



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-148002-H2COKO

Date of decision: 4 November 2024

Appellant: Mr F

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

Issue: Whether the information requested is held by the Department in accordance with article 7(1) of the AIE Regulations and whether the Department conducted adequate searches such as to identify the information requested, in accordance with the implicit requirement of article 7(5), prior to refusing the information on the basis that it was not held by it.

Summary of Commissioner's Decision: The Commissioner found that the information requested was not held by the Department and that the Department had conducted adequate searches for it and was, accordingly, justified in refusing it.

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



Background

1. The appeal in this case relates to a request for information that was originally submitted to the Department on 6 December 2021, textually as follows:

“With reference to item 3.2 of the Interim Standard for Felling & Reforestation:

“1. All information which informed the figure of 25 ha as the maximum allowable size for any single clearfell coupe.

“2. All information which informed the requirement that *“No other coupe within 120 m can be clearfelled until the original coupe has greened up, and no less than 12 months after the completion of felling”*.

“With reference to the following content from the Code of Best Forest Practice (2000)

‘In Ireland, a general distinction is made between coupes under 25 ha (which can be recommended for a general felling licence) and coupes over 25 ha (which can be recommended for a limited felling licence). When felling coupes are extended, consideration should be given to scheduling clearfells so that adjoining reforestation areas are well established. Other issues to be considered are wind risk on adjoining stands and potential edge effects, particularly with Norway spruce.

‘Large felling coupes over 25 ha may be acceptable on flat terrain or valley bottoms where visual impact is minimised. Felling in very sensitive landscape areas should be limited to 5-15 ha. While broad guidelines on coupe size are to be considered, size limits should not be absolute but relate to the size of the forest or water catchment unit. In the latter case, the coupe size will influence the likelihood of nutrient pollution. This would be an important issue if a catchment contributes to a drinking water supply.’

“Acceptable coupe size will be reviewed periodically by the Forest Service.”

“3. All information related to any review (formal or informal) of the acceptable coupe size for clear-felling since the introduction of the Code of Best Forest Practice (2000).

“4. The date on which the Code of Best Practice was formally withdrawn or became defunct.”

2. The Department’s decision was appealed to this Office and the Commissioner, on 30 May 2023, in a composite decision covering not only the appeal in that case, [OCE-120471-J6M2B9](#) but also 19 others, annulled the Department’s decision and directed it to undertake a fresh decision-making process. The Department’s subsequent new internal review decision was again appealed to this Office, case number [OCE-140759-J1P0V5](#), on 24 July 2023, culminating in the decision of the Commissioner, on 29 February 2024, to annul, again, the Department’s decision and to direct it to undertake a fresh decision-making process. Extensive background information on the legislative underpinnings of the Interim Standards for Felling & Reforestation and the Code of Best Forest Practice (2000), the material in relation to which the request for information was raised in this and



the previous two appeals, is given in the decision that issued on 24 July 2024, for which reason there is no need to duplicate it here. Information relating to the Department's second and original and internal review decisions are also detailed in that decision.

3. It should be noted that this current iteration of the appeal is in respect only of parts 1-3 of the four-part request transcribed at paragraph 1 above.
4. The third internal review decision, which gives rise to this current appeal, issued on 27 March 2024, and varied "*the original AIE decision makers [sic] decision to refuse your request.*" It is not clear whether this refers to the first original decision of 25 January 2022 that preceded the first appeal to this Office, case number OCE-120471-J6M2B9, or to that of 14 July 2023 that preceded the second appeal to this Office, case number OCE-140759-J1P0V5. As both refused the information sought, it is moot in any event. The varying of the decision in the internal review of 27 March 2024 consisted of the release of an email thread "*relevant*" to the request. The email thread was a request from the Department's AIE Unit to the Head of Environment in the Department's Forestry Division seeking records in relation to the request and an email response from that officer with a narrative response to each of the four items comprising the request for information, but without the provision of any actual records.
5. On 8 April, the appellant brought this appeal to this Office, stating that the internal review had not been conducted "*in conformance*" with the AIE Regulations.
6. I am directed by the Commissioner for Environmental Information to carry out a review of this appeal, which I have now completed under article 12(5) of the Regulations. In so doing, I have had regard to the submissions made by the appellant and the Department. In addition, I have had regard to:
 - 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);
 - the Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide');
7. What follows does not make findings on each and every argument advanced but all relevant points have been considered.

