



**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-93471-V0C2T6  
(Legacy reference: CEI/19/0035)**

**Date of decision:** 21 September 2020

**Appellant:** Mr. Ian Lumley, An Taisce

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

**Issue:** Whether the Department was justified in refusing partial access to records of communication received from representatives of solid fuel companies relating to the proposed introduction of a smokeless fuel zone on an all island basis or within the State since 1 January 2017

**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 9(1)(c) of the AIE Regulations applied to certain excerpts in two of the records at issue. He found that the Department's decision to refuse access to the remaining records was not justified and therefore directed the release of the 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**

On 3 May 2019, the appellant requested access to records of communications received from representatives of solid fuel companies based or registered in Ireland, Northern Ireland or other jurisdictions on the introduction of a smokeless fuel zone on an all island basis or within the State since January 1, 2017. The Department granted the request in part but also refused access in part under article 8(a)(ii) of the Regulations, article 8(a)(iv) of the Regulations in reference to section 29 of the Freedom of Information (FOI) Act, article 9(1)(c) of the Regulations in reference to section 36(1)(b) of the FOI Act, and article 9(2)(d) of the Regulations. An appeal was received by my Office on 22 July 2019.

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 to date. 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**

I note that the Department identified 34 records as relevant to the request. It granted access to 22 of the records in full. Adopting the numbering system used by the Department in its schedule of records, a copy of which was provided to the appellant, my review in this case is concerned with the question of whether the Department was justified in refusing access to following records under the AIE Regulations:

- Records 7-12, 14, 19 in full;
- Records 28, 30, 33, and 34 in part.

It should be noted, however, that records 8 and 10 are largely similar in content. Records 9 and 11 are identical. In addition, in its submissions to this Office dated 13 November 2019, the Department agreed that paragraph 5 of record 28 ("A large majority ... fuels across Ireland") is not confidential and may be released. It also stated that the first two redacted lines in record 33 may be released given that the same information was already made available in the press release included in record 31. However, while it also noted that the information redacted from record 30 is in the public domain through, e.g., the Register of Lobbying website, and did not identify any "provisions of the legislation" that are applicable in the circumstances, it did not expressly agree to release the record in full.

### **Definition of “Environmental Information”**

The Department also claimed for the first time in its submissions to this Office that records 8 and 10 do not contain any environmental information within the meaning of the Regulations. One of the notified third parties has also questioned whether the records affecting its interests (28 & 34) could be described as environmental information.

Article 3(1) of the AIE Regulations provides that "'environmental information' means any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
- (d) reports on the implementation of environmental legislation,
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), ), and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)".

I have had regard to the recent judgments in *Jim Redmond & Mary Redmond v Commissioner for Environmental Information & Coillte* [2020] EICA 83 and *Electricity Supply Board v Commissioner for Environmental Information* [2020] IEHC 190. I have also had regard to the judgment of the English Court of Appeal that is referred to in both of the recent Irish judgments, *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (*Henney*). I note in particular that “any information ... on” a measure affecting or likely to affect the environment is prima facie environmental information within the meaning of article 3(1)(c) of the definition, but that it is also important to determine whether access would serve the purpose of the Aarhus Convention and AIE Directive by enabling members of the public to be better informed and

better able to contribute to environmental decision-making. In this case, the records at issue consist of communications about a proposed measure to ban smoky coal on a nationwide basis. Records 8 and 10 are covering emails that include details of the dates, times, and personnel involved. Records 28 and 34 are letters to the Minister urging implementation of the nationwide smoky coal ban. I find in the circumstances, 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.

### **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 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 its submissions, the Department stressed at the outset that all the records at issue relate to the proposed national extension of the smoky coal ban, a longstanding commitment of Government dating back to 2015 at least. It noted that progress on the matter has been delayed by the threat of legal action but that it continues to work actively in the area, including by engaging with stakeholders with a view to bringing legislation forward at the earliest opportunity. In the circumstances, it considers that section 29 of the FOI Act, as incorporated into the AIE Regulations under article 8(a)(iv), applies to records 7, 9/11, 12, 14, 19, 28, 33, and 34. It also referred to section 30(1)(c) of the FOI Act for the first time, claiming that access to these records could reasonably be expected to disclose positions taken, or to be taken, in negotiations carried out by the Department.

