



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-120668-K4W4F2

Date of decision: 14 July 2022

Appellant: Mr. A

Public Authority: Department of Agriculture, Food and the Marine

Issue: Whether or not the Department dealt with the request in accordance with Article 4(5) of the AIE Directive

Summary of Commissioner's Decision: The Commissioner found that the request has not been dealt with in accordance with Article 4(5) of the Directive. The Commissioner therefore annulled the Department's decision and remitted the matter for fresh consideration by the Department.

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 4 January 2022 the appellant made the following request to the Department of Agriculture, Food and the Marine ("the Department") under the AIE Regulations:

"The information requested is: 1) All information relating to Tree Felling Licence TFL00415219, Drumcollop, Co. Leitrim.

Records to include All internal and external correspondence (including WhatsApp and Text Messages) and all iterations of the Inspector's Certification.

Post licence inspections / follow up."

2. On 11 January 2022, the Department issued its decision to part grant the request citing article 8(a)(i) of the AIE regulations (where disclosure would adversely affect the confidentiality of personal information relating to a natural person who has not consented to the disclosure of such information where that confidentiality is otherwise protected by law). It also stated that the confidentiality of the records in question is otherwise protected by law under Section 37(1) of the Freedom of Information Act 2014. The Department also stated that its decision is in line with article 10(3) of the AIE Regulations.
3. On 9 February 2022, the appellant requested an internal review on the basis that the decision maker had indicated to him in follow up email correspondence that AA Screening and EIA Screening had been carried out for this project but these records had not been provided. The appellant had been expecting to receive them.
4. On 8 March 2022, the Department affirmed the original decision. The internal review did not refer to the AA and EIA Screening reports, nor did it give reasons for withholding these records. The appellant sought a review by my Office on 15 March 2022.
5. I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review, I have considered the submissions made by the appellant and the Department. 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').



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. 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. My jurisdiction arises where a public authority has refused a request, in whole or in part. A request which has been "refused" includes a request that has not been dealt with in accordance with articles 3, 4 or 5 of the AIE Directive (see article 11(1) and 11(5)(c) of the AIE Regulations). Article 4(5) of the AIE Directive, implemented by articles 7(4)(c) and 11(4)(a) of the AIE Regulations, requires the public authority to provide reasons for a refusal to make information available.
8. In this case, the Department has decided to release parts of the information requested by the appellant, but with some "personal information" redacted. It cited article 8(a)(i) and article 10(3) of the AIE regulations as grounds for this.
9. In its internal review decision, the Department affirmed the decision on the basis that "all relevant information has been provided". However, in submissions to my Office, it confirmed it was withholding the AA and EIA screening report. However, it has not cited the grounds under the AIE Regulations it is relying on in respect of its refusal and has not provided reasons for the application of any such grounds.
10. The scope of my review in this case is confined to whether or not the request has been dealt with in accordance with article 4(5) of the AIE Directive.

Submissions of the Parties

11. The appellant's submissions can broadly be summarised as follows:
 - a. In email correspondence following the original decision, the Department indicated that EIA Screening and AA Screening have been conducted in relation to the project in question but these specific records have not been made available.
 - b. The appellant is unhappy with what he says is a discrepancy in the responses he has received from the Department. The Department indicated to him that EIA and AA screening have taken place in relation to this project – but has also said in the internal review and email correspondence that it has provided him with all relevant documents.
 - c. The appellant has not questioned the redaction of certain information by the Department in the documents that were made available to him.
12. Following a request by my Office, the Department made a submission to my Office. In addition to what it said in its original decision and internal review detailed above, its submission to my Office can be summarised as follows:
 - a. The two documents being withheld are not routinely put on the Department's information portal, the FLV.



- b. Releasing the EIA and AA screen reports may create a precedent that necessitates a large increase in documents to be added to the Department's portal. It says the resultant administrative burden would be very large and given the documents already submitted provide all the information required on the application in question. It says "this request for further documentation should be refused."
13. The Department has not cited provisions under the AIE as to the grounds under the AIE Regulations it is relying on in respect of its refusal and has not provided reasons for the application of any such grounds.

Analysis and Findings

Duty to give reasons

14. As the Department will be aware, public authorities have an obligation under the AIE Directive and the AIE Regulations to provide reasons to an applicant for the refusal of an AIE information request. Recital (16) of the AIE Directive provides that "... The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive."
15. Article 4(5) of the AIE Directive provides that "A refusal to make available all or part of the information requested shall be notified to the applicant ... The notification shall state the reasons for the refusal ..."
16. These provisions have been implemented in Ireland in articles 7(4)(c) and 11(4)(a) of the AIE Regulations which require a public authority to provide reasons for refusal both at decision and internal review stage.
17. Also of note is article 10 of the AIE regulations, which provides in paragraphs (3)-(5): "(3) The public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal. (4) The grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure. (5) 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."
18. The Department ought to be aware that case law has provided some helpful commentary in recent years regarding the statutory obligations concerning the duty to give reasons, as laid out above. In particular, the judgment of the High Court in *Right to Know v An Taoiseach* [2018] IEHC 372 notes that a public authority may refuse access to environmental information only where the requirements of the AIE Regulations have been substantively and procedurally adhered to (paragraph 80). In that case the Court held that if an AIE request is to be refused on the grounds permitted in the Directive, it must be justified via the processes set out in the Directive, as replicated in the AIE Regulations (paragraph 83).
19. In particular, the High Court stated that article 10(3), (4) and (5) mandates a public authority to:
- Consider each request on an individual basis.
 - Weigh the public interest served by disclosure against the interest served by refusal.



