



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-146824-G1D1J6**

**Date of decision:** 15 August 2024

**Appellant:** Mr. Neil Foulkes

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

**Issue:** Whether the Department was justified in refusing the appellant’s request on the basis that no environmental information within the scope of that request is held by or for it.

**Summary of Commissioner's Decision:** The Commissioner annulled the Department’s decision. He directed the Department to conduct a fresh internal review decision-making process in respect of the appellant’s request.

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.



## **Background**

1. On 3 January 2024, the appellant emailed the Department and made the following request under the AIE Regulations:

*“Under the Access to Information on the Environment Regulations, I wish to request, to be provided in electronic format;*

*For all harvesting sites in County Leitrim that were active during December 2023; by licence number,*

*A) On-site monitoring records generated and maintained by the licensee (or agent) to meet the conditions of the licence, including rainfall monitoring records.*

*B) Details of any operational adjustments and postponements maintained by the licensee (or agent) to meet the conditions of the licence.*

*Licence conditions include any mitigation generated as a result of an Appropriate Assessment.*

*These records may not currently be held by DAFM but they will be held for DAFM by the licensee (or agent) and therefore fall within the scope of the [AIE] Regulations.”*

2. The Department issued its original decision on 31 January 2024. The decision states that it was refusing the records sought on the basis that ‘no records exist’ and references article 7(5) of the AIE Regulations in this regard. The decision then sets out the search steps that were undertaken to locate the information as follows:

*“Direct contact with personnel who may have access to the information that was requested in AIE request. A digital search of the Departmental database, Share-Drive, for specific records.”*

3. The appellant requested an internal review of this decision by way of email dated the 01 February 2024. The request for review raised the following points:

*“The AIE Regulations cover information held by or for a public authority. FS-DAFM licences contain conditions which require monitoring records to be maintained by the licensee which must be available for inspection by DAFM. This information is held for the Department by the licensee and falls within the scope of my request. DAFM is required to make contact with the licensee to acquire the information that has been recorded in order*



*to satisfy the licence conditions as this is environmental information that is held for the Department by the licensee.*

*The decision maker has not contacted the relevant licensees for this information and has therefore failed to carry out adequate searches for the requested information and the request has not been completed in accordance with the Regulations.”*

4. The Department issued its internal review decision on 27 February 2024, which affirmed its original decision. The decision letter is signed off as ‘Forestry AIE Unit’ and does not specify the name or rank of the decision-maker in the review. The decision states that:

*“A new search for the requested information was conducted. The following search steps were undertaken to locate and retrieve the requested information: A digital search of the Departmental database, Share-Drive, noting specific dates and regions.*

*Direct contact with personnel who may have access to the information that was requested in AIE request.”*

5. The appellant subsequently lodged an appeal to this Office on 28 February 2024, which was accepted by this Office on 20 March 2024. The appellant further enclosed his preliminary submissions as part of his appeal application to this Office.
6. I am directed by the Commissioner to conduct a review of this appeal. I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to the decisions of the Department and to the correspondence between the parties. I have also considered the submissions made by the appellant to this Office on the matter. 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, the role of this Office is to review the public authority's decision and to affirm, annul or vary it.
9. The scope of this review is therefore concerned with whether the Department is justified in refusing access to environmental information falling within the scope of the request on the basis that no relevant information is held by or for it.

### **Preliminary Matters**

#### **Submissions**

10. The Department was notified by way of email dated the 20 March 2024 that this Office had accepted the case and requested that this Office be provided with final submissions by the 03 May 2024. No such submissions were provided in response to this request. The Department was further contacted by letter dated the 21 May 2024 with a view to clarifying certain factual matters in this case. The letter asked that a reply be provided by the 04 June 2024. Again, no response to this letter was received by this Office.
11. I acknowledge that the recent increase in AIE requests and appeals continue to be a challenge for the Department. It is encouraging to see that both of the Department's decisions were provided within the timeframe set out in the AIE Regulations. It is, however, regrettable that the Department failed to provide this Office with submissions or clarifications when requested. In the absence of any such submissions or clarifications, this Office must rely upon the grounds for refusing the appellant's request as set out in its decisions.

#### **Identity of the Decision-Maker**

12. As noted above, the internal review letter does not outline the rank or position held by the person who made that decision. Article 11(2) of the AIE Regulations requires that the person making the internal review decision be of a rank that is the 'same as, or higher than, that of the original decision-maker'. The Department was asked to clarify the name and rank of this person in this Office's letter to the Department dated 21 May 2024 but did not receive any such clarifications. I would ask the Department to ensure that this information is made clear in future decisions.



