

**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/16/0004

Date of decision: 16 January 2017

Appellant: Friends of the Irish Environment Limited

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

Issues:

1. Whether the Department was justified in refusing the request on the grounds of articles 9(2)(c) and 9(2)(d) of the AIE Regulations
2. If the Department was not justified in refusing the request, in whole or in part, whether it would be appropriate for the Commissioner to require the Department to make information available to the appellant

Summary of Commissioner's Decision: The Commissioner found that the Department was not justified in refusing access for the reasons given. He annulled the Department's decision and required the Department to provide the appellant with access to certain information.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Background

On 23 September 2015 the appellant submitted an AIE request to the Department. The request was worded as follows:

We submitted a request for all records relating to the storm damage which occurred on 1 February 2014 at Murphy's salmon farm at Gerahies, Bantry Bay, County Cork. The request was dated 12 March 2014 and was refused. We note the decision of the Information Commissioner of 13 July 2015 and your subsequent release of those records. We are by this request seeking any records created since 13 March 2014 to date on this issue. These comprise but are not restricted to:

1. Copies of the relevant scientific and technical and veterinary reports held by the Minister's Department relating to the storm damage at Murphy's salmon farm at Gerahies, Bantry Bay, including interim draft reports of April and July 2014 and the final report referred to in the IC Decision of July 2015 as due in August 2014.
2. All drafts of parliamentary replies relating to the aforesaid incident.
3. Any documentation concerning these reports or concerning this incident, including scientific records or site visits, observations and survey logs of inspection themselves, photographs, and any related records, including emails, records of meeting or phone calls.

Notes on the request:

- The numbering shown above was not included in the original request and was added, for ease of reference, by my Office.
- The references to "the Information Commissioner" and to "the IC" appear to have been intended to have been references to the Commissioner for Environmental Information. Although I hold office as both the Information Commissioner and the Commissioner for Environmental Information, they are legally separate offices.
- The "decision" referred to is my decision in case CEI/14/0007 (which is available on my website: www.ocei.ie).

The Department notified the appellant that it required an extension of one month in which to respond to the request. It subsequently refused the request on 16 November 2015. On 5 December 2015 the appellant requested an internal review of this decision and on 5 January 2016 the Department gave notice of its decision to affirm refusal. The appellant appealed to this Office on 4 February 2016.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is firstly to review the Department's internal review decision and to affirm, annul or vary it. If I find that refusal was not justified for the

reasons given in that decision, my role is to decide whether it would be appropriate for me to require the Department to make environmental information available to the appellant.

In conducting my review I took account of the submissions made by the appellant, the fish-farm operator (the Company) and the Department. I had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance); Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and *The Aarhus Convention—An Implementation Guide* (Second edition, June 2014).

Relevant AIE provisions

Article 8 (a)(ii) provides that a public authority shall not make available environmental information 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.

Article 9(1)(b) provides that a public authority may refuse to make environmental information available where disclosure of the information requested would adversely affect the course of justice.

Article 9(2)(a) provides that a public authority may refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought.

Article 9(2)(c) 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.

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

Article 10(3) provides that a public authority shall 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 of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.

Review

The decision to be reviewed

The Department refused the request on the grounds of article 9(2)(c) (because the request concerns material in the course of completion) and article 9(2)(d) (because the request concerns the internal communications of public authorities).

The Appellant's position on the decision

The appellant argued that in the earlier appeal-case CEI/14/0007 I found that the Department was not justified in refusing access to information on the same grounds relied on by the Department in this case. The appellant argued that this request is “for exactly the same records”, in that they differ only insofar as they were prepared in a later time period.

The appellant submitted that:

“We are at a loss as to how to deal with a Department that pays no heed to your decisions requiring a further appeal for reports and supporting information which have already been identified as not exempt from release by your order of 13 July 2015.

So we make this appeal against the Department's refusal under protest as we believe the actions of the Department of Agriculture, Food and Marine in refusing our request breaches our rights under legislation governing Access to Information on the Environment and under the Aarhus Convention in not accepting the ruling of your office as final and binding”.

The Department's position on its decision

In a submission to this Office the Department argued that disclosure of elements of a report which is being prepared for the Minister would be premature and would unduly constrain the Minister in respect of any action which he might deem appropriate. It argued that the documents in question form part of an overall process and that these and other elements must be treated as one. It argued that the placing of elements of this report in the public arena in advance of the Minister's decision might constitute a breach of the licence-holder's right to natural justice. It argued that any person aggrieved by the outcome of the report could point to the premature release of material as prejudicial to their interests and this could give rise to a successful legal challenge by any such person.

