



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-136261-T6R0G5

Date of decision: 20 August 2024

Appellant: Mr. Neil Foulkes

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

Issue: Whether the Department was justified, under articles 9(1)(d) and 9(2)(c) of the AIE Regulations, in refusing access to records relating to the HydroSed project.

Summary of Commissioner's Decision: The Commissioner affirmed the Department's decision to refuse access to all of the information at issue relating to the HydroSed project under article 9(2)(c) 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 case has its background in an ongoing research project, HydroSED. According to the HydroSED project [website](#), it is a collaborative research project funded by the Department of Agriculture Food and the Marine (the Department) that seeks to assess the hydrological and sediment impacts of forest operations in Ireland. There are four project partners: UCD (lead), Munster Technological University (MTU), Coillte, and Green Belt Ltd. The “About” section of the HydroSED project website further explains:

“Forestry presents pressures to the ecological status of watercourses, with sediment release being a recognised stressor in this regard. This field-based project measures flow change and sediment release at seven forestry sites with adjacent or nearby lotic waterbodies. Study sites reflect a range of soils, topographical and hydrological settings relevant to Irish forestry and the monitoring strategy targets different forestry operations (afforestation, harvesting, windrowing and reforestation). Data is related to levels of deposited sediment in riverbeds and ultimately to changes in hydromorphology and aquatic community health, with sediment fingerprinting being used to disentangle forestry operation impacts on suspended and deposited fine sediments from other catchment pressures. The efficacy and performance of commonly adopted sediment control measures in forests is also assessed. A hydrological model in combination with an appropriate soil loss model will be developed and tested to simulate hydrological and sediment release processes in Irish forestry settings.”

2. On 16 December 2022, the appellant submitted a request to the Department seeking access to:
 - (i) “A copy of Project Proposal 2019R447 Hydrological and sediment impacts of forestry operations in Ireland funded by the Forest Service of DAFM (c.18-4-19).
 - (ii) A copy of the 6-month progress report submitted to DAFM for the project in 1 (c. 8-3-21).
 - (iii) A copy of the Year 1 progress report submitted to DAFM for the project in 1 (c. 18-10-21).
 - (iv) A copy of any progress reports submitted to DAFM for the project in 1 to date in 2022.”
3. On 12 January 2023, the Department issued its original decision, wherein it refused access to four records identified as relevant to the appellant’s request. It refused access to the project proposal under article 9(1)(d) of the AIE Regulations and refused access to the 6-month progress report, the Year 1 progress report, and the Year 2 progress report under article 9(2)(c) of the AIE Regulations.
4. On 20 January 2023, the appellant sought an internal review of the Department’s decision. Regarding the Department’s reliance on article 9(1)(d) of the AIE Regulations, he contended that there is no indication that any intellectual property rights exist, and regarding the Department’s reliance on article 9(2)(c) of the AIE Regulations he contended that submitted project reports from UCD cannot be material in the course of completion.
5. On 16 February 2023, the Department issued its internal review decision, affirming its refusal of the project proposal under article 9(1)(d) of the AIE Regulations, and affirming its refusal of seemingly the three progress reports under article 9(2)(c) of the AIE Regulations and article 9(1)(d) of the AIE Regulations.
6. On 3 March 2023, the appellant submitted an appeal to this Office.



7. I am directed by the Commissioner to carry out a review under article 12(5) of the AIE Regulations. In doing so, I have had regard to the correspondence between the Department and the appellant as outlined above and to correspondence between this Office and both the Department and the appellant on the matter. I have also examined the information at issue. 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)
8. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

9. During the course of this review, the Department provided submissions to this Office which indicated that it was refusing access to all of the information at issue under articles 9(1)(d) and 9(2)(c) of the AIE Regulations.
10. The scope of this review concerns whether the Department was justified, under articles 9(1)(d) and 9(2)(c) of the AIE Regulations, in refusing access to the project proposal and three progress reports relating to the HydroSed project.

Preliminary Matters

11. It is clear from the comments of the Court of Appeal in *Redmond & Another v Commissioner for Environmental Information & Another* [2020] IECA 83, at paragraph 51, that the nature of a review by this Office is inquisitorial, rather than adversarial in nature. The extent of the inquiry is determined by this Office and not by the parties to the appeal.
12. A review by this Office is considered to be *de novo*, which means that it is based on the circumstances and the law as they pertain at the time of the decision.
13. It should be noted that, while I am required by article 12(5)(b) of the AIE Regulations to specify reasons for my decision, I must also be careful not to disclose withheld information in my decisions. This means that the detail that I can give about the information concerned and the extent to which I can describe certain matters in my analysis is limited.



