



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-116197-B6X0M5

Date of decision: 11 October 2022

Appellant: Mr Neil Foulkes

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

Issue: Whether the Department complied with the articles 7(2)(a) and 7(10) of the AIE Regulations in processing the appellant's request for information relating to the decision-making in relation to the awarding of a particular forestry licence.

Summary of Commissioner's Decision: The Commissioner found that the Department failed to comply with the provisions of the AIE Regulations in processing the request and annulled the Department's decision. He did not, however, direct the Department to undertake a fresh decision-making process as the information requested had already been provided to the appellant.

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 28 September 2021, the appellant made an AIE request for all standard information relevant to the decision-making on the awarding of a particular licence approval. In his email to the Department, the appellant stated that the Department had indicated that day that it was in a position to provide the information outside of AIE under SI 417/2020, on receipt of a fee. The appellant did not pay the fee, but provided the Department with the relevant correspondence in his AIE request and stated that he wished to receive the relevant records by 1 October 2021. He stated that as the Department had indicated it was in a position to provide the information by return, on receipt of a fee, he expected to receive it under AIE in the timeline specified.
2. On 2 October 2021, the appellant wrote to the Department to state that he had not received the requested information within the requested timeline. He stated that the licence in question was subject to appeal and the Department had failed to provide the information in an appropriate timeframe. The Department responded and advised the appellant that it would issue its decision within the timeframe outlined in its acknowledgement of the request, i.e., the 27 October 2021.
3. In response, the appellant argued that the Department was operating a parallel and unfavourable regime for access to the information requested in circumstances where the information could have been provided by 29 September on receipt of a fee.
4. The Department issued its original decision on 20 October 2021. It identified 21 records falling under the scope of the appellant's request. It released 12 of those records in full, and redacted personal information from the remaining nine records. The appellant sought an internal review of the Department's decision, and the Department affirmed its original decision on 19 November 2021.
5. The appellant brought this appeal to my Office on 22 November 2021.
6. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the correspondence between the Department and the appellant as outlined above and to correspondence between my Office and both the Department and the appellant on the matter. 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](#)).
7. What follows does not comment or make findings on each and every argument advanced but I have considered all materials submitted in the course of the investigation.



Scope of Review

8. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.
9. In his appeal to this Office, the appellant argued that the Department failed to comply with the provisions of the AIE Regulations in processing his request. The appellant stated that he had received the information requested, albeit outside of the timeframe specified by him. My review, therefore, is solely concerned with whether the Department complied with its obligations under the AIE Regulations in processing the appellant's request.

Analysis and findings

10. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Department Directive 90/313/EEC, the previous AIE Directive.
11. Article 3(2) of the AIE Directive requires public authorities to respond substantively to a request for information as soon as possible or, at the latest, within one month after the receipt by the public authority of the applicant's request. Article 3(2) also states that a public authority shall have regard to any timescale specified by the applicant.
12. Article 6(1) of the AIE Directive provides that:

“... Any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5 [of the Directive], has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious ...”
13. Those provisions have been implemented in Ireland by articles 7(2), 7(10) and 11(3) of the AIE Regulations. Article 11(3) provides that an internal review must be notified to the requester within one month of receipt of the request for the internal review.
14. In C-186/04 *Housieaux v Délégués du conseil de la Région de Bruxelles-Capitale*, a case under the predecessor to the AIE Directive, Advocate General Kokott stated at paragraph 24:

“... the aim of Directive 90/313 is to grant individuals a subjective right of access to information on the environment. However, that right could be devalued if a public authority were able to take as long as it pleased to decide on a request for such access. The value of information on the environment is dependent not least on the individual's being able to obtain it as quickly as possible. Thus, timely access to current information on the environment makes it in particular easier for the



person requesting the information to use it, for example in ongoing construction or planning proceedings in which he may be involved as a neighbour and in which he would like to protect his interests.”

15. The Court noted this paragraph with approval at paragraphs 24 and 28 of its judgment.

The Department's position

16. In its submissions to this Office, the Department stated that the requested information was assembled and issued to the appellant within the timeframes set out in AIE legislation. It provided details of the timeline for processing the request. Among other things, it stated that the request was forwarded to the appropriate business division on 29 September 2021, the FOI Unit was advised by the business division as to who the decision maker was and the formal referral email was sent to the decision maker on 30 September 2021. The Department stated that the records were gathered, examined and redacted, a decision letter was drafted by the decision maker and reviewed by the FOI Unit. A schedule of records was prepared before the original decision issued on 21 October 2021.
17. The Department set out that it has received an unprecedented number of AIE requests, which it deals with in the order in which they are received. The Department explained that the section that deals with AIE requests and the section that deals with applications are separate for administrative purposes. In response to a complaint lodged by the appellant on 21 April 2022, the Department argued that the workload of separate sections will necessarily vary and it would be impossible to align the performance of two separate work areas in respect of the timelines under which information requests are answered to meet an arbitrary requirement to do so, which, it argued, was not set down in any legislation.
18. The Department made the argument that the appellant had the option of obtaining the relevant information once a reasonable administrative fee was paid. It stated that the appellant was advised of the fee and the timeframe in which he could expect to receive the records once the fee was paid. In providing the records on receipt of a fee, the Department stated that those records would need to be examined and personal information redacted before being released administratively.
19. While the Department provided no supporting information for its point, it argued that the timescale specified by the appellant, i.e., by 1 October 2021, was “completely unrealistic,” given the number of AIE requests received by the Forestry Division and the work volume of the Division generally.

