



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-108792-Z9S0M1

**Date of decision:** 14 July 2022

**Appellant:** Right To Know CLG

**Public Authority:** Donegal County Council [the Council]

**Issue:** Whether the Council were justified in refusing the request under article 9(1)(b) of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner annulled the decision of the Council and directed release of some of the information identified as relevant to the request. He directed the Council to carry out a fresh decision-making process in respect of the remaining documents.

**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 request in this case arose out of a bog slide that occurred in Meenbog, Co. Donegal on the 12 November 2020. The incident originated on the site of a windfarm development and resulted in large quantities of peat making its way into the Shruhingarve stream and Mournebeg River causing a significant cross-border pollution event. On 16 April 2021, the appellant requested:

*“-copies of any reports, submissions, memos, or any other such review or overview documents prepared or held relating to the bog-slide near Ballybofey.*

*-copies of all records held in the email account of the Director or Assistant Director of Water and Environment relating to the bog-slide near Ballybofey.”*

2. The request was refused by the Council under article 9(1)(b) of the AIE Regulations in a decision provided to the appellant on 17 May 2021, which was outside the timelines provided for in the AIE Regulations. The decision stated that as there were various enforcement actions ongoing relating to the incident, the release of the documentation sought may prejudice future legal proceedings. The decision made reference to the public interest test and concluded that the public interest favoured not releasing the relevant records.
3. The appellant sought an internal review of this decision on the same date. In his request, he noted that the AIE Regulations do not provide for blanket refusals and that each record must be considered separately during the decision-making process.
4. The Council issued an internal review decision on 3 June 2021. This decision affirmed the initial decision “without modification” and did not outline any further analysis of the request or the justification for refusal under the AIE Regulations. The Council did provide the appellant with two overview documents: a report given to the Lifford-Stranorlar Municipal District Committee relating to the bog slide incident and an update from a multi-agency group overseeing the response to the incident. The appellant appealed this decision to my Office on 10 June 2021.
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 submissions made by the appellant and the Council. I have also examined the contents of the records in 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’).



### **Preliminary Matters**

6. As I will set out in my findings below, the manner in which the Council has sought to process this request under the AIE Regulations was not satisfactory. The initial decision did not provide sufficient reasoning for the Council's reliance on article 9(1)(b) and the appellant was not provided with a schedule of records setting out the information identified as relevant to his request. I consider it best practise for an appellant to be provided with such a schedule at initial decision stage to allow them to be fully informed when deciding whether to request an internal review of an original decision or whether to appeal to my office.
7. The internal review decision in this appeal did not seek to provide any additional reasoning or analysis for the decision to refuse the appellant's request, but simply affirmed the decision "without modification". This is not an acceptable approach as a decision-maker carrying out an internal review should review the original decision in a comprehensive manner and should provide reasons for their decision to affirm, vary or annul the original decision. This duty to specify reasons for the decision is specifically provided for in article 11(4) of the AIE Regulations.
8. Based on the above, I expect the Council to engage in a review of its processes following receipt of this decision to ensure that it complies with its obligations in its handling of AIE requests.

### **Scope of Review**

9. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and affirm, annul or vary it. Where appropriate in the circumstances of the appeal, I will require the public authority to make available environmental information to the appellant.
10. 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 interest in maintaining that exemption outweighs the public interest in disclosure.
11. The appellant sought access to two categories of environmental information. The Council has provided my Office with a schedule that identifies 242 documents relevant to the request. As I will set out below, the Council has since released some of these documents to the appellant. Accordingly, my review in this case is concerned with whether the Council was justified in refusing access to the remaining records article 9(1)(b) of the AIE Regulations.



## **Analysis and Findings**

12. The Council contends that the information requested is exempt from release under article 9(1)(b) of the AIE Regulations. This provision states:

*“9. (1) A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect—....  
(b) the course of justice (including criminal inquiries and disciplinary inquiries).”*

