



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-120712-V5W8M4

Date of decision: 21 August 2025

Appellant: Mr Neil Foulkes

Public Authority: Department of Agriculture, Food and the Marine [the Department]

Issue: Whether the Department was justified in refusing access to the appellant's request for "[a] copy of all Tenders submitted under RFT 198803: 1 Strategic Environmental Assessment, Screening for Appropriate Assessment and Appropriate Assessment (if required) of the Irish Forest Strategy and Forestry Programme 2023-2027" under article 9(1)(c) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the Department was not justified in refusing access to the information and directed the Department to release the information.

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 10 January 2022, the appellant made an AIE request to the Department, as follows:

“A copy of all Tenders submitted under RFT 198803 : 1 Strategic Environmental Assessment, Screening for Appropriate Assessment and Appropriate Assessment (if required) of the Irish Forest Strategy and Forestry Programme 2023-2027

I request that the information is provided in an electronic format as soon as is possible.”

2. The Department issued its original decision on 20 January 2022, in which it refused access to the “information on file” under article 9(1)(c) of the AIE Regulations. While the Department quoted the wording of that provision in its decision letter, it did not provide any further reasoning as to why it considered article 9(1)(c) to apply to the information at issue. Furthermore, although the Department referred to the public interest test at article 10 of the AIE Regulations, the factors it set out in favour of withholding the information concerned the right to privacy of persons and the right to due process.
3. On 11 February 2022, the appellant sought an internal review of that decision. In his internal review request, the appellant noted that the Department had not “evidenced any adverse effect that will result from the disclosure of the request records” and had not referenced “any national or Community law which protects the confidentiality of a legitimate economic interest.” The appellant also argued that the public interest factors identified by the Department as favouring refusal of the information were “not relevant to the basis for refusal.”
4. The Department’s internal review decision of 10 March 2022 affirmed its original decision and stated that the release of “[...] such information could affect future tenders as those interested in tendering must be able to do so, confident that their commercially sensitive information will not be disclosed by some other means.”
5. The appellant appealed to this Office on 14 March 2022.
6. I am directed by the Commissioner to carry out a 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 the Department. I have also examined the contents of the information sought and have had regard to the publicly available request for tenders document for the tender process at issue in this case. In addition, I have had regard to:



- the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister’s Guidance);
 - Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
 - the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
 - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’).
7. What follows does not comment or make findings on each and every argument advanced by the parties to this review, but all relevant points have been considered.

Scope of Review

8. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority’s internal review 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.
9. The scheme of the AIE Regulations, and of the AIE Directive, makes it clear that there is a presumption in favour of release of environmental information. Subject to that presumption, a public authority may refuse to release environmental information where an exemption under articles 8 or 9 applies and the interest in maintaining that exemption outweighs the public interest in disclosure.
10. The scope of this review is solely concerned with whether the Department was justified in refusing access to the appellant’s request for “[a] copy of all Tenders submitted under RFT 198803: 1 Strategic Environmental Assessment, Screening for Appropriate Assessment and Appropriate Assessment (if required) of the Irish Forest Strategy and Forestry Programme 2023-2027” under article 9(1)(c) of the AIE Regulations.

Analysis and Findings

Commercial or industrial confidentiality: article 9(1)(c)

11. The Department identified four records in response to the appellant’s request: two completed European Single Procurement Documents (ESPD) (one from Company A and one from Company B) and two detailed tender submission documents (one from Company A and one from Company B). It would appear from publicly available information that Company A was the successful tenderer. As noted above, the Department refused access to the entirety of these



records under article 9(1)(c) of the AIE Regulations.

The appellant's position

12. The appellant made a detailed submission to this Office. Essentially, the appellant argued that the Department did not justify its refusal of the information at issue under article 9(1)(c). Among other things, the appellant's submission:

- noted that article 9(1)(c) is a discretionary exception;
- noted that the Department did not identify a legal basis for the application of article 9(1)(c);
- argued that the Department had not provided any evidence that commercial or industrial confidentiality, provided for in law to protect a legitimate economic interest, applies in this case;
- argued that the internal review decision maker failed to specify the reasons for their decision, as required under article 11(4)(a) of the AIE Regulations;
- argued that the project which was being tendered for was a bespoke piece of work and contended that the Department should be asked to justify its assertion in its internal review decision that the release of the information "could affect future tenders" - the appellant argued that this assertion was purely speculative;
- argued that the Department had not provided any evidence of a specific adverse effect that would result from the release of the information requested;
- noted that although the request had been refused on the basis of commercial confidentiality, the decision maker referred to the right to privacy and the right to due process.

The Department's position

13. In its brief submission to this Office, the Department stated the following:

"[...] the Department continues to maintain that this is commercially sensitive information and should not be released to any party. It is unknown what this information will be used for and who it might be shared with. I second the internal reviewers position that releasing this information could adversely affect any future tenders run by the Department. It should also be noted that due to time constraints and volume of work that it has not been possible to contact these two companies to request their submissions as to their position in relation to the release of this information."