## **The Position of the Parties**

### **The Appellant's Position**

13. The appellant enclosed his preliminary submission alongside his appeal to this Office dated 28 February 2024. The submission stated as follows:

*"There is no evidence that DAFM has considered the fact that the information requested may be held for the Department by DAFM.*

*I pointed this out clearly in both my request and my request for an internal review, but both decision makers have ignored the point.*

*My request stated;*

*"These records may not currently be held by DAFM but they will be held for DAFM by the licensee (or agent) and therefore fall within the scope of the Regulations."*

*My IR request stated;*

*"The AIE Regulations cover information held by or for a public authority. FS-DAFM licences contain conditions which require monitoring records to be maintained by the licensee which must be available for inspection by DAFM. This information is held for the Department by the licensee and falls within the scope of my request. DAFM is required to make contact with the licensee to acquire the information that has been recorded in order to satisfy the licence conditions as this is environmental information that is held for the Department by the licensee.*

*The decision maker has not contacted the relevant licensees for this information and has therefore failed to carry out adequate searches for the requested information and the request has not been completed in accordance with the [AIE] Regulations."*

*On this basis I must conclude that DAFM has failed to take all reasonable steps to identify the requested information."*

### **The Department's Position**

14. As previously noted, the Department did not provide submissions to this Office in response to the request for same dated 20 March 2024. Furthermore, no reply was received to the request for clarifications dated 21 May 2024. The Commissioner therefore takes the Department's position in this case to be expressed in its entirety within the reasoning



outlined in both the internal review decision and in the original decision which was upheld on review.

## **Analysis and Findings**

### **Article 7**

15. Article 7(1) of the AIE Regulations requires public authorities to make available environmental information that is held by or for them upon request. Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested environmental information is held by or for the public authority concerned.
16. Although the Department does not explicitly rely on article 7(5) of the AIE Regulations in its internal review decision, the Department does refer to article 7(5) in its original decision. The Department's position as outlined in the original decision, and affirmed at internal review, is that no records exist that fall within the scope of the appellant's request. The appellant, by contrast, disputes this position and contends that information relevant to his request is either held by the Department or held on its behalf by third parties. As there is a question as to whether any information coming within the scope of the appellant's request is held by or for the Department, article 7(5) of the AIE Regulations is consequently the relevant provision to consider in this case.
17. In cases where refusal is based on article 7(5) of the Regulations, the reasons for the conclusion that no relevant information is held by or for the public authority should be provided to the appellant. The requirement under article 7(5) of the AIE Regulations for a public authority to clearly set out the actions it has taken in response to a request is not only necessary for this Office's consideration at appeal but also gives confidence to the appellant that suitable search procedures were conducted in response to their request.
18. In dealing with cases where a public authority has effectively refused a request under article 7(5) of the AIE Regulations, this Office must be satisfied that adequate steps have been taken to identify and locate relevant records, having regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances, a standard of reasonableness must necessarily apply. It is not normally this Office's function to search for environmental information.
19. What will be considered reasonable will vary from case to case. In a recently published OCEI decision – a composite decision entitled [Mr F and the Department of Agriculture, Food and the Marine](#), which issued on 27 March 2024 – the Commissioner set out a general guide of



the type of information that he would generally expect to be set out in a decision where a public authority is relying on article 7(5) of the AIE Regulations. Although the below is only an indicative list and it is for the Department to consider what steps may be relevant in an individual appeal, the Commissioner expects a decision on article 7(5) to include:

- i. an outline of exactly which areas/units etc. of the organisation were searched for the information;
- ii. details of the individuals consulted in connection with the search;
- iii. a description of the searches carried out to cover the possibility of misfiled/misplaced records;
- iv. details of guidelines, practices, procedures and arrangements in relation to the storage, filing, archiving, retention and destruction of the type of information requested in this case;
- v. the basis on which the public authority has concluded that it does not hold any information within the scope of the appellant's request and that no such information is held by any other person or body on its behalf; and
- vi. an explanation of how searches were carried out (i.e. manually, by computer, by name, by key words). Keywords should be recorded and provided in the decision as appropriate.

20. The Commissioner also expects that public authorities design their search steps based on the factual background to the case at hand. For example, where it has been suggested during the course of an appeal that a third party may hold information on behalf of a public authority, then the public authority must consider whether this may be the case and whether those third parties may hold information for the public authority within the meaning of the AIE Regulations. It may be necessary to ask those third parties to carry out searches for information in certain circumstances.

