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/16/0030

Date of decision: 1 June 2017

Appellant: Mr A

Public Authority: The Environmental Protection Agency (EPA)

Issues:

1. Whether the EPA was justified in refusing the request because it was manifestly unreasonable
2. If the EPA was not justified in refusing the request, whether it would be appropriate for the Commissioner to require the EPA to make environmental information available to the appellant

Summary of Commissioner's Decision: The Commissioner found that the EPA was justified in refusing the request under article 9(2)(a) of the AIE Regulations because the request was manifestly unreasonable. Accordingly, he affirmed the EPA's decision and did not require it to make environmental information available to the appellant.

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

Background

The AIE Request

Enva Ireland Limited trades under the name "Enva" and operates a waste management facility at Portlaoise, County Laois.

On 5 June 2016 the appellant submitted an AIE request to the EPA seeking:

> "All records in the possession of the EPA that relate directly or indirectly to the Enva plant in Portlaoise from 1 December 2015 to present.
>
> This includes all documents, internal and external correspondence, emails, handwritten notes, minutes of meetings, notes of phone calls, memos, reports, including all records relating to media reporting on the Enva plant."

In an email sent to the appellant on 13 June 2016, the EPA said that the request, as worded, would fall to be refused under article 9(2)(a), which provides that a request may be refused when it is manifestly unreasonable having regard to the volume or range of information sought. The EPA suggested that the request might be reworded so as to narrow its scope, and proposed the following wording:

> "All records related to air emissions and nuisance odours in the possession of the EPA that relate to the Enva plant in Portlaoise from 1 December 2015 to present."

The EPA added that the appellant might wish to reformulate the request in some other way and it offered to be available to discuss the matter by telephone.

The appellant replied on 27 June 2016, respectfully declining the invitation, and adding that the request was both specific and time-constrained.

On 5 July 2016 the EPA gave notification of its decision to refuse the request on the ground of article 9(2)(a) because of the volume and range on information sought. It also provided information as to how some types of information which it holds can be accessed at its offices or on its website.

The following day, the appellant requested an internal review of that decision. The EPA replied on 3 August 2016, affirming the original refusal decision. The Agency explained that it had estimated that processing the request would take in excess of 130 hours.

The appellant appealed to my Office on 15 August 2016.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is firstly to review the EPA'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 EPA to make environmental information available to the appellant.

In conducting my review I took account of the submissions made by the appellant and the EPA. 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* (The Aarhus Guide)(Second edition, June 2014).

The decision under review

The decision refused the request because, "as it involves such a volume and range of information, it falls to be refused under article 9(2)(a)".

Article 9(2)(a)

This 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.

I understand that the purpose of article 9(2)(a) is to ensure that meeting AIE requests does not unreasonably interfere with the operations of public authorities. There is, unfortunately, a dearth of authoritative guidance on what 'manifestly unreasonable' means in this context. The Oxford English dictionary defines "manifestly" as "clear or obvious to the eye or mind". Since article 9(2)(a) allows a public authority this discretion to refuse a request, this suggests that it is what is manifestly obvious to the public authority that primarily matters.

The Aarhus Guide says at page 84 that:

> "Although the Convention does not give direct guidance on how to define "manifestly unreasonable", it is clear that it must be more than just the volume and complexity of the information requested. Under article 4, paragraph 2, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request manifestly unreasonable."

The Aarhus Guide goes on to say that the above interpretation was confirmed by the Compliance Committee in its combined findings on submission ACCC/S/2004/1 (Ukraine) and communication ACCC/C/2004/3 (Ukraine), where the Committee noted that the volume of information requested does not justify a refusal to provide the requested information. The Committee stated in that case:

> "In cases where the volume is large, the public authority has several practical options: it can provide such information in an electronic form or inform the applicant of the place where such information can be examined and facilitate such examination, or indicate the charge for supplying such information, in accordance with article 4, paragraph 8, of the Convention."

As my predecessor commented in her decision in case CEI/12/0005:

> The [Aarhus] Guide is a very useful reference tool, but it does not purport to be legally binding, a position which was confirmed by the European Court of Justice in *Solvay and Others*, Case C-182/10 (16 Feb. 2012). The lack of clarity in a number of

the provisions of the Regulations is just one of the many practical difficulties my Office has encountered in dealing with the AIE regime.

The Aarhus Committee's finding in the Ukrainian case cited above concerned the cost of *supplying*, not assembling and fully considering, information. The EPA's decision in the current case was not based on concerns about the cost of supplying information. It was made because of concerns about the work- time which would be lost by key members of staff in the process of locating, identifying and copying the requested information.

