



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-138355-H5S8J1

**Date of decision:** 29 April 2024

**Appellant:** Right To Know CLG

**Public Authority:** Tailte Éireann

**Issue:** Whether Tailte Éireann was justified in refusing the information sought by relying on article 9(1)(d) of the AIE Regulations.

**Summary of Commissioner's Decision:** The Commissioner found that Tailte Éireann was entitled to rely on article 9(1)(d) of the AIE Regulations and affirmed the internal review decision

**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. The National Land Cover Map (the NLC) was produced by the surveying function of Tailte Éireann in partnership with the Environmental Protection Agency (EPA) and with the support of members of the cross-governmental national land cover and habitat mapping (NLCHM) working group. The NLC is a comprehensive geospatial database, incorporating approximately 10.1 million database features, derived using, among other sources, imagery captured by Ordnance Survey Ireland (the OSI, now the National Mapping Division of Tailte Éireann) and vector data from the OSI's core spatial database (named the 'Prime 2' database). It was released on 21 March 2023. It is available for purchase from Tailte Éireann on a commercial basis. Tailte Éireann states that the data that the National Land Cover Map comprises is a 70% like-for-like match to the Prime 2 Database which generates significant revenue.
2. On 22 March 2023, the appellant made a request to Tailte Éireann for an electronic copy of the NLC. On 20 April 2023, Tailte Éireann refused the request. On 21 April 2023, the appellant sought an internal review of this decision. On 16 May 2023, an internal review decision by Tailte Éireann affirmed the original decision.
3. The appellant appealed to this Office on 17 May 2023.
4. Tailte Éireann is a body corporate established on 1 March 2023 by the Tailte Éireann Act 2022 (Establishment Day) Order 2023. Under s. 28 of the Tailte Éireann Act 2022, the functions previously vested in the OSI (amongst other bodies and offices) were transferred to Tailte Éireann on its establishment.
5. The NLC is due to be made available on 9 June 2024 under the Open Data Directive, Land cover is listed in the Annex to Commission Implementing Regulation (EU) 2023/138 of 21 December 2022 which lays down a list of specific high-value datasets and the arrangements for their publication and re-use, implementing Article 14 of the Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information. The Directive was given effect to in Ireland by the European Union (Open Data and Re-use of Public Sector Information) Regulations 2021, which came into operation on 22 July 2021.
6. I am directed by the Commissioner 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 by Tailte Éireann. 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).
7. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

### **Scope of Review**

8. 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 environmental information available to the appellant.
9. The scheme of the AIE Regulations, and of the AIE Directive, makes it clear that there is a presumption in favour of the release of environmental information. Subject to that presumption, a public authority may refuse to release environmental information where an exemption under articles 8 or 9 applies and the interest in maintaining that exemption outweighs the public interest in disclosure.
10. This review considers whether Tailte Éireann was justified in relying on article 9(1)(d) of the AIE Regulations to refuse the release of the environmental information requested.

### **Analysis and Findings**

11. Under article 9(1)(d) of the AIE Regulations, a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect intellectual property rights. This provision is subject to the considerations in articles 10(3) and 10(4) that a public authority must weigh the public interest served by disclosure against the interest served by refusal, interpreting the grounds for refusal of a request for environmental information on a restrictive basis having regard to the public interest served by disclosure.
12. Tailte Éireann submitted that the release of the NLC would adversely affect its intellectual property rights and that it therefore sought to exercise the discretionary right of refusal under article 9(1)(d) of the AIE Regulations.
13. Under s. 17(2) of the Copyright and Related Rights Act 2000 (the 2000 Act), copyright subsists in paragraph (a) in "artistic works", which under s. 2 of the same Act includes maps, regardless of their artistic quality, and also subsists in paragraph (d) to "original databases". I am satisfied that copyright subsists in the NLC under these provisions. The appellant does not contest that copyright and *sui generis* database right applies to the NLC.



