



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-141100-G6V1P4

Date of decision: 24 October 2024

Appellant: Right To Know CLG

Public Authority: Department of Environment, Climate and Communications (the Department)

Issue: Whether the Department was justified, under article 9(2)(c) of the AIE Regulations, in refusing access to a draft report regarding the scientific assessment of peat landslides in Leitrim, Kerry, and Donegal.

Summary of Commissioner's Decision: The Commissioner annulled the Department's decision under article 9(2)(c) of the AIE Regulations. He directed the Department to carry out a fresh internal review decision making process in respect of the information at issue.

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 the Department's request for tenders (see [here](#)) for the "provision of a detailed scientific assessment of peat landslides in Leitrim, Kerry and Donegal." On 8 June 2023, the appellant submitted a request to the Department seeking access to the report on the scientific assessment, stating "[w]e understand the report was completed by end of Qtr 1, and there is an intention to publish in Qtr2...publication meets the requirements of the AIE [Regulations], we can withdraw [the] request if report is released outside the [AIE Regulations]."
2. On 16 June 2023, the appellant clarified the request, noting that it was for the "draft report", as it was now aware that the report was not complete at the date of the request.
3. On 30 June 2023, the Department issued its decision, stating that it was refusing access to the report under article 9(2)(c) of the AIE Regulations. It stated that it envisaged that the report would be complete by "end of Q3 2023." The schedule indicated that it was refusing access to both the draft report and related email.
4. On 5 July 2023, the appellant sought an internal review of the Department's decision, referring to the decision of this Office in [OCE-118678-F2W1Q9](#)
5. On 1 August 2023, the Department issued its internal review decision. While the Department affirmed its decision to refuse access to the draft report under article 9(2)(c), the schedule indicated that it was part-granting related email, redacting certain information under article 8(a)(i) of the AIE Regulations.
6. Also on 1 August 2023, the appellant submitted an appeal to this Office. It stated "RTK aren't requesting the final report, just the draft. DECC keep pushing out the publication date, yet our understanding is that the report was complete in Qtr 4 2022."
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. The scope of this review concerns whether the Department was justified, under article 9(2)(c) of the AIE Regulations, in refusing access to the draft report regarding the scientific assessment of peat landslides in Leitrim, Kerry, and Donegal.

Analysis and Findings

Context

10. This case has its background in the Department's request for tenders for the "provision of a detailed scientific assessment of peat landslides in Leitrim, Kerry and Donegal (for further details see [here](#)). The request for tenders (RFT), includes the following details:

- "The purpose of this RFT is to procure environmental science and engineering consultancy support to examine the recent peatland landslide events in Donegal, Leitrim and Kerry. The project will seek to characterise the environmental setting of the landslides, determine the main contributing factors to the failures and further determine any shared conditions that may identify susceptibility in 3 additional areas of interest to GSI and NPWS (as described in this RFT). This will also include an examination of relevant environmental and anthropologic factors. It should be noted that some of the important applications of the results of this assessment may be used to help inform the improvement of current guidance and policy documentation on peatland management (relating to peatland failures and peatland stability) produced by NPWS and GSI including the potential to update the National Landslide Susceptibility Map, to assist Local Authorities and other related bodies concerned with planning and land use."
- "Contract Objectives - The tenderer will be responsible for carrying out a focused literature review and detailed scientific assessment, using available data and data provided by GSI and NPWS, with appropriate site visits as a means of validation, to determine the main contributing factors that led to the 3 peatland landslides specified in this RFT. The tenderer will be required to use the results of the literature review and scientific assessment, where considered reliable, to assess the potential to update Geological Survey Ireland's National Landslide Susceptibility Map and to produce technical guidance notes for documentation(s) related to peatland land uses and peatland stability in Ireland. The tenderer will report both to GSI and NPWS. This will be in the format of monthly progress reports and regular meetings as determined by GSI/NPWS or the service provider. The main objectives of this project are:
 - Assess and analyse the main environmental factors that contributed to the 3 major peatland failures recorded in Ireland in 2020 and assess whether insights from these factors can be used to identify susceptible areas in 3 additional sites of interest to GSI and NPWS.
 - Identify areas where key data for such an assessment are lacking and source or record/measure if feasible either via field visits or from other organisations (cost dependant). If alternative comparable control sites have more relevant available data substitution of suitable control sites may be proposed by tenderers though cost should be on a par with original sites and final decision on such sites will be by GSI/NPWS;
 - Assess the potential to update the National Landslide Susceptibility Map and document this via a technical note.



