

**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/16/0042**

**Date of decision:** 15 June 2017

**Appellant:** Niall Sargent on behalf of Earth Horizon Productions Limited (the appellant)

**Public Authority:** Bord na Móna (BnM)

**Issue:** Whether BnM was justified in refusing an AIE request on the basis that the information requested was not held by or for BnM.

**Summary of Commissioner's Decision:** In accordance with article 12(5) of the Regulations, the Commissioner reviewed BnM's decision to refuse the appellant's AIE request. He found that BnM was justified in refusing the appellant's request on the basis that no relevant information was held by or for BnM. Accordingly, the Commissioner affirmed the refusal 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 first AIE request**

On 30 May 2016, the appellant emailed an AIE request to BnM. This request related to the tonnage of palm kernel shells (PKS) imported by BnM, the names of companies supplying PKS to BnM, information relating to compliance with standards developed by the Roundtable on Sustainable Palm Oil (RSPO), and information on three tender processes for the supply of PKS to BnM.

On 29 June 2016, BnM extended the time for making a decision on the AIE request, pursuant to article 7(2)(a) of the AIE Regulations. In particular, BnM stated that it held a large volume of information relating to the tender processes. BnM stated that it would make a decision on the AIE request by 29 July 2016.

On 25 July 2016, BnM wrote to the appellant and invited it to make a more specific request. On 29 July, the appellant modified its AIE Request in response to BnM's invitation. This modified request sought access to more specific information concerning the tender processes.

In a decision of 2 August 2016, BnM provided the appellant with information on the tonnage of PKS imported and the names of companies supplying PKS to BnM. BnM refused to provide information relating to compliance with RSPO standards on the basis that this information fell within the exception to disclosure under article 9(1)(c), relating to commercial or industrial confidentiality. BnM confirmed that one of the three tender processes was abandoned, and stated that it did not hold any requested information in this regard. In relation to information on the two completed tender processes, BnM provided the names of the successful companies.

### **The second AIE request**

In its decision letter of 2 August, BnM stated that certain parts of the appellant's refined request of 29 July were substantially different to the initial AIE request. BnM decided to treat these parts as a new and separate AIE request. The specific subjects considered in this separate request related to the two completed tender processes (GR 04-14-2 and GR 18-14-1), insofar that these processes included any information on "*A) the environmental impact of the importation of PKS in both Ireland and/or the origin country; and B) carbon dioxide (CO<sub>2</sub>) emissions estimations (such as for transportation of PKS from origin country to Ireland; burning of biomass, etc)*".

On 26 August 2016, BnM wrote to the appellant referring to the second request. BnM stated that due to the volume and complexity of the information sought, it was necessary to extend the time for making a decision on the new request until 28 September 2016.

In a letter of 9 September 2016, BnM refused the appellant's second request, but provided the appellant with some contextual information on PKS usage.

On 14 September 2016, the appellant asked BnM to carry out an internal review of its decision on the second AIE request, pursuant to article 11 of the AIE Regulations. In an email

of 13 October 2016, BnM affirmed its decision to refuse the second AIE request on the basis that no relevant information was held by or for BnM on the subjects referred to in the request. The appellant appealed this decision to my Office on 20 October 2016.

### **Scope of review**

Pursuant to article 12(5) of the AIE Regulations, my role is to review BnM's internal review decision, and to affirm, annul or vary that decision. The appellant did not request an internal review of its initial request, and no appeal of that decision has been made to my Office. The appellant did request an internal review of the second AIE request. Accordingly, my review on this appeal is limited to consideration of BnM's response to the second request

Article 7(5) of the AIE Regulations provides that where information requested is not held by or for a public authority, it must inform the applicant as soon as possible. BnM contends that no relevant information is held by or for it concerning the subjects referred to in the second AIE request. The scope of my review is therefore limited to consideration of whether adequate searches have been conducted, and whether BnM was justified in its determination that no information was held.

In making this decision I have had regard to submissions made to my Office by BnM and the appellant. I have also had regard to *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].

### **BnM's position**

In its decision letter to the appellant of 9 September, BnM stated that it did not hold any information on the subjects raised in the second request, as the information sought "was not part of the business requirements to be included in the procurement and evaluation process for these tenders". In a subsequent submission to my Office, BnM stated that it carried out searches for information and consulted with its Biomass, Peat, Powergen, and Procurement business units to ascertain if information was held.

