

**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 CEI/19/0025

Date of decision: 5 June 2020

Appellant: Right to Know CLG

Public Authority: Department of Communications, Climate Action and Environment [the Department]

Issue: Whether the Department was justified in refusing access, in whole or in part, to certain records under article 8(a)(iv) of the AIE Regulations on the basis of legal professional privilege

Summary of Commissioner's Decision: Having carried out a review in accordance with article 12(5) of the AIE Regulations, the Commissioner found that the Department was justified in refusing access to the records or parts thereof, under article 8(a)(iv) of the AIE Regulations on the basis of legal professional privilege. The Commissioner affirmed the Department's decision.

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

On 10 August 2018, the appellant requested access to records, including correspondence and submissions, relating to the making of S.I. No. 309 of 2018. The Department refused this request on the basis that the information requested was not environmental information as defined in article 3(1) of the AIE Regulations. The appellant sought internal review, at which point the Department affirmed its earlier decision. The appellant appealed to my Office under case reference CEI/18/0031.

In a decision dated 27 March 2019, I found that seven records, identified as A-G, contained environmental information as defined at article 3(1) of the AIE Regulations. I therefore required the Department to make a new decision in relation to those records.

Upon re-examining records A-G, the Department released one record (record B) in full and parts of two further records (records A and E). In its decision dated 16 April 2019, the Department refused access to the remaining records and redactions under article 8(a)(iv) of the AIE Regulations on the basis of legal professional privilege. The appellant sought internal review of that decision on 24 April 2019, which resulted in the Department affirming its decision on 9 May 2019. The appellant appealed to my Office the following day.

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 Department, and I have examined the content of the records the subject of the appeal. I have also 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').

Scope of Review

My review in this case is concerned solely with the question of whether the Department was justified in refusing access to certain records, which comprise:

- Redacted sections of one letter and one email, restating legal advice and
- Entire records described as seeking or providing legal advice.

Analysis and Findings

The grounds for refusal of a request for environmental information are set out in articles 8 and 9 of the AIE Regulations, but any proposed refusal is subject to the provisions of article 10 of the AIE Regulations. Article 10(1) states: "Notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment". Article 10(3) of the Regulations requires public authorities to

consider each request on an individual basis and to weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest. I take article 10(4) to mean, in line with the Minister's Guidance, that there is generally a presumption in favour of the release of environmental information. In addition, I note that article 10(5) clarifies, in effect, that a request should be granted in part where environmental information may be separated from other information to which article 8 or 9 applies.

In this case, the Department has refused access to the relevant records, details of which are set out below, under article 8(a)(iv) of the Regulations. Article 8(a)(iv) provides that a public authority "shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law". This includes the Freedom of Information (FOI) Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts.

Legal Professional Privilege

The withheld records are described as follows in the Department's schedule of records:

- Parts of record A, a letter sent to the Department by another government department, dated 10 May 2017, referring to legal advice concerning the desirability of a clarification to the law;
- All of record C, an email dated 28 March 2017 sent by the Office of the Attorney General referring to legal advice;
- All of record D, a legal opinion dated 3 March 2017;
- Part of record E, which is an email disclosing legal opinion;
- All of record F, a letter dated 13 February from the Department to the Office of the Attorney General setting out a proposal to clarify the status of certain State offices in the context of the AIE Regulations;
- All of record G, an internal Department email containing legal advice, dated 18 July 2017 and headed "Internal memorandum of Legal Advice".

It is the Department's position that legal professional privilege applies to records C, D, E, F and G and to the redacted parts of records A and E. As a result, the Department is of the view that it is justified in refusing access to these records, and parts of records, under article 8(a)(iv) of the AIE Regulations. The Department also maintains that the public interest in favour of disclosure does not outweigh the interests served in maintaining the confidentiality of the records.

In its submission to my Office, the appellant argues that the Department was incorrect in its application of article 8(a)(iv) of the AIE Regulations, as it had not identified the proceedings to which confidentiality attaches. It also contends that no adverse effect has been identified. In addition, the appellant maintains that legal professional privilege does not apply in the circumstances of this case because the advice was disclosed outside the party who sought and received it, thereby waiving privilege.

The CJEU indicated in Case C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany*, available [here](#), that even a rule providing generally that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those

authorities, may be sufficient for the purposes of Article 4(2)(a) of the AIE Directive, provided that the concept of "proceedings" is clearly defined under national law.

The Aarhus Convention does not define proceedings of public authorities. This is noted in the Aarhus Guide, which provides the following guidance in relation to the definition of "proceedings" of public authorities:

"...one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence."

