



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-109597-B3M7V0

Date of decision: 22 December 2022

Appellant: Mr. F.

Public Authority: Department of Agriculture, Food and the Marine [the Department]

Issue: Whether the Department correctly weighed the public interest served by disclosure against the interest served by refusal when refusing the appellant's request;

Summary of Commissioner's Decision: The Commissioner found that the refusal of the request was not justified as the public interest served by disclosure outweighed the interest served by refusal. He annulled the decision of the Department and directed release of the requested information.

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. The background of this case is in a judgment of the High Court in *Sweetman v An Bord Pleanala and others* [2021] IEHC 16, delivered on 15 January 2021. In its judgment, the Court quashed a decision of An Bord Pleanala (ABP), due to the failure (by the EPA as the competent authority) to have assigned a water framework directive “status” to a related water body. This meant that the Board could not carry out an assessment of how the work would affect the water body and the decision was not in compliance with article 4(1) of the Water Framework Directive. The Directive requires Ireland to take steps to ensure all water bodies reach a “good” status and to prevent any deterioration in the existing status of water quality.
2. On 19 April 2021, the appellant requested “any records, including correspondence (internal and external) regarding the implications of the High Court judgment in the JR Case 740 2018 (*Sweetman v ABP*) in connection with the WFD”.
3. The Department refused the request on 18 May 2021. The refusal was based on articles 9(2)(c) and 9(2)(d) of the AIE Regulations, namely that the request concerned material in the course of completion and internal communications. The appellant sought an internal review on 19 May 2021. The internal review affirmed the Department’s refusal of the request on 18 June 2021, based solely on article 9(2)(d) of the AIE Regulations. The internal review decision did not make any findings with regard to article 9(2)(c) of the AIE Regulations.
4. The appellant appealed to this Office on 28 June 2021.
5. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the Regulations. In so doing, I have had regard to the submissions made by the appellant and the Department of Agriculture, Food and the Marine. I have also examined the contents of the records at issue. In addition, I have had regard to:
 - a. 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);
 - b. Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
 - c. 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
 - d. The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’).
6. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

7. The Department identified five emails between department officials that were within the scope of the request. The request was refused on the grounds that these emails were internal communications within the meaning of article 9(2)(d) of the AIE Regulations. The appellant agrees



that these emails are internal communications for the purposes of article 9(2)(d). He bases his appeal to this Office on the grounds that the Department had incorrectly considered the weighing of the public interest against the interest served by refusal as required by both article 9(2)(d) and article 10(3). Accordingly, the review in this case is concerned with this aspect of the decision.

Preliminary Matters

8. The Department made a very brief reference at a late stage in this appeal that questioned whether the requested records were in fact environmental information, as they consisted of discussions relating to the interpretation of case law emanating from the High Court. This was not raised in the original decision or on internal review. I would remind the Department that requests should be considered in full under the AIE Regulations when received, and whether a request concerns environmental information is a preliminary issue that should be considered at the earliest stage. It is not helpful that the Department sought to raise additional arguments when this appeal reached this Office, especially where there is little evidence to support that argument.
9. For the avoidance of doubt, I consider that the requested records fall squarely within the definition of environmental information. The emails contain discussion on how the consideration of applications and the granting of tree felling licenses by DAFM and the Forestry Appeals Committee will be affected by the *Sweetman* judgment and how the Water Framework Directive should be considered in that process. The discussion in the emails contain information on multiple measures and activities within the meaning of paragraph (c) of the definition of environmental information, including the implementation of the Water Framework Directive, the granting of tree felling licenses, and the protection of water quality. The discussions refer to specific water bodies and forestation sites. I also find that the information contained in the records advances the aims of the AIE Directive and Aarhus convention as its release would allow for the public to be better informed as to the implications of the *Sweetman* judgment and the Department's approach to the protection of water quality when granting tree felling licenses.

Analysis and Findings

10. Article 9(2)(d) provides an exemption for internal correspondence of public authorities. This exemption protects the "private thinking space" of public authorities, and to allow for robust engagement between officials of public authorities concerning their affairs.
11. The Ministerial Guidelines on the Implementation of the AIE Regulations say in relation to article 9(2)(d) that "*public authorities should bear in mind that the use of this exemption is discretionary. It should not be resorted to as a simple expedient to protect all internal communications in circumstances where it would be unreasonable to do so. Normally, public authorities would not be expected to invoke this protection for information unless there are good substantial reasons- not otherwise available in Articles 8 and 9- for doing so*". The guidelines also note that "*Essentially, in considering a request/application, public authorities should start from a position of a presumption in favour of disclosure of information.*"



