Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

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-93418-X2F2P8

Date of decision: 17 September 2021

Appellant: Mr. X

Public Authority: Department of Foreign Affairs (the Department)

Issue: Whether the Department was justified in refusing access to information relating to flights and hotels paid for or refunded by Irish Aid for members of the 2018 Election Observation Roster attending training in Dublin on the basis that the request was manifestly unreasonable, within the meaning of article 9(2)(a) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the Department's refusal to provide access to the information requested was not justified under article 9(2)(a).

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 18 March 2020, the appellant requested details of flights and hotels paid for or refunded by Irish Aid for members of the 2018 Election Observation Roster that needed to attend training in Dublin concerning election observation.

2. On 16 April 2020, the Department refused access to the information on the ground that the information requested does not fall within the definition of environmental information in article 3(1) of the AIE Regulations.

3. On 23 April 2020, the appellant requested an internal review of the decision.

4. On 22 May 2020, on internal review the Department affirmed the decision to refuse access to the information on the ground that the information requested was not environmental information. The Department stated that, if it was environmental information, article 8(a)(i) would apply to justify refusal of access to the information.

5. The appellant brought this appeal to my Office on 22 May 2020.

6. 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 by the Department. I have also examined the contents of the records at issue. In addition, I have had regard to:

    - the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance);
    - Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
    - the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
    - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the Aarhus Guide).

7. What follows does not comment or make findings on each and every argument advanced but I have considered all materials submitted in the course of the investigation.

Preliminary matters

Grounds of refusal

8. The Department decided on internal review that the information requested was not environmental information. During the course of the investigation by my Office, and in light of the recent decision in *Right to Know CLG v. Commissioner for Environmental Information and Raidio Teilifís Éireann* [2021] IEHC 353 (the RTÉ case), the Department accepted that the information requested is

environmental information. It is therefore no longer in dispute between the parties whether or not the requested information constitutes environmental information.

9. The Department's internal review decision referred to the application of article 8(a)(i) in respect of the information requested. On a natural reading of the appellant's request, my view is that the scope of the request is confined to records containing *details of that which was paid for or refunded* (i.e. flights and hotels and their costs), together with any contextual information relevant to understanding those details. The appellant's request would not include, for example, the contact or other personal details of persons to whom expenses were refunded. In correspondence with my Office, the Department conceded that personal information contained in the records falls outside the scope of the request and could be separated from the information in the records which falls within the scope of the request.

10. Following its conclusions above, the Department submitted to my Office that the request may be refused because the request is manifestly unreasonable, within the meaning of article 9(2)(a) of the AIE Regulations. My Office invited the Department to write to the appellant, setting out its revised position and the Department did so on 25 May 2021. I refer to the Department's letter as the Department's "revised decision".

11. The appellant requested that I reject the Department's reliance on a fresh ground for refusal as an abuse of process and exercise my power under article 12(5)(c) of the AIE Regulations to require the Department to make available the requested information, without considering the exception. I do not consider that the Department's reliance on a new ground for refusal amounts to an abuse of process. I am satisfied that the Department changed its view as to whether the information in question is environmental information in light of the clarity provided by the High Court in the *RTÉ* case. Having accepted that the requested information is environmental information, and that the AIE Regulations apply to that information, the Department submitted that an exception under the AIE Regulations could be relied upon to refuse access to the information. In these circumstances, I could have made a decision annulling the Department's decision on internal review on the ground that the information is environmental information and remitted the case to the Department to consider the request again. However, the most expeditious way to resolve the matter in this case is to proceed with my review on the basis of the Department's revised decision.

Exchange of submissions

12. The appellant requested access to a copy of the Department's submissions to my Office. My Office did not facilitate the exchange of submissions in this case. The appellant referred me to the judgment of the Supreme Court in *J&E Davy v Financial Services Ombudsman* [2010] IESC 30 (the *Davy* case). The appellant also requested that I make a preliminary reference to the Court of Justice of the European Union as to whether the AIE Directive requires the exchange of submissions in appeals to my Office.