Positions of the Parties

Appellant's Position

14. It is the appellant's position that the Department has not demonstrated that articles 9(1)(d) and 9(2)(c) of the AIE Regulations apply to any of the information at issue. He contended that the Department provided no evidence that any intellectual copyright exists in the information requested and that submitted project proposals and progress reports are by their nature complete. He submitted that article 9(2)(c) of the AIE Regulations cannot apply to all of the information at issue.
15. The appellant specifically referred to the Department's comment in its internal review decision that "[p]remature release of this data, which is subject to change over the course of the project, would have no significant meaning without the final findings and would be open to incorrect interpretation by other individuals which could negatively impact the project itself" and submitted that "[t]he Commissioner has, on a number of occasions, found against this line of argument as a basis for refusal. [The Department] should explain why it continues to take this position in the light of the Commissioner's previous decisions."
16. The appellant also submitted that article 10 was not properly considered. He set out his view that the public interest in disclosure of the information at issue outweighs the interest served by refusal and that the Department failed to apply article 10(5) of the AIE Regulations. The appellant's submission regarding article 10 of the AIE Regulations included the following comments:
 - "It can be argued that the release of sediment in to receiving waters as a result of forestry operations should be considered to be an emission in to the environment. Therefore the HydroSED project is a research project on emissions and my request falls within the scope of [a]rticle 10(1) of the Regulations."
 - "In taking a blanket approach to my request [the Department has not] applied [a]rticle 10(4) which could have resulted in information being released under [a]rticle 10(5)."
 - "Notwithstanding my contention that the exceptions of [a]rticle 9(1)(d) and [a]rticle 9(2)(c) have not been demonstrated to apply I am of the view that, even if and where they do apply, there is still a solid public interest argument for the release of the information."
 - "The HydroSED project is intended to address a knowledge gap. That gap is well explained in the Introduction to the attached Newsletter and the Objectives of the project are laid out in the next section" [the appellant provided a copy of a redacted Newsletter, which I understand he received in response to a separate AIE request]
 - "The standard water quality mitigations that the HydroSED Project is intended to assess are currently in use by the Forest Service of [the Department] and form the basis of forestry licence conditions in many, many licences. It is strongly in the public interest in terms of environmental protection that any potential weaknesses in the current mitigations are identified as quickly as possible. Those mitigations (predominantly in terms of setbacks from watercourses) are being used to produce Determinations under Article 6(3) of the Habitats Directive that the project will not give rise to any significant effect on European Site(s). Determinations under Article 6(3) must be



demonstrated to a reasonable degree of scientific certainty. There is a lacuna in terms of the current science regarding mitigation to protect water quality in terms of forestry operations.”

- “My request was made specifically to elicit information to inform submissions and appeals on forestry licencing. I cannot over-stress the importance of this work. [The Department’s Forest Service has] been operating for years with no validation of the standard conditions which they apply to protect water quality. The necessity of this work is long overdue.”
- “I am involved in making appeals (in my own name and also in support of other parties) to the [Forestry Appeals Committee] against decisions of the Minister on forestry licences where the appeals include grounds in relation to issues of water quality. As an example - *“There is no scientific rationale presented that the setbacks applied in the project will be effective in providing mitigation against impacts on water quality. Adherence to Standards is only acceptable where those Standards are based on verified science, not historic practice. The fact that [the Department] is currently funding a project (HydroSED) which is intended to validate its suite of mitigation measures indicates that no current validation exists for those setbacks.”*
- “HydroSED is a publicly funded project; the public is paying for this research and should be entitled to access as much of the information as possible in as timely a manner as possible. The research is intended to either confirm that the existing mitigation is adequate or that changes need to be made.”
- “The information sought is very important in terms of ensuring that there is a level playing field in terms of access to environmental [information] for the public in terms of public participation in the licencing process. The information is available to both [the Department] and at least to some extent to their forestry partners in this project. It is contrary to the public interest that the public is being denied access to the requested information.”
- “The project does not need to be completed for important preliminary conclusions to have been reached. The Habitats Directive is framed around the precautionary principle and the release of any information from this project which raises any doubts regarding the efficacy of the current standard mitigations is strongly in the public interest in terms of protecting the environment.”

17. During the course of this review, this Office’s Investigator wrote to the appellant regarding the relevance of article 9(2)(c) of the AIE Regulations (discussed in further detail in the Analysis and Findings section below) and to provide him with a final opportunity to comment.
18. The Investigator outlined her view that article 9(2)(c) of the AIE Regulations can apply both to information that is itself material in the course of completion or unfinished, and to information that, while not itself material in the course of completion or unfinished, sufficiently concerns material in the course of completion or unfinished information.
19. She noted that the case at issue has a particular factual scenario in that it relates to an ongoing academic research project funded by the Department, HydroSed. She outlined that she was of the view that there is material being actively worked on in respect of the academic research project. She stated her position that while some of the information at issue may be complete, all of the information at issue is sufficiently related to material in the course of completion, namely work on the academic



research project, such that none of the information at issue can be said to be separate and independent pieces of work to that material in the course of completion. Accordingly, she indicated her view that all of the information at issue concerns material in the course of completion and article 9(2)(c) applies.

20. She also noted that while she considered there to be a public interest in the openness and transparency with regard to how public funds are used in respect of research and in the knowledge that is gained as a result of the topic of research being undertaken, she also considered there to be a strong public interest in ensuring that third level institutions have the ability to carry out research without interference and that academics have the freedom to undertake the research process without the need to prematurely defend or justify their work or have it undermined due to too early publication as a result of release under AIE. She noted her understanding that following completion of the project the final report will be published and made publicly available. Accordingly, she indicated her view that, having regard to the information at issue and the circumstances of the case at the present moment, the public interest in disclosure does not outweigh the interest served by refusal. She also stated her view that, given all of the information at issue concerns material in the course of completion, partial disclosure of the information is not possible.
21. The appellant replied to the Investigator's correspondence. In response to the Investigator's comment that "article 9(2)(c) of the AIE Regulations can apply both to information that is itself material in the course of completion or unfinished, and to information that, while not itself material in the course of completion or unfinished, sufficiently concerns material in the course of completion or unfinished information" he stated that "there are numerous decision[s] of the Commissioner relating to [a]rticle 9(2)(c). None of them would be consistent with your view as expressed." He submitted "[a]rticle 9(2)(c) is not a means to provide a basis for blanket refusals relating to processes, including research. Just because the project is in progress does not mean that all of the information relating to the project is in progress."
22. The appellant went on to state that "[i]t is the information requested which must be examined when assessing whether article 9(2)(c) applies, rather than any process to which the information relates." He noted that this is paraphrased from the decision in [OCE-135805-Z6Q3K5](#) (Mr F and Department of Agriculture, Food and the Marine). He noted that the same decision also includes "article 9(2)(c) requires an examination of the documents themselves, not of any related consultation process" and paragraph 32 of that decision states:

"The appellant argues that, by their nature, the documents constituting responses to the statutory consultation cannot be said to be material in the course of completion or unfinished as they are completed documents that have been submitted to the Department as part of a statutory consultation process. I agree with this submission. These documents have been submitted complete and finished for the Department's consideration in the context of that process. Accordingly, as they constitute material that is complete and finished, they cannot be considered to fall under the exemption in article 9(2)(c) and the Department's reliance on this provision in respect of them fails. This means that no consideration of article 10(3) in respect of them is necessary as the exempting article cannot be utilised to prevent their release."
23. The appellant further stated "the CJEU has noted that the purpose of the exception concerning material in the course of completion or unfinished documents is "to meet the need of public authorities



to have protected space in order to engage in reflection and pursue internal discussions”. He submitted that “[p]rogress [r]eports that have been submitted are complete. They have been submitted complete and finished and cannot be considered to fall under the exception in [a]rticle 9(2)(c). Once a methodology has been established and the project is running any reflection is consequent to the actual methodology, which is complete. The methodology does not fall under the exception of [a]rticle 9(2)(c).”

24. The remainder of the appellant’s reply contained the following comments:

- No protected space is needed to pursue internal discussions on completed works.
- UCD, in a related case, have already released some information in respect of this project.
- A refusal under article 9 is discretionary.
- If the AIE Regulations were intended to specifically protect academic work in progress this would be included as a specific category or basis for refusal. It is not.
- An adverse effect must be demonstrated for [a]rticle 9(2)(c) to apply – this must be reasonably foreseeable and not purely hypothetical. No tangible adverse effect has been demonstrated by any of the parties – everything put forward is speculative.
- The Investigator’s comments regarding “prematurely defending, justifying or not having work undermined appear to be an assumption on [the Investigator’s] part that I might be seeking this information in order to discredit it. This is purely a speculative position.”
- There may be other exceptions that could apply to some of the information, but article 9(2)(c) read in the light of 10(4) can only apply to individual records which are in the course of completion.
- Article 10 needs to be applied to any refusal under article 9(2)(c) so even if there is information that is in the course of completion the public interest must still be weighed before refusal can be justified.
- European Law is predicated on the precautionary principle. The nature of the research being undertaken is to investigate the effectiveness of current protections used in forestry to prevent sediment release. There is a counter public interest argument that research may be indicating that current scenarios are not adequately protecting the environment and that the research is raising doubts regarding current levels of environmental protection. It would be in the public interest that research that is raising doubts regarding the efficacy of current protections is not excluded from the public domain.
- A project may have formed conclusions on aspects of the project before the project is finally concluded.
- The public interest must be weighed on each individual record, not on the process.

25. The appellant also stated that he had consulted with his legal advisor, who was of the same view.

Department’s Position

26. The Department’s internal review decision, included the following comments in support of its decision to refuse access to the information at issue:

“Methodologies outlined in the HydroSED Research Grant Proposal report are being withheld in accordance with Article 9 (1)(d) of the AIE Regulations. HydroSED is an ongoing Department of Agriculture, Food and the Marine (DAFM) funded collaborative project, involving various research teams from UCD and project partners MTU, Coillte and Green Belt Ltd. Methodology in the research proposal is fundamental and in preparing this proposal, the project team considered a



suite of integrated and complementary tasks to ensure they combine in a comprehensive and coherent programme of investigation. A structured and systematic scientific method has been identified based on the expertise and knowledge of the project team. The report includes information that relates to live and ongoing research and research yet to be carried out (and these elements also include details relating to funding, timeframes, risks and proposed changes, anticipated deliverables etc). The premature release of this information at this time would seriously disadvantage the projects in question, UCD as Research Performing Organisation leading the research, and DAFM, in financial, competitive and potentially commercial terms. While a project is ongoing, it is important that this information is protected from release as there are real concerns that release of such comprehensive elements contained within the proposal into the public domain leave the project, including the location sites, timeframes, risks and proposed changes and anticipated deliverables at risk of being compromised.”

The 6-month interim report and Year 1 Scientific Progress report, provide detailed updates on the project and are withheld in accordance with Articles 9 (1)(d) and 9 (2) of the AIE Regulations.

Premature release of this data, which is subject to change over the course of the project, would have no significant meaning without the final findings and would be open to incorrect interpretation by other individuals which could negatively impact the project itself.

Disclosure of the requested information would adversely affect intellectual property rights. Records released under the AIE regulations are considered as being released to the world at large and in doing so we must assume that release of information contained within the proposal and interim reports that are subject to intellectual property could be commercially exploited or used in a way that would constitute an unauthorised infringement of the intellectual property rights. In accordance with the terms of the project, any intellectual property emanating from the project will be owned by the research performing organisations and access to industry parties will be via licensing which shall be on fair commercial terms, subject to overall State Aid, technology transfer and other legal or government policy considerations. It is expected that once the project is finished, expected completion date 31 August 2024, and the final report is published, then the results would be shared, contingent on the coordinator’s consent to publish.”

