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-146286-F2X2B0

Date of decision: 11 December 2024

Appellant: Mr. F

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 the request was manifestly unreasonable per article 9(2)(a) of the AIE Regulations and whether all information relevant to the appellant's request had been identified by the Department.

Summary of Commissioner's Decision: The Commissioner found that the Department was not justified in refusing the information sought on the basis that the request was manifestly unreasonable and that the Department had not taken all reasonable steps to identify information within the scope of the appellant's request. The Commissioner annulled the internal review decision and directed that the Department conduct a fresh internal review process.

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 the 13 November 2024 the appellant wrote to the Department seeking the following information under the AIE Regulations:

> *"I wish to request under the Access to Information on the Environment Regulations, in electronic format;*
>
> *1) A list of all correspondence between DAFM and* [Company A] *related to forestry licencing. This also includes the following email addresses (…)*
>
> *Details to include Date; Subject Bar; Sender & Recipients (including CC and BC)*
>
> *2) Details of the authorisation made by the Minister to permit Company A or any member of staff of Company A to issue Appropriate Assessment Determinations on behalf of the Minister."*

As the name of the company at issue in the appellant's request has been redacted for the purposes of this decision, this company shall instead be referred to throughout this decision as 'Company A'.

2. The Department responded to the appellant by way of email dated 23 November 2023. In the email, the Department noted that '[t]his is a very open-ended request which is voluminous' and asked if the appellant could narrow the timeframe in which his request relates to. It further asked if the correspondence could be narrowed to a particular subject matter. The appellant, by reply on the same day, noted that he was not seeking copies of the emails in question, but rather a list of any communications within the scope of his request. The appellant also sought clarifications about the start date of Company A's contract with the Department and stated that he would reconsider the timeframe of the request in light of this date.

3. The Department and appellant subsequently exchanged further correspondence on 08 December 2023, wherein the Department noted the start date of the Department's 'first contract' with Company A and again requested that the scope of the request be narrowed. The appellant clarified by reply that he sought access to the list of relevant correspondence in order for him to see the subject matter of these communications and that his intention was to seek 'more specific information' once he is provided with the requested list of communications.

4. The Department subsequently contacted the appellant on 11 December 2023 to notify the appellant that it was extending the timeframe to deal with the request by one month in accordance with article 7(2)(b) of the AIE Regulations. In particular, the Department stated that:

"(…) Article 7(2)(b) of the AIE Regulations allows a public body to extend this time period up to a maximum of 2 months from the date on which the request was received, where the decision maker is unable, due to the volume or complexity of the request, to make a decision within the original one-month period.

Considering the complexity of your request it will not be possible to decide on your request within the standard one-month timeframe. As we are still trying to focus the direction and narrow the scope of AIE 23 573, I will not be able to decide on the request by 13 December 2023."

5. The appellant responded to the Department's notification of extension on 12 December 2023. In his response, the appellant requested that the Department 'explain how this is a sufficiently complex request to warrant an extension' and asked if it could explain the meaning of the phrase 'still trying to focus the direction and narrow the scope' of the request' in circumstances where the appellant states that it is for the appellant as the requestor to decide on the scope of the request. This Office has not been provided with any further correspondence records as between the parties in this case which post-date the issuance of this notice.
6. The Department issued its decision on 08 January 2024. The decision states that it was refusing the request on the basis that the scope of the request was such that the request was 'manifestly unreasonable' per article 9(2)(a) of the AIE Regulations. To this end, the decision notes that:

"The scope of the AIE request, as worded, is too large to be acceptable.

It is so large as to make it meaningless and puts us in the position of having to speculate exactly what information you require.

We communicated with you to ask you to narrow the scope of your AIE request to ensure efficient gathering of information and to focus same. As you did not engage with us, we are refusing the request. As the AIE is currently written, 'all correspondence' would encompass all information used or unused which could be available to someone reviewing the file.

I am therefore refusing your request on the grounds of manifestly unreasonable under Article 9(2)(a) of the AIE regulations:"

7. The appellant requested an internal review of this decision on 08 January 2024. In the request, the appellant states that '[t]here is no need to speculate' as to what information is required by the appellant as the request is 'perfectly clear'. The

appellant continues by noting the basis for his request and by suggesting the certain search steps to procure the requested information. Finally, the appellant notes that:

> *"The decision maker has not demonstrated how the request is manifestly unreasonable.*
>
> *The decision maker has failed to apply Article 10 to the decision.*
>
> *The decision maker has failed to address Item 2 of my request."*

8. The Department issued its internal review decision on 07 February 2024. The internal review decision varied the original decision by releasing of one record which was identified as coming within Item 2 of the appellant's request but refused access to the remainder of the relevant information held by the Department. The internal review decision further differs from the original decision in that it provides more context on the preliminary search enquiries conducted in relation to the request.

