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 CEI/18/0024

Date of decision: 19 December 2018

Appellant: Dr Ted Nealon

Public Authority: Department of Communications, Climate action and Environment

Issue: Whether refusal to provide access to further environmental information was justified on the grounds that the Department does not hold such information

Summary of Commissioner's Decision: The Commissioner found that the Department does not hold additional environmental information within the scope of the appeal. Accordingly, he affirmed the Department's decision, while varying the ground of refusal to reflect that finding.

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

On 24 May 2018, the appellant submitted an AIE request to the Department seeking:

> "All information and correspondence, including all internal correspondence, all correspondence with the Minister or Ministers, all correspondence with Wicklow County Council, all correspondence with the EPA and all correspondence with the EU Commission and the European Court of Justice, relating to the following findings of the High Court …"

He cited nine findings from the judgment of the High Court in *Brownfield Restoration Ireland Limited & anor -v- Wicklow County Council; Wicklow County Council -v- O'Reilly & ors* (No. 2) [2017] IEHC 397 (*Brownfield No.2*) (delivered on 12 May 2017 and available at www.courts.ie.) That case involved a large illegal landfill site at Whitestown, County Wicklow.

The Department gave notice of its decision on 22 June 2018, saying that it had identified 42 relevant records, which it listed in a schedule of records. It granted full access to 17 records and part-access to 10, redacting certain information from the latter on the ground of article 8(a)(i) of the AIE Regulations. It refused to provide access to the remaining 15 records on the grounds of articles 8(a)(i) and 8(a)(iv).

The decision stated that: "Although your request can be said to relate to information on emissions into the environment in accordance with article 10(1) as it relates to information which falls within the scope of article 8 the information cannot be disclosed". Article 10(1) makes it clear that such a decision is not permissible, by providing that "notwithstanding article 8 … a request … shall not be refused where [it] relates to information on emissions into the environment".

The decision-maker went on the say that: "in accordance with article 10(3) I have weighed the public interest served by disclosure against the interest served by refusal of your request. I have determined that the public interest would not be served by disclosing the information you request".

The appellant requested a review of that decision in relation to 13 specific records: records numbered 5, 6, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38. He said that the ground relied on in refusing access to these records was article 8(a)(iv) (which concerns the confidentiality of the proceedings of public authorities) and he presented an argument as to why that ground should not apply.

The Department conducted a review and issued a review decision. This varied the original decision as follows:

- It varied the basis for refusing access to record no. 28 to article 9(2)(d), which concerns the internal communications of public authorities.
- It granted access to some of the information in record no. 32, but refused access to the remaining information in that record on the ground of article 8(a)(i).

The decision-maker gave reasons for her decision, which included an assertion that section 31(1)(a) of the Freedom of Information Act 2014 applied to the information that was refused on the ground of article 8(a)(iv) because the relevant records are protected by legal professional privilege.

The appellant appealed to my Office, referring to the High Court's findings on the illegal landfill site and saying:

> "The Department has invoked articles 8 (a)(iv) and (9)(2)(d) to refuse my request for numerous documents. The basis of my appeal is that nowhere in the spirit, the wording or the intent of these articles, or of any other EU or Irish legislation is the provision that they could be used as a cover-up, to prevent information about such serious occurrences from being provided. The Department also invokes the public interest when it seems that the only interests being served are those of the authorities who carried out these unfortunate actions."

In carrying out my review I had regard to the submissions made by the appellant and the Department. I also 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'); and the relevant jurisprudence of the courts.

Identifying the withheld information within the scope of appeal

The Department's schedule of records only listed records that were created after 12 May 2017. In a submission to my Office, the appellant confirmed that his request was limited to records "arising" after 12 May 2017.

Some of the Department's records comprise more than one document. For example, record number 5 contains two emails. Several of the records included the High Court judgment dated 12 May 2017 as an attachment. The appellant confirmed to my investigator that he is not seeking a copy of that judgment in his appeal. He also confirmed that he is not seeking records of correspondence between professional lawyers and "the authorities".