27. In its submissions to this Office the Department also provided detail in support of its decision to refuse access to all of the information at issue under articles 9(1)(d) and 9(2)(c) of the AIE Regulations, which I have summarised below:

- The Department stated that there is information that relates to live and ongoing research and research yet to be carried out (and these elements also include details related to funding, timeframes, risks and proposed changes, anticipated deliverables etc).
- The Department stated that the premature release of this information at this time would seriously disadvantage the projects in question, UCD as a Research Performing Organisation leading the research, and the Department, in financial, competitive and potentially commercial terms.
- The Department contended that while the project is ongoing it is important that this information is protected from release as there are real concerns that release of such comprehensive elements contained within the proposal into the public domain leave the project, including location sites,



timeframes, risks and proposed changes, and anticipated deliverables at risk of being compromised. The Department commented that all projects or applications should be judged on their own merits and that premature release of this data, which is subject to change over the course of the project, would have no significant meaning without the final findings and would be open to incorrect interpretation by other individuals which could negatively impact the project itself.

- The Department stated that the project progress reports are indicative of the project direction. It stated that the progress reports are material in the course of completion and the initial finding should not be considered in isolation. The Department outlined that the final reports and resulting peer review papers are finished documents or data and, until that point, material is incomplete.
- Regarding articles 10(3) and 10(4) of the AIE Regulations, the Department stated that the factors considered in favour of release the information included “right of the public to have access information, the need for an open, transparent and accountable public service, and the need for scrutiny of decisions” and the factors considered against release included “maintaining confidentiality of IP rights [and] protection of unfinished research and material in the course of completion.”
- Regarding article 10(5) of the AIE Regulations, the Department stated that the information could not be separated.

Analysis and Findings

28. As outlined above, the Department is refusing access to all of the information at issue under articles 9(1)(d) and 9(2)(c) of the AIE Regulations. In the circumstances of this case, I consider it appropriate to consider article 9(2)(c) of the AIE Regulations first, before proceeding to consider the other exemption relied upon, if necessary.

29. I am satisfied that the information at issue can generally be described as follows:

- Project Proposal (88 pages) - The entire record is at issue. The record comprises the application for funding, which contains a number of different sections, including: Principal Investigator Details, Partner Details, Summary of Project Details, Project Information, Work Plan, Management Plan, Summary of Key Participants – RPO, Summary of Key Participants – Non-RPO, Existing Research Facilities, Consolidated & Summary Budget Tables, Budget Details RPOs, Equipment, Staffing, Justification of Grant-Aided Costs, Explanation of Cash and/or In-Kind Contributions, Project Coordinator Conflict of Interest and Declaration, Principal Investigator Declaration, Vice President of Research/Head of Research (within Lead Institution) Declaration, TTO (within Lead Institution) Declaration, References. Details regarding the type of information provided in the various sections can be seen in the Department’s [2019 Guidelines for Applicants](#) . There is also other general information contained in the [2019 Competitive Call for Research Proposals Call Specification](#).
- 6 Month Progress Report (10 pages) - The entire record is at issue. This record comprises the 6 Month Progress Report, which contains a number of different sections, including Expenditure, Staff, Task Information, Summary (of problems encountered or anticipated and proposed measures to address these). The [Project Management and Progress Reporting Guidelines](#) available on the



Department's [website](#), describe the 6 month report as a brief summary of progress for the six month period after the project start date and “should include, start date, staffing, tasks started and issues encountered to date. In certain circumstances more detail may be requested from the coordinator, this will be on a case-by-case basis”. Details regarding the type of information provided in the 6 Month Progress Reports at issue can be seen in the Project Management and Reporting Guidelines.

- Year 1 Progress Report (32 pages) - The entire record is at issue. This is a full project progress report (PPR). It contains a number of different sections, including: Overview of Period under Review, Progress and Results Achieved on Tasks (broken down across different milestones/deliverables), Details of Modifications and Project Management, Outputs, Impacts and Knowledge Transfer. According to the Department's Project Management and Progress Reporting Guidelines available on the Department's website, the PPR is primarily intended to assist the Department in determining whether the project is on-schedule, is being carried out according to the approved proposal, and budget is being spent appropriately. The PPR captures details on the project for the period under review (including response(s) to previous PPR if applicable) and information cumulatively on the entire project. It contains a significant amount of information. Details regarding the type of information provided in the Year 1 Progress Report can be seen in the Project Management and Reporting Guidelines.
- Year 2 Progress Report (28 Pages) – The entire record is at issue. This is a full project progress report (PPR). It contains a number of different sections, including: Overview of Period under Review, Progress and Results Achieved on Tasks, Details of Modifications and Project Management, Outputs, Impacts and Knowledge Transfer. Again, this PPR contains a significant amount of information. Details regarding the type of information provided in the PPRs can be seen in the Project Management and Reporting Guidelines.

30. Article 9(2)(c) of the AIE Regulations provides that a public authority may refuse to make environmental information available where the request concerns material in the course of completion, or unfinished documents or data. This provision transposes Article 4(1)(d) of the AIE Directive, which in turn is based on part of Article 4(3)(c) of the Aarhus Convention. This exemption is not harm-based. It is not necessary for the public authority to show that there is any adverse effect in respect of the release of the information at issue to engage the exception, just that the information concerns material in the course of completion, or unfinished documents or data, although, as noted below, there is still a requirement to then consider the public interest.
31. Article 9(2)(c) of the AIE Regulations must be read alongside article 10 of the AIE Regulations. Article 10(3) of the AIE Regulations requires a public authority to consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) of the AIE Regulations provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest served by disclosure. Article 10(5) of the AIE Regulations provides that nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information. Article 10(6) of the AIE Regulations states that where a request is refused pursuant to article 9(2)(c) because it concerns material in the course of completion, the public authority shall inform the applicant of the name of the authority preparing the material and the estimated time needed for completion.