The Aarhus Convention Compliance Committee (ACCC) clarified in its report on Communication [ACCC/C/2010/51](#) (Romania), adopted on 28 March 2014, that not all actions of public authorities may qualify as "proceedings", because it considers that the term relates to "concrete events such as meetings or conferences". Legal professional privilege is a common law rule that has been incorporated into section 31(1)(a) of the FOI Act 2014 (previously section 22(1)(a) of the FOI Acts 1997 to 2003). It enables a client to maintain the confidentiality of two types of communication:

- a) confidential communications made between the client and his/her professional legal adviser for the purpose of obtaining and/or giving legal advice (advice privilege); and
- b) confidential communications made between the client and a professional legal adviser or the professional legal adviser and a third party or between the client and a third party, the dominant purpose of which is the preparation for contemplated/pending litigation (litigation privilege).

Taking into account the guidance of the courts and the ACCC, and as I have outlined in my previous decisions on this provision of the AIE Regulations, I accept that the types of communication protected by legal professional privilege may qualify for exception under article 8(a)(iv) of the AIE Regulations.

I now turn to whether legal professional privilege attaches to the records at issue.

The redacted parts of records A and E both describe, or paraphrase, legal advice that was received by the Department of Defence. Although the advice was shared with the Department, I am satisfied that it is protected by legal professional privilege. As noted by Finnegan J in *Redfern Limited v. O'Mahony* [2009] IESC 18 (quoting from *Kershaw v. Whelan*): "'Waiver is not lightly to be inferred; although privilege is an aspect of the law of evidence and not of constitutional rights it is firmly established in our law for sound reasons of public policy.'"

From the disclosed parts of record A, I am satisfied that the communication of this piece of legal advice between the two government departments was conducted on the basis that the departments shared an interest in the advice, which had been provided confidentially by Counsel. I therefore see no evidence in the present case to suggest that there has been any disclosure that would have resulted in a waiver of privilege. On the contrary, I am persuaded that there was an understanding of confidence between the two departments in relation to the limited disclosures that took place.

Records C, D, F and G comprise communications between the Department and the Office of the Attorney General and/or Counsel requesting or providing legal advice. I am satisfied that these records would also be exempt from production in court proceedings, thereby allowing for them to be withheld by the Department under article 8(a)(iv) of the AIE Regulations.

I am also satisfied that the information concerned is not information on emissions into the environment within the meaning of article 10(1) of the Regulations.

Accordingly, I now turn to my examination of whether the public interest in disclosure of the records outweighs the exception provided by the AIE Regulations.

Public Interest factors

In weighing the public interest served by disclosure against the interest served by refusal, I note that the AIE regime recognises a very strong public interest in maximising openness in relation to environmental matters so that an informed public can participate more effectively in environmental decision-making. I note that disclosure in this case would serve to reveal the nature and content of the request for legal advice, and of the response provided to this request, in relation to S.I. 309 of 2018, which amended the AIE Regulations. At the same time, I recognise the importance of legal professional privilege to the administration of justice and the need for clients and their legal advisors to maintain confidentiality in their communications.

I am guided by the High Court's statement in [Martin & Doorley v. Legal Aid Board \[2007\] 2 IEHC 76](#) that "legal professional privilege exists and has been elevated beyond a mere rule of evidence to 'a fundamental condition on which the administration of justice as a whole rests'". As a consequence, I am of the view that exceptional public interest factors in favour of disclosure would have to be found before legal professional privilege could be set aside.

Having weighed up these factors in the case of each record, or part thereof, which the Department has withheld, I find that there are no such exceptional grounds at play here. In reaching this finding, I have considered the nature and quantity of information that is otherwise available on this subject, which already affords a level of context and transparency to the public, without disrupting the confidentiality of records to which legal professional privilege attaches.

As mentioned above, the Department released the majority of both records A and E, and the entirety of record B. In so doing, it is my view that the Department successfully separated and made available, environmental information which is not subject to an exception, from environmental information that it considered itself justified in refusing under article 8(a)(iv), in line with article 10(5) of the AIE Regulations.

I consider the public interest in openness and transparency has been served to some extent by the Department's release of record B, and the partial release of records A and E. This, when read alongside the text of the Statutory Instrument and its explanatory memorandum, provides information to the public on the decision making process involved in the making of SI 309 of 2018.

I therefore find that the Department was justified in refusing to disclose the documents, as there is an overriding public interest in favour of maintaining confidentiality over legal advice sought and received by the Department in the circumstances of this case.

Decision

I have carried out a review of the Department's decision in accordance with article 12(5) of the AIE Regulations. Having considered all of the information submitted to this Office, I affirm the Department's decision that article 8(a)(iv) of the AIE Regulations applies to the environmental information contained in the records.

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
5 June 2020