In addition, the Department maintained that the following records are subject to refusal under article 8(a)(ii) of the Regulations on the basis that they were voluntarily submitted and contain "intelligence on the structure of and challenges to the market in which legitimate businesses operate and which may damage a legitimate economic interest": 7, 9/11, 14, 28, 30, 33, 34. It also maintained that article 9(1)(c) applies on the basis that the records contain commercially sensitive information within the meaning of section 36(1)(b) of the FOI Act. Although it noted that records 8, 10, 12, and 19 had also been refused under articles 8(a)(ii) and 9(1)(c), the Department did not add any comment about these records in

relation to these grounds for refusal. However, the Department observed that the release of record 9/11 had previously been opposed by the third party concerned on the basis that release would be prejudicial to: ongoing engagement with the Department; any potential legal challenge; and the third party's legitimate commercial interests.

**Deliberative process, negotiating positions (& internal communications)**

Section 29(1) of the FOI Act 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. However, 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 and public authorities. 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 it continues to work actively on the Government's commitment to deliver a smoky coal ban on a nationwide basis, including engagement with stakeholders with a view to bringing legislation forward at the earliest opportunity. It has also claimed that release of the relevant records could reasonably be expected to disclose positions taken, or to be taken, in negotiations carried out by the Department and that section 30(1)(c) of the FOI Act is therefore also of relevance. In its view, the public interest is better served by allowing it to conclude the discussions within the sector with a view to finalising legislation in this area in the near future.

However, the correspondence represents deliberate efforts by certain stakeholders to influence the Department's policy and legislation in relation to the smoky coal ban. I consider that there is a strong public interest in openness and transparency in relation to such efforts. In the circumstances, I find that no showing has been made that disclosure of the correspondence 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. Moreover, given the nature of the records, which are about efforts to influence policy and legislation rather than

“negotiations” *per se*, I am also not satisfied that section 30(1)(c) of the FOI Act applies to protect the confidentiality of any relevant “proceedings” of the Department.

Although the Department does not seem to continue to rely on article 9(2)(d) of the Regulations as a basis for refusal, I note for the sake of completeness that this provision allows a public authority to 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. In this case, however, the communications were generated by third parties. Moreover, as stated above, there is a strong public interest in openness and transparency in relation to such communications. I therefore find that article 9(2)(d) does not apply.

### **Third party interests**

The claims made for refusal under article 8(a)(ii) and article 9(1)(c) are intended to protect the interests of the affected third parties in this case, which I will refer to as Solicitors A, on behalf of three other companies, Company B, and Company C. Article 8(a)(ii) provides that a public authority shall not make available environmental information where disclosure would adversely affect the interests of any person who, voluntarily and without being under, or capable of being put under, a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information. Article 9(1)(c) allows a public authority to refuse to make environmental information available 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".

### **Solicitors A**

Solicitors A have argued in its submissions to this Office that the records affecting its interests (records 8/10, 9/11, and 12) should be refused in full. Solicitors A have presented summary arguments in support of the Department’s position in this case in relation to articles 8(a)(ii), 9(1)(c), as well as article 8(a)(iv) in reference to sections 29 and 30(1)(c) of the FOI Act. Solicitors A have also suggested that 31(1)(a) of the FOI Act applies in conjunction with article 8(a)(iv) of the Regulations on the basis of legal professional privilege.

