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-138317-J2K0C3

Date of decision: 19 February 2025

Appellant: Mr Neil Foulkes

Public Authority: Coillte

Issue: i) whether Coille has established that it did not hold any further information in accordance with article 7(5) of the AIE Regulations
ii) Whether Coillte was justified in imposing a fee under article 15(1) of the AIE Regulations

Summary of Commissioner's Decision:

i) The Commissioner found that Coillte established it did not hold any further information in accordance with article 7(5) of the AIE Regulations
ii) The Commissioner found that Coillte was justified in imposing a fee under article 15(1) of the AIE Regulations

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

Background

1. On 3 March 2023, the appellant requested the following information from Coillte *"an electronic copy of all Operational Monitoring Records for works carried out in Forest Property CE07 during the months of June, July & August of 2021. Please include details of the relevant licences."*
2. On 31 March 2023, Coillte issued its original decision to the appellant. It said it was granting access to all relevant records identified subject to a fee:

   "I have identified eight records which are relevant to your request. I am granting access to all of these records subject to payment of the charges outlined below. Please refer to the attached Schedule of Records for details of records being provided.

   Charges - Article 15 of the AIE Regulations allows a public authority to charge a reasonable fee for the cost of supplying environmental information. We have decided that a charge will apply to your AIE request. As detailed on our website, the charge is based on a rate of €20 per hour for search, retrieval, compilation & copying. We have completed our review of your AIE request and have compiled the information that we hold related to your request. We have calculated that completing your AIE request took (in excess of) one hour and therefore a charge of will be applied to your AIE request.

   This assessment can be broken down as follows:

   ***Search and retrieval time** – 2.5 hours @ €20ph (time spent locating relevant files/data sources and collating relevant documents contained on those files/data sources) €50*
   ***Compilation time** –0 .5 hours @ €20ph (time spent examining the documents, considering exemptions, completing redactions if required, and scheduling the records) €10*

   ***Total** €60*

   … Payment will be required in advance of disclosure. If payment is not received within 30 days it will be assumed that the information is no longer required, and Coillte is not obliged to furnish the information sought in your request. If you are concerned about the charge sought, assistance can be provided by the AIE Team to give you the option of refining your request, with a consequent reduction in the charge payable. If you are the holder of a current medical card or are in receipt of social welfare benefit, Coillte may reduce the charge on production of evidence by you, e.g., if you forward a copy of your medical card."

3. The appellant responded to Coillte's decision stating he is a medical card holder and asking it to calculate a reduced fee. Coillte responded confirming the reduced fee would be calculated at 6EUR per hour and sent him an invoice for the same. The appellant paid the invoice and on 4 April 2023 Coillte emailed the appellant confirming receipt of payment and attached the 8 records which it identified as being relevant to his request.

4. The appellant responded to Coillte on 4 April 2023 requesting an internal review. He said: *"The fees charged are unreasonable. I am not satisfied that all of the information related to my request have been provided. I have records from NPWS which indicate that felling works for CE07-FL0208 were ongoing as of the 22-7- 21 but no records have been provided after the single record from the 15-7-21."*

5. Coillte issued its internal review on 4 May 2023 – affirming its original decision. It said:

   "I am satisfied all documents within this category were appropriately and adequately identified and granted in full by the Decision. I can confirm that the records provided to you constitute the full extent of records corresponding to the timeframe of your Request. I affirm that no documents captured by the wording of your request have been withheld from you. The records in relation to this request reside in one location in the organisation, the competent person carried out a search for the records and confirmed that the information identified, in response to your Request, has been supplied. In relation to your comments on purportedly holding documentation from the NPWS which indicate felling works for 'CE07-FL0208 were ongoing as of the 22-7-21 but no records have been provided after the single record from the 15-7-21.' To clarify, the date on an Operational Monitoring Record (OMR) does not necessarily correspond with the date that the site is being harvested or demonstrate the date that harvest works have completed. The OMR is carried out following a walk about of a site and has nothing to do with an actual harvesting operation, it is merely an observation of the site. It is generally carried out when harvesting is ongoing. To reiterate, the OMR does not suggest when the site was started or when the site works were completed. Your Request sought OMRs for CE07 during the months of June, July & August Operational Monitoring Records and the records were supplied for the period requested. Coillte reminds you that specificity in all requests is mutually beneficial by aiding us in adhering to your request as accurately and efficiently as possible. This requires that a request identifies specific records, whether by name, date or other particular identifier. If specific data is sought which is not reflected in the 8 records granted to you, Coillte invites you to submit a fresh AIE Request denoting specific information types, rather than document types. In this instance, I can affirm that gaps in information provided by the Decision does not reflect any lapse in attention or refusal to grant the specific records sought by you.

6. The decision addressed the charges proposed as follows:

Charge Proposed - Article 15(1)(a) of the AIE Regulations allows a public authority to charge a reasonable fee for the provision of environmental information. In that regard, Coillte is within its rights to charge you for the provision of information in relation to your Request, provided such charge is reasonable. Any amount that is reasonable will not be considered as having a deterrent effect on persons wishing to obtain information or as restricting their right of access to information. As internal reviewer, I have re-considered the appropriateness and reasonability of the charge. This entailed examination of the basis of the charge, the extent of the material captured by your Request, and the overall resources necessary to supply the information to you. The information requested by you exists across many platforms and divisions within the organisation. Much time, consideration and resources have been employed to develop these systems for maximum outputs and results.

