

Appeal to the Commissioner for Environmental Information
Case CEI/10/0002

European Communities (Access to Information on the Environment)
Regulations 2007 (S.I. No. 133 of 2007)

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

Public Authority: An Bord Pleanála (the Board)

Issue: Whether the Board was justified in its refusal of access to environmental information comprising:

- the parameters the Board applies to assessing risk and determining acceptance criteria in the context of its decision to refuse permission for a 25 mm thick steel gas pipeline of 5000 mm diameter and planning guidelines for wind turbines
- the legislative basis for the oral hearing on the Corrib pipeline
- the procedures for conducting the hearing such as choice of staff, specific legislative areas to be addressed and other matters
- the specific approach of the Board to moving from a system of decision making 'based on Patronage' to one which implements the Environmental Acquis

Summary of Commissioner's Decision: The Commissioner found that the Board was justified in its decision to refuse parts of the request on the basis that it did not hold environmental information within the scope of the request. She found that section 7(5) of the Regulations allows the Board refuse a request on the basis that the information is not held by it

Background

On 13 December 2009 and 22 September 2009, the applicant asked the Board for information on

- the parameters the Board applies to assessing risk and determining acceptance criteria in the context of its decision to refuse permission for a 25 mm thick steel gas pipeline of 5000 mm diameter. Reference was also made to the planning guidelines for wind turbines and the Board's approach was questioned
- the legislative basis for the oral hearing on the Corrib pipeline
- the procedures for conducting the hearing such as choice of staff, specific legislative areas to be addressed and other matters
- the specific approach of the Board to moving from a system of decision making 'based on Patronage' to one which implements the Environmental Acquis.

Having had no decision on his request within the statutory period, the applicant applied for an internal review on 19 January 2010.

On 20 January 2010, the Board wrote to the applicant apologising for the delay in responding which it said was due to the "misdirection" of his requests which it described as "an internal fault". In relation to the legislative basis for the hearing and the procedures under which it was conducted, the Board referred to the Planning and Development Acts and Regulations and to published procedures on its website. In relation to the gas pipeline matter, the Board said that it was unable to establish what recent decision the applicant had in mind. It said that the applicant had declined an offer of assistance in clarifying this matter when a staff member had made contact with him. It regarded the request on the approach to the Environmental Acquis as too general and refused access under Article 9(2) of the Regulations.

The applicant took the decision of 20 January 2010 to be an internal review decision, given that no original decision under the Regulations had issued (so that a refusal was deemed to have been the decision). He forwarded correspondence to my Office, paid the statutory appeal fee and made an appeal under Article 12 of the Regulations.

I have taken account of the submissions of the applicant and the Board, the Regulations and Directive 2003/4/EC on public access to environmental information (the Directive).

Elizabeth Dolan of my Office, sent her preliminary views to the applicant on 17 June 2010. The applicant responded and requested that I bring this appeal to a conclusion by way of a formal binding decision.

Scope of Review

Under Article 12 of the Regulations, I must review the decision of the Board in relation to the environmental information requested and affirm, vary or annul it. I emphasise, as I have had to do in other, similar cases in which the bulk of the applicant's submissions concern criticisms of public authorities, that it is outside my remit as Commissioner to adjudicate on

how public authorities carry out their functions generally.

Applicant's arguments

The applicant made detailed submissions criticising various aspects of the Board's work including the manner in which oral hearings are conducted and claiming that the Board did not clarify or adhere to the correct legislative basis in relation to assessment of risk and other related issues. He said that the fact that the parameters the Board uses in assessing risk and determining acceptance criteria are not available is a clear breach of the relevant EU Directives.

The Board's position

Much of the Board's submissions relate to the processing of the application and a claim that parts of the request were too general. I do not accept that the reference in the original request to a 25mm thick steel gas pipeline of 500mm diameter, especially when taken in conjunction with the applicant's reference to the oral hearing on the Corrib pipeline rerouting in his email of 13 December 2009 which made reference to a previous request of 22 September 2009, was not sufficient to enable the Board's staff to identify the case to which the applicant referred. I note, however, that the matter appears to have been confused somewhat by the applicant's references to wind turbines in Dundalk.

As regards the Board's request of 19 January 2010 to the applicant that he contact a member of its staff to clarify the details of the request, I note that the applicant's response asserted that the request was clear and that, if there had been problems with it, these should have been addressed "many weeks ago". He also says that it is neither possible nor necessary for him to call officials from abroad. It seems to me that, in general, there is an onus on applicants and public bodies to cooperate where necessary to ensure that requests are dealt with properly so that appeals are not required to clarify and rule on matters that could have been cleared up at a much earlier stage in the procedure. The Board has accepted that the original request had not been addressed within the statutory time limit. It would appear from the Board's submissions that, as well as having difficulty with the pipeline issue on which I have commented above, it was unable to deduce from the text of the request any identifiable environmental information on "The specific approach of the Board to moving from a previous system of decision making based on Patronage to one which implements the Environmental Acquis". I am inclined to the view that this contains a statement/judgement by the applicant and could be interpreted as seeking the Board's opinion on its moving from what the applicant deems one system of decision making to another. Later, in submissions to my Office, the applicant clarified in relation to this part of his request, that Member States which are compliant with EU legislation regulate development according to the Environmental Acquis and a statement to this effect should be available on documentation produced by the Board.

The applicant appears to have accepted that those parts of the request covering the legislative basis and procedures for hearings were addressed by the Board although he is not satisfied that the procedures are adequate. My Office asked the Board to confirm whether it held any information to the effect that its assessment of proposed development is regulated according to the Environmental Acquis. It also requested any information held setting out parameters the Board applies to assessing risk and determining acceptance criteria in the context of the Corrib case. It queried whether the Board had produced or held any advice or guidelines on

this. The decision maker's response on behalf of the Board was that, having consulted with colleagues and checked the Corrib case, he is satisfied that the Board does not hold records indicating that it complies with the Environmental Acquis and that it did not, prior to the Corrib oral hearing, commission any information on risk parameters or criteria from its own inspectorate or from external consultants.

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 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 information 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 the information, if held, would come within the definition of environmental information in the Regulations and the Directive.

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 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 or control 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.

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 in relation to section 10(1)(a) of the FOI Acts. I have made my position clear and explained my approach in a number of recent decisions arising from appeals by the same applicant. I do not intend to repeat the detailed background here.

I do not consider that my Office has jurisdiction, nor would it be appropriate, to pursue the Board in relation to how it fulfils its statutory role. The Board's staff have stated in writing that it does not hold the information sought by the applicant apart from the oral hearing procedures and relevant legislation already referred to above. I have no reason to doubt the Board's assurances that it did not create or receive the environmental information that the applicant seeks. I consider, therefore, that article 7(5) of the Regulations applies.

Decision

I find that the Board was justified in its decision to refuse the request under Article 7(5) of the Regulations and I affirm its decision.

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

16 July 2010