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-108025-S8H1W8

Date of decision: 20 October 2022

Appellant: Right to Know CLG

Public Authority: Data Protection Commission [the DPC]

Issue: Whether the DPC are a public authority for the purposes of this appeal, whether the information sought is environmental information, whether the refusal of the request was justified under article 8(a)(iv) or article 9(2)(c).

Summary of Commissioner's Decision: The Commissioner found that the DPC is a public authority within the definition provided by the AIE Regulations and that the information sought was environmental information. He found that refusal of the requested information was not justified under article 8(a)(iv), 9(1)(d) or 9(2)(c) of the AIE Regulations. He annulled the decision of the DPC and directed the release of the information sought.

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. This appeal arises out of a request dated 8 November 2020 by Right to Know CLG (the appellant) to the Data Protection Commission (the DPC) for information relating to a consultation between Irish Water and the DPC regarding data protection issues that may arise from proposals to charge users for excessive use of water.

2. Following receipt of the request, the DPC wrote to the appellant on 9 December 2020, stating that this consultation took place between the DPC and the Department of Housing, Local Government and Heritage [the Department], rather than between the DPC and Irish Water. The email from the DPC stated "we do have records of engagement with the Department that we can provide under AIE legislation". The appellant interpreted this as a decision to grant access to those records and confirmed that it wished to proceed.

3. On 22 January 2021, the DPC wrote to the appellant extending the time-limit for responding to the request under article 7(2)(b) of the AIE Regulations due to the "complexity of the request" to 5 February 2021. The appellant sought clarification as to whether the request was being granted and received a response on 26 January 2021, which stated that "our position on releasing the information has not changed in terms of granting your request but rather it is simply taking longer than envisaged to process the request".

4. The appellant did not receive any further response from the DPC and sought an internal review on that basis on 19 February 2021. An internal review decision was not issued within the time limits set out in the AIE Regulations and so, the appellant appealed to my Office on 31 March 2021.

5. Following intervention from my Office, the DPC provided the appellant with a statement of its position on the request on 20 May 2021. This stated that the information sought was not environmental information, and even if it was, that the information was exempt from release under article 8(a)(iv) of the AIE Regulations. The letter stated that previous correspondence suggesting that the request was to be granted was incorrect and apologised for the confusion. The appellant appealed this decision to my Office on 24 May 2021 and accordingly this is the decision that is now the subject of my review under article 12(5) of the Regulations. The DPC provided my Office with a schedule of 12 documents identified as relevant to the appellant's request, together with copies of those documents.

6. In carrying out my review, I have had regard to the submissions made by the appellant, the Data Protection Commission and the Department of Housing, Local Government and Heritage as a relevant third party. I have also examined the contents of the records in 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').

7. What follows may not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

8. As set out above, the DPC refused the request on the grounds that the information sought was not environmental information, and that even if it was environmental information, that the information sought was exempt from disclosure under article 8(a)(iv), 9(2)(c) and 9(2)(d) of the AIE Regulations.

9. In the course of my review, my investigator determined that the potential disclosure of the information sought could impact the interests of the Department. Accordingly, my office notified the Department of the appeal and provided it with the opportunity to make submissions. The Department raised additional grounds to support the refusal to disclose the information sought to the appellant. The first was that the DPC was acting in a legislative capacity when participating in the consultation process regarding the proposed statutory instruments that will implement charges for excessive use of water. The Department stated that due to this the DPC should not be considered to be a public authority for the purposes of this appeal due to the exclusion contained in article 3(2)(e) of the AIE Regulations. The Department made submissions stating that without prejudice to this argument, the information sought was exempt from appeal under articles 9(1)(d), 9(2)(c) or 9(2)(d) of the AIE Regulations.

10. Based on the above, my review in this case considered the following issues:

a. Whether the DPC can be considered a public authority for the purposes of this appeal;

b. Whether the information sought is environmental information;

c. Whether the information sought is exempt from disclosure under articles 8(a)(iv), 9(1)(d), 9(2)(c) or 9(2)(d) of the AIE Regulations.

Preliminary Matters

11. The handling of this request fell short of compliance with the DPC's obligations under the AIE Regulations in several ways. The DPC initially led the appellant to understand that the request was to be granted. While this may have been in error, the DPC should review its practises and procedures to ensure that communications with individuals making requests under the AIE Regulations are clear and accurate.