The Department argued that the public interest is best served by allowing the Minister to consider the matter free of any allegation of bias or prejudice, and in ensuring that any person affected by any decision of the Minister is afforded the full protection of natural justice.

Analysis of the justification of the decision

Contrary to the appellant's assertion, the Department accepted my decision on the earlier appeal-case CEI/14/0007 as final and binding in that case. In the current case, it relied on the same argument which it made in that earlier case, which is that “the documents in question form part

of an overall process and that these and other elements must be treated as one”. Consequently, the Department did not consider the records individually and determine that some or all of them should be refused. This approach was wrong. Refusal to provide access to environmental information, particularly on grounds based on the content of the records or the consequences of their release, can only be justified following consideration of the contents of each individual record.

The Department provided my Office with copies of what it regarded as its relevant records. Some of these could not be described as either “internal communications” or as “material in the course of completion”. For example, they include:

1. A reply given in the Dáil to a parliamentary question.
2. A printout of an online-newspaper article.
3. A report from the Marine Institute to the Department.

All of the above are external communications. I understand that the Department took the view that when documents such as those listed are held in records as attachments to internal emails, the email and attachment together form an “internal communication”. While this might be literally correct, it is also the case that such attachments have an independent existence of their own, as records held by the Department. Even if such records are, at some stage, internally communicated, access to the environmental information within them ought not to be refused on the grounds of internal communications.

Similarly, the three records listed are fully completed records in their own right: access to the environmental information within them therefore ought not to be refused on the grounds of “material in the course of completion”. Article 10(4) provides that grounds for refusal must be interpreted on a restrictive basis having regard to the public interest served by disclosure. This was not done in this case.

Review Finding

I find that the Department’s internal review decision, relying as it did on considering all of the records together as one, without considering their individual contents, was not justified.

Whether it would be appropriate for me to require the Department to provide the appellant with access to withheld information

The records provided to my Office by the Department

The Department provided unredacted copies of the withheld records. These were delivered in four boxes, each of which was labelled with the name of the specific Division of the Department from where the records originated. The boxes were accompanied by schedules listing the contents; one schedule per box.

The Department asked my Office to return those records if I formed the view they should be released, in order to allow the Department to redact personal and commercial information before

release. My investigator explained that where I conclude that records should be released I would not then return those records for redactions which I had not considered in making my decision. In response, the Department provided a further three boxes of records containing proposed redactions, along with four additional schedules listing the contents of those boxes. This volume of records provided is substantially greater than that in the vast majority of appeals to date to this Office or to the Office of the Information Commissioner.

The primary purpose of a 'schedule of records' in these circumstances is to provide a description of each record and to indicate the number of records/pages involved. The four schedules of unredacted records list 1138 records, most of which are chains of internal emails. There is some lack of clarity as to what should be considered to be an individual "record" for AIE purposes. Arguably, an email with one attachment constitutes two records. On the other hand, the Department took the view in this case that where records are emails held in electronic form, each email chain (including any associated attachments) is an individual record. I accept that this was not an unreasonable approach. Unfortunately however, when such electronic records are listed as a single record but actually contain multiple documents, it can create the impression that there are fewer individual "documents" (to use a somewhat less ambiguous word) requiring consideration than is actually the case. In this instance, the four boxes of unredacted records contain far more than the 1138 documents indicated in the schedules. My investigator examined samples of records from the boxes and concluded that, if those samples are representative, the four boxes contain over 5600 documents.

To further complicate matters, there is considerable replication of records both within and between the boxes. For example, the four boxes contain 61 copies of the same "Condition Inspection Report" dated 21 March 2014 — a report which extends to 26-pages. Most of those reports are attached to emails. The Department explained that it had simply provided an exact copy of every individual relevant record held by each of its Divisions in response to my Office's request for a copy of all of the records which are the subject of the request.

In addition, the schedules supplied by the Department do not describe the documents / records in any useful way. They only describe the latest document in each email-chain, in uninformative terms such as "email DAFM internal dated 28/09/14".

