

**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 2014
(the AIE Regulations)**

Case CEI/18/0007

Date of decision: 14 June 2018

Appellant: Kevin Crowley

Public Authority: Bord Iascaigh Mhara (BIM)

Issues:

1. Whether BIM's refusal of the AIE request was justified
2. If it was not justified, whether it would be appropriate for the Commissioner to require BIM to make environmental information available to the appellant

Summary of Commissioner's Decision: The Commissioner found that BIM's refusal of the request was not justified since it was a deemed refusal without reasons. Accordingly, he annulled that decision. He decided that it would not be appropriate for him to require BIM to provide the appellant with the requested environmental information since its non-disclosure is justified on the ground of article 8(a)(iv) of the AIE Regulations.

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

In late 2015 BIM announced that it would “no longer be proceeding with its application for an aquaculture licence for a proposed 15,000 tonne organic salmon farm in Galway Bay” and said that it had “informed the licensing authority (the Department of Agriculture, Food and Marine) that it is withdrawing the application”.

On 10 November 2017 BIM received an AIE request from the appellant, as follows:

I refer to a previous request made under FOI [i.e. the Freedom of Information Act] for all legal advice and correspondence received [by BIM] with regard to the Galway Bay salmon farm. This was refused as said project was still under consideration by DAFM [i.e. the Department of Agriculture, Food and the Marine]. As this project is now withdrawn and no longer under consideration, this reason for refusal is no longer applicable.

I would like to reapply for this legal advice under Access to Information on the Environment regulations, as it refers to a project that would impact on the environment.

BIM acknowledged receipt of the request but a month passed without the appellant receiving a decision. On 11 December 2017 he contacted BIM, pointed out that it had been a month since BIM had received his request and enquired as to its status.

BIM responded the same day, saying that it required more time to process the request. While BIM referred to the complexity of the information sought, it did not cite article 7(2)(b) of the AIE Regulations or state a date by which the appellant could expect to receive a decision. It said it would “respond as soon as possible”.

On 11 January 2018 the appellant contacted BIM again and said he had still not received a decision.

On 18 January 2018 BIM’s Freedom of Information Officer issued a letter to the appellant saying that she had been “advised that BIM must refuse” the request on the ground of legal professional privilege under article 8(a)(iv) of the AIE Regulations. The letter did not purport to come from a decision-maker or say that a decision had been made to refuse the

request or make any reference to the appellant's right to request an internal review of a decision. The letter went on to say that:

If a record would be exempt from production in court proceedings on the grounds of legal professional privilege (such as the requested records) a request for access must be refused under article 8(a)(iv) of the AIE Regulations. Legal professional privilege is protected by the Freedom of Information Act 2014 (section 3(1)(a), the Irish Constitution and EU law and applies to communications between a client and its lawyers concerning legal advice. As the records in question contain legal advice, they are covered by legal professional privilege and therefore cannot be disclosed.

On 23 January 2018 the appellant asked for an internal review.

On 21 February 2018 the appellant received an internal review decision from a member of the staff of BIM who identified themselves as a decision-maker. This decision affirmed "the original decision". It also informed the appellant of a right of appeal to OCEI within six months from the date of notification of the decision.

On 7 March 2018 the appellant appealed to my Office.

Scope of the AIE request

The AIE request was for all legal advice regarding the proposed Galway Bay salmon farm received by BIM up the date when the appellant had previously made a FOI request to BIM. In the earlier FOI request the appellant had also sought records of "legal correspondence". He referred to such records again in his AIE request but did not ask for them.

Analysis of the timeline

A strict timeline applies to AIE requests and I considered the timeline of this case. The request was emailed to BIM at 11.20 pm on Thursday 9 November 2018 and I regard it as having been received by BIM on Friday 10 November 2018. Accordingly, unless BIM properly extended the time in which to give notice of a decision, notification of a decision fell due, at the latest, on 9 December 2017.

Did BIM extend time?

On 11 December 2017 BIM emailed the appellant to say that it required more time to process the request. BIM referred to “the complexity and breadth of material requested” and said it would “respond as soon as possible”.

