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## Mr. Pat Swords and the Department of Environment, Community and Local Government

### Appeal to the Commissioner for Environmental Information

CEI/12/0005

European Communities (Access to Information on the Environment) (AIE) Regulations 2007 to 2011

Appellant: Mr. Pat Swords (the Appellant)

Public Authority: Department of Environment, Community and Local Government (the Department)

**Issue: Whether the Department was justified in refusing the appellant's request in relation to public consultation on climate policy and legislation**

#### Background

On 7 March 2012, the appellant made a four-paged AIE request to the Department "in relation to Public Consultation on Climate Policy and Legislation". The request included commentary on the national climate policy and legislation development programme that had recently been initiated at the time and sought access to the following:

"Environmental information relating to public participation on climate change plans and programmes, which were conducted when all options were open and effective public participation in decision-making could take place."

"Environmental information on how due account of the public participation will be taken in the decision-making in relation to climate change plans or programmes."

"Cost-benefit and other economic analysis and assumptions used in the environmental decision making for the climate change plans or programmes being proposed."

"With regard to the statement above in relation to 'Science tell us . . .', the request relates to environmental information in which the transparency of that statement is ensured."

In its initial response, which issued on 3 April 2012 at 8:55am, the Department did not treat the matter as a formal access request under Article 6 of the AIE Regulations, but rather provided an explanation of the then on-going public consultation exercise to which the request apparently referred. At 11:01am, the appellant requested an internal review. At 16:24, the Department replied to the appellant's request for internal review in which it explained that it had not previously considered the communication of 7 March 2012 to be a formal request for access to environmental information. The Department outlined the definition of "environmental information" under Article 3(1) of the Regulations and invited the appellant to specify the environmental information sought. However, in a reply received by the Department at 16:46 on that same day, the appellant stated:

"The request was very clear in relation to the environmental information sought, see attached. If you have no such environmental information or consider you do not have to release it in accordance with the terms of the regulations, then you should make that clear in accordance with Statutory Instrument S.I. No. 133 of 2007 and your own guidelines on the same."

On 9 May 2013, the Department refused the appellant's request, because it "did not contain any clear and identifiable request for specific environmental information" and "was not refined or clarified" despite correspondence from the Department. The Department neglected in its decision to inform the appellant of his right to appeal, but nevertheless, the appellant made a timely appeal to my Office on 10 May 2012. The appellant then made a submission in support of his appeal on 8 June 2012.

On 27 August 2012, Ms. Melanie Campbell, Investigator, wrote to the appellant to inform him of her view that the Department's decision to refuse his request was justified. The appellant replied to Ms. Campbell's letter on 8 September 2013. Having had regard to the appellant's submissions, I have decided to conclude this appeal by way of a formal, binding decision.

#### Delay in Processing the Appeal

In his submission dated 8 September 2013, the appellant refers to my duties under Article 9 of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters, which is more commonly known as the "Aarhus Convention." He notes that, under Article 9(4) of the Aarhus Convention, review procedures are required to be "fair, equitable, timely and not prohibitively expensive". He states:

"With regards to 'timely', it is abundantly clear that the Commissioner's office essentially sat on the appeal and did absolutely nothing for over a year. This is an outrageous non-compliance with regard to the Commissioner's legal obligations."

As I have highlighted in my Annual Reports, since its inception, the OCEI has encountered a number of practical difficulties arising from the operation of the AIE regime. One problem is the matter of resources. Although the OCEI is a legally independent Office, to date, it has



not received any funding allocation from the State and must rely entirely on the resources that can be made available from the very limited resources available to the Office of the Information Commissioner. Consequently, there generally are considerable delays in bringing AIE appeals to completion. The delays are certainly regrettable and arguably not in keeping with the State's obligations under the Aarhus Convention, and I apologise for any inconvenience caused. However, it must be acknowledged that the delays will be difficult to overcome given the demands of the AIE regime as it currently operates in Ireland on the one hand and the dearth of available resources on the other.

#### Scope of Review

My review in this case is concerned solely with the question of whether the Department was justified in refusing the appellant's AIE request "in relation to Public Consultation on Climate Policy and Legislation".

#### Definition of "environmental information"

The AIE Regulations are based on Directive 2003/4/EC. In line with Article 2(1) of the Directive, Article 3(1) of the AIE Regulations define "environmental information" as "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 ... 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 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 ... conditions of human life, cultural sites and built structures ... affected by the state of the elements of the environment...or through those elements, by any of the matters referred to in paragraphs (b) and (c)".

#### Analysis and Findings

Article 9(2) of the Regulations allows a public authority to refuse to make environmental information available where the request (a) "is manifestly unreasonable having regard to the volume or range of information sought", or (b) "remains formulated in too general a manner taking into account Article 7(8)". Where a request is made in too general a manner, a public authority is required under Article 7(8), as soon as possible and at least within one month of receipt of the request, to invite the applicant to make a more specific request and to offer assistance to the applicant in the preparation of such a request.