- Produce a short technical note based on a review of existing environmental guidance related to developments proposed on or adjacent to blanket bogs designated as SAC and NHA and critically evaluate the evidence base, rationale and analyses used in classifying potential susceptibility to peatland failure associated with any such developments; critically review recommendations and scientific rationale given on buffering distances to prevent impacts to watercourses; and on quantification of likely effects on carbon stores and on carbon sequestration and GHG emissions and other key peatland environmental parameters.
- Produce a technical advisory note that will assist planning authorities and other interested parties in the appraisal of developments, or other land use changes, proposed in peatland areas from a landslide susceptibility perspective.”

11. The RFT also sets out that there are seven principal tasks required in order to meet the “Contract Objectives”:

- Task 1 – “Conduct a comprehensive literature review focused on the contributory factors to peat failures and peat stability. The review should also incorporate aspects of land use and the examination of potential conditioning factors for the main land uses (including afforestation (drainage patterns/growth stage of plantation etc.), peat-cutting factors/drainage and cutting methods e.g. 'sausage -machine' cutting etc.), land use change and the physical and geotechnical characteristics of peat failures in Ireland and internationally (the latter where environmental conditions are comparable to those in Ireland). Contributory factors may include:
 - Peat: type; depth; strength; structure, decomposition, water content.
 - Subsoil: type; strength; structure, permeability
 - Bedrock: rock type: strength, structure, weathering, permeability
 - Topography and geomorphology: surface slope; base peat slope; location in the landscape; distance from a concave slope; evidence of flat plateaus of peat above concave slopes.
 - Hydrology/hydrogeology: stream density; existing forestry drainage; evidence of peat pipes (subsurface flows); seepage from the base of peat at exposures.
 - Historical records: knowledge/evidence of local slides or evidence of same from aerial photographs; evidence of surface tension cracks from aerial photos; surface vegetation, e.g. evidence of stunted tree growth on forested sites; Land use: peat workings/sausage cutting; drainage causing desiccation and structural changes; fire history or overgrazing history that may have depleted the vegetation cover open peat to erosion/relevant structural changes/change in hydrological patterns.”
- Task 2 – “Assess and analyse available data and data (provided by GSI/NPWS) within the relevant catchment areas to determine the main environmental factors (geological, geomorphological, ecohydrological, climatic) and, where potentially relevant, the anthropologic factors that contributed to the 3 major peatland failures recorded in Ireland in 2020 (GIS-based analyses to include assessment and interpretation of appropriate time series Earth Observation data).
 - The analyses will be carried out primarily as a GIS-based desktop study within the relevant catchment area of the project sites (to include the 3 active landslide sites plus 3 control sites (see figures 1-7) as specified in this RFT).
 - The datasets provided by GSI/NPWS will include landslide susceptibility, topography, Tellus, meteorology, climate, hydrology, hydrogeology, geology (Bedrock/Quaternary), ecology and land use data (see guidance on the latter below). Time series earth observation data (e.g. European Space Agency) will also be provided.



