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: OCE-99411-G9T2S7

Date of decision: 10 May 2022

Appellant: Mr X

Public Authority: Environmental Protection Agency (the EPA)

Issue: Whether the EPA was justified in refusing access to certain records under articles 9(1)(b) and 9(2)(d) of the AIE Regulations and in refusing access to additional environmental information coming within the scope of the appellant's request on the basis that no further relevant environmental information is held by or for it.

Summary of Commissioner's Decision: The Commissioner annulled the EPA's decision. He directed the EPA to release records 41 and 42. He also directed the EPA to undertake a fresh decision making process in respect of records 1-26, 28-40, and 43-63 and in respect of the appellant's request for additional relevant environmental information.

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

1. This case has its background in a nine-part request submitted by the appellant to the EPA on 2 September 2019 (EPA reference OEE AIE 2019 24) seeking access to further records relating to previous requests he had made. On 2 October 2020, the EPA refused the appellant's request under articles 9(2)(a) and (b) of the AIE Regulations on the grounds that it was manifestly unreasonable having regard to the volume or range of information sought and that parts 1, 2, 3, and 4 were formulated in too general a manner. It noted that, on 26 September 2019, it had offered to assist the appellant in amending and/or refining the scope of his request.

2. On 3 October 2019, the appellant sought an internal review of that decision (OEE AIE 2019 24) wherein he also refined the scope of his request dated 2 September 2019. On 23 October 2019, the EPA notified the appellant that it would process his refined request as a fresh request in accordance with the AIE Regulations (EPA reference OEE AIE 2019 33). On 31 October 2020, the EPA informed the appellant that, due to the complexity of the environmental information requested, it required an extension of one month in accordance with article 7(2)(b) of the AIE Regulations, in order to make its decision. Subsequently, the EPA notified the appellant that it had been unable to make a decision within the extended timeframe. On 4 December 2019, the appellant sought an internal review of the deemed refusal of his request.

3. In a decision dated 2 January 2020, the EPA decided to part-grant the appellant's request. It stated that it was refusing access to 63 records in full relating to parts 1, 4, 5, 7, 8, and 9 of his request under article 9(1)(b) of the AIE Regulations on the ground that disclosure of the information would adversely affect ongoing criminal proceedings taken by the DPP against the appellant. It also refused access to part 6 under article 7(5) of the AIE Regulations on the ground that the information sought is not held by or for the EPA. It granted access to parts 2 and 3 other than in the form or manner of access desired under article 7(3)(a)(i) on the ground the information sought is already available to the public in another form or manner that is easily accessible. In doing so, the EPA directed the appellant to the relevant location on its website and provided the appropriate link.

4. The appellant submitted an appeal to my Office dated 9 November 2020, which my predecessor exercised his discretion to accept. In essence, the appellant set out that the EPA had incorrectly applied article 9(1)(b) and that it had not identified all the environmental information he had requested. He also made a number of comments in respect the EPA's decision regarding OEE AIE 2019 24, which does not form part of this review.

5. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the correspondence between the EPA and the appellant as outlined above and to correspondence between my Office and both the EPA and the appellant on the matter**.** I have also examined the content of the records at issue. In referring to the records at issue, I have adopted the numbering system used by the EPA when processing the request. In addition, I have 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).

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

Scope of the Review

7. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.

8. As outlined above, this case has its background in a nine-part request submitted by the appellant to the EPA on 2 September 2019 (OEE AIE 2019 24), which the appellant subsequently refined on 3 October 2019. The EPA processed that refined request as a fresh request (OEE AIE 2019 33) and that is the request at issue in this review. Having examined the wording of the appellant's correspondence to the EPA dated 2 September 2019 and 3 October 2019, and given that the he has not indicated otherwise to my Office, I am satisfied that the request at issue sought access to the following:

    1. Original Site Inspection/Field Notes:
        a. 04 June 2009 – [DH] & [JH]
        b. 29 June – [DF] & [JH]
        c. 23 July – [JH] & [DFr]
        d. 14 August – [DF] & [JH]
        e. 25 August – [JH] & [NH]
        f. 23 September – [JH] & [EM]
        g. 09 October- [JH] & [LM]
        h. 11 November – [EM] & [NH]
        i. 11 November – [DH] & [JH]
        j. 13 November – [EM] & [NH]
        k. 26 November – [JH] & [RM] (named professional services firm)
        l. 30 November - [JH] & [RM] (named professional services firm)
        m. 01 December- [JH] & [RM] (named professional services firm)
        n. 02 December- [JH] & [RM] (named professional services firm)
        o. 03 December- [JH] & [RM] (named professional services firm)
        p. 04 December- [JH] & [RM] (named professional services firm)
        q. 11 December – [DF] & [DH]

2. One drawing showing the location of the gas monitoring boreholes installed by or on behalf of the EPA and/or [an identified] County Council around the periphery of [Facility A] since 01 July 2010 and one drawing detailing the design of such boreholes.

3. One drawing showing the location of the gas extraction wells installed in the north-west of the [Facility A] for or on behalf of the EPA and/or [an identified] County Council since 01 July 2010 and one drawing detailing the design of such extraction wells.