32. When relying on article 9(2)(c) of the AIE Regulations, the public authority should explain why the information at issue falls within the scope of the exception, outlining which limb(s) of the exception is being relied upon. It is then for the public authority to weigh the public interest served by disclosure against the interest served by the refusal as is required by articles 10(3) and 10(4). I note the comments of the CJEU in [Case C-619/19, Land Baden-Württemberg v DR \(Land Baden-Württemberg\)](#):

“...[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.” (paragraph 69)

33. The terms “material in the course of completion” and “unfinished documents or data” are not defined in the AIE Regulations, AIE Directive, or the Aarhus Convention. However, the decisions of the CJEU in *Land Baden-Württemberg*, and [Case C-234/22, Roheline Kogukond MTÜ and Others v Keskkonnaagentuur \(Roheline Kogukond MTÜ\)](#), provide some guidance on the exception.

34. While *Land Baden-Württemberg* more specifically concerned the internal communications exception, the Court indicated that both the internal communications exception and the exception concerning material in the course of completion and unfinished documents or data are “intended to meet the need of public authorities to have a protected space in order to engage in reflection and to pursue internal discussions” (see paragraph 44).

35. In *Roheline Kogukond MTÜ*, which dealt with the question as to whether data on the location of permanent sample plots for a statistical forest inventory were to be classified as material in the course of completion or unfinished documents or data, the Court referred to the decision in *Land Baden-Württemberg*. In considering the material in the course of completion and unfinished documents or data exception, it noted at paragraphs 37 to 41:

“The referring court asks, in the first place, whether disclosure of the coordinates for the location of the permanent sample plots used for the periodic collection of data with a view to drawing up a national statistical forest inventory may be refused on the basis of point (d) of the first subparagraph of Article 4(1) of Directive 2003/4, which allows Member States to refuse a request for environmental information relating to documents in the course of completion or to unfinished documents or data.

Although the concepts of ‘material in the course of completion’ and ‘unfinished documents or data’ are not defined by [the AIE Directive], it is apparent from the explanations relating to Article 4 of the Proposal for a Directive of the European Parliament and of the Council on public access to environmental information presented by the Commission on 29 June 2000 (COM(2000) 402 final) (OJ 2000 C 337 E, p. 156) that the purpose of that exception is to meet the need of the public authorities to have a protected space in which to pursue internal considerations and debates (see, to that effect, judgment of 20 January 2021, *Land Baden-Württemberg (Internal communications)*, C-619/19, EU:C:2021:35, paragraph 44). The Court has also held that, unlike the ground for refusing access provided for in point (e) of the first subparagraph of Article 4(1) of Directive 2003/4 relating to internal communications, that provided for in point (d) of the first subparagraph of Article 4(1) of the directive relates to the preparation or drafting of documents and is therefore of a temporary



nature (see, to that effect, judgment of 20 January 2021, *Land Baden-Württemberg (Internal communications)*, C-619/19, EU:C:2021:35, paragraph 56).

That interpretation is corroborated by that of Article 4(3)(c) of the Aarhus Convention, which provides for an exception to the right of access to environmental information in relation to documents in the course of completion, and by the explanations contained in the document entitled *The Aarhus Convention: An implementation guide* (second edition, 2014) published by the United Nations Economic Commission for Europe, which, although it has no normative value, is one of the elements that may guide the interpretation of that convention (see, to that effect, judgment of 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 27).

The location coordinates of permanent sample plots used for the collection of data for drawing up a national statistical forest inventory cannot be regarded as documents in the course of completion or as unfinished documents or data when they relate to the state of the forest on a given date. The fact that those sample plots are used to measure developments in the state of forest resources and soils in successive statistical forest inventories or other reports does not call that conclusion into question. To interpret it otherwise would be tantamount to allowing the exception provided for in point (d) of the first subparagraph of Article 4(1) of Directive 2003/4 to be applied without any time limit, even though that exception is, as has been pointed out above, of a temporary nature.”

36. The first question I must consider is whether or not article 9(2)(c) of the AIE Regulations is engaged on the basis that the information at issue “concerns material in the course of completion, or unfinished documents or data”.
37. It is my view that “material in the course of completion” relates to the process of preparing information/documents. The [Aarhus Guide](#) states that “the expression ‘in the course of completion’ relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared.” However, I do not consider this comment to be relevant to this appeal, which concerns a specific academic research project and not a decision-making process. I consider that this exemption may apply in two ways, firstly to information that is *itself* in the course of completion or unfinished, but secondly to information that while not itself material in the course of completion or unfinished, sufficiently *concerns* the material in the course of completion or unfinished information.
38. The Aarhus Guide also includes the following commentary:

A request for access to raw environmental data cannot be refused on the grounds that it is “material in the course of completion” to be made publicly available only after processing or correction factors have been applied. In its findings on ACCC/C/2010/53 (United Kingdom), the Committee considered whether raw air pollution data collected from a monitoring station and not yet subject to data correction could be exempted from disclosure as “material in the course of completion”. The Committee considered that the raw data was itself environmental information within the meaning of article 2, paragraph 3 (a), of the Convention.
39. I consider that this appeal is factually different to the scenario in ACCC/C/2010/53, which did not concern an ongoing academic research project.



