



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-108532-W5W7Z8

Date of decision: 3 October 2022

Appellant: Mr. A.

Public Authority: Department of Agriculture, Food and the Marine [the Department]

Issue: Whether Department were justified in refusing the request under articles 8(a)(i) or 8(a)(iii) of the AIE Regulations, whether the request was manifestly unreasonable within the meaning of article 9(2)(a) of the AIE Regulations.

Summary of the Commissioner's Decision: The Commissioner annulled the decision of the Department and directed that a fresh decision-making process be carried out 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. This appeal concerns the Integrated Forestry Information System (iFORIS), which is a system maintained by the Department to support the processing of forestry license and scheme applications and payments.
2. On 1 April 2021, the appellant requested “*a copy of, or access to, all spatial datasets available on iFORIS used by DAFM in connection with assessing Forestry Application and Licenses.*” The appellant stated in his request that he was seeking access to spatial data only, and not to any personal data where consent for disclosure has not been given by the individuals concerned.
3. The Department issued a decision on 29 April 2021. It refused the appellant’s request under articles 8(a)(i), 8(a)(iii) and 9(2)(a) of the AIE Regulations. The Department stated that the data in question would amount to terabytes in size, and it was not feasible for the Department to supply this amount of data. The decision found that the datasets sought contained confidential personal information and information that would indicate the location of protected species. The decision also stated that many of the datasets sought are publicly available elsewhere and should be sought from the “*authoritative sources*”. The decision considered the weighing of the public interest served by disclosure against the interest served by refusal and concluded that the public interest was best served by withholding the information sought.
4. The appellant sought an internal review on 30 April 2021. The internal review decision issued on 28 May 2021. This affirmed the original decision, stating that the release of the information sought could result in the release of personal information and could adversely affect the environment. The decision held that the request was manifestly unreasonable due to the volume of information sought and indicated that the information consists of over 100 individual spatial layers. The appellant appealed to this Office on 3 June 2021.
5. I am directed by the Commissioner to carry out a review under article 12(5) of the AIE Regulations. In carrying out this review, I have had regard to the submissions made by the appellant and the Department. 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 internal review decision in this case upheld the original decision, refusing the request under articles 8(a)(i), 8(a)(iii) and 9(2)(a) of the AIE Regulations.
8. In the course of the review in this case, this Office's investigator wrote to the Department seeking further information on certain issues. In its response to this request, the Department raised a number of new issues. It suggested that the information sought was not environmental information, and raised a number of new issues relating to the refusal of the request. The Department did not refer to any provisions of the AIE Regulations to which these new issues may relate.
9. Due to the above, the scope of the review in this case is confined to:
 - a. Whether the information sought is environmental information;
 - b. Whether the refusal of the request is justified under articles 8(a)(i), 8(a)(iii) or 9(2)(a) of the AIE Regulations.
 - c. Whether the additional issues raised by the Department justified the refusal of the request.

Preliminary Matters

10. I am most disappointed by the manner in which the Department has conducted itself in processing this request. The submissions received from the Department have alluded to a number of reasons for refusing this appeal that are far outside the provisions of the AIE Regulations. It appears from its submissions to this Office that the Department has taken a certain attitude to this request based on the appellant's perceived motivation for making it. I would remind the Department that article 6(2) of the AIE Regulations states that "*an applicant shall not be required to state his or her interest in making the request*". The Department should therefore refrain from making commentary about the motivations of the requestor.
11. Other comments made by the Department suggest that the burden of proof rests on the appellant to establish whether the request should be granted. This is not in keeping with the scheme of the Regulations and of Directive 2003/4/EC upon which the Regulations are based, which make it clear that there is a presumption in favour of release of environmental information.
12. The Department raised a number of new issues relating to the refusal of this appeal without explanation at a late stage. This Office's investigator sought further information on the Department's position following this, and did not receive a response. I expect the Department to fully and comprehensively consider requests under the AIE Regulations when received. In most circumstances this should avoid the need to raise new issues when a decision is appealed to this Office. In particular, it is not satisfactory that the Department would seek to question whether the information sought is



environmental information, long after the appeal had been processed and both an initial decision and internal review decision had issued. Whether information sought is environmental information is an important threshold issue and should be an initial consideration when an AIE request is received. It is not clear why the Department sought to change its position on this issue at a very late stage. When this Office's investigator sought clarification, no response was received.