4. All correspondence between the EPA and [Organisation A] (including responses) from 01 October 2007 to 01 June 2010 relating to the Specified Engineering Works Proposal by [Organisation B] on behalf of [Organisation C] for a compost curing facility at the [Facility A].

5. The following documents:
   a. a copy of a memorandum from [LK] to the Board of Directors of the EPA dated 25 August 2004 and minutes of the board meeting at which the memorandum was considered.
   b. a copy of the Site Inspection Report for the [Organisation C, Facility A and reference] on 26 July 2004, copies of all drafts and internal correspondence relating to that Site Inspection Report, a copy of the cover letter to [Organisation C] with that report and a copy of the contemporaneous notes of [DH] and [EM] relating to that Site Inspection
   c. a copy of the Site Inspection Report for the [Organisation D, Facility B and reference] on 30 June 2004, copies of all drafts and internal correspondence relating to that Site Inspection Report, a copy of the cover letter to [Organisation D] with that Report and a copy of the contemporaneous notes of [EM] and [LS] relating to that site inspection.

6. Drafts of the letter from [KO'B] to [Organisation E] dated 22 August 2014 relating to the "botched remediation" of the [identified] illegal landfill by [identified] County Council and all internal correspondence relating to that letter. The time period is for the documents sought is from 26 June 2014 to the date of issue inclusive.

7. The contemporaneous notes, draft reports, final report, issuing letter relating to the audit of the [Organisation D] [Facility B] on 15 March 2005. It is the appellant's understanding that the audit was carried out by [RB] and [EM] and that the report was issued on 25 April 2005 with a response dated 11 May 2005.

8. The contemporaneous notes, draft reports, final report and issuing letter relating to the audit of the [Organisation C] [Facility A] on 19 September 2005 (it is the appellant's understanding that the audit was carried out by [DH], [MG], and [EM] and that the issuing letter was dated 17 November 2005).

9. The EPA inspectors' contemporaneous field notes for the following site inspections at [Organisation C] [Facility A]
   a. 04 June 2009 – [DH] & [JH]
   b. 29 June – [DF] & [JH]
   c. 23 July – [JH] & [DFr]

d. 14 August – [DF] & [JH]
e. 25 August – [JH] & [NH]
f. 23 September – [JH] & [EM]
g. 09 October –[JH] & [LM]

9. I note that in its decision dated 2 January 2020, the EPA stated that it was refusing access to 63 records in full. However, having examined the schedule of records, it appears that of the 63 records listed, 62 were refused under article 9(1)(b) (records 1-26 and 28-63, relating to parts 1, 4, 5, 7, 8, and 9 of the appellant's request) and one was granted by way of a link provided (record 27, relating to parts 2 and 3 of the appellant's request).

10. During the course of the review, the EPA notified my Office that it was also refusing access to two of the records at issue (records 41 and 42) under article 9(2)(d) of the AIE Regulations.

11. I am satisfied that this review is concerned with whether the EPA was justified in refusing access to records 1-26, 28-40, and 43-63 under article 9(1)(b) of the AIE Regulations, in refusing access to records 41 and 42 under articles 9(1)(b) and 9(2)(d) of the AIE Regulations, and in refusing access to additional environmental information coming within the scope of the appellant's request, as set out at paragraph 8, other than the records already identified on the basis that no further relevant environmental information is held by or for it.

Preliminary Matters

12. I consider that the scheme of the AIE Regulations, and of the AIE Directive upon which the AIE Regulations are based, makes it clear that there is a presumption in favour of release of environmental information.

13. It is also important to state that a review by my Office is considered to be de novo, which means that it is based on the circumstances and the law as they pertain at the time of my decision.

Analysis and Findings

Article 9(1)(b)

14. The EPA has refused access in full to all 62 records at issue under article 9(1)(b) of the AIE Regulations. Having examined their content, I am satisfied that they date between 2003 and 2010 and can generally be described as follows:

- Records 1-26 (part 1) – records comprising site inspection/field notes (including handwritten notes, assessment of odour impact field record sheets, and sampling/monitoring sheets).
- Records 28-40 (part 4) – records comprising an email attaching an amended Annual Environmental Report and a Bund Test Report, a proposal for specified engineering works, requests for clarification regarding the proposal for specified engineering works and a

response, correspondence regarding notifications of non-compliance, and correspondence relating to identified court proceedings.

- Records 41 and 42 (part 5a) – records comprising a memorandum to the EPA directors (with two attachments) and a minute of a licensing meeting of the EPA where the memorandum was discussed.
- Records 43-47 (part 5b) – records comprising a site inspection report re. a notification of non-compliance, site inspection/field notes (handwritten notes), emails (which themselves had no content) forwarding draft site inspection reports, and an email with comments regarding draft correspondence and a draft site inspection report.
- Records 48 and 49 (part 5c) – records comprising site inspection/fields notes (handwritten notes) and a site inspection report re. a notification of non-compliance.
- Records 50-54 (part 7) – records comprising site inspection/field notes (handwritten notes), a notification of non-compliance, a licence audit report re. the notification of non-compliance, a response to the notification of non-compliance, and further correspondence in relation to the notification of non-compliance.
- Records 55-63 (part 8) – records comprising site inspection/field notes (handwritten notes), a notification of non-compliance, a licence audit report re. the notification of non-compliance, a photograph, other notes, and a response to the notification of non-compliance.

