



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)**

Cases: OCE-137279-M3G7T5 & OCE-137565-Q1J5W8

Date of decision: 7 November 2023

Appellant: Mr. D

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

Issue: Whether the Department is entitled to rely on articles 9(2)(a) & 9(2)(b) of the AIE Regulations to refuse the information requested by the appellant.

Summary of Commissioner's Decision: The Commissioner found that the articles 9(2)(a) & 9(2)(b) of the AIE Regulations did not provide grounds for refusal in the circumstances of the case and remitted the case to the Department to process the requests in accordance with the provisions of the AIE Regulations.

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. This decision concerns two appeals to this Office against the decisions of the Department on two separate requests submitted by the appellant under the AIE Regulations for identical information on different dates.

Request 1

2. On 9 January 2023, the appellant requested all information on the following alleged illegal felling incidents in electronic format; AIF 113 of 2022, AIF 114 of 2022, AIF 115 of 2022, AIF 116 of 2022, AIF 117 of 2022, AIF 118 of 2022, AIF 119 of 2022, AIF 120 of 2022, AIF 121 of 2022, AIF 122 of 2022, AIF 123 of 2022. This request was given reference number AIE 23/029 by the Department.
3. There were a number of emails between the Department and the appellant between 24 January and 31 January 2023 following a request by the Department that the appellant narrow the scope of his request, which the appellant did not wish to do.
4. The Department issued its original decision on the request on 31 January 2023 advising the appellant that it was refusing the request under articles 9(2)(a) and 9(2)(b) of the AIE Regulations.
5. The appellant requested an internal review on 1 February 2023.
6. The Department replied on 16 March 2023 affirming its original decision
7. The appellant appealed to this Office on 11 April 2023.

Request 2

8. On 13 March the appellant resubmitted his request of 9 January 2023 as he had not received an acknowledgement of or a decision on his internal review request of 1 February 2023.
9. As outlined above, the internal review outcome for Request 1 was issued on 16 March 2023. Before this, on 14 March 2023, the Department responded to Request 2 advising the appellant that his request was already dealt with under the Department reference number AIE 23/029 and was being refused considering the volume and range of records requested.
10. The appellant requested an internal review on 14 March 2023.



11. The Department responded on 21 March 2023 affirming the decision to refuse the original request as this request was identical to that of AIE 23/029 and “having regard to Article 9(2)(a) & 9(2)(b) of the AIE Regulations it remains formulated in too general a manner and would place an unreasonable demand on Department resources.”
12. I have been 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. 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’).

What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

13. 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, the Commissioner will require the public authority to make available environmental information to the appellant.
14. This review is concerned with whether the Department was justified in its decisions, under article 9(2)(a) and 9(2)(b) of the AIE Regulations, to refuse access to information within the scope of the appellant’s requests.

Preliminary Matters

15. The appellant submitted two requests at different times to the Department for identical information and subsequently paid the required fees for two separate appeals to this Office. I note the Department’s comments that it does not consider that making duplicate AIE requests and subsequently lodging duplicate appeals is within the spirit of the Regulations. I also note however that the Department did not issue its internal review outcome for the initial request within the timeframe provided for in article 11(3) of the AIE Regulations and that the appellant’s email of 13 March 2023 specifically noted that the request was being re-



submitted in circumstances where he had not received an acknowledgment of or a decision on his internal review request.

16. The appellant has advised this Office that he believes there was an issue with correspondence being blocked by a firewall in or around the dates in question leading to him resubmitting the request. In the circumstances, I consider that a composite decision dealing with both appeals together is appropriate.
17. The Department, in its submissions, has noted that the appellant has informed the Department that he will automatically be requesting internal reviews of decisions where a certain officer is the decision-maker. The Regulations provide a facility for seeking an internal review of a decision on a request which an appellant considers to have been inadequately dealt with or not to be in accordance with the requirements of the AIE Directive. However, it is perhaps unhelpful for a requester to make a presumption that a request will be inadequately dealt with before a decision on the request is made and, in the normal course, decisions on whether to seek an internal review are best made on a case by case basis by requesters.
18. This Office understands that disputes may often arise between requesters and public authorities as to entitlements under the AIE Regulations and the AIE Directive but would encourage parties to engage with one another as proactively and productively as possible in the interests of the efficient operation of the AIE regime.

