

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/15/0006

Date of decision: 1 November 2016

Appellant: Mr Kevin A McFadden

Public Authority: Dublin City Council (The Council)

Issue: Whether the Council was justified in refusing the appellant's request on the basis that article 9(1)(c) applied to certain information held

Summary of Commissioner's Decision: Under article 12(5) of the AIE Regulations, the Commissioner for Environmental Information reviewed the Council's decision. He found that the Council was justified in refusing to provide information on prior written notifications of waste shipments, as well as documents supporting such notifications and an internal database of notifications, on the basis that the exception under article 9(1)(c) applied to this information. He found that the Council was justified in refusing to provide information supporting the application process in connection with the register of brokers and dealers, on the basis that the exception under article 9(1)(c) applied to this information. He found that the Council was not justified in refusing to provide access to an inspection file on the basis of article 8(a)(iv). He found that the Council was justified in part in refusing access to some of the information contained in the Council's inspections file, as the exception under article 9(1)(c) applied.

The Commissioner varied the decision of the Council, and required the Council to make available to the appellant environmental information set out in Schedule 1 to

his decision. He also required the Council to make available to the appellant environmental information set out in Schedule 3, subject to the separation of information to which article 9(1)(c) applies. He required the Council to make available to the appellant such parts of the three public registers it maintains as are relevant to the appellant's request, together with copies of any certificates of registration of brokers and dealers relevant to the request.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision 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

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (The TFS Regulation) governs the transfrontier shipment of waste within, to and from member states. In Ireland, the Waste Management (Shipment of Waste) Regulations 2007 (the Shipment of Waste Regulations) give full effect to the TFS Regulation. Regulation 4 of the Shipment of Waste Regulations designates the Council as the competent authority under article 53 of the TFS Regulations.

Regulation 5 of the European Communities (Shipments of Hazardous Waste exclusively within Ireland) Regulations 2011 designates the Council as competent authority in order to implement article 33 of the TFS Regulation and to give further effect to article 19(2) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

Regulation 4 of the Waste Management (Registration of Brokers and Dealers) Regulations 2008 (hereinafter the Registration of Brokers and Dealers Regulations) designates the Council as the competent authority for the purposes of article 6 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste. In this capacity, the Council is responsible for registration of brokers and dealers engaged in the recovery, disposal and sale of waste.

The above activities are carried out on a national basis through the Council's National Transfrontier Shipments Office (the NTFSO).

In a letter to the Council of 2 November 2014, the appellant requested "all information and records etc. you have on file" relating to Tony Sharkey and Sharkey Waste Recycling Limited (hereinafter SWR). In a decision of 4 December 2014, the Council brought publicly available information to the attention of the appellant, referring to published registers of waste shipments and the register of brokers and dealers. The Council stated that the exception under article 9(1)(c) of the AIE Regulations applied to all other information requested. The appellant sought an internal review on 11 December 2014, and received a decision on 21 January 2015. The internal review decision was made in identical terms to the first decision, and the appellant subsequently appealed the refusal of his request to my office.

Scope of Review

In conducting this review, I considered whether the information held by the Council on SWR is environmental information within the definition set out in article 3(1). I considered whether the exceptions to disclosure under articles 9(1)(c) and 8(a)(iv) apply to the information. I also considered whether the public interest in disclosure of the information outweighed the interests served by refusal of the request.

Directive 2003/4/EC (the Directive) implements the first pillar of the 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"). The Directive is transposed into Irish law by the AIE Regulations. In making this decision, I have had regard to the *Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) published by the Minister for the Environment, Community and Local Government

[the Minister's Guidance]; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide].

Documents held by the Council

Documents available for inspection by the public:

In its original decisions, the Council notified the appellant that it maintains public registers in respect of waste shipments and a register of brokers and dealers, which could be accessed online at www.dublincity.ie. An Investigator with my Office accessed the Council's website, and found that this statement was inaccurate, as there is no online register of brokers and dealers, and only information on waste shipments made in 2015 is currently available online. The Council subsequently clarified to my Office that it does not provide online access to all of the publicly accessible information it holds on waste shipment matters.

The Council clarified that the following material is publicly available for inspection on request: a register of transfrontier waste shipments of materials listed in Annex III of the TFS Regulation (green listed wastes), a register of notifications of transfrontier waste shipments of materials listed in Annex IV of the TFS Regulation (amber listed wastes containing both hazardous and non-hazardous parts), and a register of brokers and dealers (together with certificates of registration). The Council also publishes on its website the fee structure applicable for persons importing and exporting green and amber listed waste.

