



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-109049-J9H0Z6

**Date of decision:** 12 October 2022

**Appellant:** Irish Raptor Study Group

**Public Authority:** Department of Housing, Local Government and Heritage (the Department)

**Issue:** Whether the refusal of the request was justified on the basis that it concerned material in the course of completion as per article 9(2)(c) and/or that it would adversely affect intellectual property rights as per article 9(1)(d). Whether the refusal of part of the request was justified under article 7(5).

**Summary of Commissioner's Decision:** The Commissioner found that the refusal was not justified for the reasons given. He annulled the decision of the Department and directed release of the information sought. He directed the Department to undertake a fresh decision-making process in respect of one part of the 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. This request arises out of work carried out by the National Parks and Wildlife Service (NPWS) in relation to the conservation and monitoring of hen harriers. The NPWS is part of the Heritage Division of the Department. The appellant group carries out surveys, monitoring and research on birds of prey and owls (raptors) in Ireland, with the aim of securing the conservation and enhancement of Ireland's raptor population and the landscapes upon which they depend.
2. On 12 April 2021 the appellant requested copies of Irish Hen Harrier Satellite Tracking Initiative Reports 2016 to 2020 from the Department, and the following information:
  - a. How many Hen Harriers have been satellite tagged since 2016?
  - b. How many Hen Harriers that have been satellite tagged since 2016 are still alive?
  - c. Provide the date of satellite tagging of each individual and the fate/status of each satellite tagged individual Hen Harrier as of March 2021. For each individual that is considered lost/deceased, provide the age in months at loss of signal/death or the estimated date of loss of signal/death for each individual satellite tagged Hen Harrier.
3. On 4 May 2021, the Department refused the request based on articles 9(1)(d) and 9(2)(c) of the AIE Regulations. The Department stated that the information requested was being gathered by University College Cork (UCC), on behalf of the Department, pursuant to a research agreement. The information was being used for the purposes of preparing a PhD, and that it was estimated that it would take until August 2023 to allow for the completion of the PhD and associated publication of results in relevant publications. Due to this, the Department found that the information sought was "in the course of completion" as the full data set had not yet been collected and analysed. Further, it found that the release of the information sought would adversely affect intellectual property rights. The Department also stated that no report existed for 2020, as no tagging activity was undertaken during that year.
4. The appellant, through its solicitor, requested an internal review on 18 May 2021. The internal review affirmed the original decision on 16 June 2021. The internal review decision confirmed that the Department intended to publish the information generated by the research agreement on its website "in due course". The decision stated that all data generated during the survey of hen harriers during this period made up a "dataset" and should be considered as a single unit. The appellant appealed to this Office on 17 June 2021.
5. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the Regulations. In so doing, I have had regard to the submissions made by the appellant and the Department and third parties. I have also examined the contents of the records at issue. 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').
6. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

### **Scope of Review**

7. The Department originally refused the request on the basis that the information sought was “in the course of completion” within the meaning of article 9(2)(c) of the AIE Regulations, and that its release would adversely affect intellectual property rights as per article 9(1)(d) of the AIE Regulations.
8. In its appeal to this Office, the appellant group also raised the issue of the failure of the Department to identify a report for 2020. The appellant stated that even if no tagging took place in 2020, the birds tagged in previous years would still have been tracked, and data collected on them. Based on this, the appellant argued that the explanation provided by the Department for the absence of a report in 2020 was not credible. Where a public authority does not hold information requested, the correct approach is to refuse that aspect of the request under article 7(5) of the AIE Regulations.
9. Accordingly, the scope of this review concerns whether the Department’s refusal of the request was justified under articles 7(5), 9(2)(c) and 9(1)(d) of the AIE Regulations.

### **Analysis and Findings**

10. In the course of the review of this appeal, my investigator wrote to UCC and to the PhD student carrying out the relevant research offering each party an opportunity to make submissions. UCC made submissions supporting the Department’s position but did not raise any additional arguments. The PhD student did not make additional submissions.

### **Whether the Department holds a report for 2020**

11. In its schedule of records, the Department stated that no return was prepared for 2020, as no tagging was undertaken in that year. As set out above, the appellant set out in its correspondence with this Office, a copy of which was provided to the Department, that it is not satisfied with the



Department's explanation. The Department did not provide any further comment or elaboration to explain the circumstances in which no return was prepared for 2020.