Analysis and Findings

Whether the information sought is environmental information

13. As set out above, submissions received by this Office from the Department contained opaque suggestions that the information sought should not be considered environmental information. The Department did not make any substantive submissions as to why this might be the case. I consider that there is no doubt that the information sought is within the definition of environmental information as provided for in the AIE Regulations. It is clear from the schedule of information provided by the Department to this Office that the datasets relevant to this request consist of electronic information on elements of the environment, including water, soil, land, landscape and natural sites. I find that this type of information comes within the definition provided for in article 3(1) of the AIE Regulations.

Whether refusal is justified by articles 8(a)(i) and 8(a)(iii) of the AIE Regulations

14. The Department relied on article 8(a)(i) and 8(a)(iii) of the AIE Regulations in refusing the appellant's request. Article 8(a)(i) provides that a public authority shall not make available environmental information where the 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. Article 8(a)(iii) provides that a public authority shall not make available information where the disclosure would adversely affect the protection of the environment to which that information relates.
15. The applicant in his request confirmed that he was not seeking access to any personal data where consent for disclosure has not been given by the individuals concerned. I therefore find that any such information was not within the scope of his request. In relation to information to which article 8(a)(iii) may apply, the appellant confirmed in his appeal to this Office that he did not require access to any datasets that contain sensitive environmental information. This was communicated to the Department when this Office's investigator sought further submissions regarding this appeal.
16. Given this, in considering whether the refusal of the request under articles 8(a)(i) or 8(a)(iii) was justified, I must consider whether the Department correctly considered its obligations under article 10(5) of the AIE Regulations, which states that *"nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information"*.



17. The appellant's position is that registered foresters using iFORIS are only able to access personal data for their own clients and not for every client on the system. He also stated that he was aware that contractors working for the Department were previously restricted from accessing certain restricted environmental information such as hen harrier nest location data. From this, he says it is clear that there is a capability within iFORIS that permits the exclusion of general access to personal data or environmentally sensitive data. He suggests that this capability should allow for the Department to provide him access to the information requested.
18. The Department's position in its initial submissions was that relevant datasets could not be anonymised or separated from non- personal data. The Department did not refer specifically to article 10(5) of the AIE Regulations. This Office's investigator conveyed the appellant's position to the Department and sought clarification on whether the Department had considered the requirement to separate data that may be released under article 8 of the AIE Regulations from data that does not contain personal data or environmentally sensitive data from other relevant datasets. The Department's response stated that there is no functionality within the system to permit a user to view non-personal data for all forestry applications but also stated that there is functionality to permit a user to view their own application data and not the data of others. The Department stated that there was "*no evidence*" to show that a separation of personal data from non-personal data could be achieved, but did not provide any further information to show how it had sought such evidence. The Department failed to address the examples put forward by the appellant to support his contention that it should be possible to provide him with access to non-personal and non-environmentally sensitive information.
19. It is regrettable that the Department did not engage with the investigator's direct queries on this score. I consider that the scheme of the AIE Directive and AIE Regulations make it clear that there is a presumption in favour of release of environmental information. Based on this, the public authority must satisfy me that it has considered its obligations under article 10(5) of the AIE Regulations and has taken all reasonable steps to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information.
20. In the absence of responses to the queries put to the Department in relation to article 10(5) of the AIE Regulations, which would shed light on the type of information that could be released, it is not possible to carry out the balancing test required under article 10(3) of the AIE Regulations.
21. I am not satisfied based on the information provided that the Department has taken reasonable steps to identify whether it is possible to separate the datasets containing personal data or restricted environmental data from the data sets within the scope of the appellant's request. I find that the Department has not correctly considered its obligations under article 10(5) of the AIE Regulations. Due to this, the refusal of the request under articles 8(a)(i) and 8(a)(iii) is not justified.

Whether the request was manifestly unreasonable within the meaning of article 9(2)(a)