15. Article 9(1)(b) of the AIE Regulations provides that a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect the course of justice (including criminal inquiries and disciplinary inquiries). This provision seeks to transpose Article 4(2)(c) of the AIE Directive, which in turn is based on Article 4(4)(c) of the Aarhus Convention. Article 4(2)(c) of the AIE Directive provides that Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.

16. Article 9(1)(b) must be read alongside article 10 of the AIE Regulations, which provides for certain limitations on the ability of a public authority to refuse environmental information. Article 10(3) of the AIE Regulations requires a public authority to consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal and article 10(4) of the AIE Regulations provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest served by disclosure. Article 10(5) of the AIE Regulations provides that nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information.

17. The wording of article 9(1)(b) of the AIE Regulations makes it clear that there must be some adverse effect on the course of justice in order for the exception to apply. Accordingly, when relying on article 9(1)(b) the public authority must set out the reasons why it considers that disclosure of the information at issue could specifically and actually undermine the course of justice. The risk of the course of justice being undermined must be reasonably foreseeable and not purely hypothetical. If the public authority takes the view that the disclosure of the information would undermine the course of justice, it is then

for the public authority to weigh the public interest served by disclosure against the interest served by refusal (see to that effect, C-57/16 P ClientEarth v Commission paragraphs 51 and 124).

18. The Minister's Guidance, in considering "The Course of Justice" states:

> "Environmental information relating to anything which is the subject matter of any legal proceedings, or of any formal inquiry (whether past or present), or any preliminary investigation, may be refused. Examples would include information in connection with intended prosecution of offences by the Director of Public Prosecutions or by local or other public authorities; information affecting enforcement proceedings; material arising from public or disciplinary inquiries; and information relating to preliminary or other proceedings instituted by the European Commission" (paragraph 12.3).

19. In its decision, the EPA refused access to the records at issue under article 9(1)(b) of the AIE Regulations on the ground that their disclosure would adversely affect ongoing criminal proceedings taken by the DPP against the appellant. However, in its submissions to my Office, the EPA outlined that while it was continuing to rely on article 9(1)(b) of the AIE Regulations to refuse access to all of the records at issue, it was doing so on the ground that their disclosure would adversely affect ongoing criminal proceedings taken by the DPP against a Mr Y, rather than the appellant.

20. The EPA explained to my Office that a number of years ago it sent a file to the DPP alleging that two individuals, the appellant and Mr Y were responsible for disposing of or undertaking the recovery of waste at Facility A otherwise than under and in accordance with a licence under Part V of the Waste Management Act 1996, contrary to various provisions of the Waste Management Act 1996. The EPA stated, as the evidence against both individuals is so interlinked it was originally the DPP's intention to have one case brought against both the appellant and Mr Y, however, for various reasons, this could not occur. The EPA noted that the appellant was sent forward for trial alone and was acquitted by direction of the trial judge. That decision was appealed by the DPP and was overturned by the Court of Appeal, which ordered that the appellant be retried. That decision was then appealed by the appellant and was overturned by the Supreme Court, which ordered that there be no retrial.

21. The EPA noted that while the DPP's case against the appellant had concluded, the trial date for Mr Y was to be in late April 2022. It stated that some or all of the evidence that was used in the appellant's trial would most likely be used in the trial of Mr Y. It outlined that the Book of Evidence in the case against Mr Y included all of the records contained in the Book of Evidence in the case against the appellant, in addition to items of further evidence. It noted that all of the records at issue were being considered by the DPP as potential evidence.

22. The EPA stated that it envisioned that disclosure in the case against Mr Y would have many common elements to the disclosure in the case against the appellant. In its decision, the EPA indicated that all of the records withheld, apart from records 28, 38, 41, and 42, had previously been provided to the appellant's solicitor in response to a request the DPP seeking specific disclosure during the course of the criminal proceedings taken by the DPP against the appellant. In its submissions to my Office, the

EPA noted that record 28 was contained in the Book of Evidence against Mr Y and that record 38 may be used by the DPP in the trial of Mr Y.

23. Having regard to the EPA's submissions and the content of the records at issue, it appears to me that while records 1-26, 28-40, and 43-63 can be considered to be / have been evidence, potential evidence, or material that may be disclosed to the defence in the criminal prosecution of Mr Y, records 41 and 42 cannot. I therefore propose to deal with records 1-26, 28-40, and 43-63 first, before going on to consider records 41 and 42.

Records 1-26, 28-40, and 43-63

24. As noted above, it appears to me that records 1-26, 28-40, and 43-63 can be considered to be / have been evidence, potential evidence, or material that may be disclosed to the defence in the criminal prosecution of Mr Y.

25. It is important to note that the fact that information may relate to the investigation of criminal offences and potentially to matters of evidence in criminal proceedings does not, in and of itself, establish that its disclosure would adversely affect the course of justice; otherwise the AIE Regulations would provide for a class-based exception for such information, which they do not. I am aware of no restrictions on the use of the AIE Regulations as a means of obtaining information held by a public authority which might otherwise be available through the Book of Evidence / the process of specific disclosure.

