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-130454-P8G5D2

Date of decision: 15 September 2023

Appellant: Mr F

Public Authority: Coillte

Issue: Whether Coillte is entitled to rely on article 9(2)(a) of the AIE Regulations to refuse the information requested by the appellant.

Summary of Commissioner's Decision: The Commissioner found that article 9(2)(a) of the AIE Regulations did not provide grounds for refusal in the circumstances of the case and directed release of the information sought.

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 11 July 2022, the appellant requested "a list (by county, townland, forest property, compartment number) of all forest road construction works undertaken on Coillte property or by or for Coillte not on Coillte property during 2021 where the said works have been carried out without Coillte seeking development consent from the Forest Service of [the Department of Food, Agriculture and the Marine]". The appellant clarified that "the request is for newly constructed sections of road, features such as stacking areas, turning bays, loading bays, lay-byes etc or extensions to existing roads". He also asked that "the length of the works and a description of the type of works (new, extension, turning bay)" be included in the list provided.

2. Coillte responded on 8 August 2022 asking the appellant to refine his request. It informed the appellant that it considered his request, as it was originally framed, to be manifestly unreasonable having regard to the volume or range of information sought, such that article 9(2)(a) of the Regulations would provide grounds for its refusal. It also noted that "while records may exist containing the information sought, a list as requested containing the attributes [requested] does not". It informed the appellant that "site specific records can be provided in a form that already exists containing the information requested" but noted that his current request did not identify a specific geographical location. Coillte asked the appellant to refine his request "to a particular business area or forest(s) as provision of all records would…place an unreasonable demand on Coillte's resources and/or would disrupt its ability to perform its core functions".

3. The appellant responded to Coillte's request on 8 August 2022. He submitted that "the administration of the AIE Regulations is a statutory obligation which should be afforded as much weight as any other statutory obligation or the carrying out of other operational or commercial functions". He also considered that Coillte had "not indicated how providing records that [it had] acknowledged to exist is manifestly unreasonable". He asked how many records were at issue and whether Coillte had considered the option of availing of an extension of the usual one-month timeframe as provided by article 7(2)(b) of the Regulations. He concluded by informing Coillte that unless it could provide a more detailed and reasoned explanation as to why a refinement was appropriate, he saw no basis to modify his request.

4. On 10 August 2022, Coillte wrote to the appellant to inform him that it was relying on article 7(2)(b) of the Regulations to extend the timeframe for response to his request "due to the complexity of [the] request and to allow for further engagement in relation to a refinement".

5. Coillte provided its original decision to the appellant on 9 September 2022. It referred to the appellant having refused to refine his request, before informing him that his request was being refused under article 9(2)(a) of the AIE Regulations on the basis that it was

manifestly unreasonable. The decision went on to note that the request would require the AIE team to issue the request to numerous teams within the organisation and require them to indicate whether they held any relevant information. It considered that "the search through such a large number and range of records, or an examination of the kind of records concerned would place an unreasonable demand on Coillte's resources and would cause a substantial and unreasonable interference with the work of Coillte and would interfere with its ability to perform its core function". It also considered the public interest to favour the withholding of the information requested noting its position that "while the public has a right to access information on the workings of public bodies and accountability of decision-making…the public interest in ensuring that Coillte can perform its core functions outweighs the public interest in disclosure".

6. The appellant requested an internal review on 9 September 2022. He noted his view that Coillte had asked him to reduce the scope of his request rather than refine it and that the decision had made no reference to the content of his response to the request for a refinement. He also noted that he considered Coillte's reliance on article 9(2)(a) of the Regulations to be an abuse of the provision and that the decision had not taken account of article 10(5) of the Regulations.

7. Coillte delivered its internal review decision on 11 October 2022 in which it affirmed its original decision.

8. The appellant brought this appeal to my Office on 12 October 2022.

9. 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 and Coillte. 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');
    - the judgment of the Supreme Court in *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*);
    - the decisions of the Court of Justice of the European Union in T-2/03 *Verein für Konsumenteninformation v Commission* (*Verein für Konsumenteninformation*) and C-619/19 *Land Baden-Württemberg v DR* (*Land Baden-Württemberg*);

- the decision of the General Court in T-185/19 *Public.Resource.Org Inc & Right to Know v European Commission* (*Public Resource.Org*); and
- the opinion of the Advocate General in C-217/97 *Commission v Germany*.

What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

10. My review in this case is concerned with whether Coillte was justified in its refusal of the requested information under article 9(2)(a) of the AIE Regulations which provides that "a public authority may refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought".

Preliminary Matters

11. In addition to his appeal on the substantive issue of Coillte's reliance on article 9(2)(a) of the Regulations, the appellant also takes issue with Coillte's handling of his request from a procedural perspective. He notes that his request was made on 9 July 2022 and that he received an acknowledgment of his request on the same date. He argues, on that basis, that Coillte should have issued its decision on his request by 8 August 2022.

