



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

**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-93415-Y0N1P2

Date of decision: 19 November 2021

Appellant: Mr. Ken Foxe

Public Authority: Department of Environment, Climate and Communications (the Department)

Issue: Whether the Department was justified in refusing access to environmental information on the basis of legal professional privilege under articles 8(a)(iv) or 9(1)(b) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the Department was justified in refusing access to the redacted information on the basis of the exception in article 9(1)(b) and that the interest in refusal outweighs the public interest in disclosure.

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. On 27 December 2019, the appellant requested copies of all records held relating or referring to the extension of the smoky coal ban announced in December 2019, to cover the period 1 September to 27 December 2019.
2. On 21 January 2020, the Department wrote to the appellant to say that the request represents a potentially large number of records and offered to discuss refining the request to target particular information.
3. On 24 January 2020, the Department notified the appellant that, because of the volume or complexity of the environmental information requested, a response to the request would be provided within two months, in accordance with article 7(2)(b) of the AIE Regulations.
4. Following a discussion between the appellant and the Department, on 27 January 2020 the Department wrote to the appellant to confirm that the request was to be refined to seek memos, submissions, reports, briefing, reviews or explanatory notes sent to the Minister or the Secretary General of the Department in relation to the recent decision to extend the smoky coal ban to an additional 13 towns. The appellant confirmed that he was happy to proceed on that basis.
5. On 26 February 2020, the Department decided that five documents were relevant to the appellant's request but refused to provide access to the information on the basis of articles 8(a)(iv) and 8(b) of the AIE Regulations. The Department concluded that the request did not relate to information on emissions into the environment and so article 10(1) of the AIE Regulations did not apply. The Department concluded that the public interest served by refusal outweighed the public interest served by disclosure.
6. On 6 March 2020, the appellant requested an internal review.
7. On 22 April 2020, on internal review the Department affirmed its decision on the same grounds.
8. On 5 May 2020, the appellant brought this appeal to my Office.
9. I have now completed my review of the appeal under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to the observations made by the appellant when seeking an internal review and the submissions of the Department. In addition, I have had regard to:
 - [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](#)");
 - [The Aarhus Convention—An Implementation Guide](#) (Second edition, June 2014) (the "Aarhus Guide"); and
 - 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").



10. What follows does not comment or make findings on each and every argument advanced but I have considered all materials received in the course of the investigation and the proceedings.

Scope of Review

11. 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.
12. In the course of the review in this case, my investigator sought submissions from the Department in support of its decision. In light of the passage of time, the Department reviewed its decision on internal review to refuse access to all five documents in scope of the request. On 15 October 2021, the Department notified the appellant of a fresh decision by the Department. The Department provided access to the information in three of the documents in full and provided access to the remaining two documents with some information redacted on the basis of legal professional privilege (LPP), in reliance on article 8(a)(iv) of the AIE Regulations.
13. I consider that it is appropriate in this case to confine my review to the Department's revised decision to refuse access only to the redacted information. As such, the question before me is whether the Department was justified in refusing access to environmental information on the basis of LPP.

Analysis and Findings

14. The two documents which have not been released in full to the appellant are identical. They had been separately identified for disclosure by the Department because the first document was submitted initially to the relevant Principal Officer and then the Secretary General for review together with a draft consultation document, whereas the second document was subsequently submitted to the Minister together with an updated draft consultation document. As the documents are identical, what follows refers to the redacted information in both documents.
15. The redacted information forms part of a "Draft Memorandum for the approval of the Government" on "Air Quality Issues and the "Smoky Coal Ban"". The Department describes the document as a memo created for submission to the Government for its consideration at Cabinet and approval by all Ministers of the Government. The document describes the legal position under the Air Pollution Act (Marketing, Sales, Distribution and Burning of Specified Fuels) Regulations 2012 and the policy rationale for changing that position. The document comprises nine operative pages, with two further pages of appendices, and is watermarked "confidential". The redacted information is prefaced by the words: "The Department sought the advice of the Attorney General. **The Department has been advised that:**" (emphasis original).
16. The Department's revised decision was that the exception in article 8(a)(iv) of the AIE Regulations applied to the redacted information on the basis of LPP. The Department submits that the redacted information contains a summary of legal advice from the Attorney General to the Department, which was received by the Department in confidence and which remains relevant.



17. While the Department has relied on article 8(a)(iv) to justify refusal, I note that I have a broad jurisdiction on review to conduct a *de novo* consideration of a request for environmental information (*M50 Skip Hire & Recycling Limited v Commissioner for Environmental Information* [2020] IEHC 430, paragraph 18). It is my view that, in this case, protection for LPP would most appropriately fall within the exception in article 9(1)(b) of the AIE Regulations. The Department accepts that the exception in article 9(1)(b) may apply in the alternative. The appellant was invited to comment on the application of this alternative exception, but declined to do so.

Does the exception in article 9(1)(b) apply?

