



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-125767-S6L1K7

Date of decision: 13 October 2022

Appellant: Mr. T

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

Issue: Whether the Department was justified in refusing environmental information in relation to correspondence between the Department and DG Environment.

Summary of Commissioner's Decision: The Commissioner annulled the Department's decision on the ground that it had not conducted adequate searches in an effort to locate all relevant environmental information. He directed it to undertake a fresh decision-making process in respect of the appellant's request.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.



Background

1. On 7 April 2022, the appellant contacted the Department and sought access to the following information:
 - Letter dated 26 November 2020 from DG Environment to DAFM
 - For the period to 12 February 2021, all information both requested and received by DAFM for purposes of DAFM's drafting and finalising of the reply to DG Environment's letter to DAFM dated 26 November 2020 (The actual written reply (in letter format) from DAFM to DG Environment was dated 12 February 2021).

The request specified a number of different types of correspondence and records that the appellant wished to receive, but did not limit his request to those records.

2. By email of 6 May 2022, the Department informed the appellant that the request was refused as the “document [he had] requested does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken.” The Department’s decision contained no further information.
3. On 9 May 2022, the appellant requested a review of the Department’s decision. He also said that he expected to receive details of all the “steps taken and all personnel contacted in endeavouring to ascertain the information requested.”
4. On 8 June 2022, the appellant received a new decision annulling the previous decision. The Department had located records relevant to the request, but refused access to them under Article 9(2)(d) of the AIE Regulations.
5. The appellant submitted this appeal to this Office on 30 June 2022, at which stage submissions were requested from the Department.
6. I am directed by the Commissioner to carry out a review of this appeal. I have now completed this 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 and to the cases referred to throughout this decision. 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).

Scope of Review

7. The scope of this review is confined to whether or not the Department has justified its refusal of the appellant's request in line with the provisions of the AIE Regulations.

Submission of the Parties

8. The Department made a submission to this Office which can be summarised as follows:
 - i. The Department noted that the request had been refused at both stages as the information being requested did not exist or could not be found after all reasonable steps were taken.
 - ii. The Department further submitted that, even had the information been readily available, the request could have been considered manifestly unreasonable having regard to the volume and range of information sought.
 - iii. The Department also submitted that, had the records been available, the request would have been subject to articles 8(a)(iv) and 9(2)(d). It said that discussions about aspects of negotiations of matters ongoing with the European Commission would fall to be withheld under article 8(a)(iv) of the AIE Regulations, while it would withhold any documents concerning the internal communications of public authorities under article 9(2)(d) of the AIE Regulations.
 - iv. The Department also stated that releasing the requested information would not serve the public interest, as they were part of a wider complex negotiation, and their release would undermine Ireland's position in such negotiations.
9. The appellant's submission can be summarised as follows:
 - i. The appellant states that when a public authority seeks to rely on a discretionary ground in the AIE Regulations for the refusal of an AIE request, there are three issues to be considered:
 1. Can the relevant exception be said to apply to the information in question, having regard to the restrictive test mandated by article 10(4) of the AIE Regulations?
 2. If so, does the interest served by refusal of the requested information outweigh the public interest in its disclosure? (Article 10(3) of the AIE Regulations)
 3. If so, is there any material contained in the information requested which can be separated from the information subject to the relevant exception, in respect of which partial disclosure could be made'. (Article 10(5) of the AIE Regulations)



- ii. The appellant submitted that while the decision maker says that he has taken into account the public interest served by the disclosure, there is no sufficient evidence of any engagement in the process.
- iii. The appellant also submitted that the first part of his request should not have fallen within the scope of Article 9(2)(d) as it is not internal communication. He also submitted that he made a similar request, for a letter dated 12 February 2021 between the Department to DG Environment, which was released to him by the Department.
- iv. The appellant submitted that the Department has provided no evidence of its engagement in the process of considering Articles 10(3) and 10(4), while also failing to apply Article 10(5) to either part of his appeal.

Analysis and Findings

10. The manner in which the Department has dealt with this request, as set out above and discussed further here, is unacceptable. There is no evidence to show that the Department meaningfully engaged with the request at either original decision stage, or at internal review stage, which is most unsatisfactory. I acknowledge that renewed searches can sometimes reveal additional information that may not have been found initially. However, in the absence of a description of the steps taken at original decision stage to search for records linked to even the specific parts of this request, it is difficult to see that the Department took any of the necessary actions to locate records relevant to the request.
11. The Department should review its procedures for searching for environmental information, and take account of the requirement under article 5(1)(b) of the AIE Regulations for it to make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible.
12. The Department's submission to this Office contains some further detail in addition to that set out in the correspondence with the appellant. However, the Department continues to make, at times abstract, statements citing provisions of the AIE Regulations, without linking those provisions to the content of the documents or the steps that would be required to retrieve them. For example, the Department states that the request "can, as currently worded, be considered manifestly unreasonable" in accordance with article 9(2)(a) of the AIE Regulations. In saying this, the decision maker expressed his opinion that responding to the request would "place an unreasonable demand on the Department's resources". This opinion was expressed without any rationale or metrics to support how this request would affect the Department. On this basis, the Department has not justified its withholding of the records at issue under article 9(2)(a) of the AIE Regulations.



13. With regard to articles 8(a)(iv) and 9(2)(d) of the AIE Regulations, the Department has not set out how those provisions apply to the information at issue, having stated that the exceptions available would apply to the requested records.
14. Articles 7(4) and 11(4) of the AIE Regulations require the Department to provide reasons for refusal at both original decision and internal review stages. The Department ought to be aware of the requirements placed on it by the AIE Regulations, and by the requirements of fair procedures, to provide reasons for its decisions. In this regard, the judgment of the High Court in *Right to Know v An Taoiseach [2018] IEHC 371* notes that *“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”*.
15. The Department’s original decision did not refer to a weighing of the public interest served by disclosure against the interest served by refusal (as required by article 10(4) of the AIE Regulations), and the internal review decision merely stated that the public interest served by disclosure had been taken into account. Neither decision dealt with whether partial disclosure would possible in line with article 10(5) of the AIE Regulations.
16. In the absence of adequate reasons for applying the exceptions cited by the Department, or a satisfactory explanation for the public interest factors in favour of release that were weighed against the interest served by withholding the records, the Department has not justified its refusal of the appellant’s request.
17. In the circumstances, I am of the view that 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 all relevant provisions of the AIE regulations.

Decision

18. Having carried out a review on behalf of the Commissioner for Environmental Information, under article 12(5) of the AIE Regulations, I annul the Department’s decision. I remit the matter to the Department who should process the appellant’s request in accordance with the AIE Regulations.



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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

13 October 2022