12. On 8 August 2022, Coillte wrote to the appellant to request a refinement of his request and he responded on the same date, as set out above. The appellant sought an internal review of his request on the basis of what he considered to be a deemed refusal on 10 August 2022. Coillte wrote to the appellant on the same date to inform him it was relying on article 7(2)(b) of the Regulations to extend the timeframe for response from one month to two. It responded to the request for internal review noting that "the time period of one month has not yet expired in relation to your AIE request, which is dated 11th July 2022" and that his request for an internal review was thus considered to be invalid. The original decision was issued on 9 September 2022 and a further internal review sought on 10 September 2022, the response to which was delivered on 11 October 2022.

13. The original request, provided by the appellant to this Office, is dated 11 July 2022. A copy of the acknowledgment of the request issued by Coillte was not originally provided to this Office. The Investigator wrote to the appellant to clarify whether his reference to the request having been made on 9 July 2022 was made in error or whether he could provide a copy of the request dated 9 July 2022 along with Coillte's acknowledgment. The appellant provided a copy of an email sent to Coillte on 9 July 2022 attaching his request along with an automatic reply from Coillte on the same date indicating that the email would be forwarded to the relevant person in Coillte for review and response. He also provided a

copy of an email from a Coillte staff member, sent on 11 July 2022 acknowledging receipt of his AIE request "received on 09.07.2022".

14. The Investigator then contacted Coillte to ascertain its position. Coillte noted that the request had been made on 9 July 2022, which was a Saturday, and was therefore made outside of its normal working hours. It submitted that its practice has always been to deem requests sent outside of normal office hours as being received on the next working day and that the appellant was aware of this practice. It noted that the letter attached to the appellant's email which contained his request was dated 11 July 2022 (as opposed to 9 July 2022) which it considered to be an indication that he knew and accepted that his email would not be read until 11 July 2022 when staff returned to work after the weekend. It also submitted that the issuing of an automatic response was akin to a delivery receipt and could not be considered to amount to a formal acknowledgment of his request.

15. Article 7(2)(a) of the AIE Regulations provides that a public authority "shall make a decision on a request…as soon as possible and, at the latest…not later than one month from the date on which such a request is received by the public authority concerned" (emphasis added). Article 7(2)(b) of the Regulations provides that "where a public authority is unable, because of the volume or complexity of the environmental information requested, to make a decision within one month from the date on which such a request is received, it shall, as soon as possible and at the latest, before the expiry of that month –

    (i) give notice in writing to the applicant of the reasons why it is not possible to do so, and
    (ii) specify the date, not later than 2 months from the date on which the request was received, by which the response shall be made,

    and make a decision on the request and, where appropriate, make the information available to the applicant by the specified date" (emphasis added).

16. A "month" is not defined in the AIE Regulations and in those circumstances I will rely on the definition of "month" contained in the Interpretation Act 2005 which is a "calendar month". The obligation in article 7(2) is therefore to provide the appellant with a decision not later than one calendar month from the date of receipt of the request or, to provide them with notice in writing of the reasons it is not possible to provide a decision along with a date by which a decision will be issued which is no later than two calendar months from the date of the request.

17. I accept that the appellant's request was sent to Coillte on 9 July 2022. However, as is evident from the provisions of article 7(2) I have referred to above, the relevant date for the purpose of the AIE Regulations is the date on which the request is received. I also accept that the response sent by Coillte's staff member to the appellant states that the request was "received on 09.07.2022". This is unfortunate. However, in circumstances

where the acknowledgment was in fact sent on 11 July 2022, which was the first working day after the appellant sent his request, on Saturday 9 July 2022, and where the AIE Regulations clearly envisage that a public authority should only be required to commence dealing with a request on the date received (as opposed to the date sent), I think it would be unduly onerous to hold Coillte to a timeline commencing on 9 July 2022 which was clearly outside of its working hours. I therefore consider the request to have been "received" for the purposes of article 7(2) of the Regulations, on 11 July 2022.

18. I accept, however, that Coillte's acknowledgment email was a source of confusion. I encourage Coillte to clarify the language used in future acknowledgments regarding the date the request is considered to have been received for the purposes of the commencement of the timelines set out in article 7(2). I am also mindful that even if I were to find the extension of time to be invalid, that does not resolve the substantive issue in this case, which is that Coillte considers it is not obliged to provide the information to the appellant on the basis that the request is "manifestly unreasonable" such that article 9(2)(a) of the AIE Regulations applies. This means, in the appellant's case, Coillte was obliged to provide him with either a decision on his request or a notification of the extension of the timeline which complied with the conditions set out in article 7(2)(b), no later than 11 August 2022, which was one calendar month from the date of his request of 11 July 2022.

19. The appellant has not taken issue with the substantive reasons provided in Coillte's communication of 10 August 2022 to extend the timeframe for response so I will not engage in a consideration of that question.

