

**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/16/0022**

**Date of decision:** 8 August 2016

**Appellant:** Mr Francis Clauson

**Public Authority:** Commission for Energy Regulation (CER)

**Issue:** Whether the appellant's AIE request was inadequately answered by CER on the basis that CER did not consider parts of the request.

**Summary of Commissioner's Decision:** In accordance with article 12(5) of the AIE Regulations, the Commissioner reviewed CER's decision. He found that CER had inadequately answered the appellant's AIE request in circumstances where CER failed to consider substantial parts of the request. Accordingly, the Commissioner annulled CER's decision on parts one to four of the appellant's request.

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal this decision 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**

The Commission for Energy Regulation (CER) is the statutory regulator of the electricity and natural gas markets in Ireland. CER regulates the construction and operation of wind farms. On 8 April 2016, the appellant made an AIE request to CER for the following information on eight named Irish wind farms:

- "1. Copies of the Authorisation to Construct with all of the supporting information and documentation needed by the CER to issue such an authorisation.
2. Copies of the Licence to Generate Electricity with all of the supporting information and documentation needed by the CER to issue such a licence.
3. Copies of the annual reports on environmental performance required to be submitted by licenced generators
4. Copies of any correspondence in regard to compliance to planning or environmental law.
5. Copies (if separate) of environmental information in regard to the named generator grid connections to include inter alia permissions, routings & planning."

On 18 April 2016 CER emailed the appellant and stated that the request had "been deemed voluminous due to the number of records involved". The FOI Officer invited the appellant to modify his request to a more defined scope. The appellant replied by email on the same day, and offered the following modification:

"To narrow this request down in *[sic]* – I am really looking for information which the developer must supply to demonstrate compliance with Environmental and Planning law.

So in the case of 1 & 2 – it would relate to sections of these documents which relate to the facts that a developer has complied with planning permissions, environmental impact directive (EIA Directive) and habitats directives."

On 21 April 2016, CER's FOI Officer extended the time for making a decision on the request to 3 June 2016. In a decision of 2 June 2016, CER released 12 records relating to six of the eight wind farms. The decision did not include a comprehensive schedule of relevant records considered by the decision maker. CER stated that it did not hold any information relating to the fifth part of the appellant's request. The appellant requested an internal review of the decision of 2 June 2016, and included a table setting out the parts of the request he considered to be inadequately answered. In this table, the appellant described the fifth part of his request as "Supplied (CER has none)" in respect of each wind farm, and therefore I consider it reasonable to conclude that the appellant was satisfied with this aspect of his request, and sought an internal review of the remaining unanswered parts. I therefore find that appellant's internal review request

only applied to parts one to four of his AIE request, and I have not considered part five of his request for the purposes of this appeal.

In an internal review decision of 22 June 2016, CER released a further 22 documents. 16 of these documents were redacted on the basis that the redacted information was not environmental information. CER provided the records to the appellant in hard copy, consisting of hundreds of pages. CER did not specify how the 34 records released related to the four parts of the appellant's request. The appellant subsequently appealed CER's internal review decision to my Office.

### **Scope of Review**

Articles 11(5)(b) and 12(3)(a) of the AIE Regulations provide that where a request for environmental information has been inadequately answered by a public authority, a right of appeal to my Office arises. Under article 12(5) of the AIE Regulations, on receipt of a valid appeal, I must review the internal review decision of the public authority, and affirm, vary or annul the decision. I have limited the scope of my review in this appeal to consideration of the omissions evident on the face of CER's internal review decision.

Directive 2003/4/EC (the Directive) implements the first pillar of the 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 Directive is transposed into Irish law by the AIE Regulations. In making this decision I have had regard to the Guidance for Public Authorities and others on implementation of the Regulations (May 2013) published by the Minister for the Environment, Community and Local Government [the Minister's Guidance]; and The Aarhus Convention: An Implementation Guide (Second edition, June 2014) [the Aarhus Guide].

