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 CEI/19/0006

Date of decision: 17 June 2020

Appellant: C company, c/o W Solicitors

Public Authority: Department of Agriculture, Food and the Marine (the Department)

Issue: Whether the Department was justified in refusing the appellant's request for records relating to applications it submitted to the Department in 2006 and 2014 for an aquaculture licence on the basis that article 8(a)(iv) of the AIE Regulations applied to the records.

Summary of Commissioner's Decision: The Commissioner found that the Department was justified in refusing access to the 2014 licence application on the basis that article 8(a)(iv) of the AIE Regulations in conjunction with section 29 of the FOI Act. He affirmed the Department's decision accordingly.

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

The principal piece of legislation governing aquaculture licensing is the Fisheries (Amendment) Act 1997 (as amended) (1997 Act). Under Section 6 of the 1997 Act, it is illegal to engage in aquaculture without an appropriate Aquaculture Licence. The procedure for aquaculture licensing process is set down in statutory instruments made under the 1997 Act, the principal one being S.I. No. 236/1998 Aquaculture (Licence Application) Regulations 1998 (as amended) (1998 Regulations). The licence to which the AIE request in this case relates is a marine finfish renewal application and its companion foreshore licence application which were made in 2014 (the 2014 licence application). Environmental impact assessments (EIAs) are required in respect of marine finfish licence applications. Appropriate Assessments (AAs) are required if the marine finfish licence application is within or likely to impact a protected Natura 2000 site. Companion foreshore licences, which are issued under the Foreshore Acts 1933 to 2014 (1933 Act), are required for marine aquaculture. The Aquaculture and Foreshore Management Division (AFMD) at the Department of Agriculture, Food and the Marine administers aquaculture licence applications and processes foreshore lease and licence applications. The Minister for Agriculture, Food and the Marine makes the decisions on aquaculture licensing applications. The Minister's decisions are appealable to the Aquaculture Licences Appeal Board (ALAB). Since September 2015, when an application goes to Public Notice, relevant documentation relating to the application is published on the Department's website at www.agriculture.gov.ie on its Aquaculture/Foreshore Licence Applications webpage. An adverse judgment by the Court of Justice of the European Union (CJEU) against Ireland in 2007 has, as I understand it, contributed to a backlog in the processing of aquaculture licence applications. Aquaculture operators can continue to operate under their pre-existing licences until a decision is made on their renewal applications.

On 13 September 2018, a firm of solicitors made a request under the Freedom of Information Act 2014 (FOI Act) for access to records relating to an application made by or on behalf of two specified business names on 17 November 2006 for the renewal of a specified Fish Culture Licence and a specified Foreshore Licence (collectively the Licence) and all records relating to the 2014 licence application. The Department provided the requester with a schedule of 239 records covered by the request. It granted access to ten records and refused access to all other records on the basis that section 29, among other sections, of the FOI Act applied. The requester applied to the Office of the Information Commissioner for a review of the Department's FOI decision.

On 8 January 2020, the Information Commissioner's designated officer made a decision on that review in Case Number: OIC-53267-L3YT2, available at www.oic.ie. That decision varied the Department's decision on the FOI request. It found that section 29 of the FOI applied to the records relating to the 2014 licence application that fell within the scope of the request

as made. He found that the section 29 exemption did not apply to earlier records identified in the decision and directed their release.

On 14 November 2018, a firm of solicitors, on behalf of a named company, made the following request to the Department under the AIE Regulations:

> "1. The application made by / on behalf of [A company] and / or [B company] on 17 November 2006 for the renewal of Fish Culture Licence 215 and Foreshore Licence T12/85 (collectively the "Licence"); and
>
> 2. The application made by / on behalf of [A company] and / or [B company] in December 2014 for the renewal of the Licence,
>
> which is listed in the enclosed Schedule 1".

The enclosed Schedule 1 listed the 239 records that were the subject of the FOI request made on 13 September 2018 and were at issue in the Information Commissioner's review in Case Number: OIC-53267-L3YT2.

On 13 December 2018, the Department made a decision refusing access to the information requested on the basis that it did not contain environmental information as defined in article 3(1) of the AIE Regulations.

