



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

**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 2018
(the AIE Regulations)**

Case: OCE-112017-ZZZ7B2

Date of decision: 17 January 2024

Appellant: Mr. Neil Foulkes

Public Authority: Forestry Appeals Committee (FAC)

Issue: Whether the FAC was justified in part refusing the request under Articles 8 (a)(iv) & 9(1)(b) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner annulled the decision of the FAC and directed release of the records in question.

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

1. On 17 June 2021, the appellant requested a list of CN or TFL numbers relating to all decisions of the FAC that have been or are subject to judicial review.
2. On 30 July 2021 the FAC responded to the appellant, partially granting this request. The decision stated that there were six relevant judicial review cases and of the six, only one had been decided, this decision was a matter of public record so the FAC was granting access to the licence number. The remaining five cases were open and progressing through the courts, and access to relevant information in relation to those five cases was refused.
3. The grounds relied on for refusal of this information were Articles 8 (a)(iv) & 9(1)(b) of the AIE Regulations. The decision also referred to Section 29(1)(a) & (b) and 31(1)(a) of the Freedom of Information Act. The FAC also noted in its decision that while considering the public interest test under article 10 of the Regulations, it determined that “legal professional privilege outweighs the public interest” in this case.
4. The appellant requested an internal review on 31 July 2021.
5. The FAC replied to this request on 16 August 2021, affirming the original decision.
6. The appellant appealed to this Office on 23 August 2021.
7. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the Regulations. In carrying out this review, I have had regard to the submissions made by the appellant and the Forestry Appeals Committee, in addition, I have 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) (‘the Aarhus Guide’).
8. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.



Scope of Review

9. The FAC has part refused the appellant's request on the basis of articles 8 (a)(iv) & 9(1)(b) of the AIE Regulations and also referred to Section 29(1)(a) & (b) and 31(1)(a) of the Freedom of Information Act, while stating that legal professional privilege outweighs the public interest in releasing this information. The appellant has appealed such refusal.
10. My review in this case is concerned with whether the FAC is entitled to rely on Articles 8 (a)(iv) & 9(1)(b) of the AIE Regulations to refuse the appellant's request.

Preliminary Matters

11. I note that the appellant made a formal complaint to the FAC in relation to a request for an extension of time in relation to this request and I would ask that the FAC note the circumstances as outlined in the Regulations where an extension of time is warranted.
12. I also wish to express my regret that there has been a delay in the resolution of this appeal. I apologise for this and am committed to improving efficiency in order to achieve timely reviews in the future.

Analysis and Findings

13. The grounds for refusal of a request for environmental information as set out in articles 8 and 9 of the AIE Regulations are subject to the provisions of article 10 of the Regulations.
14. Article 10(3) of the Regulations 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. Article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest. In general, there is a presumption in favour of the release of environmental information.
15. In this case, the FAC has refused access to the relevant records under article 8(a)(iv) & 9(1)(b) of the Regulations. Article 8(a)(iv) 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". This includes the Freedom of Information (FOI) Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts. Article 9(1)(b) allows for a public authority to refuse to make available environmental information where disclosure of the information requested would adversely affect the course of justice.



16. The FAC set out in its original decision that “as the licence numbers are a matter of legal proceedings, they are as such a record which is considered under legal privilege” and as a result, the FAC is of the view that it is justified in refusing access to these records under article 8(a)(iv) of the AIE Regulations. The FAC also maintains that the public interest in favour of disclosure does not outweigh the interests served in maintaining the confidentiality of the records
17. This position is affirmed at Internal Review stage where the internal reviewer advises the appellant that “on the basis that the remaining five judicial cases are open, and progressing through the Courts, the FAC is not the sole respondent, and I consider that legal professional privilege outweighs the public interest.”

Article 9(1)(b) and Legal Privilege

1. The FAC contends that release of the relevant licence numbers may be refused under article 9(1)(b) of the AIE Regulations. This provision states:

“9. (1) A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect—....
(b) the course of justice (including criminal inquiries and disciplinary inquiries).”
2. The wording of the article makes it clear that there must be some adverse effect on the course of justice in order for the exception to apply. Accordingly, when relying on article 9(1)(b) the public authority must set out the reasons why it considers that the disclosure of the information at issue could specifically and actually undermine the course of justice as set out by the CJEU at paragraph 69 of *Land Baden-Wurttemberg v DR*, [Case C-619/19](#). The risk of the course of justice being undermined must be reasonably foreseeable and not purely hypothetical.
3. Based on the information submitted to this office, the FAC have suggested that release of the environmental information at the centre of this appeal be refused solely because the related cases are ongoing and progressing through the Courts. This is not sufficient to rely on article 9(1)(b). The FAC has not set out reasons during the course of this appeal as to why it believes there may be an adverse impact to the course of justice. I do not consider that it is reasonable to believe that the course of justice would be adversely affected by the release of the list of relevant licence numbers.
4. It should also be noted that in weighing the public interest served by disclosure against the interest served by refusal the AIE regime recognises a very strong public interest in



maximising openness in relation to environmental matters so that an informed public can participate more effectively in environmental decision-making.

