

16.03.2023

Mr Neil Foulkes

By email only: neilfoulkes62@gmail.com

Our Ref: AIE Request 20230037

Your Ref: Coillte Chain of Custody LM09-FL0048

Dear Mr Foulkes,

I refer to your request under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (S.I. No. 133 of 2007, S.I. No. 662 of 2011, S.I. 615 of 2014 and S.I. No. 309 of 2018) (hereafter referred to as the AIE Regulations), received on 20.01.2023 for access to information held by Coillte as follows –

A copy of all forestry certification Chain of Custody documentation for timber removed from felling licence site LM09-FL0048.

1. Summary of Decision

I made a final decision on the request on 16.03.2022. I have identified records which are relevant to your request. I have decided to refuse access these records, having regard to the provisions of Articles 9(1)(b), 9(2)(c) and 8(1)(iv) of the AIE Regulations.

2. Discretionary Grounds for Refusal

I have set out hereunder, the discretionary exemptions on which I am relying to refuse access to the information sought. Article 9 of the AIE Regulations specifies the grounds under which a public authority may refuse to make environmental information available, while retaining the power to make it available in cases where it considers it appropriate to do so. Reliance on the discretionary grounds is also subject to a public interest test, which I have addressed at Part 3 of this letter.

2.1 Article 9(1)(b): Course of Justice

This provides that a public authority may refuse to make available environmental information where disclosure of the information would adversely affect the course of justice (including, but not limited to, criminal inquiries and disciplinary inquiries).

The reference to the “*course of justice*” here is not limited to the course of extant or nascent legal proceedings of a criminal or civil nature before the Courts but is wider in import. In particular, I am of the view that the specific reference to an adverse effect, for example, on

“disciplinary inquiries” being ‘included’ shows (a) that the *“justice”* which is in course can include a disciplinary inquiry, or similar process, and also (b) that the category of included processes is not closed, and can plainly include an audit-for-certification process such as that which is being conducted by the Soil Association.

In a similar vein, the Ministerial Guidance Notes 1 published under Article 14(1) of the AIE Regulations (to which Coillte must, under Article 14(2), have regard) refer to the Article 9(1)(b) exception as encompassing environmental information *“relating to anything which is the subject matter of legal proceedings, or of any formal inquiry (whether past or present), or any preliminary investigation”*.

There are current interactions of relevance at play between Coillte and the Soil Association in relation to the conduct of the latter’s audit/certification (the **“Audit”**), insofar as (a) the Soil Association has before it information from Coillte as regards its compliance or otherwise with PEFC and FSC Irish Forest Certification Standards; and (b) Coillte is at risk of being found to be non-compliant during the course of, or at the conclusion of, the Audit which is due to be held during 2023.

These processes will play out according to the appropriate Audit procedures and rights and obligations of various parties, including those of the Soil Association itself. In my view, disclosing information in the context of ongoing considerations and/or contemplated Audit processes would adversely affect the course of justice within the meaning of this Article, insofar as, for example, any non-compliance and, consequently, any plans or measures to close it out must be effectively and fairly processed, without being unduly interfered with. If any external third party is given access to information at this stage, they might seek to avail of multiple opportunities to submit, refine, remake, add to and/or amplify any complaint during this preparatory phase, or to seek in the course of investigation to rebut, in ‘real time’, any initial responses, including supporting information, as and when they are provided. Not only would procedural fairness effectiveness and efficiency dictate that this not occur, from the point of view of Coillte, but it would also adversely affect and prejudice the integrity, effectiveness and efficiency of the process insofar as the Soil Association is concerned.

It is my understanding (and noteworthy) that the process engaged in by the Soil Association with Coillte will involve an audit being conducted during 2023, and that the Soil Association, at such time, will invite representations/submissions from Stakeholders regarding compliance, or otherwise, and will at that time engage to the appropriate extent with such Stakeholders and with the entity being audited with a view to investigating any issue highlighted, and giving the parties adequate opportunities of ‘making their case’, such that the issue might then be closed off in the appropriate way at the end of the Audit.

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In my view, against that background, releasing any information relating to a complaint which will be further analysed during the course of the audit at this stage would adversely affect the course of justice in the sense I have used that phrase above, and I note that relevant opportunities to obtain appropriate information and to make submissions and representations will be afforded to Stakeholders in the course of the formal Audit process later this year, within the framework of that process, the integrity of which should be preserved.

2.2 Article 9(2)(c): Material in the course of completion

Article 9(2)(c) entitles a public authority to refuse to make environmental information available where the request concerns material in the course of completion, or unfinished documents or data. The information being sought relates to on-going and incomplete processes (2023 Audit Process) which are currently generating material relating to the effective implementation and enforcement of the provisions of the Forestry Act, which is not yet complete. It is for this reason that I am refusing access to the information sought.

