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-109584-Z8S5F4

Date of decision: 6 January 2023

Appellant: Mr. X

Public Authority: Coillte

Issue: Whether Coillte was justified, under article 9(2)(d) of the AIE Regulations, in refusing access to information relating to the construction of a firebreak

Summary of Commissioner's Decision: The Commissioner annulled Coillte's decision in respect of record 4. He directed the release of the record, subject to the redaction of information that falls outside the scope of this review.

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 12 April 2021, the appellant submitted a request to Coillte seeking access to the following:

   "All records related to the construction of a ploughed firebreak at The Cut, Co. Laois c. 2019 / 2020 to include, inter alia;

   a. AA Screening Report, AA Report, AA Determination
   b. NIS (if applicable)
   c. Internal & External Correspondence
   d. Consent from NPWS for works within a designated area
   e. Dates of works
   f. Site surveys, including ecological surveys
   g. Records of any consultation made by Coillte in respect of the works.
   h. Photographs"

2. On 11 May 2021, Coillte issued its original decision, wherein it part-granted the appellant's request. In respect of part c, Coillte identified and granted access in full to three records labelled Email Thread 1, Email Thread 2, and Summary of Work. Email Thread 2 included an attachment which comprised a lessons learned document related to issues regarding the construction / maintenance of fire lines in the Slieve Bloom mountains, where The Cut is located. In respect of part e, Coillte referred the appellant to the Summary of Work, and in respect of part h, Coillte referred the appellant to both Email Thread 1 and 2. In respect of parts a, d, f, and g, Coillte stated that the records sought were not available and in respect of part b, it stated that the record sought was not applicable.

3. On 12 May 2021, the appellant emailed Coillte seeking clarification regarding what it meant by "not available" and "not applicable" and contended that these are not appropriate grounds for refusal. He submitted that if the records sought do not exist, that should be stated as the basis for refusal and if the records do exist but are not available, an explanation should be provided. Subsequently, Coillte clarified that "not available" and "not applicable" mean, in this case, that "having carried out all necessary checks we have found that the record(s) does not exist."

4. On 14 May 2021, the appellant sought an internal review of Coillte's decision. In particular, he suggested that there was relevant correspondence which had not been identified and, while a completion date had been provided, no dates of works had been received. He also sought further clarification regarding the records that had been described as not available/not applicable.

5. On 11 June 2021, Coillte issued its internal review decision. It identified nine further relevant records (records 1-9), which comprised email correspondence. It granted access in full to record 1 and access in part to records 2, 3, 5, 6, 7, 8, 9 by reference to article 6(1)(d) of the AIE Regulations, on the basis that the withheld information was not specific to the appellant's request. Coillte refused access in full to record 4 under article 9(2)(c) of the AIE Regulations, which provides that a public authority may refuse to make environmental information available where the request concerns material in the course of completion, or unfinished documents or data. It also informed the appellant that the dates of works were 27 March 2019 to 30 March 2019 inclusive and reiterated its clarification regarding "not available" and "not applicable".

6. On the same day, the appellant emailed Coillte asking how record 4 could be considered to be an incomplete record, given that it was email correspondence which had been sent/received. In response, Coillte explained that the content of record 4 related to the drafting of the lessons learned document, the finalised version of which was released to him at original decision. It stated that, accordingly, article 9(2)(c) of the AIE Regulations applied. The appellant emailed Coillte again, highlighting his view that email correspondence could not be considered to be in the course of completion and refused under article 9(2)(c) of the AIE Regulations. He stated that he would like to give Coillte an opportunity to reconsider its decision regarding record 4. He noted that otherwise he would appeal the decision to my Office.

7. On 16 June 2021, Coillte wrote to the appellant, explaining further its reliance on article 9(2)(c) of the AIE Regulations to refuse access to record 4. In addition, it indicated that it also wished to refuse access to record 4 under article 9(2)(d) of the AIE Regulations, which 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.

