

**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/16/0049**

**Date of decision:** 18 December 2017

**Appellant:** Mr X (the appellant)

**Public Authority:** Health Service Executive (HSE)

**Issues:** Whether the HSE was justified in its refusal of the appellant's request for access to environmental information on the basis that no information was held by or for it.

**Summary of Commissioner's Decision:** In accordance with article 12(5) of the Regulations, the Commissioner reviewed the HSE's decision on the appellant's request. The Commissioner noted that the HSE holds information which it did not take into account when making its decision on the AIE request. The Commissioner was satisfied that this new information falls within the scope of the appellant's request. On this basis, he found the HSE's decision to be inadequate, and therefore he annulled the HSE's internal review decision.

The Commissioner noted that the HSE has now disclosed the newly identified information to the appellant in full. In circumstances where the Commissioner was satisfied with the HSE's account of the information it holds, he made no further recommendation on this appeal.

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal this decision 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**

Polychlorinated biphenyls (PCBs) are persistent organic pollutants which are harmful to human health and the environment. On 12 June 1980 there was a spillage of PCB coolant from the Smithwicks Brewery at St. Francis Abbey, Kilkenny, resulting in the contamination of local rivers.

On 6 September 2016, the appellant made an AIE request to the HSE for access to "records held by the HSE relating to the PCB spillage at Smithwicks brewery on 12 June 1980." The appellant stated that his request included information on "records of health board officials who attended the immediate series of meetings after the spillage" and correspondence between health board officials and other state agencies relating to the spillage.

No decision on the request was notified to the appellant by the HSE and so on 18 October 2016 he requested an internal review on the basis of a deemed refusal. The HSE subsequently issued two separate internal review decisions on the request. An internal review decision issued from the HSE National Office of Environmental Health on 23 November 2016. The National Office of Environmental Health stated that enquiries were made to the relevant health services and senior staff, and no records could be located.

A second internal review decision on the same AIE request issued from the HSE Community Health Organisation Area 5 (encompassing Kilkenny City and County) on 22 November 2017. The Community Health Organisation also stated that it had been "unable to locate any records" relevant to the request.

The appellant appealed to my Office on 2 December 2016.

## **Scope of Review**

Under article 12(5) of the AIE Regulations, my role is to review the HSE's internal review decision and to affirm, annul or vary it. In this instance, I am concerned with the question of whether the HSE was justified in its decision that no relevant information was held by it or on its behalf. In circumstances where a public authority contends that no information is held by or for it, my practice is to review the adequacy of searches carried out by the public authority.

The AIE Regulations transpose Directive 2003/4/EC into Irish law. This Directive implements the first pillar of the 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). In making this decision I have had regard to the Guidance for Public Authorities and others on implementation of the Regulations (May 2013) published by the Minister for the Environment, Community and Local Government [the Minister's Guidance]; and The Aarhus Convention: An Implementation Guide (Second edition, June 2014) [the Aarhus Guide].

### **The appellant's position**

The appellant furnished my Office with a number of documents dating from 1980 to 2013, relating to the PCB spillage and remediation efforts. These records had been made available to the appellant by other public authorities, and referred to the involvement of the South Eastern Health Board and HSE in the response to the PCB spillage. The appellant stated that remediation of the PCB spillage continued for decades after the initial incident, and suggested that the HSE may not have properly searched for relevant information dating from after the initial incident.

### **The HSE's position**

The HSE submitted that due to the passage of time, and in line with its records retention policy, no historic information was held. The HSE drew my attention to its 2013 Records Retention Periods Policy. Page four of this policy notes that "perpetual retention of all records will be in breach of the Data Protection Acts". The policy specifies a maximum retention period of ten years for environmental information relating to "outdoor events" or "EIA + IPPC + Planning Reports etc", and a five year retention period for general records relating to environmental health. I should say in passing that, whereas the generality of such a policy seems reasonable, the retention of records regarding incidents where there may be long-term health consequences would seem to be highly desirable.

### **Queries relating to documents held**

My Investigator contacted the HSE and asked it to clarify whether it held information on the management of the PCB spillage in the years after 1980. In reply, the HSE acknowledged that it had focussed its search efforts on the initial 1980 incident. It stated that it conducted an additional search on appeal, encompassing the Operations Manager's Office for Carlow and Kilkenny, the National Health and Safety Manager, the Public Health Department, and the Principal Environmental Health Officer for Carlow and Kilkenny, to no avail.

At the same time, the HSE stated that its Director of Public Health for the South East Public Health Department had identified relevant information, which it disclosed to the appellant. This information dates from 2003 and relates to PCB remediation. My Investigator asked the HSE to confirm that all relevant information held by the Director of Public Health had been disclosed to the appellant, without omission or redaction. On searching again, the HSE found that the Director of Public Health also held a copy of a submission by a third party to the Environmental Protection Agency on PCB remediation (dating from 2000) which it also disclosed to the appellant. The HSE stated that no further relevant information was held by the Director of Public Health.

### **Findings**

The scope of the appellant's AIE request covered all information currently held by or for the HSE, on the subject of an incident which occurred in 1980. Although the appellant's request did not specifically refer to information on PCB remediation, it is reasonable to conclude that information on the spillage includes information on steps

taken to remediate PCB contamination. Having consulted with the relevant offices and departments, the HSE was not able to find any information on the spillage, but did find information on remediation efforts dating from 2000 and 2003.

It is clear from the documents sourced by the appellant from other public authorities that the HSE (and its precursor, the South Eastern Health Board) were copied in correspondence relating to the spillage, dating back as far as the 1980s. It does not appear that the HSE has retained historical information on the response to the incident. This approach is not inconsistent with the HSE's record retention policy. I also note that relevant staff members referred to in connection with the spillage have since retired.

I note that the appellant is not satisfied that the HSE has conducted proper searches for information relating to the incident. It is certainly the case that the search for relevant information on this occasion has been complicated by the need to consult multiple offices. I also note that it is not ideal that two different offices of the HSE made separate internal review decisions on the request. It is also a source of concern that searches carried out initially and at appeal stage did not reveal the full extent of information held - although I accept that the HSE made genuine efforts to facilitate the appellant.

It appears to me that the HSE has now made reasonable efforts to search for information, and has accounted for the lack of historic information on the basis of the passage of time and the operation of its record retention policy. Nevertheless, this request relates to a serious environmental incident, and I note that my decision is without prejudice to the appellant's future right to request access to specific information from the HSE on this incident.

### **Decision**

In accordance with article 12(5) of the Regulations, I have reviewed the HSE's decision on the appellant's request. The HSE acknowledged at appeal stage that it holds additional information, which it did not take into account when making its decision on the AIE request. I am satisfied that this information was within the scope of the appellant's request. On this basis, I find that the HSE's internal review decision was inadequate. I therefore annul the HSE's internal review decision. I note that the HSE has disclosed the newly identified information to the appellant. In circumstance where I am now satisfied with the HSE's account of the searches it conducted and the information held by or for it, I make no further recommendation on 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.

Peter Tyndall  
Commissioner for Environmental Information  
18 December 2017