



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-105228-K7D1P7

Date of decision: 8 June 2022

Appellant: Organisation X c/o Solicitors

Public Authority: Fingal County Council (the Council)

Issue: Whether the Council was justified in its decision to grant access to records relating to three waste facility permits concerning the appellant.

Summary of Commissioner's Decision: The Commissioner annulled the Council's decision to grant access to the records at issue. He directed the Council to undertake a fresh decision making process in respect of the records.

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 review arises from an appeal made by a third party under article 12(3)(b) of the AIE Regulations. Article 12(3)(b) provides that where a person other than the requester, including a third party, would be incriminated by the disclosure of the environmental information concerned, the requester, the person other than the requester, or third party may appeal to the Commissioner against the decision of the public authority concerned.
2. All references to the appellant in this decision can be taken to refer to the third party appellant and/or its solicitors as appropriate.
3. In this case, the Council received a request on 16 December 2020 for access to records relating to three waste facility permits concerning the appellant. Specifically, the following was sought:
 - A. Copy of the application that was submitted to Fingal County Council for [Permit A] circa late 2010/early 2011.
 - B. Copy of the Annual Environmental Report [AER] for [Permit B] for years 2009, 2010 and 2011.
 - C. Copy of destination sites for material moved off site and volumes of material moved to each destination for years 2009, 2010 and 2011.
 - D. Copy of all correspondence between the site location at [identified location] covering either [Permit B], [Permit A], and [Permit C] between the permit holders and Fingal County Council.”
4. On 6 January 2021, the Council informed the requester that, due to the large number of records encompassed by the request, it required an extension of one month, in accordance with article 7(2)(b) of the AIE Regulations, in order to make its decision.
5. On 27 January 2021, the Council formally consulted the appellant under article 7(11) of the AIE Regulations, which provides that where a request is made for information which has been provided to a public authority on a voluntary basis by a third party and, in the opinion of the public authority, release of the information may adversely affect the third party, the public authority shall take all reasonable efforts to contact the third party concerned to seek consent or otherwise to release the information, pursuant to article 8(a)(ii) and article 10. The Council explained that a number of records identified as relevant to the request comprised information that could be considered to be information that the appellant voluntarily provided to the Council, without being under any legal obligation to do so. It noted that it had considered any potential adverse effect of releasing the information requested. It also stated that it had weighed the public interest in disclosure against the interest served by refusal and was of the preliminary view that the public interest would be better served by disclosure. It attached a schedule of records and noted that the records were available in hard copy on request.



6. On 12 February 2021, the appellant made submissions to the Council. It stated that it did not consent to the release of the information on the basis that disclosure would adversely affect its business. In doing so, it stated that the information on waste acceptance and recovery available through the waste facility permit application documentation, the AER, and the correspondence is commercially sensitive in accordance with both article 9(1)(c) of the AIE Regulations and section 36(1) of the FOI Act; that the lands adjoining the site are the subject of legal proceedings and information relating to those proceedings should be refused under article 9(1)(b) of the AIE Regulations; and that the site had spent significant monies investing in bespoke plant to allow for the processing of waste material, which is intrinsically linked to information on waste types and waste destination data as well as capability and design of plant.
7. On 17 February 2021, the Council issued a decision to the requester stating that, following consultation with a third party (the appellant) under article 7(11) of the AIE Regulations it had decided to grant access to all of the records identified as relevant to the request and provided a copy of the schedule. On the same day, it also informed the appellant that it had decided to grant access. In doing so, it noted that the appellant's submissions regarding commercial sensitivity were too general and not in respect of specific documents. It also stated that it was not aware of the legal proceedings referenced and that the appellant had not demonstrated how releasing the information would affect the course of justice. It again outlined its view that the public interest would be better served by disclosure of the information at issue than by refusal.
8. The appellant submitted this appeal to my Office on 16 March 2021 under article 12(3)(b) of the AIE Regulations, contending that the information at issue should be refused under article 9(1)(b) of the AIE Regulations. During the course of the review, my Investigator invited the appellant to make submissions to this Office in support of its position that the information should be refused. However, the appellant did not do so.
9. 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 Council, the appellant, and the requester as outlined above and to correspondence between my Office and the Council, the appellant, and the requester on the matter. I have also examined the contents of the records at issue. 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).
10. In referring to the records at issue, I have adopted the record numbering system used by the Council on the schedule of records provided to my Office. I would note that there is a slight discrepancy between the numbering system used on the schedule provided to my Office, which lists the records as 1-14, and the numbering system used on the original schedule provided by the



Council to both the appellant and the requester when processing the request, which lists the records as 1-11. However, this discrepancy appears to merely be because record 10 on the original schedule is separated into four separate records on the schedule provided to my Office (i.e. records 10, 11, 12, and 13).

11. 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

12. This review is concerned solely with whether the Council was justified in its decision to grant access to 14 records relating to waste facility permits concerning the appellants.

Preliminary Matters

13. Before I consider the substantive issue arising in this case, I wish to make a number of preliminary comments.
14. First, the scheme of the AIE Regulations, and of the AIE Directive, makes it clear that there is a presumption in favour of release of environmental information. Subject to that presumption, a public authority may refuse to release environmental information where an exemption under articles 8 or 9 applies and the public interest in maintaining that exemption outweighs the public interest in disclosure.
15. Second, the release of environmental information under the AIE Regulations is, in effect, regarded as release to the world at large.
16. Third, while I am required by article 12(5)(b) of the AIE Regulations to specify reasons for my decision, I must also be careful not to disclose exempt material.
17. Finally, 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. Accordingly, notwithstanding that the appellant was consulted by the Council under article 7(11) of the AIE Regulations in the context of article 8(a)(ii) of the AIE Regulations, I consider it appropriate to examine the applicability of article 9(1)(b), as the provision cited by the appellant in its appeal to my Office.

