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-98828-R4K6M9

Date of decision: 10 March 2021

Appellant: Mr A

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

Issue: Whether the AIE Regulations provide grounds for refusal of environmental information requested by the appellant.

Summary of Commissioner's Decision: The Commissioner (i) found that certain information held by the Department was outside the scope of the appellant's request; (ii) found that certain third party information could be redacted from the information disclosed; and (iii) directed release of the remaining information 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 22 July 2020, the appellant wrote to the Department on behalf of the Macroom District Environmental Group. He requested a copy of the replanting order issued to the owners of woods at Silvergrove, Toon Valley, Co Cork and "any supplementary agreements, correspondence and/or documents relevant to its implementation".

2. The Department issued its original decision on the request on 18 August 2020. It refused access to the information sought by the appellant under article 9(1)(b) of the Regulations. Article 9(1)(b) allows for the refusal of environmental information where its disclosure would adversely affect the course of justice. The Department referred to the public interest test mandated by articles 10(3) and 10(4) of the Regulations. It considered the factors in favour of withholding the requested information were that the release of the information could prejudice an ongoing legal investigation and any possible legal action taken following the completion of the investigation such that, on balance, it considered the public interest to be best served by refusal.

3. The appellant requested an internal review of the original decision on 1 September 2020. He refuted the Department's conclusion that disclosure of the contents of the Replanting Order would prejudice the outcome of an ongoing investigation or any legal action that might arise from it. He argued that hiding the contents of the Replanting Order would only benefit those "who have treated the law with indifference" and that the Order was a document that would remain unchanged by legal argument. He submitted that the contents of the Replanting Order were a matter of public interest and that the public needed to know what was contained in the Order so that it would be in a position to report further transgressions if they occurred. He also argued that given that the woods in question were Annex I oak woodlands, matters relating to the management of the woods and the Department's actions with regard to them were a matter of public interest. Finally, he argued that hiding the information "increases the common perception that the Department of Agriculture implicitly approves of landowners who commit environmental crimes".

4. The Department issued its internal review request on 30 September 2020. While the Internal Reviewer commenced the review outcome by noting that their decision was "an entirely new and separate decision" on the request, they went on to inform the appellant that they had not found any grounds to reverse the original decision before repeating that decision verbatim.

5. The appellant's solicitor appealed the Department's decision to refuse his request in its entirety to my Office on his behalf on 29 October 2020.

Scope of Appeal

6. The Department originally relied on article 9(1)(b) as the basis for its refusal to provide the environmental information requested. However, in the course of the investigation of this appeal, it resiled completely from its reliance on article 9(1)(b) of the AIE Regulations. Initially, the Department provided my Office with a Schedule of Records relevant to the appellant's request, which included the Replanting Order. However, subsequently, the Department indicated that the

Replanting Order represented the entirety of the information held by it. It submitted that it could not be said that it held any further information in relation to the implementation of the Replanting Order as the replanting order had yet to be implemented. Following further correspondence from my Office's Investigator, the Department released a redacted copy of the Replanting Order to the appellant. It argued that certain information referred to in the Schedule it had originally provided was outside the scope of the appellant's request, as it did not relate to the Replanting Order or its implementation. The Department sought to rely on article 9(2)(d) with respect to the remaining environmental information in the Schedule.

7. As such, my decision in this case is concerned with:

   (i) Whether the information identified by the Department as being out of scope is in fact outside the scope of the appellant's request;

   (ii) Whether the AIE Regulations provide the Department with grounds for refusal of the information requested.

Preliminary Matters

8. In the first instance, I wish to express my regret that there have been considerable delays in the resolution of this appeal. Some of these delays have been occasioned by resourcing challenges in my own Office and I am committed to improving the efficiency of my Office in order to achieve more timely reviews in future. However, it must be said that the Department's engagement with my Office has been disappointing and unsatisfactory and has exacerbated the delay in the resolution of this appeal. While I appreciate that public authorities have many demands and limited resources, this does not excuse them from compliance with their obligations under the AIE Regulations. The conduct of the Department in relation to this appeal is unacceptable. I therefore expect it to take steps to engage more fully with the AIE Regulations.