To perform my statutory appeal function I have to focus on environmental information rather than on records or documents per se. Ideally, when conducting a review, I would begin with a single copy of each withheld document which potentially contains environmental information within the scope of the request. These documents should be listed in clear schedule with titles reflective of their contents. However, in this case, what I have is a copy of *every* record which the Department located from all of its Divisions, with all of the replication of documents that this involves.

Records within the scope of the AIE request

The core of the AIE request was for the environmental information contained in all records created between 13 March 2014 and 23 September 2015 related to a particular storm damage event at a particular fish-farm. In my view, the request has to be understood as being confined to such records and it does not extend to include matters which subsequently arose between the parties, including issues related to the re-location and re-use/re-stocking of fish-cages, or to a subsequent dispute between the parties which eventually led to court proceedings.

The Department took a broader view of the scope of the AIE request. For example, some of the records it provided to my Office concern a different fish-farm storm-damage incident involving a different operator, in a different county, some years before the event that is the subject of this case. I do not regard that information as within the scope of the AIE request, while the Department clearly does. I am reluctant to criticize a public authority for taking a broad view of a request and I will not do so on this occasion. However, the fact remains that I regard the scope of the AIE request as confined to matters which clearly relate to the storm-damage incident in the particular fish-farm and, for that reason, I regard some of the Department's records as being outside the scope of my review.

I next considered each of the numbered part of the appellant's request in turn, in light of the records.

Part 1: This part sought "copies of the relevant scientific and technical and veterinary reports held by the Minister's Department relating to the storm damage at Murphy's salmon farm at Gerahies, Bantry Bay, including interim draft reports of April and July 2014 and the final report referred to in the [OCEI] Decision of July 2015 as due in August 2014".

My investigator found no veterinary reports amongst the records, but he identified a number of scientific or technical reports, as follows:

1. A "Farm Incident Report" produced by the Marine Institute and dated 16 July 2014. I will refer to this as Report 'A'.
2. A "Storm Damage Report", produced by the Marine Engineering Division (MED) of the Department and dated 17 July 2014. I will refer to this as Report 'B'. This report itself contains a number of reports, most notably a report produced by Marine Specialists Ltd for the Department. The latter is the "Condition Inspection Report" mentioned earlier, and it contains details of the condition of the fish-cages after the storm.
3. An "Inspection & Assessment Report" produced by an engineering company employed by the Company (i.e. the fish-farm operator), dated 9 June 2014, along with an addendum dated 25 June 2014. I will refer to this as Report 'C'.

The records included earlier versions of reports 'A' and 'B'. I am satisfied that the environmental information contained in those earlier drafts is also contained in the later versions cited above. I therefore decided to disregard the earlier versions, since the right of access to

environmental information is not a right of access to every record which holds the same environmental information. I considered that the appellant would be best served by having access to the latest and most-complete versions of reports.

In considering whether it would be appropriate for me to require the Department to provide the appellant with copies of reports 'A' and 'B', I took account of the concerns raised by the Department.

Internal communications and material in the course of completion

First, the Department argued that access should be refused on the grounds of "internal communications" and "material in the course of completion". Report 'A' is not an internal communication, as it is a report from the Marine Institute to the Department. Both reports appear to be fully completed reports on the storm-damage event. Both contain environmental information within the scope of the request. I accept that both of these reports were later included in a draft report being prepared for the Minister. However, in case CEI/14/0007 I expressed the view that what matters in these circumstances is the actual report at issue not the overall deliberative process for which it might have been prepared. Applying the same reasoning in this case, I do not believe that a "course of completion" argument would justify the withholding of these records. Reports 'A' and 'B' are complete reports despite being later included in a larger draft report.

I accept that report 'B' was an internal communication. However, following the reasoning which I employed in case CEI/14/0007, I am not satisfied that the information in report 'B' is of the type intended to be protected under article 9(2)(d). Moreover, I am satisfied that even if it were capable of such protection, the public interest in the information in this report being publically available would outweigh the interest served by refusal.

Personal and commercial information

The Department raised concerns about personal and commercial information.

As was the case with the unredacted records, my investigator found that the three boxes of proposed redactions contain multiple versions of the same records. Moreover, he noted that there were contradictions between proposed redactions in these boxes. In other words, he found that different copies of the same record contained different proposed redactions, even when these were made for the same reasons. It is as if my Office had been supplied with records from four public authorities rather than one.

