

Appeal to the Commissioner for Environmental Information
Case CEI/14/0002

European Communities (Access to Information on the Environment) (AIE) Regulations 2007 to 2014

Appellant: An Taisce

Public Authority: Bord na Móna (BnM)

Issue: Whether BnM was justified in refusing the appellant's request for access to a copy of any correspondence, reports, documents or other information held by BnM plc and/or its subsidiary companies relating to compliance with, or breaches of, the EIA Directive (Directive 85/337/EEC, now codified as Directive 2011/92/EU) in respect of peat extraction by BnM plc and/or its subsidiary companies

Summary of Commissioner's Decision: In accordance with Article 12(5) of the AIE Regulations, the Commissioner reviewed the decision of BnM and found that it was justified in refusing the request under Articles 7(5), 8(a)(iv), and 9(1)(b) of the Regulations. He affirmed the decision of BnM accordingly.

Background

In a request dated 17 January 2014, the appellant sought access under the AIE Regulations to a copy of any correspondence, reports, documents or other information held by BnM plc and/or its subsidiary companies relating to compliance with, or breaches of, the EIA Directive (Directive 85/337/EEC, now codified as Directive 2011/92/EU) in respect of peat extraction by BnM plc and/or its subsidiary companies. On 5 February 2014, BnM wrote to the appellant to request an extension of time by agreement in which to make a decision for the purpose of establishing the processes and procedures necessary to ensure compliance with the Regulations. On 17 February 2014, the appellant notified BnM that it was not willing to agree to an extension of time. On 18 February 2014, the appellant applied for an internal review on the basis of BnM's deemed refusal of its request. In a decision dated 4 April 2014, BnM refused the request under Articles 8(a)(iv) and 9(1)(b) of the Regulations.

On 8 April 2014, the appellant appealed to this Office against BnM's decision. The appeal was accepted on 1 May 2014, but BnM initially questioned my jurisdiction over the matter. In essence, BnM argued that the appeal was premature since it did not issue its decision until 4 April 2014. However, under Articles 7(2)(a) and 10(7) of the Regulations, a decision refusing the request was deemed to have been made one month from the date of the receipt of the original request. While Article 7(2)(b) of the Regulations allows for an extension of the deadline for a period no later than two months from the date on which the request was received, this provision was not invoked in this case; that is to say, while BnM wrote to the appellant seeking an extension of time in which to make its decision, it did not expressly refer to Article 7(2)(b), it did not say that the reason for the extension was the volume or complexity of the environmental information sought, and it did not specify a date, not later than two months from the date on which the request was received, by which the response would be made. In the circumstances, the appellant's internal review request dated 18 February 2014 was valid under Article 11(1) of the Regulations.

I have now completed my review under Article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by BnM and the appellant. I have also had regard to: the Guidance provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations; Directive 2003/4/EC, upon which the AIE Regulations are based; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide] relating to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is more commonly known as the Aarhus Convention.

Scope of Review

The question before me is whether BnM was justified in refusing the appellant's request for access to information held by BnM and/or its subsidiary companies relating to compliance with, or breaches of, the EIA Directive in respect of peat extraction by BnM and/or its subsidiary companies.

Analysis and Findings

Article 7(5)

BnM has identified 50 records as falling within the scope of the request. According to an index prepared by BnM, the records span a period from 3 December 2012 to 24 September 2013. However, the record dated 3 December 2012 includes an email chain dating from 27 November 2012, and a record dated 10 December 2012 includes a note of legal advice dating from 2006. In its decision dated 4 April 2014, BnM refused access under Articles 8(a)(iv) and 9(1)(b) of the Regulations on the basis that the records were generated for the purposes of anticipated litigation and for the purposes of defending actual litigation brought by the appellant, among others.

In its initial submission to this Office dated 23 May 2014, BnM referred to a request made on 13 June 2012 by the Friends of the Irish Environment (FIE) to the Planning Authority (Westmeath County Council) under section 5 of the Planning and Development Act 1963 (as amended) to determine "whether the drainage of bogland, peat extraction and handling, the creation of accesses from public roads and other associated works by [Bulrush Horticulture Limited and Westland Horticulture Limited] are development or exempted development". BnM claimed that planning permission and accompanying EIA Directive matters became "a real and present litigation threat" once An Bord Pleanála (ABP) ultimately determined [in April 2013] that the works were development and not exempted development and as such were subject to the requirements of the planning permission process. In addition, BnM referred to the complaint made by FIE to the European Commission (EC) in 2012 pursuant to which, according to BnM, Ireland was found to be in breach of the EIA Directive in failing to correctly implement the EIA Directive in circumstances of, inter alia, peat extraction.