9. It is both unusual and disappointing that a public authority would seek to completely change its position as to the basis on which it considers the refusal of an AIE request to be justified in the manner in which the Department has done, which I have alluded to above. This change of position took place over the course of three sets of correspondence between my Office and the Department. The Investigator originally wrote to the Department on 15 June 2021 requesting further detail as to the basis on which it considered article 9(1)(b) to justify refusal of the information requested. The Department sought, and was granted, an extension of one week to the initial deadline. It provided submissions on 14 July 2021 in which it noted that the Replanting Order had yet to be implemented as its validity was being challenged by judicial review proceedings. The Department noted that "having given further consideration to the request" it was "open to release of the Replanting Order itself" but that it was "of the view that the release of any further material relating to the Replanting Order is not warranted" having regard to "local sensitivities, the pending civil proceedings, potential criminal proceedings (depending on the outcome of the civil proceedings) and the fact that there are no documents relating to the actual "implementation" of the Replanting Order".

10. My Investigator responded to the Department on 15 July 2021 noting that if it no longer sought to rely on article 9(1)(b) as a ground for refusal of the Replanting Order, it no longer had a basis to deny the appellant access to that information. She therefore asked the Department to confirm whether it had provided a copy of the Replanting Order to the appellant. She also pointed out that the appellant had requested any supplementary agreements, correspondence and/or documents relevant to the implementation of the Replanting Order and outlined that some of the documents provided to my Office by the Department would appear to be within the scope of that request. She identified those documents and ask the Department to outline the basis on which it considered each of those documents to be outside scope. She also asked the Department to clarify its position with regard to the application of article 9(1)(b). She requested a response by 29 July 2021. No response had been received by 10 August 2021 and so my Investigator wrote again to the Department, with a renewed deadline of 17 August 2021. The following day, the Department provided the appellant with a redacted copy of the Replanting Order along with further submissions. These submissions set out a further change in the Department's position which narrowed the number of records it considered to be outside of the scope of the appellant's request and sought to rely on article 9(2)(d) to refuse release of any remaining records.

11. I wish to make it clear that it is frustrating and unacceptable that a Department would set out a position at internal review stage and then continue to change that position when asked to provide further detail on its original position in the course of an appeal. The scheme of the Regulations, and of Directive 2003/4/EC upon which the Regulations are based, makes it clear that there is a presumption in favour of release of environmental information. As article 10(3) sets out, the application of grounds for refusal must be considered on an individual basis and as article 10(4) provides, grounds for refusal must be interpreted restrictively. Articles 7(4) and 11(4) of the AIE Regulations require a public authority to provide reasons for refusal both at decision and internal review stage and the judgment of the High Court in *Right to Know v An Taoiseach* [2018] IEHC 372 makes it clear that compliance with these obligations requires a public authority to go beyond a mere invocation of one of the grounds set out in articles 8 and 9 of the Regulations. The fundamental purpose of such a duty to provide reasons (i.e. so that a requester can properly understand the basis for refusal) is, in my view, significantly undermined if a public authority continually amends those reasons throughout the course of an appeal to my Office.

12. In this case, in order to avoid any further delays in the resolution of his appeal, the Investigator wrote to the appellant to ascertain whether he would be willing to have the Department set out its new position directly to him so that a decision could be reached on whether the relevant information was within scope and on whether the Regulations provided the Department with grounds for refusal of the request. This would avoid the need for my Office to remit the matter to the Department for further consideration and enable a more efficient resolution of the request which had originally been made in July 2020. The appellant was amenable to this course of action but asked that the Department be given a final deadline to provide a reasoned justification for its position. He also confirmed that, while he had been provided with a copy of the Replanting Order, the name of the individual to whom the order had been issued had been redacted. He argued that there was no basis on which the Department was entitled to make such redactions and submitted that he was entitled to be provided with an unredacted copy. The Department was provided with a two-week period within which to provide its position. It requested an extension of a further week,

which was denied on the basis that it had been granted an extension of time on two occasions and had altered the basis for its refusal in the course of the appeal leading to further delays in the processing of the appeal. No submissions were received from the Department.

Analysis and Findings

13. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant, the Department and certain third parties. I have also examined the contents of the records at issue. 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).

Information within scope

14. The first issue to be considered is whether certain information identified by the Department as being out of scope is in fact outside the scope of the appellant's request. The Department originally provided 77 documents to my Office. The appellant has confirmed that the temporal scope of his request runs from the date of the Replanting Order (i.e. 8 March 2019) to the date of his request (i.e. 22 July 2020). Only 32 of the 77 documents provided by the Department are within the temporal scope of this request. One of those documents is the Replanting Order, a redacted version of which has been provided to the appellant. I will deal with the issue of the redactions later. The Department's position is that 18 of the remaining 31 documents are out of scope. It seeks to rely on article 9(2)(d) of the Regulations as grounds for refusal of 13 of the 31 documents.