5. The FAC have also contended that legal advice privilege applies to the information sought. Where legal advice privilege applies to requested information, article 9(1)(b) may apply, but it must first be established that the information is in fact privileged. When considering if legal advice privilege applies, there are four conditions which are necessary (see *Lyons v O'Mahoney* [2017] IEHC 649);
 - I. There must be a communication between the client and lawyer,
 - II. The communication must be made in confidence,
 - III. The communication must be made either to or by a lawyer during the course of a professional legal relationship, and
 - IV. The communication must be made for the purposes of giving or receiving legal advice.
6. Legal advice privilege applies to confidential communications between a professionally qualified lawyer and a client for the purposes of obtaining or providing legal advice. The case law on legal advice privilege generally recognises that failure to provide for such privilege may adversely affect the administration of justice such that “where it is established that a communication was made between a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice, whether at the initiation of the client or the lawyer, that communication made on such an occasion should in general be privileged or exempt from disclosure, except with the consent of the client” (*Smurfit Paribas Bank Limited v AAB Export Finance Limited* [1990] 1 IR 469 at paragraph 31).
7. Based on the information provided to this office, the FAC have not established that the requested information is privileged.
8. Considering the above, I find that the FAC were not justified in relying on article 9(1)(b) in refusing the requested information.

Article 8(a)(iv)

9. Article 8(a)(iv) of the AIE Regulations provides for refusal of environmental information “where disclosure of the information would adversely affect...the confidentiality of 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)”.



10. There are a number of elements which must be satisfied before the question of refusal under article 8(a)(iv) arises:
 - I. The case must involve “proceedings” of public authorities;
 - II. Those proceedings must have an element of confidentiality;
 - III. That confidentiality must be adversely affected by the disclosure of the information requested; and
 - IV. That confidentiality must be protected by law.
11. In considering the application of article 8(a)(iv) to this appeal, the first step is to define the relevant “proceedings”. The CJEU in *Flachglas Torgau GmbH v Federal Republic of Germany* Case C-204/09 defined the concept of proceedings as the “final stages of the decision-making process of public authorities” at paragraph 63. It appears from the information received by this Office that the position of the FAC is that the judicial review proceedings themselves would be adversely affected by the release of the list of numbers requested.
12. The FAC have not established at any stage during this appeal process how the proceedings themselves are confidential, in particular when judicial review proceedings of this type will be heard in public. Even if this had been set out, the FAC has also not established how the release of the requested information could adversely affect the confidentiality of the final decision-making stage of these proceedings. I consider that the release of the requested information, which simply a technical detail relating to the matters subject to judicial review proceedings, would not adversely affect the final decision-making stage of those proceedings. It should be noted that the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted does not constitute a sufficient reason for the refusal.
13. Reference was made by the FAC in the internal review decision to sections 29 and 31 of the Freedom of Information Act 2014. This was not elaborated on in submissions made by the FAC to this Office. In circumstances where I have found that the release of the requested information would not adversely affect the confidentiality of the final decision making stages of the relevant proceedings, it is not necessary me to consider the interplay between the 2014 Act and the AIE Regulations.
14. I also note that in his submission to this Office, the appellant raises the point that considerable information would have been made public in court at the time that the application for leave for judicial review would have been made.
15. Based on the above I find that the exemption provided for under article 8 (a)(iv) of the AIE Regulations does not apply in this case.



Third Party Notification

16. During the course of the investigation this Office's investigator engaged with the FAC in an attempt to find an informal solution to this appeal. The FAC advised that a number of records in question had been released to the appellant as the proceedings had been heard and the licence numbers were now a matter of public record.
17. The FAC confirmed that it was unwilling to release the remaining licence numbers in line with their original decision. The FAC failed to identify any adverse impact which may arise from release of the numbers, however it did advise that this Office should seek the views of the licensees & Notice Parties in the remaining cases and provided no further details apart from relevant licence numbers.
18. While it is the practice of this Office that in appropriate circumstances, third parties who may potentially be adversely affected by disclosure of information be contacted in advance of any release of information and be given an opportunity to make submissions regarding the disclosure of information, I do not think it necessary in this appeal. The FAC publish license numbers on their own website. The information requested relates solely to license numbers which are already the subject of judicial review proceedings. The applications for judicial review would have been made in public and the proceedings will be heard in open court. I cannot find any reasonably foreseeable adverse effect for the third parties relevant to those license numbers that would arise from the release of this information.

Decision

19. Having carried out a review under article 12(5) of the AIE Regulations on behalf of the Commissioner for Environmental Information, I annul the decision of the FAC. I find that the FAC was not justified in part refusing the request under Articles 8(a)(iv) & 9(1)(b) of the AIE Regulations and I direct release of the requested information.

Appeal to the High Court

20. 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.



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Julie O'Leary

On behalf of the Commissioner for Environmental Information

17 January 2024