I decided to consider just one version of the proposed redactions and selected one box (box 3 of 3, marked "AFMD" – for the Aquaculture and Foreshore Management Division of the Department). I examined a copy of report 'A' in record 99. It showed that the Department proposes the redaction of information on numbers of fish and on the bulk weights of fish. I examined a copy of report 'B' in record 71 (noting that this version did not include the Condition Inspection Report). It showed that the Department proposes the redaction of information on

numbers of fish, weights of fish, and numeric details entered by hand into forms (which, I understand, are made out in the Norwegian language) on the numbers and weights of fish. I examined a copy of the Condition Inspection Report in record 156: it contains no proposed redactions.

None of the proposed redactions concerns personal information. The information on numbers of fish (and weights of fish, since that can indicate numbers of fish when their age is known) is crucially important environmental information, without which no assessment of the storm-damage reports (from an environmental point of view) would be possible. The Department presented no argument to show that the confidentiality of this information is protected by law. I am satisfied that, even if the Department had made such a case, persuasively, the public interest in access to this information would outweigh any private commercial interest served by disclosure. In saying this I am mindful that both reports date from the summer of 2014 and any commercial sensitivity that might have existed at that time is likely to be much reduced now.

Accordingly, I conclude that concerns about personal and commercial information do not mean that it would be inappropriate for me to require the Department to provide the appellant with access to reports ‘A’ and ‘B’.

There was no copy of report ‘C’ in box 3 of the AFMD file in box 3. I examined a copy of this report found in record 56 from the “MED (Marine Engineering Division) Clonakilty ‘A’ file” from the same box. The accompanying schedule indicated that the Department proposes the redaction of certain information, as follows:

- On page 26 of Appendix 1, the redaction of figures on numbers of fish, the average weights of fish and the “Biomass (Swim Wt, kg)” of fish.
- On pages 37 to 40, the redaction of the contact details of a third-party company, and of the name of the person who signed a letter on behalf of that company.
- On page 41 information on the number of fish proposed to be transferred is redacted.

I found no personal information in the relevant records.

As discussed above, I do not accept that numerical information about fish ought to be withheld from the public on grounds of commercial sensitivity. I am, however, satisfied that the contact details of a third-party company, and of the name of the person who signed the letter on behalf of that company could properly be withheld: such information, in all of the circumstances, is not in my view environmental information.

I conclude that concerns about personal and commercial information do not mean that it would be inappropriate for me to require the Department to provide the appellant with access to report ‘C’, with certain information (specified above) redacted on pages 37 to 40.

Other reports

The request also sought “interim draft reports of April and July 2014 and the final report referred to in the [OCEI] Decision of July 2015 as due in August 2014”. From searching the records, my

investigator identified draft reports dating from April 2014, July 2014 and November 2014. I am informed by the Department that a final draft has not yet been created. All of the environmental information in the April and July drafts is also in the November report. None of the drafts contain any information in the final chapter under the heading “Conclusions and Recommendations”. (The Department provided my Office with a later draft report which contains draft Conclusions and Recommendations. Although this draft is outside of the scope of this request because it post-dates the request, it shows that further work has been done on the November 2014 draft, confirming that the November 2014 version is not a final draft.)

I considered whether it would be appropriate for me to require the Department to provide the appellant with access to the November 2014 draft report. I noted that the scope of the November 2014 draft report extends beyond what I regard as the scope of the AIE request: It deals with matters which are not about the storm-damage event. I therefore conclude that it would not be appropriate for me to require the Department to provide access to the complete November 2014 draft report.

I found that parts of the November 2014 draft report are within the scope of the AIE request. These are:

- Section 1: Introduction.
- Section 2: Examination of Structural Damage by the Marine Engineering Division.
- Section 3: Examination of Environmental Issues by the Marine Institute.

Half of the information in Section 1 is also in report ‘B’. The other half is information on the first report of the incident from the Company to the Department (information which I understand has already been provided to the appellant following the earlier request).

Two headings in Section 2 differ slightly from the corresponding headings in report ‘B’. Apart from that, the contents of Section 2 and report ‘B’ are identical. I am satisfied that the environmental information in Section 2 is exactly the same as that which is in report ‘B’.

The title of Section 3 differs from that of report ‘A’. Also, report ‘A’ includes details of who signed the report, whereas Section 3 does not. In every other respect they are identical. I am satisfied that all of the environmental information in Section 3 is also in report ‘A’.