My investigator asked if he was seeking a copy of emails that forwarded a document from one person to another, or if it was only the documents being forwarded that he sought. He replied:

> "I am seeking copies of the emails as well as the documents as they give context and understanding to the environmental information and, as such, I believe should be considered environmental information; e.g. the environment is constantly evolving hence a document or report out of context and time does not provide the full or accurate information".

I considered how I should regard "correspondence between professional lawyers and the authorities" when it was subsequently forwarded from a non-lawyer recipient to another non-lawyer. I decided that it would not make sense to exclude records of correspondence between lawyers and officials only to bring the same information back into scope when the receiving official shared that correspondence with a non-lawyer colleague. I therefore regarded all emails which simply forwarded correspondence between professional lawyers and officials to other public authority officials as excluded by the appellant. I also took the appellant's statement that his request was limited to records "arising" after 12 May 2017 to mean that he did not seek older records when they were simply attached to emails that were created after 12 May 2017.

The Department provided my Office with copies of the withheld information that was listed in its schedule of records. When I excluded records of correspondence between professional lawyers and officials and records of the internal sharing of such records, the only remaining records were two emails that comprise record number 28. Subsequently, the Department informed my investigator that, while it had intended to withhold record 28 and while its schedule listed it as "refused", the Department had unintentionally released it to the appellant.

As a result, it appeared at this point that there was no withheld environmental information within the scope of this appeal.

My investigator became aware (as a result of an internet search) that a written communication from the Department to the EU Commission that was within the scope of the request was absent from the schedule of records. In *Brownfield No.2*, the Court referred (in paragraph 21) to an "erroneous statement" having been given by the Department to the EU Commission. Information available on the internet indicated that the Department had written to the Commission to inform it of a correction made to the record in response to that judgment. When asked about this, the Department confirmed that this record was created in May 2017 and it should have been included in the schedule. However, the Department added that it had already released this record to the appellant in December 2017, on foot of a Freedom of Information request. The appellant confirmed to my investigator that he received this record. Notwithstanding this, my investigator asked the Department to undertake a complete review of its search for relevant information in order to discover any other relevant records. The Department complied with this request and, in due course, reported that it had found no further records within the scope of this appeal.

My practice as Commissioner for Environmental Information when a public authority maintains that it holds no further relevant information is guided by my experience as Information Commissioner. It is not normally my function to search for records. My role is to review the decision of the public authority that it holds no further relevant records. This means that I must have regard to steps taken by the public authority which led to its conclusion along with information on the authority's record storage practices.

At the request of my investigator, the Department provided my Office with a description of its record management practices and a description of its search efforts in this case. It explained that all members of staff who might hold relevant information were asked to search for records and it confirmed that they complied with those requests. It explained how the request for record searches included requests to senior staff in any division which might hold relevant records.

The appellant submitted that: "In assessing impacts and damage to the environment, and in assessing the causes, including administrative causes, a full assessment of the relevant documents is essential". I agree. As may be seen above, when correspondence involving lawyers was excluded from scope, very few records remained at issue. My investigator asked

the Department to explain why most of the records listed as "refused" in its schedule of records related to *legal* matters while there appeared to be a lack of records regarding the *environmental* aspects of the Whitestown site. The Department explained that this reflected the different roles played by the Department and other agencies in relation to the matter. It said that, while the Department funded the remediation work at Whitestown, that work was overseen by a technical working group which included staff of the Environmental Protection Agency, the local authority and others but did not include a representative of the Department.

Having considered the Department's submissions, its explanation of its role in relation to Whitestown and other details (including details of the information already released and records excluded from scope by the appellant) along with the Department's assurance that no further relevant information is held, I accept the Department's position.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I affirm the Department's decision to refuse to provide further environmental information to the appellant, while varying the ground relied on to reflect my finding that the Department holds no further environmental information within the scope of this appeal.

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 was given to the person bringing the appeal.

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Peter Tyndall
Commissioner for Environmental Information

19 December 2018