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-93406-G5Y0Y0
(Legacy reference: CEI/20/0001)

Date of decision: 4 August 2020

Appellant: Right to Know CLG

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

Issue: Whether the Department was justified in refusing access to certain records, in full or in part, relating to Statutory Instrument (S.I.) No. 309 of 2018

Summary of Commissioner's Decision: Having carried out a review in accordance with article 12(5) of the AIE Regulations, the Commissioner varied the decision of the Department. He found that article 8(a)(iv) of the AIE Regulations applied to the majority of the records at issue. He found that the Department's decision to refuse access to certain records or parts thereof was not justified and directed the release of the information contained therein.

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

In Case CEI/18/0031, the appellant requested access to:

- copies of all records held by the Department relating to S.I. No. 309 of 2018, and
- copies of any correspondence and submissions received by the Department in advance of the making of S.I. No. 309 of 2018 by the Minister.

S.I. No. 309 of 2018 amended the AIE Regulations for the purpose of clarifying the status of certain offices, including the President, the Office of the Secretary General to the President, and the Council of State. The amendment was made while three appeals brought by the appellant concerning the status of these offices were pending before me.

According to its schedule of records, the Department identified 97 records as relevant to the request but refused access on the basis that the information requested was not environmental information as defined in article 3(1) of the AIE Regulations.[1] In my decision in Case CEI/18/0031, dated 27 March 2019, I found that seven records, identified as A-G, contained environmental information within the meaning of the Regulations and therefore required the Department to make a new decision in relation to those records. Records A-G, insofar as they continued to be withheld by the Department, were the subject of a separate review in Case CEI/19/0025.

In my decision in Case CEI/18/0031, I did not determine whether the Department was justified in refusing access to the withheld records other than records A to G. I disregarded the records other than A to G in reaching my decision, because I determined that the information contained in those records had not been "withheld".

The appellant appealed my decision in relation to the records other than A to G to the High Court under article 13 of the Regulations. I reconsidered the approach I had adopted to these records, and the matter was remitted on consent by Order of the High Court, as perfected on 20 November 2019. Accordingly, the review was reopened under a new reference number for the purpose of making a fresh determination on the question of whether the Department was justified in refusing access to the records it holds, apart from A to G, relating to S.I. No. 309 of 2018.

I have now completed my review in this remitted case 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. I have also examined the contents of records at issue, which are identified below. 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

[1] However, due to an error in the numbering system in the schedule of records, the actual number of records was 96.

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

During the course of this fresh review, the Department effectively reconsidered its position and agreed to grant access in full or in part to a large number of the records that had in fact previously been withheld. Most of the records to which the Department granted access were released to the appellant on 2 March 2020. Additional records were released to the appellant on 9 April 2020. The records which have been released to the appellant no longer form part of this review.

The following matters have also been explained to the appellant in reference to the numbering system used in the Department's schedule of records, a copy of which was made available to the appellant on 26 February 2020:

- There is no record 12, as this number was also omitted in the sequence from the schedule of records previously sent to this Office in October 2018;
- The attachment to record 54b, apart from the concluding paragraph, does not relate to S.I. No. 309 of 2018 and is therefore outside of the scope of the request and thus this review. The appellant has suggested that any record containing information relating to S.I. No. 309 of 2018 should be regarded as falling within the scope of the request in its entirety. I disagree. As certain released records indicate (e.g., record 55), additional amendments to the Regulations were under consideration at the time. The request in this case was not for records relating to any amendment, or other work of the Department, relating to the Regulations but rather specifically for records relating to S.I. No. 309 of 2018. I do not consider that parts of records relating to other proposed amendments, or work of the Department, fall within the scope of the request simply because the records also include parts relating to S.I. No. 309 of 2018.
- The redactions made from page 2 of record 72 likewise do not relate to S.I. No. 309 of 2018 and are therefore outside the scope of the request and thus this review.

Accordingly, and again adopting the numbering system used by the Department in its schedule of records, I consider that this review is now concerned with the question of whether the Department was justified in refusing access to the following:

- Records refused in full - 7, 8, 9, 14, 15, 16, 17, 18, 21, 22, 24, 27, 28, 29, 31, 33, 34, 36, 37, 39, 40, 43, 44, 48, 50, 52, 57, 59, 63, 65, 67, 71

- Records refused in part - 5, 6, 10, 11, 13, 19, 20, 23, 26, 32, 38, 41, 42, 45, 47, 49, 51, 53, 54b (the concluding paragraph of the attachment), 58, 60, 62, 64, 66, 68, 69, 72 (the first redaction).