21. The first issue that arises in this case is whether the actual searches detailed by the Department in this case are adequate in the circumstances of the case. I note that the Department, in its original decision, outlined that "[d]irect contact with personnel who may have access to the information that was requested in AIE request" was made, and indicated that "a digital search of the Departmental database, Share-Drive, for specific records" was carried out. I welcome the Department's statement in its internal review decision that it conducted a fresh search for information as part of the review process. It referred to that



fresh search as again involving “[d]irect contact with personnel who may have access to the information that was requested in AIE request” and a “digital search of the Departmental database, Share-Drive, noting specific dates and regions.”

22. Unfortunately, however, I am of the view that the level of detail provided is not sufficient to establish that the Department has carried out reasonable and appropriate searches to identify and locate environmental information held by it relevant to the appellant’s request.
23. Although the internal review decision refers to searches having been conducted in both the Share-Drive and digital databases, noting specific dates and regions, it does not, for example, set out the units of the Department to which these databases relate, the actual search terms used as part of these searches (including the relevant dates/regions), or the rationale for each search term employed. The internal review decision also does not provide any details of the identities or roles of the personnel who were contacted that may have access to the requested information, or why these personnel in particular were deemed to be relevant.
24. Furthermore, as noted above, article 7(5) provides for refusal of a request where no environmental information within the scope of that request is “held by or for” the public authority concerned. The second issue that arises in this case is whether, as suggested by the appellant, further relevant information may be held by third parties such as licensees or agents “for” the Department within the meaning of article 3 of the AIE Regulations.
25. Article 7 of the AIE Regulations requires a public authority, subject to the Regulations, to make available to the applicant any environmental information relevant to the request that is held by or for the public authority. Article 3 of the AIE Regulations provides the following definitions:
  - a. “environmental information held by a public authority” means environmental information in the possession of a public authority that has been produced or received by that authority;
  - b. “environmental information held for a public authority” means environmental information that is physically held by a natural or legal person on behalf of that authority;
26. The Commissioner’s role when determining if relevant environmental information is “held by” a public authority is based on a consideration of the circumstances in the given case, such as the details of the steps taken to search for the requested information, and details of



the public authority's records management and retention policies. These circumstances, in turn, form the basis for the Commissioner's opinion as to whether the public authority was justified determining that the requested information is not held by the public authority.

27. There have been a number of decisions of the Commissioner in recent years on the question of whether information is "held for" a public authority, including the cases of [OCE-93477-D5V8B6](#) and [OCE-97484-R5V6V1](#). While I am not bound by previous decisions of the Commissioner, these decisions provide helpful guidance as to how this issue should be considered.
28. In summary, the Commissioner must have regard to the overall factual position in a particular case and come to a conclusion as to whether or not the requested information is "physically held on behalf of" the public authority, taking into account the interpretative assistance provided by the preparatory documents to the AIE Directive. Where there is any doubt, the Commissioner must give an expansive meaning to the term "physically held on behalf of" a public authority, given the duty on me under article 10(2) of the AIE Regulations and article 4(2) of the AIE Directive to interpret grounds for refusal in a restrictive way.
29. The High Court decision in *Bord na Móna PLC v Commissioner for Environmental Information* [\[2023\] IEHC 57](#) clarifies that that the factual background to the case must be considered by the Commissioner when determining whether the public authority may be said to have control or ownership over the relevant environmental information held by a third party. This consideration may further include examining the nature of relationship between the public authority and the third party. Finally, the Court concluded that the AIE Regulations and AIE Directive require a broad interpretation of the phrase "on behalf of" to be employed when considering if information is held for a public authority. On that basis, the Court found that a legal person may be said to hold information both for their own purposes whilst concurrently holding the information on behalf of a public authority.
30. The Commissioner has also considered a number of cases in which it has been alleged that the requested information is "held for" a public authority by a third party in circumstances where it is alleged that the information relates to that third party's compliance with, *e.g.*, regulatory obligations or planning permission conditions. Examples of such cases include [OCE-97484-R5V6V1](#), [CEI/16/0035](#), and [CEI/13/0001](#).
31. These decisions provide that although a public authority may have a right or power to compel a third party to provide it with information in particular circumstances, this does not necessarily mean that the third party holds the information on behalf of that public



authority. The question as to whether information is “held for” a public authority thus depends in part on the degree of control that the public authority holds over the information in question. It is therefore necessary for the Commissioner to examine the factual background to each case and the basis upon which the requested information is created or held before coming to any conclusions on this point. The above authorities may prove to be of assistance to the Department in its conduct of the remitted decision on this request.

