

Appeal to the Commissioner for Environmental Information

Case CEI/09/0016

European Communities (Access to Information on the Environment)

Regulations 2007 (S.I. No. 133 of 2007) (the Regulations)

Applicant/Appellant: Mr Pat Swords, 10 Hillcourt Road, Glenageary, Co Dublin

Public Authority: Department of Communications, Energy and Natural Resources (the Department)

Issue: Whether the Department was justified in its refusal of access to environmental information relating to aspects of the renewable energy programme

Summary of Commissioner's Decision: The Commissioner found that the Department was justified in its decision to refuse the request except insofar as it related to information provided to the applicant in the course of the appeal on the basis that it did not hold further environmental information within the scope of the request. She found that section 7(5) of the Regulations allows a public authority to refuse a request on the basis that the information requested is not held by it.

Background

On 22 September 2009, the applicant sent a request to the Customer Service unit of the Department referring to the Regulations and seeking the following information/ responses to questions:

1. "the Strategic Environmental Assessment for the Renewable Energy Programme
2. What was the pricing basis and justification (e.g. kg CO₂ per cent) for the renewable tariffs(14 cent per kWh for offshore wind, etc.), in other words costs, benefits, alternatives, principle of proportionality.
3. Specific details on other alternatives, such as generation using renewable sources like anaerobic digestion, waste to energy (incineration), heat pumps, it would be nice to have it in a format such as the ExternE or at least in kg CO₂ per cent per kwh.
4. The 2006 Green Paper on Energy policy. Who wrote this, in particular the section on Nuclear Energy? What was his/her qualifications, I require the technical supporting documentation to the section on nuclear.
5. Who signed off on the Renewable Energy Programme both at Departmental level and at Ministerial level."

The Department responded on 21 October 2009 giving some background information as regards its role and referring the applicant to information published on its website. The applicant responded to the Department on the same day stating that his questions had not been answered. On 16 November 2009, the applicant sent an e mail to this Office referring to his request, the Aarhus Convention and what he termed the Department's failure to provide the information sought. My Office contacted the Department to clarify its handling of the matter and considered whether the applicant had made a valid appeal under the Regulations. On 11 December 2009, my Office wrote to the applicant stating that it was prepared to accept his message of 16 November 2009 as an appeal subject to payment of the statutory fee required to validate it. Following payment of the fee, the applicant's appeal was accepted on 17 February 2010.

Elizabeth Dolan, Senior Investigator of my Office, sent her preliminary views to the applicant on 11 May 2010. She indicated that she would put further queries to the Department regarding the extent of the information held if the applicant would indicate what he believed was missing. She supplied the applicant with the position of the Department as established in my Office's investigation. The applicant responded on 20 May 2010 in relation to each of the items identified and submitted detailed criticisms of the absence of technical information to support the Government's position on renewable energy. Ms Dolan identified the items within the original request which remained outstanding and put the issues to the Department on 21 May 2010. The Department responded on 18 June 2010.

I have decided to bring this appeal to a conclusion by way of a formal, binding decision. I have taken account of the submissions of the applicant and the Department, the Regulations and Directive 2003/4/EC on public access to environmental information (the

Directive). What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

Under Article 12 of the Regulations, I must review the decision of Department and affirm, vary or annul it. I emphasise, as I have had to do in other cases, that it is outside of my remit as Commissioner to adjudicate on how public authorities carry out their functions generally. My Office does not have the authority to investigate or to comment upon the applicant's views or the Department's actions in relation to the policies involved or the quality of technical information considered.

Following my Office's intervention and the applicant's submission of 20 May 2010, the following items within the request have been resolved on the basis set out and this decision will not deal any further with them:

Item 1: Strategic Environmental Assessment (SEA) for the Renewable Energy Programme In response to my Office's queries as to whether an SEA existed, the Department confirmed that no such document is held since "No strategic environmental assessment has been conducted by the Department in the renewable energy area". The Department's response adds that Sustainable Energy Ireland is currently conducting an SEA to evaluate likely significant environmental effects of plans to develop offshore renewable energy such as wind, wave and tidal energy in Irish waters and the applicant that been directed to this.

Item 4; 2006 Green Paper on Energy Policy. Who wrote this, in particular the section on Nuclear Energy? What was his / her qualifications?