Article 7(2)(b) provides that:

Where a public authority is unable, because of the volume or complexity of the environmental information requested, to make a decision within one month from the date on which such request is received, it shall, as soon as possible and at the latest, before the expiry of that month—

(i) give notice in writing to the applicant of the reasons why it is not possible to do so, and

(ii) specify the date, not later than 2 months from the date on which the request was received, by which the response shall be made,

and make a decision on the request and, where appropriate, make the information available to the applicant by the specified date.

BIM’s email of 11 December 2017 was sent over a month after BIM had received the request when the period during which BIM could have extended time had already ended. The email also failed to specify the date when a response would be made. I conclude that BIM did not extend the time for giving notice of a decision. Accordingly, the appellant was entitled to receive a decision before, or at the latest on, 9 December 2017.

Deemed refusal

Article 10(7) provides that:

Where a decision is not notified to the applicant within the relevant period specified in article 7, a decision refusing the request shall be deemed to have been made by the public authority concerned on the date of expiry of such period.

As the appellant did not receive a decision within the permitted timeframe, the law deemed his request to have been refused on 9 December 2017. On that date, the appellant acquired a right to ask BIM for a review.

Request for review

On 11 December 2017 the appellant wrote to BIM enquiring about the status of his AIE request and pointing out that over a month had passed since BIM received it. The question arises as to whether this email should be regarded as a request for a review in accordance with article 11(1). That article provides that:

Where the applicant's request has been refused under article 7, in whole or in part, the applicant may, not later than one month following receipt of the decision of the public authority concerned, request the public authority to review the decision, in whole or in part.

As the law deemed the request to have been refused on 9 December 2017, I regard that date as the date on which the appellant "received" the refusal decision. The appellant was therefore free to request a review from BIM on any date between then and the 8 January 2018. From 9 January 2018 onwards he would have no right to make such a request. However, the appellant had not been made aware of this by BIM.

BIM accepts that it did not respond to the appellant in time, but submitted that it would place "an impossible burden" on BIM to expect it to have understood the appellant's email of 11 December 2017 as a request for internal review when the appellant did not expressly ask for a 'review'. I expect that the appellant would have been very likely to have expressly asked for a review if BIM had met its statutory obligations and given him a decision on time while informing him of his right to request a review.

A deemed refusal arises as a matter of law. It arises even when both the requester and public authority are completely unaware of it, although there is no excuse for a public authority being unaware of it. In addition, the statutory timeframe governing AIE requests applies even if the parties are unaware of it or even if they agree to depart from it: it is not something that can be either ignored unilaterally or modified by consent. Accordingly, a deemed refusal

arose in this case on 9 December 2017, at which time the right to request a review also arose. That right could be exercised within one month and there is no provision in the AIE Regulations which would allow the timeframe for the making of such a request to be extended. While BIM accepts that there was a delay in responding to this AIE request, it asked me to reject this appeal on the basis that the email of 11 December 2017 was simply a request for an update and the ‘real’ request for an internal review was made on 23 January 2018.

If I were to accept BIM’s view on this matter, the request for internal review made on 23 January 2018 would have been made *after* the time period allowed for the making of such a request had expired. The result would be that the appellant could not later have acquired a right of appeal to my Office. This would mean, in effect, that the appellant would pay the price for the shortcomings of BIM’s handling of his request. That would be entirely unfair.

BIM spoke of an impossible burden. The expectation that a public authority acting on receipt of an AIE request should pay close attention to timelines, recognise when a deemed refusal will arise in the absence of giving timely notification of a decision, recognise when the right to request a review arises and when such a right will expire (along with recognising the obligation to inform the applicant of that right in the first place) does not impose an impossible burden.

In this case the appellant pointed out that it had been over a month since BIM had received his request and enquired as to its status. If BIM had properly considered the request’s status at that point in time it would have realised that a deemed refusal had arisen and that the clock was running on the appellant’s opportunity to request a review of that refusal. BIM could then have informed the appellant of this and he could have promptly and expressly sought a review. However, BIM did not properly establish the status of the request and communicate it to the appellant.