13. Neither the AIE Regulations nor the AIE Directive prescribe the procedures to be adopted by my Office. As set out in paragraphs 20.1 and 20.2 of its Procedures Manual, the policy of my Office is that, in general, submissions will not be exchanged between parties to a review, although in exceptional cases submissions may be exchanged with the consent of the relevant parties. This is to enable investigative procedures to be flexible and expeditious, as well as to ensure the protection of sensitive information. I have had regard to the analysis of O'Regan J in paragraphs 20 to 30 of *Electricity Supply Board v Commissioner for Environmental Information and Lar McKenna* [2020] IEHC 190. I note that the Supreme Court in the *Davy* case found: "*The seriousness of the matter being considered and of the consequences of the same are relevant as the requirements of natural justice may vary with the particular facts and circumstances of the case.*"

14. I have considered whether, in this case, the exchange of submissions is necessary to satisfy the requirements of natural justice. The Department set out its position on the material issue in this appeal in a letter to the appellant. My investigator then wrote to the appellant summarising any additional matters included in the Department's submissions to my Office. I note that, in this case, the seriousness of the matter being considered and the consequences of my decision are substantially different to the matters at issue in the *Davy* case. I am satisfied that, in the particular circumstances of this case, the exchange of submissions was not required to ensure fair procedures.

Scope of Review

15. 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.

16. In its revised decision, the Department refused the appellant's request for information on the basis that the appellant's request was manifestly unreasonable. My review is therefore concerned with whether the Department is entitled to rely on article 9(2)(a) of the AIE Regulations in respect of its refusal to provide access to the information requested.

The positions of the parties on article 9(2)(a)

17. The Department submits that the appellant's overall behaviour towards the Department is manifestly unreasonable and, by extension, so is the request which is the subject of this appeal. Although the appellant's request is for a small volume of information, the Department submits that the request should be considered in light of the appellant's broader pattern of behaviour. The Department states that the appellant has used requests for information as a way to pursue a grievance with the Department. The Department submits that the sheer volume of the appellant's overall correspondence constitutes an abuse of process, including his use of statutory requests for information, namely freedom of information requests (FOI requests), subject access requests (SARs) and requests for access to information on the environment (AIE requests).

18. The Department states that the appellant corresponded with it 228 times in the period from the start of 2018 until the submission of his AIE request. In addition, in the two years leading up to his AIE request, the appellant had submitted 13 FOI requests (with 9 requests for internal reviews, 6 appeals to the Information Commissioner and one appeal to the High Court) and 5 SARs. The Department states that the appellant has engaged in further correspondence with the Department since the submission of the AIE request, including further FOI requests, SARs and AIE requests. In relation to the impact of the stated behaviour on the functioning of the Department, the Department relies on its "Review of the Management of the Election Observation Roster", published in February 2021, where it describes the impact of transparency requests on the Department at paragraph D, pp.31-36.

19. In relation to the public interest balance, the Department states that it has had regard to an individual's right to make transparency requests under freedom of information and GDPR legislation as well as AIE regulations. Conversely, it states that it has considered the consequences of the abuse of that right of access: the expenditure of public resources (time, money and labour) in the cause of one individual's grievance. The Department is of the view that one individual's vexatious use of the AIE regulations does not constitute a benefit to the public interest and that rather the public interest is undermined by the continued expenditure of resources to deal with it.

20. The appellant's position is that the exception in article 9(2)(a) is confined to requests which are voluminous and that his request is not voluminous. The appellant submits that article 9(2)(a) may be compared with section 15(1)(c) of the Freedom of Information Act 2014. In relation to the Department's reliance on its published Review of the Management of the Election Observation Roster, the appellant submits that the report is not independent and that the appellant should have been, and was not, given an opportunity to make a submission in respect of its drafting. The appellant points to a previous instance of similar information being disclosed in response to a Parliamentary Question (see here).

Analysis and findings

21. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increased public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive.

22. The scheme of the AIE Directive is to provide for a general right of access to environmental information on request (Article 3) with specific, exhaustive exceptions to that general right of access (Article 4). Recital (16) informs the approach that must be taken to the Directive, providing that: "The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases."

