

**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 2014
(the AIE Regulations)**

Case CEI/17/0005

Date of decision: 24 April 2018

Appellant: SLR Environmental Consulting (Ireland) Limited

Public Authority: Offaly County Council (OCC)

Issues:

1. Whether OCC's decision to withhold specific information from the appellant on the grounds of commercial sensitivity was justified
2. If it was not justified, whether it would be appropriate to require OCC to make information available to the appellant

Summary of Commissioner's Decision: The Commissioner found that OCC's decision to refuse to provide the appellant with access to information on the grounds of commercial sensitivity was not justified, as the AIE Regulations do not permit refusal for that reason. He therefore annulled OCC's refusal decision.

The Commissioner decided to formally require OCC to provide the appellant with access to the data on waste types and quantities submitted in AERs for 2015 by the holders of the waste-facility permits specified in the AIE request.

He decided that it would be not be appropriate to require OCC to provide access to waste destination data from the same reports, on industrial confidentiality grounds, as provided by article 9(1)(c) of the AIE Regulations.

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 18 October 2016, the appellant submitted a two part AIE request to the National Waste Collection Permit Office (NWCPO) in OCC. The first part of the request sought “copies of the 2015 Annual Environmental Reports (AERs) held by the NWCPO in relation to the following waste management facilities” and went on to specify 60 permitted waste facilities in a table listing companies, locations and permit numbers. The second part of the request said: “if the 2015 AER has not been submitted for any of these facilities, please supply a copy of the latest available AER for each facility”.

On 11 November 2016, OCC notified the appellant that it had received the AIE request on 27 October 2016 and was extending the time in which to make a decision to 21 December 2016.

On 22 December 2016, OCC gave notice of its decision to part-grant the first part of the request. OCC said that it was refusing access to ‘waste data’ since it was commercially sensitive. No decision was given on the second part of the request.

The appellant requested an internal review on 3 January 2017. It made it clear that it wanted access to the waste data from 2015, but did not challenge OCC’s failure to give any decision on the second part of the request.

On 2 February 2017, OCC gave notice of its internal review decision. The internal-reviewer said that she had obtained legal opinion and, “having made particular reference to” one of my earlier decisions (that in case CEI/15/0006), decided to affirm the earlier decision on the first part of the request.

The appellant appealed to my Office on 7 February 2017, saying that:

The NWCPO provided redacted data, including environmental data, but refused to provide data on waste types and quantities handled at these facilities... That was my main interest in making the request... There are good environmental reasons for the NWCPO to make available details on quantities and types of waste accepted and dispatched from waste transfer stations in Ireland and this environmental interest should overrule any commercial sensitivities.

One of my investigators made an effort to explore a possible settlement early in the process. For a time that effort seemed promising. The appellant made it clear that he would accept the redaction of customer names, and OCC stated that it is in favour of the greatest possible

transparency in environmental reporting. On occasion, the parties focussed on the question of whether it would be desirable for *all* AERs for *all* years to be publicly available and whether there ought to be parity in the publication of AERs by the Environmental Protection Agency (EPA) and OCC. I have no role in determining whether certain information should be made publicly available as a matter of policy. My role is confined to reviewing OCC's decision to refuse to provide access to the information held by OCC as part of AERs submitted for the year 2015, in so far as such data is within the scope of the current appeal. I have no role in judging whether or how well public authorities fulfil their obligations under article 5 of the AIE Regulations. Regrettably, in this case all efforts to reach a settlement were unsuccessful and a more formal approach to dealing with this appeal was therefore required.

Very late in the processing of this appeal OCC cited article 9(1)(c) of the AIE Regulations (which deals with commercial and industrial confidentiality) as part of an argument that the confidentiality of the information at issue in this case is protected. That argument did not form part of the refusal decision given to the appellant by OCC.

Scope of Appeal

As may be seen from the above extract from the appeal, the appellant spelled out the scope of its appeal. It challenged OCC's refusal to provide access to two types of data relevant to the first part of the AIE request, i.e. "data on waste types and quantities", contained in 2015 AERs. In a later submission to my Office, the appellant argued that it should not have been refused access to three types of data, i.e. "data on waste types, tonnages and destinations". When the earlier-stated scope of appeal was put to the appellant by my investigator, the appellant presented a number of arguments as to why I should accept that waste destination data is also within the scope of appeal. I found that one of those arguments required serious consideration. The appellant showed evidence that he had withdrawn another AIE appeal on the basis of what he had been told by my Office about the scope of the current appeal. In light of this, I consider that it would be unfair if I were to regard waste-destination data as being outside the scope of appeal and therefore my review. Accordingly, I accept that the scope of this appeal concerns the data in AERs held by OCC for the year 2015 on waste types, quantities (whether expressed by volume or weight) and destinations, as submitted by the holders of the waste-facility permits that were specified in the AIE request.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review OCC's decision in so far as it relates to the scope of appeal and to annul, vary or affirm that decision.