### **CER's attempt to narrow the request**

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

Article 7(8) provides that where a request is made in too general a manner, a public authority must invite the requester to make a more specific request. The public authority must offer assistance to the applicant in the preparation of a more specific request. The Oxford English Dictionary defines "general" in this context as "not specialized or limited in range of subject, application, activity, etc". Under Article 9(2)(b), 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 7(2)(b) provides that where a public authority is unable, because of the volume or complexity of the environmental information requested, to make a decision within one month from the date on which such request is received, it may extend the time for making a decision to a date not later than two months from the date of the 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.

The above provisions are inter-related in some regards (an overly general request is more likely to capture a large volume of records); however, a request may be well specified in terms of subject matter and nevertheless involve a large range or volume of records.

The AIE Regulations do not oblige public authorities to entertain overly general requests for information. Requests must be reasonably limited with regard to subject matter. In some cases, it may not be evident to a member of the public that a particular subject has discrete subdivisions, and it may be in the interests of all parties to establish at the outset if a more specific request can be made. Article 7(8) places an obligation on public authorities to assist applicants in making a more specific request where appropriate. As the regulator, CER has comprehensive expertise on the subjects referred to in the request and it is possible that elements of the request are too general when viewed in light of the operations of CER and the types of information held. Public authorities seeking to apply article 7(8) should clearly identify the reasons why a request is too general, and should take positive steps to assist an applicant.

In this case, CER attempted to narrow the scope of the request on the basis that it had "been deemed voluminous due to the number of records involved", and not because the request was too general. CER's invitation to the appellant mixed elements of articles 7(8) and 7(2)(b) in an unsatisfactory manner, and in effect it was an informal invitation to the appellant to reduce the scope of his request. The appellant's reply was vague; he did not clearly reduce the subjects to be considered, nor did he expressly abandon any part of his request. CER did not seek further clarification in any event, and as a result the attempt to narrow the request was to no avail. Accordingly, I do not consider that the request was modified in any meaningful way by the correspondence exchanged between the parties. I note that CER made no reference to article 9(2)(a).

### **Scheduling of relevant records**

The AIE Regulations do not expressly oblige public authorities to prepare a schedule of records considered in the course of making an AIE decision, nor does the Minister's Guidance address this issue. Public authorities often refuse requests on the basis that certain information does not fall within the definition of environmental information. It is appropriate in most cases to inform a requester of the making of such a determination, and to identify the information considered. I consider it to be best practice for public authorities to include with a decision a schedule of records considered in the course the decision. Such a schedule should include details of records considered and found not to contain environmental information, environmental information which can be disclosed in full, and records which are subject to refusal in full or in part under articles 8 or 9.

In this case, both of CER's decisions included a schedule of records to be disclosed in full or in part, but did not include a list of all records considered. The disadvantage of such an approach is obvious on comparison of the two schedules; the internal review schedule included an additional

22 records which were not acknowledged in the first decision. No reason was provided for this discrepancy, and it is not possible to say whether the additional records were discounted at first instance, or whether search efforts were inadequate at the outset. In circumstances where CER relied on schedules to convey the content of its decisions, the incomplete scheduling of records amounted to a failure to provide proper reasons for refusal.

### **Matters not addressed in CER's decision**

The appellant's request contained five distinct parts, and referred to eight wind farms - the appellant effectively sought access to 40 distinct sets of information. In its first decision, CER released 12 sets of records, relating to six of the eight wind farms. No reasons were provided for the omitted subjects. The appellant's internal review request accepted CER's position that it did not hold information on the fifth part of his request; however, he rightly pointed out that "there are multiple documents missing from my request without any explanation or reasoning as required as to the reason why there were not supplied".

At internal review, CER supplied additional records, without explaining how they relate to the separate parts of the request. None of these records relate to correspondence on compliance matters as requested in part 4 of the request. No records were provided concerning Ballynancoran wind farm. It does not appear that any of the records relate to the second part of the request. No reasons were provided for these omissions.