18. 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 would adversely affect the course of justice (including criminal inquiries and disciplinary inquiries). Article 9(1)(b) seeks to implement Article 4(2)(c) of the AIE Directive, which is in turn based on Article 4(4)(c) of the Aarhus Convention. I note that the Aarhus Guide takes a narrow approach to construction of the relevant provision in the Aarhus Convention, interpreting “the course of justice” as referring to “active proceedings within the courts”. However, I also note that the Aarhus Guide, while a source of helpful guidance, is but a Guide, is not legally binding and is not determinative (*Right to Know CGL v Commissioner for Environmental Information* [2021] IEHC 353, paragraph 20).
19. LPP is a right of a person to refuse to disclose any communications with his or her lawyer made for the purpose of giving or receiving legal advice. It is a common law right with a constitutional foundation, as a dimension of the protection of the administration of justice afforded by Article 34 of the Irish Constitution.¹ The existence of LPP is predicated on there being a public interest requirement for it in the proper conduct of the administration of justice, such that it is “a fundamental condition on which the administration of justice as a whole rests” (see *Martin v Legal Aid Board* [2007] IEHC 76 and *Miley v Flood* [2001] IEHC 9). In light of this, I accept that the disclosure of information which would breach LPP would, as a result, adversely affect the course of justice, within the meaning of Article 9(1)(b) of the AIE Regulations.
20. LPP encompasses legal advice privilege and litigation privilege. Legal advice privilege covers a communication between “a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice whether at the instigation of the client or the lawyer” (*Smurfit Paribas Bank Limited v. AAB Export Finance Limited* [1990] 1 IR 469). In light of the guidance set out in *McMahon v Irish Aviation Authority* [2016] IEHC 221, I understand that for legal advice privilege to apply: (a) there must be a communication between a client and a lawyer (including solicitors, barristers, salaried in-house legal advisers, foreign lawyers and the Attorney General); (b) the communication must have been made in confidence; (c) the communication must have been made during the course of a professional legal relationship; and (d) the communication must have been made for the purposes of the giving or receiving of legal advice.

¹ LPP is also recognised as a fundamental right in the jurisprudence of the European Court of Human Rights, as an aspect of Articles 6 and 8 ([13590/88 Campbell v United Kingdom](#)) and as an EU fundamental right in the jurisprudence of the Court of Justice of the European Union ([C-155/79 AM & S v Commission](#)).



21. In this case, I accept that legal advice privilege applies to the redacted information in each document for the following reasons.
- It is clear on its face that the redacted information records a communication between the Department (a client) and the Attorney General (a lawyer);
 - I accept the Department's submission that the communication was made in confidence;
 - I accept that the relationship between the Department and the Attorney General in this context is a professional legal relationship; and
 - It is clear on its face that the communication involved the receipt of legal advice.
22. I have not seen anything to indicate that LPP has been waived by the Department in this instance. Accordingly, my view is that release of the information would breach LPP and would, therefore, adversely affect the course of justice, within the meaning of article 9(1)(b) of the AIE Regulations.

Does the public interest served by refusal outweigh the interest served by refusal?

23. I note that the Department's revised decision provided to the appellant did not address the application of the public interest test in article 10(3) and (4) of the AIE Regulations. I would remind the Department that when refusing access to information the requirements of the AIE Regulations must be substantively and procedurally adhered to, including carrying out the balancing exercise required by article 10(3) and (4) (see *Right to Know CLG v An Taoiseach (No. 2)* [2018] IEHC 372, paragraphs 67-71). My Office sought submissions from the Department on the application of article 10(3) and (4) in this case. The Department submits that the interest served by refusal outweighs the public interest served by disclosure in this case.
24. I have taken into account the following factors in weighing the interest served by refusal against the public interest served by disclosure in this case.
25. In favour of disclosure, there is an important general interest in the disclosure of environmental information to meet the purpose of the AIE Directive, in particular by contributing to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment, as set out in recital 1 to the AIE Directive. There is also a general interest in the openness and transparency of the Government's decision-making processes in relation to environmental matters. In this case, the document as a whole (most of which has been disclosed to the appellant) deals with the proposed extension of a ban on the sale, marketing and distribution of bituminous coal (the "smoky coal" ban) to additional towns in Ireland with the purpose of preventing or limiting air pollution. Given the potential impact of the emission of fuel on air quality and on the environment more generally, I consider that there is a substantial public interest in the dissemination of information on this issue.
26. In favour of refusal, the case law referred to above makes it clear that the protection of LPP is of fundamental importance to the administration of justice. The courts have emphasised the importance of the principle to facilitating free and frank communication with legal advisers (see, for example, Barr J's summary of the rationale for protection in *McMahon v Irish Aviation Authority* [2016] IEHC 221 at paragraphs 7-11). I have considered the interest in withholding the



specific legal advice at issue in this case, but I must be careful not to disclose withheld information in my decision so the extent to which I can describe its content is limited. While recognising the importance of access to environmental information, I do not consider that in this case the public interest in disclosure is sufficient to outweigh the fundamental importance of the interest of preserving the Department's right to LPP in relation to the advice that it received from the Attorney General.

27. Accordingly, I find that the Department was justified in refusing access to the redacted information on the basis of the exception in article 9(1)(b) and that the interest in refusal outweighs the public interest in disclosure.
28. In light of this finding, it is not necessary to address the application of article 8(a)(iv) of the AIE Regulations in this case.

Decision

29. Having carried out a review under article 12(5) of the AIE Regulations, I affirm the Department's decision.

Appeal to the High Court

30. 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

19 November 2021