The appellant requested an internal review of the Department's decision on 20 December 2018. It requested access to the 229 records that the Department had withheld *i.e.* the remaining records that the Department had refused access to in response to the FOI request.

On 18 January 2019, the Department made a decision annulling its initial decision that the records did contain environmental information within the meaning of article 3(1) of the AIE Regulations. However, it made a fresh decision refusing the request on the basis that article 8(a)(iv) of the AIE Regulations in conjunction with section 29 of the FOI Act applied.

The appellant appealed the Department's internal review decision to my Office on 29 January 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 correspondence between the appellant and the Department and to the submissions of the appellant and the Department to my Office. The parties' submissions in Case Number: OIC-53267-L3YT2 were included in their submissions in this appeal. I have also examined the contents of the records at issue. 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 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); The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the Aarhus Guide); section 29 of the FOI Act; and the Information Commissioner's decision in Case Number: OIC-53267-L3YT2. While I have had regard to the Information Commissioner's decision Case Number: OIC-53267-L3YT2, I conducted an independent and fresh review of all aspects of this appeal and decided it on its own merits.

Scope of Review

In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it. As set out above, the appellant made an AIE request for information to which the Department had refused access in response to an FOI request. The Information Commissioner's decision on the subsequent FOI appeal directed the release of the records relating to the 2006 licence application and upheld the refusal of access to the records relating to the 2014 licence application. During the course of my Office's investigation in this case, the appellant agreed to narrow the scope of this appeal to those records that the Information Commissioner had found the Department to be justified in refusing access to under section 29 of the FOI Act in Case Number: OIC-53267-L3YT2. For all parties' ease of reference, I have adopted the numbering system used by the Department in the schedule of records. Accordingly, my review is concerned with whether the Department was justified in refusing access to records 68, 121, 125, 127 to 140, 149, 151, 152, 154, 155, 157 to 164, 167, 171, 174, 186 to 190, 191 (excluding pages 1-10), 195 to 199, 201, 202, 222, and 224 to 239.

Analysis and Findings

As noted above, the Department refused access to the records at issue on the basis that article 8(a)(iv) of the AIE Regulations in conjunction with section 29 of the FOI Act applies to them.

Article 8(a)(iv) of the AIE Regulations

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 Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts).

The appellant asserts that the Department has not identified the particular proceedings in respect of which it is claiming article 8(a)(iv). It states that neither the Department's initial decision nor its internal review decision identified the relevant proceedings that would be adversely affected by disclosure.

I have accepted in 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. In Case CEI/18/0029 (Right to Know and Department of Culture, Heritage and the Gaeltacht) I set out the reasons why I consider that the incorporation of exceptions or exemptions contained in freedom of information legislation into article 8(a)(iv) is compatible with the AIE Directive. I also set out how I consider that Ireland has preserved the confidentiality of "proceedings" that are covered by the FOI exemptions or otherwise by law, provided that the requirements for such protection are met, including in relation to the public interest. Although I have not repeated that analysis in this decision, the same principles apply in this case. It is clear from the Department's position in this case that the records relate to its deliberative process on the 2014 licence application that it considers that the relevant proceedings are its internal workings in relation to its processing of the 2014 licence application, which it maintains are protected by section 29 of the FOI Act.

Section 29(1) of the FOI Act

Section 29(1) of the FOI Act provides that a request may be refused if (a) the record concerned contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations, and the results of consultations), and (b) the body considers that granting the request would be contrary to the public interest. These two requirements are independent. Therefore, both requirements must be met in order for the exemption to apply. However, section 29(2) provides that section 29(1) does not apply if the record contains information listed in section 29(2) which includes: (a) rules, procedures, guidelines, etc.; (b) factual information; (c) the reasons for a decision of an FOI body; (d) investigation or analysis of the performance of an FOI body; and (e) expert report.

A deliberative process may be described as a thinking process that 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.

