

Mr X and Department of Agriculture, Food and the Marine

From [Office of the Commissioner for Environmental Information \(OCEI\)](#) ([/en/organisation/efe94-office-of-the-commissioner-for-environmental-information-ocei/](#))

Case number: OCE-127116-B6P2P5

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Whether the Department was justified in its refusal of specific appropriate assessment screening determinations made by a named staff member under articles 9(2)(a) and 9(2)(b), and articles 8(a)(i), 8(a)(ii) and 8(a)(iii)

26 April 2024

Background

1. On 21 June 2022, the appellant contacted the Department and requested the

following:

“A copy of all Appropriate Assessment Screening Determinations issued by [named Forestry Inspector] during the period 2020 – 2021 (inclusive) where the Determination was to screen out the project from Appropriate Assessment.”.

2. On 21 July 2022 the appellant sought an internal review of the basis of a deemed refusal by the Department. On that same date, the Department issued a late original decision in which it refused the appellant’s request on the basis that “document you requested does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken”.

3. On 9 August 2022, the Department issued its internal review decision. While it stated it was affirming the decision made by the initial decision maker, the Department went on to refuse access to the information sought on the basis that “[...] the determinations contain sensitive environmental and personal information”, and cited articles 8(a)(i), 8(a)(ii) and 8(a)(iii). The Department contended that the appellant’s request “for such a substantial amount of information” was manifestly unreasonable having regard to the information sought and argued that to “look into over two years of files and extract the information” sought would be “a huge task” that would take “many hours”. It requested the appellant to consider narrowing his request to “to avoid unnecessary time and effort, to avoid the possible imposition of fees for that process and to establish areas of particular concern” to the appellant.

4. The appellant submitted an appeal to this Office on 10 August 2022.

5. 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. 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’);

- the Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’);
 - the judgments of the Superior Courts in *Minch v Commissioner for Environmental Information* [2017] IECA 223 (*Minch*), *Redmond & Anor v Commissioner for Environmental Information & Anor* [2020] IECA 83 (*Redmond*), *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 (*ESB*) and *Right to Know v Commissioner for Environmental Information & RTÉ* [2021] IEHC 353 (*RTÉ*);
 - the judgment of the Court of Appeal of England and Wales in *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (*Henney*) which is referenced in the decisions in *Redmond*, *ESB* and *RTÉ*; and
 - the decisions of the Court of Justice of the European Union in *C-321/96 Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat (Mecklenburg)*, and *C-316/01 Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen (Glawischnig)*.
6. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Preliminary matters

The Department’s handling of the appellant’s AIE request

7. Having reviewed the decision making records in relating to this appeal, I do not consider the Department’s responses in this case to be in accordance with the duty to give reasons, which arises not only by virtue of the AIE Regulations and Directive, but is recognised generally as a core principle of administrative law and a fundamental element of constitutional justice (see, for example, *Meadows v Minister for Justice* [2010] IESC 3 and *Balz & Anor v An Bord Pleanála & Ors* [2019] IESC 90). Both of these judgments, in the same way as the AIE Regulations, make it clear that where a requester has all or part of a request refused, they are entitled to be provided with clear reasons for that refusal. This duty arises so that the requester can take a view as to whether they consider refusal justified, or whether they wish to exercise their

entitlement to have the refusal reviewed.

8. Where a public authority refuses a request on the basis that it does not hold information within the scope of that request, it should be in a position to set out clearly the steps it has taken to identify and retrieve relevant information. Furthermore, while a public authority is fully entitled to change the basis on which it refuses information when considering the matter afresh at internal review stage, the public authority cannot then contend that it has affirmed its original decision. Rather, it has varied its original decision in that it has changed the basis for refusal.

9. This is all the more relevant if, as in this case, the public authority claims at original decision stage that it does not hold or cannot find any relevant environmental information and then at internal review stage states it is affirming that original decision but goes on to refuse access to the information sought on the basis that it contains sensitive personal and environmental information and that the request itself is manifestly unreasonable. The Department's internal review did not address or explain this contradiction.

10. The Department's internal review decision only referred to articles 8(a)(i), 8(a)(ii) and 8(a)(iii) of the AIE Regulations. However, the Department also used language which would appear to be relevant to article 9(2)(a). It described the request as "manifestly unreasonable having regard to the information sought". Furthermore, when this Office sought a copy of the information at issue, the Department queried whether the appellant's request could be considered "a manifestly unreasonable request as per Article 9(2)(a) and is formulated in too general a manner as per Article 9(2)(b) in that it is a blanket request for hundreds of files".

11. The Department provided this Office with what it described as a representative sample of "the hundreds" of records at issue. Despite relying on articles 8(a)(i), 8(a)(ii) and 8(a)(iii) in its internal review decision, the Department stated to this Office that "no redaction should ever be required on any of these."

