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/18/0006

Date of decision: 06 December 2018

Appellant: Fand Cooney

Public Authority: Investment and Development Authority (IDA)

Issue: Whether IDA was justified in not giving the appellant further information on foot of her AIE request

Summary of Commissioner's Decision: The Commissioner found that IDA was justified in not giving the appellant further information because the information which it provided adequately met her 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

The following are the key elements of the background to the case. The summary does not cite every contact that took place between the parties.

On 27 October 2017, the appellant submitted a four part AIE request to IDA seeking specific information on IDA's Strategic Sites Programme. The request was worded as follows.

1. "On Monday 27th February 2006, Dermot Byrne (Chief Executive of EirGrid) gave a presentation to the IDA regarding the development of the grid.
   Can you please provide:
   (a) a copy of that presentation including
   (b) any presentation notes and
   (c) minutes of the meeting.

2. Please provide details of how the IDA's Strategic Sites Programme was subsequently incorporated into the Transmission Forecast Statement 2007-2013 / Transmission Development Plan 2007-2013 e.g.
   (a) what strategic sites were included or allowed for in the 2007 Transmission Development Plan / forecast.
   (b) what large demand connections were included or allowed for in the 2007 Transmission Development Plan/forecast.

3. Please provide all correspondence (Including minutes/meeting notes/reports/diagrams) between the IDA and EirGrid regarding the IDA's Strategic Sites programme from 2006-2015.

4. Please provide details of the IDA's Strategic Sites programme (incl. locations/maps/reports etc.) 2006-2015, including:
   (a) correspondence sent to any other agencies (e.g. ESB, Bord na Mona, Coillte etc.)
   (b) copies of correspondence received from such agencies."

On 20 November 2017, IDA informed the appellant that parts 3 and 4 of the request related to numerous records and asked if she would reduce the scope of the request. The appellant replied on 23 November 2018, dropping parts 4(a) and 4(b) from her request (but not part 4 *per se*).

On 24 November 2017, IDA informed the appellant that it was extending the timeframe for making a decision and indicated that she could expect to receive a decision, at the latest, by 24 December 2017.

The appellant requested an update on 16 January 2018, saying that she had not received a decision. IDA apologised for its delay and said it would "revert" to her the following week. On 23 January 2018, the appellant requested an internal review, saying that she had no other option at that stage.

On 24 January 2018, one month after the date when IDA told the appellant she would receive a decision, IDA issued its decision. It said that it had decided to refuse the request in full for the following reasons:

- In relation to part 1 of the request: "IDA does not hold any records in relation to this element of your request. All files within the Property Division were searched in order to locate these records, however no records were found."
- In relation to part 2 of the request: "IDA does not compile the Transmission Development Plans/Forecasts and does not hold any records in relation to this. These plans would be compiled by EirGrid and, while they would take into account IDA's Strategic Sites Programme, we do not have any formal record in this regard."
- In relation to parts 3 and 4: "Searches undertaken in the Property Division have resulted in thousands of records relating to this element of your request. Unfortunately any further sourcing and sorting of documents would result in an undue disturbance to the workload in an already very busy area. Therefore I am refusing these parts of your request as they are voluminous."

On 19 February 2018, the appellant wrote to IDA saying that:

> "In order to help move this forward, I am further reducing the scope of this request for internal review to only part 4 of the reduced scope, i.e. please provide details of the IDA's Strategic Sites Programme (incl. locations, maps, reports, etc.) 2006 – 2015 inclusive".

She asked to be told how many records fell under that newly reduced scope saying that she did not want to "waste people's time". She added that she would have to advise [my Office] by 23 February 2018 of her intention to appeal this decision [i.e. the decision which she had been given.]

Later the same day, IDA wrote to the appellant asking her to confirm that she was requesting "an internal review on question 4". The appellant replied that she had already submitted a valid request for internal review on 23 January 2018. She added that she understood that IDA "might feel that the decision letter from 24 January 2018 superseded it". She went on to say that:

> "If the further reduced scope now makes the request manageable and likely that records will be released then I suggest that the IDA might work off the original internal review date of 23 January 208 but might extend the deadline by up to a month. I would really appreciate it if you could let me know if this is now manageable".

The appellant appealed to my Office on 23 February 2018. When notified by my Office of the appeal, IDA's representative said on 5 March 2018 that:

> "There were regrettable delays on our side in answering the request. I did ask [the appellant] to let me know if she wished to proceed with the request after she received the decision however did not get a response until two weeks ago. We are happy to proceed with this review and it is likely we can release some documents under this review to [the appellant]."

In carrying out my review I had regard to the submissions made by the appellant and IDA. I also 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); the Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide'); and the relevant jurisprudence of the courts.

Comment on IDA's handling of this request

IDA displayed a poor appreciation of its obligations when processing this AIE request, both in terms of clarifying its position on certain elements of the request and adhering to the statutory time limits. I hope that IDA will learn from this case and meet its obligations in future.

