

**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/16/0032

Date of decision: 16 March 2017

Appellant: Hedge Laying Association of Ireland (a company limited by guarantee)

Public Authority: The Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs (the Department)

Issues:

1. Whether the Department was justified in refusing to provide access to information on appointments in the Minister for Arts and Heritage's diary because it was not environmental information
2. If it was not justified, in whole or in part, whether it would be appropriate for the Commissioner to require the Department to make information available to the appellant

Summary of Commissioner's Decision: The Commissioner found that the Department's internal-review decision was not justified, because the decision-maker did not consider the relevant version of the diary. However, since that version is no longer available, the Commissioner was unable to determine if it contained any environmental information. Accordingly, the Commissioner did not consider it appropriate for him to annul the decision or to require the Department to provide the appellant with further 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

On 7 July 2016, the appellant submitted an AIE request to the Department asking for:

“A copy of the Minister’s diary showing all appointments with any non-Government body, party, agency or individual(s) since the last General Election to end September 2016. To clarify, the period requested includes the period from the election in advance of the formation of the current Government and should include all future diary appointments also.”

The appellant asked for the information to be provided by the following day.

The Department replied on 14 July 2016, expressing the view that the Minister’s diary was not environmental information and offering to process the request as a Freedom of Information (FOI) request, if the appellant found that acceptable.

The appellant replied the next day, expressing the view that the Department’s reply of 14 July 2016 constituted a refusal of the AIE request. The appellant requested an internal review of that decision, and presented its argument as to why the requested information is environmental information. In addition, the appellant made an FOI request for the same information. It also made a further AIE request and another FOI request seeking different information. This decision relates solely to the AIE request made on 7 July 2016.

The Department replied on 18 July 2016 in an email headed “Appeal of AIE Decision – acknowledgment – AIE/AHG/2016/22”. Despite its heading, the email gave details of when an “initial decision” could be expected and how the appellant could appeal to the Department if it did not receive a decision on time. The contents of the email bore no relation to its stated “subject”.

The appellant pointed this out to the Department and asked for confirmation that its request for an internal review of the refusal of its AIE request would be processed. The Department confirmed that it accepted the appellant’s request for an internal review of the AIE refusal decision and expressed regret for any confusion arising from the Department’s email of 18 July 2016.

The Department issued an AIE internal review decision on 29 July 2016. The decision affirmed the earlier decision to refuse the request because the Minister’s diary “does not contain” environmental information. It added that:

“ministerial diaries are subject to change, and as such are, in relation to future commitments, draft documents which remain subject to completion. It is the practice of this Department to publish the Minister’s diary on a regular basis and in due course the final diary in respect of each period, including that specified in your request, will be made available on the Department’s website at <http://www.ahrrga.gov.ie/about/ministers/ministers-diary/>”.

Dissatisfied with this decision, the appellant appealed to my Office on 28 August 2016.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is firstly to review the Department's internal review decision and to affirm, annul or vary it. If I find that refusal was not justified for the reasons given in that decision, my role is to decide whether it would be appropriate for me to require the Department to make environmental information available to the appellant.

In conducting my review I took account of the submissions made by the appellant and the Department. 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)(the Aarhus Guide).

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 3(2) provides that “public authority” does not include any body when acting in a judicial or legislative capacity.

Article 4(1) provides that the AIE Regulations apply to environmental information other than, subject to sub-article (2), information that, under any statutory provision apart from the AIE Regulations, is required to be made available to the public, whether for inspection or otherwise.

The decision under review

The Department refused the request for one reason: because it did not regard the requested information as environmental information. It also commented that a ministerial diary is a document in the course of completion and it indicated where ministerial diaries are published. This comment and further information were not stated to be reasons for refusal. The Department has confirmed that this understanding is correct.

In response to a query from my investigator, the Department explained how it had made its decisions:

- The Minister’s working diary is available to authorised officials within the Department as an online read-only document.
- The Department’s original decision-maker examined it online on 8 July 2016 and formed a preliminary view before considering the matter further. He examined the online diary briefly again on the 14 July 2016 and concluded that it did not contain information that was subject to the AIE regulations.
- While the above decision was being made, the Minister’s diary for the period 1 January – 30 June 2016 was being prepared for publication on the Department’s website, as per standard practice. That process involved the redaction of personal appointments which would be included in the working diary for practical reasons but which did not relate to official business. The diary for the six month period to the end of June 2016 was published online on 14 July 2016.
- Later, on 29 July 2016, the Department’s internal-review decision-maker considered the online diary, as it stood on that day, and formed the view that it did not contain environmental information.

