



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-136869-N6S0J3

Date of decision: 13 November 2023

Appellant: Mr. D

Public Authority: Department of Agriculture, Food and the Marine (the Department)

Issue: Whether the Department was justified in refusing access to certain information on the basis that no relevant environmental information was held by or for it.

Summary of Commissioner's Decision: The Commissioner annulled the decision of the Department on the ground that it had not conducted adequate searches in an effort to locate all relevant environmental information. He directed it to undertake a fresh decision-making process in respect of the appellant's request.

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 1 February 2023, the appellant made the following request for information to the Department:

“1. The date of all post licence inspections carried out in January ’23 by the Forest Service of [the Department] of the operations of Coillte felling licences.

2 All post licence inspection reports produced / completed in January ’23 by the Forest Service of [the Department] as a result of inspections carried out of the operations of Coillte felling licences. (This includes reports based on inspections that were carried out prior to January’23) The information to include any relevant correspondence and subsequent environmental information as a result of follow ups on the inspections, including surveys, analysis, etc

I request that the information is provided in an electronic format as soon as is possible.”

2. The Department issued its original decision to the appellant on 15 February 2023. It said *“Following the identification of four (4) available records which relate to your request, I have decided that you should be granted access to all of our available records. This AIE has been completed in accordance with the AIE Regulations.”*
3. On the same day, the appellant requested an internal review from the Department on the basis that he was *“not satisfied that all information covered by my request has been identified”*.
4. The Department responded to the request for an internal review on 8 March 2023. It noted that article 11(1) of the AIE Regulations provides that *“where the applicant’s request has been refused under article 7, in whole or in part, the applicant may, not later than one month following receipt of the decision of the public authority concerned, request the public authority to review the decision, in whole or in part”*. The response went on to state that *“on reviewing your request for internal review, I am aware that you received a full grant to all information available to your request at AIE stage. Accordingly an internal review will not be conducted pursuant to the AIE Regulations under Article 11”. (1) Where.”*
5. The appellant responded to the Department on 9 March 2023. He said *“all information that is the subject of my request has not been made available to me. That is what I consider to be the error in the decision and that is what I am seeking a review of. As an internal review decision maker you cannot determine whether article 7(1) has been complied with or not without carrying out a full review of the request. That is your role in the process. Your response to me is based on an assumption that the original decision maker has correctly identified all records relevant to this request. Since you have not carried out a review of the*



request you are not in a position to confirm this and are therefore not in a position to affirm the original decision”.

6. According to the appellant’s submission to this Office, further correspondence took place between the Department and the appellant as to the carrying out of an internal review. The Department informed the appellant that *“as stated in the letter [of 8 March 2023]... A review was conducted and the letter [of 8 March 2023] was issued based on my review”*. The appellant responded to the Department stating that its *“letter states very clearly [that]... an internal review will not be conducted pursuant to the AIE Regulations under Article 11”* and that the letter stated that *a review of [his] request for an internal review”* had been conducted rather than *“a review of [his] request itself”*. He reiterated his view that the Department was *“basing [its] position on an assumption which I contend that you are not permitted to make”* as its responsibility under article 11(2)(a) of the Regulations *“is to conduct a review of the decision and determine whether to ‘affirm, vary or annul the decision’”*.
7. The appellant appealed to this Office on 6 April 2023.
8. I am directed by the Commissioner for Environmental Information to carry out a 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 the Department of Agriculture, Food and the Marine. 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’).

Scope of Review

9. In accordance with article 12(5) of the AIE Regulations, the role of this Office 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, this Office will require the public authority to make available environmental information to the appellant.



10. This review is concerned with whether the Department was justified in refusing access to environmental information relating to post licence inspections of the operations of Coillte felling licences carried out in January 2023 by its Forest Service on the basis that no such information is held by or for it.