8. The appellant appealed to this Office on 25 June 2021. He noted that he was seeking a review of Coillte's decision to "refuse and partially refuse" records.

9. 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 correspondence between Coillte and the appellant as outlined above and to correspondence between my Office and both Coillte and the appellant on the matter. I have also examined the content of the records at issue. In referring to the records at issue, I have adopted the numbering system used by Coillte on the schedule of records provided to the appellant with its internal review decision. 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)

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

Scope of Review

11. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.

12. During the course of this review, the Investigator wrote to the appellant and outlined her view that, having examined his correspondence to my Office, it was her understanding that he was seeking access to the information withheld by Coillte from records 2, 3, 5, 6, 7, 8, and 9 and to record 4. The appellant did not dispute this understanding.

13. As indicated, Coillte, in its internal review by decision, by reference to article 6(1)(d) of the AIE Regulations, withheld certain information from records 2, 3, 5, 6, 7, 8 and 9. Article 6(1)(d) of the AIE Regulations provides that a request for environmental information shall state, in terms that are as specific as possible, the environmental information that is the subject of the request. I consider that the information withheld from records 2, 3, 5, 6, 7, 8, and 9 was redacted by Coillte on the basis that it fell outside the scope of the appellant's request.

14. Having examined the information withheld from records 2, 3, 5, 6, 7, and 9, I am satisfied that all of the redacted information relates to other matters discussed at meetings between Coillte, the National Parks and Wildlife Service (NPWS), and the Forest Service of the Department of Agriculture, Food and the Marine (the Department), and does not relate to the construction of the firebreak/fire line at The Cut, Co. Laois. Accordingly, I am satisfied that the information withheld from records 2, 3, 5, 6, 7, 8, and 9 does, indeed, fall outside the scope of the appellant's request and, in turn, falls outside the scope of this review.

15. In its submissions to this Office, Coillte stated that it was no longer relying on article 9(2)(c) of the AIE Regulations and was only relying on article 9(2)(d) in refusing access to record 4.

16. Record 4 is an email chain made up of eight individual emails (emails 1-8). Having examined the content of the individual emails within record 4, I am satisfied that all of the information contained therein falls within the scope of the appellant's request, apart from a small amount of information in the email dated 17 February 2020 at 09:14 (email 1) that is, the information beginning after the numbered (1-3) list to above the signature block. Again, this information does not relate to the construction of the firebreak/fire line at The Cut, Co. Laois.

17. In light of all of the above, the scope of this review is confined to whether Coillte was justified, under article 9(2)(d) of the AIE Regulations, in refusing access to all of the information contained within record 4, apart from the information identified above, as contained in the email dated 17 February 2020.

Preliminary Matters

18. Before I consider the substantive issue arising in this case, I wish to make a number of preliminary comments.

19. First, a review by my Office is considered to be de novo, which means that it is based on the circumstances and the law at the time of my decision. Accordingly, I consider it appropriate to examine the applicability of article 9(2)(d) of the AIE Regulations, notwithstanding the fact that the provision was not originally relied upon by Coillte in its internal review decision.

20. Second, it is also clear from the comments of the Court of Appeal in Redmond & Another v Commissioner for Environmental Information & Another [2020] IECA 83, at paragraph 51, that the nature of a review by my Office is inquisitorial, rather than adversarial in nature. The extent of the inquiry is determined by me, as Commissioner for Environmental Information, and not by the parties to the appeal.

21. Finally, in its submissions to this Office, in considering article 10 of the AIE Regulations (discussed further below) Coillte stated "[t]he disclosure of the withheld information would not add significantly to the information that is already available in the public domain; that is, the finished (l)essons (l)earned document. **Anything outside of this cannot be considered environmental information, as it is merely discourse"** (my emphasis). This appears to be Coillte's only comment to the effect that the information at issue is not "environmental information".

