directive.



- A request for environmental information can only be refused under the AIE Regulations. A public authority cannot agree with a third party the form and manner by which access is granted or that a fee will be charged. Any such restrictions agreed with ISO and CEN are unenforceable insofar as they interfere with the statutory obligation imposed on NSAI to make environmental information available upon request subject to the AIE Regulations and the AIE Directive.
 - Article 7(3) of the AIE Regulations is not applicable since access via the NSAI webstore cannot be considered as being “available to the public in another form or manner that is easily accessible” nor is access in that form or manner “reasonable”. Access to the Standards via the NSAI webstore requires payment, agreement to terms and conditions, and entry into a license agreement with a private third party, which are not permitted under the AIE Regulations. The electronic documents have technical restrictions imposed via password protection which are also not permitted under the AIE Regulations. As one of the appellants is based in the United States, in situ inspection of the Standards is neither feasible nor reasonable.
 - Where electronic access has been granted, there is no reasonable basis to charge for search and retrieval or copy costs and, as such, access should be granted without a charge.
8. On 28 October 2020, NSAI issued its internal review decision. That decision considered the question of whether NSAI was a public authority and if so, whether the information requested was environmental information. Like the original decision, the internal review decision did not rely on any of the exemptions contained in the AIE Regulations. Rather it focused on the question of the form and manner of access to the records. It affirmed the decision under article 7(3) of the AIE Regulations to grant access to the Standards in the form and manner described in the decision dated 23 September 2020 (i.e. by way of viewing the Standards (title and outline information) free of charge online on the Register of Standards, viewing the Standards (in full) free of charge at NSAI Head Office, or by purchasing the Standards (in full) from the NSAI webstore.
9. NSAI submitted that while the Standards are not “legislation”, they can be considered “measures” within the meaning of the definition of environmental information provided for in article 3(1)(c) of the AIE Regulations. NSAI also provided background detail in relation to the Standards, its role, and its relationship with international and European standardisation organisations such as ISO and CEN. It noted that both ISO and CEN ensure that their members, including national standardisation bodies (e.g. NSAI) who adopt and distribute harmonised standards on a national basis do so under licence and on the express condition that they act appropriately to protect copyright attaching to those standards. It stated that ISO and CEN take the position that this copyright in standards, including the Standards, is their intellectual property and of demonstrable economic value. It outlined that they licence it to NSAI for publication and sale subject to terms and conditions, which are reflected in the copyright terms and conditions which apply safeguards to the access to and use of copyrighted harmonised standards. NSAI provided copies of correspondence from ISO and CEN, outlining their positions, and a copy of the “Website Terms of Use and Terms of Sale”.
10. NSAI outlined its position that the requirements set out in both article 7(3)(a)(i) and 7(3)(a)(ii) of the AIE Regulations had been met. In respect of article 7(3)(a)(i) of the AIE Regulations, NSAI noted that the standards are “already available to the public in another form or manner that is easily accessible”. It stated that the Standards are “available to the public” with the copyright terms and conditions attached and are “easily accessible” for purchase through the NSAI webstore in that



fashion. It submitted that in order to access the Standards, requesters must agree in advance to those term and conditions, however, this does not render them anything other than “easily accessible”. It outlined its view that the question of “access” to a record is separate from the question as to what an end-user is permitted to do in terms of distribution after such access (e.g. the Standards may not be copied and published freely and disseminated otherwise than in accordance with the copyright protection required by ISO and CEN). It stated that it did not consider that applying such terms and conditions affects the easy accessibility of the Standards themselves in the first place.

