

**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/15/0035

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 was justified in refusing the appellant's request for access to incident reports concerning a chemical release incident at Smithstown, County Clare in 2012.

Summary of Commissioner's Decision: In accordance with article 12(5) of the Regulations, the Commissioner reviewed the Council's internal review decision on the appellant's request. The Commissioner found that the Council was not justified in applying the ground for refusal under article 9(2)(d). He found that article 10(1) applied to information held by the Council concerning the time and location of the incident, and the composition of chemicals emitted from the Smithstown facility. He found that the grounds for refusal concerning personal information and the interests of third parties under articles 8(a)(i) and (ii) do not apply in this case, since the appellant consented to the redaction of information identifying fire brigade staff and persons who contacted the emergency services.

Under article 12(5)(c) of the AIE Regulations, the Commissioner required the Council to make three incident reports available to the appellant, subject to the removal from the reports of names of individual fire brigade staff, and subject to the removal of names and contact details of persons who contacted the emergency services in connection with the Smithstown incident.

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

Chemifloc Ltd is a manufacturer and distributor of chemicals, and operates a facility at Smithstown Industrial Estate, Shannon, Co. Clare. The Council is the statutory Fire Authority for County Clare, with responsibility for establishing local fire brigades. The Munster Regional Communications Centre (MRCC) is a regional mobilisation and communications undertaking which provides services on behalf of seven Fire Authorities in the Munster region.

On 20 December 2012, an incident occurred at Chemifloc's Smithstown facility involving the uncontrolled release of chlorine based substances into the air. Ennis and Shannon Fire Brigades attended the scene which was made safe the same day. On 6 August 2015, the appellant made a request to the Council under the AIE Regulations for access to *"all correspondence and documents relating to Clare County Council's response to the chemical incident at the Chemifloc Plant, Smithstown on December 20 2012"*. The appellant requested access to correspondence between the Council and Chemifloc concerning the incident, as well as documents concerning the cost incurred by Clare Fire Service and other Council employees in connection with the incident.

In a decision of 24 September 2015, the Council provided the appellant with access to a number of documents concerning the incident of 20 December 2012. The Council refused to provide the appellant with access to three incident reports on the basis of the exception to disclosure set out in article 9(2)(d) of the AIE Regulations. Two of the reports were prepared by Ennis and Shannon Fire Brigades ("Shannon Fire Brigade Special Service/False Alarm Report of 20th December 2012" and "Ennis Fire Brigade Special Service/False Alarm Report of 20th December 2012"). A third report was created by the Munster Regional Communications Centre ("Munster Regional Communications Centre Incident Report for 20th December 2012 - Pages 4-7"). On 23 October 2015, the appellant requested an internal review of the Council's decision. The Council issued an internal review decision on 19 November 2015, affirming the refusal to disclose incident reports. Mr Danaher initiated an appeal to my Office on 18 December 2015 against the Council's refusal to provide access to the three "incident reports".

Scope of review

In line with the terms of the appellant's appeal request to my Office, my review in this case is limited to the question of whether the Council was justified in refusing to provide access to three incident reports relating to the chemical release incident, on the basis of article 9(2)(d). I have also considered whether it would be appropriate for me to require the Council to make the three reports available to the appellant, having regard to articles 8(a)(i), 8(a)(ii), 10(1), and 10(3) of the AIE Regulations. In conducting my review I have had regard to submissions made by the appellant and the Council.

Directive 2003/4/EC (the Directive) implements the first pillar of the 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 Directive

is transposed into Irish law by the AIE Regulations. In making this decision I have had regard to the *Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) published by the Minister for the Environment, Community and Local Government [the Minister's Guidance]; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide].

The Council's submissions

The Council submitted that the exception to disclosure under article 9(2)(d) applies to the three reports. Article 9(2)(d) provides that a public authority may 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. The Council's internal review decision stated that the records are "internal documents" which include the names of fire brigade members who attended the chemical release incident, and which are used to calculate wages of fire fighters.

In a submission to my Office, the Council further submitted that information in the MRCC report was submitted in confidence and on the understanding that it would be treated in confidence. The Council submitted that it was not in the public interest to disclose the names and contact details of persons contacting emergency services, and that section 26 of the Freedom of Information Act 1997 applied to the document. My Investigator asked the Council to restate its submissions on personal information and confidentiality in terms of articles 8 or 9 of the AIE Regulations, and to address the public interest in disclosure under article 10(3). The Council stated in reply that reasons for non-disclosure were on the basis of article 9(2)(d).

The appellant's submissions

In his appeal request, the appellant stated that he believed that the Council had incorrectly applied the exception under article 9(2)(d). The appellant stated that all of the documents are public documents, the release of which is in the public interest. The appellant characterised the events of 20 December 2012 as a serious incident.

Analysis and Findings

Consideration of the exception to disclosure under article 9(2)(d)

The Aarhus Guide provides the following commentary on this ground for refusal at page 86:

"In some countries, the internal communications exception is intended to protect the personal opinions of government staff. It does not usually apply to factual materials even when they are still in preliminary or draft form".

