



**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 CEI/17/0047**

**Date of decision:** 26 September 2018

**Appellant:** Ms AB

**Public Authority:** Department of Housing, Planning, Community and Local Government (the Department)

**Issues:** Whether the Department was justified in refusing the appellant's AIE request for information relating to a specific foreshore lease application

**Summary of Commissioner's Decision:** In accordance with article 12(5) of the AIE Regulations, the Commissioner reviewed the Department's decision. He found that processing the AIE request would place an unreasonable administrative burden on the Department so that the AIE request was manifestly unreasonable under article 9(2)(a). He went on to find that the interest in maintaining the exception in article 9(2)(a) outweighed the public interest in disclosing the information sought. He affirmed the Department's decision.

**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**

On 25 August 2017, the appellant made a request to the then Department of Housing, Planning, Community and Local Government (the Department) under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations) for access to the following information:

“all information (including all records, documents, files, consultations, all communications (internal and external) by any and all means - including minutes, notes, post-its, notations, memos, material, data, entries, logs, texts, reports, files, folders, etc.), relating to and/or referring to [a specified Foreshore Lease Application], held by the DHPLG (previously DHPCLG, DECLG, and all previous titles) dating from 01/01/2014 up to the date of your final reply. My request is to all divisions within the DHPLG (and the department's previous titles.)”.

The Department wrote to the appellant on 22 September 2017 stating that the AIE request was “deemed to be made in too general a manner” and invited the appellant under article 7(8) of the AIE Regulations to narrow the scope of the AIE request. The member of staff who wrote the letter provided her contact details in the event that she could assist the appellant in relation to her AIE request. The letter also brought to the appellant’s attention the fact that over 3,200 pages of information relating to the Application are published on the Department’s website. The Department stated that, once the matter had been finalised, additional information would be published on its website. A decision was made on the Application in December 2017 and further information relating to the Application was subsequently published on the Department’s website.

A decision on the appellant’s AIE request fell due on 24 September 2017. As no such decision was notified to the appellant by that date, the AIE request was deemed refused pursuant to article 10(7) of the AIE Regulations.

The appellant requested an internal review of the Department’s deemed refusal on 19 October 2017. On 16 November 2017, the Department notified the appellant of its internal review decision. That internal review decision stated that it did not find any grounds to reverse the decision which was deemed refused. It went on to state that it deemed that the AIE request was “too general in manner”. It also drew attention to the fact that a substantial amount of information relating to the Application was available on its website. Although the Department’s internal review decision did not cite article 9(2)(b), it is clear from its decision that it refused the appellant’s request on the basis the request was formulated in too general a manner. The appellant appealed to my Office on 12 December 2018.

In carrying out my review I have had regard to submissions of the parties and 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);
- the Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the Aarhus Guide).

### **Scope of Review**

The appellant submitted that she would be satisfied with not receiving the information relating to the relevant foreshore application (the Application) that is on the Department’s website. While the Department made only a limited effort to assist the appellant in accordance with article 7(8), I note that the appellant does not appear to have informed the Department when it was processing her AIE request that she would be satisfied not to receive the information already available on its website. It is regrettable that the appellant did not engage with the Department in an attempt to narrow the scope of her AIE request. I also note that the Department refused the appellant’s request in its entirety for being too general in manner. As a result, no environmental information was considered in respect of the request. I do not see it as my role to make a first instance decision on the release of information that the Department did not consider. My review is concerned solely with the question of whether the Department was justified in refusing the AIE request as initially formulated i.e. for access to “all information” held by the Department relating to the Application, including the information which is publicly available on its website.

### **Preliminary matter**

Before I proceed with my review, there is a preliminary matter that I would like to address. The Department refused the appellant’s AIE request under article 9(2)(b) on the basis that the request was formulated in too general a manner. Under article 10(3) a public authority must weigh the public interest served by disclosure against the interest served by refusal in each AIE request. Article 10(4) provides that the grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.