15. The Department has sought to argue that since the Replanting Order has yet to be implemented pending the outcome of legal proceedings concerning its validity "there are no documents relating to the actual "implementation" of the Replanting Order". I consider the Department's interpretation of the request as overly narrow and not in accordance with a purposive interpretation of the AIE Regulations, which seek to provide for increased transparency and access to environmental information. I am more inclined to agree with the appellant's position that his request for access to "any supplementary agreements, correspondence and/or documents relevant to its implementation" includes access to information that concerns the delayed implementation of the Replanting Order such that any information relevant to the question of why the Replanting Order has not been complied with by the deadline of 30 June 2020 set out in that Order comes within the scope of the appellant's request. Having reviewed the information in question, I am of the view that all documents with the exception of those numbered 41, 48, 50, 51 and 65 are within

the scope of the appellant's request. Documents 41, 48, 50 and 51 all relate to a Freedom of Information request made to the Department seeking inspection reports, details of complaints and emails and notes held by the Department in relation to GFL 20650 and/or the property at Silvergrove after 1 October 2018. I do not consider these documents to be "supplementary agreements, correspondence and/or documents relevant to [the] implementation [of the Replanting Order]" as requested by the appellant. Neither do I consider the document listed at Document 65 of the Schedule provided by the Department to be an agreement, document or item of correspondence relevant to the implementation of the Replanting Order (which, for the avoidance of doubt, includes materials related to its delayed implementation).

16. I consider the remaining 13 documents to be within the scope of the request. I must now consider whether the Regulations provide grounds for refusal for any of the information contained within those documents.

Articles 9(1)(b) and 9(2)(d)

17. While the Department originally invoked article 9(1)(b) as providing grounds for refusal of the information requested, it subsequently resiled from that position and sought to argue instead that certain information was outside the scope of the appellant's request and that the remaining information could be refused on the basis of article 9(2)(d) of the Regulations.

18. Article 9(2)(d) provides that a public authority may refuse to make environmental information available where the request concerns internal communications of public authorities, taking into account the public interest served by the disclosure. This exception was considered by the Court of Justice in in C-619/19 *Land Baden Württemberg v DR*. The CJEU noted in particular, at paragraph 69 of its judgment:

> "As the Advocate General has observed in point 34 of his Opinion, [the] obligation to state reasons is not fulfilled where a public authority merely refers formally to one of the exceptions provided for in Article 4(1) of Directive 2003/4. On the contrary, a public authority which adopts a decision refusing access to environmental information must set out the reasons why it considers that the disclosure of that information could specifically and actually undermine the interest protected by the exceptions relied upon. *The risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical*." (emphasis added)

19. The Department has given no indication as to how the interest sought to be protected by article 9(2)(d) would be undermined by release of the information requested. There is nothing before me to suggest any likelihood – even a hypothetical one – of such interest being undermined and I do not consider article 9(2)(d) to provide grounds for refusal in this case.

Third party information

20. There are a number of references to third parties in the information provided to my Office. Some of those references include the names of third parties who have written to the Department in a personal capacity to complain about activities taking place on the property at Silvergrove to which

the request relates. The appellant has confirmed that he is not seeking access to the identities of individuals acting in a purely private capacity, for example interested members of the public who have reported environmental damage and other issues to the Department.

21. The appellant is however seeking access to an unredacted version of the Replanting Order. The redactions made to the Order consist of the name and address of the recipient of the Order i.e. the landowner of the Silvergrove property. There are also a number of further references to the landowners throughout the information held by the Department, which is within the scope of the appellant's request.

22. The Department did not seek to rely on any of the exceptions contained in the Regulations with respect to third party information although it did indicate in its initial submissions to this Office that the issue was particularly sensitive locally and that it was "obliged to protect information provided by all parties in relation to [the] case". It did not provide any further detail as to the basis on which it considered such an obligation to arise.

23. My Investigator wrote to the landowners to advise them of the appeal and provide them with an opportunity to make submissions. The landowners in question have objected to the disclosure of the information requested by the appellant.

24. In the first instance, the landowners argue that article 8(a)(i) provides grounds for refusal of the information. Article 8(a)(i) allows for refusal of information 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. The landowners argue that there are a number of individuals who have objected to farming practices being used by them on their land and that those individuals have used information adversely against them by adding what they describe as "malicious falsehoods, exaggerations and erroneous accusations" to information and placing it in newspapers, on televisions and on social media. The landowners submit that this has had adverse impacts on their health and on the wellbeing of their children. They note that to the extent the information requested contains their names, addresses, commercial farm information, maps and/or any personal data relating to their children or their health, they do not consent to its release. They also note that if the information requested does not contain any personal information, those who object to their farming practices will add their personal information to any information disclosed and release it into the public domain.

