

Appeal to the Commissioner for Environmental Information
Case CEI/13/0002

**European Communities (Access to Information on the Environment) (AIE)
Regulations 2007 to 2014 (the Regulations)**

Appellant: Mr. MK

Public Authority: Environmental Protection Agency (EPA)

Issue: Whether the EPA was justified in its decision on the appellant's request for information. The decision was to release information relating to the investigations of his complaint about roadworks carried out near his home.

**Summary of
Commissioner's
Decision:** In accordance with Article 12(5) of the AIE Regulations, the Commissioner reviewed the decision of the EPA. He varied the decision of the EPA and found that the EPA has taken all reasonable steps to provide the appellant with the information sought and that Article 7(5) applies to any further information which, in the appellant's view, should be made available to him.

Background

On 7 December 2012, the appellant made a request to the EPA, in an email in which he forwarded an email request which had been sent to another public authority, for information relating to road works which had been carried out near his home, to include various reports, data, internal and external communications, and photographs. No decision was made on this request and the appellant sought an internal review on 18 January 2013. The EPA issued its decision on 13 February 2013, in which it identified and granted access to 144 records identified as relevant to the request. I note that there was further correspondence between the appellant and the EPA, in which a number of queries raised by the appellant about the decision of 13 February 2013 were addressed, and further information provided. As the applicant was not satisfied with the position at this stage, he appealed to my Office. In his appeal which was submitted in two parts, he identified six "factors of refusal to supply" which he was appealing, as follows:

1. "absence within the 3rd report/CD data set supplied because EPA commissioned Report /3 (AWN) if such data, because no such measuring was undertaken
2. absence of supply of such software, and inability through the means of the applicant procurement recommended in substitution for supply
3. absence of full internal (and when external) EPA administrative measure-relating communications
4. absence of entire list of expenditures
5. absence of EPA officer photography
6. absence of attendee annotations (AWN)"

He also included two other items in his appeal:

7. "The 2nd reports further fanciful and unscientific, so arbitrary claims as to "averages", and corrupted week during the first human perception survey is required.
8. Additional statements to requesting of 07/12/2012, and Part 1 of this appeal."

Following notification by my Office of the appeal, the EPA accepted that photos and videos (Item 5) had been omitted from its original response. These have since been released to the appellant. The appellant appears to have raised issues with what photographs were taken and with the investigation to which they relate. These matters are not within my remit as Commissioner to adjudicate upon. I have not been able to identify any claim on his part that additional photographs exist which have not been released to him.

I regret the delay that arose in dealing with this appeal, which was due both to resource issues in my Office and to the volume and nature of the applicant's submissions.

I have decided to bring this appeal to a conclusion now by way of a formal, binding decision. In so doing, I have had regard to the submissions of the appellant, in so far as they were relevant, and those of the public authority, and to the provisions of the Regulations. I have also had regard to the Guidance provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations[the Minister's Guidance]; Directive 2003/4/EC [the Directive], upon which the AIE Regulations are based; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide] relating to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is more commonly known as the Aarhus

Convention.

Scope of Review

Under Article 12 of the Regulations, I must review the decision of the EPA and affirm, vary or annul it. The question before me is whether the decision of the EPA was justified. As the EPA has released information relevant to Item 5 above, this is no longer in scope of this appeal.

Preliminary Matters

Original Request

Article 6(1) provides as follows:

6. (1) A request for environmental information shall—
 - (a) be made in writing or electronic form,
 - (b) state that the request is made under these Regulations,
 - (c) state the name, address and any other relevant contact details of the applicant,
 - (d) state, in terms that are as specific as possible, the environmental information that is the subject of the request, and
 - (e) if the applicant desires access to environmental information in a particular form or manner, specify the form or manner of access desired.

The original request of 7 December 2012 was contained in an eight page email which was forwarded to the EPA, having been originally sent to another public authority. The email was not sent to the EPA's designated AIE liaison officer and it was not clear from the manner in which the email was sent that it was a request for access to environmental information under the Regulations. It was only on receipt of the internal review request that the EPA were in a position to identify the original request as such, and it then proceeded to process the request in accordance with the Regulations. While there are no specific requirements as to how a request should be presented, it is not helpful to have the request so intertwined with commentary, analysis and background information to the extent that the specific information sought is not readily identifiable. In this case, it is arguable that the original request did not comply with the requirements of Article 6(1), in particular, subsection (d) of that provision as set out above. However, the EPA accepted that it was a request under the Regulations and processed it as such, and therefore, I have accepted the appeal on this basis. I should say that, having completed my review of the EPA decision, that it is my view that it went to great lengths to respond to the applicant's request. It is clear from the material made available to my Office that the request followed on from an investigation carried out by the EPA into complaints from the appellant of vibration and noise pollution, about which there has been considerable engagement with the appellant on the part of the EPA and another public authority.