12. In cases where a public authority has effectively refused a request under article 7(5), this Office must be satisfied that adequate and reasonable steps have been taken to identify and locate relevant information, having regard to the relevant circumstances. Having considered the information provided by the Department, I am not in a position to find that an effective refusal under article 7(5) of the AIE Regulations is justified. I consider that the most appropriate course of action to take at this stage is to annul the decision of the Department regarding the 2020 report, the effect of which is that the Council must consider this aspect of the appellant's request afresh. The Department should carry out fresh searches and make new enquiries regarding a 2020 report. Should this report not exist, the Department should provide the appellant with a full and reasoned explanation as to the steps taken to confirm this.
13. I will now turn to the substantive provisions of the AIE Regulations relied upon by the Department.

#### **Application of Article 9(2)(c)**

14. Given the time that has passed since the original request and decision, this Office's investigator wrote to the Department seeking an update on its position. The Department informed this Office that the PhD that was the subject of the research agreement was accepted by UCC in June 2022. Nonetheless, the Department maintained its position that the information requested remained unfinished within the meaning of article 9(2)(c) until the publication of parts of the thesis in related scientific publications. The Department stated that matters of quality review and assurance are equally as relevant to the peer-review process as they are to the PhD examination, and that errors may be detected in the peer review process that were not identified through the PhD examination. The Department informed the Investigator that two chapters of the PhD had been published, but that it was estimated that at least three to four further publications would be submitted to peer-reviewed journals, and that this would likely happen by the end of 2023.
15. Article 9(2)(c) 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*". This exemption is considered to protect the "private thinking space" of public authorities and to enable them to work on documents in private before completion.
16. Neither the AIE Regulations, the Directive nor the Convention clearly define "materials in the course of completion". It is the view of this Office that the expression "in the course of completion" relates to the process of preparation of the information or the document, and not to any decision-making process for the purpose of which the given information or document has been prepared. This phrase was considered by the Aarhus Convention Committee in ACCC/C/2010/53 (United Kingdom). The Committee considered whether raw air pollution data collected from a monitoring



station and not yet subject to “data correction” could be exempted from disclosure as “material in the course of completion”. The Committee considered that the raw data was itself environmental information and could not be considered to be “in the course of completion”. The Committee held that the data should be provided, and should the authority have any concerns about doing so, it should simply advise the requestor that the data had not yet been processed according to the agreed and regulated system of processing raw environmental data.

17. The four records identified by the Department as relevant to this request consist of reports on the activities observed in tagged hen harriers during 2016-2019. The Department has characterised the reports as being part of a “dataset” that remains unfinished or in the course of completion until the publication of results in relevant scientific publications. Bearing in mind the obligation in article 10(4) of the AIE Regulations to interpret the grounds for refusal on a restrictive basis, I do not agree with this view of the requested information.
18. Similarly, to ACCC/C/2010/53 above, the reports in question contain information gathered relating to activities of hen harriers during the relevant years. Each report is presented as a standalone document and is marked as a “final draft”. I do not accept that the publication of a PhD or articles based on this information and the peer-review process involved constitutes further work on these reports such that the information sought is currently “in the course of completion”. Any publications that may arise out of the data will be new work or documents.
19. Due to this, I find that article 9(2)(c) does not apply to the information sought and the refusal is not justified under this provision of the AIE Regulations.

#### **Application of Article 9(1)(d)**

20. The Department also based its refusal of the request on article 9(1)(d), that the release of the information sought would adversely affect intellectual property rights. The Department pointed to a section in the research agreement between UCC and NPWS which stated:

*“COPYRIGHT: This Research Agreement is intended to generate knowledge for public good purposes and as such DCHG expects that outputs/findings should be widely disseminated and made publicly available. At the end of this Research Agreement a copy of all relevant data (both raw and processed) will be made available to NPWS. Where agreed with UCC, published materials arising from the Agreement will also be made available on the DCHG website.”*

21. Notwithstanding that this section of the agreement is headed “copyright”, no submissions have been made to this Office by any of the parties involved that have established any intellectual property rights that are relevant to the request, whether in the information requested or otherwise. In order to invoke this article of the AIE Regulations, a party must establish that a



*recognised* intellectual property right exists and would be adversely affected by the release of the information sought. A general reference to intellectual property rights will not suffice.

22. As it has not been established that any relevant intellectual property rights exist that would be adversely affected by the release of information relevant to this request, I find that article 9(1)(d) of the AIE Regulations does not apply to the information sought.

### **Decision**

23. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I find that refusal of the reports located by the Department, as identified in its schedule of records, is not justified under article 9(2)(c) or 9(1)(d) of the AIE Regulations. On behalf of the Commissioner for Environmental Information, I annul the decision of the Department and I direct the release of the information sought.
24. With regard to the appellant's request for the Irish Hen Harrier Satellite Tracking Initiative Report 2020, on behalf of the Commissioner for Environmental Information, I direct that the Department should carry out a new decision making process in respect of the request for this report.

### **Appeal to the High Court**

25. 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**  
**12 October 2022**