25. Having reviewed the information in question, I note that it does refer to the landowners by name and provide their address. I accept that the landowners have not provided their consent to the release of such information. However, article 8(a)(i) also requires that the information in question be confidential and that such confidentiality be otherwise protected by law. As the landowners themselves acknowledge, numerous public references have been made to the farming activities taking place at the Silvergrove property. Details of the dispute as to the propriety of the practices taking place on the land have been the subject of articles in at least two national newspapers, both of which refer to the landowners by name as well as to the address of the property. The landowners are also named in a published judgment *Costello v The Minister for Agriculture, Food &*

The Marine [2021] IEHC 735. I do not think it can be said that such information is confidential such that article 8(a)(i) of the Regulations could be said to provide *prima facie* grounds for its refusal.

26. Even if the information in question could be said to be confidential, the landowners have not referred to any legal protections in respect of confidentiality, which might apply in this case. That being said, article 4 of the Directive, which refers to exceptions, notes that when applying article 4(2)(f) (i.e. the equivalent of article 8(a)(i) of the AIE Regulations), Member States "shall ensure that the requirements of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are complied with". Directive 95/46/EC has since been replaced by Regulation 2016/679 (the General Data Protection Regulation). Neither the Directive nor the GDPR are referred to in the Regulations. The AIE Regulations are however referred to in the Data Protection Acts 1998 to 2018, section 44 of which provides that "for the purposes of Article 86 [of the GDPR], personal data contained in environmental information may be disclosed where the information is made available under and in accordance with the Access to Information on the Environment Regulations pursuant to a request within the meaning of those Regulations". Article 86 of the GDPR in turn provides that "personal data in official documents held by a public authority or a public body … may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to this Regulation". It is therefore clear that while the GDPR and the Data Protection Acts require that the entitlements of requesters under the AIE Directive and the Regulations be balanced with the rights of natural persons to have their personal data protected and processed in accordance with data protection law, they do not provide for a blanket prohibition on the disclosure of personal data as part of an AIE request. It also appears to me that the AIE Regulations seek to reconcile public access to official documents with the right to the protection of personal data in the manner envisaged by the GDPR by providing that refusal is only permissible in circumstances where disclosure would adversely affect the confidentiality of personal information.

27. As noted by the Court of Justice in *Land Baden Württemberg v DR*, the risk of the interest which is protected by the relevant exception being undermined by disclosure of the information must be must be reasonably foreseeable and not purely hypothetical (see paragraph 69). I am also mindful that article 10(4) of the Regulations provides that grounds for refusal should be interpreted on a restrictive basis having regard to the public interest served by disclosure.

28. The landowners have pointed to what they say is an adverse impact, submitting that they have been harassed by protestors who have gathered at their property. The landowners also submit that there have been instances of trespass on the property as well as damage to fences and that complaints have been made to Gardaí in this regard. However, the adverse impacts raised by the landowners are pre-existing and this suggests that the identity of the landowners is known such that release of their names and addresses as part of the request at issue in this appeal could not be said to have an adverse impact on the confidentiality of that information. I should also emphasise that there is nothing before me to suggest that the appellant has been involved in any of the

instances of trespass or harassment referred to by the landowners. As article 10(4) requires, I must interpret any potential exception restrictively and also be mindful of the public interest in disclosure of information which demonstrates how the Department is exercising its environmental functions with regard to activities taking place in a woodland which, according to expert reports commissioned by the EPA, consists of a protected habitat listed under Annex I of the Habitats Directive (92/43/EEC) (i.e. Acidiophilous *Quercus petraea* [Sessil oak] woods with low, low-branched trees with many ferns, mosses, lichens and everygreen bushes denoted by habitat code H91A0). Dealing with any unlawful activities which have occurred on the landowner's property is a matter for the Gardaí and it is not for me to comment any further in this respect but such activity does not appear to me in this case to provide a basis for refusal of the information requested by the appellant under the AIE Regulations. The landowners also seek to rely on the exception contained at article 9(1)(a) on the grounds that the release of the information requested would adversely impact their security. For the reasons outlined above, I am not satisfied that disclosure of the information requested would adversely affect international relations, national defence or public security such that article 9(1)(a) of the Regulations should apply.