12. The DPC did not adhere to any of the time limits set out in the AIE Regulations. This was compounded by a lack of communication with the appellant to explain the delays experienced.

13. Having already neglected to respond to the request within the timeline set out in the AIE Regulations, the DPC sought to extend the time for responding to the request under article 7(2)(b). The DPC stated that this was due to the complexity of how AIE legislation applies to the functions of the DPC. I find that this is not a valid reason for an extension of time under article 7(2)(b). The regulations provide that time can be extended due to the "volume or complexity of the environmental information requested". A decision to extend time must therefore be grounded in the nature of the information sought, rather than in the application of the AIE Regulations to the information. I expect the DPC to ensure it has access to appropriate expertise to allow for timely responses to AIE requests.

14. Following receipt of this decision, I expect the DPC to carry out a review of its processes to ensure that future requests under the AIE Regulations are dealt with in a more appropriate manner.

Analysis and Findings

Whether the DPC is a public authority for the purposes of this request

15. Article 3(2)(e) of the AIE Regulations excludes a "body when acting in a judicial or legislative capacity" from the definition of "public authority" under the AIE Regulations. The Department contends that the DPC is acting in a legislative capacity when carrying out its consultation function under article 36 of the GDPR and should not be considered to hold the requested information as a public authority within the meaning of article 3(2)(e).

16. The consultation concerned two sets of draft regulations that provide for the implementation of charges for excessive use of water. These draft regulations were being prepared pursuant to the Minister's powers under sections 18 and 53F of the Water Services Act 2007.

17. The Ministerial guidelines on the implementation of the AIE Regulations state that it is considered that "legislative capacity" will comprehend a public authority when involved in the preparation of legislative proposals for the Oireachtas, such as Government Departments and the Attorney General's Office, and the preparation and making of secondary legislation, e.g. regulations, orders and bye-laws whether made by central Government or other public authorities. These guidelines were issued by the Minister under article 14 of the AIE Regulations in May 2013 and provide guidance but are not a binding legal interpretation of the AIE Regulations.

18. The lead case regarding this provision is *Flachglas Torgau* C-204/09 in which the CJEU held that one must adopt a "*functional*" interpretation of the phrase "*bodies or institutions acting in a legislative capacity*" and that ministries which pursuant to national law, are responsible for tabling draft laws, presenting them to Parliament and participating in the legislative process by formulating opinions, would come within this definition. The CJEU considered this provision in relation to secondary legislation specifically in *Deutsche Umwelthilfe eV v Bundesrepulik Deutschland* Case C-515/11. The Court was asked to consider whether executive bodies are acting in a legislative capacity when

their activities relate to legislation by the executive on the basis of authorisation given by a law enacted by parliament, where such legislation is a "*norm of a lower rank than a law*".

19. In a judgment issued in July 2013, the CJEU found that it was the specific nature of the *primary* legislative process and its particular characteristics that justify special rules in relation to acts adopted by bodies acting in a legislative capacity in connection with rights of information. The legislative process generally provides for the public to be adequately informed regarding legislative proposals via the publication of draft legislation, and the debate of legislation in parliament. This does not occur in the drafting of secondary legislation. The Court concluded that due to the nature of the secondary legislation process, the same protections should not apply, and that a ministry could not be considered to be acting in a legislative capacity when preparing secondary legislation.

20. This appeal and the consultation between the DPC and the Department involved two sets of draft regulations which were being prepared pursuant to an enabling power provided for in the Water Services Act 2007, as amended. Article 15.2.1 of the Constitution declares that the "*sole and exclusive power of making laws for the State is hereby vested in the Oireachtas*". While this means that the ultimate law-making power resides in the Oireachtas, it is also permissible for the Oireachtas to delegate limited legislative functions under certain restricted circumstances.

21. Secondary legislation, such as is relevant to this appeal, is generally prepared by the relevant department. The draft statutory instrument may be submitted to Cabinet where Government approval is required by statute, where the Government has so directed, where the minister concerned thinks fit or where the Attorney General so advises the minister concerned. The statutory instrument, if significant, may require a regulatory impact analysis. The draft legislation is then sent to the Office of Parliamentary Counsel to be formally drafted, settled and proofed. The official draft is then submitted to Government. The secretary general of Government will notify the promoting department and any concerned departments of the making of the order and lay it before the Oireachtas and arrange for a notice to be published in Irish Oifiguil. Unless revoked, the statutory instrument is automatically deemed to be passed within 21 sitting days.