In conducting my review I took account of the submissions made by the appellant, OCC and permit-holders. I 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).

Whether the refusal decision was justified

OCC's position

OCC's position is as follows:

- It received the AIE request on 27 October 2016 and extended the time for the making of a decision to 21 December 2016.
- It notified the appellant on 22 December 2016 of its decision to withhold access to 'waste data' as this was considered to be commercially sensitive.
- Its internal reviewer took legal advice and "having made particular reference to" one of my earlier decisions, [case CEI/15/0006](#) (which is available on my website www.ocei.ie), affirmed the earlier decision.

The appellant's position

The appellant's position is that the refusal to provide access to data on waste types, quantities and destinations was not justified. It argued that, while the AIE Regulations permit non-disclosure on the grounds of commercial or industrial confidentiality, such a decision to withhold information must pass several tests. It must first be established (it argued) that such confidentiality is provided in national or Community law to protect a legitimate economic interest. It submitted that OCC had not done this. It also argued that AERs for permitted waste facilities are no more commercially confidential than AERs for waste facilities licensed by the EPA and it said that the EPA publishes such data on its website.

The appellant also presented a public interest argument, arguing that “the public has a right to know if operators of permitted sites are breaching the limits set in the permits or are properly managing the waste that is delivered to the sites”. It gave an example in which one local authority had provided it with access to information of the type that is now at issue and this information enabled the appellant to find a ‘major discrepancy’ . It argued that it appeared (although it had not been proven) that one of the waste facility operators involved “may be under-reporting the quantities of waste handled at the facility by a very large amount” and it argued that this “has a number of serious implications in terms of permit compliance, planning compliance and the requirement for Environmental Impact Assessment as well as ‘fit and proper person’ status to collect and manage waste”.

Analysis

There is a discrepancy in the record concerning the date of receipt of the AIE request: The request was dated 18 October 2016 but OCC told the appellant that it was received on 27 October 2016. When my investigator queried this, OCC accepted that it had received the request on 18 October 2017, but explained that it was not received on that date by the NWCPO and “as the staff there were not familiar with AIE requests, the request was not passed to [OCC’s AIE Officer] until 27 October 2016”. OCC added that it has since implemented procedures to ensure that in future all AIE requests are passed immediately to the AIE Officer.

Regrettably, OCC failed to appreciate that the operative date when time began to run for the processing of this AIE request was the date on which OCC, as the public authority, received it, not the date when OCC’s AIE Officer received it. Since OCC received the request on 18 October 2016, the appellant was entitled to receive notification of a decision before or on 17 November 2016, unless OCC properly extended the time for a decision in accordance with article 7(2)(b). Any such time-extension could only run until 17 December 2016, i.e. to a date up to two months after the true date of receipt of the request. However, on 11 November 2016 OCC notified the appellant that it was extending the time in which to make a decision to 21 December 2016. Accordingly, OCC’s time extension went beyond what is permitted by the AIE Regulations. Even then, OCC missed its own deadline and issued its decision on 22 December 2016.

As a result of this non-compliance with the statutory timeframe by OCC, a decision refusing the AIE request is deemed in law to have been made on the latest date when a decision fell due, which was 17 December 2016. Accordingly, the decision which OCC issued on 22 December 2016 has no legal validity. Notwithstanding this, I acknowledge that OCC provided access to some of the requested information along with its purported decision on 22 December 2016.

The appellant made a valid request for internal review, and very helpfully drew OCC's attention to the requirements for refusal on the ground of commercial or industrial confidentiality. It argued that these requirements had not been met and it provided a public interest argument to the effect that even if the ground for refusal appeared to meet the required tests, the public interest in disclosure outweighed the interest served by refusal.

OCC gave notice of an internal review decision within the timescale permitted by the AIE Regulations. Regrettably, in making this decision, OCC's internal reviewer did not engage with the appellant's very relevant arguments but simply stated that "having examined the file, a legal opinion commissioned by NWCPO and having made particular reference to the decision of the Commissioner, CEI/15/0006," she had decided that the original decision-maker "was correct in the decision taken" on the request. I take this to mean that the internal-reviewer affirmed the original decision *and its reasoning*. In other words, the internal reviewer affirmed the decision to withhold information because it was commercially sensitive. It is completely unsatisfactory that the decision maker did not offer a reason for refusal that is permitted under the AIE Regulations. The inclusion of a reference to a legal opinion offered no clarity to the applicant. Neither did the reference to having made 'particular reference' to my decision in case CEI/15/0006 add anything significant, as it did not identify what part of that decision is relevant and explain why. Moreover, merely citing a previous decision by my Office is not an acceptable shorthand alternative to the requirement to state clearly the article/sub-article of the AIE Regulations which purports to justify the refusal of an AIE request.