Position of the Parties

19. The appellant submits that his request is for information related to specifically identified alleged illegal felling incidents and is targeted and specific. He submits that the Department has failed to demonstrate that it is manifestly unreasonable for it to process the request and he contends that articles 9(2)(a) and 9(2)(b) do not apply. The appellant also submits that it is in the public interest to know how the Department deal with breaches of the Forestry Act as it relates to the illegal felling of trees and that the Department have failed to apply article 10(5) correctly.
20. The Department submit that currently, there is no case management database system for alleged illegal felling cases. On receipt of a report of such an incident all necessary desktop checks are carried out and the file is referred to the relevant District Inspector. Inspection outcomes with all associated records, recommendations and correspondence are then received and cross checked by email and subsequently saved manually per case into a folder within file explorer.
21. The Department submit that the relevant unit would have to review each document and each attachment to establish whether or not it is a record containing environmental



information and establish if any redactions apply including any information that could identify an individual party to a case. Staff within the unit have set out in the submission that it would be difficult to state a time needed to provide the information requested for each case file as it depends on the complexity of the case and what stage the investigation is at.

22. The relevant unit estimates that in total 155 emails including 29 attachments of varying length and complexity in addition to multiple maps and photographs would need to be reviewed, which would require a substantial amount of time and would impact on the other work of the unit.
23. The Department does outline in a subsequent submission that at a conservative estimate it would require a staff member to work for a total of 41.5 hours to complete this request and notes that given that a standard working week is 35 hours this would mean a staff member would have to work for over one week fulltime on this request.

Analysis and Findings

24. 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”. It transposes 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”.
25. The question of what constitutes a “manifestly unreasonable” request must be approached teleologically, having regard to the purpose of the AIE Directive (see *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51, paragraph 10). The AIE Directive makes it clear that its purpose is to ensure “increased public access to environmental information and the dissemination of such information” and that “the disclosure of information should be the general rule” such that “public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases” with grounds for refusal interpreted “in a restrictive way” (see Recitals 1 and 16).
26. In addition, articles 7(2)(b) of the AIE Regulations and 3(2)(b) of the Directive envisage the processing of voluminous and complex requests and provide for extensions to the one-month timeframe within which a public authority is normally required to issue a decision on a request. It is clear therefore that a request is not necessarily covered by the “manifestly unreasonable” exception just because it is voluminous or complex.
27. When considering whether a request is manifestly unreasonable, it is necessary to examine the impact on the public authority of dealing with the request. In particular, I must examine whether responding to the request would involve the public authority in disproportionate



cost or effort, or would obstruct or significantly interfere with the normal course of its activities. In light of the findings of the Court of Justice of the European Union in T-2/03 *Verein für Konsumenteninformation v. Commission*, at paragraphs 101-115, I consider that the exception in article 9(2)(a) is only available where the administrative burden entailed by dealing with the request is particularly heavy. The burden is on the public authority to demonstrate the unreasonableness of the task entailed by the request. I expect that if a public authority wishes to rely on the manifestly unreasonable nature of a request, that public authority will clearly demonstrate the actual and specific impact that dealing with the request would have on its normal activities.

28. In that regard, the test set out by the CJEU at paragraph 69 of its decision in C-619/19 *Land Baden-Württemberg v DR* should be borne in mind:

“...[A] public authority which adopts a decision refusing access to environmental information must set out the reasons why it considers that the disclosure of that information could specifically and actually undermine the interest protected by the exceptions relied upon. The risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical”.

29. The European Commission’s First Proposal for the AIE Directive (COM/2000/0402 final - COD 2000/0169) envisaged that the exception in article 4(1)(b) of the Directive would cover requests “variously described in national legal systems as vexatious or amounting to an abus de droit”. It went on to acknowledge that “compliance with certain requests could involve the public authority in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities” before noting that “authorities should be able to refuse access in such cases in order to ensure their proper functioning”. The interest which the “manifestly unreasonable” exception seeks to protect therefore is the interest in ensuring a public authority is not overburdened by a request, to the extent that this significantly interferes with its ability to perform its other tasks and duties.