22. It is well established that delegated legislation, such as the regulations in this appeal, is subordinate to primary legislation. The Minister or other body with the power to create the legislation must remain within the "principles and policies" of the parent act as set out by the Oireachtas. Delegated law may only fill in the details of a policy that is already contained in primary legislation – it cannot incorporate an entirely new policy. The primary legislation must include sufficient guidance for the secondary legislation to follow – the delegation may not be overly broad or unfettered. A statutory instrument can be annulled by a simple majority in either house of the Oireachtas, however this has only occurred on one occasion in the history of the State.

23. Based on this analysis, I find that the above judgment in *Deutsche Umwelthilfe eV* must apply to this appeal as it concerns secondary legislation. I find that the Department was not acting in a legislative capacity within the meaning of article 3 of the AIE Regulations while preparing the relevant regulations. Due to this, the DPC cannot be found to be acting in a legislative capacity when consulting on the proposed secondary legislation on the request of the Department of

Housing. I find that the DPC holds the relevant records as a public authority within the meaning of the AIE Regulations.

24. I also note that the Ministerial guidelines on the implementation of the AIE Regulations are inaccurate in stating that public authorities preparing secondary legislation are acting in a legislative capacity, as the guidelines have not been updated to take into account the findings of the CJEU in *Deutsche Umwelthilfe eV*.

Whether the information sought is environmental information

25. Article 3(1) of the AIE Regulations sets out that:

    "environmental information" means any information in written, visual, aural, electronic or any other material form on—….

    (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"

26. I agree with the parties that the proposal to charge users for excessive use of water is a "measure" for the purposes of Article 3(1)(c) of the AIE Regulations. The question for determination is therefore whether the information sought is information "on" that measure or activity within the meaning of the definition provided for in the AIE Regulations.

27. In submissions to my office, the DPC has argued that this is not the case, as the information sought relates solely to data protection matters and is accordingly too remote from the measure in question to come within the remit of the AIE Regulations. The DPC says that the relevant records do not contain information on the state of the environment or on any environmental factors coming within the scope of article 3(1) of the AIE Regulations. The DPC states that when consulting with the Department it is not concerned with the substance of the relevant measure, or with whether the recommendations or views expressed by the Commission relating to the proposed processing activities will have an impact on environmental matters. The DPC suggests that if this information was found to be within the definition of environmental information, other information relating to the functions of the DPC would also come within the remit of the AIE Regulations.

28. The appellant states that while the information may concern data protection and privacy aspects of the proposed water charges, it is nevertheless on water charging for excessive use since it is about, relates to or concerns that measure. The appellant says is entirely consistent with the purpose of the AIE Directive for the public to have access to this type of information so they can become aware of the trade-offs between reductions in water consumption on the one hand and privacy and data protection impacts on the other. It argues that the disclosure of the relevant information could also help the public better participate in decision making around charging for excessive water usage if the public is aware of the full picture, including data protection and privacy issues.

29. In *ESB v Commissioner for Environmental Information* [2020] IEHC 190, the High Court endorsed the test established by the UK Court of Appeal in *The Department for Business, Energy, and Industrial Strategy v The Information Commissioner* [2017] EWCA Civ 844. In this case, the Court of Appeal held that information that is integral to the relevant measure or activity is information "on" the measure, while information that is too remote from the relevant measure or activity does not qualify as environmental information. At paragraph 43, the Court stated that "*The information itself need not be intrinsically environmental and the task is to find the line between information which qualifies, and that which does not qualify by reason of being too remote*."

30. Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be "on" the relevant measure or activity (*Redmond v Commissioner for Environmental Information* [2020] IECA 83 at paragraph 99). As "any information … on" a measure affecting or likely to affect the environment is prima facie environmental information, the information at issue does not, in itself, have to affect or be likely to affect the environment (*Redmond* at paragraphs 57 and 59). However, consideration of whether information is "on" the measure does require examination of the content of the information (*ESB*, at paragraph 50).

31. The documents at issue in this case comprise emails between the DPC and the Department regarding the consultation on the proposed regulations, as well as draft versions of the statutory instrument provisions and an information note for the DPC. Having viewed the contents of the relevant records, I find that the information contained therein is information "on" the relevant measure and therefore is environmental information for the purposes of the AIE Regulations. The records concern the data protection aspects of the proposals for charges for excessive use of water. The proposed processing of personal data is not insignificant in scale and importance, as Irish Water would require a range of different types of personal data in order to determine the appropriate threshold at which charges will apply for each household.