I should also note that a copy of record A (record 1.2 in the current schedule of records) from Case CEI/18/0031 was attached to record 72; as noted above, record A was the subject of a separate review in Case CEI/19/0025 and is not considered here.

Analysis and Findings

It is no longer in dispute that the requested records contain environmental information within the meaning of article 3 of the AIE Regulations. For the sake of clarity, I note that I found in Case CEI/12/0008 (Ms. Attracta Ui Bhroin and the Department of Arts, Heritage and the Gaeltacht) that the AIE Regulations and Directive are measures designed to protect the elements of the environment. Accordingly, as the records at issue concern the reasons for amending the Regulations and/or the process of making the amendment, I find, having regard to their context and contents, that the records qualify as environmental information within the meaning of article 3(1)(c) of the environmental information definition.

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 Regulations. In this case, it is relevant to note that article 10(3) 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. In addition, 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. Moreover, as indicated above, article 10(5) clarifies that a request should be granted in part where environmental information may be separated from other information to which article 8 or 9 applies.

Records at issue apart from the attachment to record 54b

The Department has refused access to the records at issue, apart from the attachment to record 54b, under article 8(a)(iv) of the AIE Regulation referencing section 31(1)(a) of the Freedom of Information (FOI) Act, i.e. on the basis of legal professional privilege. 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 (including the FOI Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts).

Confidentiality of proceedings giving rise to legal advice privilege

In correspondence with the Department that was copied to my Office, the appellant questioned the relevance of the FOI Act in relation to the AIE Regulations. The appellant asserted that the "confidentiality referred to in the AIE Regulations must be established on a standalone basis". Although the appellant does not appear to pursue its challenge to the reliance on the FOI Act in the submissions made directly to this Office, I note that I have accepted in numerous previous cases that article 8(a)(iv) effectively imports the exemptions under the FOI Act into the consideration of whether the confidentiality of proceedings of public authorities is otherwise protected by law, and I find no reason to depart from this approach. As I observed in Case CEI/18/0029 (Right to Know CLG and The Department of Culture, Heritage and the Gaeltacht), it does not appear that the incorporation of exceptions or exemptions contained in freedom of information legislation is considered by the Court of Justice of the European Union (CJEU) to be incompatible with the AIE Directive. Moreover, 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.

As noted by the Aarhus Guide, the Aarhus Convention does not define "proceedings of public authorities". The Guide states:

> "[O]ne 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".

The FOI Act does not provide generally for the confidentiality of all actions or internal operations of public authorities, of course. Rather, it authorises the disclosure of official information unless the specified conditions of the relevant exemption provisions are met. The FOI Act also specifies, in pertinent part, that no right of access applies to an exempt record where the exemption is mandatory or where the exemption operates by virtue of the exercise of a discretion that requires the weighing of the public interest, if the factors in favour of refusal outweigh those in favour of release. By incorporating the FOI Act exemptions into the AIE Regulations, Ireland has essentially preserved the confidentiality of "proceedings" that are covered by the exemptions.

In any event, the doctrine of legal professional privilege derives from the common law. As my predecessor described it as far back as 2008 in Case CEI/08/0001 (HoA Action Group and Kildare County Council), it is a common law rule that was incorporated into the FOI Act. What this means is that the common law already provided for the confidentiality of information that meets the test for legal professional privilege. The Oireachtas recognised the privilege and effectively codified it when it enacted the FOI Act by providing an exemption for records that would be exempt from production in proceedings in a court on the ground of legal professional privilege.

Thus, I accept that legal professional privilege is the type of claim for confidentiality that is protected by law as envisioned in article 8(a)(iv), with or without reference to the FOI Act. 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).

