

Appeal to the Commissioner for Environmental Information

Case CEI/14/0013

European Communities (Access to Information on the Environment)(AIE) Regulations 2007 to 2011

Appellant: Marine Terminals Limited, care of McCann Fitzgerald Solicitors, Riverside One, Sir John Rogerson's Quay, Dublin 2

Public Authority: Dublin City Council, Civic Offices, Wood Quay, Dublin 8 (the Council)

Issue: Whether the Council was justified in refusing the appellant's request for access to environmental information relating to planning enforcement correspondence on the grounds of protecting the confidentiality of personal information.

Summary of Commissioner's Decision: The Commissioner found that the Council's decision was justified under Article 8 of the Regulations. While the Council relied on Article 8(a)(i) to justify refusal, the Commissioner found that refusal to grant access was also justified under Article 8(a)(ii). Accordingly the Commissioner affirmed the Council's decision, while partly varying the grounds of justification.

Background

The Council issued a warning letter to the appellant company, on 27 March 2014, with regard to an alleged unauthorised development at the appellant's premises at Ringsend, Dublin. The appellant wrote to the Council on 13 June 2014, citing the Freedom of Information Act and the AIE Regulations. The appellant requested access to: the Council's enforcement file on the matter; all correspondence (including digital correspondence) between local residents and the Council relating to whether enforcement action should be taken against the appellant; and all records of complaints from local residents relating to noise and planning issues at the

appellant's premises.

On 16 July 2014, the Council granted access to some of the information it held, but refused access to other information. The reason given for this part-refusal was "release of such information could reveal the identity of the supplier of information to the public body which was given in confidence".

The appellant requested an internal review of the Council's decision on 25 July 2015. It noted that the original decision by the Council had not specified a legal basis (i.e. by means of reference to a specific article in the Regulations) for its part-refusal of the original request.

The Council issued its internal review decision on 18 August 2014. It affirmed the original decision and clarified the grounds for part-refusal, citing Article 8(a)(i) of the Regulations as justification.

The appellant appealed the Council's internal review decision to this Office on 18 September 2014.

Scope of Review

Under Article 12 of the Regulations, my sole role is to review the Council's internal review decision and to affirm, vary or annul it.

I take account of the submissions of the appellant, the Council and third parties identified in the records at issue. I have regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations (the Department's Guidance document); Directive 2003/4/EC, upon which the Regulations are based; the 1998 UNECE 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) (the Aarhus Guide).

The information at issue in this review was provided to me by the Council, in records numbered and described as follows:

Record 4: Letter from solicitors dated 27 February 2014.

Record 5: Copy reply to solicitors dated 3 March 2014.

Record 6: Copy sworn affidavit from complainant.

I am satisfied that all of the above records contain environmental information in the meaning of the Regulations and this is not disputed by the Council. In this review I have to determine whether the Council was justified, in its internal review decision, in refusing access to information contained in all or any of these records on the grounds of Article 8(a)(i).

Statutory provisions

The Regulations provide for mandatory refusal (subject to Article 10) in circumstances covered by Article 8.

Article 8(a)(i) provides that refusal is mandatory “where disclosure would adversely affect the confidentiality of personal information relating to a natural person who had not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law”.

Article 8(a)(ii) provides that refusal is mandatory “where disclosure would adversely affect the interests of any person who voluntarily and without being under, or capable of being put under, an obligation to do so, supplied the information requested, unless that person had consented to the release of that information”.

Article 10(1) provides that: “notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment”.

Article 10(3) provides that “the 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(5) provides that nothing in Article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which Article 8 or 9 relates, may be separated from such information.

Appellant’s arguments

The appellant’s first argument is that the effect of Article 10(1) is that refusal to provide access cannot be justified, because the request relates to emissions into the environment.

In relation to confidentiality, the appellant argues that one of the documents withheld is an affidavit which was filed in open court. It argues that in these circumstances the provision of access to this document could not “adversely affect the confidentiality of personal information” since the information is no longer confidential information.

The appellant further argues that even if it is found that the disclosure of personal information must be withheld (on the grounds that the confidentiality of personal information would be adversely affected), Article 10(5) of the Regulations requires that such information should be separated or redacted from the environmental information, which should then be made available.

Finally, the appellant argues that the Council failed to comply with the Regulations by not giving reasons for the original decision. It has not, however, argued that this failure invalidated the original decision. In any case, this review concerns the internal review decision only.

The Council’s position

The Council relies on Article 8(a)(i) as justification for refusal. It maintains that planning enforcement complainants have an expectation of confidentiality. It states that there can be no doubt that there was an expectation of confidentiality in this particular case, because the wording of the official complaint form states that personal information “will be kept confidential”. It argues that full-disclosure in this instance would be highly likely to prejudice the giving of similar information in the future, and that such an outcome would

negatively affect planning compliance. The Council did not address the issue of emissions.

