

Appeal to the Commissioner for Environmental Information
Case CEI/14/0011

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

Appellant: Jim Redmond

Public Authority: Coillte Teoranta, Dublin Road, Newtownmountkennedy, Co. Wicklow (Coillte)

Issue: Whether Coillte was justified in refusing the appellant's request for access to information relating to the sale of land and trees at Kilcooley, County Tipperary

Summary of Commissioner's Decision: The Commissioner found that Coillte was justified in refusing access to information which was not environmental information and to environmental information which was not held by or for Coillte. Accordingly, the Commissioner affirmed Coillte's decision, while partly varying the grounds justifying refusal.

Background

In March 2011, Coillte sold its leasehold interest in 402.92 hectares of land at Kilcooley Abbey Estate, Thurles, Co. Tipperary, to a private buyer. On 22 May 2014, the appellant submitted an AIE request to Coillte, seeking the following items of information in relation to the sale:

1. On what date was the land lease for forestry at Kilcooley Abbey Estate purchased from Coillte by the new owner?
2. How many acres were purchased from Coillte and what other assets were included in the sale?
3. Who purchased the Coillte land/forestry at Kilcooley Abbey Estate?
4. What price was paid to Coillte for the leasehold of the forestry land or other leases at Kilcooley Abbey Estate?
5. What other parties and legal representatives were involved in transferring the lease to the new owner?
6. Provide details on who valued the leased lands/ forestry, and how the valuation was compiled.
7. What was the valuation of the leased lands/forestry?
8. Any information or correspondence on the proposed development of the lands/forestry at Kilcooley Abbey Estate.

Coillte gave notice of its decision on 11 June 2014. In the decision, Coillte: provided information relevant to item 1 and to the first part of the item 2; sought clarification on what was meant by item 8; and refused access to information relating to the other items on the grounds of commercial sensitivity, citing Article 9 of the Regulations.

The appellant replied on 23 June 2014. In relation to item 8, he said he was seeking information or correspondence on the proposed development of the land, forestry etc and information on rights of way to and throughout the land. He asked if Coillte had considered the impact which the disposal of the land would have on the environment and rights of way, and he sought information or a report on how this was assessed and the finding of that assessment. He also wanted to know who requested the issuing of contracts in 2011 and who Coillte issued the contracts to.

On 2 July 2014, the appellant requested an internal review of Coillte's decision.

On 16 July 2014, Coillte notified the appellant of its internal review decision. Coillte affirmed the original decision while varying the grounds for partial refusal: Coillte now maintained that refusal was justified on the ground that the information sought was not environmental information in the meaning of the Regulations. In relation to the question asking "what other assets were included in the sale", Coillte said that it had sold "a leasehold interest in trees". Coillte maintained that it had no information on, or involvement in, any proposed development of Kilcooley Abbey Estate.

Jim and Mary Redmond appealed to this Office on 7 August 2014. They acknowledged that the question posed in part 2 of item 2 had been answered, i.e. by the provision of the information that a leasehold interest in trees had been sold along with the land lease. They

made it clear that they were seeking access to the information which Coillte had withheld on the ground that it was not environmental information, i.e. information which could address items 3 to 8 of the request.

Coillte provided a copy of the relevant records to my Office.

In conducting this review, I have taken account of the submissions made by the appellant and by Coillte. I have had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the Regulations (the Minister's Guidance); Directive 2003/4/EC (the Directive), upon which the 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).

Scope of Review

Under Article 12 of the Regulations, my role is to review Coillte's internal review decision and to affirm, vary or annul it. My review is concerned with whether Coillte's decision in relation to the information requested was justified. In this regard, I plan to address the following questions:

Question 1: Was Coillte's internal review decision justified because the information requested was not environmental information?

Question 2: If the information requested was environmental information, was refusal justified on the ground that such information was not held by or for Coillte?

Question 3: If the answer to question 2 is "no", was refusal justified under Article 8(a)(ii)?

Question 4: If the answer to question 3 is "no", was refusal justified under Article 9(1)(c)?

I regret the delay that arose in dealing with this review. The delay was due to a shortage of resources which has now been addressed.

Two preliminary issues arise in this case: standing and public participation.

Standing

This appeal was brought by Jim and Mary Redmond. The records do not show that Mary Redmond submitted a request for environmental information to Coillte or a subsequent request for internal review. Article 12 allows a person who was not the applicant to make an appeal to my Office only where that person would be incriminated by the disclosure of the environmental information concerned. Since this is not the case, I must find that Mary Redmond does not have standing to appeal to this Office. I therefore regard this appeal as having been made by Jim Redmond alone.

Public participation

In his submissions the appellant asserted that there had been no opportunity for public participation in the land sale. The provision of opportunities for public participation in environmental decision-making is an important part of the Aarhus Convention. However, in conducting this review my remit is confined to reviewing Coillte's internal review decision. I have no remit to investigate or rule on the provision of opportunities for public participation in decision-making. However, since the assertion that there was no opportunity for public participation will appear in the text of this decision, I feel obliged to say that records provided to me by Coillte show that it placed a newspaper advertisement and conducted public consultation in advance of the sale. I have nothing further to say about public participation.