26. I accept, however, that there are many instances where the disclosure of information under the AIE Regulations could adversely affect the course of justice. For example, if the disclosure of information was to result in in the manufacture or destruction of evidence, interference with potential witnesses, prejudicial pre-trial publicity etc. Furthermore, I consider, as a general point, that the release of material relating to the proposed conduct of a case is likely to adversely affect the course of justice in respect of future proceedings. As outlined above, when relying on article 9(1)(b) the public authority must set out the reasons why it considers that disclosure of the information at issue could specifically and actually undermine the course of justice. In addition, the risk of the course of justice being undermined must be reasonably foreseeable and not purely hypothetical

27. In its submissions to my Office, the EPA indicated that it had consulted DPP, who was of the view that information that had been released to the appellant through the Book of Evidence / in response to his solicitor's request for specific disclosure and were also relevant to the trial of Mr Y, should not also be released under the AIE Regulations. The EPA outlined that the DPP had advised that the release in response to the appellant's solicitor's request for specific disclosure, would have been subject to certain undertakings from the appellant not to use the records for any purpose unrelated to the preparation of his defence at trial and to release them under the AIE Regulations would breach such undertakings.

28. The EPA submitted, in essence, that disclosure of records 1-26, 28-40, and 43-63 under the AIE Regulations would adversely affect the criminal prosecution against Mr Y on the basis that such disclosure is unqualified and to the world large and could cause potential jurors to pre-judge relevant issues or give rise to a complaint by the accused that he was the subject of unfair pre-trial publicity. However, the EPA provided no explanation as to how such adverse effects would arise as a result of the disclosure of the particular information at issue.

29. The EPA's website states that information about compliance and enforcement of the waste sector is publicly available on its website and at EPA offices. In respect of information on its website, it notes that a specific licence, permit, or authorisation can be searched for and the corresponding "Licence Details" section gives access to the following information: licence application documentation; key compliance and enforcement reports and documents; operator submissions, annual environmental performance reports, and self-monitoring reports; EPA site visit (inspection and monitoring) reports; and site closure and decommissioning documents.

30. In respect of information at EPA offices, the website notes that members of the public can visit, by appointment, any EPA office to view all "formal enforcement correspondence" between EPA and regulated facilities, including all communications between the holder of the licence, permit or authorisation and the EPA for the purpose of their formal regulatory interactions. It states that this correspondence includes, in addition to the information and documentation available on the "Licence Details" section, for each licence, permit, or authorisation: site updates; performance and monitoring reports; notifications of complaints, incidents, and 'non-compliances'; a summary of complaints; compliance investigations; and EPA instructions and corrective actions that address non-compliance at regulated sites to achieve improvements in compliance status.

31. Having considered records 1-26, 28-40, and 43-63 which are dated between 2003 and 2010, it appears to me that a number of them fall (or support records that fall) into the categories of records that are generally publicly available on EPA's website and/or at EPA Offices. Furthermore, some of the records at issue, which were received by the EPA indicate that they had been placed on the "Public File" (e.g. records 29, 32, 53, 54).

32. In the circumstances, it seems to me that the EPA has, in essence, adopted a "blanket approach" to its refusal of records 1-26, 28-40, and 43-63 under article 9(1)(b) due to the records' relationship with the ongoing criminal proceedings, regardless of the nature or content of the records. This is not an appropriate application of the exception. For the sake of completeness, and notwithstanding that proceedings may have now commenced, I see no evidence to suggest that consideration was given to each of the records at issue to determine if it was reasonably foreseeable that disclosure of the information contained therein would in fact cause potential jurors to pre-judge relevant issues or give rise to a complaint by the accused that he was the subject of unfair pre-trial publicity. As outlined above, the fact that information may relate to the investigation of criminal offences and potentially to matters of evidence in criminal proceedings does not, in and of itself, establish that its disclosure would adversely affect the course of justice.

33. Accordingly, I find that the EPA was not justified in refusing access to records 1-26, 28-40, and 43-63 under article 9(1)(b) of the AIE Regulations. However, as it appears that the EPA has not undertaken any substantial consideration of the content of the individual records, I do not consider that it is appropriate for me to direct the release of all of the information at issue. While it is disappointing that it results in further delay, I consider that the most appropriate course of action to take at this stage is to annul the EPA's decision to refuse access to records 1-26, 28-40, and 43-63 and direct it to undertake a fresh decision-making process in respect of these records. The appellant will have a right to an internal review and a review by my Office if he is not satisfied with the EPA's decision.

Records 41 and 42

34. Notwithstanding my view above regarding the EPA's "blanket approach" to its refusal of records 1-26, 28-40, and 43-63, I would note that, in its submissions to my Office, the EPA provided more specific detail in support of its refusal of records 41 and 42 under article 9(1)(b) of the AIE Regulations. I now turn to consider those particular records.

35. The EPA informed my Office that records 41 and 42 outline a proposed strategy for dealing with potential indictable offences and that this strategy has not changed. It stated that releasing the details of this strategy could adversely affect ongoing or future cases on the basis that it could reveal the minimum criteria for the EPA/DPP to proceed. It stated that record 41 also reflects legal advice given by the DPP in relation to specific cases.