BnM further stated that, as anticipated, on 17 January 2014, the appellant served High Court judicial review proceedings, together with the request for access to information in this case, on BnM and its subsidiary, Edenderry Power Limited, seeking to challenge the decision of ABP to grant an extension of time to the planning permission of Edenderry Power Limited. Parallel High Court proceedings were received from FIE and another party.

However, the appellant maintained that BnM should hold additional information relevant to the request that was not created in the context of anticipated litigation given that the EIA Directive has been in effect since 1988. Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested information is held by or for the public authority concerned. This Office's approach to dealing with cases where a public authority has effectively refused a request under Article 7(5) is set out in previous decisions published on our website at www.ocei.gov.ie, such as CEI/11/0009, Ms. Rita Canney and Waterford City Council (7 June 2012), and CEI/08/0012, Cllr Cullen and Department of Environment, Heritage and Local Government (27 Oct. 2009). As these decisions explain, where a public authority effectively seeks to refuse a request for environmental information on the basis of Article 7(5), I must be satisfied that adequate steps have been taken to identify and locate relevant records, having regard to the relevant circumstances. In determining whether the steps taken are adequate in the circumstances, I consider that a standard of reasonableness must necessarily apply.

In support of its submissions on the matter, the appellant provided a sample of Irish press articles showing that the question of the EIA Directive's relevance to BnM's peat extraction business had been the subject of commentary since 1987. As it therefore seemed reasonable to expect that BnM may hold information relevant to the request that would not fall within

the ambit of Articles 8(a)(iv) and 9(1)(b) because of anticipated litigation and/or the EC proceedings, my Investigator wrote to BnM on 16 June 2015 to ask it to address the "search" issue that had arisen. At the time, however, my Investigator had not yet had sight of any of the records at issue (which were not forwarded to this Office until July 2015).

In subsequent submissions, BnM identified the relevant personnel who were asked to search for records falling within the scope of the request, which, as BnM stressed, focuses on compliance with or breaches of the EIA Directive. The relevant personnel identified are the following: [names, titles, and employment history of named staff members removed].

BnM said that it does not have a formal records management policy. However, it explained that [a named staff members], Solicitor, spoke to each of the relevant personnel listed above, all of whom supplied all the relevant records in his or her possession. For completeness, an email requesting a further search was sent by [the Information Officer] on 30 June 2015 to the others listed above (apart from one individual, who was on extended leave), all of whom responded, but no new documentation was located as a result. BnM also explained that the relevant people searched all of their correspondence, reports, documents and other information, including all of their electronic files/folders and emails sent and received to/from them regarding the subject matter. In the circumstances, and having regard to the contents of the records provided for the purposes of my review, my Investigator considered that there was no basis for disputing BnM's position that no further relevant records were held and accepted Article 7(5) applied to any further records that the appellant may seek relating to compliance with, or breaches of, the EIA Directive in respect of peat extraction by BnM plc and/or its subsidiary companies.

The appellant argues, however, that the Investigator's view "cannot sensibly be sustained" because of several major pre-November 2012 events "that would undoubtedly have engaged BnM in considering compliance with the EIA Directive". The appellant refers in particular to Case C-392/96, an action brought by the EC against the Irish State. The appellant asserts: "It is not credible to suggest that BnM would not have considered the implications of the EIA Directive for its peat extraction as a result of this EU infringement action." In relation to a follow-up action, Case C-294/03, the appellant states: "Again, BnM must have been considering its compliance with the EIA Directive at this time."

The appellant also refers to BnM's applications for IPPC licences for peat extraction from the Environmental Protection Agency (EPA). The appellant states:

"The grant of these licences represents the first (and only) "development consent" (Art. 2(1) EIA Directive) for peat extraction held by BnM. To suggest that BnM did not consider its compliance with the EIA Directive in the years 1990-2001 in respect of these licence applications is not credible (e.g. BnM must have considered whether it needed to submit environmental impact statements to the EPA, and whether the EPA would need to carry out EIAs). Indeed, we fear such a conclusion would risk bringing the OCEI into disrepute."