Article 10(3) of the AIE Regulations obliges a public authority to weigh the public interest served by disclosure against the interest served by refusal in every case. For this reason, although a public authority might form the view that a request is manifestly unreasonable, it would not be justified in refusing the request for that reason if the public interest in disclosure outweighed the interest served by refusal. In other words, a sufficiently strong public interest in disclosure can mean that a request which appeared at first to be unreasonable might be found, after all of the circumstances are considered, to be reasonable.

I therefore take the view that full consideration of article 9(2)(a) is a two-step process, requiring a public authority to first consider if a request is manifestly unreasonable (a process that mainly involves considering how processing the request might affect the public authority's other work) and then, if satisfied that it appears to be manifestly unreasonable, consider whether the public interest in disclosure of the information outweighs the interest served by refusal.

The EPA's position

The EPA considered the request to be manifestly unreasonable because it estimated that it would take over 130 person-hours to process it. It provided my Office with an explanation of how this conclusion was reached. The explanation included a breakdown of the number of person-hours which it was estimated that processing the request would require from each of 19 individual members of staff or offices within the Agency. It said the estimate was for the time it could take to search for and retrieve relevant records and to produce copies of same.

In its submission to my Office, the EPA emphasised that it had invited the appellant to reformulate his request so as to avoid it being unreasonable. It also emphasised that it had provided the appellant with information on how he could access its Enva enforcement file at one of its offices and how other relevant information could be obtained from its website.

The appellant's position

The appellant submitted that his request: relates to emissions into the environment; concerns just one company out of the thousands of companies which the EPA regulates; and was confined to information acquired or generated within a 6 months period.

He argued that the EPA's estimate is grossly inflated and highly improbable for a request involving just one company and a 26 week period. He argued that, if one accepted that his request would take the EPA over 130 hours to process, that would mean that it would take the EPA a total of 130,000 hours to process similar information for the rest of its licensing

operations for a mere 26 week time period. He argued that this would take 62.5 years (based on a 40 hour week).

He submitted that "a larger request regarding the Enva company and covering an approximate 3 year time period was submitted to Gas Networks and fulfilled in full and in a short period of time".

Analysis

The appellant expressed doubt about the accuracy of the EPA's time-estimate of over 130 person-hours. While there is no set cut-off number of person-hours which determines how many hours would be reasonable for a public body to expend in processing an AIE request beyond which the request would be unreasonable, I considered the appellant's challenge to the credibility of the EPA's estimate.

While it is relevant that the AIE request concerns just one company and was confined to information acquired or generated within a 6 months period, it could still be a voluminous request.

I attach no relevance to the appellant's statement that "a larger [AIE] request regarding the Enva company and covering an approximate 3 year time period was submitted to Gas Networks and fulfilled in full and in a short period of time". I have no knowledge of that request, other than noting from documentation provided by the appellant that this request involved just 11 records.

I understand the appellant's argument that, if one accepted the EPA's time- estimate in this case, if the EPA were to complete a similar exercise for all of the entities which it regulated, that process would take [one person] 62.5 work years. However, I do not see how this is relevant. The fact that one can imagine a more extreme example of a voluminous request does not mean that the current request must be reasonable.

I note the appellant's submission about there having been numerous "complaints which demonstrate ill-health affects and harm on human health arising from emissions into the atmosphere on downwind from the [Enva] facility". A high numbers of complaints would be consistent with the EPA's position that the search for relevant records would be burdensome.

In a submission to my Office the appellant described a Freedom of Information (FOI) Request made to the EPA in late 2014 for access to similar records concerning Enva for 2012.

He said that "this request was fulfilled by the EPA, even though it was for a far greater time period, covering 3 years. Very important details regarding the measures and activities affecting the environment came to light". The appellant is clearly suggesting that, since that FOI request was not refused as unreasonable, this casts doubt on the credibility of the EPA's position that the current AIE request was unreasonable. AIE and FOI are entirely separate legal regimes and it is not my practice to compare the outcome of AIE requests with that of FOI requests. However, I considered the appellant's basic point. His argument relies on a presumption that the FOI request for records created over a long period would have captured at least as many records as this AIE request for records created or acquired over a shorter

period. This in turn would rely on a presumption that records are created at an equal rate over time. That is not a presumption which I would make. The appellant's argument would come undone if there was an increase in the number of records being created or acquired by the EPA in relation to the Enva plant in recent times, whether due to an increased number of complaints, more enforcement, or some other reason or combination of reasons. To see if this was the case, I examined information supplied to my Office by both parties, along with information published by the EPA on its website. I found:

- An EPA report (*Interim status report on the Assessment of Emissions to Air at Enva Ireland Ltd, Portlaoise*) published in 2015 stated at section 5.5 that the EPA received a total of 13 complaints about odour and air emissions from the plant since 2009. In contrast, the appellant submitted that there were more than 20 formal complaints on the same matter between December 2015 and April 2017. This shows that there has been a significant increase in complaints since the time period relevant to the FOI request.