36. Record 41 comprises a memorandum (the Memorandum) submitted to the EPA directors outlining a proposed strategy to deal with current and future indictable cases and to formalise an institutional relationship between the EPA and An Garda Síochána. It has two attachments (Attachment A and Attachment B). The Memorandum provides a background as to why the proposed strategy is needed, indicates that it has carried out a number of consultations, provides six long-term options (with advantages and disadvantages) and three short-term options, makes five recommendations, and indicates where the recipients of the Memorandum can get more information. The Memorandum is dated 25 August 2004. While I note that the EPA has stated that the strategy has not changed, having examined the content of the Memorandum, it appears to me that it is quite high-level. It is, essentially, a general proposal for putting in place the structures and resources needed to allow the EPA to pursue more cases on indictment effectively and efficiently, rather than a specific legal strategy for dealing with particular cases or details as to how cases are to be conducted. Accordingly, it is not evident to me how the release of the Memorandum would adversely affect the course of justice.

37. Attachment A summarises the circumstances and the then current status of four cases which the EPA had referred to the DPP for consideration for prosecution on indictment. While Attachment A provides a number of details in respect of those cases, including the manner in which the EPA had prepared its files, it does not set out a specific legal strategy for dealing with those cases or details as to how cases are to be conducted. Given the passage of time and the high-level nature of its content, it is not evident to me how the release of Attachment A would adversely affect the course of justice.

38. Attachment B is a letter from the Director General of the EPA to the Garda Commissioner dated 9 September 2004 requesting assistance from the National Bureau of Criminal Investigation in the investigation of suspected environmental offences under the criminal code and highlights a particular case demanding urgent attention. It reflects information contained in the Memorandum. Again, given the passage of time and the high-level nature of its content, it is not evident to me how the release of Attachment B would adversely affect the course of justice.

39. For the sake of completeness, while I note that the EPA stated that record 41 reflects legal advice given by the DPP in relation to specific cases, it did not at any stage specify which information contained legal advice or submit that it was subject to legal professional privilege. Accordingly, even if legal professional privilege applied to record 41, whether in full or in part, it seems that the EPA has chosen to waive any such privilege that might have applied.

40. Record 42 is the minute of a licensing meeting held on 5 October 2004 where directors of the EPA appear to have considered record 41. It briefly describes the Memorandum, acknowledges that a number of options were put forward, notes that, following discussion, the proposal was approved in principal, and sets out an immediate next step of writing to the Garda Commissioner. It provides no detail of the discussion that took place. Having considered the submissions of the EPA and examined the content of record 42, it is also not evident to me how disclosure of any of the information in record 42 would adversely affect the course of justice.

41. Consequently, I find that the EPA was not justified in refusing access to records 41 and 42 under article 9(1)(b) of the AIE Regulations.

Article 9(2)(d)

42. The EPA has also refused access in full to records 41 and 42 under article 9(2)(d) of the AIE Regulations.

43. Article 9(2)(d) of the AIE Regulations provides that a public authority may refuse to make environmental information available where the request concerns internal communications of public authorities, taking into account the public interest served by the disclosure. This provision transposes Article 4(1)(e) of the AIE Directive, which in turn is based on part of Article 4(3)(c) of the Aarhus Convention.

44. As with article 9(1)(b) of the AIE Regulations, article 9(2)(d) must be read alongside article 10 of the AIE Regulations, which, as noted above, provides for certain limitations on the ability of a public authority to refuse environmental information.

45. When relying on article 9(2)(d), the public authority should show that the information at issue is an "internal communication" such that it falls within the scope of the exception. It is then for the public authority to weigh the public interest served by disclosure against the public interest served by refusal.

46. The term "internal communications" is not defined in the AIE Regulations, the AIE Directive, or the Aarhus Convention. However, the decision of the Court of Justice of the European Union (CJEU), in C-619/19 Land Baden-Württemberg v DR, gives some guidance on the internal communications exception. It notes that the term "communications", should be given a separate meaning to the terms "material" or "document" (paragraph 40), and that it can be interpreted as relating to "information addressed by an author to someone, an addressee who or which may be an abstract entity – such as 'members' of an administration or the 'executive board' of a legal person – or a specific person belonging to that entity, such as a member of staff or an official" (paragraph 37). It further notes that not all environmental information held by a public authority is necessarily "internal" and states that the "internal communications" exception:

> "…must be interpreted as meaning that the term 'internal communications' covers all information which circulates within a public authority and which, on the date of the request for access, has not left that authority's internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received" and
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> "…must be interpreted as meaning that the applicability of the exception to the right of access to environmental information provided for by it in respect of internal communications of a public authority is not limited in time. However, that exception can apply only for the period during which protection of the information sought is justified".

47. In addition, the Minister's Guidance, in considering "internal communications", outlines:

> "[Article 9(2)(d)] provides that information included in the internal communications of a public authority may be protected from release. This could include internal minutes or other communications, between officials or different public authorities, or between officials and Ministers. Public authorities should bear in mind that the use of this exception is discretionary. It should not be resorted to as a simple expedient to protect all internal communications in circumstances where it would be unreasonable to do so (see also sub-articles 10(3) and 10(4)). Normally, public authorities would not be expected to invoke this protection for information unless there are good and substantial reasons – not otherwise available in Articles 8 and 9 – for doing so" (paragraph 12.7).