### **The appellant's position**

My Investigator wrote to the appellant and asked if it was aware of any relevant information that may be held by or for BnM. Mr Sargent replied that he was not aware of any specific documents or information held by or for BnM. In a submission to my Office, the appellant expressed dissatisfaction with the confusing manner in which the AIE requests had been processed. The appellant also submitted that article 10(1) (which disapplies certain grounds for refusal under articles 8 and 9) applies in this case because the AIE request relates to questions on emissions and environmental concerns.

### **Analysis and findings**

#### **Consideration of procedural aspects of the appellant's AIE requests**

In this case, the appellant initially sought access to a wide range of information on PKS, some of which was disclosed by BnM. I consider that it was reasonable in the circumstances for

BnM to extend time for processing the initial request. However, it is less than satisfactory that the appellant was asked to modify its request at a very late stage, and after BnM had waited almost two months to make a decision on the request. I note that invitations under article 7(8) must be made not later than one month after receipt of the AIE request. BnM's invitation in this case was therefore at least three weeks too late, and invalid for the purposes of the AIE Regulations. Article 7(8) requires the public authority to offer assistance to the applicant in the preparation of a more specific request. While BnM assisted the appellant by directing it to appropriate parts of the AIE Regulations, it does not appear that the appellant was provided with information on BnM procurement practices, or the type of information routinely held by BnM, which may have facilitated the making of a more specific request.

I am not satisfied that it was necessary for BnM to deal with elements of the first request as a new and separate AIE request. The appellant's modified request was more specific, but nevertheless concerned the same subjects as those raised at the outset (i.e. aspects of the tender processes). I am surprised that it was necessary for BnM to extend time for processing the second AIE request in circumstances where it had already considered the matter extensively.

It is likely that many of the delays that occurred in this case could have been avoided if BnM had invited the appellant to make a more specific request at the outset, as required by article 7(8). I note that this failure was acknowledged in BnM's internal review decision. Notwithstanding these delays and procedural lapses, I am satisfied that BnM engaged with the appellant and made efforts to provide information on PKS generally. In circumstances where only the second AIE request has been appealed to my Office, I make no findings with regard to the above matters.

#### Consideration of article 7(5)

Article 7(5) of the AIE Regulations provides that where the information requested is not held by or for a public authority, the public authority must inform the applicant as soon as possible. In the present case, BnM refused the second AIE request on the basis that no requested environmental information was held by or for it. Where a public authority refuses a request for environmental information in this way, I must be satisfied that adequate steps have been taken to identify and locate relevant records and information.

The appellant initially asked for all second stage tender documents, and all correspondence relating to the tender processes. Following engagement with BnM, the appellant limited its request to tender process documents which addressed the subjects of the environmental impact of PKS or emission projections for PKS. After six weeks of consideration of this request, BnM informed the appellant that no information was held. I am not satisfied that this reply was made "as soon as possible", as required by article 7(5). Notwithstanding this, I am satisfied that BnM has made sufficient efforts to search for relevant information, and that such information is not held by or for BnM. I am also convinced by BnM's statement that the procurement processes did not include assessment of emissions or environmental impact of PKS. Accordingly, I find that BnM was justified in refusing the appellant's second AIE request on the basis that no relevant information is held.

I note that my decision on this matter is without prejudice to the appellant's right to request access to any other environmental information on BnM tender processes, and that any

subsequent request for environmental information should be processed in accordance with the AIE regulations without unnecessary delay.

#### Consideration of article 10(1)

Article 10(1) of the AIE Regulations provides that, notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment. The appellant submitted to my Office that this section applied to its request. However, as no relevant information is held by or for BnM, refusal of the request is justified notwithstanding article 10(1).

#### **Decision**

In accordance with article 12(5) of the AIE Regulations, I have reviewed BnM's decision to refuse the appellant's second AIE request. I find that BnM was justified in refusing the appellant's second AIE request on the basis that no relevant information was held by or for BnM. I therefore affirm the refusal of the appellant's second AIE request.

#### **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  
15 June 2017