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 2018 (the AIE Regulations)

Case CEI/19/0002

Date of decision: 29 July 2019

Appellant: Mr P

Public Authority: Inland Fisheries Ireland (IFI)

Issue: Whether IFI's search for relevant environmental information held for it (within the meaning of article 3 of the AIE Regulations) was adequate.

Summary of Commissioner's Decision: The Commissioner found that IFI's search for information was adequate. He found that, in the circumstances, IFI was not obliged, when processing this AIE request, to ask a retired member of staff if they held relevant information in a private email account (if any) or on a privately-owned mobile phone on IFI's behalf. Accordingly, the Commissioner affirmed IFI's decision and did not require it to take any action.

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

Inland Fisheries Ireland (IFI) is the statutory agency responsible for inland fisheries in Ireland. It operates under the aegis of the Department of Communications, Climate Action and Environment (source: www.fisheriesireland.ie).

On 26 September 2018, the appellant submitted the following AIE request to IFI:

"I wish to use the provisions of the AIE regulations to seek the following information:

1. I seek a copy of the pre-application documents and records relating to project (ABP) REF: 10.HA0014 - concerning the Kilkenny Central access scheme New Bridge (now named St. Francis Bridge) in the City of Kilkenny and associated road works.
2. I request that the scope be fully comprehensive, to include but not limited to emails and minutes of meetings between the then SRFB (now IFI) and others, to include but not limited to; the NPWS, An Bord Pleanála, the National Roads Authority, Kilkenny County Council, and any other Government Department and or public body.
3. I wish the scope to include but not be limited to, all presentations, and project information created by or on behalf of Kilkenny County Council to include internal SRFB (IFI) contributions to the file, memoranda, letters, briefing notes, notes of phone calls, the pre-application consultation form and maps, and any other correspondence; internal or external, related to this pre-application.
4. In short I am seeking all relevant pre-application information held by or for IFI (then SRFB) and its officials both serving and former officials and I wish to emphasise that searches of any relevant private email addresses and/or messaging services should be considered when processing this request.
5. As this request also concerns the building of a bridge within an SAC, including a roadway which now brings traffic into that area, I submit that this request concerns emissions and should be dealt with 'promptly and positively' as required by the AIE regulations.
6. I refer you to the recent decision of the www.ocei.ie - Ms. Fand Cooney & An Bord Pleanála (ABP)."

On 19 October 2018 IFI notified the appellant that "due to an administrative error" the request was not received by IFI's AIE Officer until 17 October 2018. IFI explained that "a final decision on your request will, in the normal course of events, issue to you within one month of receipt of your request, i.e. by 17 November 2018".

There are two problems with that notification. First, IFI's obligation was to provide the appellant with a decision within one month of IFI receiving the request and not within a month of any particular IFI officer receiving it. Second, even if IFI had received the request

on 17 October 2018, the appellant would have been entitled to receive a decision by 16 November 2018 at the latest.

As the request was sent by email after normal office hours on 26 September 2018, I regard it as having been made on 27 September 2018. Accordingly, the appellant was entitled to receive a decision by no later than 26 October 2018. When he did not receive a decision by that date, the AIE Regulations deem that the request was refused on 26 October 2018. On that date also, the appellant acquired the right to request an internal review and that right would, if not exercised, expire at midnight on 25 November 2018.

On 1 November 2018, IFI wrote to the appellant drawing attention to the fact that, in response to a Freedom of Information (FOI) request made by him, IFI had previously provided him with access to many documents which fell within the scope of his AIE request. The appellant replied on 9 November 2018 and confirmed that IFI could regard the documents released in response to that FOI request as being out of the scope of his AIE request.

