



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-111820-N9T6W7, OCE-111842-S3M9P3, OCE-111844-T0F6R5, OCE-
111846-Z5C9T1

Date of decision: 01 July 2022

Appellant: Organisation XYZ c/o Mr X

Public Authority: Land Development Agency (the LDA)

Issue: Whether the LDA was justified, under article 9(2)(a) of the AIE Regulations, in refusing access to information coming within the scope of four requests submitted by the appellant.

Summary of Commissioner's Decision: The Commissioner annulled the LDA's decision. He directed the LDA to undertake a fresh decision making process in respect of each of the four requests.

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 28 April 2021, the appellant submitted 93 separate requests to the LDA seeking access to information under the AIE Regulations. It stated that it required the information urgently and before 12 May 2021.
2. On 12 May 2021, the LDA wrote to the appellant in respect of all 93 requests and stated that it would be treating them as one request. It stated that such an approach should ensure that a single fee would be applicable in the event that the appellant wished to bring an appeal to my Office. The LDA also referred to article 9(2)(a) of the AIE Regulations, explaining that the provision provides that a public authority may refuse to make environmental information available where a request is manifestly unreasonable having regard to the volume or range of information sought. It further indicated that the appellant's request was too broad and stated that a significant reduction in the volume and range of material being sought was needed. It asked the appellant to get in contact, should it require assistance in narrowing the scope.
3. On 3 June 2021 (dated 3 May 2021, in error), the LDA issued its original decision to the appellant in respect of the combined request. It refused access to all of the information sought in full under article 9(2)(a) of the AIE Regulations and noted that no correspondence had been received with regard to narrowing the scope of the information sought. It also outlined that it was open to the appellant to refine its request and submit a new application under the AIE Regulations. On 9 June 2021, the LDA wrote to the appellant clarifying the date of its original decision and responding to a number of other queries raised by the appellant in correspondence dated 28 May 2021 that was received by the LDA on 8 June 2021.
4. By way of correspondence on 11 June 2021 and 24 June 2021, the appellant sought an internal review of the LDA's decision in respect of each of the requests. On 15 July 2021, the LDA affirmed its original decision under article 9(2)(a) of the AIE Regulations in respect of the combined request.
5. On 12 August 2021, the appellant submitted, and paid the required fees for, four separate appeals to my Office. In doing so, it noted that the LDA had combined its 93 requests, however, it was only seeking a review of the LDA's decision in respect of:
 1. Request 2003/4 EC – 3 (appellant's reference) seeking access to "a list, of: - all correspondence/documentation/pieces of paper generated, and all information known by [the LDA] that in any and all ways relate to regeneration of land and property ... including but not limited to, structures..." (OCE-111820-N9T6W7)
 2. Request 2003/4 EC – 41 (appellant's reference) seeking access to "a list, of: - all correspondence/documentation/pieces of paper generated, and all information known by [the LDA] that in any and all ways relate to green procurement of activities and services..." (OCE-111842-S3M9P3)
 3. Request 2003/4 EC – 77 (appellant's reference) seeking access to "a list, of: - all correspondence/documentation/pieces of paper generated, and all information known by [the LDA] that in any and all ways relate to SDG 13 Climate Action, including but not limited to its applicable targets of the 169 targets..." (OCE-111844-T0F6R5)



4. Request 2003/4 EC – 78 (appellant’s reference) seeking access to “copies, of: - all correspondence/documentation/pieces of paper generated, and all information known by [the LDA] that in any and all ways relate to SDG 13 Climate Action, including but not limited to its applicable targets of the 169 targets...” (OCE-111846-Z5C9T1)
6. During the course of this review, given the material change in circumstances (i.e. the reduction in the volume of information at issue) my Office sought to ascertain whether the LDA would be willing to re-process the four relevant requests, if the appellant agreed to this course of action. While the LDA indicated that it would be willing to do so, the appellant indicated that it required a binding decision.
7. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the correspondence between the LDA and the appellant as outlined above and to correspondence between my Office and both the LDA and the appellant on the matter. 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).
8. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of the Review

9. 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.
10. The scope of this review is concerned solely with whether the LDA was justified, under article 9(2)(a) of the AIE Regulations, in refusing access to information coming within the scope of four requests submitted by the appellant – Request 2003/4 EC – 3, Request 2003/4 EC – 41, Request 2003/4 EC – 77, and Request 2003/4 EC – 78.

Preliminary Matters

11. I consider that the scheme of the AIE Regulations, and of the AIE Directive upon which the AIE Regulations are based, makes it clear that there is a presumption in favour of release of environmental information.