The AIE Directive does not mandate any particular system of information storage/organisation in Coillte. The public interest is the central focus of the Directive. In any case, Coillte organises its information in a manner which facilitates the efficient completion of its day-to day functions. Such functions, elaboration on which is publicly available on our website, serve the public interest in a manner the Directive is designed to protect. At times, this systemic organisation of information may be incompatible with its easy and immediate dissemination. In such instances a reasonable fee may be charged for its identification and release. Coillte is assured that such an approach facilitates the protection of the public interest insofar as is practicable, by enabling both efficient storage of information, and its dissemination to the public. The basis on which the charge of €60 was calculated is clearly set out in the Decision. It was based on: search and retrieval time; time spent locating relevant files/data sources; collating relevant documents contained on those files/data sources; examining the documents, considering exemptions, and scheduling the records.

I am satisfied that the time spent on the Request as set out in the Decision has been accurately recorded, the work involved clearly set out, the fees calculated in a transparent manner and the subsequent charge correctly applied. In being strictly limited to reimbursement for man-hours spent on the request, I am satisfied that the charge is reasonable. In that regard, the amount of the charge is herein affirmed. Concerns as regards fees are best addressed in accordance with correspondence which issued to you on the 31/03/2023. This communication offered assistance if you were concerned about the charges sought."

7. The appellant appealed to my Office on 16 May 2023.

8. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and Coillte. 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').

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

Scope of Review

10. In accordance with article 12(5) of the AIE Regulations, the role of this office is to review the public authority's internal review decision and to affirm, annul or vary it. Article 11(5) of the regulations sets out that a reference to a request being refused, in whole or in part information includes a request that has not been dealt with in accordance with Articles 3, 4 or 5 of the AIE Directive, (including the ground that the amount of the fee charged under article 15(1) is excessive.)

11. In this appeal, Coillte has decided to grant the appellant's request, subject to payment of a fee. The appellant submits that the fee in this case is not reasonable. As such the scope of my review in this case is firstly whether or not the request has been dealt with in accordance with Article 5(2) of the AIE Directive and article 15(1) of the AIE Regulations.

12. Pursuant to article 7(5) of the AIE Regulations, the scope of this review is also to investigate whether Coillte has taken all reasonable steps to identify the requested information.

Submissions

13. On 11 May 2023, the appellant provided this Office with a preliminary submission. He stated he was appealing Coillte's decision on the basis that the fees charged are unreasonable having regard to article 7(1) of the AIE Directive – and that he maintains that the "*basic environmental information of Operational Monitoring Records should be actively disseminated."* He also said he is not satisfied that all information falling within the scope of the request has been provided.

14. The appellant referred to the duty on public authorities set out in Article 5 (b) of the Regulations, and Article 7 (1) of the AIE Directive, and referred to the obligation on public authorities for "*Active and systematic dissemination*", and on it to ensure "*environmental information progressively becomes available in electronic* databases". He stated that

"almost twenty years after the AIE Directive came in to force Coillte cannot even maintain its environmental information in a manner that its own staff can find the OMR's for one Forest Property for a three-month period (a total of 8 records) in less than 2.5 hours." The appellant stated that his request relates to a single Coillte Forest Property, over a three-month window and that Coillte should be expected to have its data maintained in such a way that information relating such information would be easily identified.

15. The appellant said Coillte's explanation that *"The information requested by you exists across many platforms and divisions within the organisation"* is used regularly by Coillte "*without any explanation as to what the platforms and divisions are and how this impacts on Coillte's ability to locate and retrieve information."* The appellant maintained that the data management system used by Coillte has not been designed to make environmental information readily reproducible and accessible, and said Coillte has admitted that its systems are established in terms of its own needs rather than those of having environmental information readily reproducible and accessible. The appellant submits therefore it is not reasonable for it to charge an hourly rate for the search and retrieval of information.

16. He submits that information related to individual felling licences in a particular forest property should be held in a manner that permits for all information specifically related to those licences to be located efficiently. He submits that "*If Coillte's information is stored in a manner that is incompatible with its easy dissemination then I do not consider it reasonable that the public authority should look to charge the public for this inefficiency. That would create a perverse incentive for a public authority to operate in a manner that in not consistent with the AIE Directive."*

17. The appellant submits Coillte has been asked to provide him with a detailed explanation regarding the Data Management System that it uses for Operational Monitoring Records. He stated there is an obligation on Coillte to fully explain how it stores and maintains this information if it is to justify the charges. The appellant reiterated that his issue with the charges is related to the fact Coillte is trying to charge for the 3 hours it says it took to search, retrieve and compile the information – when it should be actively disseminated. He says that to allow Coillte to charge for this information would serve as a disincentive to actively disseminate the information. He also says "*This is not Coillte's information, it is public information held by Coillte on behalf of the public it serves."*

18. The appellant says that although he has been charged a reduced fee, as a medical card holder, it does not exclude the possibility that the fee is unreasonable or are being used as a deterrent. He says Coillte has only recently started applying fees, and as he makes "a lot of" AIE requests due to what he sees as Coillte's failure to actively disseminate information, the application of fees would have a cumulative effect on him.

