Case RPSI/22/05

Decision of the Information Commissioner in his capacity as Appeal Commissioner on an appeal made under Regulation 12 of the European Union (Open Data and Re-use of Public Sector Information) Regulations 2021 (the Regulations)

Appellant: Mr X

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

Issue: Whether the Department's decision to refuse the appellant's request for re-use of EIA screenings for felling licences was in compliance with the Regulations

Decision: The Appeal Commissioner found that the Department had not made a proper decision under the Regulations. He annulled the decision and directed the Department to consider the request again in accordance with the Regulations.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision to the High Court on a point of law from the decision, as set out in Regulation 20 of the Regulations. Such an appeal must be initiated not later than eight weeks after notice of this decision was given to the person bringing the appeal.

Open Data

The concept of Open Data is about making data held by public bodies available, and easily accessible online, for reuse and redistribution. The Open Data and Re-use of Public Sector Information Directive (Directive (EU) 2019/1024) of 20 June 2019 (the Directive) came into operation in Ireland on 22 July 2021, further to the provisions of Statutory Instrument No. 376/2021 (the Regulations). Similar to previous legislation, which was revoked, the new laws provide for the making of requests for the re-use of public sector information. However, the Regulations now also require public bodies and certain public undertakings to publish data in free and open formats.

As Information Commissioner, I am the designated "Appeal Commissioner" under the Regulations insofar as requests for re-use of records are concerned. Regulation 17 provides that, on receipt of a valid request for an appeal under the Regulations, I must carry out a review, further to which I may decide to affirm, vary or annul the decision under review.

Background to review

At the outset, I regret the delay in finalising this review. It took longer than I would have liked due to the volume of work in the Office of the Information Commissioner and the Office of the Commissioner for Environmental Information in recent months.

On 12 May 2022, the appellant made an application for re-use of "all EIA Screenings for felling licences on iFORIS held by the Forest Service of [the Department] not otherwise published on the Forest Licence Viewer." He said that the "right of access to these documents is already established and they should be being actively disseminated." The Department's decision of 8 July 2022 refused the request.

On 11 July 2022, the appellant appealed the Department's decision to my Office. In the course of my review, I have considered the above exchanges and further correspondence between the Office and the Department. I have decided to conclude the review by way of a final, binding decision.

Scope of review

Regulation 15 provides a right of appeal against certain decisions by a public sector body, including a decision to refuse to allow a requester to re-use a document. Accordingly, this review is solely concerned with whether the Department's refusal of the appellant's request for re-use of records was in compliance with the Regulations.

The appellant offers to provide examples of records covered by his request, which he says he obtained under AIE. This appears to be in the context of why I should direct the Department to grant his request for re-use of other documents covered by the request. He does not, for instance, argue that he should be given a more open format of the records already in his possession.

The appellant also says that the Department did not notify him of a date by which to expect a decision. However, the legislation does not provide for the review of a body's compliance

with the administrative requirements of the Regulations. Therefore, this review does not extend to examining the Department's handling of the request.

Analysis and Findings

The Department's position

The Department's decision says that the appellant had "… requested … [a] copy of all EIA Screening Reports (iFORIS) for felling licences issued by DAFM in 2022 which have not been published on the Forest Licence Viewer." It says that it had decided "to refuse access to the information sought as the release of the data in question is protected by law under the European Union (Open Data and Re-Use of Public Sector Information) Regulations 2021".

The decision also says that:

- a request for "procedural information", such as that requested, does not further the Directive's overall objective to continue the strengthening of the EU's data economy.

- data made available for re-use in an open format must be linked to the national open data portal (data.gov.ie). It said that, because data relevant to Forestry Licencing is already available on the Department's Forestry Licence Viewer, "this request, made under Open Data, is not applicable".

- article 3(2)(ii) of the Regulations provides that the legislation does not apply to documents which are part of administrative practice but where the overall process is subject to review, such as the Forestry licencing system.

The Department's decision lists factors in favour of releasing and withholding the records "(if they exist at all)" and says that "on balance, the public interest in this case is best served by withholding this information". In particular, it says, in favour of withholding the information, that "the documents do not exist in most cases and are not required in any case for the processing of the licences in question. As regards afforestation, forest road building and deforestation, these are Annex 2 activities under the EIA Directive. The Forestry Appeals Committee have supported the Department's view that thinning, felling and replanting is not covered under the EIA Directive and an EIA screening is therefore not required. "

Finally, while its correspondence with this Office appears to question whether relevant records exist, the Department also suggests that number of records involved might be "very voluminous".

The appellant's position

The appellant says that the Directive/Regulations apply to his request. He says that the Department does not explain how the records are protected under law, or why Regulation 3(2) is relevant.