As noted in Case CEI/17/0046 (Mr. Y and Kilkenny County Council), available at www.ocei.ie, I accept that records which may not, on an individual basis, satisfy the criteria for legal advice privilege may nevertheless qualify for legal professional privilege where they form part of a continuum of correspondence that results from the original request for advice. In adopting this approach, I have had regard to the following comments by Mr. Adrian Keane in "The Modern Law of Evidence" (4th Ed.), Butterworths, 1996, at pp. 521-522:

> "Communications between a solicitor and his client may enjoy privilege even if they do not specifically seek or convey advice. In *Balabel v Air India* (1988) Ch. 317; [1988] 2 All E.R., 246, CA., ...[t]he Court of Appeal held that in most solicitor and client relationships, especially where a transaction involves protracted dealings, there will be a continuum of communications and meetings between the solicitor and client; and where information is passed between them as part of that continuum, the aim being to keep both informed so that advice may be sought and given as required, privilege will attach."

In its submissions to this Office, the appellant argues that the dominant purpose test applies to advice privilege as well as litigation privilege. In support of this position, the appellant refers to the following:

> "McCann Fitzgerald have on 11 March 2020 published a very useful note dealing with Dominant Purpose and Continuum of Advice citing the applicable case law (https://www.mccannfitzgerald.com/knowledge/disputes/asserting-privilege-in-the-email-era-dominant-purpose-and-continuum-of-advice)."

The appellant argues that the dominant purpose of the emails at issue is the preparation and adoption of SI 309/2018, "which is squarely within the day to day business of DCCAE". The appellant also refers to the communications with other public authorities such as the Department of An Taoiseach and the Department of Defence, which are not between lawyer and client, and states: "Given the wide and indiscriminate circulation of what is described as 'legal advice' it is clear that DCCAE, at the time, did not consider the information to be privileged."

In addition, the appellant states that the Office of the Parliamentary Counsel does not provide legal advice to other authorities. In support of this position, the appellant refers to the Office of the Attorney General's website in stating: "It should also be noted that the Office of Parliamentary Council does not provide legal advice to other public authorities (see e.g. http://www.attorneygeneral.ie/pc/pc_do.html) and therefore communications with it cannot be considered to be privileged."

In relation to the question of "proceedings", the appellant argues that the concept "cannot encompass the general day to day functions of a public authority within its area of competence". It also argues that no adverse effect has been identified. Moreover, in its view, the Department has taken into account irrelevant factors in its public interest balancing test. It contends that all of the records at issue should be released in full.

I accept that the legal proceedings or "concrete events" giving rise to legal professional privilege, such as engaging in a continuum of communications with legal advisers for the purpose of obtaining and/or giving legal advice, qualify as "proceedings" for the purposes of article 8(a)(iv) of the Regulations. Moreover, the need for legal advice may in fact arise in the course of a public authority carrying out its day-to-day functions. I do not consider that actual court proceedings relevant to the legal advice must be in existence in order for article 8(a)(iv) to apply. As I stated in Case CEI/17/0046 in relation to legal advice privilege: "The privilege 'belongs' to the client and there is no requirement for litigation to be in train or anticipated. The concept of 'once privileged always privileged' applies where privilege is based on advice privilege and thus, unless otherwise lost or waived, legal advice privilege lasts indefinitely." It follows that disclosure of the legal advice through AIE would adversely affect the confidentiality of such communications.

Records protected by legal advice privilege

In relation to S.I. No. 309 of 2018, the initial proposal for the amendment arose in the context of an AIE request that had been made by the appellant to the Department of Defence for information relating to the President. Legal advice shared between the Department and the Department of Defence was the subject of my review in Case CEI/19/0025, which I referenced above.

The records at issue in this case, as well as those that have been released to the appellant, reflect that the Department sought and obtained legal advice in relation to the proposed amendment from its own internal legal adviser and the Office of the Attorney General. The Office of Parliamentary Counsel (OPC) is a constituent part of the Office of the Attorney General. In the process of drafting the amending Regulations, the OPC provided legal advice in relation to the proposed amendment. The website of the Office of the Attorney General notes that during the process of drafting legislation, "legal issues can arise which may involve Parliamentary Counsel seeking the advice of another lawyer (known as an Advisory Counsel) in the Office of the Attorney General whose specific function it is to give legal advice to Government Departments". However, the website does not say the OPC does not in any circumstance provide advice to public authorities or that communications with it cannot be considered as privileged. Moreover, the records also indicate that the OPC and the Advisory Counsel worked together on the matter, with many of the records identified on the schedule as involving an email chain with the OPC actually including or consisting of communications with the Advisory Counsel.