The Department said that Mr. Noel Dempsey T.D., then Minister for Communications Marine and Natural Resources, published the Energy Policy Green Paper, entitled "Towards a Sustainable Energy Future for Ireland", on 1st October 2006. According to the Department, there was a two-month consultation process signalled at the launch. Information was given to the public about how to make submissions to the Department of Communications, Marine and Natural Resources. Over 100 submissions were made which were published on the Department's website. The content of the consultation and submissions stages informed the Government's energy policy White Paper, "Delivering a Sustainable Energy Future for Ireland A Framework for Energy Policy to 2020" which was launched and published in March 2007. The White Paper contained the Government's agreed energy policy directions, and listed over 200 actions, targets and policies. The position of the Department is that documents such as the energy policy White Paper are statements of Government proposals and/or policy on particular policy issues. The energy policy White and Green Papers were considered, deliberated on and agreed by Government. The Department stated that various individuals worked on particular sections, but this does not affect the fact that they are Government statements, of proposals for energy policy.

The Department contended that the names and qualifications of all those who worked on the Energy Green Paper is not environmental information, in that it does not constitute

information and/or data about the environment or factors underpinning it, as defined in Article 3 (1) (a) to (f) of the Regulations. The applicant accepts the position regarding the individuals involved but wishes to pursue the element of item 4 which covers technical supporting documentation. This is addressed below.

Item 5: Who signed off on the Renewable Energy Programme both at Departmental level and at Ministerial level?

The Department does not describe the various schemes and policies in place on renewable energy as 'the renewable energy programme.' It says that renewable energy policy is part of overall energy policy which is set out in the Government's 2007 White Paper on energy policy 'Delivering a sustainable energy future for Ireland: The Energy Policy Framework 2007-2020.' According to the Department, the then Taoiseach Bertie Ahern and then Minister for Energy Noel Dempsey wrote the forewords to the White Paper. The White Paper is a statement of overall collective Government policy and the paper was agreed by the Cabinet as a whole. The then Secretary General of the Department of Communications, Marine and Natural Resources would have had ultimate sign off of any draft documents in this context.

The applicant accepts that this information adequately addresses item 5.

Applicant's arguments

The applicant's submissions are discursive and critical of the Department's justification for certain positions. It is clear that he has examined various documents published on the Department's website and elsewhere; he takes issue with their content and conclusions. He concludes in relation to Item 2 (pricing basis and justification for renewable tariffs) that there is insufficient information on the criteria of environmental protection, sustainable development, local employment, social cohesion, security of supply and meeting Kyoto targets in relation to the tariffs. Essentially, he argues that further information on this should be held. Regarding the technical supporting documentation in Item 4, he seeks documentation in relation to those parts of the Green Paper dealing with nuclear power and nuclear waste.

My Office put his submissions to the Department and asked it to address the matter of whether any additional information was held.

Department's position

In the course of the appeal, the Department provided a Schedule of Records with its reasons for its decisions on the various items.

The Department's position on the pricing basis and justification of tariffs (item 2) is that the information is already available to the public in an easily assessable format on its website and thus refusal is justified under Article 7(3) of the AIE Regulations. It says that the justification for the Renewable Energy Feed in Tariffs (REFIT) covering wind, small hydro and biomass and biomass landfill gas is set out in the Department's correspondence with the European Commission seeking state aid clearance for the scheme. The links to various relevant documents were provided to the applicant in the course of this appeal. However, the Department states that it holds no records on justification of prices of other

forms of proposed REFIT categories such as offshore wind, ocean, anaerobic digestion/HE CHP for which State Aid approval has yet to be obtained. It says that it is currently reviewing renewable energy feed in tariffs in the bio- energy sector.

Following further queries from my Office and the applicant's response to the information provided, the Department's position is that no further information is held on renewable tariffs (item 2). It goes on to say that, subsequent to the applicant's request, an announcement of new feed-in tariffs for the biomass AD/CHP sector was made in May 2010 and supporting information is held on this. Such information, created after the request under appeal, is not within the scope of this decision.

The Department commented that it is not entirely clear what information is being sought in item 3 on alternatives. It pointed to information on the Department's schemes and policies in the various areas of renewable energy on websites to which links were provided. It said that the 2003 consultation document 'Options for Future Renewable Energy Policy, Targets and Programmes' was aimed at stimulating debate in developing future renewable energy policy in Ireland. Specific information on the alternatives considered were identified in parts of that document. It made reference to various other published studies and reports.