Statutory Provisions

Article 3(1) of the 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 6 (1)(d) provides that a request for environmental information shall state, in terms that are as specific as possible, the environmental information that is the subject of the request.

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 public authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it. Article 4(1) of the Directive makes it clear that failure to provide information in these circumstances may properly be characterised as a "refusal" to provide access.

Article 7(8) provides that where a request is made by the applicant in too general a manner, the public authority shall as soon as possible and at the latest within one month of receipt of the request, invite the applicant to make a more specific request.

Article 8(a)(ii) provides that a public authority shall not make available environmental information where disclosure would adversely affect the interests of any person who, voluntarily and without being under, or capable of being put under, a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information. Article 8 is subject to Article 10.

Article 9(1)(c) provides that refusal may be justified where disclosure would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest. Article 9 is subject to Article 10.

Article 10(3) provides that a public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.

Coillte's Position

Coillte's position is that the information requested is not environmental information in the meaning of the Regulations. In relation to Article 3(1)(c) which deals with measures or activities, Coillte cited case CEI/11/0001 (Mr Gavin Sheridan and Central Bank of Ireland) in which it was held that there must be a sufficient connection between the information concerned and an aspect of the activity that has an effect on the environmental elements and factors referred to in paragraphs (a) and (b) of the definition. In relation to information which would identify the purchaser, Coillte cited case CEI/12/0004 (Mr Gavin Sheridan and Dublin City Council) in which it was held that the identity of a company has no bearing on the environment.

Coillte maintains that, if I were to find that information is environmental information, refusal would be justified under Article 9(1)(c), for reasons of commercial or industrial confidentiality. Coillte believes that disclosure would have a significant impact on its ability to conduct similar business in the future.

In its submission to this Office, Coillte made an additional argument, saying that Article 8(a)(ii) might apply since disclosure might affect the interests of a third party, i.e. the purchaser.

The Appellant's Position

The appellant maintains that the information he requested is environmental information in the meaning of the Regulations. He argues that, since it is Coillte's stated policy, when selling land, to sell it for purposes other than forestry, the sale of such a large forest, along with its harvesting-rights, is "likely to affect the state of the land, landscape and natural sites, biological diversity and its components, as an element of the environment and the interaction among those elements".

He argues that since the sale is likely to have such effects, then the requested information is environmental information, including information on cost-benefit and other economic analyses and assumptions, used within the framework of measures and activities within the meaning of the Regulations.

In relation to Article 9(1)(c), the appellant points out that this is a discretionary power to refuse access and he doubts whether any legitimate economic interest is at stake. He cites the Directive to show that disclosure should be the general rule and that public authorities should make environmental information available to the public to the widest extent possible.

Analysis and Findings

Question 1. Was Coillte's internal review decision justified because the information requested was not environmental information?

Items 3 - 7 of the request

The appellant argues that the information requested is environmental information because the sale of such a large forest, along with its harvesting-rights, is likely to affect the state of the land, landscape and natural sites, biological diversity and its components, and the interaction among those elements, and that this is especially so because of Coillte's policy of selling land for purposes other than forestry. I have to consider if this is the case.

My investigator contacted the Forest Service of the Department of Agriculture, Food and the Marine, seeking information on the control of tree-felling in Ireland. He established that under section 37 of the Forestry Act, 1946, it is (with very few exceptions) a criminal offence to uproot any tree over ten years old or to cut down any tree of any age (including trees which form part of a hedgerow), unless a felling notice has been lodged at the Garda Station nearest to the trees at least 21 days before felling is planned to commence. A felling notice is a notice of intention to fell trees. An Garda Síochána sends completed felling notices to the Forest Service, which responds by issuing an Order prohibiting the felling of the trees. From the time a prohibition Order is issued, it is a criminal offence to fell the trees without a felling licence granted by the Minister. Information on the Forest Service's section of the Department's website shows that the Forest Service considers the silvicultural, environmental and landscape implications of all proposed tree-felling.

It follows that even if the new owner of the forest wished to fell the entire forest, he or she could not lawfully do so simply by virtue of acquiring ownership of the land and trees. Viewed in this light, I consider that in the circumstances of this case, the change of forest-ownership, in itself and without more, does not constitute a measure or an activity affecting or likely to affect the elements and factors referred to in Article 3(1)(a) or (b), or a measure or activity designed to protect those elements.

The appellant attaches weight to Coillte's stated policy of selling land for "purposes other than forestry". There is nothing in the records to suggest that the land at issue in this case was bought for non-forestry purposes. Even if it was bought for non-forestry purposes, that would not necessarily mean that the new owner intended to alter the management of the woodland. In any case, a felling licence would, in practice, be required before there could be

any significant interference with the forest.

Having carefully considered the request in light of Article 3(1), I find that the information on the sale of land in this case, in itself, including the sale of afforested land, is not environmental information. I appreciate that a new forest-owner might not continue Coillte's policy of open public access and that this could lead to an understandable feeling within the local community of loss of amenity. I also appreciate that a new forest-owner might apply for a licence to fell trees, up to and including a licence to fell all of the trees on the land. But such concerns do not mean that information on the land sale, in itself, constitutes environmental information in the meaning of the Regulations.