The article published by McCann FitzGerald that the appellant refers to discusses a recent decision of the Court of Appeal of England and Wales (EWCA) in *The Civil Aviation Authority v Jet2.Com Ltd, R. (on the Application of)* [2020] EWCA Civ 35. The decision clarified that the dominant purpose test applies to legal advice privilege as well litigation privilege, but it did not substantially alter the legal professional privilege rule in either its jurisdiction or that of Ireland. The Irish Courts, and this Office, have long recognised a distinction between legal advice and legal assistance, a matter that was in some doubt in the UK. However, in the EWCA case referred to, Hickinbottom L.J. confirmed the wide scope of legal advice privilege (referred to as "LAP") in relation to communications made in a "legal context" and particularly in relation to the concept of "continuum of communications". Thus, a "broad (rather than nit-picking) approach" is the proper approach in considering a continuum of communications between lawyer and client. Hickinbottom L.J. explained:

> "Although of course the context will be important, the court is unlikely to be persuaded by fine arguments as to whether a particular document or communication does fall outside legal advice, particularly as the legal and non-legal might be so intermingled that distinguishing the two and severance are for practical purposes

> impossible and it can be properly said that the dominant purpose of the document as a whole is giving or seeking legal advice."

With certain exceptions (outlined below), I am satisfied that the dominant purpose of the communications at issue in this case was the seeking and/or giving of legal advice and that the communications therefore qualify for legal professional privilege.

I do not agree that any of the communications to which access has been refused were "widely circulated". As noted by Finnegan J in *Redfern Limited v. O'Mahony* [2009] IESC 18, Finnegan J (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.'" Thus, the Court found that privilege "will not, however, be lost where there is limited disclosure for a particular purpose or to parties with a common interest". In this case, communications from the Department's internal legal adviser and the Advisory Counsel were shared with the Department of An Taoiseach as part of the continuum of communications for the purpose of seeking and giving legal advice (records 39, 40, 41, 43). I am satisfied that the communications were carried out on an understanding of confidence and for a particular purpose. I do not accept in the circumstances that any privilege was waived.

The following records which were refused in part include extracts that restate the legal advice that was sought or obtained:

- Covering emails included in record 47;
- Attachment included in record 47 entitled "Position of President under the Access to Information on the Environment Regulations";
- Covering emails included in record 49;
- Emails included in record 53;
- Records 51, 68, 69, 71, and 72.

I accept that the parts of these records restating the legal advice sought or obtained are also protected by legal advice privilege.

<u>Records that do not qualify for legal advice privilege</u>

However, I note that, while further legal advice was sought from the Department's internal legal adviser in the early part of 2018, the process of seeking and/or obtaining legal advice from the Office of the Attorney General appears to have concluded in December 2017. The following extracts consist of communications with the OPC in 2018 that relate primarily to instructions for the drafting of the amending Regulations without any new legal advice being sought or given:

- Record 44: the first two emails in the chain;
- Record 48: the first five emails in the chain;

- Record 52: page 1;
- Record 57: pages 1 and 2;
- Record 58: from bottom of page 1 (email of 28 March 2018 at 09:30) to most of page 3, inclusive of the email of 25 January 2018 at 15:08;
- Record 59: pages 1 and 2, and part of page 3, inclusive of the email of 25 January 2018 at 15:08;
- Record 60: pages 2 and 3;
- Record 62 apart from the email dated 3 August 2017;
- Record 63 apart from the email dated 3 August 2017;
- Record 64 apart from the email dated 3 August 2017;
- Record 65 apart from the email dated 3 August 2017;
- Record 66 apart from the email dated 3 August 2017.

For the sake of clarity, I note that the parts of record 65 that I do not regard as involving legal advice include the attached draft Regulations. This draft was completed in May 2018, approximately two months after the process of seeking and obtaining legal advice from the Department's internal legal adviser appears to have concluded.

In addition, record 67 is a cover note from the Support Unit of the OPC forwarding a draft of the Regulations. Another copy of the draft Regulations is included in record 68. I find no basis for concluding that these copies of the draft Regulations, which again date from May 2018, qualify for legal professional privilege.