32. It is clearly set out that information on a "measure" does not, in and of itself, have to affect or be likely to affect the environment to come within the definition of environmental information. I am not persuaded that the information sought is too remote from the relevant measure to come within the definition of environmental information, as I find that the information in the relevant records is sufficiently related to the substance of the policy proposals. I find that the information contained in the records advances the aims of the AIE directive and Aarhus Convention as its release would allow for increased public participation in the debate surrounding the proposals for charges for excessive use of water. Based on the above, the information sought is environmental information within the meaning of the AIE Regulations.

Whether the information sought is exempt from release under the AIE Regulations

33. Having found that the DPC holds the relevant records as a public authority subject to the AIE Regulations, and that the information sought is environmental information, I will consider the submissions made by the DPC and the Department in which it is argued that the information sought is exempt under various articles of the AIE Regulations, namely 8(a)(iv), 9(1)(d), 9(2)(c) and 9(2)(d).

Whether Article 8(a)(iv) applies to the relevant records

34. The DPC argues that if the information sought is found to be environmental information, it is justified in refusing access to all 12 identified records under article 8(a)(iv) of the AIE Regulations. There are a number of elements which must be satisfied before the question of refusal under article 8(a)(iv) arises:

    a. The case must involve "proceedings" of the public authority;

    b. Those proceedings must have an element of confidentiality

    c. That confidentiality must be adversely affected by the disclosure of the information requested

    d. That confidentiality must be protected by law.

35. The DPC argues that the exercise of its function under article 36(4) of the General Data Protection Regulation (GDPR) should be considered to be proceedings for the purposes of Article 8(a)(iv). This provides that "*member states shall consult the supervisory authority [the DPC] during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing*".

36. Neither the Aarhus Convention nor the AIE Regulations provide a definitive definition of proceedings. The CJEU has provided some guidance on the meaning of "proceedings". In its judgment on Case C-204/*09 Flachglas Torgau GmbH v Bundesrepublik Deutschland*, the Court of Justice of the European Union stated that the concept of 'proceedings' of public authorities "*refers to the final stages of the decision-making process of public authorities*".

37. In case C-60/15 *Saint-Gobain Glass Deutschland GmbH v European Commission*, the Court noted at paragraph 81 that: *"…Article 4(4)(a) of the Aarhus Convention provides that a request for environmental information may be refused where disclosure of that information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law, and not the entire administrative procedure at the end of which those authorities hold their proceedings."* The Advocate General's opinion in that case suggested at paragraph 51 that the term "proceedings" should be understood as *"covering only the deliberation stage of decision-making procedures, as is suggested by the terms used in the French version of the Aarhus Convention and in the German, French and Italian versions of Directive 2003/4.*"

38. The Advocate General's opinion also stated at paragraph 83 that "*In the spirit of restrictive interpretation applicable to the Directive as a whole, and to Article 4(1) and (2) in particular, it seems to me that the concept of 'proceedings of public authorities' should be confined, at the broadest, to expressions of view and discussions of policy options in the context of decision-taking procedures within each such authority. The concept should, of course, not be dependent on the form of the proceedings (written or oral), and it should be remembered that Article 4(4) of the Directive*

requires, wherever possible, information not covered by a ground for refusal to be separated out from information which is covered. Finally, […], communications between public authorities, whatever their nature, cannot be regarded as proceedings of such authorities."

39. The consultation process between the DPC and the Department that generated the records relevant to this request arises out of the DPC's functions under Article 36 of the General Data Protection Regulation. This provides: "*Member States shall consult the supervisory authority during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing*." Information provided on the DPC website sets out that consultation should take place during the development phase of the legislative measure. It also states that states that the consultation requirement is an on-going one, and that State bodies should keep the DPC informed, particularly when there are changes to the proposed legislation after initial consultation with the DPC.

40. The DPC argues that the entire purpose of the consultation process is for it to deliberate on and make a decision as to whether the data processing operation proposed by the consulting government department are in accordance with data protection laws. It states that while the written advice issued by the Commission is not described as a "decision" this does not mean that it is not a decision making process. Due to this, the DPC says that the consultation process is a "decision making procedure" as described in the CJEU cases above. In considering the comment in *Saint Gobain*, that "*communications between public authorities, whatever their nature, cannot be regarded as proceedings",* the DPC states that the consultation process cannot be considered to be merely communication between public authorities as the interaction between the DPC and the Department is due to a mandatory statutory consultation process.