When the right to request a review has arisen and an applicant then enquires about the status of his request or asks for an update, I do not regard it as impossible or unreasonable to expect the public authority to recognise that it ought to either inform the applicant of the right to request a review of a deemed refusal decision (if sufficient time remains) or regard such a

request itself as a request for a review so as to give effect to the applicant's rights under AIE law and inform the appellant accordingly.

I am satisfied in all the circumstances that I should regard the appellant's email dated 11 December 2017 as a request for a review.

Appeal to OCEI

It follows that since the appellant did not receive a review decision by or on 9 January 2018, he acquired the right to appeal to my Office on that date.

When BIM informed him of his right of appeal, it told him that he could appeal within six months of receiving its decision. In fact, the AIE Regulations allow for an appeal within one month of when an appellant received (or ought to have received, if sooner in time) an internal review decision.

The appellant appealed to my Office on 7 March 2018. Although this was within what BIM erroneously considered to be the permitted time period, it was in fact almost one month outside of that period. I have no reason to believe that BIM deliberately misled the appellant in this regard. I can only surmise that BIM failed to appreciate the timescale set out in the AIE Regulations regarding deemed refusal decisions and time extensions. Having said that, it is entirely unacceptable that BIM told the appellant he had six months in which to appeal when he really had just one month. BIM ought to be aware that the AIE access regime is entirely separate from and different to the FOI statutory provisions, including time periods for making an appeal.

The AIE Regulations permit me to extend the time for initiating an appeal when I am satisfied in the circumstances of a case that it is reasonable to do so. In light of BIM's handling of this case and the misinformation which it gave to the appellant, I decided that it would be reasonable to extend the time in which to initiate this appeal and I extended it to 7 March 2018. Accordingly, this appeal was made on time and is valid.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is; to review BIM's refusal decision; to annul, vary or affirm that decision; and to decide if it would be appropriate for me to require BIM to make environmental information available to the appellant.

In conducting my review I took account of the submissions made by BIM and the appellant. I 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 information at issue

There is a difference between legal advice and legal assistance. However, this AIE request sought only the former and my review is therefore concerned only with records of legal advice.

BIM provided my Office with a copy of its relevant records. They appear to be very comprehensive and I am satisfied that I have been given all of the relevant records.

I am satisfied that the records include confidential communications given to BIM by its lawyers acting in a professional lawyer-client relationship and that these records contain legal advice.

I considered whether the records of legal advice contain environmental information. BIM did not argue that they do not, but since my jurisdiction when reviewing the decision of a public authority on an AIE request is confined to environmental information, I thought it prudent to take this step.

Article 3(1) of the AIE Regulations provides that:

“environmental information” means any information in written, visual, aural, electronic or any other material form on—

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
- (d) reports on the implementation of environmental legislation,
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

I examined the records of legal advice in search of such information. I did not find any information that would meet the requirements of subparagraphs (a), (b), (d), (e) or (f) of the definition of environmental information.

I gave special consideration to whether any of the records of legal advice contain information meeting subparagraph (c), i.e. information on any measure, such as policies, legislation, plans, programmes, environmental agreements, or activities affecting or likely to affect the

elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements. I regard BIM's policy of seeking an aquaculture licence as such a measure. After all, every fish farm must have some effects on the state of the elements of the environment; for example, effects on landscape. I did not identify any other measure that I should consider.

I examined the contents of the legal advice records with a view to identifying information that was integral to BIM's policy of seeking an aquaculture licence and I found some information of that type. I therefore concluded that some of the information in the records provided to me by BIM contains environmental information within the meaning of subparagraph (c) of the definition set out in the AIE Regulations.

Analysis of the justification of refusal

BIM's original decision on the request was a deemed refusal decision. As the appellant did not subsequently receive a review decision on time, another deemed refusal arose.