48. While the Minister's Guidance states that internal communications could include communications between officials or different public authorities, I note that it does not say that it may include communications between any two public authorities. The High Court held in its judgment in Right to Know CLG and an Taoiseach and the Minister for Communications, Climate Action and Environment [2018] IEHC 371 that the Government is "undoubtedly" a public authority (paragraph 97). That case concerned meetings of the Government and it is notable that even though each Minister present at such meetings is the head of an individual public authority, (i.e. a department) collectively as 'the Government' they also constitute a single public authority. I am not aware of any other case in which the courts have upheld a communication between two or more public authorities as the internal communications of public authorities.

49. As referred to above, record 41 comprises a Memorandum dated 25 August 2004, which has two attachments Attachment A and Attachment B. The Memorandum outlines a proposed strategy to deal with current and future indictable cases and to formalise an institutional relationship between the EPA and An Garda Síochána. It is from an identified staff member of the EPA to the directors of the EPA. There is no evidence to suggest that the Memorandum has left the internal sphere of the EPA. Accordingly, I find that the Memorandum is an internal communication and falls within the scope of the exception provided for at article 9(2)(d).

50. Attachment A to the memorandum summarises the circumstances and the then current status of four cases which the EPA had referred to the DPP for consideration for prosecution on indictment. Having examined Attachment A it is clearly a constituent part of the memorandum itself and it is not a separate document. Accordingly, I find that Attachment A is an internal communication and falls within the scope of the exception provided for at article 9(2)(d).

51. Attachment B is a letter from the Director General of the EPA to the Garda Commissioner dated 9 September 2004 requesting assistance from the National Bureau of Criminal Investigation in the investigation of suspected environmental offences under the criminal code and highlights a particular case demanding urgent attention. Notwithstanding that Attachment B is *attached* to the Memorandum, it can be distinguished from Attachment A in that it is a separate communication. It is a letter between two non-departmental public authorities, the EPA and An Garda Síochána and having regard to the content of Record 42, appears to have been sent. Accordingly, I find that Attachment B is not an internal communication and does not fall within the scope of the exception provided for at article 9(2)(d).

52. Record 42 is the minute of a licensing meeting held on 5 October 2004 where directors of the EPA appear to have considered record 41. It briefly describes the Memorandum, acknowledges that a number of options were put forward, notes that, following discussion, the proposal was approved in principal, and sets out an immediate next step of writing to the Garda Commissioner. It provides no detail of the discussion that took place. I am of the view that minutes of internal meetings of public authorities are internal communications, given that they recount oral communications that occurred. Record 42 is clearly the minute of an internal meeting of the EPA directors. There is no evidence to suggest that anyone outside the EPA attended the meeting or that the record has left the internal sphere of the EPA. Accordingly, I am satisfied that it is an "internal communication" and falls within the scope of the exception provided for at article 9(2)(d).

53. As noted above, article 9(2)(d) must be read alongside article 10 of the AIE Regulations. Article 10(3) of the AIE Regulations requires a public authority to consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal and article 10(4) of the AIE Regulations provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest served by disclosure. Article 10(5) of the AIE Regulations provides that nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information.

54. In considering the public interest served by disclosure, it is important to be mindful of the purpose of the AIE regime, as reflected in Recital 1 of the Preamble to the AIE Directive, which provides that "increased public access to environmental information and the dissemination of such information contribute to greater public awareness of environmental decision-making and, eventually, to a better environment." The AIE regime thereby recognises a very strong public interest in openness and transparency in relation to environmental decision-making. Further, there is undoubtedly a public interest in the openness and transparency with regard to how the EPA carries out its functions, including its environmental enforcement functions.

55. The AIE regime also acknowledges that there may be exceptions to the general rule of disclosure of information, as noted in Recital 16 of the AIE Directive, which provides that "public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases". One such case is in respect of internal communications of public authorities. The general public interest in such an exception is evident from the European Commission's Explanatory Memorandum on the AIE Directive which notes that "it should be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account". This was referred to by the CJEU in C-619/19 Land Baden-Württemberg v DR, which clearly stated that the exception is intended to meet the need of public authorities to have a protected space in order to engage in reflection and to pursue internal discussions (paragraph 44).

56. As noted at paragraph 46, the CJEU in C-619/19 Land Baden-Württemberg v DR outlined that there is no temporal limitation on the operation of the exception regarding internal communications (see paragraphs 54 to 57). The CJEU further highlighted that as the exception is potentially very wide, the public interest balancing exercise required must be tightly controlled (paragraph 60). The interests involved must be weighed on the basis of an actual and specific examination of each situation brought before the public authority and myself on appeal (paragraph 59). Despite there being no temporal limit on the operation of the exemption, the CJEU introduced one into the balancing exercise. It noted that public authorities to which a request for access to environmental information in an internal communication has been made must take into account the time that has passed since that communication and the information that it contains were drawn up and that the exception can apply only for the period during which protection is justified in the light of the content of such a communication. It further commented:

> "In particular, if, in the light of the objective of creating, for public authorities, a protected space in order to engage in reflection and to pursue internal discussions, information contained in an internal communication could properly not be disclosed on the date of the request for access, a public authority may, on the other hand, be led to take the view that, on account of its age, the information has become historical and that it is accordingly no longer sensitive, where some time has passed since it was drawn up (see, by analogy, judgment of 19 June 2018, Baumeister, C-15/16, EU:C:2018:464, paragraph 54)" (paragraph 65)

Having regard to the above, it appears to me that the older the information at issue, the greater the requirement on public authorities to explain why it should not be released.

