

**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 2014 (the AIE
Regulations)
Case CEI/15/0034**

Date of decision: 12 April 2017

Appellant: Dan Danaher on behalf of the Clare Champion (the appellant)

Public Authority: Clare County Council (the Council)

Issue: Whether the Council's decision to grant the appellant's request for access to environmental information failed to take into account all information held by or for the Council, and was therefore not in accordance with the AIE Regulations.

Summary of Commissioner's Decision: In accordance with article 12(5) of the Regulations, the Commissioner reviewed the Council's decision on the appellant's request. The Commissioner was satisfied that the Council disclosed all relevant information to the appellant at internal review stage. He therefore affirmed the decision of the Council.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision 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 23 March 2012, the Council brought proceedings in Clare District Court against Chemifloc Limited (Chemifloc) in relation to breaches of section 70 of the Water Services Act 2007. These proceedings related to emissions from a Chemifloc facility into a sewer at Smithstown Industrial Estate, County Clare. Chemifloc entered a plea of guilty and offered to pay the Council's costs, as well as making a payment to the University of Limerick. Following these payments, and having been assured that Chemifloc had corrected the issues with regard to the sewer, the Court subsequently decided to strike out the proceedings without convicting Chemifloc of an offence. On 31 July 2015, the appellant (a journalist with the Clare Champion newspaper) made a request to the Council under the AIE Regulations for access to *"all correspondence and documents relating to the prosecution taken by Clare County Council against Chemifloc"* in relation to the Smithstown sewer. The appellant requested correspondence between the Council and Chemifloc, as well as documents concerning the cost of repairs to the Smithstown sewerage system, and documents concerning the causes of damage to the sewer at Smithstown.

In a decision of 24 September 2015, the Council provided the appellant with copies of 12 documents in partially redacted format concerning emissions into the Smithstown sewer and Chemifloc. The Council refused to provide information on the cost of repairs made to the sewer, and cited the exception under article 9(1)(b) of the AIE Regulations in this regard, relating to the course of justice. The Council advised the appellant that Irish Water had assumed the role of Water Services Authority with responsibility for the sewer.

On 23 October 2015, the appellant requested an internal review of the Council's decision. The appellant's request for an internal review was made in narrower terms than his initial request, and concerned the Council's refusal to provide access to *"documents concerning the cost of damage"* to the sewer. The Council issued an internal review decision on 19 November 2015, in which it varied the original decision and provided the appellant with a copy of a cost estimate for repairs to the sewer, prepared by the Water Services Executive Engineer for the Shannon area. The Council clarified that it was not possible to state whether damage to the sewer line had been caused by any one incident or company. The internal review decision did not refer to any exceptions under the AIE Regulations, neither did it expressly state that the cost estimate provided to the appellant was all of the information it held on the cost of repairs. This appeal was initiated on 18 December 2015.

Scope of review

Under articles 12(5) of the AIE Regulations, where an AIE request is appealed to my Office I must review the internal review decision of the public authority and affirm, vary or annul that decision. In this case, the initial AIE request referred generally to information on the prosecution of Chemifloc, whereas the subsequent internal review and appeal requests referred specifically to the cost of repairing the damaged sewer. The Council's internal review decision was therefore appropriately limited to consideration of information on the cost of repairing the sewer.

In its internal review decision, the Council varied its initial refusal and provided access to additional information. My approach in cases where a public authority contends that all

relevant information has been disclosed is to assess the adequacy of the searches for information. Therefore, the scope of this review is limited to an assessment of the adequacy of search efforts by the Council. In making my decision, I have had regard to submissions from the parties and the AIE Regulations.

The Council's position

In a submission to my Office, the Council stated that, apart from the information already disclosed to the appellant, no other relevant information was held by or for the Council on the cost of damage to the sewer. The Council explained that there were no funds to carry out repair work at the time of the prosecution in 2012, and that Irish Water subsequently took over responsibility for the sewer in January 2014.

The appellant's position

In his appeal to my Office, the appellant stated that the Council had incorrectly applied article 9(1)(b) of the AIE Regulations, and questioned whether this provision could apply in circumstances where a prosecution had been concluded. I note that, although the Council did initially cite article 9(1)(b) as a ground for refusing to disclose cost information, it varied its position in this regard at internal review stage by releasing the information concerned. An Investigator with my Office wrote to the appellant and notified him of the Council's contention that no additional information was held by or for it on the cost of repairing the sewer. The appellant was invited to provide details of any information which he believed the Council held concerning the cost of repairs to the sewer; however no response was received in this regard.

Analysis of adequacy of searches

My Investigator asked the Council to provide an account of searches it carried out for relevant information held by or on its behalf. The Council stated that it searched its file register, carried out physical searches of file cabinets and informal records, and searched its electronic information system. The Council also said that it examined the outcomes of previous FOI and AIE requests, and made enquiries to relevant staff members. Accordingly, I am satisfied that the Council carried out appropriate searches for information.

To facilitate my review, the Council provided my Office with 41 records relating generally to the prosecution of Chemifloc (numbered R1- R41). My Investigator reviewed the content of all of these records. Two of these records (R27 and R38) relate to the cost of repairing the Smithstown sewer. Record R27 consists of two documents: a cost estimate for repairs to the sewer, and an internal Council email of 9 May 2012 which repeats one figure from the estimate. Record R38 is a copy of the email contained in record R27. The Council confirmed to my Investigator that both R27 documents were disclosed to the appellant at internal review stage, without redactions. Having reviewed this information, I am satisfied that, apart from the two records which have already been disclosed to the appellant, none of the documents identified by the Council contained information on the cost of damage to the sewer.

I also note the contextual information provided by the Council to explain why it does not hold information on the actual cost of repairing the sewer. I accept the fact that the Council did not carry out any repairs, and I note that responsibility for the sewer passed to Irish Water in 2014. I note that the Council informed the appellant of this fact in its original decision.

I am therefore satisfied that no additional environmental information is held for or by the Council on the cost of repairing the Smithstown sewer.

Decision

In accordance with article 12(5) of the Regulations, I have reviewed the Council's decision on the appellant's request. I am satisfied that the Council disclosed all relevant information to the appellant at internal review stage. I therefore affirm the Council's internal review decision. My decision on appeal is confined to information on the cost of repairs to the Smithstown sewer, and so the appellant is entitled to request access to wider environmental information relating to this matter should he wish.

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
12 April 2017