- The same EPA report shows that the Agency investigated a single incidence of licence non-compliance at the plant between 2013 and 2015 and no prosecution was deemed necessary. In contrast, the appellant submitted that the EPA prosecuted Enva for non-compliance in December 2015 and made a further "non-compliance" finding in December 2016. This indicates an escalation in enforcement activity, which could be expected to lead to an increase in the creation or acquisition of records.

- The EPA told my investigator in October 2016 that the Enva facility "is currently: the subject of ongoing enforcement correspondence"; the "subject of a licence review"; and was "the subject of a *Prime Time Investigates* programme which aired on 7 January 2016". It added that there has also been "considerable correspondence (between the EPA and Enva) in relation to financial information in the form of enforcement fees, investigation and prosecution files, complaint-line files, the Risk Based Methodology for Enforcement , Licence Review files and other correspondence".

Clearly, more complaints, more interaction with the news media, and more enforcement action would be likely to lead to the creation and acquisition of more records that those which would accumulate over a longer but less eventful time period. Since all of the information available to me suggests that this plant took up more of the EPA's time in the time period relevant to this case, I conclude that I should not give weight to the outcome of the FOI request cited by the appellant.

According to the EPA's breakdown of its time-estimate, most of the relevant EPA officers estimated that it would take between 1 – 3 hours of their time. On its own, that does not appear to be an unreasonable individual burden. Several key staff-members estimated that the task would take them much longer, from 10.5 hours to 22.5 hours and as many as 28 hours. (The EPA manager with responsibility for the plant at issue in the case listed 22.5 hours, for example). According to these estimates, each of these staff members would have to be diverted from the Agency's core-work from between 1.5 and 4 working days to process

the request. Arguably, meeting AIE requests ought to be regarded as part of the core work of every public authority, in the same way that all compliance work is part and parcel of the running of any modern organisation. It follows that public authorities ought to ensure that they have a nominated person or persons to coordinate responses to AIE requests, and they should accept that those who control information within the organisation (be they managers, scientists, technicians, administrative or other staff) will have to set aside time occasionally to meet AIE requests. It is inevitable that such demands on staff will sometimes be inconvenient and conflict with other time-bound goals of the public authority. From my experience of dealing with the EPA, I am satisfied that it has put in the place the necessary staffing capacity to process AIE requests and that it processes requests for information in good faith. The appellant's own cited instance of how the EPA dealt with an earlier FOI request concerning the same company over a longer period of time supports this view.

I accept that the EPA drew-up its time-estimate in good faith, using its unique knowledge of its own business information-storage practices. However, the real time-burden might be less onerous than that estimated, since most of the staff involved in processing the request would only have to search for information that is not already available on the EPA's website. Most of the time-estimates for individual staff members are low, and even when considered together I am not convinced that various officers spending between 1 and 3 hours on such a task would amount to significant disruption of the EPA's core work. However, I am concerned with the high estimates for particular officers, particularly key managers who estimate the need to devote multiple days to the task. In any event, in light of the extensive information made available on the EPA's website, I suspect that the time estimate for gathering and copying relevant information might be overly pessimistic.

On the other hand, if the EPA did search its records and identify all of the relevant environmental information which it held, I am very aware of the time that can be taken-up in sifting through multiple email-chains (located through the efforts of different searchers), so as to eliminate duplicated records, and in producing a schedule listing just one copy of each individual record. In most cases that process leads to consideration of the contents of each email etc. with a view to deciding if they constitute or contain environmental information. When all records containing environmental information are assembled, the contents of each record are likely to require consideration yet again, in the light of articles 8, 9 and 10. That process would be very likely to lead to the identification of a need to consult with third-parties who might be affected by release of the information. All of that work would draw further on the EPA's resources, and the EPA does not appear to have fully taken account of this in its time-estimate.

