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-93467-S3L2Z8
(Legacy reference: CEI/19/0024)

Date of decision: 21 September 2020

Appellant: Right to Know CLG

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

Issue: Whether the Department was justified in refusing access to records of correspondence with the coal industry regarding threats of litigation in relation to a proposed nationwide ban on smoky coal

Summary of Commissioner's Decision: Having carried out a review in accordance with article 12(5) of the AIE Regulations, the Commissioner found that the Department's decision to refuse access to the records sought 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 5 April 2019, the appellant requested access to correspondence with the coal industry regarding threats of litigation in relation to a proposed nationwide ban on smoky coal. The request was based on a report in *The Irish Times* from the same day (https://www.irishtimes.com/news/environment/government-delays-plans-for-smoky-coal-ban-following-legal-threats-from-industry-1.3849945). The Department refused the request in full under article 8(a)(ii) of the AIE Regulations, article 8(a)(iv) of the AIE Regulations in reference to section 29 of the Freedom of Information (FOI) Act, article 9(1)(c) of the AIE Regulations in reference to section 36(1)(b) of the FOI Act, and article 9(2)(d) of the AIE Regulations. The appellant appealed to my Office on 9 May 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 13 documents consisting of 67 pages of records as relevant to the request. It asserted for the first time in its submissions to this Office that four of the pages do not constitute "correspondence with the coal industry" and therefore should be excluded from the scope of the request. I consider that the belated assertion would require me to take an unduly narrow approach to the request given that the pages in question are emails forwarding the correspondence in question within the Department. Accordingly, 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 records 1 to 67 under the AIE Regulations.

Definition of "Environmental Information"

The Department also claimed for the first time in its submissions to this Office that certain records (1, 3, 5, 6, 11, 12, 13, 57) do not contain any environmental information within the meaning of the Regulations.

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 correspondence about a proposed measure to ban smoky coal on a nationwide basis. Records 1, 3, 5, 6, 11, 12, 13, 57 are covering emails that include details of the dates, times, and personnel involved. 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 noted that the records at issue relate to threatened legal action against it in relation to proposed legislative measures to regulate the solid fuel trade. It identified the key records from the relevant third parties as 4, 7-10, 13, 17-20, 21-56, 58-59, 60-67. It stated that the other records (1-3, 5-6, 11-12, 14-16, and 57) were generated on foot of threatened legal action. It stressed that the threat of litigation is continuing and ongoing.

The Department also noted that the relevant third parties made very strong responses when consulted by the decision-maker in this case in which they opposed release on the grounds of legal professional privilege and commercial sensitivity. The Department observed that certain records contain information on the companies' view of the structure of the market, on the impact of the proposed regulation, on weaknesses in the companies' positions in relation to market changes, and on likely losses.

The Department therefore claimed that the following records are subject to refusal under article 8(a)(iv) of the Regulations in reference to section 31(1)(a) of the FOI Act and also under article 9(1)(c): 1, 2, 4, 5, 7-10, 13, 14, 16-20, 21-56, 57-67. It also maintained that article 8(a)(ii) of the Regulations applies to the following records: 7-10, 17-19, 21-56, 60-67. In addition, as the Department continues to work on policy and legislation in relation to the regulation of solid fuels in light of the issues raised by the correspondence, its position is that all of the records at issue fall within the scope of section 29 of the FOI Act, as incorporated into the AIE Regulations under article 8(a)(iv).

In addressing the Department's grounds for refusal, I will start with the claims relating to the threatened litigation and deliberative process. I will then consider the claims raised which relate solely to the interests of the affected third parties.

Threatened litigation

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

Legal professional privilege is a common law rule incorporated into section 31(1)(a) of the Act that 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).

I do not accept that correspondence threatening litigation itself qualifies as confidential communications for the purposes of the legal professional privilege rule. On the contrary, the correspondence was addressed directly to the Department, the opposing party in the dispute underlying the threats. I am therefore not satisfied that article 8(a)(iv) of the Regulations applies in this case on the basis of legal professional privilege as claimed.

Deliberative process (& 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 on policy and legislation in relation to the regulation of solid fuels in light of the issues raised by the correspondence. In its view, the public interest is better served by it being able to finalise policy in this area (e.g., through engagement with relevant stakeholders) without intrusion. 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.

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, and Company B. 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".

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.

Solicitors A, on the other hand, have argued that the records should be refused in full. They have indicated that they may have misunderstood this Office's consultation letter as suggesting that the request was refused in full under article 8(a)(ii) though some of the records at issue in this case were not generated by its clients or any other third parties. I note, however, that my Office's consultation letter suggested that the Department should be contacted with any queries regarding the contents of the records or the Department's position on the matter. I further note that Solicitors A followed this suggestion in March of this year. I therefore find no basis for concluding that Solicitors A or its clients have been prejudiced by any misunderstanding arising from its reading of this Office's letter.

Solicitors A have otherwise 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 31(1)(a) of the FOI Act.

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. I have also found that the records do not qualify for legal professional privilege. 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. In any event, given the very strong public interest recognised under the AIE regime in maximising openness in relation to environmental matters, I find that the public interest in disclosure of the records at issue outweighs the interests served by refusal.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I find that the Department was not justified in refusing access to the records at issue and therefore direct release of the information concerned.

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