29. However, I also note that the information requested does contain the landowners' mobile phone numbers, email address and details of a health condition. This condition was disclosed by the landowner as part of her appeal to the Forestry Appeals Commission against the Department's decision to revoke their felling licence and, as such, there is a question as to whether they have a reasonable expectation of privacy with respect to this information. I note in this regard that the Data Protection Notice of the Agricultural Appeals Office (AAO) provides that AAO, when processing a Forestry Appeals Committee appeal, may share data collected from the appellant with other relevant parties (including the Department of Agriculture, Food and the Marine) and the data may be included in the record of and read publicly at any oral hearing held for the relevant appeal. It also notes that the AAO may be requested to disclose the data held by it to a third party where a case arises. The Department of Agriculture's Data Protection Notice sets out that personal data will be shared where there is a valid legal basis to do so and in accordance with data protection legislation. As outlined above, the Data Protection Acts do provide a legal basis for the sharing of personal data for the purposes of compliance with an AIE request. That being said, I consider that disclosure of the landowners' contact details, details of their health conditions and a copy of their personal signature in circumstances where the landowners have made complaints of harassment to the Gardaí would have a reasonably foreseeable adverse effect such that article 8(a)(i) provides grounds for the refusal of such information. I am also satisfied that the interest in refusal of this information outweighs any public interest in its disclosure since it is not sufficiently connected to the environmental information being sought by the appellant which consists of a copy of the Replanting Order and "any supplementary agreements, correspondence and/or documents relevant to its implementation".

30. The landowners also submit that article 9(1)(b) provides grounds for refusal of the information requested. They argue that release of the information would adversely affect ongoing criminal and civil proceedings relating to the Replanting Order and felling licence as it might adversely influence

the judge and impact their chance of a fair hearing. The essence of their argument in this respect is that release of the information would lead to this information being shared through national and social media which would be detrimental to their chance of a fair hearing "as the judge and all involved could be adversely affected by … falsehoods and exaggerations". This would appear to me to amount to a hypothetical argument rather than setting out a reasonably foreseeable basis on which it could be said that the landowners' entitlement to a fair hearing might be undermined. I note in this regard that judges are not likely to look outside the evidence presented to them in a courtroom when reaching their verdict on a case and, indeed, their decision would be appealable were they to do so. In addition, it is now commonplace for judges to have to consider cases where there is significant public interest and comment on both traditional and social media. My understanding from the landowners' submissions is that the criminal proceedings are District Court proceedings, and as such will not involve a jury. However, if there is a jury trial then the judge can deal with issues by directions to the jury in the normal way.

31. I also note that a judgment in the civil proceedings brought by the landowners was delivered in November 2021 and thus would not be impacted by release of the information at issue in this appeal. Bearing in mind the criteria set out by the Court of Justice at paragraph 69 of its decision in *Land Baden Württemberg*, I am not satisfied that a reasonably foreseeable risk of an adverse impact on the course of justice has been established such that article 9(1)(b) might be said to apply.

32. The landowners also invoke article 9(2)(d) of the Regulations. As noted in the Proposal for a Directive of the European Parliament and of the Council on public access to environmental information (COM/2000/0402 final - COD 2000/0169) the interest sought to be protected by such exception is the private thinking space of public authorities. This was reiterated by the Court of Justice in *Land Baden Württemberg v DR* (see paragraph 44). The landowners have not pointed to the manner in which that interest would be undermined. Since the Department has already decided and embarked on a course of action relating to the felling licence and the Replanting Order, I cannot see how there remains a private thinking space to be protected.

33. The landowners have also sought to rely on article 8(b) which allows for refusal of information where disclosure, to the extent that it would involve the disclosure of discussions at one or more meetings of the Government, is prohibited by Article 28 of the Constitution. However, I am satisfied that none of the information held by the Department within the scope of the request is subject to cabinet confidentiality.

34. The relevant information also includes correspondence between the Department and the EPA with regard to the property at Silvergrove. My Investigator wrote to the EPA to provide it with an opportunity to make submissions on the release of the relevant information. The EPA confirmed it had no objections to such release.

35. As such, I am satisfied that the Regulations do not provide grounds for the redaction of the names and address of the landowners however their contact details, signature and health details can be removed from the information disclosed. In addition, as the appellant has confirmed that he is not seeking access to the identities of individuals acting in a purely private capacity, for example

interested members of the public who have reported environmental damage and other issues to the Department, this third party information can be considered outside the scope of his request and can therefore be removed from the information disclosed.

Decision

36. Having carried out a review under article 12(5) of the AIE Regulations, I annul the Department's decision and direct release of the information requested with the exception of the landowners' contact details, signature and health details. The appellant has confirmed that he is not seeking access to the identities of individuals acting in a purely private capacity such as interested members of the public who have reported environmental damage and other issues to the Department. As such, information identifying those individuals can be redacted from the information provided.

Appeal to the High Court

37. 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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Ger Deering
Commissioner for Environmental Information

10 March 2021