9. In relation to the scope of the requests, the internal review decision states:

> *"There are more than 3000 staff employed by DAFM. In order to process this request every staff member would have to be contacted in order that they carry out a search of their mailboxes to see if they have had any correspondence with [the company]. You were asked to narrow the scope of your request at initial decision stage which you failed to do. I have contacted our ISO team with a view to progressing this request and they have responded that based on the information provided by you no results were found. They advised that for this request to be processed they would need the names of individual mailboxes, timelines, and subject matter. (…)*
>
> *Additionally, for over 3000 staff to check their personal mailboxes, along with shared mailboxes to see if they have any correspondence relating to your request and then check to see which, if any, contain environmental information remains manifestly unreasonable in accordance with Article 9 (2) of the AIE regulations.*

The internal review decision further outlines the Department's considerations in relation to articles 10(3), 10(4), and 10(5) of the AIE Regulations:

> *In accordance with Article 10(5) nothing in articles 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. No information in relation to Point 1, in my opinion, can be separated in this case as your request is formulated in too general a manner to be able to specify any records which may be relevant.*

Having spoken with a member of the Inspectorate he conducted a search of his own mailbox. This resulted in over 2,500 emails with Niall Phelan. Each of these emails would then have to be checked to see if they contain environmental information. Given the staffing numbers in DAFM this remains manifestly unreasonable."

10. The internal review then outlines the Department's considerations of the public interest relating to the release of the requested information. The Department concluded that the public interest would not be served by disclosing the requested information, again noting its position that the request 'is too general and as such is manifestly unreasonable', and that it would divert staff resources from their core tasks in order to conduct a search for the relevant information in their email records.

11. The appellant lodged an appeal with this Office on 12 February 2024, which was accepted on 19 February 2024. The appellant further enclosed his preliminary submissions as part of his appeal application to this Office.

12. Following the acceptance of the appellant's request, this Office engaged in correspondence with the Department with a view to reaching resolutions in a number of appeals before this Office involving the Department, including the present appeal. As part of this process, the Department subsequently issued a revised internal review decision letter on 19 June 2024 ('the revised decision').

13. The revised decision varied the previous internal review decision by part granting Item 1 of the appellant's request. The revised decision notes that one record was found within the scope of Item 1 of the appellant's request, but that the rest of the appellant's request 'is deemed to be manifestly unreasonable under Article 9 (2)(a)'. The decision further notes the steps that would be required in order for it to conduct the search for information relevant to Item 1 of the appellant's request and the outlines impact that this search would have on the functions of the Department if these steps were to be undertaken.

14. The revised decision sets out that the Department was able to extract an Excel spreadsheet which was prepared by the Senior Inspector of Felling Licences in the Department and which relate to emails sent to a named staff member within Company A between the dates of 17 January 2022 and 17 January 2024. The Department states that the Senior Inspector is 'the main point of contact' between the Department and the named staff member in Company A.

15. The Department's revised decision provides details the on search steps undertaken by the Department, including preliminary scoping searches to determine the extent of the relevant records that are held by or for the Department, and the results of

those searches. The decision further sets out the search steps that were conducted in order to produce the spreadsheet.

16. The headers of this spreadsheet notes certain information, such as the name of the sender of the email, who is CC'd in the email, the subject of the email, and the date it was sent on. The spreadsheet contains 2,558 lines of data entries and appears to list to one email record per line of the spreadsheet.

17. Following the issuance of the Department's revised internal review decision letter dated 19 June 2024, the appellant was contacted by this Office on 01 July 2024 to ascertain if the appellant wished to continue with his appeal. The appellant replied to this email on 02 July 2024 and confirmed that he wished to continue the appeal. In particular, the appellant noted that '[t]he amended decision also failed to address Item 2 of my request so remains incomplete' and that he was 'also not satisfied that all information falling within the scope of Item 1 has been identified'.

18. 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').

19. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

20. The scope of this review is concerned with whether the Department is justified in refusing access to environmental information falling within the scope of the request

on the basis of article 9(2)(a) of the AIE Regulations and whether the Department has identified all information relevant to the appellant's request.

21. 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. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.

Preliminary Matters

22. A review by this Office is considered to be *de novo*, which means that it is based on the circumstances and the law as they pertain at the time of this decision. This approach has been endorsed by the decision of the High Court in *M50 Skip Hire Recycling Limited v the Commissioner for Environmental Information* [2020] IEHC 430.

23. It is clear from the comments of the Court of Appeal in *Redmond & Another v Commissioner for Environmental Information & Another* [2020] IECA 83, at paragraph 51, that the nature of a review by this Office is inquisitorial, rather than adversarial in nature. The extent of the inquiry is determined by this Office and not by the parties to the appeal.