The appellant's arguments are speculative in nature in that they are based on the appellant's own (albeit strongly held) belief that the question of compliance with the EIA Directive should have been regarded by the BnM as a relevant consideration in relation to its peat extraction operations. However, as the appellant has acknowledged, BnM was operating under licences issued by the EPA throughout the years in question. What the appellant does not seem to recognise is the likelihood that it would have been the licensing requirements, rather than the Directive itself, that would have been regarded as directly relevant to BnM's operations. Thus, in relation to Case C-392/96 and the follow-up action, it is not at all clear why BnM would "undoubtedly" have been engaged in considering compliance with the EIA Directive itself unless the State had directly involved BnM in the matter, as it did in relation to the EC proceedings that commenced on foot of the FIE complaint at the end of 2012. The appellant's request in this case does not seek information relating to compliance with or breaches of the EPA licensing requirements, including the question of whether the EPA may have required environmental impact statements. Rather, as BnM has emphasised, the appellant's request is specifically focused on the question of compliance with, or breaches of, the EIA Directive.

Moreover, the appellant has not had the benefit of examining the records provided by BnM for the purposes of my review. As my Investigator explained, this Office is restricted in terms of what can be said about the contents of the records at issue. However, I consider it appropriate to emphasise that the records provide no basis for disputing BnM's position that no further relevant records are held. For example, there is nothing in the content of the records that would point to the existence of earlier information within the scope of the request. While the question of the EIA Directive's relevance to BnM's peat extraction business has been the subject of commentary since 1987, this does not mean necessarily mean that the question of compliance with or breaches of the EIA Directive was a "live" issue for BnM until it was notified of the EC proceedings in late November 2012. It is apparent from the legal advice dating from 2006 that the question of the EIA Directive was given some consideration at that time. However, the legal advice was not even stored on BnM's premises and had to be retrieved in December 2012 from a representative of the solicitor who had provided the advice. Moreover, the 2006 legal advice covers a number of issues relating to planning and environmental legislation and thus seems to have been provided in a general context rather than in response to any particular question concerning the EIA Directive. Otherwise, I find nothing to suggest that the issue of compliance with, or breaches of, the EIA Directive (as opposed to the EPA licences) was given the consideration that the appellant supposes. In the circumstances, I am satisfied that BnM has carried out a reasonable search for records relevant to the appellant's request and that Article 7(5) applies to any additional records relating to compliance with, or breaches of, the EIA Directive in respect of peat extraction by BnM plc and/or its subsidiary companies.

Legal professional privilege/course of justice

BnM claims that, in light of the ABP decisions that issued in April 2013 and the EC proceedings that commenced in 2012, the records held which are relevant to the request in this case fall into one or more of the following categories:

Confidential communications made between BnM and their internal and external professional legal advisors for the purpose of obtaining and/or giving legal advice; and/or
Communications between parties within BnM and their internal and external legal advisors or between those legal advisors and third parties or between BnM and third parties the

dominant purpose of which is the preparation for contemplated or pending litigation;
and/or

Communications made in confidence between BnM and the Department the dominant purpose of which is to assist the Department in response to the EC proceedings instituted against it in respect of a number of matters including the matters the subject of the request by An Taisce.

In relation to the question of the dominant purpose test, BnM states that the threat of litigation was "foremost in our minds" at the time that the records concerned were created or obtained, as evidenced by the manner in which "the correspondence and documentation was generated and exchanged expressly and with deliberate care directly through our internal legal advisers as well as involving our external legal advisers". In support of its position, BnM refers to the recent case of *Domhnall MacA'Bhaird v. The Commissioners of Public Works in Ireland* [2015] IEHC 129. BnM maintains that there was "an obvious legal controversy", and states that "[t]he fact that litigation ensued between the questioning body (An Taisce) relating to exactly the issue under request only further copperfastens our position". BnM also argues that common interest privilege applies to certain legal advice that was shared with the Department of the Environment, Community and Local Government (DECLG) and the Department of Communications, Energy and Natural Resources (DCENR).

Article 8(a)(iv) of the Regulations provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts). Article 9(1)(b) of the Regulations allows a public authority to refuse to make available environmental information where disclosure of the information requested would adversely affect the course of justice (including criminal inquiries and disciplinary inquiries). Like all refusal grounds under AIE, Articles 8(a)(iv) and 9(1)(b) are subject to Article 10(3) of the Regulations, which requires public authorities to consider each request on an individual basis and to weigh the public interest served by disclosure against the interest served by refusal.