It seems to me that applicants who wish to have access to environmental information and have their requests dealt with in a timely and efficient manner would be well advised to contact the designated officer with responsibility for AIE in the first instance. Member States are required by the Directive to make practical arrangements (including the designation of information officers) for the effective exercise of the right to environmental information.

Appellant's submissions

The appellant was invited by my Office, in accordance with normal practice, to make

submissions which would be taken into account in dealing with the appeal. Since this appeal was accepted, he sent more than forty emails to my Office in response to the invitation to make submissions, in addition to numerous other emails relating to this appeal prior to it being accepted

and other matters on which he has corresponded with my Office. This level of correspondence was, having regard to my knowledge and experience, and by objective standards, extensive and what might be termed obsessive in nature. Some of the emails raise issues about the technical analysis in some of the documents he received in response to his request and provide extensive commentary on the content of records received. Others relate to issues raised previously which he was advised were not within my remit as Commissioner. Many of these emails are very long (11 over 20 pages long, one of which contains 189 pages), and it is difficult to decipher what points are being made by the appellant in these emails, and which are relevant to this appeal. The approach of the appellant in sending emails to multiple addressees in various public authorities and other bodies is unhelpful, and also makes it difficult to identify those relevant to this appeal. On examination, it became clear that only some of the emails could be considered relevant to this appeal, but it was remained unclear in many instances as to what point was being made and what bearing it had on the appeal.

Mindful of the need to ensure progress of the work of the Office and the need to ensure that all appeals before my Office can be progressed in accordance with available resources, I had to consider the appropriateness of deploying the level of resources which would be required to fully consider all of the points made in the appellant's emails. In this context and in the circumstances of this case, all of the emails received were reviewed briefly by the Investigator and only those emails in which it was clear in the opening paragraphs that the content was directly relevant to the matters at issue in this appeal were considered further. I do not believe that the Regulations, the Directive or the Aarhus Convention were intended to be used by applicants as a mechanism to place an unreasonable administrative burden on public authorities over an extended period of time, in pursuit of grievances they may have with the exercise by a public authority of its functions. I am satisfied that any issues raised in the appellant's submissions which are relevant to his appeal have been identified and taken into account.

Functions of the Commissioner

While I have no doubt that the matters of which the applicant complains are important and have greatly affected him, my role is confined to adjudicating on his appeal in accordance with the Regulations. I emphasise, as I have had to do in other cases, that it is outside of my remit as Commissioner to adjudicate on how public authorities carry out their functions generally. It is not within my remit to determine what measures or standards are to be used by public authorities or how they should respond to issues raised with them e.g. in this case complaints about vibrations and noise pollution resulting from road works carried out near the applicant's home. Neither is my role one of an alternative dispute resolution process. I note that the matters the subject of the AIE request from the applicant have also been the subject of complaints by the applicant to the EPA and another public authority, which have been investigated by these bodies.

In a recent judgment, *NAMA -v- Commissioner for Environmental Information* [2015] IESC 51, the Supreme Court held that “In order to understand what the statutory instrument means and does in this case, it is necessary, perhaps first, to understand exactly what the Directive does and means, which in this case may also mean interpreting the provisions of the

Convention". While this is of assistance in interpreting the Regulations, I do not consider that it extends my role as Commissioner beyond that which is provided for in the Regulations.

Analysis and Findings

Article 7(5) of the AIE Regulations is the provision that applies where the requested information is not held by or for the public authority concerned. A similar though not identical ground for refusal in relation to records "not held" is provided for under section 15(1)(a) [formerly section 10(1)(a)] of the Freedom of Information (FOI) Act. In previous decisions published on my website at www.ocei.gov.ie, I have explained that my approach in dealing with cases where a public authority has effectively refused a request under Article 7(5) is guided by the experience of the Office of the Information Commissioner in relation to section 15(1)(a) [formerly section 10(1)(a)] cases.

In its submission to my Office, the EPA set out the steps taken to search for information relevant to the request and its position on each of the "factors"/items set out above. The steps taken include a review of paper and electronic files, and interviewing relevant staff. The EPA also offered to make the hard copy file available for viewing by the appellant at one of its offices by arrangement. Taken together with the 144 records released in response to the internal review request, the additional information provided in response to the appellant's queries to the EPA and the photographs and videos provided since, I am satisfied that the EPA has taken reasonable steps to search for and provide information sought by the applicant.

In the circumstances of this appeal outlined above, I consider it appropriate to address the "factors of refusal to supply", as follows:

Items 1 & 2.

According to the EPA, the information sought was provided to the appellant both by email and CD copy and it has identified the record numbers on the schedule which are the reports (Records 67, 92 and 109). It also informed my Office that details of how to download the relevant software for reading the data were provided to the appellant. In relation to the two earlier reports, the EPA stated that these reports were commissioned by another public authority and it received only copies of the reports and not of the data. There is nothing in the Regulations which requires the public authority, in this case the EPA, to acquire information held by another public authority in order to respond to an AIE request. While Article 7(6)(a) provides for the transfer of a request where a public authority is aware that the information sought is held by another public authority, in the circumstances of this case, where the EPA was aware that the same request had been made to the relevant public authority, I see no reason why it should have transferred the request.