No other grounds for refusal have been identified in relation to these records. I am therefore not satisfied that the Department's decision to refuse access to the extracts outlined above, record 67, and the draft Regulations dating from May 2018 was justified and find that the relevant information should be released accordingly.

The public interest in relation to the privileged communications

In weighing the public interest served by disclosure of the information protected by legal advice privilege against the interest served by refusal, I note 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. In this case, disclosure would enhance transparency by providing further insight into the considerations taken into account in amending the AIE Regulations through S.I. No. 309 of 2018.

On the other hand, I recognise that legal professional privilege is regarded as a cornerstone of the administration of justice. In Martin & Doorley v. Legal Aid Board [2007] 2 IEHC 76, for example, the High Court held 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'". Accordingly, I consider that there would have to be exceptional

public interest factors at play, in favour of disclosure, before legal professional privilege could be set aside. In this case, the Department has already released a large amount of information regarding the amendment process, including communications that took place with this Office. Further records fall to be released as a result of this decision. I therefore consider that the public interest in openness and transparency has been served to a large extent. In the circumstances, I am satisfied that the public interest served by disclosure of the information protected by legal professional privilege does not outweigh the interest served by refusal and that article 8(a)(iv) applies as claimed with the exceptions identified above.

Concluding paragraph of the attachment to record 54b

The Department does not claim that any part of the attachment to record 54b is entitled to legal professional privilege. As explained above, however, all but the concluding paragraph is outside of scope. The grounds for refusal that have been invoked by the Department are article 8(a)(iv) in reference to section 29 of the FOI Act, article 9(2)(c) and article 9(2)(d).

Section 29(1) provides that (a) an FOI body may refuse to grant a request if the record concerned contains matter relating to the deliberative process of an FOI body and (b) the granting of the request would be contrary to the public interest. For section 29(1)(a) to apply, the record must contain matter relating to the deliberative process and the process must be the deliberative process of an FOI body. Secondly, section 29(2) provides that section 29(1) does not apply in certain circumstances. For example, section 29(2)(b) provides that section 29(1) does not apply to a record in so far as it contains factual information. The exemption is subject to a public interest test and the public interest test is stronger than the public interest test in other provisions of the Act – it must be shown that the granting of the request would be contrary to the public interest.

A deliberative process may be described as a thinking process which informs decision making in FOI bodies. It involves the gathering of information from a variety of sources and weighing or considering carefully all of the information and facts obtained with a view to making a decision or reflecting upon the reasons for or against a particular choice. Thus, it involves the consideration of various matters with a view to making a decision on a particular matter. It would, for example, include some weighing up or evaluation of competing options or the consideration of proposals or courses of action.

In this case, the Department has stated that the release of the attachment could impact on its ability to discuss its work priorities prior to these being agreed. However, the deliberative process relating to S.I. No. 309 of 2018 has concluded and no showing has been made that disclosure of the information contained in the final paragraph of the attachment to record 54b would be contrary to the public interest. I am therefore not satisfied that

section 29 of the FOI Act protects the confidentiality of the information concerned for the purposes of article 8(a)(iv) of the Regulations.

Article 9(2)(c) of the Regulations states that a public authority may refuse to make environmental information available where the request concerns material in the course of completion, or unfinished documents or data. However, the attachment itself appears to be a final memorandum that was submitted to officials within the Department on 6 March 2018. S.I. No. 309 of 2018 was subsequently published on 3 August 2018. In the circumstances, I find no basis for concluding that article 9(2)(c) applies.

Article 9(2)(d) of the Regulations states that a public authority may refuse to make environmental information available where the request concerns internal communications of public authorities, taking into account the public interest served by the disclosure. I accept that the relevant information is an internal communication. However, its disclosure would enhance transparency regarding the decision-making process that led to the making of the now published S.I. No. 309 of 2018. Taking this into account, I find that article 9(2)(d) does not apply.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I vary the Department's decision in this case on the basis that article 8(a)(iv) applies to the records at issue with certain exceptions. I find that the refusal of access to the following was not justified and I therefore direct the release of:

- The extracts identified above as relating primarily to instructions for the drafting of S.I. No. 309 of 2018 without any new legal advice being sought or obtained;
- Record 67 and the other copies of the draft Regulations dating from May 2018;
- The concluding paragraph of the attachment to record 54b.

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.

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Peter Tyndall
Commissioner for Environmental Information
4 August 2020