12. Article 9(2)(d) specifically requires a public authority to take into account the public interest served by the disclosure of the requested information. Further to this, where article 9(2)(d) applies, the refusal is also subject to the public interest balancing test as set out in article 10(4) of the AIE Regulations.
13. The Aarhus Convention Implementation Guide notes at page 90 that *“the fact that the requested information falls, in a literal sense, under one or other of the exempt categories is not in and of itself justification for invoking the exemption. The public authority is required to weigh the public interest served by disclosure against the interest served by the exemption”*. The Guide further states in relation to the article 10(3) requirements that the *“balancing test that authorities must go through to weigh the public interest served by disclosure against an interest protected under one of the exceptions in subparagraphs (a) to (h) was noted by the Compliance Committee in its findings on communication ACCC/C/2007/21 (European Community). In that case, the Committee rejected the position of the Party concerned that the identification of any harm to one of the protected interests would be sufficient to keep the information from being disclosed. As the Committee state, in situations where there is a significant public interest in disclosure of certain environmental information, and a relatively small harm to the interests involved, the Convention would require disclosure”*.
14. In submissions to this Office, the Department argued that it requires time to read and absorb a judgment and consider any implications that may arise. It argued that the Department’s remit is to provide the public with guidelines on forestry matters that are grounded in the best information available, having been carefully considered. It argued that based on this, the early release of material such as that requested in this case would not serve the best interests of the public. The Department argues that the content of the emails may not represent the views of the Department, and would be misleading. The Department argued that that the disclosure may seriously affect the ability for an open deliberative process in matters relating to the consideration of the impact of case law.
15. The appellant argues that the weighing of the public interest by the decision maker against the interest served by refusal was not carried out in a sufficiently detailed or reasoned manner. In his submissions he set out that he felt unable to make more extensive submissions regarding how the balancing exercise should be carried out without sight of the withheld information.
16. The review function of this office is inquisitorial in nature and is carried out on a *de novo* basis. In *M50 Skip Hire & Recycling Limited v Commissioner for Environmental Information* the High Court commented at paragraph 48 that *“the concept of public interest affords the Respondent [this Office] the discretion to weigh many factors in the balance and to do so at a particular point in time and with reference to the particular facts of the case”*. It is also clear from the scheme of the AIE Regulations that there is a presumption in favour of disclosure of environmental information and as per article 10(4) of the AIE Regulations, the grounds for refusal should be interpreted in a restrictive manner having regard to the public interest served by disclosure.
17. In favour of disclosure, I consider that there is a strong public interest in the disclosure of environmental information, in particular information relating to how public authorities carry out their functions. The information sought concerns the implementation of EU legislation relating to water quality. I consider that access to information relating to the Department’s assessment of



significant environmental judgments will assist the public in holding the Department or their public representatives to account over how this type of legislation is being implemented. Water quality is of particular concern in Ireland, which adds to the public interest in the disclosure of relevant information. The Environmental Protection Agency in October 2022 stated that Ireland is failing to meet its obligations under the Water Framework Directive, with only 54% of surface water bodies in satisfactory condition.

18. In favour of refusal, I consider that there is an interest in giving public authorities privacy with regard to their internal communications and protecting the private thinking space of public authorities. This exception allows for officials to freely express doubts, objections, concerns and generally debate a variety of different views in the knowledge that such debate will be shielded from public view. I note that the Department have specifically argued that the release of the information sought would be premature, as it has not yet fully formulated its response in relation to the relevant High Court case. I also note that the Department considers that the information may be misleading or may be taken to represent the official views of the Department when it does not do so.
19. There will certainly be circumstances where the public interest served by the disclosure of information such as that at issue in this case will not outweigh the interest served by refusal. I consider that in order for this to be the case, specific and actual factors must be present in the requested information in order to “tip the balance” in favour of refusal. Such circumstances may include where the information contains discussion of potential legal weaknesses or liabilities, discussion of particularly sensitive issues or other circumstances where the nature of the discussion means that the requirement for the protection of the private thinking space outweighs the public interest served by disclosure.
20. I do not consider that any such factors are present in this case. The emails contain reasoned discussion regarding the effects of the case law and how the Department might approach the granting of felling licenses where a water body may be affected. The emails do mention some specific appeals to the Forestry Appeals Committee, however at this stage these have all been decided.
21. I also note that the judgment in *Sweetman* was delivered on 15 January 2021, and accordingly the Department has had almost two years to consider a response to the case. The Department has not pointed me to any particular aspect of the requested information that might lead to incorrect or misleading information made available, or any information that might be considered particularly sensitive for any reason. Due to this, I place less weight on the interests served by refusal in this particular instance.
22. I do not place significant weight on the argument that the release of information may be misleading. Firstly, this presupposes that the reader is not capable of distinguishing between an internal email conversation between Department officials, and an official statement or policy document. Secondly, the clear solution to any concern that the information may be misleading is for the public authority to provide context or clarification when releasing information.
23. Taking all of the above into account, I consider that the public interest in disclosure outweighs the interest served by refusal.



Decision

24. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I annul the decision of the Department and direct the release of the information sought.

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.

Deirdre McGoldrick

On behalf of the Commissioner for Environmental Information

22 December 2022