



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

**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: OCE-102375-J9W5Q1

Date of decision: 22 July 2021

Appellant: Mr X

Public Authority: Department of Agriculture, Food and the Marine (the Department)

Issue: Whether the Department was justified in refusing access to environmental information relating to / that informed the development of the Appropriate Assessment Procedure (AAP) requirements regarding hen harrier special protection areas (SPAs), felling, and other disturbance operations and relating to reviews and revisions of the AAP on the basis that no such environmental information is held by or for it.

Summary of Commissioner's Decision: The Commissioner found that it was reasonable to conclude that no relevant environmental information was held by or for the Department following its carrying out of adequate searches and thus, article 7(5) of the AIE regulations applied.

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

1. On 19 October 2020, the appellant requested the following from the Department:
 1. “Records which relate to / informed the development of the Appropriate Assessment Procedure (AAP) requirements regarding [h]en [h]arrier SPAs, felling and other disturbance operations; to include *inter alia* correspondence (internal and external), [m]inutes of meetings, [r]eports (including drafts), tenders, consultation, advice from specialists / consultants, etc.
 2. Records relating to reviews and revisions of the Procedure
 3. Records of updates received from NPWS including date of receipt of record, general location (as specific as possible but consistent with protecting sensitive information), nature of the update (specific activity), date of updating of the FS [Forest Service] database; licence number and date of notification of any relevant party.”
2. On 11 November 2020, the Department informed the appellant that, due to the complexity of the environmental information requested, it required an extension of one month in accordance with article 7(2)(b) of the AIE Regulations, in order to make its decision. It stated that he could expect to receive a reply to his request by 17 December 2020.
3. As the Department did not issue a decision on the request within the required timeframe, the appellant sought an internal review of the deemed refusal of his request on 18 December 2020.
4. On 14 January 2021, the Department issued its internal review decision, wherein it granted access to two records in full and three in part in respect of part 3 of the appellant’s request. It refused access to any further environmental information on the ground that no additional relevant records could be located.
5. The appellant brought this appeal to my Office on 18 January 2021. In subsequent correspondence, he stated that he was satisfied with the response received in respect of part 3 of his request and that it did not form part of his appeal. He outlined that he continued to seek environmental information relevant to parts 1 and 2 of his request relating to the hen harrier appropriate assessment procedure / protocol.
6. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and the Department. In addition, I have 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').

Scope of Review

7. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.
8. The scope of this review is concerned solely with whether the Department was justified in refusing access to environmental information relating to / that informed the development of the AAP requirements regarding hen harrier SPAs, felling, and other disturbance operations and relating to reviews and revisions of the AAP, on the basis that no such environmental information is held by or for it.

Analysis and Findings

9. Article 7(1) of the AIE Regulations requires public authorities to make available environmental information that is held by or for them on request. Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested environmental information is held by or for the public authority concerned. My approach to dealing with cases where a public authority has effectively refused a request under article 7(5) is that I must be satisfied that adequate steps have been taken to identify and locate relevant environmental information, having regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances, I consider that a standard of reasonableness must necessarily apply. It is not normally my function to search for environmental information.
10. In its submissions to this Office, the Department provided details of its record storage practices and the searches conducted in response to the appellant's request. As my Office has already provided the appellant with those details, I do not propose to repeat them in full here.