Section 29(1)(a) of the FOI Act

The Department provided a detailed history of the licensing process, which is summarised at length in Case Number: OIC-53267-L3YT2. I will not repeat that history here. The Department submits that the records at issue are internal communications between it and its scientific and technical advisers in relation to the licence application. It maintains that the 2014 licence application and accompanying documentation is currently under consideration by the Department. The Department explains that the 1998 Regulations provide for

consultations in relation to aquaculture licence applications with public and statutory consultees, including with a wide range of scientific and technical advisers. The 1998 Regulations also provide for a period of public consultation on licence applications. Regulation 8 requires an applicant to give public notice of an aquaculture licence application and to make the environmental impact statement available. Regulation 9 gives any member of the public the right to make a submission in relation to an application. Regulation 12 provides that in carrying out his or her consideration and environmental impact assessment the Minister must have regard to, among other matters, submissions made by members of the public. The Department explains that Directive 2003/35/EC on public participation (the Public Participation Directive), which implements public participation provisions in respect of environmental decision making in the second pillar of the Aarhus Convention, is a crucial factor in the processing of licensing applications. It states that the 2014 licence application has not yet reached the public and statutory consultation part of the licensing process. It contends that, as the application is active and has not yet proceeded to public consultation, the records relate to its deliberative process.

Having considered the matter carefully, I am satisfied that the records at issue in this case relate to a deliberative process by an FOI body, namely the consideration by the Department of the 2014 licence application and accompanying documentation in the exercise of the Minister's statutory decision making powers on aquaculture licences. While it would not be appropriate for me to describe the content of the records in detail, having examined the contents, I accept that they include information from a variety of sources that the Department is examining in its consideration of the 2014 licence application. The information in the records includes advice and opinions from the Department's scientific and technical advisers in relation to the 2014 licence application. I accept that the 2014 licence application remains under active consideration and that it has yet to proceed to public and statutory consultation. I consider that the records are being evaluated by the Department in progressing the 2014 licence application for the purposes of the Minister making a decision on that application. Accordingly, I am satisfied that the first requirement for section 29(1) to apply is met. The question I must consider, therefore, is whether disclosure of the records at this in point would be contrary to the public interest.

Section 29(1)(b) of the FOI Act

The public interest test at section 29(1)(b) requires the FOI body to show that the granting of the request would be contrary to the public interest. This generally requires a body to identify a specific harm to the public interest flowing from disclosure. A mere assertion without supporting evidence is not sufficient to satisfy the requirement that granting access to the record would be contrary to the public interest.

The Department submits that the disclosure of the records prior to the public consultation may result in an unfair perceived advantage on the licence applicant (the appellant) thereby potentially undermining the impartiality and fairness of the statutory licensing processes

which would be contrary to the public interest. It states that decisions by the Minister may be appealed to the ALAB and that the premature disclosure of the records to one party - the licence applicant - could be used by other parties as justification for an appeal of the Minister's decision, and be represented as a breach of fair procedures by the Department.

The appellant submits that the Department's concerns are speculative and that it has not identified any specific risk as to why disclosure of the records could affect the perceived fairness of the overall licensing process. It denies that an unfair advantage perceived or otherwise, would be conferred on its client if the records were disclosed prior to the public consultation as disclosure under the FOI Act or AIE Regulations is disclosure to the world at large. It further contends that given that disclosure is to the world at large, it is difficult to understand how other parties could use the information as justification for an appeal of the Minister's decision. The appellant notes that decisions by the Minister on aquaculture licences are appealable to the ALAB regardless of whether the records at issue are disclosed to it. It states that there is no reason why disclosure under the AIE Regulations could be viewed as a breach of fair procedures under the licensing application process.

Having regard to the content of the records at issue and after carefully considering the matter, I accept that disclosure of the records, which relate to an ongoing licence application, could affect the perceived fairness of the overall licensing of aquaculture. The Department operates the licensing process with a view to ensuring that it accords with the principles of procedural fairness whilst balancing the rights of others to participate in that process. I acknowledge that the Minister's eventual decision on the 2014 licence application can be appealed to ALAB regardless of whether the records are disclosed. However, disclosure of the records to the appellant in this case is likely to give rise to at least a perception that the Department has engaged more extensively with, or given unequal access to this licence applicant, over and above other licence applicants. It could also appear as if this licence applicant was presented with an additional opportunity, when compared with other license applicants, to rectify deficiencies (if any) with its application before the public and statutory consultations commenced. In my opinion, this could give rise to concerns about the fair administration of the statutory licensing process by the Department and decisions on licence applications by the Minister in relation to both the 2014 licence application and the wider aquaculture licensing process. Thus, I am willing to accept that disclosure of the records at this point of time in the licensing process could erode people's trust in it. The aquaculture licensing process is a statutory process, which expressly provides for consultation with the public and specified bodies at a specified point in time in the licensing process. In my view, requiring the Department to disclose records that comprise its on-going deliberations on an active licence application before the public and statutory consultation would serve to undermine the integrity of the licensing process. I am satisfied that it is in the public interest that decisions on aquaculture licence applications, including the 2014 licence application, are taken in accordance with the statutory process set down by the Legislature. In my view, it would be contrary to the public interest to require the

