

**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 2014
(the AIE Regulations)**

Case CEI/16/0014

Date of decision: 27 March 2017

Appellant: New Morning Intellectual Property Limited

Public Authority: Transport Infrastructure Ireland (TII)

Issue: Whether the appellant's AIE request was invalid because it did not state in terms that were as specific as possible the environmental information that it sought

Summary of Commissioner's Decision: The Commissioner found that the request was a valid AIE request which should now be processed by TII in accordance with 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

TII was established through a merger of the National Roads Authority and the Railway Procurement Agency under the Roads Act 2015.

The AIE Request

On 29 January 2016 the appellant company submitted an AIE request to TII asking for the following information:

1. “The raw data for all traffic counters installed on the M1 motorway for all years available, and
2. The meta data in each case”.

In the written request, under the heading “Format”, the appellant said:

“I wish to receive all of the information in electronic format and in relation to part 1 of the request in a machine-readable format that can easily be imported into Microsoft Excel (i.e. CSV, XLS etc.).... Alternatively, publication on the TII website would be a satisfactory way of granting the request.”

On 26 February 2016, TII gave notice of its decision to refuse the request because:

“Under article 6 of the AIE Regulations, applications for information on the environment should ‘state, in terms that are as specific as possible, the environmental information that is the subject of the request’. Following consideration of your request, it is our view that your request does not fall within the scope of the Regulations concerned.”

On receipt of this decision, the appellant company requested a review of this decision, adding that it had “stated in clear terms the scope of [the] request”.

Having received no review decision by 29 March 2016, the appellant company appealed to my Office. When informed by my Office that an appeal had been made, TII said (on 31 March 2016) that “we are “currently finalising our internal review of our earlier decision and will be issuing our response to the requester shortly”. TII did not subsequently issue an internal review decision. In any event, the time for issuing such a decision had passed.

On several occasions during my Office’s investigation of this case the possibility of a settlement arose. Regrettably, while time was spent on exploring such possibilities, no settlement was reached and it became necessary to proceed to a formal decision.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review the decisions of public authorities and to affirm, annul or vary such decisions. Ordinarily, if I find that refusal was not justified for the reasons given in a particular decision, my role is to decide whether it would be appropriate for me to require the public authority to make environmental information available to the appellant. However, this appeal involves a threshold jurisdiction question: was the request which gave rise to this appeal a valid AIE request? My Office’s

Manual of Procedures (available at <http://www.ocei.gov.ie/en/About-Us/Policies-and-Strategies/FOI-Manuals/Procedures-Manual/>) sets out (on page 12) how I deal with threshold jurisdiction cases. It explains that:

“A determination on the threshold question must be made before the review may proceed. Once the determination is made that the matter is within the remit of AIE, and no appeal to the High Court is made, the public authority should then deal with the request in accordance with the Regulations. If the appellant remains dissatisfied with the handling of his/her request following internal review and thus appeals again to this Office with respect to the original request, then the matter will be reopened administratively without payment of a new fee and given priority treatment by this Office insofar as it is practicable to do so.”

My task at this stage, therefore, is to review TII’s decision to reject the AIE request as invalid.

In conducting my review I took account of the submissions made by the appellant and by TII. I 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).

Relevant AIE provisions

Article 3(1) provides that “environmental information” means any information in written, visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
- (d) reports on the implementation of environmental legislation,
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

Article 6(1)(d) provides that a request for environmental information shall state, in terms that are as specific as possible, the environmental information that is the subject of the request.

Article 6(1)(e) provides that a request for environmental information shall, if the applicant desires access to environmental information in a particular form or manner, specify the form or manner of access desired.

Article 7(3) provides as follows:

(a) Where a request has been made to a public authority for access to environmental information in a particular form or manner, access shall be given in that form or manner unless—

(i) the information is already available to the public in another form or manner that is easily accessible, or

(ii) access in another form or manner would be reasonable.

Article 7(8) 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 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.

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).

The decision under review

As no review decision was issued by TII, the decision to be reviewed is TII's original decision. That said:

“Under article 6 of the AIE Regulations, applications for information on the environment should ‘state, in terms that are as specific as possible, the environmental information that is the subject of the request’. Following consideration of your request, it is our view that your request does not fall within the scope of the Regulations concerned.”

The decision did not expressly say that TII did not regard the requested information as environmental information. However, in later correspondence with my Office, TII said:

“It is difficult to reconcile [the appellant’s] view that raw/meta traffic counter data constitutes environmental information within the meaning of the [AIE] Regulations”.

In its decision letter, TII also gave details of how traffic counter information could be freely accessed on its website, but it did not say that the requested raw data was available on its website.

The appellant’s position on TII’s decision

The appellant company made it clear to my Office that it understood that the request had been refused “based on article 6, due to non-observance of formalities”. It argued, in its request for an internal review by TII, that it had stated in clear terms the scope of the request. The appellant company also told my Office that the information provided on TII’s website does not satisfy its request.