57. In its submissions to my Office, the EPA outlined that, in favour of disclosure, it considered the public interest in individuals being able to exercise their rights under the AIE Regulations to the greatest extent possible in order to access environmental information and the public interest in environmental information being made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. It outlined that, against disclosure, it considered the strong public interest in ensuring that information is not released under the AIE regime that could adversely affect criminal proceedings and the fact that release of the relevant information to a requester under the AIE Regulations places no restrictions on the subsequent uses to which the records may be put.

58. The Memorandum and Attachment A of record 41 and record 42 are described earlier in this decision. Having examined the information at issue, I am satisfied that the release of the Memorandum and Attachment A of record 41 and record 42 would provide insight into the EPA's environmental enforcement function and the preparation of its strategy to deal with serious environmental crime more effectively and efficiently, including details of the advantages and disadvantages of different options and the resources required to carry out the task. I am also satisfied that their release would assist the public's understanding of the relationship between the EPA, the DPP, and An Garda Síochána with regard to environmental enforcement. Given the importance of environmental enforcement, I consider that there is a strong public interest in such insight.

59. I have already found the disclosure of the Memorandum and Attachment A of record 41 and record 42 would not adversely affect the course of justice. As outlined above, the exception provided for in article 9(2)(d) of the AIE Regulations is designed to protect the "private thinking space" of public authorities. I accept that there is a strong public interest in protecting the space required by public authorities to think in private, engage in reflection, and pursue internal discussions. However, while the information at issue clearly contains detail of the internal considerations of the EPA with regard to its proposed strategy and its position on the status of particular cases, the information at issue is now over seventeen years old and the cases mentioned have progressed. The EPA also indicated that the strategy has been adopted. In my view, the impact of the disclosure of the records at issue would have no serious impact on the willingness of EPA staff members to prepare similar internal communications in the future and would not undermine the maintenance of the "private thinking space" of the EPA.

60. In the circumstances of this particular case, I am satisfied that that the public interest served by disclosure of the memorandum and Attachment A of record 41 and record 42 outweighs the public interest served by refusal of such information. For the sake of completeness, I wish to note that even if I am incorrect in my characterisation of Attachment B and it is, in fact, an "internal communication", for the same reasons as set out above regarding the Memorandum and Attachment A of record 41 and record 42, I am satisfied that the public interest served by the disclosure of Attachment B of record 41 would outweigh the public interest served by refusal of such information.

61. Consequently, I find that the EPA was not justified in refusing access to records 41 and 42 under article 9(2)(d) of the AIE Regulations.

Article 7(5)

62. Article 7(1) of the AIE Regulations requires public authorities to make available environmental information that is held by or for them on request. Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested environmental information is held by or for the public authority concerned. My approach to dealing with cases where a public authority has effectively refused a request under article 7(5) is that I must be satisfied that adequate steps have been taken to identify and locate relevant environmental information, having regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances, I consider that a standard of reasonableness must necessarily apply. It is not normally my function to search for environmental information.

63. In its submissions to my Office, the EPA provided details of its record storage practices and the searches conducted in response to the appellant's request. The EPA outlined that, as the Office of Environmental Enforcement (OEE) is responsible for enforcing and dealing with EPA licensed sites, the searches carried out were focused on the OEE. The EPA explained that, during the relevant time period, it was the practice of the OEE to set up an individual electronic folder for each EPA licensed site. It also stated that there were physical folders which contained any hard copy information received in respect of each licence.

64. The EPA noted that 17 relevant staff members were consulted, including any staff members mentioned in the appellant's request that still work for the EPA. It stated that they were asked to search for both electronic and non-electronic records. It outlined that the staff members carried out the searches of the relevant electronic folders and their emails using key words, including names and registration numbers. It stated that partial words were used to ensure that any alternative spelling would be picked up. It also stated that an enforcement database was searched. The EPA outlined that its staff do not use private emails to communicate in relation to licensed sites and that the EPA ICT Internet Usage Policy and the EPA ICT Mobile Devices Policy prohibit EPA staff from using personal email accounts for official business.

65. The EPA explained that each inspector records any field notes they take at facility site inspections into a dedicated hard back field notebook. It outlined that they record the date and the registration number of the site they visit. It stated that these field notebooks are usually held by the inspectors themselves unless they are requested to hand them over to the EPA legal team for evidence in prosecution cases. It noted that pages are not removed from these notebooks. The EPA stated that the inspectors searched their field notebooks by year, date, and licence registration number.

66. In referring to a discovery request submitted by the appellant dated 27 July 2012 seeking voluntary discovery of records, the EPA noted that all relevant information had been downloaded, collected in hard copy, and held off-site in 14 filing cabinets. It stated that one of the barristers who was involved in

collating and accessing the information for the discovery request was employed to search the off-site information for records which might come within the scope of the appellant's AIE request.

