

Standard acceptance letter to the FOI body (records required)

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 CEI/18/0026

Date of decision: 19 December 2018

Appellant: Mr X

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

Issue: Whether the Department was justified in refusing access to three categories of records relating specifically to certain "GLAS" applications involving penalties

Summary of Commissioner's Decision: Having carried out a review in accordance with article 12(5) of the AIE Regulations, the Commissioner found that the Department was justified in refusing access to the information sought under article 8(a)(i) and affirmed its decision accordingly.

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

In a request dated 14 May 2018, the appellant sought access to three categories of records relating to the Green, Low-Carbon, Agri-Environment Scheme (GLAS: (1) details for GLAS applicants who were issued with penalties under the coppicing of hedgerows or laying of hedgerows measures; (2) a "suitably" redacted" copy of the Record Sheets for the farms referred to in category 1 showing the date(s) and length(s) layed or coppiced (m) and maintenance thereafter; and (3) a copy of inspector reports for the farms referred to in category 1. His request followed a previous request for details of GLAS applications involving hedge coppicing and laying measures where the "accumulative length of works in a single application is equal to or exceeds 500m". The previous request, which was the subject of a review carried out in [Case CEI/18/0013](#), was granted in part and thus the appellant has already been granted access to many of the details that he now seeks specifically in relation to GLAS applicants who have been issued with penalties. Such details include the date of application; tranche of GLAS; county; length of coppicing; and length of hedge laying. According to an exchange of emails that occurred subsequent to the request, herd reference numbers were also provided in some instances. During the course of my review in Case CEI/18/0013, the appellant was also granted access to the District Electoral Division (DED) identifiers that were available from the Land Parcel Identification System (LPIS) numbers included in the GLAS applications. I found that the Department's decision to refuse access to the townland details also sought was justified under article 8(a)(i) of the AIE Regulations.

In this case, the Department made a belated decision on 6 July 2018 refusing the appellant's request under section 8(a)(i) of the AIE Regulations on the basis that disclosure of the information sought would adversely affect the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law. The Department also stated that it did not hold the requested record sheets; this was an apparent reference to article 7(5) of the AIE Regulations, which is the relevant provision to consider where the question arises as to whether the requested information is held by or for the public authority concerned. On 9 July 2018, the appellant applied for an internal review of the Department's decision, but in a decision dated 7 August 2018, the Department affirmed its original decision to refuse the request under articles 7(5) and 8(a)(i) of the Regulations. The appellant subsequently appealed to this Office against the Department's decision.

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 Department and the appellant. I have also had regard to: the Guidance provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations; Directive 2003/4/EC, upon which the AIE Regulations are based; The Aarhus Convention: An Implementation Guide (Second edition, June 2014) [the Aarhus Guide] relating to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is more commonly known as the Aarhus Convention; and also the text of the Aarhus Convention itself.

Scope of the Review

I note that this is my third review involving a request by the appellant for records relating to GLAS applicants, though it is the first relating specifically to applications involving penalties. In [Case CEI/18/0015](#), the appellant sought access to "suitably redacted" record sheets for 15 particular GLAS applications involving the laying of hedgerows. The Department refused the request on the basis that the record sheets were not held by or for it. In my decision, I accepted the Department's position that record sheets are generally maintained by the individual GLAS participants and that the Department does not have a legal entitlement to demand a copy of the record sheets simply by reason of the contractual relationship that exists between it and the participants. While the appellant continues to argue in this case that the contractual relationship means that records sheets in the possession of individual GLAS participants should be regarded as Departmental records held on behalf of the Department, I find no reason to reconsider my decision in Case CEI/18/0015.

However, in Case CEI/18/0015, it was acknowledged that a copy of the record sheets may be provided to the Department in the event of an issue arising with the record-keeping that may result in penalties. In a submission made in this case dated 22 October 2018, the Department explained that there are 363 GLAS applications relevant to appellant's request. It confirmed that a copy of the relevant record sheets may in fact be held where an issue arose in relation to the record keeping in addition to the coppicing or laying of hedgerow activities. According to the Department, in some cases, record sheets are not produced on the day of the on-site inspection. In these cases, the GLAS participant may be permitted to send the record sheets directly to the inspector within a specified time period. If an issue is identified in respect of the record sheets provided, a copy is retained. Otherwise the procedure is for the records sheets to be returned to the participant without a copy being made. In addition, where the deadline for providing the record sheets is not met and a penalty is imposed, the inspector is no longer required to seek the records, i.e. the participant may simply accept the penalty rather than comply with the request to produce the record sheets in the first instance. However, there are some instances in which individual inspectors retain a copy of all or part of the submitted record sheets contrary to procedure.

Thus, my review in this case is concerned solely with the question of whether the Department was justified in refusing access to the information sought regarding GLAS participants who have been issued with penalties under the coppicing of hedgerows or laying of hedgerows measures, including the relevant record sheets that it holds.

Analysis and Findings

The grounds for refusal of a request for environmental information are set out in articles 8 and 9 of the AIE Regulations, but any proposed refusal is subject to the provisions of article 10 of the Regulations. Article 10(1) states: "Notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment". Article 10(3) of the Regulations requires public authorities to consider each request on an individual basis and to weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest. I take article 10(4) to mean, in line with the Minister's Guidance, that there is generally a presumption in favour of the release of environmental information. However, as discussed below, this is subject to the strong protection afforded to the right to privacy under

European and Irish law. In addition, I note that, while article 10(5) provides that a request should be granted in part where environmental information may be separated from other information to which article 8 or 9 applies, I consider that article 10(5) applies only where it is reasonably practicable to sever the information concerned and that a reasonable and proportionate approach should be taken in determining whether to grant access to information in part.