The High Court in *Right to Know v An Taoiseach & Anor* [2018] IEHC 371 (*Right to Know*), available at [www.courts.ie](http://www.courts.ie), held, amongst other things, that a public authority may only refuse access to environmental information where articles 10(3), (4) and (5) of the AIE Regulations have been substantively and procedurally adhered to (see para. 80). The Court stated that the obligations in those articles are mandatory (see para. 87). I also note that the Court stated that “the absence of any indicator” in the internal review decision that was the subject of that case suggested that no balancing exercise was carried out. I note that in this case the internal review decision did not demonstrate that consideration had been given to the public interest in disclosure. I also note that the Department failed to state whether it had considered the public interest test at all. I consider that in failing to address the public interest test in its internal review decision the Council failed to meet its obligation under article 10(3).

### **Analysis and Findings**

In my view article 9(2)(a) is the most relevant provision in this case. Article 9(2)(a) of the AIE Regulations allows a public authority to refuse access to environmental information where the request is manifestly unreasonable "having regard to the volume or range of information sought".

#### **The public authority’s position**

The Department in its letter dated 22 September 2017 informed the appellant that over 3,200 pages of information relating to the Application are available on its website. During this review, it submitted that the number had risen to approximately 3,500 pages. In its submission the Department estimated that it would take at least 63 hours, or nine days, to compile a schedule of records for the AIE request. While I note that a schedule of records is not required under the AIE Regulations, I have stated in previous decisions that I consider the provision of a schedule of records in response to an AIE request to be best practice. The Department stated that it would take 105 hours, or 15 days, to examine the records for (i) environmental information and (ii) to redact/withhold information. It also stated that it would take 21 hours, or three days, to match the records on paper files with those already published. In addition, it submitted that it could have refused the AIE request on the basis that it would be prohibitively expensive to process.

#### **The appellant’s position**

The appellant submitted that the AIE request is clear in that it limits the environmental information sought to one specific foreshore planning application. She acknowledged that processing the request may require significant resources and involves a large amount of

information. However, the appellant argued that she believed that “disclosure of the information sought outweighs the “onerous task” involved”, given the nature of the Application. The appellant stated that while a substantial amount of information relating to the Application is available on the Department’s website a substantial amount of information is not equivalent to all information. The appellant continued that she was satisfied not to receive information which is already published on the Department’s website. In addition, the appellant said that she believed the Department held additional information relating to the Application which had not been provided either online or in response to her AIE request.

### **Consideration of Article 9(2)(a)**

While article 9(2)(a) refers to a request being manifestly unreasonable having regard to the volume or range of information sought, the volume or range of information requested alone is not enough to refuse a request. Rather, the volume or range is a consideration to be taken into account when determining if a request is manifestly unreasonable where, for example, processing the request places an unreasonable administrative burden on the relevant public authority, diverting it away from its core work.

As noted above, the Department submitted that it would take nine days to prepare a schedule of records for the appellant’s AIE request. It also submitted it would take 15 days for it to review the information to determine if it was environmental information and if any of it should be redacted and that it would take three days to cross reference paper files with the information on its website. The member of staff within the Department who provided my Office with these estimates explained that they were based on her experience as an AIE decision maker. Determining what is or is not environmental information is not necessarily a straightforward matter. I am willing to accept that where there are over 3,500 pages of information (as is the situation in this case) that it would take a substantial amount of time to determine what is environmental information and if any of the exceptions to disclosure in articles 8 and 9 apply and to prepare a schedule of records for this. I am also willing to accept that it would take several days to cross reference the paper files with the information available on the Department’s website. It seems likely also that the estimates provided do not include any provision for identifying and contacting any third parties who might potentially be adversely affected or, in terms of article 12(3)(b) of the AIE Regulations, “incriminated by” the disclosure of environmental information. Given the broad all-encompassing nature of the AIE request and the large volume of information it covers (which is evident from the amount of information relating to the Application the Department has made available on its website) and the experience of the person who estimated the amount of time it would take to

process the request, I consider that the Department's estimates for the amount of time it would take to process the appellant's AIE request are reasonable.