Position of the Parties

20. Coillte considers article 9(2)(a) of the AIE Regulations to provide grounds for refusal of the appellant's request. Its arguments in support of its position may be summarised as follows:

(i) Coillte submits that the request is manifestly unreasonable having regard to the volume or range of information sought. It submits that while records may exist containing the information sought, a list in the form requested and containing the attributes requested does not.
(ii) It submits that site specific records can be provided in a form that already exists containing the information requested but that the request does not identify a specific geographic location such as a BAU or a Forest Code.
(iii) It submits that the provision of all records would place an unreasonable demand on Coillte's resources and/or would disrupt its ability to perform its core functions.
(iv) It sets out that the request would require its AIE Team to issue the request to numerous teams within the organisation and require them to indicate whether they hold any information relevant to the request.

(v) It submits that the volume of information sought would overwhelm the AIE Team if it were to act on the request alone, meaning that a number of teams within the organisation whose roles are unconnected with AIE would be diverted from their prescribed duties, affecting their ability to carry out their duties effectively which would have an adverse impact on Coillte.

(vi) It submits that the search through such a large number and range of records or an examination of the kind of records concerned would place an unreasonable demand on Coillte's resources and would cause a substantial and unreasonable interference with the work of Coillte and interfere with its ability to perform its core functions.

(vii) It submits that it has come to this conclusion having regard to the decision of the Court of Justice of the European Union in *Verein fur Konsumenten Information v Commission*. It notes that the CJEU stated in that case that where concrete examination of documents would entail an unreasonable amount of administrative work, an institution retains the right to balance the interest in public access to the documents against the burden of work so caused in order to safeguard the interests of good administration.

(viii) It submits that compliance with the request would exceed the limits of what may reasonably be required such that a derogation from the obligation to examine the records is permissible.

(ix) It acknowledges that article 9(2)(a), like each of the grounds for refusal contained in the AIE Regulations, is to be interpreted restrictively. It submits, however, that the ground is nevertheless available to public authorities as a means for refusing a request for information where a public authority genuinely feels that the request at issue is manifestly unreasonable. It submits that the provisions of the AIE Regulations are carefully worded "*in consideration of the obligations that they place upon public authorities in order to comply and within strict timeframes etc*". It submits that such discretionary grounds are available to public authorities where they believe they are needed and once it has given due consideration to the public interest served by the disclosure of the requested information in the specific circumstances.

(x) It refers to guidance from the Aarhus Convention Compliance Committee from August 2017 which, it submits, states that "*whether or not a request is manifestly unreasonable relates to the nature of the request itself for example, its volume, vagueness, complexity or repetitive nature, rather than the reasons for the request which is not required to be stated*".

(xi) It also refers to the European Commission's First Proposal for the AIE Directive which states that "*public authorities should also be entitled to refuse access to environmental information where requests are manifestly unreasonable or formulated in too general a manner. Manifestly unreasonable requests would include those, variously described in national legal systems as vexatious or amounting to an abus de droit. Moreover, compliance with certain requests could involve the public authority in disproportionate cost or effect or would obstruct or*

significantly interfere with the normal course of its activities. Authorities should be able to refuse access in such cases in order to ensure their proper functioning".

(xii) It refers to the decision of the Commissioner in OCE-108782-X6N0D1 *Right to Know and Transport Infrastructure Ireland*. It notes that the factors considered by the Commissioner to be of relevance in determining whether the request could be refused on the basis of article 9(2)(a) included the impact on the public authority of dealing with the request and whether responding to the request would impose disproportionate cost or effort upon the public authority or obstruct or significantly interfere with the normal course of its duties. It notes that the decision also set out that the exception provided for in article 9(2)(a) is only available where the administrative burden entailed by dealing with the request is particularly heavy and that the public authority is required to clearly demonstrate the "*actual and specific impact*" that dealing with the request would have on its normal activities. It submits that Coillte has done so in this case.

(xiii) It also notes that there are distinctions between the present case and the facts of the cited decision, which involved a request for a single document with which TII was relatively familiar. It submits that in this case multiple staff members would be required to search for, retrieve and review emails and other correspondence relating to the request.

(xiv) It refers to the decision of the Commissioner in CEI/16/0030 *Mr A and the Environmental Protection Agency*. It notes that in that case the EPA estimated that responding to a request for records held by or for it which related to the Enva plant over a five-month period would take over 130 hours of search, retrieval and copying work. It notes that the Commissioner was satisfied in that case that processing of the request would, in all of the circumstances, impose an unreasonable burden on the EPA and, in particular, on the work of senior and specialist members of staff to the detriment of the EPA's core work.

(xv) It refers to the decision in *M50 Skip Hire & Recycling Limited v Commissioner for Environmental Information* in which, it submits, the High Court found that it was clear from the terms of article 10(3) of the AIE Regulations that a public authority enjoys a wide discretion when weighing up, in each individual case, the public interest served by a disclosure against the interest served by refusal to disclose the relevant information.

(xvi) It submits that while the public has a right to access information on the workings of public bodies and accountability of decision-making, in this case, the arguments against release far outweigh those in favour. It submits that release of the information requested would result in an onerous burden being placed on Coillte which would interfere with its core functions.