12. Article 7(4)(c) of the AIE Regulations requires a public authority to specify the reasons for refusal of a request. Article 10(3) 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. The Department ought to be aware of the requirements placed on it by the AIE Regulations, and by the requirements of fair procedures, to provide reasons for its decisions. Neither of the Department's decisions contained any adequate justification for its conclusion that the relevant exceptions relied on upon applied in this case, nor did any of the Department's

engagements with this Office provide any explanation for the positions it had adopted. Furthermore, the Department entirely failed to consider or weigh the public interest factors at issue in this case at any stage of this case, despite the obligation to do so under article 10(3).

Scope of Review

13. 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. Where appropriate in the circumstances of an appeal, the public authority may be directed to make available environmental information to the appellant.

14. Taking all of the Department's statements together, and in the interests of ensuring that this decision addresses all potentially relevant matters, it seems to me that the most appropriate course of action in this case is for me to proceed on the basis that the Department wishes to rely on both articles 9(2)(a) and 9(2)(b) and articles 8(a)(i), 8(a)(ii) and 8(a)(iii) in refusing access to the information at issue.

15. My review is therefore concerned with whether the Department was justified in its refusal of the information sought under articles 9(2)(a) and 9(2)(b) and articles 8(a)(i), 8(a)(ii) and 8(a)(iii).

16. I also wish to note that the Department was invited to make submissions at the time that this review was accepted. The Department engaged in some correspondence with this Office at that stage. Given the circumstances of the case, I did not consider it necessary to seek further submissions from the Department.

Analysis and Findings

Position of the parties

17. The Department's original and internal review decisions are outlined in some detail above, as are the statements it made to this Office. It is clear from the Department's correspondence with this Office that it is of the view that the appellant's request was manifestly unreasonable within the meaning of article 9(2)(a) and that it was formulated in too general a manner as per article 9(2)(b). In its internal review decision, the Department contended that articles 8(a)(i), 8(a)(ii) and 8(a)(iii) apply to the information sought as "the determinations contain sensitive environmental and personal information." However, I also note that the Department later stated that "no redaction should ever be required on any of these" after it provided a representative sample of the records at issue to this Office.

18. In his submission to this Office the appellant contended that the Department's original decision that it did not hold or could not locate the requested information was "not even remotely credible". The appellant contended that the Department's internal review decision was "one of the most incomprehensible decisions" that he had ever received in response to an AIE request. The appellant described that decision as "not only unreasoned" but also "confused and contradictory", and noted that the Department had undertaken "no weighing of the public interest" of his request. The appellant argued that he was not in a position to make a proper submission on such a decision and requested this Office to ask the Department to provide a meaningful and reasoned decision.

Articles 9(2)(a) and 9(2)(b)

19. Article 9(2)(a) 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. This provision seeks to transpose article 4(1)(b) of the AIE Directive, which provides that Member States may provide for a request for environmental information to be refused if the request is manifestly unreasonable, and, in turn, is based on part of article 4(3)(b) of the Aarhus Convention.

20. Article 9(2)(b) provides that a public authority may refuse to make environmental information available where the request remains formulated in too general a manner, taking into account article 7(8). Article 9(2)(b) seeks to transpose article 4(1)(c) of the AIE Directive, which provides that Member States may provide for a request for environmental information to be refused if the request is formulated in too general a manner, taking into account article 3(3), and, in turn, is based on part of article 4(3)(b) of the Aarhus Convention.

21. Articles 9(2)(a) and 9(2)(b) must be read alongside article 10 of the AIE Regulations, which provides for certain limitations on the ability of a public authority to refuse environmental information. 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 and 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 7(4)(c) of the Regulations requires a public authority to specify the reasons for refusal of a request.

22. The Minister's Guidance at paragraph 12.8 states the following:

“Article 9[(2) ...] clarifies that a public authority may refuse to make information available if the request is considered unreasonable due to the range of material sought, if the request is too general or if the material requested is not yet completed. Public authorities are requested to invoke these grounds for refusal sparingly, and to assist the applicant (to reformulate a request, for example) as appropriate.”

23. In its internal review decision, the Department described the request as “manifestly unreasonable having regard to the information sought” and contended that to “look into over two years of files and extract the information being sought is a huge task which will take many hours.” During the course of this review, the Department queried whether the appellant's request could be considered “a manifestly unreasonable request as per Article 9(2)(a) and is formulated in too general a manner as per Article 9(2)(b) in that it is a blanket request for hundreds of files?” The Department indicated to this Office that its IT unit had determined that 329 individual assessments were captured by the appellant's request.