I accept that the above information is publicly available. I am satisfied that the public information described is environmental information. I therefore require the Council to make available to the appellant such parts of the three public registers as relate to his request, together with copies of any certificates of registration issued relevant to the request.

Non-public information held by the Council

The Investigator attended at the Council's National Transfrontier Shipments Office to inspect relevant environmental information and the Council provided my Office with copies of relevant information to facilitate my review.

The non-public information held by the Council is as follows:

1. information on prior written notifications for consent to transfrontier shipments, together with documents supporting notifications and database of notifications, which include SWR as a party to the shipment
2. application forms and supporting documents submitted by SWR to the Council in connection with the register of brokers and dealers, and
3. a file concerning inspections of SWR carried out by the Council.

Submissions by the parties

My Office invited the parties to this appeal to make submissions in writing. The appellant was notified of all material issues relevant to this appeal, but did not make a submission.

The Council's Position

In its original decision and at internal review stage, the Council stated that, with the exception of information stated to be available online, all information held on file was considered "commercially sensitive and confidential".

On appeal to my Office, the Council submitted that information on transfers of waste was submitted on a confidential basis, and that a duty of confidence existed in this regard. The Council also submitted that its enforcement role would be adversely affected if information submitted in the course of investigations was disclosed. The Council contended that disclosure of information on inspections could adversely affect the economic interests of persons concerned.

The Third Party's Position

An Investigator with my Office contacted SWR and invited the company to make a submission on the appeal. SWR stated that it was one of a small number of waste operators working in a very competitive market. The company stated that details of tonnage of waste processed and details of commercial relationships with other companies were commercially sensitive. The company suggested that this AIE request was an attempt by its competitors to access commercially sensitive information and to damage its competitive position.

Analysis and Findings

Does the information held fall within the definition of environmental information under article 3(1) of the AIE Regulations

Article 3(1) of the Regulations defines "environmental information" as

"any information in written, visual, aural, electronic or any other material form on—

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
- (d) reports on the implementation of environmental legislation,
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);"

The Aarhus Guide remarks that the intention of the drafters when defining “environmental information” “was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation.”

I consider that details of administrative fees levied by the Council in connection with its activities are incidental to the matters set out in the definition of environmental information and do not fall to be considered in the course of this appeal. Notwithstanding this, I note that the Council publishes details of administrative fees relating to waste shipment on its website.

I am satisfied that information on enforcement of waste legislation, databases of waste shipments, notifications to the Council of waste shipments, and applications for registration as a waste broker or dealer is environmental information under paragraph (c) of the definition, as information on measures and activities designed to protect the elements of the environment.

I next considered whether the exceptions to disclosure applied to the environmental information held by the Council.

1. Do exceptions to disclosure apply to information on prior written notifications of transfrontier shipments?

Under the TFS Regulation, and the related Irish Shipment of Waste Regulations, shipments of certain types of waste (including amber list wastes) are subject to prior written notification and consent. The Council holds a number of such notifications concerning SWR. These notifications are made in the form set out in Annex IA of the TFS Regulation, and include supporting information including details of financial guarantees, values of shipments, contracts between notifiers and consignees, lists of hauliers and carriers, detailed descriptions of waste shipments, transport itineraries, and waste permits for parties to the shipment. The Council also maintains a comprehensive internal database of amber list shipments of waste, which includes information not available on the public database (such as the identities of waste producers and destination facilities).

Consideration of the exception under article 9(1)(c)

Article 9(1)(c) provides that a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.

In order for section 9(1)(c) to apply, confidentiality must be provided for in national or Community law. Article 21 of the TFS Regulation provides that “the competent authorities of dispatch or destination may make publicly available by appropriate means, such as the Internet, information on notifications of shipments they have consented to, where such information is not confidential under national or Community legislation”. Recital 23 to the preamble of the TFS Regulation further states that “Member States should be required to ensure that, in accordance with *[the Aarhus Convention]*, the relevant competent authorities make publicly available by appropriate means information on notifications of shipments, where such information is not confidential under national or Community legislation.” Regulation 14(3) of the Registration of Brokers and Dealers Regulations provides that information “provided to the competent authority under either article 18 of the TFS Regulation, these Regulations or the Waste Management (Shipments of Waste) Regulations 2007 (S.I. No. 419 of 2007) shall, where the competent

authority considers it appropriate in the interests of business confidentiality, be treated as confidential".