Analysis and Findings

Emissions

The appellant specifically requested information relating to “noise emissions” and to complaints about noise. The Department’s Guidance document states that “emissions should be construed as discharges of whatever kind to all environmental media”. The question arises as to whether “noise-making” constitutes an “emission into the environment”, when it does not discharge or release any substance into the atmosphere. The Aarhus Guide states, at page 88 under the heading “Defining Emissions”, that the term “emission” has been defined in the Industrial Emissions Directive (2010/75/EU) as a “direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land”. Similarly, the Environmental Noise Directive (2002/49/EC) recognises noise as an emission. I conclude from the above that noise-making constitutes an emission into the environment for the purposes of the Regulations.

The next issue for consideration is the meaning of Article 10(1) of the Regulations. Under one interpretation, it could be understood to mean that [subject to Article 9 but not to sub-article 9(1)(c)] once a request relates to emissions, access to all of the requested environmental information must be provided even when that information does not contain information on emissions. If this argument were correct, any request under AIE legislation would only have to include a reference to alleged emissions and full disclosure would have to follow [subject to Article 9 but not to sub-article 9(1)(c)]. It is difficult to think of any human activity which would not involve some kind of emission; for example, the exhalation of carbon dioxide or the making of even the slightest sound. Such an interpretation could lead to absurdity and to the abuse of the legislation.

The Regulations have to be interpreted in light of the Directive. The Supreme Court approved of this approach in its judgment in *NAMA -v- Commissioner for Environmental Information* [2015] IESC 51. The Court held that “In order to understand what the statutory instrument means and does in this case, it is necessary, perhaps first, to understand exactly what the Directive does and means, which in this case may also mean interpreting the provisions of the Convention”. The General Court of the Court of Justice of the European Union interpreted the relevant provision of the Directive in Case T-545/11 (*Stichting Greenpeace Nederland-v-Pesticide Action Network Europe*) and held that, in order for environmental information to constitute information on emissions, “it suffices that the information requested relates in a sufficiently direct manner to emissions into the environment”. I understand, therefore, that the question which I must answer is: does the information to which access has been requested in this case, i.e. the information contained in the records withheld by the Council, relate in a sufficiently direct manner to noise emissions into the environment?

None of the records at issue says anything about the constituent elements or levels of noise emissions. None of the records includes the words “noise”, “emissions”, “disturbance”, or “nuisance”, for example. The sole subject matter of the records is an alleged unauthorised structure. Notwithstanding this, there is a relationship between the alleged unauthorised development of a structure and concerns about noise emissions coming from that structure. It is fair to say that the concerns which some local residents have about the appellant’s premises

primarily concern noise emissions. This is borne out by several newspaper articles which my investigator brought to my attention: these articles carry headings such as “*Port firm turns deaf ear to residents*”, “*Locals demand results of port noise survey*”, and “*Port taken to court in noisy neighbours row*”. Nonetheless, the fact remains that nothing in the withheld records would lead a reader of just those documents to understand that they relate in any way to noise emissions.

Applying the *Stichting Greenpeace* test, I consider that the information at issue in this case does not constitute information on emissions, because it does not relate in a sufficiently direct manner to emissions into the environment. Therefore I do not consider that the request relates to information on emissions into the environment. I conclude that the provisions of Article 10(1) do not trump those of Article 8 in this case.

The next issue is whether the Public Authority’s decision was justified under Article 8.

Consideration of Article 8

The Council refused access in reliance on Article 8(a)(i), which provides that refusal is mandatory where disclosure would adversely affect the confidentiality of personal information relating to a natural person who had not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law. I must therefore consider:

1. Whether the information at issue is personal information relating to a natural person who had not consented to disclosure.
2. Whether the information is confidential information.
3. Whether such confidentiality is otherwise protected by law.
4. Whether confidentiality (if any) would be adversely affected by disclosure.

If all of the above questions are answered in the affirmative, refusal would be mandatory (subject to consideration of the remaining provisions of Article 10).

Having examined the records at issue, I am satisfied that they relate to a natural person. My investigator has spoken to this person and I am satisfied that there is no consent to disclosure.

The expression “personal information” is not defined in the Regulations. The Department’s Guidance document indicates that AIE decision-makers should have regard to the relevant provisions of the Freedom of Information (FOI) Act 2014. That Act defines personal information as including information about an identifiable individual that is held by an FOI body on the understanding that it would be treated by that body as confidential. In the present case the records are “about” an identifiable individual in the sense that they identify an individual person and contain private correspondence sent by or to them. The records are held by the Council, which is an FOI body. To fully constitute personal information under the FOI legislation, the information must have been held by the Council on the understanding that it would be treated in confidence. In its internal review decision, the Council states that “the wording of the official complaint form states that personal information will be kept

confidential". The complaint form supplied to this Office by the Council does not contain any wording at all on the subject of confidentiality. The wording referred to by the Council appears on a different complaint form which is available from the Council's website. Notwithstanding this, in its internal review decision the Council made it clear that it regards all details of persons who submit reports of suspected breaches of planning law as confidential, in order to ensure that would-be informants are not deterred by fear of exposure.