The appellant’s position on the decision under review

The appellant argued, both in its request for internal review and in a submission which accompanied its appeal to my Office, that the requested information is environmental information. The essence of its argument is as follows:

“[The Minister’s] engagements, by the very definition of the Minister’s role and remit including responsibilities set out in various pieces of environmental legislation, relate to measures and activities which are intended to protect the environment and also could impact on the environment, and elements of the environment, and activities and measures

intended to protect it. Her activity and involvement in various factors, measures and activities, including policy making or legislation or other actions and engagements could impact on the environment”.

The appellant cited the judgment in *Minch v Commissioner for Environmental Information* [2016] IEHC 91, in which Baker J. held at paragraph 62:

“In conclusion, I consider that any information that might have informed or be capable of informing the thinking of the Government in making decisions with regard to the National Broadband Plan, including economic models or costs-benefit analyses, is capable of being environmental information, and is so capable notwithstanding that such models do not contain information on emissions or impacts on the environment as such”.

The appellant argued that the Minister’s diary “does conform to the definition set out in the regulations”. It submitted that:

“In the same way as a report ‘might have informed or be capable of informing the thinking of the Government in making-decisions’ and thus be capable of being environmental information’ – the activity and information on activities as detailed in the Minister’s diaries is information and activities capable of being environmental information.”

The appellant also argued that “proposed future appointments” have a validity as a record at appoint in time”, while adding that “even firm appointments can vary”.

Analysis of the justification of the decision under review

Identifying the information at issue

The AIE request did not seek a complete copy of the Minister’s diary: it asked for –

“A copy of the Minister’s diary showing all appointments with any non-Government body, party, agency or individual(s) since the last General Election to end September 2016”.

Since it was an AIE request, it has to be understood as if it asked for –

“A copy of all environmental information in the Minister’s diary showing appointments with any non-Government body, party, agency or individual(s) since the last General Election to end September 2016”.

AIE provides a right of access to environmental information that is held by or for a public authority unless refusal is justified. In the normal course of events, the question arises as to whether the requested information was held by the public authority when the request was made. A public authority is under no obligation to obtain information which it did not hold when the request was received, in order to meet an AIE request. Accordingly, the task for the Department in this case was to consider whether the Minister’s diary contained any environmental

information when the AIE request was first considered. The AIE request was sent by email on 7 July 2016 at 20.32 hours. So, while it was received by the Department's email system on 7 July 2016, it was not until the following day that an official first had an opportunity to consider it. That such a timely consideration of the contents of the diary, as it stood on that day, took place is to be welcomed, since the contents of the diary were liable to be changed day by day.

In light of the above, I regard the Minister's diary, as it stood when accessed by the original decision-maker on 8 July 2016, as constituting the information that is at issue in this case.

Whether the information at issue contains environmental information

Regrettably, the Department did not secure a copy of the diary as it stood when first examined by its original decision-maker. The Department now acknowledges that when the original decision-maker looked again at the online diary some days later, that version probably contained different information from the version considered on 8 July 2016, on account of some information having been added and some deleted in the normal course of business, between viewings. Regrettably also, the internal-review decision-maker considered different information again when he viewed the diary online on 29 July 2016. Moreover, the Department has informed my Office that, due to Information and Communications Technology constraints, it is not able to re-create the diaries as they stood when decisions were made. I expect that a computer forensic expert could perform such work, but I accept that the Department does not have such expertise and it would not be reasonable to expect it to acquire it for the present purpose.

Since the record containing the information at issue is no longer available, I am unable to search it for environmental information.

Finding

I find that the Department's internal-review decision-maker did not consider the information which is at issue in this case. Accordingly, I find that this decision was not justified.

I make this finding in the knowledge that the relevant record was not available to the internal-review decision-maker.

Since the relevant record is no longer available, I am unable to determine if refusal would be justified following consideration of its contents.

Whether it would be appropriate for me to require the Department to provide the appellant with access to withheld information

This case essentially involves a dispute about what information (if any) in a particular record is environmental information. The appellant has argued that information (which it does not possess and has not seen) is environmental information. The Department maintains that information (which it did possess and has seen) does not contain environmental information.