Scope of appeal

My investigator put it to the appellant that he understood that the scope of her appeal was confined to that part of the request which sought "details of the IDA's strategic sites programme (including locations, maps, reports etc.) 2006 – 2015 inclusive". The appellant confirmed that this was correct, but added:

> "If possible, I would appreciate if the Commissioner could also review the refusal of IDA to provide access to potential 'informal' records as per part 2 of my request".

I regret that it was not possible for me to review that part because the appellant withdrew it from the scope of her internal review request.

I noted that the appellant asked for "details" of the specified subject and not for "all information" on it. It is very clear to me from reading the casefile that the appellant was at all times anxious to obtain environmental information without imposing an unreasonable burden on IDA. The reasonableness of her approach was helpful.

Given that the appellant asked for "details" of a particular topic, it would have been useful if IDA had responded by asking her to clarify what, in particular, she was seeking. To conduct my review I had to form a view on the scope of that part of the request that led to this appeal. I considered that while it sought "details" of the IDA's strategic sites programme from 2006 – 2015 inclusive, it should be understood as;

- Including a request for relevant reports, maps and details of locations.
- Including a request for 'similar information' (because of the inclusion of the word "etcetera").
- Not including a request for *all* information held by IDA on the subject.
- Not including a request for information that was specifically asked for in parts 1, 2, 3, 4(a) and 4(b) of the original request since those parts were expressly withdrawn from scope by the appellant.

To a certain extent, this request for "details" gave IDA some discretion to decide which details to provide. I consider that the most appropriate details to provide would be the main or overarching details held by IDA on its strategic sites programme.

Settlement efforts

My investigator engaged with the parties to explore a possible settlement. In August 2018 IDA provided the appellant with access to 36 records relating to seven Strategic Sites. On reviewing those records, the appellant told my investigator:

> "I am getting the impression that I have been handed a lucky dip rather than all of the documents. I can't imagine that an agency such as the IDA have a national strategic sites programme that consists of totally independently managed projects without some overall policy/plan/strategy/progress reporting".

The appellant told IDA that it seemed to her that its search for documents might have been too narrow and she asked it to carry out a new broader search. IDA assured my investigator that this new search would be focussed on establishing what IDA *as a whole*, and not just its Property Division. Having completed a fresh search, IDA reported that it had not found any further relevant records regarding strategic sites. The appellant did not accept this and the efforts to reach a settlement therefore concluded.

IDA's position

IDA's position is that it has given the appellant the requested details on the strategic sites that existed up to and including 2015. It submitted that not all sites of interest to IDA are deemed to be "strategic" sites.

The appellant's position

The appellant indicated that she would be satisfied if she received unambiguous answers to three questions:

Question 1. Were these 7 sites the only strategic sites known to IDA up to the end of 2015?

Question 2. Is there an overarching map or prospectus showing all of these locations on one document?

Question 3. Is there an overarching plan / report / programme / progress update reports showing all the strategic sites and, for example, IDA's development policy relating to these?

Clarification sought and obtained

Since the appellant's questions offered the possibility of bringing this somewhat confused case to a conclusion, my investigator put those questions to IDA. IDA answered the three

questions and clarified its answers when my investigator asked some follow-on questions. Its answers may be summarised as follows:

Answer to question 1. Yes. Only seven sites were deemed "strategic" sites during the years specified in the request.

Answer to question 2. No, there is no one map or prospectus showing all of the sites.

Answer to question 3. No.

Assessment

The issue for my review was to determine whether IDA had wrongly withheld information that it should have given to the appellant on foot of the modified part 4 of her AIE request.

As that part of the request simply sought "details" of IDA's strategic sites programme, there was a degree of uncertainty as to exactly which details the appellant sought. IDA provided the appellant with access to 36 records and regarded this as a reasonable response to the request. The appellant found it difficult to accept that IDA had adequately searched for all relevant information and she summarised her concerns in three questions. IDA stated that it had conducted a fresh and more thorough search for relevant information and found none. It also answered the three questions proposed by the appellant.

It falls to me to consider whether I am satisfied with IDA's response. Article 7(5) effectively allows a public authority to refuse to provide access to information that it does not hold. My approach to dealing with cases where a public authority claims not to hold information (or further information) is set out in previous decisions published on www.ocei.ie. In such cases, I consider whether I am satisfied that adequate steps have been taken to identify and locate relevant information having regard to the scope of the request and the particular circumstances of the case. In determining whether the steps taken were adequate in the circumstances, I consider that a standard of reasonableness must apply. In the current case, having considered all of the circumstances, I am satisfied by IDA's answers to the questions posed.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I affirm IDA's refusal to provide further information to the appellant. I accept that the information provided by IDA to the appellant adequately met her request. I hope that she will be assured of this by IDA's unambiguous answers to the questions that she posed.

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.

Peter Tyndall
Commissioner for Environmental Information
06 December 2018