BIM accepts and regrets that it did not comply with the statutory time limits pertaining to this AIE request. Deemed refusals are never justified, not least because they are decisions without appropriate reasons. I therefore find that BIM's refusal of this AIE request was not justified.

Whether it would be appropriate for me to require BIM to make environmental information available to the appellant

It does not necessarily follow from a finding that a decision was not justified for the reasons given or in the absence of any reason given that I should require the disclosure of information to the appellant. I am required to be satisfied that it would be appropriate to impose such requirements before taking that step.

Legal professional privilege

BIM's letter dated 18 January 2018 said:

- The records sought are covered by legal professional privilege and are exempt from disclosure under the AIE Regulations. More specifically, if a record would be exempt

from production in Court proceedings on the grounds of legal professional privilege (such as the records which you have requested), a request for access must be refused under 8(a)(iv) of the AIE Regulations.

- Legal professional privilege is protected by the Freedom of Information Act 2014 (section 31(1)(a)), the Irish Constitution and EU Law and applies to communications between a client and its lawyers concerning legal advice. As the records in question contain legal advice, they are covered by legal professional privilege and therefore cannot be disclosed.

I do not agree with BIM's assertion that "if a record would be exempt from production in Court proceedings on the grounds of legal professional privilege, a request for access **must** be refused under 8(a)(iv) of the AIE Regulations" (my emphasis). A request for environmental information can only be refused under article 8(a)(iv) if three tests are met:

1. Disclosure would adversely affect the confidentiality of the proceedings of one or more public authorities.
2. Such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts).
3. The public interest in disclosure does not outweigh the interest served by refusal. (Article 10(3) of the AIE Regulations refers.)

I considered whether article 8(a)(iv) applied in the current case. The appellant addressed this issue in a submission which included the following points.

- BIM's statement of reliance on legal professional privilege in their response makes no mention of the specific provisions in the Irish Constitution or EU law under which legal professional privilege may be claimed.
- The protection of legal privilege claimed can only apply in the case of legal proceedings actually in being. No such legal proceedings were ever instituted, and no legal proceedings were 'in contemplation' at the time the legal services were provided. On 21 December 2015 BIM notified the public that it had formally withdrawn its application for the salmon farm in Galway Bay. Therefore, the project is dead; no

legal proceedings are imaginable or can be contemplated, and the legal advice is no longer relevant or necessary.

- There are no court proceedings, 'in contemplation' or 'in being'. The legal advice and correspondences requested and at issue did not amount to legally privileged professional advice and correspondence. Rather, it can only be said to have been “legal assistance” in a setting wherein no litigation was contemplated or in being. The mere vague possibility of litigation, of some form or other, at some stage or other in the future does not give rise to legal professional privilege. Reliance on legal professional privilege is therefore inappropriate.
- The reliance of BIM on article 8(a)(iv) is unfounded insofar as the documents and records requested do not relate to the “confidentiality of the proceedings of a public authority”, “where such confidentiality is otherwise protected by law”. BIM has failed to identify any legal provisions that protect the confidentiality of records and documents requested.
- The public interest served by disclosure must be taken into account.

Whenever a public authority decides to refuse a request in reliance on article 8(a)(iv) the particular proceedings which it has in mind and the basis for the belief that the confidentiality of those proceedings is protected by law must be identified. BIM submitted to my Office that at the relevant time it was “applying for (and the now Minister for Agriculture, Fisheries and the Marine was considering) a joint aquaculture and foreshore licence” and that process was its ‘proceedings’ within the meaning of article 8(a)(iv). I accept that statement.

“Proceedings” under article 8(a)(iv) are not confined to legal proceedings. However, I regard only BIM’s proceedings as relevant here, as the disclosure of BIM’s legal advice could not adversely affect the confidentiality of the proceedings of the relevant Minister or Department.

BIM submitted that the proceedings in which it was engaged required it to obtain legal advice. It submitted that the confidentiality of the legal advice which it received is protected by legal advice privilege.