The correspondence at issue represents deliberate efforts by the coal industry to influence policy and legislation relating to the proposed nationwide ban on smoky coal. I have found above that the records consist of information on a measure affecting or likely to affect the environment. Solicitors A have not shown how its interests or that of its clients would be harmed by the release of the records at issue. For instance, as stated by Cross J. in the High Court case of *Westwood Club v The Information Commissioner* [2014] IEHC 375, it is not sufficient for a party relying on section 36(1)(b) to merely restate the provisions of the section, list the documents and say that they are commercially sensitive. Moreover, I do not accept that the records qualify as confidential communications for the purposes of the legal

professional privilege rule. In any event, given the very strong public interest recognised under the AIE regime in maximising openness in relation to environmental matters, I find, with the exception of the few excerpts discussed below, that the public interest in disclosure of the records at issue outweighs the interests served by refusal.

#### Company B

In its submissions to this Office, Company B stated through its solicitors that it has no objection to the release of the records affecting its interests.

#### Company C

Company C has argued in its submissions to this Office that certain excerpts included in the redactions made from its records of correspondence with the Department, which have largely been released, are commercially sensitive within the meaning of section 36(1) of the FOI Act and therefore should not be disclosed under article 9(1)(c) of the Regulations. The particular excerpts that it has identified are as follows:

- record 28: “Should this .... has fallen.”
- Record 34:
  - “The decision will ... in Ireland” (bottom of p. 3);
  - “CPL’s position ... urgency” (bottom of p. 3);
  - “Finally, if we ... regulation in Ireland” (p. 4).

The excerpts refer to sensitive market information relating to the company’s current and future business operations. Company C has outlined how disclosure of the excerpts could create commercial problems for the company and weaken its position against its competitors. It has also addressed the public interest, noting that there is a strong public interest in ensuring that sensitive commercial matters shared with the Government remain confidential. As stated in its submissions:

If such matters were to be disclosed, it would undermine the confidence of commerce and industry in discussing important and commercially sensitive matters with Government in fear of the confidentiality of such matters not holding good. This would in turn undermine the confidence that companies would have to invest in Ireland if their particular investment decisions were to be subject to public disclosure (and where there is no compelling reason to the contrary why such information should be disclosed). There is therefore a strong public interest in upholding and protecting the commercially sensitive information of investors in Ireland in order to prevent harm to the legitimate economic interests of such parties.

Article 9(1)(c) of the AIE Regulations is a discretionary ground for refusal that may apply where:

1. The information at issue is commercially or industrially confidential;
2. The confidentiality of the information is provided for in national or Community law to protect a legitimate economic interest;
3. The confidentiality of the information is provided for in national or Community law to protect a legitimate economic interest.

I accept that section 36 is a relevant national law that provides for the protection of commercially sensitive information. Section 36(1) provides in pertinent part that a request shall be refused if the record concerned contains "(b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or (c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates."

The essence of the test in section 36(1)(b) is not the nature of the information, but the nature of the harm which might be occasioned by its release. I note that the standard of proof is relatively low under sections 36(1)(b) and (c) in that the mere possibility of prejudice to the competitive position, or to the conduct or outcome of negotiations, of the person concerned is sufficient. Based on my examination of the relevant excerpts and submissions, I am satisfied that article 9(1)(c) applies as claimed.

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. On the other hand, however, both the AIE regime and the FOI Act recognise a public interest in restricting access to certain information. Competing interests must be assessed in order to weigh the public interest in favour of disclosure against the potential harm that might result from disclosure. In this case, I accept that there is a strong public interest in stakeholders being able to share commercially sensitive information with public authorities without fear of harming their competitive position as a result. I also consider that the public interest in openness and transparency in relation to Company C's correspondence has been served to a large extent. In the circumstances, I find that the public interest served by disclosure of the excerpts identified by Company C does not outweigh the legitimate economic interest of Company C that I accept is protected by law.

### **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 9(1)(c) applies to the excerpts in records 28 and 24 identified by Company C in its submissions to this Office, but that the



refusal of access to the other records at issue was not justified. I therefore direct the release of the records at issue apart from the relevant excerpts in records 28 and 34.

**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**  
**21 September 2020**