The Department also submitted that it could have refused the AIE request on the basis that it would be prohibitively expensive to process. The Department estimated that the cost of processing the appellant's AIE request would be €3,200. The Department provided a breakdown of how it estimated that cost. My Office provided the appellant with a copy of that breakdown of estimated costs, and I see no need to detail it here. Unlike with the Freedom of Information Act 2014, there is no provision in the AIE Regulations which allows a public authority to refuse an AIE request where the charge for processing the request exceeds, or is likely to exceed, a prescribed amount. Therefore, I do not accept that the cost of processing the appellant's AIE request is a ground for refusing the request under the AIE Regulations. However, I do consider that the estimated cost for processing an AIE request is something which I can take into account in considering whether an AIE request would place an unreasonable administrative burden on the relevant public authority, diverting it away from its core work. Due to the amount of time it would take to process the AIE request, I am willing to accept that processing the request would require substantial resources.

I have seen no evidence in the course of this review which contradicts the Department's submission that it would take a large amount of time, at a high cost, to process the appellant's AIE request. On the contrary, given the volume of information captured by the AIE request and the experience of the person who produced the estimates for the amount of time and cost it would take to process the request, I accept that it would take the Department a considerable amount of time and other resources to process the AIE request. I note that the appellant acknowledged that the information sought involves a large amount of information and that disclosing it may require a significant amount of resources. I am of the view that the time and other resources that would be required to provide the appellant with all environmental information relating to the Application would result in a disproportionate diversion of resources from the Department's core work, in particular, the work of the unit which would be responsible for processing the request. I therefore find that processing the AIE request would place an unreasonable administrative burden on the Department, that the appellant's AIE request is manifestly unreasonable and that article 9(2)(a) applies to it.

## **Public interest test**

Article 10(3) requires that a public authority "consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal."

Article 10(4) of the AIE Regulations specifies a restrictive interpretative approach to the all exceptions having regard to the public interest served by disclosure.

In favour of disclosing the information the appellant submitted that the Application involves:

- numerous areas of the environment protected by legislation;
- a significant length of time in that the lease would be for a period of 35 years on the foreshore;
- 557 submissions from the public on the Application and
- a planning application which required public consent.

I accept that the above points are all public interest factors in favour of release of the information. The points raised by the appellant above support the general public interest that lies in ensuring openness and transparency in relation to a public authority's processing of planning and related applications in relation to various consents for works.

The internal review decision maker in the Department stated that he "would not have judged it in the public interest to require the Department to prepare for release over 1,700 documents, particularly in view of the fact that documentation relevant to the licensing process was already published on the Department's website and the applicant was informed of this". The large amount of information relating to the Application which the Department has made available on its website is noteworthy, and I consider that this goes a long way in satisfying the public interest in openness and transparency in relation to the Application at the centre of this case. Again I note that the appellant acknowledged that the information sought involves a large amount of information and that disclosing it may require a significant amount of resources and would be an onerous task for the Department. I also recognise the disproportionate administrative burden that would be imposed on the Department if it were to process the AIE request as it stands. In addition, I consider that there is a public interest in protecting the integrity of the AIE regime and making sure that the AIE Regulations are used responsibly.

In the circumstances of this case, I find that the public interest favours maintaining the exception in article 9(2)(a) as processing the AIE request would place unreasonable administrative burden on the Department which, in the circumstances of this case, outweighs the public interest in disclosing the information sought.

### **Decision**

In accordance with Article 12(5) of the AIE Regulations, I have reviewed the decision of the Department in this case. I affirm the Department's decision to refuse the appellant's AIE request on the basis that article 9(2)(a) of the AIE Regulations applies to it.

### **Comment**

I note that it is open to the appellant to make a new AIE request focussing on specific environmental information which would avoid the difficulties created by the volume and complexity of the information sought in the current request. It seems to me that the applicant should be in a position to examine the information on the website and (if necessary with some assistance from the Department) to identify the types of environmental information about the Application e.g. particular stages in the process which have not been published and which she wishes to have.

### **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**

26 September 2018