- Among other factors the analyses will need to include assessments of: peat properties, subsoil permeability, geomorphology, catchment and drainage (including anthropogenic drainage) characteristics, habitat condition and ecosystem functioning, historical and current land uses /land use changes and its effects on peat properties/stratigraphy/structure and ecohydrology/ecosystem functioning.
 - An assessment of potential site visits should also be carried out in order to validate the analyses carried out under Task 2 (where required)."
- Task 3 – "Identify sites or locations within the study area sites where key data is lacking and collect accordingly via focused field visits (in order to validate the analyses carried out under Task 2). Produce a short report on the validation of analyses carried out under Task 2 and identify additional data sources and collect/calculate the cost accordingly.
 - As a means of validating the desktop study carried out under Task 2 limited focused field visits may be undertaken (where site access is permitted) to assess key site characteristics and collect additional data where this is deemed necessary and agreed with GSI/NPWS. Examples of additional data sources (in addition to the specified literature review and field investigation data) may include engagement with other professional practitioners or Local Authorities and/or engagement with university researchers working on peatland instability or peat failures (particularly in blanket bog and allied peatland environments/settings) etc."
- Task 4 – "Assess the potential to update the National Landslide Susceptibility Map and associated database using data collated and analysed in this project.
 - Review and assess whether areas of peatland within the study areas of this project, currently mapped as low to moderate susceptibility on the National Landslide Susceptibility Map, are likely to have a higher classification of susceptibility to landslides due to factors, not previously included in the analyses, for example those associated with peatland ecology, peatland degradation, hydrology, stratigraphy or geomorphology or historic or recent land use changes etc. and produce a short technical note based on this review."
- Task 5 - Produce a short technical note to identify data gaps (with respect to peatland failures and peat stability) related to impact assessments and planning associated with infrastructural developments and other land uses/land use changes that have the potential to affect blanket bog and allied peatland habitats.
- Task 6 – "Produce a technical advisory note that will be of assistance to planning authorities and government agencies for informing the assessments of potential impacts of proposed land use changes (e.g. infrastructural developments, peat extraction, forestry operations etc.) on key blanket bog features and properties including geology, geomorphology, stratigraphy, structure, ecology, ecohydrological functioning and directly or indirectly on peat stability."
- Task 7 – "Submit a synthesis, or overarching, report, detailing the finding of the focused literature review, methods, results, discussion, conclusions and recommendation of the study. All data and analyses produced as part of this study in addition to the technical notes produced as part of task 4, 5 and 6 should also be submitted."



Article 9(2)(c) of the AIE Regulations

12. The Department is refusing access to the draft report regarding the scientific assessment of peat landslides in Leitrim, Kerry, and Donegal under article 9(2)(c) of the AIE Regulations.
13. 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.
14. 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.
15. Articles 7(4) and 11(4) of the AIE Regulations require public authorities to provide reasons for refusal at both original and internal review decision stages, consistent with Article 4(5) of the AIE Directive. In this regard, the High Court in *Right to Know v An Taoiseach* [2018] IEHC 372 noted, in particular, that “in light of the adjudicatory processes in which a decision-maker is required to engage pursuant to Articles 10(3), (4) and (5) and 11(4) of the AIE Regulations, 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” (paragraph 106). The Court held that in an absence of any indicator in the review decision that the balancing exercise mandated by articles 10(3) and (4) had been carried out, suggested that no balancing exercise had, in fact, been undertaken and that the same was true in respect of the mandatory obligation set out in article 10(5) of the AIE Regulations (paragraph 87).
16. 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)



17. 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.
18. 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).
19. 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.”

20. As indicated above, the first question to be addressed 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” (i.e. which limb(s) of the exemption is being relied upon).
21. It is this Office’s 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, this Office considers that the factual circumstance of each case is relevant to assess and considers 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.
22. 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. [...]

Similarly, the mere status of something as a draft alone does not automatically bring it under the exception. The words “in the course of completion” suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the “course of completion” they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. “In the course of completion” suggests that the document will have more work done on it within some reasonable time frame. Other articles of the Convention also give some guidance as to how Parties might interpret “in the course of completion”. Articles 6, 7 and 8 concerning public participation require certain draft documents to be accessible for public review. Thus, drafts of documents such as permits, EIAs, policies, programmes, plans and executive regulations that are open for comment under the Convention would not be “materials in the course of completion” under this exception.