19. The appellant raised the point as to whether it is even cost effective for Coillte to be applying fees in some cases – with the additional administrative costs involved. He questions whether Coillte is using fees to deter requests.

20. He also stated that Coillte limiting its charges to "*reimbursement for man-hours spent on the request" - In seeking to charge for 100% of the 'man-hours' spent on the request Coillte is effectively turning dealing with AIE requests in to a commercial activity. It should be accepted that at least a proportion of the time spent on dealing with requests be absorbed as part of the statutory functioning of the authority. I would argue that this in itself would make Coillte's system for charging unreasonable.*

21. With regards the question as to whether all records have been provided, the appellant stated the following:

    "*I have received a single operational record related to felling licence CE07-FL0208. I am aware from records received from the NPWS that works were ongoing on this site for a period of weeks commencing in early July. For other sites OMR's are generally recorded approximately once a week. This would strongly suggest to me that more than one OMR should exist for CE07-FL0208.*

    The licence concerned is a contentious one as Coillte had been notified by the NPWS of a breeding Hen Harrier proximate to the site and had recommended that works be suspended. Records from NPWS indicate that works continued.

    Coillte's explanation for the lack of OMR's for this project is less than convincing….The notion that Operational Monitoring Records have nothing to do with the actual operation that is being monitored is incredulous.

    The wording of the explanation given by the decision maker makes me suspicious that Coillte is trying to apply an incorrect and overly narrow interpretation of my request in order to withhold certain information. My request is for Operational Monitoring Records <u>for works carried out</u> in Forest Property CE07 during the months of June, July & August of 2021

    I am not seeking records that <u>were made</u> during this period. I am seeking records that relate to <u>works carried out</u> during this period.

    I am of the view that additional records should exist for this licence in particular and I would like the Commissioner to confirm with Coillte that the full extent of records covered by my request has been provided."

22. Coillte provided this Office with its submission on 1 November 2023. It cited article 15 of the AIE Regulations, Recital 18 of the AIE Directive, and article 5 of the AIE Directive in justifying the reasonableness of the charge. It stated:

    "*the Charge was calculated based on 3 hours' of work. Our in-house team dedicated to AIE requests performed the following tasks in identifying the Information:*
    (a) Engagement with a senior member of Coillte staff, who is a subject matter expert, for instruction;
    (b) Retrieval of the information likely falling within the Request from Coillte's database;
    (c) Review of the resulting information to ensure that no information appeared to be missing.
    (d) Consideration of any exemptions pursuant to the AIE Regulations, which would not permit Coillte to disclose the underlying information; and
    (e) Review of the Information and compilation of a schedule to provide to the Applicant.
    Having spoken with the initial decision-maker and the AIE team, I am satisfied that this work was completed at all stages at the appropriate level of expertise.

    It is our position that there is no correlation between the number of records identified and the amount of time required to complete searches to the extent required by the AIE Regulations.

    I am satisfied that Coillte worked as efficiently as possible to respond to the Request and provided the Applicant with a detailed schedule of the time involved. I am further satisfied that the time spent on the Request, as set out in the Initial Decision has been accurately recorded, the work involved clearly set out, the Charge calculated in a transparent manner and the subsequent reduced Charge correctly applied."

23. Coillte made reference to the decision of the Court of Justice of the European Union in *East Sussex County Council v Information Commissioner (East Sussex*) – and concluded that it is satisfied the Charges was correctly calculated and applied based on the *actual time spent* by Coillte staff on the Request. It said:

    "In addition, the Court in the East Sussex case, found that the expression "reasonable amount" in the AIE Directive does not include any amount that may have a deterrent effect on persons wishing to obtain information or that may restrict their right of access to information….The Charge applied by Coillte for the purpose of the Request cannot reasonably be assessed as having a deterrent effect given the level of the Charge initially applied and the subsequent reduction taking into given the economic circumstances of the Applicant. I therefore refute the Applicant's assertion, as contained in his referral for internal review, that "The fees charged are unreasonable".

… Coillte is transparent regarding its charges under the AIE Regulations and was clear in all communication with the Applicant as to the extent of the charges and the calculation of same. Coillte was also clear in its communication of the reduction available and accepted the Applicant's request for a reduced Charge once he gave details of his economic circumstances."

24. With regards the adequacy of the searches, Coillte submitted the following:

    "I have reviewed, with the initial decision maker and the internal reviewer, the specific steps taken to search, retrieve and collate the Information. As already explained, a member of the AIE Team engages with a senior member of Coillte staff as Subject Matter Expert (SME) in dealing with a Request for environmental information under the AIE Regulations and, in this instance, I can confirm that the Harvesting Forester in BAU 2 was the nominated SME and point of contact for the AIE Team in dealing with the Request. A copy of the Request was furnished to the Harvesting Forester who duly checked the databases for any operational records for the relevant forest property and found a total of 8 records.

    It appears contradictory that the Applicant alleges on the one hand, that the time exerted on the Request is excessive but, on the other, that the Information is lacking and does not fully capture the extent of the Request. I am satisfied that Coillte has done exactly what was required of it under the AIE Regulations and the Directive. I confirm, pursuant to Article 7(5) of the AIE Regulations, that Coillte does not possess any further records on the Request and that no additional information exists. I am satisfied that adequate steps have been taken by Coillte to identify and locate the Information and these steps were reasonable, having regard to the Request…

    …At Internal Review stage, the Applicant was invited to submit a further AIE request If he required specific data not reflected in the Information furnished. It is a matter for the Applicant to clearly request the information required."