11. By way of background, the Department outlined that there are three divisions concerned with forestry: the Forestry Division, the Forestry Inspectorate Division, and the Forest Sector Development Division. The Department stated that, in a case such as this, the records created would most likely comprise emails, word documents, pdf documents and spreadsheets. It noted that that they may also include discussion papers, minutes of meetings, and other supporting documents etc.
12. In relation to electronic records, the Department explained that personnel have their own file folder on the IT system to save material, which is not available to other users, and that there is also a shared area for each division, which is only available to other divisions in limited circumstances. It also outlined that there are no specific folders on the shared area where records relating to hen harrier policy are stored. Furthermore, it explained that any emails that are more than two years old are automatically deleted. In relation to hard copy records, the Department noted that hard copy files may have been created and that there is appropriate physical storage at each of its locations across the country.
13. The Department noted that personnel involved in the development of the environmental information sought would be technical personnel within the Forestry Inspectorate Division and explained that personnel with responsibility for environmental policy in relation to forestry, as well as other staff members, were asked to search their records and provide documents relevant to the request. It noted that it would have expected them to carry out searches of their emails and file folders, shared folders, and any relevant physical storage areas. It stated that the electronic searches would have been carried out using key words (e.g. Hen Harrier; protocol etc).
14. In his submissions to this Office, the appellant noted that the Department's Forestry Standards Manual (2015), includes the following paragraph within Appendix 21 "AAP and Hen Harrier":

"Specific procedures apply in relation to applications for consent / grant approval / licences involving certain forestry operations which have the potential to disturb Hen Harrier breeding activity within and surrounding SPAs designated for breeding Hen Harrier. These procedures, agreed with National Parks & Wildlife Service (NPWS), focus on disturbance operations within so-called 'Red Areas' during the Hen Harrier breeding season, 1st April to 15th August, inclusive."

The appellant also provided this Office with a full copy of Appendix 21 and outlined his contention that, in essence, records which underpinned the development of the procedure contained therein, including the agreement reached with the NPWS, ought to exist.



15. During the course of the review, my Investigator wrote to the Department to seek clarification in respect of the appellant's contention and further detail regarding the steps taken / process involved in developing the AAP requirements agreed with the NPWS contained in Appendix 21. My investigator highlighted that Appendix 21 appeared to contain some of the information previously contained in Appendix C to Circular 02/2012 – Appropriate Assessment Procedures for Forestry Activities.
16. In response, the Department outlined that normally, when such matters are being developed, any personnel/bodies, agencies involved would meet to discuss the contents, develop drafts, review papers etc., with the final procedures being agreed among the group. It noted, however, that in the absence of records in relation to the development of the protocol, it could not be more specific in this case and it was also not possible to say whether the procedures referred to in Appendix 21 had been revised.
17. The Department further outlined that a relevant staff member had explained that he had very little information regarding the hen harrier protocol, which he considered to refer to the procedure in place regarding disturbance operations in so-called "red-areas" associated with SPA's. The staff member had also set out that the heavy lifting in terms of developing the procedure took place a number of years ago, albeit refreshed for the Forestry Standards Manual (2015). It noted that the staff member had advised that he had mainly dealt with a named individual within the NPWS and that, apart from the finished publication, he did not have any correspondence. The Department also outlined that he had explained that since then, correspondence and developments have revolved around the transfer of updated red area data, the occasional notification of new nest sites, and the more recent data sharing agreements with NPWS, the Hen Harrier Project, and the Department, to allow NPWS to incorporate Hen Harrier project survey data in annual updates.
18. The general thrust of the Department's position is that it holds no relevant environmental information. I wish to emphasise that it is outside my remit as Commissioner to adjudicate on how public authorities carry out their functions generally, including with respect to their environmental information management practices. I have no role in assessing how public authorities collect, maintain and disseminate environmental information. My role concerns reviewing appeals of requests for access to environmental information within the scope of the request, which is held by or for the relevant public authority and no more than that.
19. Having considered the details of the searches and the explanations given by the Department, I am satisfied that the Department has taken adequate steps to identify and locate all relevant environmental information held by it. As such, I find that article 7(5) of the AIE Regulations applies.



Decision

20. Having carried out a review under article 12(5) of the AIE Regulations, I hereby affirm the Department's decision to refuse access to relevant environmental information relating to the AAP requirements regarding hen harrier SPAs, felling, and other disturbance operations under article 7(5) of the AIE Regulations.

Appeal to the High Court

21. 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
22 July 2021