14. Section 4 of the Ordnance Survey Ireland Act 2001 outlines the relevant functions of Tailte Éireann, as originally assigned to the OSI:
- “(1) The general function of OSI is to provide a national mapping service in the State. In this regard it shall operate in the public interest by creating and maintaining the definitive national mapping and related geographic records of the State.
- (2) OSI’s functions shall include all such tasks as are necessary to fulfil its general function including, but without prejudice to the foregoing, the following:
- ...
- (i) to protect the Government copyright on OSI records, databases, products and published material including copyright on OSI records, databases, products and published material made prior to the establishment day.”
- Tailte Éireann therefore has a statutory obligation to protect government copyright on its records, databases and products.
15. The appellant has argued that release of the NLC under the AIE Regulations would not adversely affect the intellectual property rights of Tailte Éireann, as those rights would continue to subsist and could be enforced if unlawful use of the information occurred. I do not agree with this contention. I find that release of the NLC under AIE would affect the ability of Tailte Éireann to charge for the use of the NLC and also the Prime 2 database, due to the overlap in data. The ability to charge for use is an element of the rights that make up intellectual property rights. As the Intellectual Property Office of Ireland outlines in its guidance, among the advantages of intellectual property protection are that it can “turn your knowledge/idea into a tangible asset capable of assignment, transfer and licensing”, that it can “generate revenue and provide a return on investment in research and development” and “generate royalty income from licensing”.
16. However, under s. 76 of the 2000 Act, “where the undertaking of a particular act is specifically authorised by an enactment then, unless the enactment provides otherwise, the undertaking of that act shall not infringe the copyright in a work”. Therefore, although article 9(1)(d) of the AIE Regulations is engaged, it remains to be assessed in the overall framework of the AIE Regulations, which includes a requirement to consider the public interest in article 10.
17. Tailte Éireann (and prior to March 2023, the OSI) generates revenue from the sale of maps. A schedule of fees is provided by order of the ministers for Public Expenditure, National Development Plan Delivery and Reform and for Housing, Local Government and Heritage in the Tailte Éireann Act 2022 (National Mapping Division Fees) Order 2023.
18. There is a public interest in a public authority maintaining its revenue stream to offset the public expenditure required in compiling it.



19. Tailte Éireann also noted that land cover data was identified and described as a high value dataset under the EU Commission Implementing Regulation (EU) 2023/138, which will be applicable from June 2024.
20. It submitted that Tailte Éireann was a newly formed entity, in its first months of operation and it required time to adjust its business model and operational plans accordingly before complying with the EU Commission Implementing Regulation (EU) 2023/138.
21. While Tailte Éireann is a new body, its establishment involved a wholesale transfer of functions from dissolved bodies, including the OSI which previously managed the commercial sale of mapping. Although there would be some adjustments in the transition, Tailte Éireann is not in practice a wholly new body, but one that is inheriting the structures of the OSI, at least as regards long-term planning of the state's commercial mapping. Therefore, only limited consideration is given to the fact that Tailte Éireann is formally a new body.
22. The investigator in this Office asked the appellant to set out the factors it considered relevant to public interest balancing test. The appellant stated that a requestor is not required to state an interest when making a request. This is correct. However, even if it is not required when making a request, the public interest in release of the particular information sought is a relevant factor in all appeals before the Commissioner in assessing the public interest in favour of release and in balancing the interests under article 10(3) of the Regulations. Notwithstanding the above, the appellant stated that the NLC contains detailed environmental information and that its release would increase public awareness of environmental matters. The appellant also stated that as the NLC will soon become available under the Open Data Directive, it was clearly information that should be actively disseminated and therefore it was illogical to refuse access under AIE.
23. Article 6 of Commission Implementing Regulation (EU) 2023/138, which will bring the NLC under the remit of the Open Data Directive provides that it “shall apply from 16 months after entry into force”.
24. Two observations can be made in consideration of this submission. The first is that Tailte Éireann and other public authorities cannot be bound a regulation which does not yet apply. Secondly, if I was to assess this request on the basis of future requirement, I would be ignoring the purpose of the delay in the application of Regulation 2023/138. The time between the issuing of the regulation and its coming into operation is a transition period which allows bodies such as Tailte Éireann to adjust their practices, including their business models, and to otherwise prepare data for availability under the Open Data Directive.



25. There is a public interest in favour of release of this environmental information. As noted by the appellant in its submissions, the release of the information sought in this request would undoubtedly increase public awareness of environmental matters.
26. However, where the revenue to date of the mapping division of Tailte Éireann has relied on its ability to licence and sell its mapping products, there is also an interest in permitting Tailte Éireann to protect its intellectual property by withholding the requested information. An adjustment time is also required by Tailte Éireann to adapt its business models to the Open Data Directive under which it will be required to release the NLC. I also note that this information will at the appropriate time become subject to the Open Data Directive.
27. On balance, even considering the grounds for refusal on a restrictive basis, I find that the interest in refusal outweighs the public interest in disclosure of the requested information at this time.
28. In its submissions, Tailte Éireann advised that in the weeks to come, it would be creating an accessible and free to view public web map of land cover data to facilitate wider interest in the data. However, in correspondence to this Office nearly ten months after the date of the submissions, Tailte Éireann advised that work was underway to progress the initiative. It is regrettable the submissions included the earlier timeline, where this was a factor that might have been considered as part of the public interest balancing test.

### **Decision**

29. Having carried out a review under article 12(5) of the AIE Regulations, I affirm Tailte Éireann's internal review decision to refuse access to the requested information under article 9(1)(d) of the AIE Regulations.

### **Appeal to the High Court**

30. 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.

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**Julie O'Leary**

**On behalf of the Commissioner for Environmental Information**

**29 April 2024**