I conclude that the Department’s concerns about personal and commercial information do not mean that it would be inappropriate for me to require the Department to provide the appellant with access to Sections 1, 2 and 3 of the November 2014 draft report for the Minister. However, I also conclude that this would serve no purpose if the same information was being released in the form of reports ‘A’ and ‘B’.

The Department expressed concerns that disclosure would adversely affect the course of justice, in light of ongoing judicial review proceedings involving the parties. My investigator invited the Department to set out how those legal proceedings relate to the information which is the subject of this appeal case, as opposed to being merely matters which arose between the parties following the storm-damage event, albeit that those matters might never have arisen were it not

for that event. The Department responded by providing a copy of the pleadings and said that the hearing had taken place, with judgment reserved. I examined the pleadings and I am not satisfied that the proceedings concern the storm damage event: they concern matters which arose after the storm event which I regard as being outside of the scope of my review.

Accordingly, I am not satisfied that disclosure of reports ‘A’, ‘B’ or ‘C’ would adversely affect the course of justice.

In an associated argument, the Department expressed concerns that disclosure of the withheld information would be “premature” and “would unduly constrain the Minister in respect of any action which he might deem appropriate”. It argued that the placing of elements of this report in the public arena in advance of the Minister’s decision might constitute a breach of the licence-holders right to natural justice. It argued that any person aggrieved by the outcome of the report could point to the premature release of material as prejudicial to their interests and this could give rise to a successful legal challenge by any such person.

I do not agree that it would be premature for the public to find out what the Department’s engineers and the Marine Institute’s scientists, and, indeed, what the Company’s own engineering consultants, reported about this important incidence of storm damage almost three years after the event. Similarly, I do not agree that a person aggrieved by the disclosure of the reports could claim that their release was premature. On the contrary, it could reasonably be said that the provision of such information to the public is considerably overdue.

I also do not agree that the Minister would be constrained as a result of the public having access to the contents of technical and scientific reports. If the Minister is constrained in making decisions in response to the storm damage event and what might be learned from it, it might be because he has not yet received his Department’s recommendations.

As regards how disclosure might affect the interests of a “person aggrieved by the outcome of the reports”, I note that the closest provision in the AIE Regulations to address this concern is article 8(a)(ii). This provides that a public authority shall not make available environmental information where disclosure of that 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. This provision is itself subject to article 10(3) which provides that the public authority shall weigh the public interest served by disclosure against the interest served by refusal. If the Department wished to invoke article 8(a)(ii), it ought to have consulted with all of those which it perceived to be “persons likely to be aggrieved” (presumably; the Company in this case) and (if appropriate, in light of any views expressed by the Company) properly made out its case to my Office in this regard. As it did not do so, my investigator contacted the Company and asked if it consents to the release of the information in reports ‘A’, ‘B’ and ‘C’. It was clear from the Company’s response that it does not consent: its representative said that the information “could be sensitive and if part extracted by the wrong mind frame, and used for adverse publicity, it could affect the future of our business and the judgment of the courts”. The latter

was a reference to the fact that the Company is awaiting judgment from the High Court on the case which it brought against the Minister for Agriculture, Food and the Marine for what the Company's representative described as the Department's "handling of the situation ... following an incredible storm [which] caused the death/loss of my fish on 1st February 2014". The Company asked for a copy of any records which might be released. My investigator explained that one of the records (report 'C') is the Company's own report, while this Office (unlike the Department) is not at liberty to provide copies of the other reports. My investigator explained that these records consist of one report from the Marine Engineering Division on the storm-damage to the Company's fish-farm, and another report on the same subject compiled by the Marine Institute. He invited the Company to make a detailed submission, should it wish to do so, setting out: whether the Company was under a legal obligation to provide information to the Department; or whether the Company could have been legally obliged to provide information; and whether, how, and to what extent, the Company's interests *would* be adversely affected by disclosure. My investigator recommended that, if the Company wished to make such a case, it should submit details of the risk of harm feared and the probability of such harm occurring. The Company was afforded a three week period in which to do this, but no submission was received.

I understand that the Company fears that disclosure *could* lead to reputational damage. However, article 8 (a)(ii) requires that, for refusal to be justified on this ground, it must be the case that disclosure *would* adversely affect the interests of the supplier of information. Neither the Department nor the Company have satisfied me that this would be the case. Moreover, even if such a case had been made out, I am of the view that the public interest in disclosure of the information at issue would outweigh the interest served by refusal. As I said in my decision in the earlier case CEI/14/0007:

"I consider that there is a very strong public interest in openness and accountability in relation to how the Department and Marine Institute carry out their functions under the legislation governing the aquaculture industry".