As you will see, this Article refers, amongst other things, to *“the request concern[ing] material in the course of completion”*. As is clear from the facts and circumstances of this matter, there has been, and will be, a consideration by the Soil Association of all information that is received in advance of and during its audit that has been scheduled during 2023, as well as of the principal question generally of whether Coillte is compliant with PEFC and FSC Irish Forest Certification Standards. In that connection, and specifically in relation to the complaint which will be subject to further investigation by the Soil Association during the time of the audit, there is clearly material in the course of completion, and the request for access to any information on the complaint, or which relates to it, concerns that material.

There is no ‘harm’ test in this provision, such as the ‘adverse effect’ test, so the provision is satisfied where, as a matter of fact, a request concerns material in the course of completion, whether or not it would have an adverse or other effect thereon. I am satisfied that the request does concern material in the course of completion.

Name of Authority and Estimated Time for Completion

Pursuant to Article 10(6), I advise that Coillte and the Soil Association are the authorities preparing the material that is in the course of completion, and the estimated time needed for completion would be approximately two months after the completion of the 2023 audit by the Soil Association, but this is subject to change either way.

2.3 Article 8(a)(iv)

This provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of the proceedings of

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public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Act with respect to exempt records within the meaning of those Acts).

As I mentioned above, Coillte is, and will be, interacting with the Soil Association in relation to ongoing certification and compliance with PEFC and FSC Irish Forest Certification Standards. By disclosing Coillte's responses or details of any supporting information provided to the Soil Association, Coillte would be disclosing its current position on a matter of compliance and any potential response(s) to it, in circumstances where these are matters of confidential ongoing deliberation and consideration within Coillte.

In my view, to disclose any information relating to LM09-FL0048 now would adversely affect the confidentiality of Coillte's proceedings. In my view, the "proceedings" covered by national law include all deliberations and processes of public bodies as are protected by means of the exemption provisions set out in the FOI Act 2014, including in particular those protected by sections 29, 30 and 31.

3 Public interest test

In accordance with Article 10(3) and 10(4) I have weighed the public interest served by disclosure against the interest served by refusal of your request.

Article 10(3) requires that Coillte consider each request under the AIE Regulations on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.

Article 10(4) requires that the grounds for refusal of a request for environmental information be interpreted on a restrictive basis having regard to the public interest served by disclosure.

These requirements apply to discretionary grounds for refusal of a request under Article 9, which I have relied upon.

In considering the public interest generally, I have considered relevant factors both for and against release of the requested information, as set out below.

It is my opinion that the public interest served by disclosure would be openness and transparency. In this regard, Coillte makes as much information as possible available through its public files, its website and through the DAFM Forest Licence Viewer. Also, information relating to the subject matter set out in the AIE Request can be made available by the Soil Association once the 2023 Audit is complete. Further, I consider the public interest served by individuals being able to exercise their rights under the AIE Regulations to the greatest possible extent, in order to gain access to environmental information.

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Finally, I consider the public interest served by environmental information being made available and shared with the public in order to achieve the widest possible systematic availability of environmental information.

However, in the present case, I believe that the factors in favor of refusing access far outweigh those in favor of granting access. I consider there to be a strong public interest in affording public authorities the space necessary to produce documentation that related to on-going and incomplete processes, this will inevitably produce better outcomes for the public at large.

I consider that, while the aims of the AIE Legislation include information-access and informed participation in decision-making and so on, and while it is generally in the public interest to make available environmental information that will facilitate this, it is also the case that, particularly in a regulatory context where there are ongoing processes, and where the regulatory system is itself designed to protect the environment and to enforce environment-facing laws, there are significant countervailing public interest considerations that can serve to lead to the reasonable conclusion – as is my conclusion in this case - that the public interest in release, or release at this point, of the information sought would not serve the public interest as well as non-disclosure would. In all the circumstances, I do not believe that the balance of legitimate public interests weighs in favour of disclosure of the requested information.

Right of Review

Under Article 11 of the AIE Regulations you have a right to request an internal review of this decision. An internal review involves a complete reconsideration of the matter by a member of the staff of Coillte, unconnected with the original decision, of the same or higher rank than the original decision-maker, who may affirm, vary or annul the original decision.

If you wish to request an internal review, you can do so by writing to:

Nicola Wall
Information and Data Protection Officer
Coillte CGA
Email: Nicola.Wall@coillte.ie

referring to this decision, quoting the AIE reference number. This request must be made within one month of the date of receipt of this decision. The decision of an internal review will be communicated to you within one month of receipt of your request for an internal review.

Please contact me if I can assist you in any matter relating to your request.

Yours sincerely,

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Sent by email, no signature

Nicholas Egan
Acting Environmental information Officer,
Coillte CGA
Email: nicholas.egan@coillte.ie

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