On 16 November 2018 IFI notified the appellant of its decision on the request. As the law had already deemed the request to have been refused on 26 October 2018, this decision of 16 November 2018 does not have the status of a decision made under article 7 of the AIE Regulations. It purported to refuse the request, but in fact it part-granted it by providing access to one record. In relation to part 4 of the request, which emphasised that "relevant private email addresses and/or messaging services should be considered when processing" the request, IFI said that a personal email account did not come within the scope of the request because:

> "Under IFI's internal policy regarding the use of information and communications technology, all IFI employees and officials are expressly prohibited from using personal email accounts when processing any information relating to IFI in their professional capacity and are prohibited from holding information on behalf of IFI within their personal email accounts".

In relation to text messages, IFI said that the device in question had passed into the ownership of a former employee.

The appellant requested an internal review on the same day, challenging IFI's position on both personal emails and the mobile phone. He stated, among other things, that IFI had an

obligation to investigate whether all information held on the mobile phone had been sent back to IFI and IFI must demonstrate that staff had been asked about private email accounts.

The appellant was entitled to receive a review decision, at the latest, on 15 December 2018. As he did not, he acquired the right to appeal to my Office before or on 14 January 2019.

IFI issued a review decision on 7 January 2019, i.e. three weeks late. IFI offered no explanation for this, its second failure to respond within the timeframe set out in the AIE Regulations.

This decision affirmed the original decision in relation to part 4 of the request. It explained that the employee who held the mobile device had since retired and IFI considered that ownership of the device had passed to the retiree. It said "the information stored on the phone is therefore not deemed to be held by a public body, as defined by the AIE Regulations". It added there was no basis for believing that such records (containing pre-planning information) "might exist on non-official systems". It said it was not deemed "reasonable or appropriate to ask a former employee to search their personal email account for any relevant pre-application information in the circumstances".

The internal review decision maker notified the appellant of his right to appeal to my Office, but quoted the incorrect fee for making such appeals. It is important that would-be appellants are not confused or deterred from appealing by being given incorrect information. I will ask IFI to review and update its letter templates for future cases and, indeed, to improve its compliance generally with the timeframes for processing AIE requests.

The appellant appealed to my Office on 7 January 2019.

In carrying out my review I had regard to the submissions made by the appellant and IFI. I also 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').

While I do not recite here all of the detail in the submissions made to my Office, I have considered all of the relevant arguments.

Scope of appeal

The appellant confirmed that his appeal challenged two aspects of IFI's internal review decision:

1. Whether IFI ought to have asked a particular retired officer if they held relevant environmental information in their private (i.e. non-IFI) email account(s).
2. Whether IFI ought to have asked the same retiree if they held relevant environmental information on a mobile phone that had once belonged to IFI, but which, by the date of the AIE request, had become the retiree's personal mobile phone.

Scope of review

Article 7(5) of the AIE Regulations allows a public authority to refuse a request where the information is not held by or for it. When reviewing such decisions, I must be satisfied that adequate steps have been taken to identify and locate relevant information held by or for the public authority in the particular circumstances.

Article 3 of the AIE Regulations defines the terms 'held by' and 'held for' as follows:

- "Environmental information held *by* a public authority" means "environmental information in the possession of a public authority that has been produced or received by that authority".
- "Environmental information held *for* a public authority" means "environmental information that is physically held by a natural or legal person on behalf of that authority.

IFI maintains that it does not itself physically hold any information on the mobile phone or in any email account belonging to the retiree. I accept that. The issue that fell for consideration in this case was whether IFI ought to have asked the retiree if they held relevant information either on their mobile phone or in a personal email account.

The appellant's position

In his appeal, the appellant said that IFI's decision was not justified or satisfactory as IFI did not adequately perform a balancing test of the public interest. He argued that it is unacceptable to find that information cannot be released simply because a member of staff of a public body has retired and the phone used is now private. He suggested that future AIE

requests could be turned down on the basis of a cynical use of retirement or career breaks—thus avoiding the release of important information.

He submitted that it was "absurd" for IFI to state that it does not hold the information. He expressed concern that IFI did not clarify the information that it held in whatever format. He said that staff in all kinds of organisations do not necessarily follow protocols and may sometimes use private email accounts for convenience.