I am also of the belief that openness and accountability serve the interests of those involved in the industry, like the Company in this instance, since the public trust on which they depend, commercially, relies to a considerable degree on public confidence in the effectiveness of regulatory oversight.

In light of all of the above, I find that the potential negative effects of disclosure on the interests of the Company do not mean that it would be inappropriate for me to require disclosure of the information in reports 'A', 'B' or 'C'.

Part 2: This part of the request was for "All drafts of parliamentary replies relating to the aforesaid incident". The appellant clarified that it intended this part of the request to be understood as a request for "the first and all subsequent drafts of the response to parliamentary questions (PQs)".

In its internal review decision the Department made no mention of why this part of the request, in particular, was refused: its reasons for refusal applied to the entire request. Those reasons concerned ‘material in the course of completion’ and ‘internal communications’.

When asked by my investigator, the Department said that it does not hold copies of preparatory drafts of parliamentary replies. However, my investigator later found one amongst the records: in record 473 (an email dated 20 March 2014) in box 3 of the unredacted records. My investigator found that the wording of this draft was not exactly the same as the reply later given in the Dáil, which was a combined reply to two PQs.

I regard the system of PQs as crucially important for our democracy, in terms of the opportunity for openness and accountability which it provides. I consider that preparatory drafts of replies to PQs are of the type of record that is intended to be protected by article 9(1)(d), as internal communications. Having considered the public interest served by disclosure, I find that it would not be appropriate for me to require the Department to provide the appellant with access to the information in this preparatory draft.

My investigator found that the records contain replies given in the Dáil to other PQs. However, only one of these records is within the scope of the request – i.e. as a record created between 13 March 2014 and 23 September 2015. This is record number 147 of box 1 of the unredacted records. It sets out the reply given to “PQ 15940/14, Thursday 3 April 2014”. Since this reply was delivered in the Dáil, it is neither unfinished nor a mere internal communication.

Replies to PQs are published on the Oireachtas website. Article 4(1) of the AIE Regulations provides that the AIE Regulations do not apply to environmental information that, under any statutory provision other than the AIE Regulations, is required to be made available to the public. The Department did not argue that the AIE Regulations do not apply to this information. The Debates Office of the Oireachtas (when contacted by my investigator) confirmed that there is no requirement in law for parliamentary replies to be published. Therefore the AIE Regulations apply to any environmental information contained in parliamentary replies.

I cannot see how any of the concerns raised by the Department (such as those about the course of justice) could justify the withholding of this information. I therefore find that it would be appropriate for me to require the Department to provide the appellant with access to the information in this reply to a PQ.

Part 3: This part of the request was for “any documentation concerning these Reports or concerning this incident, including scientific records or site visits, observations and survey logs of inspection themselves, photographs, and any related records, including emails, records of meeting or phone calls”.

In processing the earlier parts of the request, my investigator reviewed the records, searching for any indication of technical, scientific or veterinary reports. In this process he looked closely at records which appeared to be “scientific records, technical observations, surveys, inspections or

photographs” and checked (and found) that any information which they contained had been incorporated into reports ‘A’ or ‘B’.

That component of part 3 which remained to be considered could therefore be described as a request for “any documentation concerning these Reports or concerning this incident, and any related records, including emails, records of meeting or phone calls”, *except for* any scientific records or site visits, observations and survey logs of inspections, or photographs, where such information has already been addressed by part 1”.

This residual component of part 3 of the request proved to be unusually problematic for my Office. Part of the difficulty was caused by the very broad wording used. AIE legislation does not create a right of access to “all documentation” which merely “concerns”, in some way, an environmental matter. Since this request is part of an AIE request, it must be understood as a request for “all environmental information” contained in the requested records. Accordingly, processing this part of the request would first require the identification of all records captured by the request, followed by the identification of all environmental information within those records.

In dealing with parts 1 and 2, my investigator was able to search the records (which are paper records) by scanning them for keywords related to technical, scientific or veterinary reports, as well as for references to parliamentary questions or replies. This was an onerous task which took a considerable amount of time to complete. However, it was achievable because it was quickly evident from the face of each record whether it contained any information of potential relevance to parts 1 and 2.