14. The Department was invited to make a further, focused submission to this Office when the case was assigned to an investigator. In that request for submissions, the Department was asked to address specific queries concerning its reliance on article 9(1)(c). In particular, the Department was asked to identify where the claimed confidentiality of the information was provided by law, whether that confidentiality is required to protect a legitimate economic



interest, and how the confidentiality of any such legitimate economic interest would be adversely affected by the disclosure of the information at issue.

15. Regrettably, the Department did not respond to these specific queries or to this Office's request for focused submissions more generally.

The Request for Tenders document

16. During the course of this review, this Office became aware that the request for tenders document (RFT) for the tendering process at issue, RFT 198803, was publicly available online. It remains so as of the date of this decision. Requests or invitations for tenders are generally, by their nature, publicly available documents and usually remain so following the conclusion of the tendering process.
17. Of relevance to this case is that the RFT for the tendering process at issue provided specific information to prospective tenderers as to how information provided to the Department during the tender competition may be disclosed. It also instructed prospective tenderers to take specific actions if they considered information they were providing in their tenders to be confidential or commercially sensitive in nature. Specifically, Part 2, Instructions to Tenderers, sub-part 2.16, entitled "Freedom of Information" provides as follows:

"2.16.1 Tenderers should be aware that, under the Freedom of Information Act 2014 and the European Communities (Access to Information on the Environment) Regulations 2007 to 2014, information provided by them during this Competition may be liable to be disclosed.

2.16.2 Tenderers are asked to consider if any of the information supplied by them in their Tender should not be disclosed because of its confidentiality or commercial sensitivity. If Tenderers consider that certain information is not to be disclosed because of its confidentiality or commercial sensitivity, Tenderers must, when providing such information, clearly identify the specific sections of their Tender containing such information and specify the reasons for its confidentiality or commercial sensitivity. For the avoidance of doubt Tenderers may not assert confidentiality or commercial sensitivity over the entire Tender but must clearly identify the specific section containing such information. If Tenderers do not identify information as confidential or commercially sensitive, it is liable to be released in response to a request under the above legislation without further notice to or consultation with the Tenderer. The Contracting Authority will, where possible, consult with Tenderers about confidential or commercially sensitive information so identified before making its decision on a request received. The Contracting Authority accepts no liability whatsoever in respect of any information provided which is subsequently released (irrespective of notification) or in respect of any consequential



damage suffered as a result of such obligations.”

Analysis

18. Article 9(1)(c) of the AIE Regulations permits a public authority to refuse to make environmental information available where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided in national or Community law to protect a legitimate economic interest. A number of elements are required in order to engage the exemption provided for in this article:
 - a. The information must be commercial or industrial in nature.
 - b. The confidentiality of the information must be provided for by law.
 - c. The confidentiality is protecting a legitimate economic interest.
 - d. The confidentiality would be adversely affected by disclosure.
19. In order to show that the confidentiality is protecting a legitimate economic interest, it must be shown that the release of the information would adversely affect that legitimate economic interest. Even if it is adequately demonstrated that all the required elements are present to engage the exemption at article 9(1)(c), it is also subject to article 10 of the AIE Regulations, which requires a public authority to consider each request on an individual basis and to weigh the public interest served by disclosure against the public interest served by refusal, interpreting the grounds for refusal on a restrictive basis having regard to the public interest served by disclosure.
20. The Department argued that that releasing the information could adversely affect any future tenders run by the Department. It also stated that it is “unknown what this information will be used for and who it might be shared with.”
21. It is necessary to make a preliminary observation in relation to a point raised by the Department in its submission. As per article 6(2) of the AIE Regulations, the motive or interest of a person or persons making a request for access to environmental information is irrelevant to whether or not the information at issue is eligible for release. Accordingly, the Department’s argument that it is “unknown” what the information at issue might be used for upon release, or with whom the information might be shared, is entirely irrelevant to this review, except insofar as any such future use would harm an interest protected by one or more of the exceptions to release provided for in the AIE Regulations themselves, such as article 9(1)(c). Not knowing how information subject to release under AIE might be used or shared by requesters is not in and of itself a ground to refuse the information.