41. Having viewed the relevant records and having regard to their contents, I am not persuaded with the characterisation of the consultation process as a decision-making procedure such that it comes within the definition of proceedings under article 8(a)(iv) of the AIE Regulations. The records consist of a relatively informal email exchange between the DPC and the Department. The documents provided to my Office do not contain anything that I consider to be a definitive "decision" on whether the draft regulations are in compliance with data protection laws. The documents also do not contain any record or information on any deliberative process within the DPC that led to particular advice being offered or issues being raised. I consider that the purpose of the consultation is not for the DPC to make a decision as to whether the proposed legislation is in compliance with data protection law, but to provide an early opportunity for the DPC to provide input and feedback on legislative proposals. The advice provided is not binding on the Department. Should it be the case that the advice provided by the DPC was disregarded, the DPC has other powers under the GDPR and Data Protection Act 2018, but I find that the use of these powers would be a separate process to the consultation process that is relevant to this appeal.

42. On the basis of the foregoing, I am not satisfied that the consultation process between the DPC and the Department under article 36 of the GDPR is a decision making process such that it constitutes "proceedings" within the meaning of article 8(a)(iv), as the process lacks the decision-making or

deliberative aspect that is required by the relevant case law. Accordingly, I find that the DPC's refusal of the appellant's request based on article 8(a)(iv) is not justified.

43. This Office has referred a question to the High Court on the interplay between article 8(a)(iv) of the Regulations and the provisions of the Freedom of Information Acts. If I were satisfied that the conditions set out in article 8(a)(iv) (as identified in paragraph 34 above) had been satisfied, it would perhaps have been necessary for me to put my decision in this case on hold pending the outcome of those proceedings. However, in circumstances where one of the conditions are fulfilled, I do not believe it is necessary for me to await the outcome of the High Court proceedings in order to reach a decision in this case.

Whether Article 9(2)(c) applies to documents 8, 9, 11 and 12

44. Article 9(2)(c) of the AIE Regulations provides that a public authority may refuse to make environmental information available where the request concerns material in the course of completion or unfinished documents or data. The Department argues that the draft statutory instruments relating to the proposals to charge users for excessive use of water are exempt from release under this article. In the documents provided to my Office by the DPC, there are two draft versions of two different draft statutory instruments- the first regulating how household water allowances will be adjusted based on household size, and the second providing for exemptions from the proposed charges based on medical need.

45. I agree these draft regulations are unfinished documents within the meaning of article 9(2)(c) of the AIE Regulations. The regulations have yet to be published. The Irish Water Charges Plan states that households will become liable for excess use charges from Q3 2022 and that bills will not issue to households before 1 October 2023. It is not clear from this plan when it could be expected that the regulations would be finalised and brought into force.

46. Having established that the draft regulations are unfinished documents within the meaning on article 9(2)(c), article 10(3) requires that the public interest served by disclosure is weighed against the interest served by refusal.

47. In favour of disclosure, I consider that there is a benefit in providing the public with detailed information regarding the proposals to charge users for excess use of water. I consider that this will allow the public to participate more fully in the debate regarding the proposed measure and to understand the exact implications of the proposals and how they are to be implemented. Disclosure of the draft statutory instrument will allow the public to track the development of the regulations as they may change over time. It also provides for further transparency in the drafting of secondary legislation, which in contrast with primary legislation is not generally debated in public.

48. In favour of refusal, I recognise the benefit of allowing the Department to have the "private thinking space" to work on draft regulations in private. I recognise that the ability to draft regulations without the requirement to publish draft versions for public use allows for regulations

to be drafted more efficiently and quickly. I note that charges for use of water have been a controversial subject in Ireland, and that it could be said that increased public scrutiny of the draft regulations would make it difficult for the Department to progress the policy.

49. In considering the above, I note that the implementation of charges for excessive use of water appears to now be well settled. The Water Services Act 2007 has been amended by the Water Services No. 2 Act 2013 and the Water Services Act 2017 to allow for these charges to be implemented. The Irish Water Charges Plan referenced above was drawn up pursuant to s.22 of the 2013 Act and has been approved by the Commission for Regulations of Utilities. This plan contains detailed information on the proposals for charges. Given the amount of information that is in the public domain regarding these proposals, I do not place significant weight on the need to protect the "private thinking space" of the Department in respect of these regulations. I also note that these draft regulations were first prepared by the Department some point before the initiation of the contact with the DPC in August 2019. Given that it is now October 2022 and the regulations have yet to be published or brought into force, it is difficult to see how the disclosure of these regulations would impact the efficiency or speed of the drafting progress. For these reasons, I find that the public interest served by disclosure of the draft regulations (documents 8, 9, 11 and 12) outweighs the interest served by the exemption.