I have considered if there is any way in which items 3 to 7 could be understood as constituting a request for environmental information. The Regulations recognise (in Articles 6 and 7) that it is desirable that requests for environmental information are specific and "not too general". Where a request is too general, a public authority is obliged under the Regulations to assist the applicant in making a more specific request. While the request in this case has to be understood as having been intended to constitute a request for environmental information, it was quite specific in nature. A public authority is not obliged to engage with an applicant with a view to expanding a request: a public authority is entitled to address each specific request as it was made. To read items 3 to 7 as being part of a request for environmental information would require distortion of the plain and ordinary meaning of the words. Following these considerations, I find that the information requested in items 3 to 7 is not environmental information in the meaning of the Regulations.

Item 8 of the request

Any information held by or for Coillte on proposals for development by the new owner of the lands/forestry at Kilcooley Abbey Estate could constitute environmental information if it was information on a measure or activity affecting or likely to affect the elements or factors referred to in Article 3(1)(a) and (b). I therefore find that this part of the request should properly be understood as a request for access to environmental information.

Finding in relation to Question 1

I find that Coillte's internal review decision, with regard to items 3 to 7, was justified on the basis that the information requested was not environmental information.

I find that item 8 constituted a request for environmental information, and I will therefore consider question 2 in this review.

Question 2. In so far as the request was for environmental information, was refusal to provide access justified on the grounds that such information was not held by or for Coillte?

The appellant argues that "in Coillte's disposal of its interest in the lands at Kilcooley Abbey, it was aware of the proposed development of the land". Coillte denies holding information on any proposed development of the land. I note that the word "development", in law, does not exclude forestry works, albeit that many forestry works are "exempted developments". Viewed in this light, the expression "proposed development", in this case, ought to be understood as including proposed forestry works. I note from Coillte's records that it did

hold some information on licensing obligations regarding tree re-planting. The existence of re-planting obligations does not mean that there will be tree-felling: it means that there already has been tree-felling, and that it was a condition of the felling licence which allowed such felling that certain re-planting would be undertaken. Accordingly, I am satisfied that Coillte did hold some information about “development” which might be expected to take place in the forest in the future. However, I stop short of saying that Coillte should have characterised such information as being information on “proposed” development. I am satisfied that the records show that Coillte decided to dispose of its leasehold interest for its own commercial reasons. Nothing in the records provided to my Office constitutes information on development proposals.

Article 7(5) 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 2014. In previous decisions published on my website at www.ocei.gov.ie, I have explained that my approach to 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 cases involving section 15(1)(a) of the FOI Act. My approach is to assess the adequacy of searches conducted by the public authority in looking for relevant records and to decide whether the decision maker was justified in deciding that the information was not held for or by the public authority. It is not normally a function of my Office to search for information.

Coillte provided my Office with details of the steps it took to search for relevant information. Those steps included a search of files, including electronic files, and direct requests for information from relevant staff. Staff consulted included the Head of Land Solutions and the solicitor who dealt with the sale. Coillte has confirmed that no relevant information was found in these searches. I am satisfied that Coillte took reasonable steps to search for information relevant to item 8 and I accept its written assurance that it is not withholding such information.

The appellant responded to Coillte's invitation to explain what he meant in item 8 by asking new questions: for example, he asked Coillte to identify the person(s) who requested the issuing of contracts. Such new questions could only be considered in this review to the extent that they constitute a clarification of the original request in item 8, which was a request for information or correspondence on the proposed development of the lands or forestry. Since the records show no information held by or for Coillte on any proposed development, these new questions are not for consideration within this review.

Finding in relation to Question 2

I find that Coillte was justified under Article 7(5) in refusing to provide access to information relevant to item 8 on the ground that no such information was held by or for it.

In light of the above, I find that no environmental information within the scope of the request is currently being withheld from the appellant by Coillte and there is therefore no requirement to consider questions 3 or 4.

Conclusion

I find that Coillte was justified in refusing to provide information relevant to items 3 to 7 of the request, because the information requested was not environmental information. In relation to item 8, I find that Coillte was justified in not providing access to information on development proposals because no such information was held by or for Coillte.

I am pleased to note that, since this appeal was made and before this decision was taken, Coillte voluntarily provided the appellant with access to environmental information which had not been requested, i.e. information on the forest (its percentage of tree-cover, the composition of tree-species, the age-class of the trees, maps of the woodland compartments), information on re-planting obligations, information on environmental impact assessment, biodiversity areas and old woodland.

Decision

I have reviewed Coillte's internal review decision in accordance with Article 12(5) of the Regulations. I find that Coillte was justified in refusing access to all of the information requested. The information requested in items 3 to 7 of the request is not environmental information. While item 8 was a request for environmental information, such information was not held by or for Coillte.

Accordingly, I affirm Coillte's decision, while partly varying the grounds of justification to include reliance on Article 7(5) in relation to information not held.

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 is given.

Peter Tyndall
Commissioner for Environmental Information
2 November 2015