22. I would remind Coillte that whether information is "environmental information" is one of the threshold issues to be considered when processing an AIE request. Accordingly, in cases where an exemption provision has been relied upon it is unhelpful for a public authority to raise such an argument for the first time before my Office. Furthermore, it is inappropriate for a public authority to assess whether information is "environmental information" when considering article 10 of the AIE Regulations, given that article 10 only falls to be engaged where a public authority is seeking to refuse access to information that has already been defined as "environmental information" under one of the exemption provisions provided for under the AIE Regulations.

23. For the avoidance of doubt, I consider that the information at issue contained in record 4 falls squarely within the definition of environmental information as provided for in article 3(1)(c) of the AIE Regulations. Article 3(1)(c) provides that "environmental information" means any information on measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) (i.e. the environment) as well as measures or activities designed to protect those elements.

24. The lessons learned document released to the appellant at original decision was prepared following issues that had arisen out of fire line construction and maintenance works completed in 2018 and 2019 in the Slieve Bloom Mountains, so as to ensure consistency, regulatory compliance, best practice, and appropriate communication procedures are in place for all such works into the future. The document contains findings from the lessons learned exercise and notes:

> "Following an extensive review of the incidents in question, and the processes in place, the Operations Process Group determined that any planned ground breaking activities within and adjacent to Natura 2000 sites should be environmentally pre-screened to ensure that these areas will not potentially be impacted upon.
>
> As a result, the procedures for such work have been updated to reflect the requirements to appropriately mitigate potential environmental impacts, and to ensure the appropriate bodies are notified of any works, as appropriate. A summary of the updated process and actions taken to date can be seen [in this document].

25. I am satisfied that the lessons learned document is a measure or activity likely to affect the environment within the meaning of paragraph (c) and that the information at issue in record 4, which comprises emails discussing the preparation of the lessons learned document, is information "on" the document. Accordingly, notwithstanding Coillte's comments the information at issue is discourse and may not add significantly to the information already available, I find that that the information at issue is "environmental information" within the meaning of paragraph (c) of the definitions article 3(1) of the AIE Regulations. I will, therefore, now go on to consider Coillte's application of article 9(2)(d) of the AIE Regulations in respect of the information at issue.

Analysis and Findings

26. Article 9(2)(d) of the AIE Regulations 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 provision transposes Article 4(1)(e) of the AIE Directive, which in turn is based on part of Article 4(3)(c) of the Aarhus Convention.

27. Article 9(2)(d) must be read alongside article 10 of the AIE Regulations. Article 10(3) of the AIE Regulations requires a public authority to consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal and article 10(4) of the AIE Regulations provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest served by disclosure. Article 10(5) of the AIE Regulations provides that 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.

28. When relying on article 9(2)(d), the public authority should show that the information at issue is an "internal communication" such that it falls within the scope of the exception. It is then for the public authority to weigh the public interest served by disclosure against the public interest served by refusal.

29. The term "internal communications" is not defined in the AIE Regulations, the AIE Directive, or the Aarhus Convention. However, the decision of the Court of Justice of the European Union (CJEU), in C619/19 Land Baden-Württemberg v DR, provides some guidance on the internal communications exception. It notes that the term "communications", should be given a separate meaning to the terms "material" or "document" (paragraph 40), and that it can be interpreted as relating to "information addressed by an author to someone, an addressee who or which may be an abstract entity – such as 'members' of an administration or the 'executive board' of a legal person – or a specific person belonging to that entity, such as a member of staff or an official" (paragraph 37). It further notes that not all environmental information held by a public authority is necessarily "internal" and states that the "internal communications" exception:

> "…must be interpreted as meaning that the term 'internal communications' covers all information which circulates within a public authority and which, on the date of the request for access, has not left that authority's internal sphere – as the case may be, after

being received by that authority, provided that it was not or should not have been made available to the public before it was so received" and

"…must be interpreted as meaning that the applicability of the exception to the right of access to environmental information provided for by it in respect of internal communications of a public authority is not limited in time. However, that exception can apply only for the period during which protection of the information sought is justified".