In relation to item 3, Ms Dolan asked the Department whether it held any additional information on (a) a ranking system for technology alternatives in terms of their ability to meet the criteria in the Directive and (b) options to reach the objectives in legislation. The Department responded that no such information is held.

In response to the applicant's request for technical support documentation on the nuclear energy section of the report (item 4), the Department provided a list of source material and acknowledged that material from bodies such as the International Energy Agency and the European Commission is relevant. However, it said that a complete list of all technical material consulted is not held.

The list supplied of sources cited in the Green Paper is:

Commission for Energy Regulation. Gas Capacity Statement, 2005.

Commission for Energy Regulation. Regulators' Annual Report to the European Commission. 2005.

Commission for Energy Regulation. Strategic Plan, 2005-2010. 2005.

Commission for Energy Regulation and Northern Ireland Authority for Energy Regulation. Market Power Mitigation in the SEM: Decision Paper. 2006.

Department of Communications, Marine and Natural Resources. All-Island Energy Market: Renewable Electricity – A '20-20 Vision' . 2005.

Department of Communications, Marine and Natural Resources. Energy Research, Development and Demonstration: Consultation Paper. 2005.

Department of Communications, Marine and Natural Resources and Department of Enterprise, Trade and Investment. All-Island Energy Market Development Framework. 2004.

Department of Communications, Marine and Natural Resources. Green Paper on Sustainable Energy. 1999.

Department of Enterprise, Trade and Employment. Irish Electricity Markets Principal Challenges. 2005.

Department of Enterprise, Trade and Investment, N.I. Energy – a Strategic Framework for Northern Ireland. 2004.

Department of the Environment, Heritage and Local Government. National Climate Change Strategy Ireland. 2000.

Department of Finance. Code of Practice for the Governance of State Bodies. 2001.

Department of Trade and Industry, U.K. The Energy Challenge – Energy Review Report 2006.

Economic and Social Research Institute. Medium-Term Review, 2005-2012. 2005.

Economic and Social Research Institute. Aspects of Irish Energy Policy. 2005.

EirGrid. Generation Adequacy Report, 2006-2012. 2005.

EirGrid. Transmission Forecast Statement, 2005-2011. 2005.

European Commission. A European Strategy for Sustainable, Competitive and Secure Energy. 2005.

European Commission. Doing More with Less: Green Paper on Energy Efficiency. 2005.

European Commission. Report on Progress in Creating the Internal Gas and Electricity Market. 2005.

European Commission. Energy Infrastructure and Security of Supply. 2003.

Forfas. Input to the Energy Policy Green Paper (unpublished submission). 2006

Government of Ireland. National Spatial Strategy for Ireland, 2002-2020. 2002.

Government of Ireland. National Climate Change Strategy. 2000.

International Energy Agency. Lessons from Liberalised Electricity Markets. 2005.

International Energy Agency. World Energy Outlook 2005.

International Energy Agency. World Energy Outlook 2004.

International Energy Agency. Ireland 2003 Review.

International Energy Agency. Security of Supply in Electricity Markets. 2002.

Irish Academy of Engineering. Future Energy Policy in Ireland. 2006.

Irish Business and Employers Confederation Energy Policy Committee. 7 Principles of a National Energy Policy. 2006

Organisation for Economic Co-operation and Development. Guidelines on Corporate Governance of State-Owned Enterprises. 2005.

Sustainable Energy Ireland. Energy in Ireland, 1990-2004. 2006.

Sustainable Energy Ireland. Renewable Energy in Ireland, 2005 Update. 2006.

Sustainable Energy Ireland. Security of Supply Metrics, First Report. 2006.

World Bank. Reforming Infrastructure: Privatisation, Regulation and Competition. 2004.

The Department's position is that the applicant's identification of specific areas concerning the nuclear power and nuclear waste issues does not narrow the task of examining all the sources. It says that many general energy policy reports and analysis by bodies such as the International Energy Agency and the EU Commission as referenced in the Green Paper cover diverse issues and technologies. A single report might contain material on many different fuels and energy uses as well as technological and research issues. Nuclear energy could arise in such reports under a number of headings and an exercise to review all the sources in order to compile a list of sources accessed in preparation of the Green Paper would be time consuming and expensive in terms of staff

resources. The Department's view is that to do this now having regard to the range and volume of material would be an unreasonable exercise.