22. The Department also contends that the appellant's request is manifestly unreasonable. Article 9(2)(a) states that *"a public authority may refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought"*.
23. The Aarhus Convention Implementation Guide states, *"Public authorities may refuse a request for information that is "manifestly unreasonable". ... Although the Convention does not give direct guidance on how to define "manifestly unreasonable", it is clear that it must be more than just the volume and complexity of the information requested. Under article 4, paragraph 2, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request "manifestly unreasonable" as envisioned in paragraph 3(b)"*.
24. In light of the findings of the Court of Justice of the European Union in T-2/03 *Verein für Konsumenteninformation v. Commission*, at paragraphs 101-115, I consider that the exception in article 9(2)(a) is only available where the administrative burden entailed by dealing with the request is particularly heavy. It is the responsibility of the public authority to demonstrate the unreasonableness of the task entailed by the request.
25. The Department says that it holds over 100 layers of data relevant to the appellant's request which amounts to terabytes in size and as a result, the request is manifestly unreasonable. This Office's investigator wrote to the Department seeking further information on the steps that would be involved in processing the appellant's request such as an estimate of time length of time it would take to fulfil the request and the impact this would have on the functioning of the Department. The Department responded stating that it would take *"potentially weeks of work"* to prepare the material for release, but did not provide any further information to support this statement. The Department stated that it is simply not feasible for it to supply this amount of data, but have not set out why that might be the case.
26. I am not satisfied that the Department has established that the request is manifestly unreasonable within the meaning of Article 9(2)(a). I find that the Department has not seriously contemplated the processing of this request, or properly considered what might be involved in doing so, but has concluded that the request is manifestly unreasonable solely based on the volume of information involved. It is not sufficient to state that it would take *"potentially weeks"* to process a request without setting out the basis upon which this is estimated. While volume may be a relevant factor in considering whether a request is manifestly unreasonable, to justify refusal based on article 9(2)(a) of the AIE Regulations, the Department must establish that the volume of information sought is such that it renders the request manifestly unreasonable. It is clear that the AIE Regulations provide for the processing of requests of a certain level of volume by providing for the extension of time for responding to a request in article 7(2)(b).



27. As mentioned above, the Department is also obligated under article 10(3) of the AIE Regulations to weigh the public interest served by disclosure against the interest served by refusal. I find that it is not possible for the Department to correctly consider the application of article 9(2)(a) or article 10(3) of the AIE regulations when it has not established or taken any steps to establish the relevant facts, namely the steps, resources and time commitment that would actually be involved in processing the appellants request. The Department also failed to consider any measures that might mitigate the burden caused by the volume of information sought such as the form or manner of access to be offered. Based on this, I am not satisfied that the request is manifestly unreasonable and I find that the Department's refusal of the request under article 9(2)(a) was not justified.

Additional issues raised by the Department

28. In correspondence for the purposes of this review, the Department raised a number of additional grounds for refusal of this request. These included:
- a. whether the release of the information sought would undermine the Department's security mechanisms;
 - b. that the information sought represents the intellectual property of the Department;
 - c. that the data requested is provided to the Department in particular circumstances which may not include acting as a broker or supplier of the data;
 - d. that there are specific license agreements in relation to imagery on the scheme that precludes the supply of this data to third parties;
 - e. that the data requested is available elsewhere and should be sought from the authoritative source;
 - f. that the Forest Service is not the business or data controller for some of the information sought.
29. The above arguments were made by the Department without reference to any relevant provisions of the AIE Regulations. This Office's investigator wrote to the Department seeking further information on the issues raised and outlining that it was necessary for the Department to set out any reasons for refusal by reference to the AIE Regulations. No response was received to this request.
30. I have considered the additional arguments made by the Department. I do not find that they justify the refusal of the request under the AIE Regulations based on the information provided. I will comment briefly on the reasons in the hope of assisting the Department in processing of future AIE requests.
31. If the Department has concerns over information sought under AIE requests being used to undermine the security mechanisms or economic interests of the Department, the Department must consider whether the request should be refused under articles 9(1)(a) or 9(1)(c) of the AIE Regulations, or any other relevant provision, and reasons must be given for this refusal. If the Department has concerns over the impact of disclosure of information on intellectual property rights of the Department or of a third party, the Department must justify the refusal under the article 9(1)(d) of the AIE Regulations. The fact that the information sought may be available elsewhere does not justify refusal of the information



sought. Finally, whether the Forest Service or a different section within the Department is the business or data controller of the information sought is irrelevant to the processing of an AIE request for information held by the Department, which is the relevant public authority for the purposes of the AIE Regulations.

Decision

32. Having carried out a review under article 12(5) of the AIE Regulations, I find that the refusal of the information sought was not justified by the reasons given and I annul the decision of the Department. Given the lack of information available to this Office, and the possibility of revealing personal data or otherwise sensitive information, I do not consider it appropriate to direct release of the information sought at this time and I remit the request to the Department to carry out a fresh decision making process, taking into account the findings above.

Appeal to the High Court

33. 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

3 October 2022