Article 8(a)(i) provides for the refusal of environmental information where disclosure of the information would adversely affect the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law. Although article 8(a)(i) refers to “personal information”, both the AIE Directive and the Aarhus Convention in the corresponding exception to article 8(a)(i) refer to “personal data”. Article 4 of the AIE Directive provides that Member States shall ensure that the requirements of Directive 95/46/EC are complied with (Directive 95/46/EC has been repealed and replaced by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, more commonly known as the General Data Protection Regulation (GDPR)). ‘Personal data’ is any information or data relating to an identified or identifiable natural person. Article 4(1) of the GDPR specifies, moreover, that “an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”. I further note that, in Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen (Schecke)*, available [here](#), the CJEU stated that “[n]o automatic priority can be conferred on the objective of transparency over the right to protection of personal data . . . even if important economic interests are at stake”.

GLAS is a scheme designed under the Common Agricultural Policy (CAP) that provides funding to farmers who undertake, on a voluntary basis, to carry out activities that promote biodiversity, protect water quality, and help combat climate change. It is intended to achieve the objectives of Articles 28 and 30 of Regulation (EU) No. 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD). To comply with the scheme, an applicant must fulfil a number of core requirements, including the requirement to have a qualified agricultural advisor prepare and submit the GLAS application. The terms and conditions of the scheme specify that a participant must be the holder of an active herd number with Herd Owner status and must also have all lands farmed declared in his/her name on the Integrated Administration and Control System (IACS).

In Case CEI/18/0013, I referred to the publication requirements under EU Regulation 1306/2013 that apply to all beneficiaries of CAP funding. I noted that the Regulation was adopted in part to order to bring EU rules on transparency with respect to CAP payments in line with the principle of proportionality following the CJEU's *Schecke* judgment. I also noted that CAP beneficiaries are required to be informed of the publication of their personal data before that publication takes place.

In the context of this case, I further note that Recital 63 of Regulation 1306/2013 states: “As personal data or business secrets might be involved in the application of national control systems and the conformity clearance, the Member States and the Commission should guarantee the confidentiality of information received in that context.” Article 103, in turn,

requires that Member States and the Commission to "take all necessary steps to ensure the confidentiality of the information communicated or obtained under inspection and clearance of accounts measures implemented under [the] Regulation". I further note that Recital 78 of the Regulation indicates that the publication requirements under the Regulation, as discussed in Case CEI/18/0013, are intended to satisfy the need for transparency for the purposes of "public control" in respect of individual CAP beneficiaries. In the circumstances, it seems to me that GLAS participants generally have a reasonable expectation that information relating to their GLAS applications will be treated as confidential personal data (or business secrets in appropriate cases) apart from the information that is required to be published under Article 111 of the Regulation. The GLAS application itself relates to an identifiable individual and his/her property and employment as a farmer.

As indicated above, the appellant now seeks many of the same details previously sought in Case CEI/18/0013, but specifically in respect of GLAS applications involving penalties. In the circumstances, I do not consider that it would be appropriate to examine the requested details in isolation in determining whether they qualify as personal information or data for the purposes of article 8(a)(i) of the AIE Regulation. Any details sought in this case could be cross-matched with those previously released, in the context of other information that is publicly available, and thus disclosure runs the risk of identifying the particular applications involving participants who have been issued with penalties. It is simply not practicable to determine how much information about the relevant GLAS applications can be disclosed without an individual participant becoming identifiable.

Where information relating to a GLAS participant has been communicated or obtained under inspection measures, "all necessary steps" must be taken to ensure its confidentiality. Any penalties issued under the scheme would necessarily have arisen as a result of an inspection, which is part of the national control system administered by the Department. I am therefore satisfied that Regulation 1306/2013 requires the Department to treat as confidential any details that could be used to identify individual GLAS applications involving penalties. It follows that the Department is also required to treat as confidential any record sheets and inspection reports that it holds relating to such applications. Accordingly, I find that all three categories of records sought by the appellant in this case fall within the exception to access provided for by article 8(a)(i) of the AIE Regulations.

In relation to the the public interest test under article 10(3) of the AIE Regulations, I note that the right to privacy is afforded strong protection under both European and Irish law. The right to privacy and the right to data protection are fundamental rights under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ("the Charter"). The right to privacy has also been recognised by the Irish courts as an unenumerated right under Article 40.3 of the Irish Constitution. I therefore consider that there is a very strong public interest in upholding an individual's right to privacy and right to data protection. While neither right is absolute, I consider that privacy and data protection rights should be set aside only where the public interest served by granting the request is sufficiently strong to outweigh the public interest in protecting privacy and personal data. In this case, as in Case CEI/18/0013, I find that the information published under EU Regulation 1306/2013 together with the additional details previously made available to the appellant satisfies the public interest in openness and transparency in relation to GLAS to a large extent. I am therefore satisfied that the public interest served by disclosure of information relating specifically to GLAS applications involving penalties does not outweigh the interest served by refusal. I am also satisfied that it is not reasonably practicable to apply article 10(5) in the circumstances of this case.

Decision

In accordance with article 12(5) of the AIE Regulations, I have reviewed the decision of the Department in this case. I find that Department's decision to refuse the appellant's request for access to information relating specifically to GLAS applications involving penalties was justified under article 8(a)(i) of the Regulations. I affirm the Department's decision accordingly.

Appeal to the High Court

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.

Peter Tyndall
Commissioner for Environmental Information
19 December 2018