67. The general thrust of the appellant's position is that the EPA has not identified all relevant information in response to his request. In his statement of appeal to my Office dated 9 November 2020, he made a number of contentions, including: that the information at the link provided by the EPA relating to parts 2 and 3 of his request was not the relevant information, on the basis that the information sought related to infrastructure that had been installed and the drawings at the link provided related to proposed infrastructure that had not yet been installed; that the information relating to part 6 of his request should exist; and that the EPA had not identified all of the relevant field notes requested. During the course of this review, my Investigator wrote to the EPA outlining the appellant's position and seeking clarification in respect of his contentions. In doing so she noted that, upon her initial examination of the file, it appeared to her that that certain field notes relating to part 1(h) and part 9(a), (b), (d), and (e) (which were also referred to in part 1) had not been identified.

68. In response to the appellant's contention regarding parts 2 and 3 of his request, the EPA stated that the drawings provided do relate to infrastructure that was installed and that this was confirmed by the relevant EPA inspector. It stated that the inspector confirmed that the details of all the gas wells from 2010 – 2017 are contained in the publically available documents relating to the application made on 11 September 2017 by [identified] County Council to the EPA for a licence. It stated that the records include reports and assessments on landfill gas monitoring wells and gas infrastructure and its performance and these are contained in the Environmental Impact Assessment report, licence application documentation, and appendices. It noted that all the details in relation to the application are available at a new link (due to EPA's updated website). Similarly, it stated that the particular reference to the drawing is now at a new link.

69. In response to the appellant's contention regarding part 6, the EPA noted that all of the electronic records in the folder for the relevant EPA licensed site were examined. It outlined that it is not possible to consult the individual who wrote the letter as he is retired from the EPA and his email account no longer exists.

70. In response to the appellant's contention that all the field notes requested had not been identified, the EPA outlined its position that the field notes relating to part 1(h) did not exist, stating that one of the named inspectors had left the EPA and there was no relevant record relating to him for that date on the EPA enforcement database. It noted that the other named inspector checked his site notebook for the year in question and that there was no entry between 8 October 2009 and 13 November 2009. It also stated that he noted that there was a joint visit on 11 November 2009 by two other named individuals and he advised that it was unlikely that two separate visits would have been undertaken.

71. However, the EPA also informed my Office that it had located a number of records that were not located during its response to the AIE request and should have been, including, but not limited to those identified by my Investigator. It provided my Office with a copy of those records, which comprised both handwritten notes and odour impact sheets. It noted that it was seeking to withhold them under article 9(1)(b) of the AIE Regulations.

72. This, of itself, provides a sufficient ground for me to find that the EPA has not considered all relevant information for release. However, I would also point out that one of the records located during the course of this review, was an odour impact sheet for a date and individual for which and whom handwritten notes had already been identified. It appears to me that for some dates and some individuals both odour impact sheets and handwritten notes have been identified, however, for others, only one or the other have been identified. In light of the additional odour impact sheet located, it is unclear to me whether both odour impact sheets and handwritten notes should, in the relevant circumstances, exist for each individual. Also, having further examined the wording of the appellant's request and the records at issue, it appears to me that, in addition to the field notes referred to by my Investigator, there may also be field notes relating to parts 1(j), 5, and 7 for particular individuals, which have not been identified. Given that a number of field notes were located in response to my Investigator's specific queries, this also raises doubts regarding the adequacy of the searches carried out and whether all records relating to each and every relevant individual and date were considered.

73. Furthermore, while I acknowledge that, in respect of part 6 of the appellant's request, the EPA indicated that it carried out searches for the information sought, I note that in its submissions to my Office it stated that such information concerned "drafts of the letter from [KO'B] to [Organisation E] dated 22 August 2014". However, part 6 of the appellant's request also concerned "all internal correspondence relating to that letter". Accordingly, it appears to me that the EPA took an unduly narrow interpretation of part 6 of the appellant's request.

74. In all the circumstances, I am not in a position to find that the EPA has taken adequate steps to identify and locate all relevant environmental information coming within the scope of the appellant's request. I cannot find that article 7(5) applies in this case. I would add that given the EPA's description of its records management practices in respect of records such as those at issue in this case, it is difficult to understand how the EPA failed to identify all relevant records during its initial processing of the request.

75. I consider that the most appropriate course of action to take at this stage is to annul the decision of the EPA to refuse access to additional environmental information coming within the scope of the appellant's request, the effect of which is that the EPA must consider the appellant's request for such information afresh and make a new, first instance decision in accordance with the provisions of the AIE Regulations. Before doing so, the EPA may find it useful to engage further with the appellant in the first instance to clarify the precise nature of the additional information he believes ought to exist.

Decision

76. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul the EPA's decision in this case. I direct the EPA to release records 41 and 42. I also direct the EPA to undertake a fresh decision making process in respect of records 1-26, 28-40, and 43-63 and in respect of the appellant's request for additional relevant environmental information.

Appeal to the High Court

77. 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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Ger Deering
Commissioner for Environmental Information
10 May 2022