

**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 CEI/19/0026**

**Date of decision:** 22 November 2019

**Appellant:** Dr C

**Public Authority:** Department of Culture, Heritage and the Gaeltacht (the Department)

**Issue:** Whether the Department was justified in refusing access to certain information concerning the outcome of the grey seal management plan process since 2010

**Summary of Commissioner's Decision:** The Commissioner found that it was reasonable to conclude that information requested was not held by the Department following its carrying out of adequate searches and thus article 7(5) of the AIE Regulations applied.

**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**

On 18 February 2019, the appellant requested under both the AIE Regulations and the Freedom of Information (FOI) Act access to information regarding the development and existence of a management plan for grey seals and, if such plan does not exist, an explanation for this. He also sought details pertaining to licences to shoot "Culprit grey seals". On 1 March 2019, the Department gave the applicant a number of clarifications including confirmation that it had not published a management plan for grey seals. It also supplied some information on parts of his request. Subsequently on 27 March 2019, the Department issued an AIE decision on the request in which it released two records and a table of permits.

In a message to the Department on 8 April 2019, the appellant said that he had decided to make an AIE review request. He clarified that it was the **outcome** of the process of developing a seal management plan that concerned him and that one of the records released to him had been written before the research had been completed at the beginning rather than at the end of the process. The appellant attached a detailed account of the background to the matter including his concerns about management and policy issues since recommendations were made in 2010. In an internal review decision of 7 May 2019, the Department said that "all appropriate records" that it held had been provided. The decision maker confirmed that "there is no seal management plan" and offered to meet with the appellant to discuss a number of issues.

On 14 May 2019, the appellant submitted an appeal to my Office.

I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the appellant's exchanges with the Department and to the submissions of the appellant and the Department to my Office. I now consider it appropriate to bring this matter to a conclusion by way of a formal, binding decision.

## **Scope of Review**

In the course of the review, my Office clarified with the appellant the scope of the review and my role in relation to it. This review is concerned solely with the question of whether the Department is justified in its decision to refuse access to any further information about the outcome of the grey seal management plan development process.

## **Analysis and Findings**

While I do not comment on each and every part of the appellant's submissions, I have carefully considered all of them insofar as they are relevant to my review.

Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested information is held by or for the public authority concerned.

Article 7(5) provides that:

"Where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it".

Article 3(1) of the Regulations defines "environmental information held by a public authority" to mean "environmental information in the possession of a public authority that has been produced or received by that authority". It states that "'environmental information held for a public authority' means environmental information that is physically held by a natural or legal person on behalf of that authority".

This is, in effect, a ground on which a public authority may refuse (in whole or in part) a request for environmental information. A similar but not identical provision in relation to records "not held" exists in the Freedom of Information Act 2014. As Commissioner for Environmental Information, I am guided in my approach by the experience of the Office of the Information Commissioner. In cases where a public authority claims not to hold the environmental information requested, I consider that my role is to decide whether the public authority's decision maker had regard to all of the relevant evidence and to assess the adequacy of its searches for relevant information. The evidence in such cases generally consists of information on the steps actually taken to search for the information along with miscellaneous other information about the records management practices of the public authority, insofar as those practices relate to the information in question. On the basis of the information provided, I form a view as to whether the decision maker was justified in coming to the decision that the information is not held for or by the public authority. It is not normally my function to search

for records. The Information Commissioner's approach in such cases has been upheld by the High Court.

My investigator put a series of questions to the Department in relation to the steps it took to search for records containing information falling within the scope of the request as clarified. She explained that the evidence that I would require in this kind of case generally consists of the steps taken to search for the information along with, where relevant, miscellaneous other information about the records management practices of the public authority. Given that the appellant had submitted that there would be interaction between the Department and Bord Iascaigh Mhara, the Marine Institute and Inland Fisheries Ireland on the seal management plan issue, she enquired as to what processes or procedures would typically apply to such contacts and where any records of them would be held.

The Department provided details of how it manages its records including retention, destruction and archiving issues but these were not of direct relevance to the adequacy of search issues in this case. It said that both its electronic and paper files had been searched. The Department's response initially indicated that the matter was being handled by its National Parks and Wildlife Service (NPWS) and that any interactions concerning the seal management plan would take place within the Licensing unit. It said that all Wildlife Licensing files are stored electronically and that the only information within the scope of the request that a search of these using the term "seal" brought up was the information that was collated to produce the records already released in the Department's decision of 27 March 2019.

My investigator then put it to the Department that, from its account of the searches, they seemed to have been directed at licensing files, including prosecutions. She asked whether information on any development of a seal management plan or the rejection of plans to do so would be likely to be found elsewhere. In response, the Department supplied details of searches carried out by a senior (named) member of staff in the Science and Biodiversity unit. This individual confirmed that they had carried out "extensive and comprehensive searches" of files, documents and emails in the Biodiversity and Scientific unit to include contacts between the Biodiversity Unit and the NPWS Marine Mammal ecologist from 2010 to 2018 in relation to

all aspects of seal survey and monitoring , seal fisheries interactions and seal research. The Department stated that no further information within the scope of the request as clarified could be found. According to the individual who took responsibility for the search in this area, the ecologist also checked his files and confirmed that he held no further information relating to a seal management plan.

Since the appellant's submissions included references to matters of policy and to various parliamentary questions on the issue of grey seal management over the years, my Office further contacted the Department and asked it to comment on the possibility that information such as briefing on the issue might be held in, for example, the Minister's Office, Legal Unit or elsewhere. The Department's response was that only Licensing, Biodiversity or Scientific Units would hold any information on the seal management plan. It confirmed in writing that, if there had been exchanges with anyone about the outcome of that process up to the time of the appellant's AIE request, those units would hold any such records. It said that anything that would pertain to the seal management plan would have gone through the named individuals in the units as described above. According to the Department, if there was anything held in the Minister's Office or elsewhere in the Department, it would have originated in either Licensing or Science and Biodiversity and anything that came from the Minister's Office or elsewhere would be passed onto the responsible individuals in those sections to retain a copy on file.

The AIE Regulations do not provide for a right of access to records which **ought** to exist or for situations where the information was not recorded or retained in order to be held by the public authority. I do not have jurisdiction to require a public authority to create records where such records were not, at the relevant time, held by or for the public authority concerned. As the appellant is aware, neither can I investigate such matters as why the Department did not act as he believes it should have.

In determining whether the steps taken to look for the records are adequate, I consider that a standard of reasonableness must necessarily apply. In all the circumstances, having regard to the Department's accounts of its search efforts, I am satisfied that article 7(5) applies.

### **Decision**

Having carried out a review under article 12(5) of the AIE Regulations, I affirm the Department's decision in this case on the basis that article 7(5) applies to the further information sought.

**Appeal to the High Court**

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.

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**Peter Tyndall**

**Commissioner for Environmental Information**

**22 November 2019**