disclosure of records at this point in time, as it would serve to undermine the integrity of the licensing process. I therefore find that in this case the Department was justified in refusing access to the records relating to the 2014 licence application on the basis that section 29(1) applies to records 68, 121, 125, 127 to 140, 149, 151, 152, 154, 155, 157 to 164, 167, 171, 174, 186 to 190, 191 (excluding pages 1-10), 195 to 199, 201, 202, 222, and 224 to 239.

Section 29(2) of the FOI Act

Section 29(2) of the FOI Act provides that section 29(1) does not apply if the record contains information listed in section 29(2). I am satisfied that the only potentially relevant exclusion in this case is at subsection (b) - factual information. Section 2 of the FOI Act states that "factual information" includes information of a statistical, financial, econometric or empirical nature, together with any analysis thereof. The Information Commissioner regards factual information as including material presented to provide a factual background to the central topic in a record, and that factual information is distinguishable from information in the form of a proposal, opinion or recommendation.

As I state above, it would not be appropriate for me to describe the content of the records in detail. Having examined the content of the records at issue in the light of the definition of factual information, I find that the records contain small elements of contextual factual information such as the coordinates for the site of the current licence and of the proposed licence site. The factual information in the records amounts to a very small portion of the total information in the records. In my view scientific or technical reports, studies or, as in this case, analyses made up of advice and opinions (including those used for the purposes of decisions such as the licence decision made pursuant to an enactment or scheme as described in section 29(2)(e)) tend to contain at least some factual information. I have stated in previous decisions that it cannot have been the intention of the Legislature that refusals to disclose such reports, studies and analyses could never be justified, simply because they contain factual information (see Case CEI/15/0027 (Damien McCallig and The Department of Housing, Planning, Community and Local Government) and Case CEI/15/0032 (Damien McCallig and The Department of Communications, Climate Action and Environment), available at www.ocei.ie). I consider that section 29(1) can apply to scientific or technical reports, studies or, as in this case, analyses used for the purpose of a decision of an FOI body made pursuant to an enactment, even when they contain some factual information. The information in the records, when read as a whole, both in the individual records and the entire set of records comprises of advice and opinions from the Department's scientific and technical advisers in relation to the 2014 application. The purpose of the records is to inform the Department's processing of the 2014 licence application, which as noted above is under active consideration, for the purposes of informing the Minister's decision on that application. In the circumstances of this case, I consider that the limited factual information in the records is inextricably linked to and cannot be separated from the advice and opinions contained within. In addition, applying

section 29(2) to the factual information in this case would involve the cutting or "dissecting" of the records at issue and would not be reasonable nor proportionate. In the circumstances of this case, I find that section 29(2) is does not apply.

For the reasons above, I am satisfied that disclosure of the records at issue would adversely affect the confidentiality of the records that are protected by section 29 of the FOI Act and that, subject to the public interest, article 8(a)(iv) applies.

Public Interest

The Department submits that the release of the records prior to the conclusion of the deliberative process on the 2014 licence application, including the public and statutory consultations would potentially undermine the impartiality and fairness of the statutory licensing process and is contrary to the public interest. It contends that disclosure of the records to the applicant (the appellant) at this time may confer a perceived advantage on the applicant before the public consultation process. The Department notes that the Information Commissioner in Case Number: OIC-53267-L3YT2 upheld the Department's decision not to disclose the records relating to the 2014 application that are also the subject of this appeal. It also states that the potential public interest served by the disclosure of the records would in any event be satisfied once the public and statutory consultation processes provided for in the legislation have concluded and the Minister makes the appropriate determination. It continues that, in the circumstances, the public interest in not disclosing the records at this time outweigh the public interest served by the disclosure of the records.