Nothing in the records at issue explicitly demonstrates that the complainant had an expectation of confidentiality. However, when contacted by my investigator, the complainant maintained that they had such an expectation. The Council's website includes a section with advice on "how to complain about a development". It states that the complainant's name will be kept confidential and adds that "on occasion, your evidence in court will be required to ensure a successful outcome to enforcement action. In such circumstances, you will be asked in advance if you are willing to give evidence".

I am satisfied from the above that the Council and the complainant had a mutual understanding of confidentiality and that both parties understood that if the Council wished to embark on legal action in reliance on evidence to be given by the complainant, the complainant's consent would be required before confidentiality would be conceded. Accordingly, I am satisfied that the information at issue constitutes personal information under the FOI Act's definition, and I therefore accept it as personal information for the purpose of this review.

The next question is whether the records actually contain confidential information, as distinct from anyone's expectation of confidentiality. In answering this question I must have regard to information that is already in the public domain. The appellant argues that one of the documents withheld is an affidavit which was filed in open court and that this document cannot therefore be regarded as confidential. In its submission to this Office, the appellant supplied a copy of this affidavit, which related to a judicial review case (case number 2014/193 JR). For clarity, I will refer to this as the "judicial review affidavit" and to the affidavit in record 6 as the "record affidavit". The complainant's solicitor has assured this Office in writing that the judicial review affidavit was not opened to the court. I compared the two affidavits and found that they are different documents. I am therefore satisfied that, regardless of whether or not the judicial review affidavit was opened in court, the judicial review proceedings did not cause the affidavit in record 6 to lose its confidential status.

Internet searches carried out by my investigator revealed that some local residents have been quoted by the news media expressing concerns about the appellant's premises. One resident is on public record as having made an application under section 5 of the Planning and Development Acts 2000 to 2010 regarding a structure on the appellant's premises. (A "section 5 planning application" is a request for a declaration by a planning authority as to whether a particular development would be exempt from, or subject to, the need for planning permission.) Much of the dispute between the appellant and local residents has been played out in public. However, this does not mean that all confidentiality has been lost. After carefully considering the contents of the records at issue, I find that they go beyond merely identifying a complainant and a complaint: they also contain information which does not appear to be in the public domain. I conclude that, in these circumstances, the records contain confidential personal information.

The next question is whether the confidentiality of the personal information at issue is protected by law. I have already established that the information is personal information in the meaning of the FOI Act 2014.

Under section 37(1) of the FOI Act, personal information must not be disclosed. Section 37(2) of the FOI Act provides that section 37(1) does not apply if: the information concerned relates to the requester concerned; any individual to whom the information relates consents; information of the same kind as that contained in the record in respect of individuals generally, or a class of individuals that is, having regard to all the circumstances, of significant size, is available to the general public; the information was given to the FOI body concerned by the individual to whom it relates and the individual was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public; or disclosure of the information is necessary in order to avoid a serious and imminent danger to the life or health of an individual. I find that none of the provisions of section 37(2) apply in this case.

Section 37(5)(b) of the FOI Act permits the disclosure of personal information where disclosure would benefit the individual to whom the information relates: that is not the case in this instance.

Section 37(5)(a) provides that refusal on the grounds of section 37(1) is subject to a public interest test: the information will not be protected by the FOI Act if the public interest in the request being granted outweighs the public interest in the upholding of the right to privacy of the individual to whom the information relates. There is a public interest in public access to information on the environment in order for the public to be able to participate in environmental decision-making. In the current case the appellant seeks information relating to complaints made against it. In the event of enforcement proceedings, the appellant would have a right of access to details of the case against it and an opportunity to defend its position. It is difficult to see how refusal of access to the information at issue, in the current context, could in any way deprive the appellant of its ability to participate in environmental decision-making or to defend its interests in litigation, should the latter arise. Against this I must weigh the public interest in the maintenance of the privacy of the complainant. The public interest in these circumstances lies not just in the public interest in vindicating the constitutional right to privacy, but also in the public interest in compliance with planning law. The Information Commissioner has held that the public interest argument in favour of refusing to release information can include the public interest in individuals being able to communicate in confidence with public bodies and in safeguarding the flow of information to public bodies (*Mr X and a Health Board*, Case No. 99397, and *Mr X and South Eastern Health Board*, Case No. 020533). Both of these public interests apply in this case. Having considered the arguments in the circumstances of this case, I am satisfied that the public interest in granting access to the information is not sufficiently strong to outweigh the public interest in withholding the information. I therefore consider that the personal information at issue in this case is protected in law.