23. Article 4(1)(b) of the AIE Directive provides that "Member States may provide for a request for environmental information to be refused if the request is manifestly unreasonable". The European

Commission's First Proposal for the AIE Directive 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*. Moreover, 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. Authorities should be able to refuse access in such cases in order to ensure their proper functioning." The Aarhus Convention Compliance Committee has emphasised 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 reason for the request, which is not required to be stated." (Report adopted on a request for advice by Belarus, ACCC/A/2014/1, paragraph 28)

24. However, the exception enabling a request to be refused as manifestly unreasonable under article 9(2)(a) of the AIE Regulations includes the additional words "having regard to the volume or range of information sought". There is a presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used (*Cork County Council v Whillock* [1993] 1 IR 231). In addition, article 10(2) of the AIE Regulations requires grounds of refusal to be interpreted restrictively, so where two interpretations of an exception are possible, the more restrictive interpretation must be adopted.

25. The words "have regard to" are often used in legislation to place a duty on an identified person to consider certain matters, for example the guidance of a Minister or factors, when coming to a decision. In such cases, the duty is to give full and reasonable consideration to the relevant matter, no more and no less (see *McEvoy v Meath County Council* [2003] 1 IR 208). This is the way that the term is used in articles 7(10) and 14(2) of the AIE Regulations. However, in article 9(2)(a) there is no comma before the term "having regard to", suggesting that the words "having regard to" qualify the term "manifestly unreasonable" rather than applying to any consideration by the public authority. I also note that sub-paragraphs (b) and (d) of article 9(2) state ", taking into account …" to identify matters which must be considered when concluding whether a request has been formulated in too general a manner or concerns internal communications. If the term "having regard to" in article 9(2)(a) had been intended to have the same meaning, one would have expected the same language and punctuation to be used in article 9(2)(a), (b) and (d). Taking this all into account, I conclude that the term "having regard to" in article 9(2)(a) is used in the same manner is it is used in Article 34 of the Irish Constitution, to denote "due to" or "as a result of". In other words, article 9(2)(a) provides that a public authority may refuse to make environmental information available where the request is manifestly unreasonable due to the volume or range of information sought.

26. This meaning is consistent with the understanding of the Minister who enacted the provision, as evidenced by paragraph 12.8 of the Minister's Guidance. That states that "a public authority may refuse to make information available if the request is considered unreasonable due to the range of material sought". I also note that Ireland is entitled, in implementing the AIE Directive, to permit public authorities to rely on more limited (but not more generous) exceptions than those set out in Article 4 of the AIE Directive. Article 4(1)(b) of the AIE Directive grants Member States a mere

option (as can clearly be seen from the use of the verb "may") to provide for refusal to grant a request for information in certain specified cases (see C-233/00 *Commission v. France*, paragraph 78).. Accordingly, in order for a request to be refused as manifestly unreasonable under article 9(2)(a) of the AIE Regulations, the request must, at the very least, seek information which is voluminous or wide-ranging.

27. I have considered whether a request might be found to be voluminous or wide-ranging, in accordance with article 9(2)(a), solely on the basis that it is one of a series of requests. However, such an approach would be inconsistent with article 10(3) of the AIE Regulations and Article 4(2) of the AIE Directive, which require consideration of each request on an individual basis and the weighing of the public interest in each particular case. Those provisions, and the scheme of the AIE Regulations generally, suggest an intention on the part of the legislator to expressly permit repeated requests for environmental information.

28. In this case, the information held by the Department is contained in seven records. The request is neither voluminous nor wide-ranging. In those circumstances, it is not open to the Department to rely on article 9(2)(a) to refuse access to the information requested. Accordingly, I am satisfied that the Department's refusal to provide the information was not justified.

Decision

29. Having carried out a review under article 12(5) of the AIE Regulations, I annul the Department's decision. Under article 12(5)(c) of the AIE Regulations, I require the Department to make any information falling within the scope of the appellant's request available to the appellant, taking into account paragraph 9 above in relation to personal information.

Appeal to the High Court

30. 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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Peter Tyndall
Commissioner for Environmental Information
17 September 2021