Since the subject record is no longer available, I am unable to fully determine this matter.

When asked by my investigator for a copy of the working diary as it stood on 8 July 2016, the Department indicated that the best it could do was provide what amount to “snapshots” of the working diary as it stood when it was routinely “backed-up” by the Department’s information technology system on 24 June 2016 and again on 22 July 2016, i.e. approximately two weeks before and after the date of the AIE request.

Although it is now practically impossible to identify all of the relevant information that was held by the Department when the AIE request was made, it is reasonable to take it that information which is common to both backed-up versions of the working diary was present in the diary on 8 July 2016.

Before examining those records in search of environmental information, I considered the forms that environmental information can take. I am well aware that it does not always take an obviously environmental form. I considered the range of sources described above in the “scope of review” section, and I especially considered the appellant’s submission on this issue.

I concluded that environmental information could be found in a diary of engagements. If, for example, a diary listed a meeting of the Minister with a landowners’ representative-body to discuss a proposal to relax the legislative controls on hedge-cutting during the bird-nesting season in a Bill which was currently being prepared, that might be environmental information on account of being ‘information on a measure likely to affect elements of the environment’. On the other hand, if that meeting was cancelled, the fact that it was ever listed might not be environmental information. If the meeting was listed simply as a meeting with a landowners’ representative-body, without more, it would be far more difficult to determine that such information is environmental information. Even if an appointment was listed as a “meeting with a landowners’ representative-body to discuss a proposal to relax the legislative controls on hedge-cutting during the bird-nesting season in the Bill which is currently being prepared”, such information might fall outside of the provisions of the AIE Regulations on account of the interaction between article 4(1) of the AIE Regulations (reproduced above) and the requirement in the Lobbying Act 2015 for the making public of certain lobbying information. Moreover, if the purpose of a meeting was to consider legislative changes, and if the Department was at that time acting in a legislative capacity, it would not be a public authority for the purposes of the AIE Regulations when so acting, due to article 3(2) of the AIE Regulations (reproduced above). These considerations illustrate the special challenges that are encountered when dealing with AIE rather than FOI requests.

The passage in the judgment cited by the appellant in relation to information which would be “capable of informing the thinking of the Government in making-decisions” relates to environmental information of type (e) in the definition set out in the AIE Regulations (reproduced above). It referred to information on cost-benefit and other economic analyses and assumptions: types of information that are unlikely to feature in a diary of engagements.

Thus prepared to identify environmental information, I proceeded to examine the information common to the two backed-up diaries. I found nothing that I would regard as environmental information. Since neither backed-up version provided by the Department covers dates before 26 June 2016, I also examined the Minister's published diary for the period 26 February 2016 to 25 June 2016. I found no information which I would regard as environmental information.

Conclusion

Although I was unable to identify and consider the exact information that was in the Minister's working diary on 8 July 2016, I was able to identify some information which was almost certainly listed in that version. I found nothing that I would regard as environmental information.

In these circumstances, it would not be appropriate for me to require the Department to provide the appellant with access to further information. I note that the Minister's diary for the period of interest to the appellant is now published on the Department's website.

Decision

Having reviewed the Department's internal review decision, I find that it was not justified because it was made without considering the exact information that was held at the relevant time. However, since that record is no longer available, I am unable to establish if refusal would have been justified if the correct information had been considered. I therefore decided not to formally annul the Department's decision or to require it to provide access to any information.

Comments

This case raised some novel issues. Neither my Office's previous decisions, the Minister's Guidance, nor the Aarhus Guide give advice on how such cases ought to be dealt with. I am satisfied that the Department acted in good faith in always regarding the Minister's diary as "a living document". However, in hindsight, this case shows the need for a public authority to "freeze" a copy of the relevant information on first learning of an AIE request relating to a record such as a working diary. It also highlights the need for public authorities to ensure that a copy of such key information is retained for use by an internal-review decision-maker and later again, by my Office in the event of an appeal.

For completeness, I wish to add that I doubt if refusal on the grounds that a document is "in the course of completion" could be justified in the case of a document of a type that is arguably, by one view, not capable of being, or ever intended to be, 'completed', such as where a diary lists future engagements that are always subject to change. An alternative view of such a diary would be that it is "always complete", in the sense that it is complete at every moment in time, though liable to be replaced by another version.

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

16 March 2017