24. I am satisfied that in light of the inquisitorial and *de novo* nature of reviews conducted by this Office that I am entitled to have regard to the revised internal review decision and to its enclosures as part of my considerations in this case.

Item 1 of the Appellant's Request

25. As noted in paragraph 14 above, the Department's revised decision also enclosed a spreadsheet of communication records relating to Item 1 of the appellant's requests. The Department's issuance of this revised decision and its engagement with the appellant's request is welcomed in this regard.

Item 2 of the Appellant's Request

26. This Office has been provided with a copy of the documentation released by the Department in its internal review relating to Part 2 of the appellant's request. As noted above, the appellant requested a copy of authorisations made by the Minister which permit Company A to make Appropriate Assessment Determination on behalf of the Minister. The document released to the appellant in the internal review regarding Item 2 of his request is titled 'Schedule B: Services: The Specification'. Paragraph one of the document 'describes the work that will be required in dealing with these files and represents the primary area of work covered by this tender'. The document then proceeds to outline a number of tasks in this regard.

27. In his email dated 20 June 2024, the appellant contends that this document is not what he sought under Item 2 of the request, and that he is of the opinion that this Item remains unfulfilled.

Analysis and Findings

The Position of the parties

The Position of the Appellant

28. The appellant provided this Office with preliminary submissions on 08 February 2024 as part of his appeal of the internal review decision. The main thrust of the appellant's case is that it would not require all 3,000 staff members within the Department to search for relevant information in response to his search, and that there were alternative search methods which the Department could use to identify relevant information, but which were not used in the present case.

29. The appellant's preliminary submissions may be summarised as follows:

- that the Department 'has failed to demonstrate that the exception of Article 9 (2) (a) applies to Item 1';
- that he has not sought to be provided with the contents of the emails and instead is seeking that the list outlines certain metadata relating to the date, subject matter, sender, and recipients of each communication, and therefore the contents of each email does not need to be checked;
- that it is not necessary to ask all 3000 staff members within the Department to conduct a search of their email inboxes and that the Department's IT section could identify those staff who were in communication with Company A in order to limit the search to those staff members' email accounts;
- that providing a list of emails detailing communications between a staff member and Company A is not manifestly unreasonable, and that article 10(5) of the AIE Regulations could have been applied here;
- that the Department's provision of a spreadsheet detailing communications between a staff member and Company A demonstrates that it is possible to identify specific staff who were in contact with Company A;
- that the Department did not respond to his request to confirm when the Department's contract with Company A began;
- that article 10 of the AIE Regulations is not relevant as the Department have not demonstrated that the exception of Article 9(2)(a) applies;

- that the information provided in response to Item 2 of his request is not the information sought by him in this Item and that the Item remains unfulfilled.

30. The appellant was informed on 19 February 2024 that this Office has accepted his appeal and that it was in the course of its reviewing. The email noted that the appellant had included his preliminary submissions as part of his appeal to this Office and asked that the appellant provide any further submissions that he may wish to make to this Office by the 12 March 2024. The appellant replied to this email on 20 February 2024 and stated that he is satisfied with the adequacy of his preliminary submissions.

The Position of the Department

31. This Office contacted the Department by way of email dated 19 February 2024 and informed them that the Commissioner has accepted the appellant's appeal and was now in the course of his review. The email requested that the Department provide this Office with the relevant subject matter records as well as its final submissions in relation to the appeal. No submissions were provided by the Department, however I will proceed with this review on the basis of the position outlined in the revised internal review decision, the details of which are outlined above.

Article 9(2)(a)

32. Article 9(2)(a) of the AIE Regulations provides that a public authority may refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought. When considering whether a request is manifestly unreasonable, it is necessary to examine the impact on the public authority of dealing with the request. In particular, it is necessary to examine whether responding to the request would involve the public authority in disproportionate cost or effort, or would obstruct or significantly interfere with the normal course of its activities.

33. Article 9(2)(a) 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.

34. When considering whether a request is manifestly unreasonable, it is necessary to examine the impact on the public authority of dealing with the request. In particular, it is necessary to examine whether responding to the request would involve the public authority in disproportionate cost or effort, or would obstruct or significantly interfere with the normal course of its activities. The findings of the Court of Justice of the European Union ('CJEU') in T-2/03 *Verein für Konsumenteninformation v Commission*, at paragraphs 101-115, suggest that the exception in article 9(2)(a) is only available where the administrative burden entailed by dealing with the request is particularly heavy. The burden is on the public authority to demonstrate the unreasonableness of the task entailed by the request. If a public authority wishes to rely on the manifestly unreasonable nature of a request to refuse all or part of that request, it should be in a position to clearly demonstrate the actual and specific impact that dealing with the request would have on its normal activities.

35. The revised internal review decision provided to the appellant has granted access to a list of correspondence between one DAFM employee and a named employee in company A dating between January 2021 and January 2022. The decision contends that to provide any further information to the appellant would be manifestly unreasonable, as it would require a search by all 3000+ staff in DAFM.