11. In respect of article 7(3)(a)(ii) of the AIE Regulations, NSAI stated that it found it “reasonable” to apply copyright terms and conditions to the grant of access to the Standards. It stated that the Standards are the intellectual property of ISO and CEN and both had reminded NSAI of its obligations and stipulated that it must act to protect their copyright in return for the right to distribute the Standards. NSAI noted that copyright protects the income stream to the organisations which would inevitably be endangered, were no copyright related restrictions placed on the use to which the Standards may be put by an end-user following purchase from NSAI. It stated that in the EU, the financial viability of the standardisation process is specifically recognised in Recital 9 of Regulation (EU) No. 1025/2012. NSAI also explained that the ability to view the Standards free of charge at NSAI’s Head Office is in compliance with the copyright policies of both ISO and CEN. NSAI stated that access to the Standards had been granted in line with its licensing obligations and that it was notable that article 9(1)(d) of the AIE Regulations, subject to article 10, provides for the refusal of environmental information, where its disclosure would adversely affect intellectual property rights. It also highlighted that the Minister’s Guidance states “[i]nformation that is the subject of copyright does not necessarily prevent public authorities from releasing the information that they hold, but it would be prudent to satisfy itself fully that the information should properly be released and make it clear to the applicant that the copyright exists.”
12. NSAI considered the question of whether a fee for access is “reasonable” in accordance with article 15(1) of the AIE Regulations. It noted that article 15(1)(a) of the AIE Regulations provides that a public authority may charge a fee when it makes available environmental information in accordance with the AIE Regulations, provided that such fee shall be reasonable having regard to the AIE Directive, and that Recital 18 of the AIE Directive provides “...where public authorities make available environmental information on a commercial basis, and where this is necessary in order to guarantee the continuation of collecting and publishing such information, a market-based charge is considered to be reasonable; an advance payment may be required...”. NSAI outlined its view that a market-based fee can be charged and is reasonable. NSAI stated that the fees applied for access to the Standards as part of the process of accessing each of them via the NSAI webstore are informed by and in accordance with the ISO and CEN policies and are no more than those charged for the purchase of any standards. It outlined its view that it is reasonable to charge an advance payment for the grant of access to the Standards in circumstances where the content of the Standards is the intellectual property of ISO and CEN, who have stipulated that such a payment must be charged as part of NSAI’s entitlement to adopt national versions of the ISO and CEN standards and distribute the Standards in the first place, and where revenues obtained from sales of the standards contribute to the funding of sustainable standardisation activity. It stated that if copies of the Standards were obtainable from NSAI free of charge in the form and manner requested by the appellants, economic operators and members of the public would not be willing to pay a fee in order to obtain copies of the documents in the ordinary course.



13. The parties then engaged in further correspondence about the form and manner of access and fees to be charged. While I note that NSAI stated that the appellants were required to accept its “Terms of Use: Examination of Publications at NSAI Head Office” in order to use the examination facilities provided, I do not think that it is necessary to set out this correspondence in full here. Suffice to say the parties could not agree on the form and manner of access. The appellants appealed to my office on 23 November 2020.
14. 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 correspondence between NSAI and the appellants referred to above and correspondence between this Office and both the appellants and NSAI on the matter. In addition, I have had regard to:
 - (a) 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);
 - (b) Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
 - (c) 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
 - (d) The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’).
15. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

16. NSAI offered access to the Standards in a number of ways, including by way of in situ examination free of charge subject to the acceptance of terms under article 7(3)(a)(ii) of the AIE Regulations.
17. In their submissions to my Office dated 13 January 2021, the appellants indicated that they wished my review to consider two issues, namely:
 - (a) Whether the Standards constitute legislation under article 3(1)(c) of the AIE Regulations
 - (b) Whether NSAI is entitled to make in-situ examination under article 15(1)(c) of the AIE Regulations conditional on the acceptance of terms and conditions.

The appellants also stated that they did not “wish to contest the imposition of fees at this point, particularly where they have been denied their right to examine the requested standards in situ free of charge.”

18. However it is clear from the finding at paragraph 51 of the judgment of Collins J in the *Court of Appeal in Redmond v Commissioner for Environmental information* [2020] IECA 83 that an appeal to my Office is inquisitorial and not adversarial. The extent of the inquiry is determined by me and not the parties to the appeal. The issues set out in the preceding paragraphs are relevant to the request for information made to NSAI but do not fall to be considered in this appeal for reasons that I will set out below.