23. 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.”
24. 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.”



25. I wish to reiterate that the particular factual scenario in each individual case must be considered and, in addition to the specific information at issue, is a key factor in assessing the application of article 9(2)(c) of the AIE Regulations. Cases are often distinguished on their facts.
26. 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”.
27. I consider that “material in the course of completion” refers to the process of preparing “material” that is itself being actively worked on (just because something is labelled “draft” does not necessarily mean it is “in the course of completion”). However, while information no longer being actively worked on may not itself be “material in the course of completion” it may concern material in the course of completion. 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.
28. I consider that “unfinished documents” are documents that a public authority is still working on (just because something is labelled “draft” does not necessarily mean it is “unfinished”) and “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 documents” or “unfinished data”, I am of the view that it is necessary to identify the document being worked on / data that is actively being collected, be able to explain why, and how, the information at issue concerns that document/data, and consider whether the information at issue is a separate and independent piece of work to that document/data – if the information at issue is a separate and independent piece of work, the exception will not be applicable. Whether documents/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.
29. During the course of this review, the Department, in its submissions to this Office, indicated that there were ongoing delays in finalising reports for individual tasks related to the overall report and that key hydrology and hydrogeology analyses were missing due to a staffing/resourcing issue in respect of the required hydrogeologist. The Department stated that a significant piece of the report is hydrology based and that the detailed scientific assessment by the senior hydrogeologist is a contributing factor in the delay of the report. The Department advised that the Lead Geologist (GSI, division of the Department) and the NPWS project manager met with the service provider in November 2023 and that the hydrogeologist assigned to the project had been on leave and then left the service provider, which resulted in a long delay. The Department stated that a new hydrogeologist was carrying out the



required outstanding work and the reports would then be sent over to GSI and NPWS for review collectively.

30. In August 2024, the Department provided a further update to this Office. It stated that the Lead Geologist advised that the final review of the draft documentation had been submitted to the service provider following input from the replacement hydrogeologist to the reports. The Department stated that it anticipates that its feedback and comments will be addressed in the coming weeks (after annual leave throughout the month of August) and a final review of the reports will then be completed by GSI and NPWS upon receipt of the amended documentation. It stated that a review of the reports will also be required by the Department's Planning Policy Unit. The Department stated that it anticipates that the reports will be deemed final and made publicly available in Q4 2024.
31. The Investigator provided the appellant with the details of the Department's submissions, as outlined in paragraphs 29 and 30, and set out her view regarding the application of article 9(2)(c) of the AIE Regulations. In response, the appellant indicated that it did not wish to make submissions on the public interest test and included the following comments:

"RTK are happy to receive the report without hydrology and hydrogeology analysis. That data likely only makes up a % of the report.

Of note is that "hydrology" and related terms were only mentioned eight times in the original tender back in May 2021.

RTK have not received the index of the report, but we would assume less than 20% of the records are related to the hydrology and hydrogeology analysis.

To follow Dept logic, any PA could circumvent the release of records under AIE Regs by simply deeming all records incomplete due to the absence of a % of the records.

A more logical approach would be to release the completed records, and with a note in the release highlighting the records unreleased, eg due to staff shortages

...[W]e would like to focus on whether a PA can refuse to release records based on a % of the records being incomplete / unavailable. RTK are unable to see the index of the report to assess that % if the report is on hydrology and hydrogeology analysis."

32. This Office wrote to the Department on a number of occasions seeking access to a copy of the draft report at issue. Subsequent to the details of the Department's submissions provided to the appellant, the Department updated this Office, again without providing a copy of the draft report at issue, stating:

"...it is anticipated that the outstanding reports (3) will be reviewed and finalised by Geological Survey Ireland (DECC) and the National Parks and Wildlife Service (DHLGH) shortly with a view to making them available in Q4 of 2024. Key hydrology and hydrogeology assessments which were previously omitted from the main draft report (and technical notes) due to long-term incapacitation of the project hydrogeologist has now been submitted by the service provider thus providing a full assessment for final review."



