

Our Reference: FPL/624/02744

Your Reference:

22 December 2022

By email only

The NSAI
aie@nsai.ie

RE: AIE Request 02-20

Our clients: Public.Resource.Org Inc and Right to Know CLG.

A Chara

Many thanks for your letter dated 13 December 2022 setting out reasons for refusing to grant access. On behalf of our clients, we are therefore requesting an internal review of this decision.

An outline of our clients' comments on the refusal decision are set out below.

1. It is agreed that the Records constitute environmental information and that the NSAI is a public authority under the AIE Regulations. It is also agreed that there is a presumption in favour of disclosure and it is noted that the NSAI accepts in principle that the Records should be presumptively released.
2. The requestors disagree that the Records are protected by copyright.
 - a. First it is wrong to place reliance on the decision of the General Court in case T-185/19 since it is currently under appeal to the Court of Justice (C-588/21 P) and since it concerns a different set of records requested under different legislation.
 - b. Second the bald assertions of copyright by ISO and CEN and their "Terms of use and terms of sale" are irrelevant since copyright is a legal concept and exists only to protect works which are original in the sense that they are the author's own intellectual creation and the classification is reserved only to the elements of a work which that are the expression of such creation. While we have not had sight of the requested standards since even in-situ access has been refused, it is assumed that they are merely lists of technical procedures, thresholds, methodologies, templates etc which by their very nature are not original. In addition, even the layout and presentation of harmonised standards do not allow for any form of free and creative choice since they are governed

FP Logue LLP
8/10 Coke Lane
Smithfield, Dublin 7
Ireland

Partners: Fred Logue, Eoin Brady
Consultants: TJ McIntyre

p: +353 (0)1 531 3510
f: +353 (0)1 531 3513
e: info@fplogue.com

www.fplogue.com

by their own standards which sets out in fine detail how they should be presented and even how the language should be expressed¹.

- c. The judgment in *James Elliott* speaks for itself when it states at paragraph 4 that “a harmonised standard such as that at issue in the main proceedings, adopted on the basis of Directive 89/106 and the references to which have been published in the Official Journal of the European Union, forms part of EU law, since it is by reference to the provisions of such a standard that it is established whether or not the presumption laid down in Article 4(2) of Directive 89/106 applies to a given product” This couldn't be clearer.
 - d. It is notable that the decision has not dealt with the fact that the NSAI is required to actively disseminate the Records under Article 7(2)(a) of the AIE Directive since this provision includes EU and Irish law which the Court of Justice has already found to include the Records.
3. Even if, for argument's sake, the Records were protected by copyright the exception in Regulation 9(1)(d) is not engaged.
- a. First it is not a breach of copyright to grant access to the Records by virtue of section 76 of the Copyright and Related Rights Act 2000 (the “2000 Act”) which provides that it is not an infringement of copyright to undertake an act under statutory authority as is the case here.
 - b. Second there is no suggestion that the requestors' use of the Records, once released, would infringe any alleged copyright and indeed it can be confirmed that the requestors use of the Records will be confined to acts that are permitted under Chapter 6 of Part II of the 2000 Act notwithstanding that they don't agree that there is a copyright.
 - c. Third even if NSAI or an alleged copyright holder apprehended an infringement of its intellectual property rights then it could apply to the District, Circuit or High Court for appropriate remedies depending on the value of the claim. In particular the District Court is a low-cost jurisdiction for litigating copyright claims up to €15,000. There is therefore no suggestion that it would be difficult for NSAI, ISO or CEN, all of which are well resourced organisations, to assert their intellectual property rights.
 - d. Fourth the income that would be allegedly lost has not been quantified or put in the context of the overall income streams of the holders of the alleged copyrights, but it is obvious that the alleged loss of revenue would be negligible.
 - e. Fifth, insofar as arguments are made that the release of the request would undermine the entire standardisation system and/or the financing of ISO/CEN and/or NSAI there is no evidence for this allegation. It is not relevant to make arguments which are tantamount to saying that the system of harmonised standards systematically takes precedence over the right of access to them. This argument is essentially that access to harmonised standards as a category of information must always be refused. This is inconsistent with the presumption of access already accepted by NSAI.

¹ For example <https://www.iso.org/drafting-standards.html>

- f. Therefore, there is no adverse effect on alleged intellectual property rights which will not be affected by granting the request and in any event any perceived loss will be negligible so that any effect that there might be is *de minimis* and therefore not adverse.
4. Even if it can be said that there is an adverse effect on intellectual property rights, the public interest nonetheless favours release.
- a. First, as set out above, there is no interference with intellectual property rights through a grant of access, the alleged copyright will exist one way or the other. In fact the point of copyright is to allow authors to make their works available. In other words the very act of making a work available has no impact on copyright at all.
 - b. Second the public interest factors in favour of refusal can only be related to the exception invoked and must be made by reference to the content of the Records. Therefore, this public interest may consist only of a quantification of the degree and likelihood of the harm anticipated by release to the requestors of the Records and nothing else. The views of NSAI based on an alleged incompatibility between the right of access and the system of harmonised standards are entirely irrelevant. As set out above the alleged loss of revenue (assuming that the requestors were prepared to pay for the Records) is negligible relative to the size of ISO and CEN and bearing in mind that NSAI is state funded.
 - c. Third the decision maker has underestimated the public interest in granting the request. These standards concern environmental management and greenhouse gases and access therefore is important in the context of combating climate change and halting biodiversity loss, this hasn't been taken into account. Given that the Records are part of EU and Irish law and are de-facto mandatory a very significant weight should be given to granting the request.
 - d. In conclusion the decision maker incorrectly outweighed a strong public interest in granting the request with a negligible public interest in refusal.
5. In situ examination
- a. It is noted that the internal review has not dealt with in-situ consultation of the Records and we would ask that this be considered in the internal review decision, if anything an in-situ examination would facilitate a more focused submission on why electronic copies should be provided and therefore this is an additional public interest factor specifically in relation to the form and manner of access.

Yours faithfully



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