Any search for further information relevant to part 3 would be a far more onerous task. It is far from clear how many records are captured by this part of the request. It is likely that several thousand of the records could be potentially relevant to part 3, albeit that they might or might not contain environmental information. Any search would be a search for *unspecified* environmental information, and a keyword search would not suffice. It would require much more consideration of: what each individual document is saying; what other records it might be referring to; whether such information taken together, in context, might constitute environmental information; whether the information is incorporated into reports ‘A’, ‘B’ or ‘C’, or in a reply to a parliamentary question; and whether it might be appropriate for me to require a public authority to make it available.

I estimate that it could take weeks of work to merely identify and catalogue each document of potential relevance to part 3 of the request. It could then take a further month or more to assess all identified documents. Such a task would fully occupy my limited staff resources for many weeks on a single case. Such a burden would be unprecedented, and the interests of other appellants would be prejudiced by the subsequent delay in dealing with their cases. This case has already consumed an unusually high proportion of the resources available to me.

Article 9(2)(a) of the AIE Regulations permits a public authority to refuse a request which is manifestly unreasonable having regard to the volume or range of information sought. However,

the AIE Regulations do not expressly provide for circumstances in which my Office is faced with reviewing a manifestly unreasonable request. In most cases, one would expect that the public authority to which the request was made would be the first to express concerns that it is unreasonable. The Department did not do so in this case. It then proceeded to gather its records, but did not embark on any detailed consideration of their contents, record by record. By treating all of the records “as one”, the Department avoided the onerous (but, in my view, necessary) task of considering the contents of each record on its own merits.

In considering whether it would be appropriate for me to require a public authority to make certain information available I must have regard, in particular, to the provisions of articles 8, 9 and 10 of the AIE Regulations. I take the view that, where I conclude that part of a request (in light of the volume and range of the relevant records and the resources which would be required to fully consider them, record by record) is manifestly unreasonable in all of the circumstances, even where this issue has not been raised by the public authority, I may properly conclude that it would not be appropriate for me to process that part of the request or to require a public authority to make such information available to an appellant.

Conclusion

I find that this part of this request is manifestly unreasonable having regard to the volume and range of information sought (in light of the resources which would be required to fully process it). Accordingly, I find that it would not be appropriate for me to impose any ‘requirement to disclose’ in relation to the relevant information.

I believe that this approach best serves the appellant, by providing access to important technical reports as soon as possible and best serves other appellants by allowing my Office to address their appeals without further delay. I appreciate that the appellant might be disappointed with this conclusion. However, it is open to the appellant to submit a more specific request for environmental information if it wishes to do so.

To avoid such a situation arising in the future, I appeal to applicants for information to avoid adding “catch-all” or “trawling” elements to what are otherwise appropriately specific requests for environmental information. I also appeal to public authorities responding to AIE requests to assemble the relevant information (without duplication of records, where that can be avoided), together with a single schedule listing and describing the contents of each record. I appreciate that there might be circumstances in which a public authority would not wish to provide a description of the contents of records to appellants for legitimate reasons. However, even in such cases, it is important that any schedule prepared for submission to my Office would describe the contents of the records in a meaningful and useful way. Where a request captures a large number of records, public authorities may wish to consider article 9(2)(a), which permits refusal when a request is manifestly unreasonable having regard to the volume or range of information sought (subject to article 10(3)). Where a public authority decides not to invoke article 9(2)(a) in cases involving voluminous records, it must then proceed to identify and consider the information contained in each document in its records on its own merits.

Decision

Having reviewed the Department's internal review decision, I find that its refusal was not justified by the reasons given. Under the power given to me by article 12(5), I annul the Department's decision and require the Department to make available to the appellant the information set out in the appendix to this decision.

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

16 January 2017

Appendix to decision of the Commissioner for Environmental Information in case CEI/16/0004

1. The "Farm Incident Report" produced by the Marine Institute and dated 16 July 2014.
2. The "Storm Damage Report", produced by the Marine Engineering Division (MED) of the Department and dated 17 July 2014.
3. The "Inspection & Assessment Report" produced by the engineering company employed by the Company, dated 9 June 2014, along with an addendum dated 25 June 2014 (subject to the redactions identified- i.e. parts of pages 37 - 40 not comprising environmental information).
4. The reply given to "PQ 15940/14, Thursday 3 April 2014".

Ends