Article 7(3) of the Regulations deals with the form or manner of access to information. The EPA stated that the appellant was provided with the details of how to download the software required to access the files, including instructions from the consultants who prepared the reports. While it is important that information provided in response to a request be made available in an accessible manner, I consider that there are limits to the extent to which a public authority can be expected to provide an applicant with software or technical support. I do not, for example, consider it reasonable that a public authority purchase software licences for the use of applicants, particularly where an offer of access by inspection has been made, as is the case here.

I am satisfied that the response of the EPA meets the requirements of Article 7(3). I am also satisfied that the EPA has taken reasonable steps to provide the appellant with the information sought and that Article 7(5) applies to any further information which, in the appellant's view should be made available to him. I find accordingly.

Item 3 Absence of full internal (and when external) EPA administrative measure-relating communications.

It is not clear from the original request what information the applicant sought in this regard. In his appeal to my Office, he refers to correspondence between himself and the EPA Internal Audit Committee and other areas of the EPA. In a letter to the applicant of 28 February 2013, the EPA stated: "I confirm that the Agency has sent you all environmental information relevant to your request" In its submission, the EPA stated that it had provided the appellant with all relevant correspondence. It further stated that not all correspondence referred to by the appellant constituted environmental information as defined in the Regulations and therefore [was] outside the scope of the Regulations. The EPA submission quoted the response from the Audit Committee to the appellant as follows: "... Having reviewed the correspondence and the matters raised therein, the committee determined that such matters do not fall within the remit of the committee. Consequently, the Internal Audit Committee cannot assist you as it has no function in investigating such matters."

The usual approach of my Office is to obtain any relevant records from the public authority and examine same to determine whether the information contained therein constituted environmental information as per the Regulations. In this case, the EPA was asked to provide this Office with the relevant information. The Investigator examined the material provided and determined that some of the information clearly related to the processing of the applicant's requests to the EPA for information and therefore, does not fall within the scope of this appeal. She was not able to identify any environmental information relevant to the request which has not already been supplied to the appellant by the EPA. I note that the schedule of 144 records released clearly identifies many internal and external communications between the EPA and the appellant and between the EPA and others .

I am satisfied that the EPA has taken reasonable steps to provide the appellant with the information sought and that Article 7(5) applies to any further information which, in the appellant's view should be made available to him. I find accordingly.

Item 4 - Absence of entire list of expenditures

The EPA provided the appellant with some information on expenditure e.g. the costs of certain reports. The question of whether financial information falls within the definition of "environmental information" has been addressed in previous decisions. The position taken has been that there must be a sufficient link between the financial information sought and the impact of that information on the environment for the information to be considered "environmental information". In this case, I can see no direct link between the expenditure information sought and an impact on the environment, such as for the information to be considered "environmental information". However, as the information has been provided by the EPA, it is not necessary for me to determine whether the information is in fact environmental information. I am satisfied that there is nothing to be determined by me in this regard and I find accordingly.

Item 6 - absence of attendee annotations

According to the EPA, all reports have been sent to the appellant in full. It is not clear to me on what basis the appellant contends that additional information is held in this regard. The EPA has provided information to the appellant as set out above. With the information available to me, I have no reason to believe that there is additional information which has not been furnished at this stage. I am satisfied that the EPA has provided the appellant with all relevant information available to it and has offered further access via inspection. Therefore, I find that Article 7(5) applies to any further information which, in the appellant's view, should be made available to him.

Item 7 - The 2nd reports further fanciful and unscientific, so arbitrary claims as to "averages", and corrupted week during the first human perception survey is required

I have not been able to identify what particular information, environmental or otherwise, the appellant sought to which this item of appeal relates. However, I am satisfied that the EPA has provided the appellant with all relevant information available to it and has offered further access via inspection. Therefore, I find that Article 7(5) applies to any further information which, in the appellant's view, should be made available to him.

Item 8 - Additional statements to requesting of 07/12/2012, and Part 1 of this appeal.

This item and Part 1 of his appeal refer to supporting statements from the applicant to the EPA with his original request and included detailed analysis and/or commentary on information received. I have not readily been able to identify particular information sought to which this item relates. As above, I am satisfied that the EPA has provided the appellant with all relevant information available to it and has offered further access via inspection. Therefore, I find that Article 7(5) applies to any further information which, in the appellant's view, should be made available to him.

Decision

In accordance with Article 12(5) of the AIE Regulations, I have reviewed the decision of the EPA in this case. I hereby vary the decision of the EPA and find that, apart from that information released by the EPA which is not in scope of this appeal, the EPA has taken all reasonable steps to provide the appellant with the information sought and that Article 7(5) applies to any further information which, in the appellant's view, should be made available to him.

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

1 October 2015