40. In *Roheline Kogukond MTÜ*, the information at issue concerned location coordinates of permanent sample plots used to draw up the Estonian statistical forest inventory. The CJEU noted that “the permanent sample plots, the location coordinates of which are requested..., are sampling units used for the periodic collection of data with a view to drawing up, by extrapolation, statistical reports on forest stands in Estonia and on land use and development. Those sample plots are located on the sides of 64-hectare square plots, chosen for their representative nature of the state of the forest and soils.” The CJEU held that “[t]he location coordinates of permanent sample plots used for the collection of data for drawing up a national statistical forest inventory cannot be regarded as documents in the course of completion or as unfinished documents or data when they relate to the state of the forest on a given date. It noted that “the fact that those sample plots are used to measure developments in the state of forest resources and soils in successive statistical forest inventories or other reports does not call that conclusion into question. To interpret it otherwise would be tantamount to allowing the exception...to be applied without any time limit, even though that exception is...of a temporary nature.”
41. Advocate General Kokott in her [Opinion](#) commented “the data on the location of the permanent sample plots of the statistical forest inventory are already available in full and therefore do not fall into any of the three categories [provided for in the exception]” (paragraph 60). She further stated, at paragraphs 61 to 64:

“The fact that the data on the location of the permanent sample plots of the statistical forest inventory are to be used to regularly produce further reports on the state of the forests does not change that. Those reports and the information collected therein may at certain times fall under the abovementioned categories of cases and thus within the exception pursuant to Article 4(1)(d) of the Environmental Information Directive. However, that does not mean that the location data may be withheld. While they are explicitly or implicitly part of the reports, they are significant in their own right regardless of the individual reports, which may not yet have been completed. That is also demonstrated by the fact that those location data not only form the basis of reports that are still being processed, but – as the Environment Agency acknowledges – also form the basis of reports that have already been completed in the past.

The above considerations on the possibly limited interest of the public in the disclosure of the location data do not change the conclusion. They do not change the fact that the location data are part of operations that have already been completed.

It would be contrary to the temporary nature of that exemption to apply it indefinitely to certain data by reason of the repeated use of that data, even though the data has already been definitively established. Rather, the exception is intended to apply only during a specific period, that is to say during the processing of materials, documents and data. The idea of a time-limited application of that exception is confirmed by the second subparagraph of Article 4(1) of the Environmental Information Directive, according to which a refusal to disclose material that is in the process of being completed must already indicate when the material is expected to be complete.

Therefore, data on the location of the permanent sample plots of a regularly repeated statistical forest inventory do not constitute material in the process of being completed, nor are they documents which have not yet been completed or data which have not yet been processed for the purposes of Article 4(1)(d) of the Environmental Information Directive.”



42. In my view, notwithstanding that some of the information at issue in this case includes location data, the appeal before me and *Roheline Kogukond MTÜ*, can be distinguished on their facts. In contrast to *Roheline Kogukond MTÜ*, which solely concerned access to coordinates for permanent sample plots used for previous and future repeated data collection, this appeal concerns a wider variety of information, including location data, for ongoing research, that has an estimated completion date.
43. It is also important to note that I am not bound to follow previous decisions of the Commissioner and I must have regard to the facts of this particular case, which are considerably different to those in [OCE-135805-Z6Q3K5](#) referred to by the appellant.
44. As stated above, I am satisfied that article 9(2)(c) of the AIE Regulations can be relied upon in circumstances beyond where the information itself is, for example, “material in the course of completion” or “unfinished data”, and can be relied upon where the information concerns “material in the course of completion” or “unfinished data”.
45. In assessing whether the information at issue concerns “material in the course of completion”, I am of the view that it is necessary to identify material that is actively being worked upon, be able to explain why, and how, the information at issue concerns that material, and consider whether the information at issue is a separate and independent piece of work to that material – if the information at issue is a separate and independent piece of work, the exception will not be applicable. I also consider that the material that is actively being worked upon must have a physical existence (it cannot be something that does not have a physical existence (e.g. a project, exercise or process, although it can be part of same). For example, an overarching project, even if it is not complete, cannot be considered to be “material in the course of completion”, however individual documents that form part of the project might be if they have not yet been completed.
46. I consider that “unfinished data” is data that a public authority is still collecting at the time of the decision. Again, in assessing whether the information at issue concerns “unfinished data”, I am of the view that it is necessary to identify the data that is actively being collected, be able to explain why, and how, the information at issue concerns that data, and consider whether the information at issue is a separate and independent piece of work to that data – if the information at issue is a separate and independent piece of work, the exception will not be applicable. Whether data can be considered to be unfinished depends on the circumstances. I consider that data which is part of routine monitoring or collected raw data being used as part of ongoing research or policy development, even if it has not been analysed or validated, may not generally be regarded as part of ongoing unfinished data collection.
47. The information at issue concerns the proposal and project reports relating to the ongoing HydroSED project”. As previously noted, according the HydroSED project [website](#) , it is a collaborative research project funded by the Department that seeks to assess the hydrological and sediment impacts of forest operations in Ireland.
48. Having examined the information at issue it is evident that, the project proposal and progress reports submitted to the Department are complete records. However, what is relevant in this case is whether the information at issue concerns material in the course of completion and/or concerns unfinished documents or data. I wish to reiterate that while I am required by article 12(5)(b) of the AIE



Regulations to specify reasons for my decision, I must also be careful not to disclose withheld information in my decisions. This means that the detail that I can give about the content of the information at issue and the extent to which I can describe certain matters in my analysis is limited.