Disclosure would cause the complete loss of the confidentiality of the personal information involved. Clearly, this would constitute an adverse effect.

Having answered in the affirmative each of the four questions posed earlier, I conclude that

refusal to grant access to the information at issue is justified under Article 8(a)(i).

Other mandatory grounds for refusal which should be considered

The Council did not seek to rely, additionally or alternatively, on Article 8(a)(ii) under which refusal is mandatory where disclosure “would adversely affect the interests of any person who voluntarily and without being under, or capable of being put under, an obligation to do so, supplied the information requested, unless that person had consented to the release of that information”.

The complainant in this case is a person who voluntarily and without being under, or capable of being put under, an obligation to do so, supplied information. The complainant does not consent to disclosure of the information. The complainant has provided me with grounds for their belief that their interests would be adversely affected by disclosure and I accept that there is a reasonable basis for that belief. In reaching this conclusion I have taken account of all of the information available to me about the history of the dispute and of the degree to which elements of it have been conducted in public.

I conclude from my consideration of Article 8(a)(ii) that its provisions justify refusal to provide access to each of the records at issue.

Article 8 Conclusion

I find that refusal to disclose the information at issue in this case is justified by sub-articles 8(a)(i) and 8(a)(ii). In arriving at this finding I have applied the provisions of sub-articles 10(4) (i.e. applied the grounds for refusal in a restrictive basis) and 10(3) (considered each request on an individual basis).

Consideration of Article 10(3): The Public Interest

I have already given some consideration to weighing the public interest in the context of the FOI legislation. It now falls to me, having concluded from Article 8 that refusal to provide access is justified, to reconsider the public interest for the purposes of the Regulations. Despite Article 8, if the public interest in favour of disclosure outweighs the interests justifying refusal, disclosure could be warranted.

The interests protected by Article 8 are described in the Regulations in personal terms, i.e. the confidentiality of personal information and effects on the interests of a person. They nonetheless involve public interests. There is a public interest in respecting the constitutional right to privacy and a public interest in not deterring members of the public from reporting suspected wrong-doing, including in the planning context. Against that there is a public interest in access to environmental information and in the opportunity to participate in environmental decision-making; neither of these interests, however, requires that members of the public are not permitted to communicate concerns about suspected breaches of the planning law to public authorities in confidence. On balance, I do not consider that the public interest requires that the interests protected by Article 8 in this case need be set aside.

Consideration of Article 10(5): Separation

Article 10(5) provides that nothing in Article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which Article 8 or 9 relates, may be separated from such information. In interpreting this provision, I have had regard to the corresponding provision in the Directive. Article 4(4) of the

Directive provides that “environmental information ... shall be made available in part where it is possible to separate out any information falling within the scope of ... paragraph 2”.

Paragraphs 2(f), relates to the confidentiality of personal data and or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law). Paragraph 2(e) relates to the interests ... of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless the person consented to the release of the information concerned.

Article 6 of the Aarhus Convention provides:

“Each Party shall ensure that, if information exempted from disclosure under [Article] 4 can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.”

Article 4 of the Aarhus Convention concerns, amongst other things, the confidentiality of personal data and the interests of a person who supplied information to a public authority voluntarily.

In light of all of the above, I understand that Article 10(5) of the Regulations means that nothing in Article 8 justifies a refusal to provide access to environmental information which, although held with information to which Article 8 relates, may be separated from such information without adversely affecting the confidentiality of personal information relating to a natural person who had not consented to the disclosure of the information (where that confidentiality is otherwise protected by law) and without adversely affecting the interests of a person who voluntarily and without being under, or capable of being put under, an obligation, supplied the information requested, unless that person had consented to the release of that information.

The question before me is whether it would be possible to release the information requested, after first redacting all information which would expressly identify the complainant, without causing prejudice to the confidentiality of that person's personal information or without negatively affecting that person's interests. I have carefully considered all of the information available to me and the particular circumstances of this appeal-case. As is often the case with AIE reviews when dealing with issues of legally protected confidentiality, it would not be appropriate for me to go into the detail of my deliberations on this matter. I conclude, however, that it is not possible to provide access to the records, even with names and addresses redacted, without leading to the type of adverse effects which must be avoided. I therefore find that Article 10(5) does not displace the justification for refusal under Article 8 in this case.

Decision

In accordance with Article 12(5) of the AIE Regulations, I have reviewed the decision of Dublin City Council in this case. I find that the Council's decision to refuse the appellant's request was justified under Article 8(a)(i) and (ii) of the Regulations.

Accordingly, I affirm the Council's decision, while partly varying the basis for it.

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 is given.

Peter Tyndall**Commissioner for Environmental Information**

Date