- Interpret the grounds for refusal on a restrictive basis having regard to the public interest served by disclosure.
 - Consider the possibility of providing partial access to information (paragraph 79).
20. The Court held that an absence of any indicator in the review decision that the exercise mandated by article 10(3), (4) and (5) had been carried out suggested that no balancing exercise had been carried out (paragraph 87). The Court held that the Department of An Taoiseach's internal review decision did not comply with the requirements of the AIE Directive as it had not considered the public interest in favour of disclosure (paragraphs 88-89).
21. The Court accepted that the applicant had not shown how the lack of reasoning in the Department's internal review decision had inhibited it from seeking judicial review. However, it went on to find that the internal review decision did not comply with the reasons requirements of Article 4(5) of the AIE Directive and article 11(4) of the AIE Regulations. In doing so it stated that "the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted cannot, to my mind, constitute a sufficient reason for the refusal." The Court was not persuaded that it was sufficient for the applicant to be able to infer the reasons for the decision, as "such matters should not be left to inference where there is an express statutory requirement that reasons be included in the document putting the measure in force and where the reasons might be open to reasonable doubt" (paragraph 106). While I do not think there is a need to go into it in detail here, I might also add this finding of the Court in *An Taoiseach* is consistent with the CJEU's case law on the EU Aarhus Regulation.
22. To my mind, the above illustrates that the obligations on the public authority are clearly set out in statute and expanded on in case law. It now falls to me to consider whether the Department has discharged its statutory duty in this regard in this appellant's case.
23. Taking into account the AIE legislation and relevant case law, in this appeal to the OCEI, I am not satisfied that the Department has substantively and procedurally complied with the requirements of Articles 4(5) of the AIE Directive, as implemented by the AIE Regulations in articles 7(4), 11(4) and 10(3), (4) and (5) as laid out above. I have come to this conclusion based on the following:

The AA and EIA screening reports

- The Department in its original decision and internal review did not cite which grounds of the AIE regulations it seeks to rely on to withhold the AA and EIA screening reports.
- In correspondence to the appellant and my Office, the Department provided what appear to be contradictory statements about the information in question. I note in its submission to my Office that the Department affirmed the point of the internal reviewer that the appellant had received all the material sought in relation to his application. It also said that releasing the two reports may create a precedent that necessitates a large increase in documents to be added to the Department's portal and that the resultant administrative burden would be very large. It added that these two documents are not routinely put on the Department's information portal, the FLV. The Department failed to explain which parts of the AIE regulations it is relying on to withhold this information.



- Even if the Department had stated which provision of the AIE Regulations it is relying on for withholding the AA and EIA reports, this would still not have been enough to discharge its obligations as set out in statute and case law. I say this because, as laid out in *Right to Know v An Taoiseach*, “the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted cannot, to my mind, constitute a sufficient reason for the refusal”. The Department needed to go further than stating the statutory ground upon which disclosure of environmental information may be exempt. It needed to take steps to ensure that it provided further detail to the applicant in respect of its refusal of the request for environmental information under the AIE Regulations. I cannot see that it did so.
- I also note that the Department’s internal review outcome did not refer to a weighing of the public interest served by disclosure against the interest served by refusal of the AA and EIA Screening reports (as required by article 10(4) of the AIE Regulations). Nor did it deal with the issue of whether partial disclosure was possible in line with article 10(5) of the AIE Regulations. The Department has failed to demonstrate that it substantively and procedurally adhered to the requirements of the AIE Regulations.

The redacted information

- In the original decision (affirmed in the internal review) the Department referred to article 8(a)(i) (in relation to it redacting personal information). The Department needed to go further than merely stating the statutory ground upon which disclosure of environmental information may be exempt. It needed to take steps to ensure that further detail is provided to applicants in respect of its refusal of the request for environmental information under the AIE Regulations. Again, I cannot see that it did so.
 - I also note that the Department’s original decision (affirmed in the internal review) referred to article 10(4) but did not explain if it carried out a weighing of the public interest served by disclosure against the interest served by refusal (as required by article 10(4) of the AIE Regulations). The Department has failed to demonstrate that it substantively and procedurally adhered to the requirements of the AIE Regulations.
24. The fundamental purpose of the duty to provide reasons as outlined above is so a requester can properly understand the basis for refusal. For the reasons explained above, the Department’s conduct in relation to this appeal has fallen short of its statutory obligations under the AIE regulations. This is unacceptable and I expect it to take steps to engage more fully with the AIE Regulations.
25. In *Right to Know v An Taoiseach* the Court cited *RPS v Kildare County Council* [2016] IEHC 113 in relation to the purpose of a right to reasons. The recognition of a legal right to reasons, as a matter of natural justice, constitutional law, under the ECHR, and in EU law, reflects and serves a range of important policy objectives. In summary, reasons enable a person to know whether there are grounds to challenge the decision; enable the decision to be effectively reviewed when challenged; encourage and support better administrative decision-making; and act as a promoter of transparency and a deterrent to arbitrary administrative action or malpractice. For the reasons explained above, I am satisfied that the request has not been dealt with in accordance with Articles 4(5) of the Directive because the Department has:



- A) failed to identify the basis upon which it withheld the AA and EIA screening reports.
- B) failed to give reasons under the AIE Regulations for refusing to provide the redacted information under AIE legislation; and
- C) failed to carry out the balancing test required by article 10(3)-(5) of the AIE Regulations and to give reasons for its conclusion, when attempting to rely on an exception in respect of its refusal to provide the redacted information.

Decision

26. Based on the foregoing, I hereby annul the Department's decision on the appellant's request and remit the matter for fresh consideration by the Department. I expect that this fresh decision-making progress shall culminate in a decision which complies with the requirements of the AIE Regulations and the AIE Directive.

Appeal to the High Court

27. 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

14 July 2022