(xvii) It submits that since the appellant refused to refine his request article 10(5) cannot be applied as the volume of information sought is manifestly unreasonable and therefore incapable of separation and dissemination at this time.

(xviii) In response to queries from the Investigator, Coillte indicated that its Engineering Process Manager had conducted a high level search to confirm his original

estimation of the level of work that would be involved in responding to the appellant's request. It noted that there were approximately 400 sites where roadworks may have taken place for which development consent was not sought or required. It submitted that it does not record the exact categorisation of the works as requested by the appellant and that it has no current operational or business reason to do so. It notes that it only holds records on the type of work carried out such as "work on existing roads" or "work on new roads".

(xix) Coillte submits that responding to the appellant's request would require documents relating to those approximately 400 sites to be reviewed by the Engineering Process Manager with input from the Lead Engineers in each of its six Business Area Units. It submits that those documents may also need to be reviewed by foresters working in the specific sites as they would have certain operational records or information that may be relevant to the request. In addition, it explained that engagement and discussion with the external contractors who carried out the roadworks may also be necessary to sufficiently categorise the works as required in the request. It noted that Coillte engages approximately forty external contractors to carry out work on its behalf.

(xx) It submits that the Lead Engineer and local foresters for each Business Area Unit would firstly need to use the GIS system to search for the road in question and identify its road number, following which it would be necessary to search work records against that road number. It acknowledged that in many instances the local team may be able to recall the type of work carried out on each road from memory but submitted that in cases where the work records were limited or did not categories the nature of the roadworks completed, the Lead Engineer would have to contact the external contractor to obtain further details and/or records. It submitted that once all of the information was collated, it would need to be sent to the Engineering Process Manager for a final check before it was released. Coillte estimated that this work would involve 10 to 12 hours of the Engineering Process Manager's time as well as 7 hours work from each of the six Lead Engineers and 2 to 3 hours work for each of the 18 Local Foresters. It noted again that information may need to be sought from some of Coillte's 40 external contractors but submitted that the level of their time involved could not be estimated without commencing the work in question.

(xxi) When asked by the Investigator if it had taken steps to maintain, organise or proactively disseminate information of the type sought by the appellant, Coillte responded that the records in question were operational records. It submitted that those records had not been organised and the relevant information was contained in different files and systems within the organisation.

(xxii) It submitted that operational records such as those at issue in this appeal are not records capable of being actively disseminated and that it was not required by the AIE Regulations to disseminate such information or to organise it in any other way, as it could not reasonably anticipate that all information related to this topic would be requested under the AIE regime. It also noted that this Office's own website

informs the public that it has "no role in assessing how public authorities collect, maintain and disseminate environmental information". It also noted that it did actively disseminate "a large amount of environmental information" which it considered to be "of key interest to the wider public and [its] stakeholders" including Annual Reports, Strategic Forestry Plans, Carbon Modelling Reports and its Public Viewer.

(xxiii) Coillte went on to refer to the decision of the General Court of the European Union in *Public.Resource.Org Inc & Right to Know v European Commission*. It referred to paragraphs 118 and 119 of the decision in particular in which the Court noted that "…it is apparent from Article 5(3)(b) of the Aarhus Convention, as implemented by Article 4(2)(a) of Regulation 1367/2006, the obligation to actively disseminate environmental information is limited to texts of EU legislation on the environment or relating to it, and to policies, plans and programmes relating to the environment. Furthermore, both the Aarhus Convention and Regulation No 1367/2006 provide for public access to environmental information either on request or as part of active dissemination by the authorities or institutions concerned. However, since the authorities and institutions may refuse a request for access to information where that information falls within the scope of a number of exceptions, it necessarily follows that they are under no obligation to actively disseminate that information. Were matters otherwise, the exceptions concerned would cease to serve any useful purpose, which is manifestly incompatible with the spirit and the letter of the Aarhus Convention and that regulation".

(xxiv) Coillte again submitted that providing the information sought by the appellant would divert specialist engineering staff and forestry operational staff from their core duties which would significantly obstruct and interfere with the normal course of its activities such that the task exceeds the limit of what might reasonably be required of it.

(xxv) Coillte acknowledged that there were factors in favour of release of the information at issue including the public interest in openness and transparency and the public interest in individuals being able to exercise their rights under the AIE Regulations to the greatest extent possible in order to access environmental information.

(xxvi) However, Coillte considered the factors in favour of refusal to outweigh the public interest in release. It again submitted that the "unreasonable burden of fully processing the request would divert staff away from their normal work and cause a substantial and unreasonable disruption to that work". It reiterated that it would take "between 76 and 108 hours to identify, locate and extract the information requested" resulting in "an unreasonable diversion of limited resources". It submitted that it had engaged with the appellant in an effort to reduce the scope of his request but he refused to do so and that "there is also a strong public interest in the efficient and effective performance of Coillte and in ensuring we do not have to divert limited resources in dealing with voluminous AIE requests".