In summary, I suspect that the EPA's time-estimate might be overly pessimistic in some ways (taking into account information that is already available on its website) and, perhaps, overly optimistic in other ways (e.g. by omitting to take into account the time taken for consultation with third-parties, etc.). Overall, however, I am satisfied that processing this request would, in all of the circumstances, impose an unreasonable burden on the EPA, in particular, on the work-time of senior and specialist members of staff, to the detriment of the Agency's important core work

Conclusion

I conclude that the EPA was justified in forming the view that the AIE request was manifestly unreasonable having regard to the volume or range of information sought.

Whether the public interest in disclosure outweighed the interest served by refusal

The EPA's decision letter did not show that it had considered this question. When asked about this by my investigator, the EPA said that it had considered the matter in making the decision but had not "outlined this clearly" in the decision letter. Since the AIE Regulations require this weighing exercise to be undertaken in every case where refusal is considered, decision-letters should always show that this was considered. Best practice would be for public authorities to give details of what they understood to be the interests served by refusal and disclosure. This could serve several purposes: it would make decisions more transparent; it could lead to a requester better understanding the decision and therefore deciding not to appeal to my Office; or, if they do appeal to my Office, it could lead to greater clarity about what precise aspect of the public authority's decision was being challenged.

Notwithstanding the EPA's failure to show in its written decision that it had carried out this weighing exercise, I have fully considered it after taking account of the positions of the parties.

The EPA's position

The EPA submitted that the public interests served by disclosure would be openness, transparency and accountability. In this regard, it said that it "makes as much information as possible available through its public files and its website, and in its Freedom of Information Publication Scheme (also available on its website). It said that, in particular, it had published a number of reports on odours and emissions to air from the Enva plant on its website. These include the "*Second Interim Status Report: Monitoring of ambient air quality adjacent to ENVA Ireland Ltd, Portlaoise*" which was published 12 Aug 2016. It also said that "since 01 January 2016, key enforcement documents such as site inspection and monitoring reports can be viewed on the EPA's website and the full enforcement file for a licensed facility can be viewed at any of the EPA's offices"

The EPA submitted that the interests served by refusal are also public interests: it said that the "unreasonable burden "of fully processing the request would "entail diverting staff away from their normal work and cause substantial and unreasonable disruption to the work" of the Agency. It added that its time estimate did not include consideration of the time it would take to review documents found in a search and "making a decision on a case by case [i.e. document by document] basis" (something which it had not mentioned in earlier correspondence about its refusal decision). It argued that the EPA needs to be allowed to conduct its business and deliver its services without unjustified disruption and disproportionate costs to the public purse". Finally, it said that it had engaged with the requester and asked him to refine his request but he had declined to do so. The EPA concluded that, on balance, the public interest in disclosure does not outweigh the interests served by refusal.

I note that the public interests served by disclosure which were identified by the EPA are general public interests and the EPA did not identify any particular public interest in access to information that it might hold. To some extent this is to be expected, since the EPA, in refusing the request as manifestly unreasonable, has not gathered or individually considered the contents of the withheld records.

The appellant's position

At the invitation of my investigator, the appellant made a detailed submission to my Office on the public interest. He said that the requested records "all stem from emissions into the environment, the regulation and enforcement of these emissions and the measures and activities affecting their environmental impact". I will not reproduce his submission here in full, but it was set out with the following headings (with my additional comments included in brackets):

- Numerous complaints by members of the public to the EPA (about odours coming from the plant).
- Complaints by members of the public to Gas Networks (about odours coming from the plant).
- The prosecution and criminal conviction of Enva (on 18 December 2015 for "four counts of odour nuisance").
- Submissions by members of the public (to the EPA from numerous people, explicitly referring to their welfare and well-being).
- Non-compliance in public areas (i.e. a finding of non-compliance at Enva by the EPA, in relation to odour "resulting in a significant impairment of, or significant interference with the environment beyond the facility").
- Media reporting (the appellant cited "numerous media reports on these matters" and provided links to a sample of 21 national or regional newspaper articles along with 2 mentions in Seanad debates).
- Ministerial investigation (the appellant quoted the Minister for the Environment saying in 2014 that he "will ask the EPA to carry out a very detailed investigation and to provide a report to the Minister" adding that "the report will then be made available to the public").
- Health investigation in the interest of the public (the appellant cited Senator John Crown calling for a full health-only based investigation in the Seanad on 9 July 2014).
- Scope of material requested in the public interest (the appellant re-stated that his request "in essence deals with direct emissions into the atmosphere that are affecting the health of the public, the welfare of the public and also the measures and activities of the EPA that are having a direct environmental impact". He added that "ultimately, I believe it is of the utmost public interest when matters are affecting the health and welfare of the public.