13. This allows a public authority to 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). The Minister’s Guidance on the implementation of the AIE Regulations suggests that the course of justice includes matters “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”.
14. The wording of the article 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 the disclosure of the information at issue could specifically and actually undermine the course of justice as set out by the CJEU at paragraph 69 of *Land Baden-Wurtemberg v Deutsche Bahn*, Case C-619/19. The risk of the course of justice being undermined must be reasonably foreseeable and not purely hypothetical. Connection or relevance to ongoing proceedings does not *prima facie* render records immune from release.
15. 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. Of particular relevance to this appeal is the requirement in Article 10(5) of the AIE Regulations which 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.
16. This essentially requires that a public authority must justify the refusal to release each record individually. As set out by the appellant in correspondence with the Council and in his appeal, it is not appropriate to apply the exemption in a blanket fashion to records identified as relevant to a request. Each individual record identified as relevant to the request must be examined to discern whether that record could be released without adversely affecting the course of justice.
17. My investigator wrote to the Council seeking further information on its reliance on article 9(1)(b) of the AIE Regulations and also seeking contact details for third parties mentioned in the relevant records. My Office received two separate responses to the request. The first from the Planning Section of the Council stated that, as the planning enforcement proceedings relating to the incident had concluded, the Planning section was happy to release the documents it had provided as



relevant to the request. Following this, 52 of the documents identified by the Council as relevant to the request were released to the appellant. The second response, from the Environmental Section of the Council, stated that a case related to the bog slide was progressing in the District Court, but that there was a question over whether the judge would accept jurisdiction of that case. No further specifics on the case were provided such as who the parties to the case are and what legislation the case may have been taken under. Neither response provided further details on any specific adverse effect that would occur if the information sought was released, nor did the Council take the opportunity to carry out an individual consideration of the records as required under Article 10(5) of the AIE Regulations.

18. I find that there were two main issues with the manner in which the Council has sought to rely on the exemption provided for in article 9(1)(b). First, the Council did not set out any potential adverse effect on the course of justice in its initial decision or internal review, and again failed to do so when offered the opportunity to make submissions by my office. The decision-maker did not specify what type of proceedings were ongoing in relation to the incident and did not provide any evidence that the release of records would affect those proceedings. As set out above, a mere connection to enforcement proceedings is not sufficient to engage the provisions of article 9(1)(b). Examples of adverse effect would include information that might result in adverse pre-trial publicity that would create a real risk of an unfair trial, or information that if in the public domain would hamper the ability of a party to conduct their case.
19. Second, the Council sought to apply the exemption in a blanket manner. It failed to assess each record individually to consider whether partial disclosure might have been a possibility as required by article 10(5). Given that the Council failed to correctly carry out these two steps in applying the exemption, the question of considering the interest in refusing or granting the request does not arise. I therefore find that the Council's refusal to release the records under article 9(1)(b) of the AIE Regulations was not justified under the provisions of the Regulations.
20. Given that the refusal to release the records has not been justified, I must now consider whether the relevant documents should be released to the appellant at this stage, or whether I should direct the Council to carry out a fresh decision making process.
21. Many of the relevant documents contained references to third parties. My investigator sought contact details for these third parties from the Council. Disappointingly these contact details were not provided. As set out in the OCEI procedures manual, I take the view that procedural fairness requires that any potentially affected third party be notified of an appeal and be given an opportunity to make submissions where the interests of the third party would potentially be affected by any proposed disclosure of the environmental information under review. I am therefore unwilling to direct release of all relevant information at this stage in circumstances where third parties referred to in the information or that may be affected by the disclosure of the information requested have not been provided with an opportunity to make submissions. It has not been



possible for my Office to contact those parties in order to do so. I consider it necessary for the public authority to carry out a fresh decision-making process in respect of these documents.

22. However, I have identified some documents within those relevant to the request that I am satisfied are appropriate for release at this time given that the Council have not satisfied me that any exemptions under the AIE Regulations apply to the information sought. I have set out details of these documents in an appendix to this decision.
23. The documents I have identified are largely emails and documents that are internal to the Council and concern the Council's reaction to and management of the bog slide. I am satisfied that the disclosure of this information is appropriate in all of the circumstances and will not adversely affect the interests of any third party.

### **Decision**

24. Having carried out a review under article 12(5) of the AIE Regulations, I annul the decision of the Council. I direct the Council to release certain documents to the appellant as set out in the attached schedule, and to carry out a fresh decision making process in respect of the remaining documents. In doing so, I expect the Council to engage in a comprehensive manner with the provisions of the AIE Regulations, taking into account my comments in this decision and the rights of third parties. Should the appellant remain unsatisfied with the decision of the Council, he will be free to appeal that decision once again to my Office.

### **Appeal to the High Court**

25. 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**

**14 July 2022**



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**Appendix**

**Documents to be Released**

ENVMMG1	1-3, 7-35, 41-42, 46-62, 68-81.
ENVBC	51, 54-56.