(xxvii) Finally, it submitted that the courts have drawn a distinction between what might be interesting to the public and what might, properly speaking, be in the public

interest. It also submitted that "it is well established that the private interest of a requester is not to be confused with the public interest". It referred to the appellant's submission that the public interest in the release of the information requested includes the public interest in ensuring a public authority can evidence that it has correctly complied with the law in seeking consent for activities which are subject to development consent. It submitted that this was a matter which was more properly the responsibility of the Department of Agriculture, Food and the Marine in its capacity as regulator and that it was not for members of the public to seek to police compliance at a national level. Coillte noted that it had "no difficulty if members of the public seek information relating to roadworks which did not require consent, provided such requests are reasonable in their scope and volume" and would "always assess each individual request, and in this regard if the appellant's request had been limited to a smaller geographical area it may have avoided being refused as being manifestly unreasonable".

21. The appellant disputes Coillte's position for the following reasons:

(i) The appellant argues that article 9(2)(a) provides a discretionary basis for refusal which, according to the Ministerial Guidelines, should be applied sparingly.

(ii) He refers to OCE-120546-L8F1K3 in which the Commissioner found that Coillte had not justified its decision to refuse access to information under article 9(2)(a). He notes that this Office is required to examine each appeal on its merits but submits that Coillte has made previous decisions in which it has failed to apply article 9(2)(a) "sparingly or justifiably". He submits in that regard that he has 11 appeals with this Office which involve refusals by Coillte under article 9(2)(a) of the AIE Regulations.

(iii) He argues that the AIE Regulations provide for a presumption in favour of disclosure and that there is an onus on Coillte to demonstrate that the request is manifestly unreasonable. He submits that the decision-maker has determined that the volume of information sought would overwhelm the AIE team but argues that Coillte has stated in previous AIE decisions that its AIE team does not have central access to records and would only be performing a co-ordinating role. He refers to Coillte's initial response to his request which notes that "*our AIE team are co-ordinating our response to your request which has been forwarded to relevant staff for their attention*".

(iv) He submits that it is part of the duties of any member of staff in a public authority who handles environmental information to assist in complying with a request under the AIE Regulations.

(v) He rejects Coillte's suggestion that he was invited to "refine [his] request to a particular BAU or Forest Code" (emphasis added). He submits that he was asked to significantly reduce the scope of his request. He argues that his request is perfectly clear, does not require refinement and is for specific information on a specific subject for a specified period.

(vi) He submits that there are 6 BAUs in total and that each operates separately. He argues that it is difficult to see how reducing the scope of his request to one BAU would place any less pressure on that BAU and that Coillte's position for the manifest unreasonableness of his request lacks logic.

(vii) He also argues that the request to reduce the scope of his request to a particular Forest Code is unreasonable given that there are 317 Forest Codes.

(viii) He submits that Coillte is applying article 9(2)(a) as a first line of defence rather than actually considering what is required to meet a request and that it seeks to avoid or reduce its obligations under the Regulations, prioritising its commercial functions over its statutory duties.

(ix) He refers to Coillte's statement that "*it was put to [him] that, while records may exist containing the information sought, a list as requested containing the attributes referred to in [his] Request does not*". He submits that this makes his request more reasonable and that his intention in seeking the list was to reduce the burden on Coillte. He submits that in circumstances where he does not know how many cases fall within the scope of his request, he considered it to be reasonable to seek to determine the scope or scale of the information by seeking a list and not the full suite of records so that he could then seek more detailed information at a later stage. He submits that he was acting responsibly in framing his request as he did as it would not be in the interests of either party for unnecessary information to be requested.

(x) He rejects Coillte's suggestion that the wording of his original request does not identify a specific geographical location. He argues that his request refers to works "*on Coillte property or by or for Coillte not on Coillte property*" and that this is sufficient to determine the scope or framework of his request.

(xi) He submits that Coillte has not evaluated what work it will take to complete the request and has provided no assessment as to how many people would be involved or how many hours of work would be required across the different BAUs. He argues that it cannot therefore be said that Coillte has demonstrated that the request is manifestly unreasonable and the information should therefore be released.

(xii) He submits that there is no basis to consider the public interest test as Coillte has not demonstrated that article 9(2)(a) applies but argues that the public interest in the release of the information requested includes the public interest in ensuring a public authority can evidence that it has correctly complied with the law in seeking consent for activities which are subject to development consent.

(xiii) He also submits that Coillte has failed to apply article 10(5) to his request and argues that there is no evidence that adequate investigations were made before refusing his request.

Analysis and Findings

22. Article 9(2)(a) of the AIE Regulations provides that "a public authority may refuse to make environmental information available where the request is manifestly unreasonable having

regard to the volume or range of information sought". It transposes article 4(1)(b) of the AIE Directive which provides that "Member States may provide for a request for environmental information to be refused if the request is manifestly unreasonable".