I note that the NWCPO, in a letter which formed part of OCC's submission, was not itself satisfied that all of the withheld information was commercial sensitive. The latter said that "while NWCPO could redact 'customer lists', we cannot be confident that the other information contained within the annual returns is not commercially sensitive". It is clear

from this that the NWCPO itself was not confident that the withheld information was commercially sensitive.

Finding

The AIE Regulations do not permit the refusal of an AIE request on the ground that the requested information is commercially sensitive. As the first part of this request was part-refused on that ground, I must find that this refusal decision was not justified.

Whether it would be appropriate to require OCC to make information available

As I have said in previous decisions, it does not necessarily follow that because refusal of an AIE request was not justified for the reason given, or in the absence of any reason being given, that I should proceed to require a public authority to make information available to an appellant. I would need to be satisfied that the imposition of such a requirement would be appropriate in all of the circumstances.

The only concern which OCC had raised with my Office concerned the effects of disclosure on the commercial interests of the waste-permit holders. In other words, OCC did not advance any argument that disclosure would or could affect its own interests.

I noted that none of the permit-holders consulted by my investigator argued that disclosure of data on waste types and quantities would affect their interests. I was therefore satisfied that it would be appropriate for me to require OCC to release these types of information.

My investigator endeavoured to consult all of the affected permit holders. Some of them argued strongly that public disclosure of data which would reveal where they send waste would seriously harm their interests. A representative of one of the permit holders explained that if large companies knew the details of companies in Ireland or elsewhere in Europe (or further afield such as China) that accept waste from smaller Irish companies, the larger companies could use their economic might to target the same receiving companies, and thereby eliminate any competitive edge held by smaller Irish companies, leading eventually to their forced departure from the industry. It was put to me that such a result would be anti-competitive and therefore contrary to the public interest. No one argued that the information is secret: it is provided to the Irish regulators, which use it as they see fit but without jeopardising the commercial viability of the businesses which provided it. It was also put to me that the waste destinations used by companies in 2015 are very likely to be the same

waste destinations used by them today. Accordingly (it was argued) there can be no presumption that data from 2015 is any less sensitive today that it was in 2015.

I accept that there is a real and serious risk that such harmful effects could result from the public disclosure of the waste destinations used by permit holders. I therefore considered this type of information in more detail. It is clear to me that data on waste destinations is given in confidence and trust to OCC in AERs. I am satisfied that it is given to OCC in circumstances which impose an obligation of confidence on OCC. Clearly that would not be the case if the information was given to OCC in the knowledge that it is OCC's practice to publish such information. In the present circumstances it was given in the knowledge that OCC's practice is not to publish it. I am satisfied, in the circumstances, that the confidentiality of the waste-destination data is protected in Irish law by the common law equitable duty of confidence. I am also satisfied that it serves to protect the legitimate economic interests of permit holders.

From the above considerations I am satisfied that refusal to provide access to the data on waste destinations could be justified under article 9(1)(c) of the AIE Regulations. That article provides that a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.

I considered article 10(3), which requires me to weigh the public interest served by disclosure against the interest served by refusal. The primary interest served by non-disclosure in this case is the private interest of smaller waste facility permit holders in their being protected from being forced out of business by larger operators. I also recognise a public interest in maintaining competition in the waste management industry. On the other hand, the appellant has argued that public disclosure would enable other players in the waste-management industry to spot discrepancies in reporting and bring them to the attention of the relevant authorities. I accept that those involved in the industry would be well equipped to scrutinise the annual returns of their competitors so as to spot discrepancies that could indicate inaccurate reporting and potentially lead to the reporting of suspicions of malpractice to regulators. Weighing the interests served by disclosure against those served by non-disclosure, I find that the interest served by disclosure in this instance does not outweigh the interests served by non-disclosure. I am satisfied that the present system, whereby permit holders are required to report the destinations of their waste to the regulators but not to their

competitors, strikes the right balance and best serves the public interest. I am therefore satisfied, after weighing the public interest, that it would not be appropriate for me to require OCC to provide the appellant with access to the waste destination data.

I considered the data at issue and I am satisfied that it does not relate to information on emissions into the environment within the meaning of the AIE Regulations.

I considered article 10(5), 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. I am satisfied that my decision will comply with this provision.

Decision

Having reviewed OCC's decision to refuse to provide access to data on waste types, waste quantities and waste destinations from the Annual Environmental Reports which it holds for the year 2015, I find that OCC's decision was not justified by the reason given. Under the power given to me by article 12(5), I hereby annul that decision.

I require OCC to provide the appellant with access to all data on waste types and quantities that was submitted in AERs for 2015 by the holders of the waste-facility permits specified in the AIE request. I do not require OCC to provide access to waste destination data from the 2015 AERs.

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

24 April 2018