30. In addition, the Minister's Guidance, in considering "internal communications", outlines:

> "Public authorities should bear in mind that the use of this exception is discretionary. It should not be resorted to as a simple expedient to protect all internal communications in circumstances where it would be unreasonable to do so (see also sub-articles 10(3) and 10(4)). Normally, public authorities would not be expected to invoke this protection for information unless there are good and substantial reasons – not otherwise available in Articles 8 and 9 – for doing so" (paragraph 12.7).

31. The information at issue within record 4 is contained within eight individual emails (emails 1-8), which make up an email chain. Having examined the individual emails, I am satisfied that all of them are between the Coillte Managing Director and the Coillte Director of Forest Operations, with one email copied to the Coillte Director of Stewardship, Risk, and Communication. There is no evidence to suggest that the emails left the internal sphere of Coillte. Accordingly, I am satisfied that they are internal communications and fall within the scope of the exception provided for at article 9(2)(d) of the AIE Regulations.

32. As noted above, article 9(2)(d) must be read alongside article 10 of the AIE Regulations. In considering the public interest served by disclosure, it is important to be mindful of the purpose of the AIE regime, as reflected in Recital 1 of the Preamble to the AIE Directive, which provides that "increased public access to environmental information and the dissemination of such information contribute to greater public awareness of environmental decision-making and, eventually, to a better environment." The AIE regime thereby recognises a very strong public interest in openness and transparency in relation to environmental decision-making. Further, there is undoubtedly a public interest in the openness and transparency with regard to how Coillte approaches the construction and maintenance of fire lines (which are intended to prevent future fires spreading and damaging residential areas, forest, or wildlife habitat) and how Coillte approaches and learns from issues which have arisen when doing so. The information at issue in record 4 relates to the preparation of the lessons learned document which was developed following issues regarding particular fire line work undertaken by Coillte.

33. The AIE regime also acknowledges that there may be exceptions to the general rule of disclosure of information, as noted in Recital 16 of the AIE Directive, which provides that "public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases". One such case is in respect of internal communications of public authorities. The general public interest in such an exception is evident from the European Commission's Explanatory Memorandum on the AIE Directive, which notes that "it should be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of

completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account". This was referred to by the CJEU in C-619/19 Land Baden-Württemberg v DR, which clearly stated that the exception is intended to meet the need of public authorities to have a protected space in order to engage in reflection and to pursue internal discussions (paragraph 44).

34. As noted above, the CJEU in C-619/19 Land Baden-Württemberg v DR outlined that there is no temporal limitation on the operation of the exception regarding internal communications (see paragraphs 54 to 57). The CJEU further highlighted that as the exception is potentially very wide, the public interest balancing exercise required must be tightly controlled (paragraph 60). The interests involved must be weighed on the basis of an actual and specific examination of each situation brought before the public authority and myself on appeal (paragraph 59). Despite there being no temporal limit on the operation of the exemption, the CJEU introduced one into the balancing exercise. It noted that public authorities to which a request for access to environmental information in an internal communication has been made must take into account the time that has passed since that communication and the information that it contains were drawn up and that the exception can apply only for the period during which protection is justified in the light of the content of such a communication. It further commented:

> "In particular, if, in the light of the objective of creating, for public authorities, a protected space in order to engage in reflection and to pursue internal discussions, information contained in an internal communication could properly not be disclosed on the date of the request for access, a public authority may, on the other hand, be led to take the view that, on account of its age, the information has become historical and that it is accordingly no longer sensitive, where some time has passed since it was drawn up (see, by analogy, judgment of 19 June 2018, Baumeister, C-15/16, EU:C:2018:464, paragraph 54)" (paragraph 65).