25. On 30 May 2024, the appellant provided some additional points in relation to the fee charged by Coillte for the information at issue. These included the following:

    "The charging for search and retrieval time creates a perverse incentive (particularly for a public authority, like Coillte, which has a commercial remit) to not actively disseminate environmental information. Why disseminate at a cost to the authority when a charge can be applied to supply the information making the activity cost neutral or even profitable? Why organise environmental information for ease of dissemination if you can apply a charge to search and retrieve. The more that is charged for search and retrieval the more the public is likely to be dissuaded from seeking information.

26. He then quoted the AIE Regulations in particular article 15(1), and Recital 18 of the AIE Directive which relates to *"advance payment will be required should be limited. In particular cases, where public authorities make available environmental information on a commercial basis, and where this is necessary in order to guarantee the continuation of collecting and publishing such information, a market based charge is considered to be reasonable; an advance payment may be required."*

27. He says this situation described in Recital 18 of the AIE Directive does not apply to his request. "*There is a sound temporal basis for my position. The timing for making an appeal against an IR decision is based on the date on which the decision is issued, not the date on which the environmental information is released. Where payment is required up front the requester is discriminated against in terms of the amount of time available to appeal a decision once the information has been received. It can take a number of days for payments to process and if information needs to be posted that eats further in to the appeal window. There is therefore a two-tier approach to appeal times - 1) where information is released with the decision and 2) where information is only released on payment of a fee. The latter has a shorter and undetermined window. If the information is released on the day before the month appeal window is up the requester has just one day to consider making an appeal. This is a possibility if the payment must be made before the information is released. The Regulations are not structured to address such a (fundamentally unfair) situation and that is why I am of the view that the interpretation must be that the information must be released with the decision."*

28. The appellant also made reference to the findings and recommendations of communication ACCC/C/2017/147 concerning compliance by the *Republic of Moldova, Adopted by the Aarhus Convention Compliance Committee on 25 July 2021,* notably paragraphs 85-89. He states *"the fees applied by Coillte are unreasonable as they involve charging for indirect costs which the ACCC does not consider to fall within the scope of charging. The AIE Regulations are a statutory responsibility of public authorities therefore it should be expected that at least a proportion of the time taken to process AIE requests should be absorbed as part of the general duties of the staff of the public authority. To seek to be reimbursed for the actual hours spent effectively means that Coillte is not treating the implementation of the Regulations as a statutory duty but as a self-funding activity. It could be argued that, if Coillte is over-estimating the time taken for the work and / or that the staff carrying out the work are paid less than €20 per hour, Coillte is turning a statutory duty in to a commercial activity. This is not reasonable. The regulations require the charging of fees to be reasonable <u>having regard to the Directive</u>. That final caveat is highly significant – note Preamble 18 and paragraph 86 of ACCC communication ACCC/C/2017/147."*

29. An investigator from this Office put some of the points made by the appellant to Coillte regarding the searches it conducted in relation to the information requested by the appellant.

30. Coillte responded to the Investigator on 10 July 2024: *"You have raised further queries on Coillte's position that all operational monitoring records (OMRs) for harvest unit CE07-H0090 (corresponding felling licence CE07-FL02208) have been identified. In stating this position we have relied on Article 7(5) of the AIE Regulations. I have consulted with Coillte's QA and Certification Specialist to assist in dealing with your query. He has carried out further investigations and has provided further context to explain why no more than one OMR exists for harvest unit CE07-H0090 (corresponding felling licence CE07-FL02208). He has confirmed that a site commencement meeting would have taken place between the Forest Works Manager and the Contractor. This would have involved a walk over of the site and agreement on any particulars relating to the operations. Subsequent to this the Forester would have visited the site and carried out an electronic Operational monitoring record (OMR). OMRs are not a daily record, and the frequency of the OMR would be determined by a number of factors which may include but are not limited to: what stage the operation is at (e.g. has forwarding commenced), the site conditions and how sensitive it is, the weather conditions, any concerns or queries raised by the operator). It is not unusual for a week to elapse between OMRs. They act as a record to indicate compliance, standard of work and a record of any request/remedials that may be made by the Forest works manager. In this case a record of site monitoring was provided indicating OMR was completed on the 15/07/2022. All harvesting operations on this site subsequently ceased on the 22/07/2022, therefore there was no further OMRs after the 15/07/2022. Details of the searches carried out by the Harvesting Forester BAU2 are contained within our main submission of 01 November 2023. On carrying out the within review I can confirm that the searches were carried by the Harvesting Forester in the database where such records are stored electronically using key words/phrases/references "CE07", "July 2021", "August 2021". Once each harvest unit and corresponding felling licence was identified further searches were carried out using those references."*

Analysis and Findings

Article 7(5)

31. The appellant contends that Coillte should hold further records in relation to his request – beyond the 8 records that it has already identified and provided him with. He states he has reason to believe felling works for licence CE07-FL0208 were ongoing as of 22 July 2021, yet Coillte has not provided any records to him from after 15 July 2021. The appellant says to his knowledge OMR's are generally recorded weekly – suggesting that more than one OMR should exist for CE07-FL0208. The appellant provided further context that he believes

the licence for CE07-FL0208 *"is a contentious one as Coillte had been notified by the NPWS of a breeding Hen Harrier proximate to the site and had recommended that works be suspended. Records from NPWS indicate that works continued."*

32. Article 7(5) of the AIE Regulations is the relevant provision of the AIE Regulations when a request is refused on the grounds that a public authority does not hold the information sought, as follows:

    "7(5) where a request is made to a public authority and the 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."

