



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/20/0009**

Date of decision: 22 July 2020

Appellant: Raymond Neilon

Public Authority: Irish Aviation Authority (IAA)

Issues:

1. Whether the IAA's refusal of the request was justified
2. If it was not justified, whether it would be appropriate to require the IAA to release specific information to the appellant

Summary of Commissioner's Decision: The Commissioner noted that the IAA's refusal of the request was a deemed refusal. Since deemed refusals are refusals without reasons, the Commissioner found that refusal was not justified and he annulled it. He decided that it would not be appropriate to require the IAA to release specific information since it has not been established that the IAA holds relevant information. Noting that the IAA said that it is possible that it holds such information, the Commissioner remitted the matter to the IAA for a fresh search and decision. He noted the IAA's stated willingness to provide the appellant with the requested information if it is found.

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 31 January 2020, the appellant submitted the following AIE request to the IAA:

“Under the AIE regulations I wish to apply to the IAA for the 17 as constructed wind turbine coordinates that the IAA have received from the developers/ operators of Garracummer wind farm Hollyford County Tipperary as per conditions set down by ABP, planning file numbers for this development are 04/1259, 04/1034 and 04/1178 and are accessible in the planning portal at Tipperary Co. Council”.

The appellant later clarified to my Office that it is the planning files and their associated conditions, and not the wind turbine coordinates, that are accessible in the planning portal at Tipperary Co. Council.

The appellant was entitled to receive a decision before midnight on 28 February 2020. As he did not, the law deemed that the IAA had refused his request on 28 February 2020.

On 4 March 2020, the appellant requested an internal review. As he did not receive a review decision before midnight on 3 April 2020, he acquired a right of appeal. He exercised that right on 14 April 2020.

On 16 April 2020 my Office informed the IAA of the appeal. The IAA responded saying:

“Regrettably a response was not issued to [the appellant] due to a clerical error and the attached [letter] was issued to him on the 21st April 2020”.

The attached letter began with:

“I refer to your Access to Environmental Information request received by the Irish Aviation Authority (IAA) on 31st January 2020. As requested, ... the table below ... outlines the co-ordinates for the as constructed wind turbines that the IAA received from the developers/ operators of Garracummer Wind Farm in Hollyford County Tipperary, as per conditions set down by An Bord Pleanála (Ref: 04/1259, 04/1034 and 04/1178).”

The table which followed listed 15 sets of co-ordinates in latitude and longitude. The letter made no reference to the missed decision deadlines and offered no explanation as to why

two sets of coordinates were absent from the table. The IAA later told my investigator that all of the co-ordinates identified in its search were released.

The appellant wrote to the IAA saying:

“To be clear, what I am asking for is; a copy of the coordinates that the IAA received from the operators, as per planning conditions set down by An Bord Pleanála. I believe that the coordinates that you have forwarded may have come from an updated version from OSI maps, and that is not what I have requested in my last AIE Request”.

The IAA told my investigator that it was only on receipt of this email that it realised that the appellant sought a copy of the actual letter which initially notified the IAA of the turbine co-ordinates, as constructed. I do not fault the IAA for not realising that before this clarification was given. I understand that the IAA regards all reports of the building of new wind turbines as “obstacle notifications” and copies the details of such obstacles onto a register of obstacles to aviation. I understand that, in the current case, the IAA had taken data from that register to create the table which it gave to the appellant. The IAA told my investigator that, now that it knows exactly what the appellant seeks, it is willing to conduct a wider search, this time looking in a wider range of files to see if the original document(s) can be found. In IAA’s opinion, it is possible but unlikely that the requested information will be found. Moreover, the IAA, when asked about access to records by my investigator, explained that it had no access to its remotely stored files because of the Covid 19 crisis. My investigator informed the appellant of the IAA’s position and the appellant asked for his appeal to be concluded by formal decision.

I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I had regard to the submissions made by the appellant and the IAA. I also had regard to: the guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations; 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).

Issues

I identified the following issues:

1. Whether the IAA's refusal of the request was justified.
2. Whether it would be appropriate for me to require the IAA to release specific information to the appellant.

Issue 1: Whether the IAA's refusal of the request was justified

The IAA has accepted the above "Background" detail. Accordingly, there is no dispute that the IAA failed to issue a decision on the request within the timeframe required and later failed to issue a review decision within the timeframe required. The AIE Regulations expressly 'deem' an unanswered original request to have been 'refused' and implicitly deem an unanswered request for an internal review to have been refused.

No reasons were given to the appellant at the time for these refusals.

Finding. The refusal of an AIE request without reasons is never justified under the AIE Regulations. Accordingly, I am satisfied that the IAA's refusal was not justified.

I note that the IAA has acknowledged that there was error on its side and accepts that it should have ensured that the request was dealt with in accordance with AIE timeframes. I am pleased to also note that the IAA has apologised to the appellant.

Issue 2: Whether it would be appropriate for me to require the IAA to release specific information to the appellant

My practise is to only require public authorities to release particular information to an appellant when I am first satisfied that such information is held by or for the public authority. In this case, I am not in a position to be satisfied on that point. The IAA itself does not know if it holds the requested information. However, it now understands exactly what the appellant sought in his request and has indicated its willingness to conduct an appropriately thorough search for it. It informed my Office that it has already commenced that search and I understand that it now has regained access to its remotely stored records.

In addition, the IAA has assured my Office that, if the requested information is found, it has no objection to providing the appellant with access to it.

While article 12 of the AIE Regulations grants me the power to enter a public authority's premises and require to be furnished with environmental information, I am satisfied that it would not be appropriate for me to exercise that power in these circumstances.

Finding: I find that it would not be appropriate for me to require the IAA to provide the appellant with access to environmental information in the current circumstances because it has not been established that the IAA holds it.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I annul the IAA's refusal decision. I expect the IAA to conduct an appropriate search for the requested information and give the appellant a decision within the statutory timeframe, which is within one month of receipt of this decision. I expect the IAA to notify the appellant at the same time of his right to request a review of that decision.

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

22 July 2020