Analysis and Findings

18. It is the appellant's position that each of the 14 records at issue is exempt from release under article 9(1)(b) of the AIE Regulations. Having examined the content of the records, I am satisfied that they can generally be described as follows:
 - Record 1 - Cover email and application (including form and appendices) for Permit A
 - Records 2 and 3 – 2009 and 2010 AERs for Permit B
 - Record 5 – Correspondence regarding Permit B
 - Record 6 – Correspondence regarding review of Permit B and application for Permit D (relates to Permit A)



- Record 7 – Correspondence regarding application for Permit A
- Record 8 – Correspondence regarding operation of Permit A
- Record 9 – Correspondence regarding application (including form and appendices) for Permit C
- Record 10 – Correspondence regarding operation of Permit C (general compliance)
- Record 11 – Correspondence regarding operation of Permit C (decommissioning, restoration, and aftercare plan)
- Record 12 – Correspondence regarding operation of Permit C (bonds)
- Record 13 – Correspondence regarding operation of Permit C (2013 AER)
- Record 14 – Correspondence regarding water pollution

19. 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.
20. 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.
21. 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 exemption to apply. As such, when relying on article 9(1)(b) it is necessary to set out the reasons why 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. Where the view is taken that the disclosure of the information would undermine the course of justice, it is then necessary to weigh the public interest served by disclosure against the public interest served by refusal (see to that effect, C-57/16 P ClientEarth v Commission paragraphs 51 and 124).
22. 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).

23. The appellant, in its statement of appeal, submitted that the records at issue concerned its business interests and land. It stated that the parties who previously controlled the land fell into a dispute and that High Court proceedings are currently at an advanced stage. It speculated that the appellant is a party connected to the proceedings and/or its property. It provided copies of related court documents. It explained that discovery had been sought by the plaintiff(s) and that a discovery order had been granted. It noted that discovery had also been sought by the defendant(s), however, no application to court, determination, or court order had been made at the time.
24. The appellant contended that the information sought by the requester under the AIE Regulations is a “mirror image” of the discovery request sought by the defendant(s) in the proceedings. It stated that, while it did not know the identity of the requester, it believed that the defendant(s) is directly or through its servants or agents, the party seeking the information under the AIE Regulations. It contended that the defendant(s) is abusing its position in an effort to obtain information which is the subject matter of the proceedings and that it is inappropriate to disclose information in such circumstances where the proceedings are ongoing. I understand that the Council is not a party to the relevant proceedings, which concern a dispute between private parties, and no court order for non-party discovery has been made.
25. The general thrust of the appellant’s position is that the records at issue are exempt from release under article 9(1)(b) because they relate to the ongoing proceedings identified and would more appropriately be sought by way of discovery.
26. It is important to note that the fact that information may relate to ongoing legal 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 exemption for such information, which they do not. I am also 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 process of discovery.
27. I accept, however, that there are many instances where 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 the manufacture or destruction of evidence, interference with potential witnesses, prejudicial pre-trial publicity, contempt of court 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) it is necessary to set out the reasons why 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.
28. The records at issue are held by the Council and relate to waste permit applications and correspondence regarding the processing of those applications, the compliance with and operation of the related permits, and water pollution. In my view, while the records at issue may be relevant to the proceedings identified, the appellant has not shown how it expects the release of the



records to adversely affect the course of justice; neither has it shown that any such expectation of an adverse effect is reasonably foreseeable within the terms of the exemption. It is also not evident to me upon my examination of the records how their release would adversely affect the course of justice.

29. In the circumstances and having examined the content of the records at issue, I find that article 9(1)(b) does not apply to them.
30. Notwithstanding my view above, I do not consider it appropriate to simply affirm the Council's decision to grant access to all of the records at issue in this case.
31. Having examined the records, it is very clear that a number of them contain information relating to third parties other than the appellant, who do not appear to have been consulted/notified by the Council when processing the request, including what could be described as personal information that may have the quality of confidence, which also does not appear to have been considered.
32. Furthermore, although the Council indicated to both the appellant and the requester that it was releasing the records in the public interest – it provided no substantive consideration of the exemption provision being disapplied or detail of the factors considered when weighing the public interest served by disclosure against the interest served by refusal.
33. I also believe it is relevant to note that, during the course of the review, as it appeared that some of the information contained in the records may, at some stage, have been available for public inspection under the Waste Management (Facility Permit and Registration) Regulations 2007 (as amended), my Investigator asked the Council specific queries in that regard. However, the Council failed to respond to those specific queries / to identify the relevant information that may have been available for public inspection.
34. It seems to me that the Council, in essence, adopted a “blanket approach” to its decision to grant access to the records at issue, regardless of their specific nature or content. While I have found that article 9(1)(b) of the AIE Regulations does not apply to the records and I accept that it may well be the case that certain records should be released, I see no evidence to suggest that the Council gave any substantial consideration to the content of the individual records to determine if each should properly be released under the AIE Regulations, as is required. It is most disappointing that the Council does not appear to have fully engaged with its obligations under the AIE Regulations.
35. In light of all of the above, I consider that the most appropriate action to take at this stage is to annul the Council's decision to grant access to all of the records at issue and direct it to undertake a fresh decision-making process in respect of the records, in accordance with the provisions of the AIE Regulations.

Decision

36. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul the decision of the Council to grant access to the records at issue relating to three waste facility permits concerning the appellant.



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Appeal to the High Court

37. 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.

Ger Deering
Commissioner for Environmental Information
8 June 2022