With regard to the appellant's list, I note the following:

- Information on air quality and odours which led to the prosecution of Enva, and its conviction on 18 December 2015 would most likely pre-date the scope of the current AIE request. The fact that the convictions were secured emphasises the importance of the EPA's continued monitoring of Enva's operations. However, it does not add much to the weight of the public interest in access to the documents requested in this case.
- I do not know if what the appellant called a "Ministerial investigation" (i.e. an EPA investigation at the request of a Minister) ever took place, but if it did it would most likely fall outside the scope of the AIE request by pre-dating December 2015. Similarly with the investigation called for by Senator Crown.

Weighing the interest served by refusal against the interest served by disclosure

It is always difficult to attribute a weighting to the public interest in access to information that has not been gathered and which I have not seen. However, it is an unavoidable reality in all cases where article 9(2)(a) is invoked that this test must be carried out without sight of the relevant records.

I am satisfied that there is a strong public interest in the efficient and effective performance of the EPA. I am also satisfied that there is significant public interest in access to information concerning licensing compliance at the Enva plant and the quality of the environment in its environs.

The facts that are available to me show that the plant is licensed by the EPA, its licence is (or recently was) under review, and the EPA is monitoring emissions and air quality and periodically producing reports on same, which are made available to the public. The facts also show that the EPA has undertaken enforcement action and information on that action is also publically available. The appellant has argued persuasively that the overall issue is highly important. However, he has not shown that the public interest in accessing that part of the withheld information (i.e. that information which has not yet been made public on the EPA's websites or at its offices) outweighs the public interest in allowing the EPA to get on with its work without having to fully process an AIE request which I have found to be manifestly unreasonable. It appears to me that it would take extraordinary evidence of a pressing public interest in access to particular information before that interest could be said to outweigh concerns about a public authority having to embark on processing what otherwise appeared to be a manifestly unreasonable request. If there was reason to believe that the EPA was not monitoring emissions at the Enva plant or was shirking from its duty to take enforcement action when appropriate, I might find that the test was met. However, I have no reason to reach such a conclusion in this case. I am also mindful that the EPA invited the appellant to modify his request. It is entirely open to the appellant to make a new AIE request asking for whatever item of environmental information he wants access to. In other words, whatever environmental information the appellant wants access to can be specifically asked for without the need to ask for a range of documents such as those asked for in this case.

Article 5 of the AIE Regulations obliges every public authority to: make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means; ensure that environmental information compiled by or for it, is up-to-date, accurate and comparable; and maintain registers or lists of the environmental information held by the authority and designate an information officer for such purposes or provide an information point to give clear indications of where such information can be found. It is clear from article 5(2) that, by specifying a *minimal range* of information that must be maintained so as to be readily reproducible and accessible, this obligation does not apply to every individual item of environmental information which a public authority might hold. For example, I would regard key environmental records such as technical reports on air quality as constituting core environmental information falling within article 5(2), while regarding any environmental information which might exist in a multitude of emails created during the process of drafting, publishing, circulating, reviewing and revising such reports as falling outside the minimal requirements set by article 5(2).

While public authorities should of course aspire to go beyond merely minimal compliance with article 5, it makes sense, I suggest, to interpret article 5 as not requiring public authorities to make publically available every record of "internal and external correspondence, emails, handwritten notes, minutes of meetings, notes of phone calls, memos" (in the wording of this AIE request). If it were otherwise, an organisation like the EPA might have to make virtually all of its records publicly available, although I note that subarticle 5(4) provides that exceptions in articles 7, 8 and 9 can affect the duties imposed by article 5.

While I have no role in auditing how public authorities comply with article 5, I have formed the view in the course of my work that the EPA takes its article 5 obligations seriously, as one would expect. The catch-all wording of the AIE request in this case would capture environmental information that would fall under article 5(b) and that which would not. I expect that much or possibly all of the information that would fall under article 5(b) is already publically available.

Conclusion

I find that the public interest served by disclosure does not outweigh the interest served by refusal in this case.

Decision

I find, after weighing the public interest in accordance with article 10(3), that the EPA was justified in refusing the request on the ground of article 9(2)(a) because the request was manifestly unreasonable.

Accordingly, I affirm the EPA's refusal decision and do not require the EPA to make environmental information available to the appellant.

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
1 June 2017