23. The question of what constitutes a "manifestly unreasonable" request must be approached teleologically, having regard to the purpose of the AIE Directive (see *NAMA*, paragraph 10). The AIE Directive makes it clear that its purpose is to ensure "increased public access to environmental information and the dissemination of such information" and that "the disclosure of information should be the general rule" such that "public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases" with grounds for refusal interpreted "in a restrictive way" (see Recitals 1 and 16).

24. In addition, articles 7(2)(b) of the AIE Regulations and 3(2)(b) of the Directive envisage the processing of voluminous and complex requests and provide for extensions to the one-month timeframe within which a public authority is normally required to issue a decision on a request. It is clear therefore that a request is not necessarily covered by the "manifestly unreasonable" exception just because it is voluminous or complex.

25. Article 7(1) of the AIE Directive imposes an obligation on Member States to ensure that public authorities organise environmental information which is relevant to their functions, and held by or for them, with a view to its active and systematic dissemination while article 3(5) provides for a duty to support the public in seeking access to information and to put practical arrangements in place to ensure the effective exercise of the right of access to environmental information. Article 5 of the Regulations seeks to implement these provisions and provides, *inter alia*, that public authorities must "make all reasonable efforts to maintain environmental information held by or for [them] in a manner that is readily reproducible and accessible by information technology or by other electronic means". In his opinion in *Commission v Germany*, Advocate General Fennelly observed that "Article 7, which requires periodic publication of general information on the state of the environment, appears to indicate that individual requests should, in principle, be on questions of detail" (see paragraph 30). This indicates that the mere fact a request is detailed does not mean it is necessarily unreasonable.

26. When considering whether a request is manifestly unreasonable, it is necessary to examine the impact on the public authority of dealing with the request. In particular, I must examine whether responding to the request would involve the public authority in disproportionate cost or effort or would substantially interfere with the normal course of its activities. In light of the findings of the CJEU in *Verein für Konsumenteninformation* (see paragraphs 101-115) I consider that the exception in article 9(2)(a) is only available where the administrative burden in dealing with the request is particularly heavy. The burden is on the public authority to demonstrate the unreasonableness of the task entailed by the

request. In that regard, the test set out by the CJEU at paragraph 69 of its decision in *Land Baden-Württemberg* should be borne in mind:

> "…[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".

27. The European Commission's First Proposal for the AIE Directive (COM/2000/0402 final - COD 2000/0169) envisaged that the exception in article 4(1)(b) would cover requests "variously described in national legal systems as vexatious or amounting to an abus de droit". It went on to acknowledge that "compliance with certain requests could involve the public authority in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities" before noting that "authorities should be able to refuse access in such cases "in order to ensure their proper functioning". The interest which the "manifestly unreasonable" exception seeks to protect therefore is the interest in ensuring a public authority is not overburdened by a request, to the extent that this interferes with its ability to perform its other tasks and duties.

28. That being said, it is also important to bear in mind the duties imposed on public authorities by article 7 and 3(5) of the AIE Directive. The extent to which the obligations contained in articles 3(5) and 7 have been transposed by the Regulations has not been fully explored. It is clear from the jurisprudence of the CJEU, in cases such as C-188/89 *Foster v British Gas plc*, that these obligations can have a direct effect on public authorities to the extent they can be considered emanations of the state. Coillte is correct to note that this Office's website informs the public that it has "no role in assessing how public authorities collect, maintain and disseminate environmental information". The jurisdiction conferred on this Office by article 12 of the AIE Regulations relates to decisions on individual access requests, and not directly to the obligations relating to proactive dissemination. However, the requirements contained at article 7 are relevant to the obligation to interpret the AIE Regulations teleologically, having regard to the purpose of the Directive, when performing the functions provided for by article 12 of the AIE Regulations. This flows from the *NAMA* judgment set out above, and the doctrine of indirect effect. The exception in article 9(2)(a) of the Regulations is not intended to endorse any failure by public authorities to comply with their duties to organise and disseminate information. This means that when considering the workload imposed by a request, it is important not to allow a situation where a failure to comply with the obligations imposed by articles 7 and 3(5) of the AIE Directive and article 5 of the AIE Regulations, increases the prospect that a public authority will be able to successfully rely on the "manifestly unreasonable" exception. This would lead to a perverse situation whereby failure to comply with certain obligations under the Directive and Regulations would effectively be rewarded by the application of less onerous standards by this Office on review of requests under article 12.

29. It is important to recall what exactly the appellant is seeking here. Essentially, the appellant is asking for a list of the works carried out by or for Coillte on forest roads in 2021, for which development consent was not sought. He has asked that the list identify the works by county, townland, forest property and compartment number. He has also asked that it include the length of the works and a description of the type of work involved.