In her letter to the appellant, Ms. Campbell noted that there were indications that the appellant did not seek access to environmental information per se, but rather sought through his request to challenge the validity of the national climate policy review process. She considered that the request was not made in good faith in the circumstances and that it was therefore liable to refusal under Article 9(2)(a) on the basis of being manifestly unreasonable. In his reply, the appellant points out that the Aarhus Convention Implementation Guide states in relation to the "manifestly unreasonable" refusal ground:

"If a Party decides to provide for this exception it will need to define 'manifestly unreasonable' so as to assist public authorities in determining when a request is so unreasonable that it may be refused under this exception, and protect the public's interest that the test will not be applied arbitrarily."

The Implementation Guide is a very useful reference tool, but it does not purport to be legally binding, a position which was confirmed by the European Court of Justice in *Solvay and Others*, Case C-182/10 (16 Feb. 2012). The lack of clarity in a number of the provisions of the Regulations is just one of the many practical difficulties my Office has encountered in dealing with the AIE regime, but I do not find that Article 9(2)(a) is too ambiguous to apply in a fair and equitable manner. The inclusion of the word "manifestly" itself clarifies that the unreasonable nature of the request must be clear or obvious. While it is not my purpose here to describe the full range of circumstances in which Article 9(2)(a) may apply, I consider that the term "manifestly unreasonable" is sufficiently clear to denote, without further explanation, any request of broad or indeterminate range which has been made in bad faith or which otherwise appears to have been made for some purpose unrelated to the access process. Thus, in Case CEI/09/0014, *Mr. Tony Lowes, Friends of the Irish Environment* (May 2012), involving a request for all records held by the Office of the Attorney General (AGO) relating to two sets of infringement proceedings brought against the State, I noted that the request seemed to be more about how the AGO dealt with the infringement proceedings on behalf of the State than it was about access to environmental information in its own right. In the circumstances, I found that the request was manifestly unreasonable by its very nature.

In this case, it is readily apparent to me from the commentary included with the appellant's request, and in his submissions to this Office, that he does not seek access to any identifiable environmental information which he genuinely believes may be held by the Department. Rather, he seeks to challenge the Department's reliance on the mandatory greenhouse gas mitigation targets underlying the national climate policy and legislation development programme and to raise questions about the Department's intention to take "due account" of "all" submissions made in the context of the public consultation exercise being carried out at the time his request was made. I acknowledge that there is controversy over the commitments which have been made at national and EU level to reduce greenhouse gas emissions, but nevertheless, I find that the appellant's request represents a misuse of the right of access under Article 6 of the AIE Regulations. In the circumstances, I concur with Ms. Campbell's view that the request is subject to refusal under Article 9(2)(a).

In addition, I find that the Department was justified in refusing the request under Article 9(2)(b). Item One of the request was for unspecified environmental information relating to an unspecified public participation exercise that may or may not have taken place prior to the public participation exercise that took place over an earlier period. The appellant did not clarify what sort of information was being sought under Item Two of the request relating to how "due account ... will be taken" of the public participation exercise underway at the time. Item Three sought "[c]ost-benefit and other economic analyses and assumptions", but the appellant did not specify what "environmental decision-making" this was in reference to. Item Four referred to the need to ensure the transparency of a statement made in a publication on the website of the European Commission, but it was entirely unclear what sort of relevant environmental information the appellant expected the Department to hold about the statement.



I note that the Department made only a limited effort to assist the appellant in accordance with Article 7(8), but it was evident from his rapid and abrupt response to the Department's message that it was unlikely he would modify his request so as to render it more specific. While the AIE Regulations impose significant obligations on public authorities, I consider that it was incumbent upon the appellant to act reasonably and in good faith in making his request. Moreover, the appellant's submissions to this Office support the view that the request was not actually directed at obtaining any particular items of environmental information held by the Department. I am satisfied in the circumstances that the request has remained formulated in too general a manner, taking into account Article 7(8).

Under Article 10(3) of the Regulations, "[t]he public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the public interest served by refusal". In her letter to appellant, Ms. Campbell observed that it would not serve the public interest for the Department to devote resources to efforts to grant the appellant's request while it remained unclear what, if any, environmental information he actually sought. It seems to me, as a general matter, that "the public interest served by disclosure" is outweighed by the interest served by refusal where, as here, the request appears to have been made for some purpose unrelated to the access process. In any event, disclosure in the circumstances of this request would be problematic given the absence of clarity as to the particular environmental information being sought.

**Decision**

In accordance with Article 12(5) of the AIE Regulations, I have reviewed the decision of the Department in this case. I find that the Department's decision to refuse the appellant's request was justified under Article 9(2)(a) and (b) of the Regulations. I affirm the Department's decision accordingly.

**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.

**Emily O'Reilly**  
**Commissioner for Environmental Information**  
**20 September 2013**