The appellant says that the records are not protected by law, and that, to the contrary, they are required to be made available under law (i.e. the EIA Directive). He says that, since the

"full body of information that is the subject of my request has not previously been made publicly available, it falls to be made available on request." He refers to similar data that he says the Department routinely publishes in relation to afforestation and forest road licences, but not for felling licences.

The appellant says that the Regulations do not provide for the consideration of the public interest and that it is already established under AIE legislation that information of the type requested falls to be released.

Analysis

At the outset, it is important to note that I have no role in seeking to require the Department to comply with the publication requirements of environmental or of any other legislation, or in determining what steps a body is required to take when performing its duties.

Regulation 6(5)(a) provides that where a request for reuse is refused, the public body "shall communicate the grounds for refusal to the requester, in particular and where appropriate by reference to the matters contained in Regulation 3(2)(a) to (h) or Regulation 5."

The Department contends that the requested information (which it describes incorrectly) is "protected by law" under the Regulations. It does not, however, set out the grounds for refusal by reference to Regulation 3(2)(a) to (h), or Regulation 5, as required by the Regulations. This means that the appellant does not have sufficient explanation for the refusal of his request, which runs contrary to the tenets of procedural fairness that underpin decision making by public bodies.

By setting out the factors in favour of withholding the information and releasing it, the Department appears to carry out what is generally known as a public interest balancing test. However, as set out already, the Directive and Regulations provide for the publication of data in an open format and for the making of requests for the re-use of particular documents. As detailed further below, they are not an access regime and they do not provide for the protection of records. Neither do they require consideration of the public interest in deciding on a request for re-use, or indeed the apparent merits of any request.

While the Department also contends that the Regulations do not apply to the records, it gives no basis for this position. It refers to the separate process by which bodies are expected to publish open data further to the Directive. It does not explain why the availability of certain licencing information on the Forestry Licence Viewer generally precludes the making of a request for the re-use of that or related information.

Furthermore, the Department does not explain why it appears to believe that Article 3(2) of the Regulations is relevant to the request, other than to assert that this provision is concerned with administrative records. I note that Article 3(2)(a) of the Regulations (which transposes Article 1(2)(a) of the Directive) is concerned with, inter alia, documents "the supply of which is an activity falling outside the scope of the public task of the public sector body …".

The Directive lays down an obligation for Member States to make all existing documents re- usable unless access is restricted or excluded under national rules on access to documents or subject to the other exceptions laid down within the Directive. This Directive builds on the existing access regimes in the Member States and does not change the national rules for access to documents. In other words, a right of access to a document is an essential precursor to the right to re-use such a document. Furthermore, in addition to records that a body may make available under an access request, it seems to me that a request for re-use may be made for a published document, or a document that a body is willing to disclose outside of an access regime, for instance.

It does not appear that the Department has already published the records that the appellant has requested for re-use, or that it is willing to disclose them outside of any access regime. Rather, the appellant specifies that he is seeking the re-use of documents to which he asserts he has an established right of access. The Department neither accepts this assertion nor refers to any decision by an appropriate appeal body, which finds that the records are protected under an access regime. Indeed, the Department appears not to have identified whether relevant records exist or the number involved.

My powers as Appeals Commissioner do not extend to determining whether access to the records sought for re-use would be excluded or restricted under any access regimes. This (and/or the extent to which relevant records exist or are voluminous) is for the Department to consider under the relevant legislation. Such a decision would be subject to a right of appeal under that legislation, either to this Office or to the relevant prescribed forum.

It should be noted that a right of access to a particular record does not of itself arise from a body's past publication of the same type of record (or from a body's grant of access to the same type of record under an access regime). However, these may be relevant factors in considering whether to grant an access request.

In all of the circumstances, I am not satisfied that the Department has made a proper decision on the appellant's request. Therefore, I have decided to annul the Department's decision and to direct it to make a fresh decision on the request in accordance with the Regulations. As a first step, the Department should assess whether the request is an access request (in which case it should be processed accordingly) or a valid request for re-use under the Regulations.

Decision

In accordance with Regulation 17(2) of the Regulations, I have reviewed the Department's decision on the appellant's request. I find that the Department's decision is not in accordance with the Regulations. I annul the Department's decision and I direct it to make a new decision on the request further to the Regulations.

Right of Appeal

A party to this appeal or any other person affected by this decision may appeal this decision to the High Court on a point of law from the decision, as set out in Regulation 20 of the Regulations. Such an appeal must be initiated not later than eight weeks after notice of this decision was given to the person bringing the appeal.

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Ger Deering
Information Commissioner
29 March 2023