30. I acknowledge Coillte's submission that the request encompasses approximately 400 sets of works carried out over 2021. However, what the appellant is requesting is a list of those works. The request for detail as to the county, townland, forest property and compartment number for each set of works does not seem to me to be overly onerous to comply with since these are merely identifiers for the works. Providing a description of the type of work involved is slightly more onerous as is the provision of information on the length of time taken. However, I note that Coillte has submitted that "in many instances the local team may be able to recall the type of work carried out on each road from memory". I also note that the information sought by the appellant as to the length and description of the works appears to align with the criteria set down by the Department under which works may be exempt from the requirement for the consent of the Minister. For example, works to construct stacking areas, turntables, lay-bys and culverts do not require consent nor does the extension of an existing road by up to one third of its length subject to a maximum length of 90 metres and compliance with certain additional conditions. It is reasonable to assume that Coillte would maintain a record of the basis on which it considered the works could be undertaken without consent and that such records would be relatively easily accessible if, for any reason, Coillte was required to explain to the Department why consent had not been sought in a particular case.

31. As I have outlined above, the exception in article 9(2)(a) is not intended to endorse any failure by public authorities to comply with their duties to of organisation and dissemination of environmental information under article 5 of the AIE Regulations and Article 7 of the AIE Directive. In addition, a restrictive approach is mandated by Recital 16 of the Directive which makes it clear that "disclosure of information should be the general rule" and by article 10(4) of the Regulations which provides that "the grounds for refusal must be interpreted on a restrictive basis having regard to the public interest served by disclosure".

32. I agree with the appellant's contention that there is a public interest in ensuring a public authority can evidence that it has correctly complied with the law in seeking consent for activities which are subject to development consent. I accept Coillte's contention that compliance with the rules for development consent is a matter for the Department however I do not agree with its contention that "it is not for members of the public to seek to police compliance at a national level". Recital 1 of the Directive clearly outlines that the underlying objective of the AIE Directive is to provide for increased public access to environmental information and the dissemination of such information as this

"contribute[s] to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually to a better environment". The carrying out of works in forests is a measure which is likely to give rise to environmental impacts and it therefore appears to me to come within the type of information which Recital 1 considered would contribute to greater awareness and more effective participation in environmental decision-making. It is, in my view, in the public interest that members of the public should be able to obtain information not only as to the criteria in which development consent is required but also information as to how these criteria are applied in practice both by the Department as regulator and by those subject to regulation. I am therefore not persuaded by Coillte's argument that the information sought in this case falls more in the realm of what is interesting to the public as opposed to in the public interest or that it is a matter of purely private interest.

33. The Investigator in this case asked Coillte whether it had taken steps to maintain, organise or proactively disseminate information of the type sought by the appellant in his request. As outlined above, Coillte submitted that the information in question had not been organised and was contained in different files and systems within the organisation on the basis that the records in question were "operational records" and it was not required by the AIE Regulations to disseminate such information or to organise it in any other way as it could not reasonably anticipate that all information related to this topic would be requested under the AIE regime. It also noted that it did actively disseminate "a large amount of environmental information" which it considered to be "of key interest to the wider public and [its] stakeholders" including Annual Reports, Strategic Forestry Plans, Carbon Modelling Reports and its Public Viewer.

34. With respect to Coillte, the obligations contained in articles 7 and 3(5) of the Directive and article 5 of the Regulations do not refer to a subset of environmental information as it contends. Article 7 of the Directive applies to "environmental information which is relevant to [the] functions [of the public authority in question] and which is held by or for them". Article 3(5) refers both to "information" and "environmental information" while article 5 of the AIE Regulations refers to "environmental information held by or for [a public authority]". There is no distinction between "operational records" which come within the definition of "environmental information" contained at article 3(1) of the Regulations and other forms of "environmental information". I also note that Coillte's argument that it could not reasonably anticipate that all information related to this topic would be requested under the AIE regime and therefore was not required by the AIE Regulations to disseminate or organise the information in question is somewhat confusing given that the Directive and Regulations envisage both proactive dissemination and dissemination on request where the level of detail required is greater than that contained in the information which is proactively disseminated, as evidenced by the comments of Advocate General Fennelly in *Commission v Germany* referred to in paragraph 25 above.

35. Indeed, the decision in the *Public Resource.Org* case, relied on by Coillte in its submissions, also appears to me to support that view. The Court in that case noted that the Aarhus Convention and Regulation 1367/2006 (which provides for access to environmental information held by or for EU institutions) "provide for public access to environmental information either on request or as part of active dissemination by the authorities and institutions concerned". While I accept Coillte's position, supported by reference to the *Public Resource.Org* case, that the existence of exceptions to the duty to disclose environmental information mean that the AIE Directive and Regulations do not envisage proactive dissemination of every piece of environmental information held by or for a public authority, I do not consider the findings of the Court in *Public Resource.Org* to detract from my view that it would severely undermine the purpose of the Directive and the Regulations were a public authority which made less effort to organise its information in a manner which facilitates access more likely to be in a position to successfully avail of the "manifestly unreasonable" exception.