33. In reply, the Investigator again asked for a copy of the draft report at issue to be provided and for the Department to respond to the appellant's submissions detailed at paragraph 31. She also noted the Department's most recent update and asked "are there reports, other than the three outstanding, which could be released to the requester? Please also provide further to detail regarding the nature of the work being undertaken and explain the interrelationship between the reports (e.g. How many reports are there? What do they cover? Are they individual reports? Do they all form one overall report? What does the overall report cover?)."
34. The Department, in responding to the appellant's submissions, stated that to date it has been unable to grant access to the full set of reports under article 9(2)(c) of the AIE Regulations. It commented:
- "The assessment of the contributing factors concerns data and analyses within the relevant catchment areas of each of the 3 peatland failures for ecology, geotechnical properties and hydrology /hydrogeology. The hydrogeology/hydrology assessment covers for example river catchments, presence of drainage, headwaters of streams, natural drainage systems and rainfall. All of these are considered to be of equal importance to a full scientific assessment to the contributing factors leading to these landslides."
35. The Department, in responding to the query as to whether there are reports, other than the three outstanding, which could be released to the requester, stated:
- The final project report (one overall report) will comprise a set of reports covering each of the 7 tasks as outlined in the original RFT. To date we have finalised report/technical notes for Task 1 and 4. The outstanding reports/technical notes are being reviewed by GSI, NPWS, DECC and DHLGH as they now contain the key information relating to hydrology/hydrogeology information previously omitted. Until all reports are finalised we would consider the reports for Task 1 and 4 to remain as draft, pending inclusion in the main overall project report.
36. The Department, in responding to the query regarding the nature of the work being undertaken and the interrelationship between the reports, provided the following information:
- "How many reports are there? The main project report will contain a set of 6 individual reports and technical notes covering each of the 7 tasks as outlined in the original RFT.
 - What do they cover? The reports cover the following - Task 1 Literature Review, Task 2/3 – Main Factors considered to have contributed to three major peat failures in 2020 (covering assessment of available data and key data collected as part of this project), Task 4 - Potential to update National Landslide Susceptibility Map, Task 5 - Data gaps related to impact assessments and planning, Task 6 – Environmental impact assessment of land use changes on peat stability on blanket bog/peatland, Task 7 – Synthesis report.
 - Are they individual reports? - Yes.
 - Do they all form one overall report? Yes – the individual reports will form the main project report.
 - What does the overall report cover? The overall report will cover a focused literature review and detailed scientific assessment to determine the main contributing factors that led to the 3 peatland



landslides that occurred in 2020. The results of the literature review and scientific assessment will be used to inform recommendations on the potential to update the national landslide susceptibility map and to produce technical notes for use by Local Authorities and other bodies concerning peatland land use and highlight data gaps relating to impact assessments and planning.”

37. The Department also provided a copy of a presentation which, it stated:

“...outlines the main objectives of the project highlighting the importance of a complete assessment of the contributing factors to these peatland failures (triggering and conditioning). This presentation was presented at a Peatland Workshop hosted by iCrag in 2023 to outline the scope of the project and initial findings under Task 2 (assess and analyse available data). A multi-disciplinary approach was applied in this project which involved input from several disciplines relating to ecology, hydrology/hydrogeology, Geotechnical, Geological and remote sensing. The 7 principal tasks as outlined in the RFT are required to meet the objectives of the project i.e. conduct a comprehensive literature review, assess and analyse available data, identify where key data is lacking and collect accordingly and produce a series of technical notes relating to the potential to update the national landslide susceptibility map, assess data gaps relating to impact assessments and assessment of potential impacts of land use changes on key blanket bog features.”