In Cases CEI/08/0012 and CEI/08/0001, HoA Action Group and Kildare County Council (22 September 2008), available at www.ocei.gov.ie, my predecessor recognised that Article 8(a)(iv) may be applicable where information is protected by legal professional privilege. Legal professional privilege enables the client to maintain the confidentiality of two types of communication:

confidential communications made between the client and his/her professional legal adviser for the purpose of obtaining and/or giving legal advice, and
confidential communications made between the client and a professional legal adviser or the professional legal adviser and a third party or between the client and a third party, the dominant purpose of which is the preparation for contemplated/pending litigation.

I also note that the Minister's Guidance advises in relation to Article 9(1)(b):

"Environmental information relating to anything which is the subject matter of any legal proceedings, or any formal inquiry (whether past or present), or any preliminary investigation, may be refused. Examples would include information in connection with intended prosecution of offences by the Director of Public Prosecutions or by local or other public authorities; information affecting enforcement proceedings; material arising from public or disciplinary inquiries; and information relating to preliminary or other proceedings instituted by the European Commission."

The case file before me reflects that BnM was notified of a peat extraction data gathering exercise by the DECLG in late November 2012. The DECLG's data gathering exercise was in response to a request by the EC to provide detailed information on the matter because of an FIE petition pending before the European Parliament at the time. The case file also reflects that BnM immediately sought internal and external legal advice in response to the notification. I will address the records at issue below in the context of the categories generally identified by the BnM in its submissions. However, I note that, in light of the close involvement of BnM's internal legal department in the matter, and the email chains included in the records at issue, there is some degree of overlap in terms of which records fall into which category. Thus, for instance, some of the records identified as falling within Category 3 could be regarded as also falling within Category 1, at least in part, insofar as the communications were forwarded to the legal department for observations. At the same time, however, it should be noted that simply copying communications to an in-house lawyer is not sufficient for privilege to attach.

Category 1 (records numbered 2, 5-8, 12-13, 16, 18-27, 30-34, 38-42, 46-48)

The majority of the records at issue consist of actual legal advice, requests for legal advice, or form part of the continuum of communications relating to the requests for legal advice. On the face of it, such records would be exempt from production in a court under the first limb of the legal professional privilege rule even in the absence of contemplated/pending litigation. Certain legal advice was shared with the DECLG and DCENR, but it is apparent that these parties shared a common interest in relation to formulating a response to the EC's inquiries. Moreover, I note that Minister for the Environment and the State were also named as notice parties in the High Court proceedings brought by the appellant (and also FIE): *An Taisce v. An Bord Pleanála* [2015] IEHC 633. The appellant does not accept that common interest privilege applies and has supported its submissions with a recent article on the subject. However, as the article explains:

"The essence of the privilege is that it can arise where two (or more) parties have a sufficiently common interest in the subject matter of the privileged documents, such that the communication between them of such documents can be regarded as being protected by 'common interest privilege'. Strictly speaking, it is not, in and of itself, a distinct form of privilege, but rather a basis on which the disclosure of a privileged document by one party to another with a sufficiently common interest in the subject matter thereof does not result in the waiver of privilege."

The article also refers to *Redfern Limited v. O'Mahony* [2009] IESC 18, in which Finnegan J quoted the following passage from *Kershaw v. Whelan*: "Waiver is not lightly to be inferred; although privilege is an aspect of the law of evidence and not of constitutional rights it is firmly established in our law for sound reasons of public policy." I find no evidence to suggest that there has been any disclosure that would have resulted in a waiver of privilege in this case. On the contrary, I am satisfied that there was an understanding of confidence between BnM, DECLG, and DCENR in relation to the limited disclosures that were made.