In submissions to my Office, both the Council and SWR contended that disclosure of notification information would prejudice the competitive position of the company in the waste processing market, as well as the competitive positions of associated companies. In support of this contention, the Council submitted that waste shipment notifications typically included details of contracts between commercially linked parties, estimated amounts of material to be shipped, customer lists, identities of destination facilities, and financial guarantee calculations including the price per tonne of the material shipped. I am satisfied that this commercial and industrial information would be leveraged by competitors if disclosed, to the detriment of SWR and its commercial partners.

Applying the statutory duty of confidence to article 9(1)(c) of the AIE Regulations, I am satisfied that regulation 14(3) protects a legitimate economic interest. I am also satisfied that disclosure of information on prior notifications would adversely affect commercial and industrial confidentiality. Accordingly, I find that the exception under article 9(1)(c) applies to information supplied as part of the prior notification process under the Shipment of Waste Regulations, together with supporting documents, as well as the unredacted database of amber list shipments held by the Council. With the exception of the information already published by the Council, I do not believe that it would be possible to further separate environmental information held on notifications from information to which article 9(1)(c) applies.

Consideration of the public interest in disclosure under article 10(3)

Article 10(3) of the AIE Regulations requires that a public authority must "consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal". In this instance, the public interest served by disclosure includes the transparent operation of bodies involved in the regulation of waste. The interests served by refusal primarily concern the protection of the legitimate commercial interests of private companies engaged in the waste processing market. On balance I consider that the public interest in transparency is met in this case by the Council's existing publication system (the public amber list shipments database), which identifies parties seeking consent to ship waste, the types of waste transported and the destination state. I am therefore satisfied that the exception under article 9(1)(c) applies notwithstanding the public interest balancing test under article 10(3).

2. Do exceptions to disclosure apply to information on applications for registration of brokers and dealers?

The Council makes certificates of registration for brokers and dealers available to the public on request. In the course of applying for registration, brokers and dealers must complete an application form and provide background corporate and industrial information. The Council informed my Office that application documents are retained by Council, but are not made available for public inspection as they are considered by the Council to be commercially sensitive. The Council holds application documents submitted by SWR in this context.

I am satisfied that regulation 14(3) of the Registration of Brokers and Dealers Regulations, set out above, creates a duty of confidence in circumstances where the Council has formed the view that such a duty is appropriate in the interests of business confidentiality. I therefore consider that

the exception under article 9(1)(c) applies to this information, as national law has provided for confidentiality of industrial information to protect a legitimate economic interest and disclosure would adversely affect such confidence.

Article 10(3) requires that I must weigh the public interest in disclosure against the interests served by refusal. In the present case, I noted the public interest in the transparent administration of the register of brokers and dealers, and the proper identification of persons eligible to operate in the market. I considered that the interest served by refusal relates to the protection of sensitive commercial information on SWR, disclosure of which would prejudice the competitive position of the company. Although I considered that the information submitted in the course of registration was of limited commercial or industrial interest, I also found that the public interest in transparency was substantially met by the availability of certificates of registration on request, together with the register of brokers and dealers. On balance, I was not satisfied that the public interest in disclosure outweighs the interests served by refusal. Accordingly, having considered the public interest balancing test under article 10(3), I found that the exception under article 9(1)(c) applies to application forms and supporting documents submitted to the Council by SWR in connection with the register of brokers and dealers.

3. Do exceptions to disclosure apply to information contained in the inspection file concerning SWR?

Documents held on the inspection file

The Council holds a file concerning details of inspections of SWR carried out between October 2011 and September 2014. The file includes a very broad range of documents, some of which were created in the course of investigations and some of which were furnished to the Council by SWR for information purposes.

Consideration of the exception under article 8(a)(iv)

Article 8(a)(iv) of the AIE 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 records which are exempt from disclosure under the Freedom of Information Act 2014).

One such exemption is contained in Section 30(1)(a) of the Freedom of Information Act 2014 which provides that a head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of an FOI body or the procedures or methods employed for the conduct thereof. This is a harm-based provision, subject to a public interest test under Section 30(2) of the Freedom of Information Act.