In his earlier request for internal review, the appellant cited a decision that I made in my separate role as Information Commissioner "in the case of Right to Know and the former Minister of Justice … who has been ordered to release any relevant records". I understand that he was referring to case number 170315 (available at www.oic.ie). It should be noted that I did not order the release of records in that decision. While the appellant in the current case did not expand on why he believed that Freedom of Information appeal decision was relevant in this instance, I understood that he was arguing that its reasoning should carry across into this case and lead to a decision in his favour.

IFI's position

IFI's position in its internal review decision and submission may be summarised as follows:

- The employee was retired when the request was received.
- The mobile phone that the retiree held when they were employed by IFI was then owned by the retiree.
- IFI did not have any arrangement with the retiree to hold such information after retirement.
- IFI is therefore satisfied that no information is held on that phone on behalf of IFI.
- IFI is also satisfied, for the same reasons, that no information is held in any private email account owned by the retiree on behalf of IFI.

IFI's decision-maker said that he saw no basis for believing that any of the requested information "might exist on non-official systems". He therefore did not deem it appropriate to ask a former employee to search their personal (i.e. non-IFI) email account for such information.

IFI provided my Office with a copy of its Information and Communications Technology policy document. This expressly prohibits IFI employees from using personal email accounts when processing information relating to IFI.

Assessment

IFI told the appellant that "personal email accounts do not come within the scope" of his request. Personal email accounts holding items of official information can fall within the scope of an AIE request and in the current case they did, not least because they were specified in the request itself by the appellant.

As that was the case, and since it was clear that when IFI received the request it neither owned the retiree's mobile phone nor physically possessed any information that the retiree might have held in a personal email account(s), the issue was whether the retiree should have been asked if they held any relevant information on their mobile phone or in a personal email account on behalf of IFI.

The appellant's argument that IFI "did not adequately perform a balancing test of the public interest in favour or release and interest in favour of non-release" was misplaced. Such a test is required when a public authority is considering the release of environmental information that has been identified as being held by or for the authority. It is not relevant to the earlier stage when the authority is searching for relevant information that is held by or for it.

The appellant cited the decision I made in my separate role as Information Commissioner in FOI appeal case 170315. In that decision I directed the relevant department to ask its former minister if they held "any additional records" within the scope of the request. There was evidence that the former minister had, when in Office, used an unofficial gmail account in relation to official departmental business. No similar evidence was brought to my attention in the current case. In any event, case 170315 concerned different legislation. In the circumstances, I concluded that the reasoning behind case 170315 does not apply to the current AIE appeal case.

Part 4 of the AIE request sought information held by or for IFI *and* its officials, both serving and former. Clearly, official information *held by* serving officials of a public authority is *held by* that public authority. I could envisage circumstances in which a retired employee could hold official information *on behalf of* their former employer. For example, there could be an arrangement between a retired official and their former employer that would see the retiree acting in a new role as an 'external consultant' and holding official information in that

capacity, *on behalf of* the authority. In the current case, however, IFI denies the existence of any arrangement which would have authorised or required the retiree to hold information on its behalf. I have no reason to doubt that position and I accept it. In these circumstances, I would not regard it as either reasonable or proportionate for IFI, in the course of processing this AIE request, to have asked the retiree if they held relevant information on its behalf. Moreover, I am satisfied that IFI was not obliged by the AIE Regulations to do so. In the ordinary course of affairs, it would be an extraordinary step for a public authority, in responding to an AIE request, to contact a retired member of staff to ask if they held particular information in circumstances where such possession would be in direct contravention of the public authority's express policies. Indeed, to do so could suggest irregularity or wrongdoing on the part of the retiree.

I concluded that extending the search for information to the retiree in this case was not required by the AIE Regulations.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I find that IFI's search for relevant information held for it was adequate. IFI was not obliged in the circumstances to ask a retired member of staff if they held relevant information in a private email account or on their privately-owned mobile phone. Accordingly, I affirm IFI's decision and do not require it to take any action.

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
29 July 2019