12. 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.
13. As noted above, the appellant submitted, and paid the required fees for, four separate appeals to my Office. In the circumstances of these appeals, where the public authority issued a single decision on all four requests at issue, and where the grounds for refusal are not directly related to the content of particular records, I have decided that a composite decision is appropriate.

Analysis and Findings

14. 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. This provision seeks to transpose 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, and, in turn, is based on part of Article 4(3)(b) of the Aarhus Convention.
15. Article 9(2)(a) of the AIE Regulations must be read alongside article 10 of the AIE Regulations, which provides for certain limitations on the ability of a public authority to refuse environmental information. 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.
16. Having regard to the LDA's submissions to this Office, I would like to emphasise that article 9(2)(a) of the AIE Regulations and section 15(1)(g) of the FOI Act 2014 are separate and distinct provisions from two different access regimes. The language of section 15(1)(g) is not replicated in the AIE Regulations and it is not open to public authorities, or this Office, to rely on that provision when dealing with a request under the AIE Regulations. Article 9(2)(a) of the AIE Regulations, and the corresponding provision in the AIE Directive, is the only legislative provision that should be considered when dealing with this request.
17. In this case, the LDA considered the 93 requests submitted by the appellant, including the four requests at issue, together. It then refused access to all of the information sought under article 9(2)(a) of the AIE Regulations. The LDA outlined to this Office that it decided to consider the 93 requests as one request for a number of reasons, including:
 - the requests came in one envelope, from one organisation, and were similar in style;
 - the requests were similar and the responses would have been nearly identical;
 - all correspondence with the appellant needed to be sent by post – to answer each request would not have been environmentally friendly and would have placed a disproportionate administrative burden on the LDA, a burden which was increased due to the Covid-19 restrictions in place at the time; and
 - to ensure that only one fee would apply, should the decision be appealed to my Office.



18. The AIE Regulations do not provide a definition for what constitutes a request. The four appeals that are before me are very similar in nature, use the same terminology and request information on similar subject matter. The appellant submitted the requests to the LDA at the same time; indeed, they were all contained in one envelope. I do not believe it to be unreasonable for a public authority to consider separate pieces of correspondence that it receives from one party to be a multi-part request, especially in circumstances where doing so would achieve efficiencies in responding to the requester.
19. Whether dealing with 93 separate requests, or a smaller number of multi-part requests, it is incumbent upon the LDA to ensure that it complies with each of the requirements of the AIE Regulations. It is clear that the volume of information requested by the appellant represented a challenge for the LDA. As soon as possible upon realising that a response would not be issued within the timeframe specified by the appellant, or within one month of receipt of the request, the LDA should have notified the appellant that it required an extension of time to respond, as provided for under article 7(2)(b) of the AIE Regulations. This does not appear to have occurred in this case.
20. Further, when reaching a conclusion that the appellant's request(s) were manifestly unreasonable under article 9(2)(a) of the AIE Regulations, the LDA did not show that it had considered each element of the request. In particular, the requirements of 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, do not appear to have been fulfilled.
21. I note that the LDA, in its internal review decision, set out its view that the requests were made in a general manner, reflecting the wording of article 9(2)(b) of the AIE Regulations, although it did not specifically mention the provision. The LDA did not elaborate on this point in detail and its overall findings were made in the context of all 93 pieces of correspondence. There was no reference to any analysis that it had carried out under article 10(5) of the AIE Regulations on whether or not parts of the request could be separated in order to provide a response to those parts.
22. As a consequence, the LDA has not justified its decision to refuse access to the information sought in the four appeals at issue here, under article 9(2)(a) of the AIE Regulations. I consider that the most appropriate course of action to take is to annul the decision of the LDA in respect of the four appeals and direct it to undertake a fresh decision-making process in respect of each. In processing the requests afresh, the LDA should have full regard to the provisions of the AIE Regulations. Given comments made by the LDA to this Office regarding the lists sought, I would note that generally, prior to considering whether article 8 or 9 of the AIE Regulations applies, a public authority should assess whether the environmental information sought is held by or for them. As the LDA is aware, article 7(5) is the relevant provision to consider when the question arises as to whether requested environmental information is held by or for a public authority, however if a public authority wishes to rely on article 7(5) of the AIE Regulations in refusing access, it must set out its reasons for doing so.



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Decision

23. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul the LDA's decision under article 9(2)(a) of the AIE Regulations to refuse access to information coming within the scope of four requests submitted by the appellant. I direct the LDA to process the four requests afresh.

Right of Appeal

24. 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
01 July 2022