Scope of appeal

8. This appeal is concerned with whether the information released can be considered to be the making available of "*environmental information ... held by the public authority*" as required by article 7(1) of the AIE Regulations and whether the Department has carried out adequate searches such as to identify and locate the information requested, in accordance with the implicit requirement of article 7(5) of the AIE Regulations so to do, prior to refusing to release it on the basis that it is not held by it.



Analysis and Findings

Release of information “held by...the public authority” (article 7(1) of the AIE Regulations)

9. In normal course, when information is released by public authorities on foot of an AIE request for information, this is done by the provision of copies of records that are relevant to the request. In this case, the officer who responded to the AIE Unit’s request for records provided a written response to each of the four matters raised by the requester in his request for information. However, as pointed out by the appellant in submissions to this Office, there was no provision by the AIE Unit of *“actual records held by or for the Department.”* The appellant acknowledges that the provision of the responses *“is helpful”* but correctly notes that *“a decision under the [AIE] Regulations must be made in the context of the Regulations [and] if information is not held by or for the public authority then this must be stated and details of the reasonable steps taken to locate the information must be detailed.”* I concur also with his view that the AIE Regulations *“are not a query and response mechanism”* and that the Department appears to have *“treated [his request] as a query and not as an AIE request.”* I make the point here that the foregoing is not a criticism of the officer who provided the responses to the AIE Unit, who, as detailed further below, had knowledge that no information relevant to the request did, in fact, exist.

10. I find, accordingly, that the furnishing of responses provided to the appellant in this case did not constitute the release of information held by the Department, in accordance with article 7(1) of the AIE Regulations.

Adequate searches under article 7(5) of the AIE Regulations

11. The above said, I now turn necessarily to the matter of whether the Department has conducted adequate searches for the information requested such as to fulfil its requirement to comply with article 7(5) of the AIE Regulations.

12. Article 7(5) provides that *“where information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it.”* A prerequisite to enable a public authority to rely on this provision is evidence of adequate searches for environmental information that is asserted not to exist by it having been conducted.

13. It is useful to review the trajectory of the decisions of the Department since the original request was submitted to it by the appellant on 6 December 2021. The first internal review decision, of 25 February 2022, affirmed the original decision of 25 January 2022, which was *“to refuse ... access to the information sought as the document ... requested does not exist or cannot be found after all reasonable steps to ascertain its whereabouts [had] been taken.”* Crucially, no detail in respect of the steps carried out was given in the decision. The second internal review decision which the Department made, on 18 July 2023 and which arose from the first appeal to this Office, affirmed its original decision made on 14 July 2023, stating that *“the documentation you requested does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken.”* A list of steps taken to identify and locate any relevant records followed that statement. A little more detail regarding those steps may perhaps have satisfied the appellant that no records were, in fact,



held by the Department. The steps carried out are transcribed at paragraph 15.e. below. The third internal review request, which followed the Commissioner's decision in the second appeal to this Office (OCE-140759-J1P0V5), as noted above at paragraph 4, varied one or other of the original decisions to refuse the information sought, by the release of an email thread "relevant" to the request. It also identified the steps taken to locate and retrieve the requested information by indicating that "direct contact" had been made with "personnel who may have access to the information that was requested" in the AIE request.

14. In the course of the review of the current appeal, the investigator sought confirmation from the Department that the information concerning searches carried out that were indicated in its second internal review decision of 18 July 2023, see above, was still valid and requested information on any other searches that may have been conducted, with a view to ascertain the depth of searches it had carried out in an attempt to identify and locate any information relevant to the request.
15. In response, the Department made the following points, all of which were conveyed to the appellant for review and comment:
 - a. It is the Department's position that no records are available in relation to items 1 -3 of the appellant's request and that the request is refused under article 7(5) of the AIE Regulations.
 - b. The decision-maker (DM) contacted the Head of Environment in the Department's Forestry Division, a (grade 1) forestry inspector, Kevin Collins, and asked him for any records in relation to the request. Said officer provided a response which offered answers to the appellant's queries, confirming that "no additional records remain" in relation to item 1 of the request and that no reviews had been carried out on the size of the coupes for clearfelling.
 - c. In respect of that part of his response sent to the DM that related to item 1 of the request (contained within the narrative responses indicate above at paragraphs 4 and 9), Mr Collins stated that "[t]he 25 ha [hectare] figure was carried over from the Code of Best Forest Practice: Ireland document published in the year 2000, and no additional records remain regarding how it was originally derived". The AIE Unit followed up with the officer who, in response, confirmed that the 25 ha figure was carried forward from the Code of Best Forest Practice – Ireland (2000) (page 141, Section 12.4 Felling Coupes). He went on to clarify the following:

"I had just joined the Department in early 2000. Having had previous experience in editing technical work, I was given the task of editing the various drafts and coordinating with the outside designer / publisher to get the entire 'suite' of documents ready for printing. From recollection, the 25 ha figure appeared in the draft text produced by the consultant forester, Dr Gerhardt Gallagher, who was engaged by DAFM to assist with producing the Code and the Standard. (The Guidelines were produced differently). Sadly, Dr Gallagher is recently deceased, having passed away just several months ago.



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“The above is reflected in the inside cover of the Code itself, which states: ‘Editorial Working Group: K.D. Collins (Forest Service), Dr. G. Gallagher (Forestry Consultant), Professor J.J. Gardiner (University College Dublin), Dr. E. Hendrick (COFORD) and D. McAree (Forest Service)’. Dr. G. Gallagher also assembled the material for the various forest operations described in the Code.

“As a new recruit to the Inspectorate, I wouldn’t have been aware of the basis for the 25 ha, and I certainly don’t have any records of the rationale supporting that figure, or of any discussions that may (or may not) have taken place and which arrived at that figure.”

- d. The officer stated that he had not checked his records, as he knows that he does not have any documents or drafts dating back *“that far”* which might indicate the source of the 25 ha figure.
- e. In regard to the steps taken to search for information indicated in the second internal review decision of 18 July 2023, these were as follows:
 - “• Circulation of e-mail to relevant staff, which gave the definition of the records sought and stressed the need for all staff to carefully consider if they were aware of, or could find, any such records.*
 - “• A search of the electronic databases and records held both on mainframe computers and individual staff computers.*
 - “• A search of the electronic folder where the original AIE request and subsequent search emails.”*
- f. The Department’s response went on to say that the DM had contacted numerous staff in the search for records in relation to this request, including Seamus Dunne, Senior Forestry Inspector; Seppi Hona, (Grade 1) Regional Forestry Inspector; Ciaran Nugent, (Grade 1) Regional Forestry Inspector; Karl Coggins, (Grade 1) Forestry Inspector; Kevin Collins, (Grade 1) Forestry Inspector, Environment; Aaron McNulty, (Grade 3) Forestry Inspector, Environment, and a Higher Executive Officer, Felling. The Department indicated, further, that Mr McNulty in turn contacted Frank Barrett, (Grade 3) Forestry Inspector, who referred him to Kevin Collins, as the latter was involved in drafting the Interim Standards for Felling & Reforestation.
- g. The Department confirmed that the information given in the second internal review decision, transcribed above at subparagraph e., was still valid.
- h. It is the Department’s contention that no records exist in relation to item 1 of the request as the 25 ha was merely transposed from the Code of Best Forest Practice and any records relating to it are more than 20 years’ old and Mr Collins has confirmed that he has no records dating back *“that far”*.
- i. In relation to items 2 and 3 of the request, Mr Collins has stated that there has been no review (formal or informal) of the acceptable coupe size for clearfelling since the introduction of the Code of Best Forest Practice and that therefore no records exist



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- j. Accordingly, it is the Department's position that the request is refused under article 7(5) of the AIE Regulations.
16. As indicated, all the above was conveyed to the appellant for review and comment. In response, whilst inferring acceptance of the possibility that no information relevant to his request may be held by the Department, he indicated his wish that this appeal should conclude with a decision by the Commissioner.
17. Having reviewed the information furnished to the investigator in this appeal, I am satisfied that the Department has conducted adequate and reasonable searches for the information requested, that no such information is held by it and that it was justified in refusing it under article 7(5) of the AIE Regulations.

Conclusion

18. I have given careful consideration to the appellant's expressed presumption in submissions to this Office that the information he requested is held by the Department and also to the detailed reasons given by the public authority as to why that is not the case and to its detailed description of efforts to identify and locate the information requested by way of the searches it carried out. I am satisfied that the information requested is not held by the Department and that the Department has conducted adequate searches such as to rule out the possibility that it does, in fact, hold it.

Decision

19. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I affirm the Department's decision to refuse the information requested on the basis that it is not held by it, in accordance with article 7(5) of the AIE Regulations.

Appeal to the High Court

20. 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
4 November 2024