I am aware that legal advice privilege and litigation privilege are two distinct types of privilege that both come under the term ‘legal professional privilege’. It is well established that legal advice privilege exists in Irish law. It applies to confidential communications between a lawyer and client, in the course of a professional legal relationship, for the purpose of seeking or giving legal advice. The privilege ‘belongs’ to the client and there is no requirement for litigation to be in train or anticipated. I am satisfied that BIM is entitled to claim legal advice privilege in relation to the information that is at issue in this review. I therefore accept that disclosure in this case would adversely affect the confidentiality of BIM’s licence-seeking proceedings and I accept that such confidentiality is otherwise protected by law.

Turning now to article 10(3) of the AIE Regulations, I recognise that there is a public interest in the upholding of legal professional privilege. It is regarded as a cornerstone of the administration of justice. In [Martin & Doorley v. Legal Aid Board \[2007\] 2 IEHC 76](#), for example, the High Court held that “legal professional privilege exists and has been elevated beyond a mere rule of evidence to ‘a fundamental condition on which the administration of justice as a whole rests’”. Accordingly, there would have to be exceptional public interest factors at play, in favour of disclosure, before legal professional privilege could be set aside.

The public interest served by disclosure

I considered the appellant’s public interest arguments to see if such factors apply in this case. He summarised his argument as follows:

In this case there was a public expenditure of €269,813 on legal fees. The request relates to information of public interest for which significant public funds were expended, concerning marine salmon farming— which is an issue of considerable controversy and public disquiet due to apprehended adverse impacts on the marine environment. The project concerned would have represented a 125% (approx.) increase in the capacity of this industry. Being concentrated on one site, this would have represented a massive intensification of salmon farming, with potentially catastrophic effects on wild fish and fisheries.

The taxpayer is entitled to know: how tax revenue is spent; that public servants are not acting outside of their remit; that public servants are obtaining value for money; that State agencies are not being used as a front for private businesses to circumvent proper planning and licensing regulations; whether BIM has any remit or legislative basis to apply for an aquaculture licence; whether BIM had any remit or legislative basis to enter into contracts with a private operator whereby it would be a licensee of a lease held by BIM; whether BIM would have any legal recourse to enforce conditions of a contract with regard to operational matters that would be, of necessity, commercially confidential to a private operator; whether BIM would have any power to enforce licence conditions greater than those of DAFM; whether BIM would have the legal remit to require additional conditions in a contract, such as requiring local employment, as suggested in the Environmental Impact Statement, and whether these conditions would be enforceable; whether the funding by BIM of the initial environmental assessment, application, and public consultation, at considerable cost, would have constituted illegal State aid to a private operator, and whether advice was obtained on this.

I appreciate that there is a very significant public interest in the protection of biodiversity in general and the marine environment and inland fisheries in particular. However, this case is about access to legal advice. I would expect that members of the public who are concerned about the protection of the marine environment and inland fisheries would be pleased to know that public authorities seek professional legal advice when contemplating projects which could affect the environment. Such advice could only help to ensure that the many laws that are in place for the purpose of protecting the environment are identified and complied with. Unlike the appellant, I have had the opportunity of considering the legal advice that is at issue in this case and I am completely satisfied that the public interest in access to it does not outweigh the public interest that is served by the protection of legal advice privilege.

I considered whether any environmental information contained in the legal advice could be separated, in accordance with article 10(5) of the AIE Regulations, from information to

which article 8(a)(iv) applies. I concluded that such separation is not practicable since the request was solely for legal advice and article 8(a)(iv) applies to all of the legal advice.

Decision

The deemed refusal by BIM of this request was not justified and I hereby annul it. I find that it would not be appropriate for me to require BIM to provide access to the requested environmental information because non-disclosure is justified under article 8(a)(iv). This is because disclosure would adversely affect the confidentiality of BIM's proceedings in circumstances where such confidentiality is otherwise protected by law and the public interest in disclosure does not outweigh the interest served by non-disclosure. Accordingly, I do not require BIM to make specific environmental information available to the appellant.

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.

Peter Tyndall

Commissioner for Environmental Information

14 June 2018