36. It is also important to bear in mind the context in which the observations of the Court in *Public Resource.Org* were made. The Court's references to the Aarhus Convention and Regulation 1327/2006 were made as part of its consideration of the applicant's arguments that certain harmonised standards should be disclosed under Regulation 1049/2001 on the basis of an overriding public interest in disclosure stemming from the obligation of transparency in environmental matters. The key finding in paragraph 118 (which is referred to by Coillte in its submissions) is that "the applicants' argument that the Commission was required to actively disseminate the requested harmonised standards is based on the erroneous premise that those harmonised standards fall within the category of 'EU legislation on the environment or relating to it'". It is presumably for this reason that the decision of the Court refers only to article 5(3)(b) of the Aarhus Convention and does not consider the text of either article in its entirety. Thus article 5 of the Aarhus Convention provides that:

> "Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:
>
> (a) Reports on the state of the environment, as referred to in paragraph 4 below;
> (b) Texts of legislation on or relating to the environment;
> (c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and
> (d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention".

37. At EU institution level, this obligation is provided for in article 4 of Regulation 1327/2006 provides examples (a) to (g) of the types of information which should be proactively disseminated and makes it clear that those examples are illustrative rather than exhausting. Thus it provides that:

> "(1) Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology in accordance with Articles 11(1) and (2), and 12 of Regulation (EC) No 1049/2001. They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks. To that end, they shall place the environmental information that they hold on databases and equip these with search aids and other forms of software designed to assist the public in locating the information they require.
>
> The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Regulation unless it is already available in electronic form. Community institutions and bodies shall as far as possible indicate where information collected before entry into force of this Regulation which is not available in electronic form is located.
>
> Community institutions and bodies shall make all reasonable efforts to maintain environmental information held by them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.
>
> (2) The environmental information to be made available and disseminated shall be updated as appropriate. In addition to the documents listed in Article 12(2) and (2) and Article 13(1) and (2) of Regulation (EC) No 1049/2001, the databases or registers shall include the following:
>
> (a) texts of international treaties, conventions or agreements, and of Community legislation on the environment or relating to it, and of policies, plans and programmes relating to the environment;
> (b) progress reports on the implementation of the items referred to under (a) where prepared or held in electronic form by Community institutions or bodies;
> (c) steps taken in proceedings for infringements of Community law from the stage of the reasoned opinion pursuant to Article 226(1) of the Treaty;
> (d) reports on the state of the environment as referred to in paragraph 4;
> (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;

(f) authorisations with a significant impact on the environment, and environmental agreements, or a reference to the place where such information can be requested or accessed;
(g) environmental impact studies and risk assessments concerning environmental elements, or a reference to the place where such information can be requested or accessed".

I also note that the obligation in article 5(1)(b) of the Regulations makes no reference to proactive dissemination and simply requires a public authority to "make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means".

38. On this basis, I do not accept, as Coillte has sought to argue, that the decision in *Public Resource.Org* is authority for the proposition that the obligation to organise and proactively disseminate environmental information is a relatively narrow one. As I have already indicated above, it is not my function to assess how public authorities maintain and disseminate environmental information. However, Coillte's acknowledgment that it does not organise the information in question with a view to its dissemination is relevant to my assessment as to whether it is permissible now for Coillte to rely on article 9(2)(a) to refuse that information on the basis that to provide that information would be unduly burdensome.

39. Coillte has submitted in its responses that responding to the request "would significantly obstruct and interfere with the normal course of its activities such that the task exceeds the limit of what might reasonably be required of it". However, the CJEU's guidance, along with the wording of the Regulations and the Directive makes it clear that it is for Coillte to clearly demonstrate the actual and specific impact that dealing with the request would have on the public authority's normal activities. Other than providing an estimate of the level of working hours required to deal with the request and the roles of the team members involved, Coillte has provided little detail in terms of the impact on its activities which would result from the request. In terms of Coillte's submission that the request would require between 76 and 108 working hours, I note that this workload would be divided across twenty-five staff members. A workload of between two hours and a day and a half for each of the staff members involved does not appear unduly onerous to me or to involve disproportionate costs or effort. I accept that this estimate does not include the time required of contractors but it is not readily apparent to me why consultation with contractors would be necessary to obtain the details sought by the appellant. I accept that the input of the contractors might be necessary to provide a detailed description of the works carried out but the examples provided by the appellant "new, extension, turning bay" suggest that the level of specificity required is such as would already be referred to in Coillte's own records.

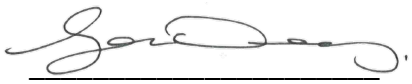
40. On the facts of this case, and taking all of the above into account, my view is that the threshold for the request to be manifestly unreasonable has not been met. Accordingly, I do not consider Coillte to have been justified in refusing the request on the basis of article 9(2)(a) of the AIE Regulations.

Decision

41. Having carried out a review under article 12(5) of the AIE Regulations, I annul Coillte's decision. As the information has yet to be compiled, I will remit the matter to Coillte to process the request in accordance with the provisions of the AIE Regulations.

Appeal to the High Court

42. 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
15 September 2023