24. 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, I must 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. In light of the findings of the Court of Justice of the European Union in T-2/03 Verein für Konsumenteninformation v. Commission, at paragraphs 101-115, I consider 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.

25. The Department has provided no detailed or specific reasoning for its reliance on article 9(2)(a) of the AIE Regulations. Despite arguing in its internal review decision that examining “over two years” of files in order to extract the information sought by the appellant “is a huge task which will take many hours”, the Department did not explain how or why this would impose an unreasonable level of work on the Department in processing the request. Nor does the fact that the Department’s IT unit appears to have later determined that 329 individual assessments were covered by the request demonstrate that responding to the request would involve the Department in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities.

26. While I note that the Department asked the appellant to narrow his request, it only did so in its internal review decision, where it also stated it was refusing the request under articles 8(a)(i), 8(a)(ii) and 8(a)(iii). Furthermore, the Department’s invitation to narrow the request was not accompanied by any assistance or guidance as to how the appellant should refine the request in order to avoid the request being refused. In light of the Department’s parallel decision that the information was exempt from release on the basis of articles 8(a)(i), 8(a)(ii) and 8(a)(iii), along with the already quite specific and focused wording of the request itself, it is difficult to understand how the appellant could ever have successfully narrowed the request so as to avoid it being refused.

27. Taking all of the above into account, my view is that the threshold for finding the request to be manifestly unreasonable has not been met in this appeal. Accordingly, the Department has not established that article 9(2)(a) of the AIE Regulations applies to this request.

28. Article 9(2)(b) of the AIE Regulations and article 4(1)(c) of the AIE Directive respectively require that article 7(8) of the AIE Regulations and article 3(3) of the AIE Directive be taken into account. Article 7(8) of the AIE Regulations provides that where a request is made by the applicant in too general a manner, the public authority shall, as soon as possible and at the latest within one month of receipt of the request, invite the applicant to make a more specific request and offer assistance to the applicant in the preparation of such a request. Article 3(3) of the AIE Directive provides that if a request is formulated in too general a manner, the public authority

shall as soon as possible, and at the latest within one month, ask the applicant to specify the request and shall assist the applicant in doing so e.g. by providing information on the use of public registers

29. As noted above, the Department only invited the appellant to narrow his request in its internal review decision, and offered him no assistance in doing so. Furthermore, it appears to me that the appellant's request cannot reasonably be described as formulated "in too general a manner." In my view, the request was worded very specifically and in such a manner so as to limit its scope to a very narrow and limited category of environmental information. Essentially, the appellant sought a very specific category of records prepared by a specific named civil servant over a defined and limited time period. It is hard to see how the appellant could have been more specific or focused in drafting his request or in describing the environmental information sought in his request.

30. Accordingly, I find therefore, that the Department was also not justified in its decision to refuse the appellant's request under article 9(2)(b) of the AIE Regulations.

31. Having found neither article 9(2)(a) nor article 9(2)(b) to apply, it is not necessary for me to consider the public interest balancing exercise provided for at article 10(3) of the AIE Regulations. As noted, the Department made no mention of that mandatory public interest test in either of its decisions or in correspondence with this Office. Accordingly, I am satisfied that even if I had found that the requirements of articles 9(2)(a) and/or 9(2)(b) were met in this case, the Department's failure to go on to consider the public interest test would mean that both of those provisions could not apply.

Articles 8(a)(i), 8(a)(ii) and 8(a)(iii)

32. At internal review stage, the Department stated it was refusing access to the information sought "[a]s the determinations contain sensitive environmental and personal information, I am citing Article 8(a)(i), (ii) and (iii)".

33. The Department did not refer to these article 8 provisions in its correspondence with this Office, nor did it put forward any arguments that could be relevant to those provisions, although I note that, rather confusingly, it did state that "no redaction should ever be required on any of these" when providing sample records to this Office.

34. Article 8(a)(i) is the relevant article of the AIE Regulations providing for the non-

disclosure of personal information in certain circumstances. This provision states:

“8. A public authority shall not make available environmental information in accordance with article 7 where disclosure of the information— (a) would adversely affect— (i) the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law”.

35. Article 8(a)(ii) provides that a public authority shall not make available environmental information where disclosure would adversely affect the interests of any person who, voluntarily and without being under, or capable of being put under, a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information.

36. Article 8(a)(iii) of the AIE Regulations provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the protection of the environment to which that information relates. This provision seeks to transpose article 4(2)(h) of the AIE Directive, which in turn is based on article 4(4)(h) of the Aarhus Convention. I note that the AIE Directive and the Aarhus Convention provide examples of the type of information intended to be protected, respectively referring to “the location of rare species” and “the breeding sites of rare species”.