Category 2 (records numbered 3-4, 14-15, 35)

Certain other records contain internal communications following the decisions of ABP in April 2013 that I do not regard as qualifying for legal advice privilege, though the internal legal department may have been involved. In addition, there are communications with other peat extraction operators following the ABP decisions. I accept that a "real and present" threat of litigation arose for BnM when the ABP decisions issued and that BnM shared a common interest with the other peat extraction operators in dealing with the implications of the decisions and in preparing for the litigation that ultimately materialised. I therefore accept that the dominant purpose of the communications that followed the ABP decisions was to address the threat of litigation and to prepare for the actual litigation that followed. I also accept that the communications are regarded as confidential and I find no basis for concluding that any privilege that would have attached to the communications has been lost. Accordingly, I am satisfied that these communications would be exempt from production in a court under the second limb of the legal professional privilege rule. Moreover, I accept that parties to a dispute should be able to prepare for the conduct of contemplated or actual litigation in confidence. Although the litigation recently resulted in a High Court judgment in favour of the appellant, a stay on the ruling was granted until at least 30 April 2016; thus, it seems that the proceedings have not fully concluded and that litigation privilege continues to apply.

Category 3 (records numbered 1, 9-11, 17, 28-29, 36-37, 43-45, 49-50)

I regard the remaining records as falling within Category 3, but such records include not only communications with the DECLG but also internal communications and communications with the DECNR and other public authorities involved in the data gathering exercise for the purposes of the EC proceedings. While the subject of the communications dating from April 2013 overlapped with issues arising from the ABP decisions, it is apparent that the communications directly relating to the EC proceedings served the purpose of assisting the DECLG, on behalf of the State, in preparing a response to the EC's inquiries; therefore, the question arises as to whether such communications meet the dominant purpose test in order to qualify for litigation privilege.

The EC's inquiries were on foot of a complaint brought by FIE, which had also brought the request under section 5 of the Planning and Development Act 1963 (as amended) that ultimately led to the decisions by ABP that the peat extraction operations by Bulrush Horticulture Limited and Westland Horticulture Limited were development and not exempted development and as such were subject to the requirements of the planning permission process. The litigation that was anticipated as a result of the ABP decisions subsequently materialised in January 2014 when the appellant, FIE, and another party served High Court judicial review proceedings on BnM and its subsidiary company, Edenderry Power Limited, seeking to challenge a decision of ABP to grant an extension of time to the planning permission of Edenderry Power Limited. As noted above, the Minister for the Environment and the State were also notice parties to the High Court action. In addition, the judgment of the Court notes that the alleged failure of the State to transpose the EIA Directive properly was one of the grounds stated in the application for judicial review. Thus, it is apparent that the proceedings before the EC and the events giving rise to the High Court proceedings were closely connected. In the circumstances, I find no basis to dispute BnM's position that litigation was anticipated and was "foremost" in the minds of the personnel involved from the time that BnM was notified by DECLG of the EC proceedings. I therefore accept that litigation privilege would apply.

In any event, having regard to the Minister's Guidance and the Aarhus Guide, I am satisfied that the records created or obtained in the course of preparing a response to proceedings brought by the EC qualify for protection under Article 9(1)(b) of the Regulations even if, strictly speaking, legal professional privilege does not apply. The Minister's Guidance, which is quoted above, expressly refers to "information relating to preliminary or other proceedings instituted by the European Commission". The Aarhus Guide states that the "course of justice refers to active proceedings within the courts", but then goes on to say that public authorities "also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation". Preliminary proceedings brought by the EC form part of the infringement procedure that can ultimately lead to a referral to the Court of Justice. I accept that, when parties are notified of EC proceedings, they must be able to prepare for the matter in confidence in a similar manner as when litigation before the courts is contemplated. In this case, the appellant has clarified that Ireland has not since 2012 been found to be in breach of the EIA Directive in relation to peat extraction, but the appellant does not deny that relevant infringement proceedings are ongoing.

Conclusion

Accordingly, I am satisfied that Articles 8(a)(iv) and 9(1)(b) apply in this case as claimed. I note that I have considered the public interest served by disclosure in light of the contents of the records, which would shed light on the degree to which BnM considered itself in compliance with the EIA Directive and other relevant legislation. On the other hand, I have had regard to the importance of legal professional privilege to the administration of justice and the need for parties to a dispute to be able to prepare for the conduct of legal proceedings, including EC proceedings, in confidence. On balance, I find that the public interest served by disclosure is outweighed by the interests served by refusal.

Decision

In accordance with Article 12(5) of the AIE Regulations, I have reviewed the decision of BnM in this case. I find that BnM's decision to refuse the appellant's request was justified

under Articles 7(5), 8(a)(iv), and 9(1)(b) of the Regulations. I affirm BnM's decision accordingly.

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