22. Furthermore, release under the AIE Regulations is release to the world at large and access cannot be given subject to the acceptance of such terms, which include restrictions regarding the use and making public of the information concerned. Accordingly, it is unnecessary for public authorities to consider the potential different actors with whom information released under the AIE Regulations may be shared; public authorities should proceed on the basis that the information will be accessible to anyone and everyone.
23. There are several issues with the manner in which the Department sought to rely on article 9(1)(c) in this case.
24. First, a necessary element of applying article 9(1)(c) is identifying the relevant national or Community law which provides a basis for the confidentiality of the information sought. The Department, in neither its decisions nor its submission to this Office, made any reference to any national or Community law which provides a basis for the confidentiality of the information sought. While the Department's initial submission described the information at issue as commercially sensitive, it did not set out where in law the confidentiality of such purported commercially sensitive information is protected.
25. Secondly, even if the Department had cited a legislative basis for the confidentiality claimed, it has failed to identify how the information itself is commercial or industrial in nature or to set out any specific potential adverse effect that release would have on that claimed commercial or industrial confidentiality in either its initial decision or its internal review decision. The Department stated in its internal review decision that "[t]he release of such information could affect future tenders as those interested in tendering must be able to do so, confident that their commercially sensitive information will not be disclosed by some other means." The Department again failed to identify any specific potential adverse effect to the commercial or industrial confidentiality claimed when offered the opportunity to make submissions by this Office, apart from simply restating that "[...] releasing this information could adversely affect any future tenders run by the Department."
26. Rather than being an adverse effect on the commercial or industrial confidentiality claimed, it seems to me that the Department is describing a potential negative consequence for its own ability to run tender competitions. Even if such an outcome could be described as an adverse effect on the purported commercial or industrial confidentiality of the information at issue, having regard to the wording of part 2.16 of the RFT document for the tender competition in question, it is clear that tenderers in **this** tender competition knew that the information they supplied to the Department could be released under FOI and/or AIE and they proceeded to provide it in any event. Accordingly, the Department's argument is not borne out by the facts of this case.
27. Having failed to identify an adverse effect within the meaning of article 9(1)(c), the Department consequently also failed to explain *how* or *why* release would adversely impact the commercial or industrial confidentiality claimed. The Department also did not provide any



evidence that the release of information would affect the confidentiality claimed.

28. As set out in the RFT document and referred to above, in addition to being directly informed that the information they supply to the Department may be released under FOI or AIE, tenderers were specifically instructed that if they considered that certain information should not be disclosed due to its “confidentiality or commercial sensitivity”, they had to clearly identify “[...] the specific sections of their Tender containing such information and specify the reasons for its confidentiality or commercial sensitivity.” Furthermore, the RFT document emphasises that tenderers could not assert confidentiality or commercial sensitivity over their entire tenders, but rather had to identify the specific sections with such information. Finally, the RFT document explicitly makes clear that if tenderers did not identify information as confidential or commercially sensitive “[...] it is liable to be released [...]” in response to an AIE or FOI request “[...] without further notice to or consultation with [...]” tenderers.
29. I have carefully reviewed the information at issue in this review, which consists of four documents submitted by Company A and Company B as part of this tender process. There is no reference in either Company A or Company B’s ESPDs to any of the information they provided as being commercial sensitivity or confidential in nature. Similarly, there is no reference in Company A’s detailed tender submission document to any of its information possessing either of those qualities. Given that the companies in question were effectively “on notice” that this information could be released if requested under the AIE Regulations, I am satisfied that I can find that the release of this information would not adversely affect the legitimate economic interests of the companies involved, and that therefore article 9(1)(c) cannot apply to these parts of the information at issue.
30. However, Company B’s detailed tender submission document does assert that its tender contains commercially sensitive information. Specifically, part 1.11 of the record states, under the heading “Freedom of Information”, that “[t]his submission contains commercially sensitive information on our proposed approach and finance arrangements; hence where such information is included, we request that this information is not released.”
31. As set out already, the RFT required prospective tenderers to identify the specific sections of their tenders that contain confidential or commercially sensitive information. While Company B refers to its proposed approach and finance arrangements as being commercially sensitive, it fails to clearly identify which parts of the tender submission are captured by those terms. In particular, having carefully examined Company B’s tender submission I consider that its “proposed approach” is weaved throughout the entirety of the submission itself, and is not, for instance, limited to Chapter 3, which it states describes “[...] our proposed approach for completing the project successfully”. It seems clear to me that Company B is, in effect, claiming that all or nearly all of its tender is commercially sensitive. Furthermore, despite the RFT requiring prospective tenderers to “specify the reasons” for the commercial sensitivity or confidentiality claimed, Company B’s tender submission fails to provide any justification or



evidence as to why the information on its proposed approach or financial arrangements is commercially sensitive.

32. I have also reviewed the information in question, and in particular given the age of the information at this point, I am not satisfied that the release of the information sought would adversely affect the legitimate economic interests of any of the companies involved. Due to this, I find that article 9(1)(c) does not apply to the withheld information.
33. Having had regard to the arguments of the parties, along with the contents and nature of the information at issue, and in particular the wording and framing of the RFT document, I find that the Department failed to demonstrate that the elements necessary to engage the exemption provided for at article 9(1)(c) are present in this case, and that neither Company A nor B provided sufficient information in their tender documents to do so either. Accordingly, the question of considering the public interest test at article 10 of the AIE Regulations does not arise. I find therefore that article 9(1)(c) does not apply to the information at issue.

Decision

34. Having carried out a review under article 12(5) of the AIE Regulations, I annul the Department's decision and direct release of the four records at issue in full.

Appeal to the High Court

35. 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
21 August 2025