Statutory provisions

The Directive and Regulations set out the following definition in relation to what may be requested:

“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;

Article 3(1) of the Regulations defines "environmental information" as
"any information in written, visual, aural, electronic or any other material form on... [elements, measures, reports etc. affecting or relating to the environment and factors affecting it detailed at (a) - (f)]"

Article 7(3) (a) of the Regulations provides that access to environmental information shall be given in the form requested unless -

"(i) the information is readily available to the public in another form or manner that is easily accessible, or

(ii) access in another form would be reasonable".

Article 7(5) of the Regulations provides :

"Where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it."

Analysis and Findings

In this case, it is not in dispute that if the information, if held, would come within the definition of environmental information in the Regulations and the Directive. Neither is it in dispute that at least some of the information sought by the applicant is available on the Department's website or otherwise publicly available so that a direction to release it under the Regulations is unnecessary. However, I would point out that article 7(3) cited by the Department appears to apply to situations where the form of access is at issue rather than the information itself.

The Regulations and Directive refer to information in the possession of a public authority and produced or received by it. Article 7(5) of the Regulations allows a public authority to effectively refuse a request by notifying the requester that it does not hold the material sought. There is also provision whereby a public authority that is aware that the information is held by or for another public authority, shall transfer the request. This indicates that the Regulations and Directive envisage situations in which it is legitimate for a public authority to refuse access simply because it does not hold the information sought. *"The Aarhus Convention: an Implementation Guide"* [ECE/CEP/72] says that if the public authority does not hold the information requested, it is under no obligation to secure it. It goes on to suggest that failure to possess environmental information relevant to a public authority's responsibilities might be a violation of Article 5, paragraph 1(a) of the Convention which relates to the requirement that public authorities collect, possess

and disseminate environmental information.

A similar provision in relation to records "not held" exists in Section 10(1)(a) of the FOI Acts. I am guided in my approach by the Office of the Information Commissioner's experience. In cases where the public authority claims not to hold the environmental information requested, my role is to decide whether the decision maker has had regard to all the relevant evidence and where relevant to assess the adequacy of the searches conducted by the public authority in looking for relevant records. My Office's approach in search cases was upheld in a decision of the High Court in the case of *Ryan v the Information Commissioner* Unreported May 20 2003.

In relation to the interpretation of Article 7(5) of the Regulations, I have taken a similar approach to that developed and approved by the High Court under FOI. In the case of additional information under item 3, I have no reason to doubt Department's assertion that the specific information sought was neither produced nor received by it and is, therefore, not held by it at this time. I consider, therefore, that Department is justified in refusing the request on the basis that it does not hold the environmental information sought.

In relation to the production of a list of technical supporting documentation in response to item 4, the position is that a complete list of all technical material consulted is not held by the Department. I have considered the feasibility of searching for supporting documentation on the specific points identified by the applicant as "false". I consider that even if the Department were to expend the resources necessary to go through the Green Paper and extract relevant references and attempt to link them to definite sources and to the points identified, I cannot see how the information thus created would be reliable unless the authors attributed and detailed each piece of technical supporting material. It seems to me that one could not be certain as to which sources were actually consulted and relied upon or what relative weight was given to the various materials and opinions. I consider that by identifying the list of sources as it did in the course of the appeal, the Department provided the information insofar as was practicable. However, I note that the Department failed to provide this information in its original decision in response to the request made under the Regulations.

I accept the Department's arguments as outlined above that to conduct the exercise necessary to review and compile a list of technical supporting documentation which may have been consulted on the section on nuclear energy in the course of the Green Paper's preparation would require extensive time and staff resources. In any event, I am satisfied that the information sought is not held at this time and section 7(5) of the Regulations applies.

Decision

In accordance with article 12(5) of the Regulations, I have reviewed the decision of the Department in this case and I find, for the reasons detailed above that it was justified in its decision to refuse the request **except** in relation to those parts of the information sought which were provided to the applicant in the course of this appeal. I vary the decision of the Department 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 is given.

Emily O'Reilly
Commissioner for Environmental Information

September 2010