The Minister's Guidance states in this regard:

"Article 9.2(d) provides that information included in the internal communications of a public authority may be protected from release. This could include internal minutes or other

communications, between officials or different public authorities, or between officials and Ministers. Public authorities should bear in mind that the use of this exception is discretionary. It should not be resorted to as a simple expedient to protect all internal communications in circumstances where it would be unreasonable to do so (see also sub-articles 10(3) and 10(4)). Normally, public authorities would not be expected to invoke this protection for information unless there are good and substantial reasons – not otherwise available in Articles 8 and 9 – for doing so."

Article 10(3) provides that a public authority must consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) provides that the grounds for refusal must be interpreted on a restrictive basis having regard to the public interest served by disclosure.

The incident reports are internal records created by the fire brigades and the MRCC, and held for the Council as the relevant Fire Authority. The Council clarified that fire brigade incident reports are prepared immediately following an attendance of the fire brigade at an incident and contain the view of the officer in charge of the incident. The Council submitted that such reports are not investigation reports. The MRCC incident report appears to be a contemporary record of the attendance of emergency services at the incident. The reports do not appear to be communications between public authority staff; they are factual administrative records of the incident. The Council provided reasons for refusal under article 9(2)(d) on the basis that the reports were "internal documents" which contained the names of fire brigade staff and persons who may have contacted emergency services. This approach does not seem to accord with Minister's Guidance, insofar that it suggests that article 9(2)(d) should only be applied where grounds for refusal are otherwise not available. I note in this regard that the AIE Regulations provide express grounds for refusal relating to the confidentiality of personal information and the interests of third parties; however, these grounds for refusal were not cited by the Council in refusing the appellant's request, or on appeal to my Office.

My Investigator asked the appellant if the scope of his request extended to information on the identities of fire brigade staff contained in the reports, or information on identities of persons who may have contacted the emergency services in connection with the Smithstown incident. The appellant confirmed for the purposes of this appeal that he did not require access to such information, and consented to the redaction of this information. Notwithstanding this, the Council declined to provide the appellant with redacted versions of the reports, and requested my decision on the remaining information contained in the reports.

I accept the Council's submissions to the extent that the incident reports are not comprehensive investigation reports relating to the incident. However, having considered the context in which the incident reports were created, and the information contained in the reports, I am not satisfied that the appellant's request concerned internal communications of public authorities for the purposes of article 9(2)(d). The reports are purely administrative and factual in character, and appear to be part of a routine record-keeping process relating to a fire brigade call-out. Even if such information was capable of constituting internal communications for the purposes of article 9(2)(d), I am satisfied that the public interest in disclosure of information of a chemical release incident would outweigh the interest served by this ground for refusal in the circumstances.

On the basis of the above, I find that article 9(2)(d) does not apply to the three incident reports.

Consideration of information on emissions into the environment under article 10(1)

Article 10(1) of the AIE Regulations provides that, 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. In its judgment in the case of *Commission v Stichting Greenpeace Nederland and PAN Europe C-673/13 P*, the Court of Justice of the European Union held that information which relates to emissions must actually concern or be relevant to such emissions, and found that this provision does not include information having any link at all, direct or indirect, to emissions into the environment. In the present case, the withheld incident reports contain information on the time, location, and composition of an uncontrolled release of gas from an installation, all of which information concerns an emission for the purposes of article 10(1). At the same time, I also note that other information contained in the reports relates to personnel and operational matters, which do not concern or relate to emissions into the environment, and are not covered by article 10(1).

I therefore find that, to the extent that the appellant's request relates to information on emissions into the environment (i.e. insofar as the reports record particulars of an emission of gas), the request is not capable of being refused on the basis of exceptions to disclosure under articles 8 or 9(1)(c). This finding does not apply to parts of the reports which do not concern or relate to the emission.

Consideration of the exceptions to disclosure under articles 8(a)(i) and (ii)

Article 8(a)(i) of the AIE Regulations provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law.

Article 8(a)(ii) provides that a public authority shall not make available environmental information in accordance with article 7 where disclosure of the information 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,

The Council did not expressly refer to these grounds for refusal in its original decision, or in its submissions on appeal. Having reviewed the information held, I am satisfied that issues concerning the confidentiality of personal information and third party interests do not arise in this case, because the appellant has consented to the redaction of the names of individual fire brigade staff, and names and contact details of persons who contacted the MRCC in connection with the Smithstown incident. I also note that details of the incident of 20 December 2012 are in the public domain, including information published by the Environmental Protection Agency.

Decision

In accordance with article 12(5) of the AIE Regulations, I have reviewed the decision of the Council. I find that the Council's decision to refuse the appellant's request on the basis of article 9(2)(d) was not justified. I find that article 10(1) applies to information contained in the incident reports concerning the time, location, and composition of chemicals emitted from the Smithstown facility. I find that the grounds for refusal under article 8(a)(i) and (ii) do not apply in the circumstances of this case.

Under article 12(5)(c) of the AIE Regulations, I require the Council to make the three reports available to the appellant, subject to the removal from the reports of the names of individual fire brigade staff, and subject to the removal of information which discloses the identity or contact details of persons who contacted the MRCC in connection with the Smithstown incident.

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