Application of Article 9(2)(d)

50. The DPC made brief reference to article 9(2)(d) in its submissions to my Office. Article 9(2)(d) of the AIE Regulations provides that a public authority may refuse to make environmental information available where the request contains internal communications of public authorities, taking into account the public interest served by the disclosure. The DPC suggested that all relevant documents were exempt from release under this provision.

51. Internal communications are not defined in the AIE Regulations, the AIE Directive, or the Aarhus Convention. The decision of the Court of Justice of the European Union in C-619/19 *Land Baden-Wurttemberg v DR* commented that the term "communications" should be given a separate meaning to the terms "material" or "document" and that it can be interpreted as relating to "*information addressed by an author to someone…such as "members" of an administration or the "executive board" of a legal person- or a specific person belonging to that entity such as a member of staff or an official*". This judgment also commented that "internal communications" must be interpreted as meaning *"information which circulates within a public authority and which, on the date of the request for access, has not left that authority's internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received*".

52. Having reviewed the documents relevant to this request, I am satisfied that they do not qualify as "internal communications" within the meaning of article 9(2)(d). The documents consist of correspondence and documents shared between the Department of Housing and the DPC, and none of these could be considered to be "internal" to either public authority.

53. The Department of Housing, when consulted, suggested that article 9(2)(d) applies in particular to document 7 and document 10.

54. Document 7 is an information note on the proposed regulations, which was prepared by the Department and provided to the DPC via email. Following this, there was a series of emails between the Department and the DPC concerning the issues raised in the information note. There has been no suggestion that the emails between the Department and the DPC are "internal communications". I find that the information note left the "internal sphere" of the Department and was received by the DPC, and that subsequently was the subject of a discussion between these two public authorities. I therefore find that the information note does not meet the definition of "internal communications".

55. Document 10 is a data protection impact assessment that was prepared by a consulting firm for Irish Water. It is clear that this report was prepared by the consulting firm, sent to Irish Water, shared with the Department and then shared with the DPC. Due to this series of interactions between a private entity and three separate public authorities, I find that the report does not come within the definition of "internal communications" as provided for in the AIE Regulations.

56. I am satisfied that none of the other documents relevant to this request are internal communications within the meaning of article 9(2)(d) of the AIE Regulations.

57. Accordingly, I find that refusal to disclose documents 7 and 10, or any of the withheld records, is not justified under article 9(2)(d) of the AIE Regulations.

Whether Article 9(1)(d) applies to document 10.

58. The Department suggested that article 9(1)(d) should be considered in respect of document 10 as the consulting firm claimed intellectual property rights in the report. As set out above, this report was prepared for Irish Water, shared with the Department and then shared with the DPC. This provision provides that a public authority may refuse to make available environmental information where the disclosure would adversely affect intellectual property rights.

59. Given the nature of the report, my investigator wrote to the consulting firm that had prepared the report for Irish Water to provide the firm with an opportunity to make third party submissions regarding my decision in this appeal. The company made submissions stating that the disclosure of the report could affect the company's intellectual property rights. However, the company did not make submissions regarding the type of intellectual property rights it claims in the report e.g. copyright, trademark etc.

60. As neither the Department nor the consulting firm have established any recognisable intellectual property rights in the report that would be adversely affected by its release, refusal of the request based on article 9(1)(d) of the AIE Regulations is not justified. I would also note that any subsisting intellectual property rights in the report are not negated by its release pursuant to an AIE request.

Decision

61. In summary, having carried out a review under article 12(5) of the AIE Regulations I find that the DPC held the information sought as a public authority within the meaning of the AIE Regulations, and that the information sought was environmental information. I do not find that the refusal of the information sought is justified under articles 8(a)(iv), 9(1)(d), 9(2)(d) or 9(2)(c) of the AIE Regulations. I annul the decision of the DPC and direct release of the information sought to the appellant.

Appeal to the High Court

62. 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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Ger Deering

Commissioner for Environmental Information

20 October 2022