35. In its submissions to this Office, Coillte noted that the emails in record 4 constitute a discourse between senior managers regarding the development of the lessons learned document. It noted that the finalised lessons learned document was sent to the NPWS and the Department; however the emails were not. It also noted that the finalised lessons learned document had been released to the appellant at original decision.

36. In its submissions to my Office, Coillte outlined that, in favour of disclosure, it considered the public interest in openness and transparency. It also stated that it considered the public interest in environmental information being made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information.

37. Coillte outlined that, against disclosure, it considered the strong public interest in protecting the space required by public authorities to think in private, engage in reflection and pursue internal discussion. It contended that this significantly enhances the quality of environmental information that is produced and made available to the public. It also stated that it considered the strong public interest in protecting the right of a public authority to have a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. It submitted that the disclosure of the information at issue would present a chilling effect on the

exchange of free and frank views of Coillte staff and would affect their ability to engage in similar internal communications in future. It also indicated that disclosure could result in a "less-than-ideal" level of internal communication and care in preparing documents, such as the lessons learned document, to a high standard based on a reluctance to engage in such communications owing to the possibility of their future disclosure.

38. Furthermore, Coillte outlined its position that the public interest in openness and transparency had been satisfied by the disclosure of the lessons learned document and refusal of the emails satisfied the public interest in permitting the private thinking space to prepare such documents. Coillte suggested that if it was required to make available not only documents such as the lessons learned document, which it stated it was not legally required to prepare, but also internal communications relating to their preparation, this would cause a reluctance to prepare such documents in the future or communicate openly in doing so. It noted that the disclosure of the withheld information would not add significantly to the information that is in the finalised lessons learned document released to the appellant and in the public domain.

39. As indicated, the information at issue within record 4 is contained within eight individual emails (emails 1-8) between the Coillte Managing Director and the Coillte Director of Forest Operations, with one email copied to the Coillte Director of Stewardship, Risk, and Communication, which make up an email chain. While I am required by article 12(5)(b) of the AIE Regulations to specify reasons for my decision, I must also be careful not to disclose withheld information in my decisions. This means that the detail that I can give about the content of emails 1-8 and the extent to which I can describe certain matters in my analysis is limited. However, having examined the individual emails, I am satisfied that the information at issue can generally be described as high-level detail regarding the preparation of the lessons learned document incorporating a mitigation plan. In addition, notwithstanding Coillte's submissions to this Office, I am of the view that certain information within emails 1 and 8 is similar to information which has already been released to the appellant in records 2 and 3 and Email Thread 2.

40. Having examined the information at issue, I am satisfied that its release would provide insight into Coillte's approach to developing a lessons learned document where issues have arisen regarding the construction / maintenance of fire lines. I am also satisfied that its release would assist in the public's understanding of the interactions between Coillte, the NPWS, and the Department in such instances. Given the importance of reflecting on lessons learned and the interactions between the three entities concerned in the context of environmental protection, I consider that there is a strong public interest in such insight.

41. As outlined above, the exception provided for in article 9(2)(d) of the AIE Regulations is designed to protect the "private thinking space" of public authorities. I accept that there is a strong public interest in protecting the space required by public authorities to think in private, engage in reflection, and pursue internal discussions. However, while the information at issue clearly contains some detail of the internal considerations of Coillte with regard to its preparation of the lessons learned document and mitigation plan, the information is either at a very high level or has already been released to the appellant. Furthermore, the emails were sent over two years ago and the lessons learned document has been completed and circulated to both NPWS and the Department. In my view, the impact of the disclosure of the information at issue should have no serious impact on the willingness of Coillte staff members, in particular senior managers, to

prepare similar internal communications or lessons learned documents in the future and should not undermine the maintenance of the "private thinking space" of Coillte.

Decision

42. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul Coillte's decision in respect of record 4. I direct the release of the record, subject to the redaction of the information contained in the email dated 17 February 2020, which falls outside the scope of this review.

Appeal to the High Court

43. 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
6 January 2023