37. As with articles 9(2)(a) and 9(2)(b), articles 8(a)(i), 8(a)(ii) and 8(a)(iii) must be read alongside article 10 of the AIE Regulations. Article 10(3) 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) 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) provides that nothing in article 8 or 9 shall authorize 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.

38. In this case, the Department has merely referred to articles 8(a)(i), 8(a)(ii) and 8(a)(iii) in its internal review decision and contended that the information at issue contains “sensitive environmental and personal information”.

39. In relation to article 8(a)(i), there is no evidence to suggest that the Department carried out any examination of the information to determine if the particular information contained therein is, in fact, personal information which has the quality of

confidence required to engage the exemption.

40. In relation to article 8(a)(ii), the Department provided no explanation as to where the confidentiality of any such information is provided by law, nor did it identify any law upon which it was relying. Further, the Department provided no explanation as to why it was satisfied that the person or persons was/were not legally obliged (and could not be legally obliged) to supply the information at issue to the Department. It also failed to explain why it was satisfied that the person or persons supplying the information at issue had not consented to its disclosure.

41. In relation to article 8(a)(iii), the Minister's Guidance, in considering "[m]aterial the disclosure of which would make it more likely that the environment to which such material related would be damaged" outlines:

"This exclusion is designed to cover information such as that pertaining to the location of endangered species where, for example, disclosure of detailed information would pose a risk to the continued integrity of rare specimens" (paragraph 11.4).

42. The Aarhus Guide notes that the equivalent provision in the Aarhus Convention allows public authorities "to protect certain sites, such as the breeding sites of rare species, from exploitation — even to the extent of keeping their location a secret. It exists primarily as a safeguard, allowing public authorities to take harm to the environment into consideration when making a decision whether or not to release information."

43. I am satisfied that the purpose of article 8(a)(iii) of the AIE Regulations is to allow for the withholding of information where disclosure would be harmful to the protection of the environment. When relying on article 8(a)(iii) the public authority should identify the environment to which the information at issue relates and explain how disclosure of the information at issue would adversely affect the protection of that environment. Again, the public authority must demonstrate a clear link between disclosure of the specific information that it has withheld and any adverse effect. The risk of the protection of the environment being undermined must be reasonably foreseeable and not purely hypothetical.

44. Insofar as the Department was referring to its reliance on article 8(a)(iii) in its internal review decision, the Department merely stated that the information at issue

contains “sensitive environmental [...] information”. The Department did not argue or provide any evidence that the release of such sensitive environment would lead to any adverse effect, as required by article 8(a)(iii). The same can be said for articles 8(a)(i) and 8(a)(ii) where in both instances the Department made no attempt to demonstrate a clear link between disclosure and any adverse effect, or to even describe any such adverse effect, or indeed any effect at all.

45. Even if reliance on articles 8(a)(i), 8(a)(ii) and 8(a)(iii) had been justified in respect of the information sought, the Department would have still needed to consider the public interest balancing test as required by article 10(3) of the AIE Regulations. There is no evidence before me that the Department considered article 10(3) or any of the other relevant provisions of article 10 in this case.

46. I find that it is not possible for the Department to have correctly considered the application of articles 8(a)(i), 8(a)(ii) and 8(a)(iii) in the circumstances where it does not appear to have adequately considered the information in question. Furthermore, it is clear to me that Department failed to comply with its obligations under article 10 of the AIE Regulations.

47. Accordingly, I find that the Department has failed to provide sufficient reasoning to justify the application of any of the provisions of article 8 of the AIE Regulations.

Conclusion

48. On the facts of this case, and taking all of the above into account, I find that the Department was not justified in its reliance on articles 9(2)(a) and 9(2)(b) or articles 8(a)(i), 8(a)(ii), and 8(a)(iii).

49. As noted above, this Office has only been provided with a “representative sample” of the information relevant to this request. Accordingly, I consider that the most appropriate course of action to take is to annul the internal review decision of the Department. The Department should provide the appellant with a new internal review decision.

50. In carrying out a new internal review process, however, the Department should have full regard to the provisions of the AIE Regulations and the duty to give reasons, which arises not only by virtue of the AIE Regulations and Directive, but is recognised generally as a core principle of administrative law and a fundamental element of constitutional justice.

51. Furthermore, if the Department wishes to refuse access to some or all of the

information sought, it must ensure that it carefully carries out the public interest test provided for at article 10(3) of the AIE Regulations and in doing so considers the specific public interest considerations arising in this case in favour of release of the information at issue, against the interests served by not releasing it. The Department must also have regard to the other provisions of article 10, and in particular articles 10(4) and 10(5).

Decision

52. Having carried out a review under article 12(5) of the AIE Regulations, I 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

53. 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

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