30. That being said, it is also important to bear in mind the duties imposed on public authorities by articles 7 and 3(5) of the AIE Directive in relation to the organisation and dissemination of environmental information. The extent to which the obligations contained in articles 3(5) and 7 have been transposed by the Regulations has not been fully explored. It is clear from the jurisprudence of the CJEU, in cases such as C-188/89 *Foster v British Gas plc*, that these obligations can have a direct effect on public authorities to the extent they can be considered emanations of the state. I accept that the jurisdiction conferred on this Office by article 12 of the AIE Regulations relates to decisions on individual access requests, and not directly to the obligations relating to proactive dissemination. However, the requirements contained in article 7 are relevant to the obligation to interpret the AIE Regulations teleologically, having regard to the purpose of the Directive, when performing the functions provided for by article 12 of the AIE Regulations. This flows from the decision of the Supreme Court in *National Asset Management Agency v Commissioner for Environmental Information*, and the doctrine



of indirect effect first set out by the CJEU in C-14/83 *Von Colson v Land Nordrhein-Westfalen*. The exception in article 9(2)(a) of the AIE Regulations is not intended to endorse any failure by public authorities to comply with their duties to organise and disseminate information. This means that when considering the workload imposed by a request, it is important not to allow for a situation where a failure to comply with the obligations imposed by articles 7 and 3(5) of the Directive and article 5 of the Regulations, increases the prospect that a public authority will be able to successfully rely on the “manifestly unreasonable” exception. This would lead to a perverse situation whereby failure to comply with certain obligations under the Directive and Regulations would effectively be rewarded by the application of less onerous standards by this Office on review of requests under article 12.

31. The Department notes that it does not have a case management system in place for alleged instances of illegal felling meaning the information in this case would need to be retrieved from the relevant system and reviewed by a member of staff. In this case the Department have estimated that it would require one staff member to work for a total of 41.5 hours to complete this request in full. Dedicating approximately 41.5 hours of one staff member’s time to complete this request is a significant amount of time. However, having regard to the above and to the fact that the Department is a large organisation with over 3,000 members of staff, processing the request does not, in my view, risk substantial interference with the work of the Department, and I do not consider this to amount to a heavy administrative burden of the standard the CJEU found to be required in *Verein für Konsumenteninformation v Commission*. There is therefore no basis on which I can conclude that the request would give rise to a reasonably foreseeable risk of disproportionate cost or effort on the part of the Department, bearing in mind its duty to organise and disseminate environmental information as set out in articles 7 and 3(5) of the Directive and article 5 of the Regulations. I am therefore not satisfied that the request is manifestly unreasonable within the meaning of article 9(2)(a) such that the Department is entitled to refuse the appellant’s request on that basis.
32. Article 9(2)(b) provides that “a public authority may refuse to make environmental information available where the request remains formulated in too general a manner, taking into account article 7(8)”. Article 7(8) provides that “where a request is made by the applicant in too general a manner, the public authority shall, as soon as possible and at the latest within one month of receipt of the request, invite the applicant to make a more specific request and offer assistance to the applicant in the preparation of such a request”. As outlined above, the Department did correspond with the appellant to request that he narrow the scope of his request. The appellant responded to indicate that he did not wish to narrow his request and submits that he considers the range of information sought to be reasonable, targeted and specific.
33. When considering whether the appellant’s request remains formulated in too general a manner, it must be borne in mind that Recital 16 of the AIE Directive provides that “the right to information means that disclosure of information should be the general rule and that



public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases". Article 10(4) of the Regulations provides that the grounds for refusal of a request must be interpreted on a restrictive basis having regard to the public interest served by disclosure. I therefore consider that the scheme of the AIE Regulations and the Directive make it clear that there is a presumption in favour of the release of environmental information and that it is for the public authority seeking to withhold information to establish that it is entitled to do so having regard to the grounds for refusal set out in the Regulations.

34. The Department has provided no reasoning in support of its position that the request is formulated too generally. Having considered the request, I note that it is limited to information relating to eleven incidents of alleged illegal felling which took place during 2022. I am therefore not satisfied that there is any basis on which I can conclude that the Department is entitled to rely on article 9(2)(b) of the AIE Regulations to refuse the request.
35. Taking all of the above into account, I do not believe that the threshold for the request to be manifestly unreasonable has been met or that the request is formulated in too general a manner. Accordingly, I do not consider the Department to have been justified in refusing the requests on the basis of articles 9(2)(a) or 9(2)(b) of the AIE Regulations.

Decision

36. Having carried out a review under article 12(5) of the AIE Regulations on behalf of the Commissioner for Environmental Information, I annul the Department's decision. As the information has yet to be compiled, I will remit the matter to the Department to process the requests in accordance with the provisions of the AIE Regulations.

Appeal to the High Court

37. 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