49. I can state that the information at issue shows that there are a significant number of tasks and deliverables that are required to be completed by the end of the research project, some of which have been completed, some of which are ongoing, and some of which (during the relevant period) had not yet been started. I am satisfied that all of those tasks and deliverables are intrinsically interlinked and that all of the information at issue is also intrinsically linked to those tasks and deliverables. I am also satisfied that, notwithstanding the time that has passed, some of the tasks and deliverables remain ongoing and there is material actively being worked upon. I am also satisfied that given the nature of the information at issue, although it is complete, none of it can be said to be separate and independent pieces of work to those tasks and deliverables that I am satisfied comprise material in the course of completion.
50. In all the circumstances of this case, I am satisfied that there is a sufficient basis to conclude that all of the information at issue concerns material in the course of completion to the extent that it falls within the scope of the exception provided for at article 9(2)(c) of the AIE Regulations. It is important to note that this decision raises a novel issue. My Office has not previously considered access under the AIE regime to information regarding an ongoing academic research project. As such, all previous decisions under article 9(2)(c) of the AIE Regulations must be treated with caution. The appellant has relied on the approach this Office has taken in previous cases and argues that I am adopting a new, class based exemption here. To a certain extent I can understand the appellant's position. However, this appeal is factually different from all of those cases in that the appellant is seeking all environmental records relating to a live academic research project.
51. However, that is not the end of the matter. As noted above, article 9(2)(c) must be read alongside article 10 of the AIE Regulations. It is necessary to weigh the public interest served by disclosure against the interest served by refusal, in accordance with article 10(3) and 10(4) of the AIE Regulations.
52. In considering the public interest served by disclosure, it is important to be mindful of the purpose of the AIE regime, as reflected in Recital 1 of the Preamble to the AIE Directive, which provides that "increased public access to environmental information and the dissemination of such information contribute to greater public awareness of environmental decision-making and, eventually, to a better environment." The AIE regime thereby recognises a very strong public interest in openness and transparency in relation to environmental decision-making.
53. The AIE regime also acknowledges that there may be exceptions to the general rule of disclosure of information, as noted in Recital 16 of the AIE Directive, which provides that "public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases". One such case is in respect of "material in the course of completion, or unfinished documents or data". The general public interest in such an exception is evident from the European Commission's Explanatory Memorandum on the AIE Directive, which notes that "it should be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account". This was referred to by the CJEU in *Land Baden Württemberg* (and



reiterated in *Roheline Kogukond MTÜ*), which clearly stated that the exception is intended to meet the need of public authorities to have a protected space in order to engage in reflection and to pursue internal discussions.

54. The HydroSed Project received funding following the Department's [2019 Call for Research Proposals](#) . According to the Call announcement, the Call invited eligible Research Performing Organisation (RPO's) to submit collaborative research proposals directed at addressing current priority issues across four thematic areas that spanned the entire agri-food, forest, and bioeconomy sector:

- Environment and Climate Smart Approaches to Agri-Food Systems
- Animal and Plant Production, One Health and Welfare
- Rural Growth, Digitalisation and the Bio-economy
- Food

55. The Call announcement further explained that the Department has three “public good” competitive research funding programmes that cover the Food, Agriculture, and Forestry thematic areas. It briefly described the three programmes as follows:

- “Food Institutional Research Measure (Food) aims to develop platform technologies that underpin a competitive, innovative and sustainable food manufacturing and marketing sector some of which can be further exploited through more industry facing public support programmes.
- Research Stimulus Fund (Agriculture) aims to support sustainable and competitive agricultural production practices and policies, and contribute to building and maintaining a knowledge economy and research capability in the primary agriculture sector.
- Programme of Competitive Forest Research for Development (Forestry) aims to develop a scientific foundation and support for a sustainable, competitive, market orientated and innovative forest industry.”

56. The Department's [table of research projects funded by DAFM Call 2010 onwards](#) (as at date of this decision) available on the Department's [website](#) sets out that the HydroSed project was awarded €597,505 and a summary of the project, as follows:

“HydroSed- Hydrological and sediment impacts of forestry operations in Ireland. Forestry remains a significant pressure in many watercourses at risk of not meeting their WFD status with sediment release being a recognised stressor in this regard. The recognition of these pressures highlights issues with the adequacy and/or implementation of good management forestry practices. This project assesses flow changes and sediment releases from different forestry operations (afforestation, harvesting, windrowing and reforestation) and the efficacy and performance of commonly adopted sediment mitigation measures. Seven forestry sites with adjacent or nearby lotic waterbodies covering three major soil types (peats, peaty mineral soils and mineral soils) have been identified for study. The study sites have been specifically chosen to reflect the significant role of private forest operators in meeting our national target of 18% forestry land cover by 2046 and where mineral soils as opposed to traditional peats (often in upland catchment fractions) are expected to increasingly underpin the establishment of new forests. Study sites will be extensively



instrumented and continuously monitored over a three-year period for rainfall, river discharge and sediment input from the forest block using a ‘paired-catchment’ approach that will facilitate the direct assessment of changes in hydrology and sediment input from forestry activities, with potential influences from any confounding factors being kept to a minimum. Direct measurement of flow and sediment inputs at study sites will be complimented by measures and fingerprinting of deposited sediment in channel bed substrates and the impact of changes and inputs will be related to changed biological status downstream of forest sites. In adding value to the measured datasets, the project will also explore the development and parameterising of hydrological models for the study sites and the integration of LiDAR surveys and hyperspectral imaging as a possible means of assessing changes to forestry drainage networks and the longer-term performance of sediment control measures.”