33. I must be satisfied that Coillte has taken adequate steps to identify and locate relevant records, having regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances, a standard of reasonableness must necessarily apply. In determining this I have paid particular attention to the appellant's reasons as to why he believes further information should be held by Coillte in relation to his request.

34. I have carefully examined the steps Coillte says it took to ensure all information relevant to the request has been identified. Coillte said in its original decision that "*the information requested by the appellant exists across many platforms and divisions within the organisation."* It later in submission to us clarified that the records in relation to this request reside in one location in the organisation, and the "*competent person*" or Subject Matter Expert (SME), carried out a search for the records. Coillte says the SME in this case was a senior member of Coillte staff – the Harvesting Forester in BAU 2. It said the Harvesting Forester checked the databases for any operational records for the relevant forest property and found a total of 8 records. Coillte stated that the Harvesting Forester used the key words "*CE07*", "*July 2021*", "*August 2021*" when conducting these searches.

35. Coillte specifically addressed the appellant's assertion that more records must be held by it relating to his request as he holds documents from the NPWS which indicated felling works for CE07-FL0208 were ongoing as of the 22 July 2021 (yet no records have been provided after 15 July 2021). Coillte explained that *"the date on an ORM does not necessarily correspond with the date that the site is being harvested or demonstrate the date that harvest works have completed. The OMR is carried out following a walk about of a site and has nothing to do with an actual harvesting operation, it is merely an observation of the site. It is generally carried out when harvesting is ongoing. To reiterate, the OMR does not suggest when the site was started or when the site works were completed".*

36. The appellant did not accept Coillte's explanation of why it holds no records relevant to his request after 15 July 2021. An investigator from my Office asked Coillte for more detail regarding its searches and context for why no more than one ORM exists for felling licence CE07-FL02208. It responded stating that it had consulted with Coillte's "*QA and Certification Specialist"* regarding how OMRs are carried out. Coillte explained that "*a site commencement meeting would have taken place between the Forest Works Manager and*

the Contractor. This would have involved a walk over of the site and agreement on any particulars relating to the operations. Subsequent to this the Forester would have visited the site and carried out an electronic OMR."

37. Regarding the appellant's point about OMR's being conducted weekly – Coillte said the frequency of the OMR would be determined by a number of factors including *"what stage the operation is at (e.g. has forwarding commenced), the site conditions and how sensitive it is, the weather conditions, any concerns or queries raised by the operator). It is not unusual for a week to elapse between OMRs. They act as a record to indicate compliance, standard of work and a record of any request/remedials that may be made by the Forest works manager."* Coillte confirmed that in this case a record of site monitoring was provided indicating OMR was completed on the 15 July 2021 – the corresponding record was located and provided to the appellant. Coillte confirmed that harvesting operations on this site subsequently ceased on 22 July 2021, and that there were no further OMRs after the 15 July 2021. Coillte says this is why its searches yielded no further records than what it has already provided the appellant with.

38. On balance I am persuaded based on the evidence before me that Coillte has taken sufficient steps to determine that no further records are held by it in relation to the appellant's request.

39. The appellant disputes what he says is Coillte's narrow interpretation of his request and says it has done so in order to withhold information. He says his request is for "*OMR's **for works carried out** in Forest Property CE07 in June, July and August 2021"* He says he is not seeking records *"that <u>were made</u> during this period. I am seeking records that relate to <u>works carried out</u> during this period."* I consider Coillte's interpretation of the appellant's AIE request to be reasonable, based on the wording of that original request for information - OMR's for CE07 during the months of June, July and August 2021.

40. I also note that Coillte has attempted to address the appellant's concerns regarding the scope of the request throughout – stating "if *specific data is sought which is not reflected in the 8 records granted to you, Coillte invites you to submit a fresh AIE Request denoting specific information types (name, date or other particular identifier), rather than document types."* I acknowledge that the appellant has the option to submit a fresh request for information beyond the scope of his original request should he wish to do so.

<u>Were the charges imposed in relation to the AIE request reasonable?</u>

41. *Article 5 of the AIE Directive provides:*

"1. Access to any public registers or lists established and maintained as mentioned in Article 3(5) and examination in situ of the information requested shall be free of charge.
2. Public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount.
3. Where charges are made, public authorities shall publish and make available to applicants a schedule of such charges as well as information on the circumstances in which a charge may be levied or waived."