36. The revised decision outlines at page two that the Department asked its IT team 'to see if this was information that they could isolate from emails without the 3000 individual staff members needing to be interrupted'. No further information in this regard or response from the IT team is noted in the decision. Furthermore, both the internal review decision and the revised decision refers to the Department has having made certain enquiries of their 'in-house ISO team' with a view to progressing the request, which both decisions note resulted in no records being identified as the ISO team 'advised that for this request to be processed they would need the names of individual mailboxes, timelines, and subject matter'.

37. I am not satisfied that it would in fact be necessary for all staff in the Department to carry out a search for information relevant to this request. As the Department are aware, the onus on a public authority is to take all *reasonable* steps to identify information held by or for it within the scope of a request. It is clear from the context of this request that Company A is engaged by the Department in relation to forestry licensing and the appellant has specified in his request that he is seeking access to a list of correspondence related to forestry licensing. This should allow the

Department to reasonably narrow its search to a number of relevant business units or sections, as not all 3000 employees of the Department are involved in forestry licensing. Within a reduced number of sections, it may be reasonable for the Department to narrow its search to a number of staff members, if it can provide an explanation as to the basis for doing so. Given that I am not satisfied that the search required in response to this request would be as wide as the Department has set out in the revised internal review decision, I find that the Department has not established that the request is manifestly unreasonable and I will annul the decision of the Department on that basis. If the Department considers that requiring a much reduced number of employees to carry out a search for relevant information is also manifestly unreasonable, it should set out its reasons for this in a new internal review decision.

38. In the revised internal review decision, the Department has limited its search to a single staff member. This staff member indicated that his search showed that there are approximately 4000 emails sent to Company A. He goes on to state that "anything <2 years has been removed from my email account as per Department policy". The decision explains that the email retention policy of the Department is 2 years before emails are automatically removed and deleted. However, it is unclear how the staff member concluded that there were 4000 emails that were relevant to the request if a portion of those had been automatically deleted. The Department should specify if it does in fact hold this information.

39. Company A stated to the Department that its searches showed over 11,000 emails with the Department. It is therefore clear that not all emails were accounted for in the search of the email inbox of the Department staff member. The Department should therefore consider how it can conduct a wider search to ensure that it has taken all reasonable steps to identify information within the scope of this request, in line with my comments in paragraph 37 above. The Department should also provide further information on the Department's email retention policy, including a copy of that policy. As noted above, the onus on the Department is to take all reasonable steps to identify information relevant to the appellant's request. It therefore may be the case that the Department carries out a reasonable and appropriate search for relevant information, and does not locate 11,000 emails. If all reasonable steps are taken by the Department, then this may still satisfy the Department's obligations under the AIE Regulations.

40. The revised internal review decision makes a number of comments regarding the review of the information sought, but has not set out any information regarding any exemptions that might apply. I would note that the appellant is seeking a list of

correspondence in this request, and therefore no review of the content of the body of any email should be required.

41. In relation to part 2 of the appellant's request, the first internal review decision provided the appellant with a page from a contract between Company A and the Department. As set out above, this page is titled 'Schedule B: Services: The Specification'. Paragraph one of the document 'describes the work that will be required in dealing with these files and represents the primary area of work covered by this tender'. The document then proceeds to outline a number of tasks in this regard. It is not clear that this document is in fact an "*authorisation made by the Minister to permit Company A or any member of staff of [Company A] to issue Appropriate Assessment Determinations on behalf of the Minister.*" It may be the case that the Department's view is that this element of the contract does constitute such an authorisation, or that the Department does not hold any further information relevant to this part of the request. In either case, the Department should set out further context in a new internal review decision, and if no further information exists relevant to this part of the request, the Department should set out the searches it undertook in order to establish that this was the case.

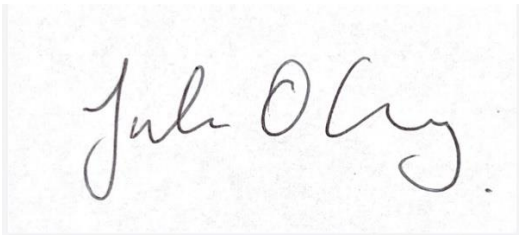
42. Given the above, I am satisfied that the appropriate course of action is to annul the decision of the Department and require the Department to provide the appellant with a new internal review decision. In carrying out this new internal review process, the Department should consider what reasonable steps should be taken to ensure that all information relevant to the appellant's request is identified and should provide the appellant with full details of the steps carried in a new internal review decision.

Decision

43. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul the internal review decision of the Department. The Department should provide the appellant with a new internal review decision.

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.



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Julie O'Leary
On behalf of the Commission for Environmental information
11 December 2024