

**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/16/0008

Date of decision: 9 August 2016

Appellant: Scott Coombs

Public Authority: Environmental Protection Agency (EPA)

Issue: Whether the EPA was justified in refusing a request on the basis that the information requested was not within the scope of the AIE Regulations, having regard to the definition of environmental information set out in article 3(1) of those Regulations

Summary of Commissioner's Decision: The Commissioner varied the EPA's decision. He found that refusal was not justified for the reason given, but was justified because the requested information was not held by or for the EPA

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 10 November 2015, the appellant submitted an AIE request to the EPA, asking for the following:

A list of environmental information held by the EPA (whether in written, visual, aural, electronic or any other material form) on all research, research programmes and projects, and measures where a company called “Achilles Procurement Services Limited” (Achilles) has provided consultation or procurement services on or under the direction of the Irish Environmental Protection Agency since the 1st January 2000.

On 7 December 2015, the EPA gave notice of its decision to refuse the request. On 9 December 2015, the appellant requested an internal review of this decision.

On 21 December 2015, the EPA gave notice of its decision to affirm the earlier decision to refuse. On 11 January 2016, the appellant appealed to this Office.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review the EPA’s internal review decision and to affirm, annul or vary it.

In conducting my review I took account of the submissions made by the appellant and by the EPA. 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; 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) of the AIE Regulations 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 7(5) provides that, where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it.

The EPA's position

The EPA acknowledged that it corresponds with Achilles in relation to various aspects of procurement. It submitted that:

“Such correspondence or indeed the activities carried out by Achilles do not constitute ‘activities ... likely to affect the elements and factors’ (in the definition of environmental information) as put forward” by the appellant.

The EPA refused the request because it considered that the information sought was not within the scope of the AIE Regulations, having regard to the definition of environmental information set out in those Regulations. Accordingly, the EPA advised the appellant of his right to seek the same information under the Freedom of Information Act.

In a submission to my Office, the EPA went further and stated that it did not hold the requested list.

The Appellant's position

In his request for an internal review, the appellant said that the information which he asked for:

“Pertains to activities ... likely to affect the state of the elements of the environment, and also affect noise, waste, emissions and discharges into the environment, since the UGEE research programme explicitly provides for drilling and other groundworks associated with drilling”.

He argued that, as a broader level, the information sought is part of administrative measures initiated by Government, which may lead to policies and programmes likely to affect the environment. He also argued that UGEE activities, by definition, affect the state of the elements of the environment, and that therefore any activities carried out by, at the request of, or with the participation of the EPA that is part of UGEE research or that is a precursor of or a precondition of UGEE activities is in the scope of the AIE Regulations.

The appellant submitted that the EPA's assertion that the information which he sought was not environmental information is fallacious. He argued that there is no basis for a claim that “procurement services” are not part of “administrative measures” that form part of the definition of environmental information. He argued that the UGEE research programme is an environmental research programme which is looking at emissions into air/water/soil and effects

of these on the environment. Therefore, he argued, any activities associated with it, including procurement activities, fall under the definitions in the AIE Regulations.

In his appeal to this Office, the appellant emphasised that:

“I have asked for a list of environmental information, not the information itself. If the EPA is saying that there is no environmental information involving Achilles, then that should be the reason for the rejection and they should state that. Since they did not state that, then the inference (is) that environmental information involving Achilles does indeed exist and they should therefore provide a list of it.”

Analysis

This case is similar to case CEI/16/0003, which involved the same parties. My analysis in this case is the same as in CEI/16/0003.

An “AIE request” is a special kind of request for information. It must, in all cases, be a request for “environmental information” made pursuant to the AIE Regulations.

In this case, the EPA took the view that the requested information was not within the scope of the AIE Regulations, because it was not environmental information.

Since the request was clearly intended to be an AIE request, it should have been understood as a request for any and all environmental information contained in the list specified in the request.

In the experience of this Office, it is rarely the case that it can be said that requested information is not environmental information, or does not contain environmental information, without first identifying the information at issue (if, in fact, it is held) and examining its contents.

I am satisfied that the request in this case was a request for environmental information. The real issues for this review are:

1. Whether the particular list which was specified by the appellant was held by or for the EPA when the request was made.
2. If it was, whether it contains environmental information (by which I mean: whether the list *itself* contains environmental information, not whether one or more listed records might, if obtained and examined, be found to contain environmental information.)

The EPA assured me in writing that, following internal enquiries, it has established that it did not hold such a list. I accept that assurance.

There is no obligation on a public authority to create information in a material form for the purpose of responding to an AIE request.

Findings

I find that the request was a request for environmental information within the scope of the AIE Regulations. I also find that the requested information was not held by or for the EPA.

Article 5(c) of the AIE Regulations obliges public authorities to maintain registers or lists of the environmental information which they hold. The remit of my Office does not extend to

investigating or deciding whether, and to what extent, public authorities meet this obligation, and I have not done so in this case.

Decision

I hereby vary the EPA's decision. I find that refusal was not justified by the reason given. I find that refusal was justified on the ground of article 7(5) of the AIE Regulations, because the requested information was not held by or for the EPA.

The comments which I included in my decision in case CEI/16/0003 are equally applicable to this case.

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
9 August 2016