The appellant's position

20. In a submission to this Office, the appellant stated that his request concerned the approval of a licence application to afforest lands. He explained that the application was made on 16 November 2020 and the decision to approve the application was issued by the Forestry Division on 22 September 2021. The appellant explained that that decision was subject to appeal to the Forestry Appeals Committee (the FAC) within 14 days of approval, i.e., by 6 October 2021.
21. The appellant stated that on 25 September 2021, he emailed the Forestry Division requested all records informing the decision to award the licence and he received a response on 28 September,



stating that the information would be provided as soon as possible. The appellant asked the Department how soon records could be provided, and the Department responded advising the appellant of the fee due and stating that the records could be provided the next day.

22. Following receipt of this email and on the same day, the appellant made his AIE request to the Department, as outlined above. When the Department failed to provide the information within the timeline he had specified, the appellant wrote to the Department regarding the matter. In response, the Department stated that it would respond to his AIE request by 27 October 2021. The Department gave no explanation as to why it had not provided the information within the timeline specified, nor did it give any indication that it would review the appellant's contention that it had not complied with the AIE Regulations in failing to do so.
23. With regard to the redactions made to the records, the appellant stated that it was his understanding that on making an application for such a licence, an applicant signs a declaration regarding the release of personal information, consenting to the disclosure of their name.
24. The appellant stated his view that, in circumstances where the Department had told him that he could be provided with the records, on payment of a fee, on the 29 September 2021, that date was the soonest possible date for the purposes of the AIE Regulations. The appellant believes that in failing to provide the information until 20 October 2021, the Department did not comply with the AIE Regulations and denied him the opportunity to consider the information and make a decision as to whether or not to appeal the licence. The appellant argued that the processing of his request was in contravention of both the spirit and the letter of the AIE Directive and Regulations.
25. The essence of the appellant's arguments is that the Department is operating parallel regimes for access to environmental information, whereby access under the AIE Regulations is disadvantaged by the Department's own processes and procedures. He contends that the information sought ought to have been provided as soon as possible, which the Department advised him, in its email of 28 September, was 29 September 2021.

Analysis

26. In this case, the Department did not provide the information sought within the timeline specified by the appellant. It appears from correspondence between the parties that the Department did not have regard to the timeline specified in processing the request. Despite the appellant notifying the Department that it had not provided the information within the timeline specified, the Department did not offer any explanation for its failure to do so.
27. It is clear from correspondence between the Forestry Division and the appellant that had he paid a fee, the Forestry Division believed that it could provide the information outside of the AIE process on 29 September 2021. While the Department stated in its submissions that the information had not been gathered or redacted when it undertook to provide the information on this date, it has not provided any evidence to suggest that it would have been unable to supply the information to the appellant on this date, outside of the AIE regime. When advising the appellant that it would provide the information



on 29 September, the Department gave him no indication that the redaction of personal information from the records would cause a delay.

28. While the AIE Regulations do not define what is meant by “as soon as possible,” I do not consider the Department’s arguments that it responded within the timeframe set out in the AIE Regulations as sufficient to find that it complied with its obligations under article 7(2) of the AIE Regulations. The one-month timeframe outlined in the Regulations is not the target for responding to AIE requests, rather it is the latest date on which a public authority should respond. Beyond that date, the request is deemed refused unless a public authority has already extended the timeline for responding under article 7(2)(b) of the Regulations.
29. Furthermore, Article 7(2)(a) is subject to article 7(10) of the Regulations, which states that a public authority shall have regard to any timescale specified by the applicant.
30. I appreciate that the Department has received an unprecedented number of AIE requests. It states that it responded to the appellant’s request as soon as possible. In its acknowledgement of the appellant’s request, the Department noted the timescale specified by the appellant. However, it made no further reference to that timescale and provided no explanation as to why it had not provided the information within that timescale. Indeed, in submissions to this Office, the Department provided no satisfactory evidence to suggest that it had had regard to the timescale specified by the appellant, other than to argue that it was “completely unrealistic”, without qualifying or supporting that contention with sufficient evidence or a satisfactory explanation as to how that timescale was unrealistic when the Forestry Division had stated it would be in a position to provide the information on 29 September 2021.
31. It is my view that in the circumstances of this case, the Department’s processing of the request and its failure to have regard to the timeline specified by the appellant impaired his right to public participation. The Department provided records to the appellant 10 working days after the deadline for lodging an appeal of the licence approval.
32. While it is not the role of this Office to prescribe procedures for public authorities in processing AIE requests, it would appear to me that in responding to requests, the Department ought to have regard to the principles of the Aarhus Convention in enabling public participation to the fullest possible extent. At the very least, the Department in this case ought to have had regard to the deadline for making an appeal of the licence at issue and endeavoured to provide the information in advance of that deadline.
33. On the facts of this case, and taking all of the above into account, my view is that the Department failed to comply with articles 7(2)(a) and 7(10) of the AIE Regulations in processing the appellant’s request and that the Department has not justified its failure to do so in its submissions to this Office.
34. I consider that the most appropriate course of action to take is to annul the decision of the Department in this case.



Decision

35. Having carried out a review under article 12(5) of the AIE Regulations, I find that the Department failed to comply with articles 7(2) and 7(10) of the AIE Regulations and that this failure was not justified. I hereby annul the Department's decision. As the information has been provided to the appellant at this stage, I do not consider it necessary for the Department to conduct a fresh decision-making process in this case.

Appeal to the High Court

36. 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