Analysis of the justification of the decision under review

TII found the request to be invalid because it did not comply with one of the five provisions of article 6(1) of the AIE Regulations, in that contrary to sub-article (1)(d), it did not “state, in terms that are as specific as possible, the environmental information that is the subject of the request”.

Clearly the request asked for information. The issues are whether it asked for “environmental information”, and, if it did, whether the environmental information requested was stated as “specifically as possible”, in light of how that expression should be understood.

Did the request ask for “environmental information”?

The request asked for raw data from traffic counters, along with its associated meta data.

The operation of a motorway is clearly an activity which affects elements of the environment. The use of roads by motor vehicles is also clearly an activity which affects elements of the environment. The raw data from traffic counters on a motorway would be quantitative information on the movement of motor vehicles on the motorway at specific times on specific dates. I regard such data as constituting environmental information on account of it being integral information on the activity of operating a motorway and the activity of using motor vehicles. I also regard any meta-data associated with such raw data as environmental information, in that it too would be integral information on such activities, in that it would significantly assist any analysis of the raw data.

I am therefore satisfied that the requested information is environmental information. While such raw data, even together with its associated meta data, might prove difficult (and perhaps even impossible) for people without specialist expertise or a special computer programme to understand, that would not alter its status as environmental information.

Was the requested environmental information stated in terms as that were as specific as possible, within the meaning of article 6(1)(d) of the AIE Regulations?

I considered what “as specific as possible” means in this context. I noted that the AIE Directive does not contain a similar provision to article 6(1)(d) and neither does the Aarhus Convention. The Minister’s Guidance provides no assistance. A search of my Office’s previous decisions showed that this issue has not been the subject of a previous finding.

Clearly, it cannot have been the legislative intent that a request would be invalid simply because a public authority found it possible to express the information sought with a greater degree of specificity than the requester managed to achieve in the AIE request.

From the above, and taking into account the provisions of the AIE Regulations which deal with requests which are manifestly unreasonable or too general, along with the need to interpret the AIE Regulations in a manner which is consistent with the AIE Directive, I conclude that the expression “as specific as possible” in article 6(1)(d) means simply that a request should state the environmental information which is sought in a manner which is sufficiently specific so as to enable a public authority to process the request. In other words, I consider that the provision should be regarded as advising requesters to try to be as specific as *they* can be, so as to assist the public authority.

With this in mind, I considered whether the request in the current case met this standard. It said:

“The requested information is as follows:

1. The raw data for all traffic counters installed on the M1 motorway for all years available, and
2. The meta data in each case”.

Three paragraphs further down in the request, the requester wrote (under the heading “Format”)

“I wish to receive all of the information in electronic format and in relation to part 1 of the request in a machine-readable format that can easily be imported into Microsoft Excel (i.e. CSV, XLS etc.).... I note that TII maintains a network of traffic counters and that data is published in relation to some of them in machine readable format on the internet, accordingly there should be no difficulty in providing the data in relation to the counters on the M1 which are not published at this time. Alternatively, publication on the TII website would be a satisfactory way of granting the request.”

TII submitted that the information requested in this case and the format requested are inseparable. TII rejected my investigator’s suggestion that they are separate matters and that the form requested was akin to a statement of preferred format. I do not agree with TII’s view. The “information requested” and the “format” were quite separate elements of the AIE request in this case. Moreover, I am satisfied after considering the provisions of articles 6(1)(e) and 7(3)(a) that “information” and its “form” are properly to be regarded as different, albeit related, issues. For example, I am satisfied that it would not be permissible for a public

authority to refuse an AIE request simply because it was not practicable to provide the requested information in the requested form. In such circumstances the provisions of article 7(3)(a) must be complied with. My conclusion is made all the more firm by the fact that the appellant in this case suggested an alternative format of access, i.e. publication on TII's website.

Thus satisfied that the requested information is the raw data for all traffic counters installed on the M1 motorway for all years available, and the meta data in each case, regardless of the format in which such data might be provided, I considered whether the words used were sufficiently specific to enable TII to understand what it was being asked for.

The M1 motorway is a specific road.

Data "for all years available" was requested. I expect that TII would very quickly have been able to identify the range of years for which such information was held by or for it. That part of the request is sufficiently specific to enable TII to understand the time period involved.

The request was for raw data, not averaged, or otherwise aggregated data. That much is clear. I expect that such data might include minute-by-minute or even second-by-second data, if that is what the traffic counters record.

In conclusion, I am satisfied that the request complied with article 6(1)(d) of the AIE Regulations.

Decision

Having reviewed TII's decision, I find that its rejection of the validity of the AIE request was not justified. The request satisfied the requirements of article 6(1)(d) of the AIE Regulations. I therefore annul TII's decision.

I now expect TII to process the request, in light of my findings in this decision, in accordance with the AIE Regulations.

Appeal to the High Court

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.

Peter Tyndall

Commissioner for Environmental Information

27 March 2017