32. In this case, the appellant’s request for information explicitly refers to the possibility that some of the requested information may be “held for” the Department by the Department’s licensees or agents. The search details outlined in the original and internal review decisions, however, do not set out any details of the steps taken to establish whether any such information could be held on behalf of the Department. The Department therefore does not appear to have given any or any sufficient consideration to whether relevant information which may be in the possession of these licensees or agents would be held for the Department.
33. As noted above, by way of letter dated 21 May 2024, this Office sought to clarify the circumstances relating to the searches undertaken by the Department to identify information “held by” it and whether it had sought to determine if relevant information may be “held for” it. No response was received to this Office’s queries in this regard. Due to this, I do not have sufficient information and I am unable at this time to make a finding as to whether any information relevant to this request held by third parties may be held “for” the Department within the meaning of article 3 of the AIE Regulations.
34. In light of the reasons outlined above, I am not satisfied that the Department has demonstrated that reasonable or adequate steps have been taken to identify and locate relevant information that may be held by the Department or given proper consideration as to whether relevant information that may be in the possession of third parties would be held for the Department within the meaning of the AIE Regulations. If the Department is of the view that information held by third parties is not held for the Department, then it must provide reasons for this finding.
35. The duty to give reasons for decisions arises not only by virtue of the AIE Regulations and AIE Directive but is also recognised generally as a core principle of administrative law and a fundamental element of constitutional justice (see, *e.g.*, *Meadows v Minister for Justice* [\[2010\] IESC 3](#) and *Balz & Anor. v An Bord Pleanála & Ors.* [\[2019\] IESC 90](#)). Both of these



judgments, in the same way as the AIE Regulations, make it clear that where a requestor has all or part of a request refused, they are entitled to be provided with clear reasons for that refusal. This duty arises so that the requestor can take a view as to whether they consider refusal justified, or whether they wish to exercise their entitlement to have the refusal reviewed, whether at internal review stage or through an appeal to this Office.

36. The judgment of the High Court in *Right to Know v An Taoiseach* [2018] IEHC 379 notes that:

*“(...) the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted cannot, to my mind, constitute a sufficient reason for the refusal”.*

37. This view aligns with the decision of the Court of Justice of the EU in *C-619/19 Land Baden Württemberg v DR*. This decision contains some useful guidance in relation to the application of exceptions generally. The CJEU notes at paragraph 69 of its judgment:

*“As the Advocate General has observed in point 34 of his Opinion, [the] obligation to state reasons is not fulfilled where a public authority merely refers formally to one of the exceptions provided for in Article 4(1) of [AIE] Directive 2003/4. On the contrary, 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”.*

38. I am therefore of the view that the reasons provided by the Department in its internal decision are inadequate as, having regard to the responsibilities placed on public authorities by the AIE Regulations, it is not possible for the appellant to discern from the decision whether the Department has carried out reasonable searches for information that may be held by it or established if third parties that may be in the possession of relevant information would hold that information on its behalf.

### **Conclusion**

39. In all the circumstances of this case, I cannot be satisfied that the Department has carried out reasonable steps in an effort to ascertain the whereabouts of all information coming within the scope of the appellant’s request that may be held by it. Additionally, I cannot be satisfied that the Department properly considered whether any relevant information in the possession of third parties would be held for the Department within the meaning of the AIE



Regulations. I find, therefore that the Department's decision under article 7(5) of the AIE Regulations is not justified.

40. I consider that the most appropriate course of action is to annul the decision of the Department, the effect of which is that the Department must carry out a fresh internal review decision-making process. I appreciate that remitting the case back to the Department causes further delay for the appellant. However, I consider it to be the most efficient course of action to take in this instance.
41. The Department, following its fresh search for information, should provide full and complete details of the steps taken by it to the appellant.
42. Furthermore, given the particular content of the appellant's submissions, when considering the appellant's request afresh, the Department should take note of article 3(1) of the AIE Regulations and the relevant definitions in respect of "environmental information held by a public authority" and "environmental information held for a public authority". In determining whether any relevant information in the possession of third parties would be held for the Department, the Department may wish to have regard to the authorities referred to at paragraphs 26 to 30, however, I make no comment as to the applicability of the above authorities to the facts at hand. In the event that the Department determines that such information would not be held for the Department, it should provide the appellant with full reasoning for reaching this conclusion.

### **Decision**

43. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul the decision of the Department and direct it to conduct a fresh internal review decision-making process in respect of the appellant's request.

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

44. 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.



Coimisinéir um Fhaisnéis Comhshaoil  
Commissioner for Environmental Information

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**Julie O'Leary**

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

**15 August 2024**