



**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-115109-S8Q5P5

Date of decision: 17 August 2022

Appellant: Mr B

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

Issue: Whether or not the request has been dealt with 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 because the Department has:

A) failed to give sufficient reasons under the AIE Regulations for refusing to release all records relating to the development of a procedure by the Forest Service for addressing any issues regarding the construction of potentially unsanctioned Forest Roads.

B) 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 information requested.

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 31 August 2021 the appellant made the following request to the Department of Agriculture, Food and the Marine (the Department) under the AIE Regulations:

“A copy of all records relating to the development of a procedure by the Forest Service for addressing any issues regarding the construction of potentially unsanctioned Forest Roads.”
2. On 28 September 2021, the Department issued its decision to refuse access to the records requested as the material sought did not meet the definition of “environmental information” as set out in article 3(1) of the AIE regulations.
3. On 28 September 2021 the appellant requested a review of the Department's decision. He disagreed with the Department’s response that this was not “environmental information” as defined in the AIE Regulations.
4. On 28 October 2021 the Department issued the outcome of the internal review to the appellant. The internal review affirmed the original decision.
5. The appellant sought a review of the Department’s decision by my Office on 29 October 2021.
6. I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to 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’).
7. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

8. The Department in its original decision, internal review and initial submission to my Office, held that it would not release the information requested by the appellant on the basis that it was not “environmental information” under article 3(1) of the AIE regulations. In a further submission to my Office, on 14 June 2022, the Department changed its position and conceded that the information requested did fall under the definition of “environmental information”. As there is no longer a



dispute over whether the information requested is “environmental information”, this decision will not deal with that issue.

9. In accordance with article 12(5) of the AIE Regulations, my role is to review the Department’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 (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.
10. In this case, the Department has declined to release the information requested by the appellant. In its submission to my Office, the Department said it was relying on article 9(2)(c) of the AIE regulations to withhold the information requested. It also said it was withholding the information because it enjoys legal privilege, but did not specify which provision of the AIE Regulations it is relying on for this.
11. 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.

Preliminary matters

12. In its 14 June 2022 submission, the Department stated that while it now accepts the information requested is “environmental information”, it was now refusing to release the information citing article 9(2)(c) of the AIE regulations. It also said in its submission that the material requested enjoys legal privilege but has not cited a provision within the AIE Regulations to support this.
13. The Department’s handling of this appeal to date falls short of what I would expect of a public authority. I note it has recently changed its reason for refusing to release the information requested, nearly eight months after the appeal came to my Office, and in an apparent response to a request by my Office for it to provide further information. This has resulted in considerable delays to this appeal, which is unacceptable.
14. I also note that the original decision on this request appears to have been a template wording, which set out that article 10 of the AIE Regulations had been taken into account, noting its connection to articles 8 and 9. In this case, the information had been refused on grounds of article 3, and neither article 8 nor 9 had featured in the decision before this point. This is a confusing error and, in my view, displays a lack of engagement with the decision on the request at hand.

Analysis and Findings

Submissions of the Department

15. The Department’s submission to my Office can be summarised as follows:
 - A) The information requested concerns incomplete and preliminary draft documents – “any procedure which the Forest Service is developing on the construction of unsanctioned Forest Roads



is not yet finished”. Therefore, under article 9 (2)(c) the documents should not be released. It added that it has considered the provisions of article 10 of the Regulations in making this submission.

B) The material requested enjoys legal privilege (the Department has not cited which provision of the regulations it is relying on for this.)

Duty to give reasons

16. The Department ought to be aware that it has an obligation under the AIE Directive and the AIE Regulations, as well as under fair procedures, 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.”
17. 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 ...’.
18. 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.
19. 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.”
20. The Department ought also 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).
21. 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).
22. 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).
23. The Court, while accepting the position of the respondent 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, went on to accept 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.
24. To my mind, the above illustrates that the obligations on the public authority, in this case the Department, 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 case.
25. Taking into account the AIE legislation and relevant case law, in this appeal, I am not satisfied that the Department has substantively and procedurally complied with the requirements of article 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 Department in its submission to my Office said it is relying on article 9(2)(c) of the AIE regulations. It has not detailed the reasons why it considers that the information requested by the appellant concerns material in the course of completion, or unfinished documents or data.
 - If attempting to rely on an exemption provision, the Department must go further than merely stating the statutory ground upon which disclosure of the environmental information requested may be refused. 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 specify its reasons for refusal of the request for environmental information under the AIE Regulations and for its conclusion on the balancing test in article 10. I cannot see that it did so.
 - I note that the Department has not stated any public interest factors in favour of release of the information, or the interests against its release, which were considered in this case (as required by article 10(4) of the AIE Regulations). The Department has not explained how it has concluded that, on balance, the interest served by refusal under article 9(2)(c) outweighs the public interest served by disclosure. Nor did it deal with the issue of whether partial disclosure



was possible in line with article 10(5) of the AIE Regulations – it did not clarify if the exemption applied to all of the information in each of the records provided to this Office that are at issue.

- The Department has also stated that the material “enjoys legal privilege” - but it has not cited any provisions within the AIE regulations to support its position on this point.

26. 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.

27. For the reasons explained above, I find that the request has not been dealt with in accordance with article 4(5) of the Directive because the Department has:

- A) failed to give sufficient reasons under the AIE Regulations for refusing to release all records relating to the development of a procedure by the Forest Service for addressing any issues regarding the construction of potentially unsanctioned Forest Roads.
- B) failed to carry out the balancing test required by articles 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 information requested.

Decision

28. 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

29. 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

17 August 2022