While I acknowledge that CER dedicated significant resources to this request and furnished the appellant with a large amount of information, CER's overall approach was disorganised and incomplete. Essentially, CER's decisions ignored the detail of the appellant's request and provided information in an undifferentiated manner, addressing some but not all of the relevant subjects.

### **Findings**

Article 12(5) of the AIE Regulations provides that, following the receipt of an appeal, I must review the decision of the public authority, and affirm, vary, or annul the decision. My review of CER's decision has been limited to consideration of the omissions evident on the face of the internal review decision.

In most appeals to my Office, it is my practice to review the relevant information held by the public authority, and to invite submissions from all parties on the application of the AIE Regulations to the information concerned. In this case, it does not appear to me that CER has made a proper decision on the appellant's request. In particular, the second and fourth parts of the request appear not to have been considered, and no decision was notified to the appellant in respect of information on Ballynancoran wind farm. I am satisfied that the appellant's request has been inadequately answered in circumstances where CER has failed to consider the subjects included in parts one to four of the request.

In his appeal to my Office, the appellant requested that I carry out a wide ranging review of CER's decision. While I regret any delay in resolving this matter, it would be an inappropriate

use of the limited resources of my Office to carry out a comprehensive first instance review of the outstanding matters where CER itself has not yet made a proper decision on the request. It seems to me that the most expedient approach in this case is to annul CER's decision, in order to allow CER make a new decision on the appellant's request. In making a new decision, CER may wish to consider making an invitation to the appellant under article 7(8), as discussed above. If the appellant remains dissatisfied with the handling of his request following internal review and thus appeals again to this Office, then the matter will be accepted without payment of a new fee and given priority treatment by this Office insofar as it is practicable to do so.

I therefore find that CER has inadequately answered the appellant's AIE request in circumstances where it failed to consider substantial parts of the request. Accordingly, I annul CER's decision on parts one to four of the appellant's request.

Where no appeal of my decision is made to the High Court, CER should make a new decision on the outstanding parts of appellant's request, in line with the AIE Regulations. CER's decision should have regard to the exceptions to disclosure under articles 8 and 9, and the public interest considerations under articles 10(3) and (4).

### **Redaction of documents**

Article 10(5) of the AIE Regulations provides that:

"Nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information."

This provision allows for redaction or separation of information where the exceptions under article 8 or 9 apply to the information.

16 of the 34 sets of records provided by CER were disclosed to the appellant with redactions. In every case, the reason given for redaction was that the information "does not fall under Regulation 6 of the European Communities (Access to Information on the Environment) Regulations 2007 to 2014". This approach runs counter to the intention of the AIE Regulations, insofar as the definition of environmental information is deliberately framed to be broad, encompassing not just information on the state of the elements of the environment, but also any information on measures or activities affecting or likely to affect the state of elements of the environment. Information does not need to directly reflect the state of the elements of the environment in order to fall within the definition. I also consider that contextual information should not be separated unnecessarily from environmental information.

The AIE Regulations provide a system of mandatory and discretionary exceptions to disclosure, subject to a public interest test, which are the proper mechanisms by which a public authority can protect sensitive information. CER's approach, in which documents have been parsed for "non-environmental" information is problematic, as it presupposes that environmental information is a narrow category of information which can be isolated from its wider context.

There are circumstances where it is appropriate to redact material other than excepted material under articles 8 and 9. Out of scope information can be redacted, and it is possible that a document could contain clearly delineated sections which do not contain environmental information, which could therefore be separated. Nevertheless, the definition of environmental information is broad enough to make item-by-item redactions of information unworkable in most cases.

I have not reviewed the specific redactions made by CER, and I make no findings on the redactions since I have otherwise annulled the relevant parts of the decision as inadequate. However, should CER decide to issue a new decision on the request, I would strongly suggest that it provide adequate reasons for redactions, taking into account the broad definition of environmental information and articles 8 and 9 of 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**  
**8 August 2016**