57. Further details related to the 2019 funding call were set out in the Department’s [2019 Competitive Call for Research Proposals Call Specification](#) and [2019 Guidelines for Applicants](#) . There are reporting requirements in respect of funded projects with further information set out in the Department’s [Project Management and Progress Reporting Guidelines](#) which include details on the six month and annual reports that are required to be submitted.
58. I understand that the final report on the HydroSed project will be published and made publicly available. I also understand that there has been public dissemination of information during the course of the HyrdoSed project (e.g. on the project website, discussed on the radio/podcasts/X (twitter), at conferences etc). Furthermore, the Department’s Policy on [Open Access](#) outlines:

Recognising the key role that research, technology and innovation plays in developing a competitive, knowledge based, sustainable economy, DAFM’s Competitive Research Funding Programmes place great emphasis on the need for active and varied dissemination of the outputs of research. Acknowledging that Open Access enhances the free circulation of knowledge, ultimately expediting innovation, DAFM is supportive of the drive for openness and transparency in the Irish publicly funded research landscape.

DAFM is fully committed to ensuring that the research outputs from its Competitive Research Funding Programmes are made available to all potential end users including the food Industry, SMEs, farming organisations, farm advisory services, farming community, public sector & regulatory bodies, academia and civil society and thus supports the National Principles on Open Access Policy Statement.

DAFM’s Open Access Policy requires researchers in receipt of funding from DAFM’s Competitive Research Funding Programmes to comply with its Policy on Open Access, as follows:

1. Accepted peer-review research and scholarly publications (including conference proceedings and technical reports), which arise in whole or in part from research funded by DAFM, should, subject to the copyright and archiving policies of the publisher, be made available at the earliest possible date through their institutional repository (information on Irish Research institutional repositories is available through Rian, www.rian.ie). Publisher’s embargo period should not normally exceed six months for scientific, technical and health science research publications. Protection of Intellectual Property must, in the first instance, take precedence over any form of publication and indeed open access deposition.



2. Publications deposited in an institutional open access repository must contain a link from the deposited version to the publication site, a URL/DOI (Document Object Identifier) must be used.
 3. In accordance with the National Principles on Open Access Policy Statement, where possible, research data (i.e. associated metadata and supporting documentation including any research monographs) supporting the publication should also be made available in an open access repository whenever feasible and linked to the associated publication where appropriate. European and national data protection rules must be taken into account in relation to research data, as well as concerns regarding trade secrets, confidentiality or national security.”
59. Having examined the information at issue, I am satisfied that its release would provide insight into the Department’s funding of research projects and how that process operates in practice, as well as HydroSed project itself and the work being undertaken. There is undoubtedly a strong public interest in the openness and transparency with regard to how public funds are used in respect of research projects and, as also contented by the appellant, in the knowledge that is gained as a result of the topic of research being undertaken.
60. However, it must also be noted that the exception provided for in article 9(2)(c) of the AIE Regulations is designed to protect the “private thinking space” of public authorities. In this instance, the exemption operates to allow for the carrying out of important research by third level institutions. There is also a strong public interest in ensuring that third level institutions have the ability to carry out research without interference in the terms under which any relevant grant has been received and that academics have the freedom to undertake the research process without the need to prematurely defend/justify their work or have it be undermined due to too early publication of relevant information to the world at large under the AIE regime. It is important to note that this is in no way, as suggested by the appellant, an assumption that he might be seeking this information in order to discredit it, rather it is concerned with the rigours of academic research and publication generally. I am conscious that the timing of release is relevant to this case and note the Department’s comments that the estimated date for completion of the project is 31 August 2024 and that following the completion of the project the final report will be published and made publicly available, which will include some of the information at issue. I am satisfied that release of the information at issue at this point in time would undermine the private thinking space required by the academics concerned to carry out their research. I find that the above considerations apply to all of the information requested, and therefore it is not necessary for me to individually analyse the public interest test in respect of all material requested.
61. In light of the particular information at issue and all the circumstances of this case, I conclude that the public interest in disclosure does not outweigh the interest served by refusal.
62. In accordance with article 10(5) of the AIE Regulations, I have considered whether information which, although held with information to which article 9(2)(c) applies can be separated from such information. While I note the appellant’s position, including his comments that “the public interest must be weighed on each individual record, not on the process” and notwithstanding any similar information that may already be in the public domain (e.g. whether on the project website, contained within the Department’s summary of research projects funded, discussed on the radio/podcasts/X (twitter) or at conferences etc) or previously released to him, given that all the information at issue concerns material



in the course of completion, I am satisfied that partial disclosure of the information is not possible under the AIE Regulations. I have found that all of the information requested is covered by the exemption and release would undermine third level research. Partial release of information would have the same effect and is thus not possible.

63. Article 10(6) of the AIE Regulations requires a public authority “to inform the applicant of the name of the authority preparing the material and estimated time needed for completion” where a request is refused under “article 9(2)(c) because it concerns material in the course of completion”. Having regard to the information provided by the Department and its indication that the estimated date for completion of the HydroSed project is 31 August 2024, I am satisfied that it complied with article 10(6) of the AIE Regulations.
64. In conclusion, I find that the Department’s decision to refuse access to all of the information at issue under article 9(2)(c) of the AIE Regulations was justified. In light of that finding, I am not required to go on and consider the applicability of the other exemption provision relied upon, namely, article 9(1)(d) of the AIE Regulations.

Decision

65. Having carried out a review under article 12(5) of the AIE Regulations, I hereby affirm the Department’s decision to refuse access to all of the information at issue under article 9(2)(c) of the AIE Regulations.

Appeal to the High Court

66. 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.

Julie O’Leary
On behalf of the Commissioner for Environmental Information
20 August 2024