42. Article 15(1) of the AIE Regulations broadly transposes article 5 of the Directive and provides*:*

    "15 (1) (a) A public authority may charge a fee when it makes available environmental information in accordance with these Regulations (including when it makes such information available following an appeal to the Commissioner under article 12), provided that such fee shall be reasonable having regard to the Directive.
    (b) Notwithstanding sub-article (a), a public authority shall not charge a fee for access to any public registers or lists of environmental information pursuant to article 5(1)(d).
    (c) Notwithstanding sub-article (a), a public authority shall not charge a fee for the examination in situ of information requested.
    (d) Where an applicant examines information in situ and wishes to obtain copies of that information, a public authority may charge a fee, consistent with the list of fees specified under article 15(2) for the provision of such copies."

43. The AIE Directive makes it clear that public authorities are entitled to charge a fee for the supply of environmental information provided the fee does not exceed a reasonable amount. Article 5(2) is transposed into national law by article 15(1)(a) of the AIE Regulations which provides that public authorities are entitled to charge a fee so long as the fee is reasonable. The question to be addressed in this appeal is whether the fee of 18EUR (made up of 3 hours search and retrieval at a rate of 6EUR/hour), imposed by Coillte in this case for the supply of information, is reasonable as per the requirements of article 5(2) of the Directive transposed by article 15(1) of the AIE Regulations.

44. Neither the Directive nor the Regulations define what is *"reasonable"* in this context, therefore to determine what is meant by *"reasonable"* I have had regard to the relevant case law. The question of what is reasonable in this context will also encompass the question of what a public authority is and is not permitted to charge for when supplying information.

45. In its original decision and internal review Coillte set out the basis on which it calculated the fee of 60EUR (later confirmed as reduced to 18EUR on production of a valid medical card, which the appellant provided). This calculation included the time it spent on search and retrieval of the relevant records.

46. In C-71/14 *East Sussex County Council v Information Commissioner*, the Court of Justice found that all of the factors on the basis of which the amount of the charge is calculated must relate to the *actual costs* of supplying the requested information. The Court found that this may include the costs attributable to the time spent by the staff of the public authority concerned on answering an individual request for information, including the time spent on searching for the information and putting it in the form required. *"The costs of 'supplying' environmental information which may be charged under Article 5(2) of Directive 2003/4 encompass not only postal and photocopying costs but also the costs attributable to the time spent by the staff of the public authority concerned on answering an individual request for information, which includes the time spent on searching for the information and putting it in the form required."* (paragraph 39)

47. The appellant does not think it is reasonable for Coillte to charge for search and retrieval time and he says it *"creates a perverse incentive (particularly for a public authority, like Coillte, which has a commercial remit) to not actively disseminate environmental information."* To this end he has referenced the findings and recommendations of communication ACCC/C/2017147 concerning compliance by the Republic of Moldova, adopted by the Aarhus Convention Compliance Committee on 25 July 2021 which stated that charges *"must not include the cost of the collection or acquisition of the information itself or any other indirect cost."* The appellant states *"I contend that the fees applied by Coillte are unreasonable as they involve charging for indirect costs which the ACCC does not consider to fall within the scope of charging."*

48. By way of background, the ACCC was established under Article 15 of the Aarhus Convention and serves as a compliance mechanism whereby Parties to the Convention or members of the public may, for example, bring a concern regarding the implementation of the Convention to the Committee for consideration. It is a non-confrontational, non-judicial and consultative mechanism established to review compliance by Parties to the Convention. While it maybe useful to refer to, the question before me is whether the public authority in this appeal acted in accordance with article 5(2) of the AIE Directive, and applied article 15(1) of the AIE Regulations correctly, and in deciding this I am bound by the relevant Irish and European case law. As I have set out above the ECJ in *East Sussex* clearly stated that charging for time spent on search and retrieval of records is permitted therefore I find that Coillte was entitled to take this into account when calculating the charge.

49. The appellant asserts that Coillte's failure to organise its information efficiently has resulted in an excessive amount of time to process his request. He stated in submission to this Office: *"Coillte's system is excessively inefficient if it takes three hours to identify and collate the attached from an existing database."* The appellant maintains that the data management system used by Coillte has not been designed to make environmental information readily reproducible and accessible, and says Coillte has admitted that its

systems are established in terms of its own needs rather than those of having environmental information readily reproducible and accessible.

50. Article 15(1) makes it clear that the question of what is a reasonable fee must be approached having *regard to the requirements of the AIE Directive*. Article 3(5) of the Directive requires Member States to ensure that *"officials are required to support the public in seeking access to information"* and that *"the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised".* Article 7(1) seeks to ensure that public authorities are required *"to organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available".*

51. With articles 7(1) and 3(5) of the Directive in mind, it is clear that AIE requests of a general nature often are of a kind that one would expect to either be proactively published by the public authority or organised and maintained by the public authority in a manner that enables its easy dissemination on request. In such circumstances I do not think it would be reasonable to allow a public authority to rely on its own failure to adequately organise its information to justify the imposition of a charge on the appellant in respect of work which arguably would not have been required had proper document management arrangements been in place.