Submissions of the parties

11. In addition to the detail I have set out in the background above, the appellant made further submissions to this Office that the Department is in error for failing to carry out an internal review. He said *“to accept the decision maker’s position would permit a public authority to refuse to carry out an internal review of any request where the original decision was to grant a request in full. There must be capacity within the AIE regime for a requester to challenge a decision to grant a request on the basis that not all information falling within the scope of a request has been identified. To do otherwise would set an unacceptable precedent”*.
12. The Department in its submission to this Office on 26 April 2023 said: *“at initial decision stage this request has been fully granted based on records available at the time of this request. An internal review was not conducted pursuant to the AIE Regulations under Article 11 (1) where the applicant’s request has been refused under article 7, in whole or in part, the application may, not later than one month following receipt of the decision of the public authority concerned, request the public authority to review the decision, in whole or in part. There is no provision in the Regulations for an internal review where a full grant has been given. However, given the points raised by the Appellant I conducted additional searches. 2 further documents were located. 1 in relation to TY14-FL0146. This record was not available at the time of the initial request as it was received by this Department on the 3/3/2023, the initial decision had issued on the 15/2/2023. 2. DL03-FL0059. This information was held in a departmental mailbox and had not been uploaded to the relevant file at the time of the initial decision therefore the decision maker was unaware of its existence.”*

Preliminary Matters

13. Much of the correspondence between the appellant and the Department in this case centres around the internal review process, with an apparent dispute over whether the Department’s original decision constituted a refusal to release the requested information. The Department states that the appellant’s request was not refused, rather it was fully granted. It therefore concluded *“an internal review will not be conducted pursuant to the AIE Regulations under Article 11. (1)”*. The appellant says his request for information was refused on the basis that not all the information covered by his request had been identified.



14. The position adopted by the Department in this case is wholly unsatisfactory. In essence, the Department at first refused to carry out an internal review on the basis that the appellant's request had been granted in full at original decision stage. The Department is correct to note that article 11(1) of the Regulations provides that "where the applicant's request has been refused under article 7, in whole or in part, the applicant may, not later than one month following receipt of the decision of the public authority concerned, request the public authority to review the decision, in whole or in part". In this case, the appellant considered his request to have been refused in part on the basis of his belief that further information was held by the Department which had not been provided to him. When questioned by the appellant, the Department noted that it had conducted a review and was satisfied that the request had been granted in full at original decision stage. The Department reiterated, in submissions to this Office, that the request had been granted in full before going on to note that further searches had in fact revealed that further information within the scope of the request was held by the Department. The Department has now admitted that the appellant was correct in his belief as it has now located information which was not provided to the appellant as it "had not been uploaded to the relevant file at the time of the initial decision". The basis on which the Department contends that it was not obliged to conduct an internal review (i.e. that the request had been fully granted) is therefore factually incorrect and unsustainable on that basis alone.
15. For the avoidance of doubt, however, I am not satisfied that the Department is entitled to refuse a request for internal review even if it had been the case that the request was fully granted at original decision stage. Article 11(5) of the Regulations provides that "the reference to a request refused in whole or in part" in article 11(1) includes a request that "has been inadequately answered" or "has otherwise not been dealt with in accordance with Article 3, 4 or 5 of the Directive". Article 3 of the Directive sets out general provisions for the entitlement to access environmental information on request including the timeframes for responding to requests and the requirement for public authorities to provide reasons to an applicant in the case of refusal of a request. It also contains more general provisions which require Member States to ensure that the public is provided with adequate support, information, advice and guidance in relation to their access rights. Article 4 sets out the bases on which requests for environmental information may be refused while article 5 provides for the charges which may be imposed in relation to access requests. It appears to me therefore that the scope of a "refused request" under article 11(5) is wider than that contended for by the Department, which has argued that if it considers a request to have been granted then there is no basis on which an appellant is entitled to an internal review. For example, a request might be considered granted subject to the payment of a fee but article 11(5) makes it clear that in that case, an appellant is entitled to an internal review. In addition, as the decision of the Supreme Court in *NAMA* makes clear, the "th[e] specific obligation undertaken by Ireland as a member of the EU" requires that "the interpretation of legislation...implementing a directive" is approached "so far as possible, teleologically, in order to achieve the purpose of the directive" (para 10). The obligation set out in article 11 in relation to the carrying out of an internal review



must therefore be interpreted in accordance with the provisions of article 6 of the Directive which provides as follows:

- (1) Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.
 - (2) In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.
 - (3) Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article.
16. If the Department's position is accepted, then in any case where a public authority states at original decision that a request has been fully granted, an appellant will have no recourse to an internal review procedure. In those circumstances, it is difficult to see how an appellant could appeal the decision of the public authority to this Office, as article 12 of the Regulations provides for a right to appeal to this Office where "a decision of a public authority has been affirmed, in whole or in part, under article 11" or "where no decision is notified by a public authority" in the timeframe set out in article 11(3) (see article 12(3) and 12(4)). If that were the case, the only mechanism for review of the decision of the public authority would be a judicial review procedure which is unlikely to satisfy the "expeditious and either free of charge or inexpensive" requirement in article 6(1) of the Directive. In my view, therefore, article 11 must be understood as meaning that in circumstances where there is a dispute between the appellant and the public authority as to whether a request has been granted in full, an entitlement to request an internal review under article 11 arises. This interpretation gives rise to little prejudice or inconvenience to either party since, if it is the case that having reviewed the position, a public authority remains satisfied that the request has been granted in full, it can simply affirm the original decision and set out its reasons for doing so. If the Department's position is accepted however significant prejudice may arise for an appellant who has no means of challenging the position of the public authority other than through a judicial review process. Indeed, the fact that, in this case, further searches revealed the existence of further information



demonstrates the purpose of the inclusion of appeal mechanisms such as the internal review in the provisions of the Directive and the Regulations.

17. The function of this Office is to review the decision made by the Department at internal review stage. The Department says it did not conduct an internal review on the basis that its original decision was to grant full access to the information requested by the appellant. Based on the facts of this case and having regard to my analysis above, I consider there was a “deemed refusal” of the internal review request under article 12(4)(a)(ii) (i.e. on the basis of the public authority having failed to issue a decision on a request for internal review within the relevant time limit set out in the AIE Regulations).

Analysis and Findings

18. Article 7(1) of the AIE Regulations requires public authorities to make available environmental information that is held by or for them on request. Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested environmental information is held by or for the public authority concerned.
19. Although the Department did not explicitly rely on article 7(5) of the AIE Regulations at any stage of its decision-making, its position is that all records available relating to the appellant’s request have been identified and released. As the Department has implied that further information requested by the appellant is not held by or for it, the question to be addressed is whether the Department can rely on article 7(5) of the Regulations.
20. This Office’s approach to dealing with cases where the public authority has effectively refused a request under article 7(5) is to examine whether adequate steps have been taken to identify and locate relevant environmental information, having regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances, a standard of reasonableness is applied. It is not normally the function of this Office to search for environmental information.
21. From a review of the Department’s submissions in this case I am of the view that it has not demonstrated that it has carried out reasonable and appropriate searches to identify and retrieve environmental information relevant to the appellant’s request.
22. The Department in its submission to this Office on 26 April 2023 said, *“given the points raised by the Appellant I conducted additional searches. 2 further documents were located. 1 in relation to TY14-FL0146. This record was not available at the time of the initial request as it was received by this Department on the 3/3/2023, the initial decision had issued on the 15/2/2023. 2. DL03-FL0059. This information was held in a departmental mailbox and had not been uploaded to the relevant file at the time of the initial decision therefore the decision maker was unaware of its existence.”* It is not clear specifically which “points raised by the appellant” the Department is referring to, but it is a welcome development



that further records relating to the appellant's request were found. I note the Department has attempted to explain why these records were not located earlier. But it is unfortunately still unclear what steps were taken by the Department to ensure all relevant information was located, as little or no detail has been provided as to what these "additional searches" entailed.

23. The Investigator wrote to the Department on 18 July 2023 inviting it to make further submissions – with a specific request to provide full and complete details of the steps taken to identify and locate information within the scope of the appellant's request, "along with its records management, retention and disposal policies in respect of the specific information/records sought in this case." No response to these questions was received.
24. For the reasons outlined above, the Department has failed to show that adequate steps have been taken to identify and locate relevant environmental information requested by the appellant.
25. I consider therefore that the most appropriate course of action is to remit this matter to the Department so that further searches can be carried out to identify and locate any information which may be held by or for it, within the scope of the appellant's request. If no additional information is retrieved as a result of those searches, the Department should write to the appellant advising him of this and setting out the steps taken by it in conducting those searches. I appreciate that remitting the case back to the Department causes further delay for the appellant. However, I consider it to be the most efficient course of action to take in this instance.

Decision

26. Having carried out a review under article 12(5) of the AIE Regulations, I annul the Department's decision in this case and direct it to undertake a fresh decision-making process. If no further information within the scope of the appellant's request is located by the Department, it should provide full and complete details of the steps taken by it in conducting those searches.

Appeal to the High Court

27. 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.

Emma Libreri
on behalf of the Commissioner for Environmental Information