The appellant submits that there is a public interest in:

- Knowing about how a service is administered to ensure that its administration is consistent with the provision of an effective service where the administration of that service may impact the environment. In support, it cites the Information Commissioner's decision in Case No. 98078 (Wall and Department of Health and Children).
- The disclosure of information relating to the performance of a public authority of its environmental regulatory functions.
- The openness and transparency of an environmental application and permitting process.
- Openness in public expenditure such as whether a budget is being used efficiently.
- Exposing any inefficiency or unfairness where it may impact the environment.
- Members of the public exercising their right of access to environmental information.

In weighing the public interest served by disclosure against the interest served by refusal, 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. There is also a very strong public interest in

openness and transparency in relation to the manner in which public bodies carry out their environmental functions, including about how the Department carries out its aquaculture licensing functions.

On the other hand, the AIE regime recognises the public interest in restricting access to certain information including where there is a need to give public authorities the necessary space to carry out their environmental functions. The aquaculture licensing process is complex involving EIAs and AAs (if required) and consultations with public and statutory consultees. The statutory framework for the licensing process provides that the submissions made in response to those consultations must be taken into the account in the Minister's consideration of the application. Prior to the consultations with the public and statutory consultees, the AFMD enters into an initial consultation seeking advice from it technical and scientific advisors. All the information that is gathered in relation to an application, much of it technical, has to be evaluated before the Minister makes a decision on the application. While the length of time that the process is taking is long, this, of itself, is not a factor which would outweigh the public interests in the Department being given the space in which to deliberate and decide on this complex issue. In the circumstances of this case, I consider that there is a strong public interest in giving the Department and the Minister the space to consider the information in the records relating to an active licence application *i.e.* the 2014 licence application before proceeding to the next steps of the statutory licensing process.

In addition, the records in this case relate to the AFMD's initial consultation with its technical and scientific advisors, prior to the statutory and public consultation. The records represent a snapshot of the information that the Department is collating in its processing of the 2014 licence application, as it stands at one point in time, in what it is a long process. The Legislature has set down a statutory licensing process that provides for public participation in this environmental decision-making at a specified point in time for both the aquaculture licensing process and the foreshore licensing process. Information made available to the public via the Department's website for the public consultation on an aquaculture licence application include copies of the application, the EIS, the AA (if required) and submissions and comments made by the statutory consultees. The public participation provisions were introduced into the aquaculture licensing and foreshore licensing processes for the purposes of transposing the provisions of Directive No. 2011/92/EU of the European Parliament and of the Council of 13 December 2011 (as amended by Council Directive 2014/52/EU) on the assessment of the effects of certain public and private projects on the environment (EIA Directive) and the Public Participation Directive. The purposes of the public participation provisions in the EIA Directive and the Public Participation Directive include implementing the second pillar of the Aarhus Convention. Thus, it seems to me that the EU and national Legislature has specifically considered, and provided for, public participation in the aquaculture licensing process and has done so at specified point in time in that process. It has also provided for access to specified environmental information relating to licence applications as part of that public

participation process. In my view, there is a significant public interest in allowing the 2014 licence application to proceed through the statutory process as set down by the Legislature.

In this case, an extensive amount of information has already been disclosed to the appellant pursuant to the Information Commissioner's decision in Case Number: OIC-53267-L3YT2, including all information concerning the 2006 licence application. I therefore consider that in the circumstances of this case the public interest in openness and transparency has been served to a large extent.

Having regard to the content of the records at issue and after carefully considering the matter, I am satisfied that the public interest served by disclosure of records does not outweigh the interest served by refusal. I therefore find that article 8(a)(iv) applies in full to the records relating to the 2014 licence application.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I affirm the Department's decision to refuse access to the records relating to the 2014 application that is records 68, 121, 125, 127 to 140, 149, 151, 152, 154, 155, 157 to 164, 167, 171, 174, 186 to 190, 191 (excluding pages 1-10), 195 to 199, 201, 202, 222, and 224 to 239 on the basis that article 8(a)(iv) of the AIE Regulations applies in full to those records.

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
17 June 2020