52. The Advocate General in *East Sussex* clarified that when calculating a fee for the supply of information, a public authority cannot pass on the costs of a failure to comply with other parts of the Directive to requestor: *"Moreover, an authority may not rely on its failure to comply with its obligations under, for example, Articles 3 and 7 of Directive 2003/4 in order to justify charging an applicant under Article 5(2) because, for example, it is holding information as raw data and has not yet organised that information (as required) in a manner that renders access possible."*

53. Coillte has not tried to make the case that the specific information requested by the appellant in this case is held in a way that enables easy dissemination – rather it has explained that *"Coillte organises its information in a manner which facilitates the efficient completion of its day-to day functions. Such functions, elaboration on which is publicly available on our website, serve the public interest in a manner the Directive is designed to protect. At times, this systemic organisation of information may be incompatible with its easy and immediate dissemination."* I consider the information at issue in this appeal, namely *"all Operational Monitoring Records for works carried out in Forest Property CE07 during the months of June, July & August of 2021."* to be quite far on the specific end of the spectrum. I am not persuaded it is information that I would necessarily expect Coillte to hold in a way that enables easy dissemination.

54. Having said that, I must stress, as I have done in multiple previous decisions, that there is nothing to stop the public authority from publishing such information regularly, thereby avoiding the need to process AIE Requests seeking such specific information. Indeed, greater proactive publication of environmental information is a significant tool in managing the number of AIE requests made on such matters, and ultimately would reduce the number of appeals to this Office. I am mindful that the role of this Office under article 12(5), is to review the internal review of the public authority with a view to affirming, varying or annulling the decision. It is not the Commissioner's role to direct public authorities to organise their files in a way which facilitates active dissemination – rather this obligation falls under the general duties of a public authority (article 5 of the AIE Regulations). But as *East Sussex* makes it clear that public authorities cannot pass its failure to comply with its obligations under, for example, Articles 3 and 7 of the AIE Directive, in order to justify charging an applicant, it is something I have had to consider carefully when deciding on the reasonableness of the fee set out by Coillte in this case. It follows that I am not persuaded that Coillte, when calculating its charge in this case, was trying to justify any failure to comply with its obligations under the AIE Directive.

55. As I have set out above, Coillte was entitled to factor in search and retrieval costs (which it did), and I do not consider that in setting the charge it is trying to justify any failure to comply with its obligations under the AIE Directive. The next step is to determine whether the charge amount itself set by Coillte exceeds a reasonable amount.

56. The ECJ in *East Sussex* found that the expression *"reasonable amount"* in the AIE Directive does not include any amount that may have a deterrent effect on persons wishing to obtain information or that may restrict their right of access to information. The Court found that *"in order to assess whether a charge…has a deterrent effect, account must be taken both of the economic situation of the person requesting the information and of the public interest in the protection of the environment. That assessment cannot therefore relate solely to the person's economic situation but must also be based on an objective analysis of the amount of the charge. To that extent, the charge must not exceed the financial capacity of the person concerned, nor in any event appear objectively unreasonable"* (paragraph 43).

57. The appellant has stated that the Commissioner should take into account the *"cumulative impact"* of the fees that Coillte have charged him for AIE requests. He says he makes frequent requests under the AIE regime to Coillte, due to what he says is a failure by Coillte to actively disseminate information in line with their obligations under the AIE Directive.

58. The role of the Commissioner under article 12(5) of the AIE Regulations is to review the internal review decision made by a public authority in relation to a particular request, and to affirm, vary or annul that decision. I consider that the question before me is the reasonableness of the particular fee charged in this instance in relation to *this particular request.* In considering whether this fee is reasonable having regard to the AIE Directive (as required by article 15(1)(a) of the AIE Regulations), I do not consider that it would be

appropriate for me to take into account charges in relation to previous AIE requests made by the appellant for information held by or for Coillte.

59. There is nothing in the AIE Regulations, or AIE Directive or in *East Sussex* (the leading ECJ authority on fees) that suggests that when considering the reasonableness of a fee, account can or should be taken of charges imposed in relation to previous AIE requests made by the appellant. Due to this, I consider that the reasonableness of each individual fee should be assessed on a case by case basis.

60. However, while I do not consider it appropriate to consider the cumulative effect of charges in relation to previous AIE requests on the appellant - the ECJ in *East Sussex* is quite clear that account should be taken of the *economic situation as a whole* of the requester when a public authority considers the reasonableness of a fee in relation to environmental information.

61. To determine whether the charge imposed by Coillte in this case has a deterrent effect on the appellant or restricts his right of access to information, account must be taken of his economic situation. Coillte, in both its original decision and internal review, stated that it may reduce the charge if the appellant produces evidence that he is a medical card holder or in receipt of social welfare benefit. Additionally, I note that on its website under its published schedule of fees Coillte says it may charge a reduced fee of 6EUR per hour having regard to the means of the applicant. Ultimately Coillte did apply a reduced rate of 6EUR per hour, resulting in a charge of 18EUR paid by the appellant in advance of receiving the 8 records relevant to this request. I consider that in providing for such a reduced rate, Coillte have endeavoured to take into account the economic situation of the requestor.

62. The appellant said in his submissions to this Office that Coillte merely said it *"may"* reduce the fees on production of a medical card, not that it *"will"*, and that this could act as a deterrent to requesters. It is unclear why Coillte has used the word *"may"* but I note that Coillte has since changed the wording on its website to less ambiguous language – "*Coillte will reduce the rate to €6.00 per hour having regard to the means of the applicant (on production of evidence)."* In any event, Coillte did apply the reduced fee in this case, which the appellant paid – so I do not think the wording used by Coillte in its schedule of fees acted as a deterrent to the appellant in his case.