19. I am satisfied that the scope of this review is confined to whether NSAI was justified in giving access to the standards by way of in situ examination free of charge subject to the acceptance of terms under article 7(3)(a)(ii) of the AIE Regulations.

Analysis and Findings

20. The AIE Regulations contain a clear process that must be followed by public authorities when dealing with a request for information. First, the body receiving the request must be a public authority as defined in article 3(1) of the AIE Regulations. Second, the public authority must assess the information covered by the request to determine if it is environmental information as also defined in article 3(1) of the AIE Regulations. The AIE regime only applies to environmental information held by or for a public authority. These are the threshold jurisdictional issues that arise from time to time in appeals to this Office. In the internal review decision NSAI considered both of these and answered them in the affirmative.
21. Next, the public authority must consider if the request complies with the requirements of article 6 of the AIE Regulations. No issues regarding compliance with article 6 arose in this case. The AIE Directive and associated case law of the CJEU and Irish courts are clear that once a valid request for environmental information has been made under the AIE Regulations, there is a presumption in favour of releasing that information. The public authority can only refuse access to the information under the exhaustive list of exemptions contained in Article 4 of the AIE Directive, transposed into Irish law by articles 7, 8, 9 and 10 of the AIE Regulations. Where a public authority is relying on an exemption it is not sufficient to merely recite the relevant provision, but the public authority must also give clear reasons as to why that provision has been relied on.
22. Certain exemptions require that the public authority show that release would adversely affect the interest being protected by the exemption. For example, article 9(1)(d) of the AIE Regulations states that a public authority may refuse access where disclosure would adversely affect intellectual property rights. Even if a public authority lawfully relies on an exemption in the AIE Regulations, in each case it must carry out a public interest balancing test and “weigh the public interest served by disclosure against the interest served by refusal” (article 10(3) of the AIE Regulations). It must also consider the question of redaction or separation of exempt information under article 10(5) of the AIE Regulations.
23. When making decisions under AIE, the public authority must carry out this process before it can grant or refuse access to environmental information under the AIE Regulations. Further, it is only when it has been determined that information should properly be released that article 7(3) of the AIE Regulations can be engaged. However, the AIE Regulations are just one access regime. There is nothing in those Regulations that preclude the public authority from granting access to the information outside the regime, even if access would be denied as a result of one of the exemptions.
24. There is nothing on the face of the original decision or the internal review decision that shows that NSAI considered the application of any of the exemptions. It could have sought to refuse access to the information under article 9(1)(d) of the AIE Regulations or any other relevant exemption. Instead it appears to have entirely skipped this important step in the AIE process and sought to protect copyright by giving access by way of in situ examination free of charge subject to the



acceptance of terms under 7(3)(a)(ii) of the AIE Regulations. The legally correct process for NSAI to consider the questions of copyright raised in this case is under the exemption and associated public interest balancing test.

25. I consider that this is a significant legal error in NSAI's internal review decision and that it is appropriate for me to exercise my power under article 12(5) of the AIE Regulations to annul that decision and remit it to NSAI for fresh consideration.
26. Given that NSAI erred in not considering the exemptions, I do not consider it necessary to analyse in detail the dispute between the parties in relation to the form and manner of access. It appears to me that many of the issues raised by the parties under article 7 of the AIE Regulations may become moot when NSAI issues a fresh decision, having followed the correct process, as provided for under the AIE Regulations.
27. I have read the judgment of the General Court in Case T-185/19 Public.Resource.Org Inc & Right to Know v European Commission, delivered on 14 July 2021 and note its findings. However, given the deficiencies in NSAI's decisions highlighted above, I do not think that I need to set out an analysis the findings of the court here.

Decision

28. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul NSAI's decision to provide access to the Standards by way of in situ examination free of charge subject to the acceptance of terms under article 7(3)(a)(ii) of the AIE Regulations on the ground that NSAI did not, in either the original decision or the internal review decision, follow the process as set out in the AIE Regulations. I direct NSAI to conduct a fresh decision-making process in respect of the appellants' request in accordance with the AIE Regulations.

Appeal to the High Court

29. 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
21 October 2022