38. The Department also explained that “[k]ey hydrology and hydrogeology data collection and assessments under task 2 and 3 which were previously omitted from the main draft report (and technical notes) due to [absence of] project hydrogeologist has now been submitted by the service provider thus providing a full assessment for final review by GSI, NPWS, DECC and DHLGH and we anticipate the final project report (as referenced above) to be published by the end of November.”

39. The Department again did not provide a copy of any of the information being refused to this Office.

40. In this case, the Department appears to have merely referred to article 9(2)(c) in seeking to refuse access to the entirety of the draft report at issue, including individual reports which form the main project report, under article 9(2)(c) of the AIE Regulations. There is no evidence to suggest that the Department carried out an any examination of the actual information at issue to determine if it does in fact engage article 9(2)(c) of the AIE Regulations. This is supported by the fact that the Department has not properly provided a copy of the information at issue to this Office.

41. I also note that in its original and internal review decisions, the Department simply referred to the wording of article 9(2)(c) of the AIE Regulations and, regarding articles 10(3) and 10(4) of the AIE Regulations, merely stated that it had weighed the public interest served by disclosure against the interest served by refusal of the request, determining that the public interest would not be served by disclosing the information. In its internal review decision, it added “there is information to be added to the draft report and ... it would be contrary to the public interest to release an incomplete report.” The Department gave no proper indication of any of the factors considered in favour of or against release and no further explanation of any balancing exercise carried out. It also gave no consideration of whether partial disclosure was possible in line with article 10(5) of the AIE Regulations.

42. In the circumstances, while the Department provided some further detail in its correspondence with this Office and while it may well be the case that article 9(2)(c) of the AIE Regulations, subject to article 10, is applicable in respect of certain information, I am not satisfied that the Department gave any



substantive consideration to the actual information at issue to determine if it did in fact concern material in the course of completion, or unfinished documents or data, or provided adequate reasons for its refusal in this case. As highlighted, articles 7(4) and 11(4) of the AIE Regulations require public authorities to provide reasons for refusal at both original and internal review decision stages, consistent with Article 4(5) of the AIE Directive. It is most disappointing that the Department does not appear to have engaged fully within its obligations under the AIE Regulations.

43. Accordingly, at this stage, I consider that the most appropriate course of action to take in this case is to annul the Department's decision under article 9(2)(c) of the AIE Regulations and direct it to undertake a fresh internal review decision-making process in respect of the report sought.
44. In reaching this conclusion, I wish to make a number of comments. Given that, notwithstanding repeated requests from this Office, this Office has not properly been provided with a copy of the information at issue, I do not believe that it is appropriate for me to direct the release of the information concerned.
45. I also do not believe that it is appropriate for me to seek the information again from the Department in order that it can be assessed by this Office for release – this Office has a significant backlog of appeals and I consider that it is not the best use of resources to carry out the task of reviewing information which has not been done by public authorities in the first instance. I understand that this may be frustrating for the appellant but I consider that the AIE regime is best served by remittal in this case. Should the Department not correctly engage with its obligations under the AIE regulations when carrying out a new decision-making process, I may have to consider simply ordering release of the information.
46. I would encourage the Department to address this matter without delay. In re-considering the request, should the Department wish to rely on article 9(2)(c) of the AIE Regulations (or any other exemption provision provided for in article 8/9 of the AIE Regulations), it must fully set out its reasons for reaching its conclusions as well as, where relevant, its considerations of article 10 of the AIE Regulations, including paragraphs (3), (4), and (5).
47. For the sake of completeness, I also note the Department's comments to this Office that the report is expected to be completed by the end of November 2024. While I acknowledge the length of time that has now passed since the date of the appellant's request, I wish note that it is open to the parties to liaise and reach an agreement regarding access outside the AIE process.

Decision

48. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul the Department's decision to refuse access to the information at issue under article 9(2)(c) of the AIE Regulations. I direct the Department to carry out a fresh decision making process in respect of that information.



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Appeal to the High Court

49. 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

24 October 2024