63. For the second limb of the test to determine whether the charge in this case has a deterrent effect, I need to consider whether the amount charged is objectively reasonable. Coillte has set out the basis on which the charge was calculated – the appellant is charged a fee of 6EUR per hour (on production of a valid medical card) for 3 hours of work. Coillte has set out what was involved in this work and how the 3 hour time frame was arrived at in some level of detail.

64. I consider the timeframe of 3 hours as set out by Coillte for processing this information request, bearing in mind the breakdown it has given in how it arrived at this timeframe,

does not to my mind seem disproportionate or excessive. Furthermore, I would point out that the steps in the process detailed by Coillte are of the type that this Office would expect to be undertaken in response to a request for environmental information.

65. In his Opinion in *Commission v Germany C-217/97* which concerned Directive 90/313/EEC (the predecessor of the current AIE Directive), Advocate General Fennelly considered that the notion of what is *"reasonable"* must be interpreted in light of the general scheme and purpose of the Directive. In light of this,*"the question of whether the charges for the supply of information are 'reasonable' must be judged from the perspective of the member of the public requesting the information, rather than that of the public authority"* (paragraph 23).

66. Drawing on this Office's experience and the Commissioner's various statutory remits, I consider that the average member of the public would not necessarily find 18EUR to be an unreasonable sum of money in the circumstances of the case, including the time spent by Coillte in processing the request and in the context of other comparable expenses that members of the public incur on a daily basis. For example, an appeal to this Office in the absence of a medical card or other such mitigating factor incurs a charge of 50EUR (or 15 EUR at a reduced rate).

67. While not appropriate to make a direct comparison, it is also worth considering that the fees in dispute in *East Sussex* for the supply of information relating to property charges (a total charge of approximately 23EUR) and in the analogous case of *C-216/05 Commission v Ireland* , concerning fees for participation in the environmental impact assessment procedure (20EUR in procedures before local authorities and 45EUR in procedures before An Bord Pleanála), were not too dissimilar to the fee at issue in this appeal. I am mindful that the aforementioned cases were all unique in their circumstances, were some years ago now, and account naturally should be taken of the fact that currency values can fluctuate over time due to a variety of factors.

68. The test set out by *East Sussex* also explains that when assessing the reasonableness of the charge *"account must be taken… of the public interest in the protection of the environment."* I have considered the public interest in the protection of the environment of the information within the information requested. In general, if there is a high public interest, this may call into doubt the reasonableness of the charge. The appellant alludes to what he considers a public interest in the information at issue. He states: *"The licence concerned is a contentious one as Coillte had been notified by the NPWS of a breeding Hen Harrier proximate to the site and had recommended that works be suspended. Records from NPWS indicate that works continued."*

69. Coillte has explained to the appellant why the date on an Operational Monitoring Record does not necessarily correspond to the date that the site is being harvested or demonstrate the date that harvest works were completed. In the circumstances of this case I do not consider the public interest in the requested information is high enough to render the fee of 18EUR charged by Coillte unreasonable.

70. For the reasons I have set out, in the circumstances of this case I am not persuaded that the fee imposed by Coillte is unreasonable either subjectively or objectively – the test set out by *East Sussex* to determine whether the charge imposed has a deterrent effect on persons wishing to obtain the information. It follows that I find that the fee of 18EUR upon production of a valid medical card is reasonable and Coillte has acted in accordance with article 5(2) of the AIE Directive and article 15(1) of the AIE Regulations.

71. The appellant questioned whether it is even cost effective for Coillte to be applying fees in some cases – with the additional administrative costs involved. I must reiterate that I am looking at the fee imposed by Coillte in relation to this information request only. For the reasons I have set out in detail above, I do not consider the fee imposed by Coillte in this case to be unreasonable and do not consider it to be a deterrent. Beyond that, Coillte's decision to charge a fee versus the administrative costs involved in calculating and creating an invoice is an internal matter for Coillte alone. My remit is to decide if the fee imposed under article 15(1) of the AIE Regulations is justified, and in this case I have found that it is.

72. The appellant is of the opinion that as he makes frequent requests of this nature, Coillte is trying to deter him by charging a fee. This decision deals with the circumstances of this particular appeal only, and while I have found the fee proposed by Coillte is reasonable in this instance, I make no determination on whether fees charged in relation to any other AIE requests made by the appellant or any other requestor are justified. This will be determined on a case by case basis, having regard to the particular merits of the appeal before me.

73. The appellant is unhappy that Coillte required payment from him before it released the records. Coillte indicated it had already carried out the work of identifying and collating the relevant records which it said were ready to be released to the appellant upon payment of the fee. I have found the fee in this case is reasonable and Coillte's position that upon receipt of payment it would release the information (which it did) does not seem to be contrary to the Regulations. What Coillte offered in this case is to supply the records to the appellant once payment is received. It was not requiring advance payment before it carries out the work of processing the request, which is what I consider the reference to advance payment in the AIE directive to refer to.

<u>Decision</u>

74. Having carried out a review under article 12(5) of the AIE Regulations, I affirm Coillte's decision.

<u>Appeal to the High Court</u>

75. A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

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Ger Deering
Commissioner for Environmental Information
19 February 2025