I note that it is an offence to contravene any provision of the Shipment of Waste Regulations and that the Council has an express enforcement role under the Regulations. I further note that under regulation 13 of the Registration of Brokers and Dealers Regulations, SWR is obliged to furnish the Council with information in relation to the collection and movement of waste and under regulation 14 the Council is obliged to carry out appropriate periodic inspections of brokers and dealers.

In a submission to my Office the Council stated that it is

"...obligated to ensure that there is full adherence to the Waste Shipment Regulations. Therefore, the enforcement role of the NTFSO is crucial. The confidentiality of any audits/investigations allows the NTFSO to obtain information in confidence as part of that process and also protects the integrity of the operations of the NTFSO in this regard. The release of this information could prejudice the outcome of current and future investigations/proceedings on behalf of the NTFSO."

In my capacity as Information Commissioner, I have found that more than a mere assertion of prejudice is required in order for Section 30 to apply. In the present case, the Council contends that the integrity of its operations would be prejudiced by the loss of confidentiality of its investigations, as it would be detrimental to its ability to obtain relevant information. I note in this regard that the inspection file does not contain any representations from third parties regarding enforcement issues. I also note that there is a legal obligation on brokers and dealers under regulation 13(1)(d) of the Registration of Brokers and Dealers Regulations to furnish the Council with information in relation to the collection and movement of waste "in such form and at such frequency as may be specified" by the Council. I do not consider that details of investigations on the file are in some way sensitive or revealing of Council enforcement procedures, or that other undertakings could avoid sanction based on the content of the file. I am therefore not satisfied that the Council has identified how a loss of confidence would prejudice its ability to carry out current or future investigations, and accordingly I find that neither Section 30(1)(a) of the Freedom of Information Act 2014 nor article 8(a)(iv) apply to the information contained in the inspection file.

Consideration of the exception under article 9(1)(c)

Article 9(1)(c) only applies where commercial and industrial confidentiality is provided by law to protect a legitimate economic interest. The Council submitted that disclosure of inspections of SWR could cause detriment to the reputation of the company.

Paragraph 12.4 of the Minister's Guidance refers to article 9(1)(c) and states that the "fact that a person or company asks for information to be treated as confidential does not of itself establish it as such for the purpose of the Regulations, and the public authority must satisfy itself that real and substantial commercial interests are threatened. In addition, the fact that the release of information (for example, in relation to a pollution incident) might damage the reputation of a company is not of itself adequate reason for withholding it."

While I accept that undertakings may have a legitimate economic interest in maintaining their reputation, I am not satisfied that regulation 14(3) was intended to prevent disclosure of information on inspections carried out by the competent authority, or that such information is otherwise protected by law. I therefore discounted the possibility that reputational damage could operate to prevent disclosure in this case.

I next considered whether the inspection file contained information which could be used by other companies to prejudice the competitive position of SWR (i.e. information concerning "business confidentiality" for the purposes of regulation 14(3) of the Brokers and Dealers Regulations). SWR was very forthcoming and cooperative in its dealings with the Council, and provided detailed information on its commercial activities. As a result, the inspection file includes a significant amount of business information, including information on types and amounts of waste processed and shipped by SWR, sources of supply, the identities of commercially linked

companies, and returns made to other regulatory bodies. The inspection file also contains some duplicate copies of information addressed previously in this decision. I considered each document in the inspection file individually to assess whether article 9(1)(c) applied to the information contained therein.

I found that two records held on the file did not contain commercial or industrial information attracting legal protection. These records are set out in Schedule 1 to this Decision.

I found that article 9(1)(c) applied to records set out in Schedule 2 to this decision. I consider that the records listed in Schedule 2 are innately commercial and industrial in character, to the extent that the commercial and industrial information in these records cannot be separated from other environmental information.

I found that records set out in Schedule 3 to this decision contain some commercial and industrial information to which article 9(1)(c) applied. On examination, I considered that the commercial and industrial information in these records could be separated from other environmental information.

I next considered whether the public interest in disclosure outweighed the interests served by refusal under article 10(3). I acknowledge that there is a strong public interest in the transparent enforcement of waste legislation. At the same time, SWR has brought to my attention the highly competitive nature of the waste processing market, and I am mindful of the need to protect the legitimate economic interests of the company from unnecessary prejudice. Having reviewed the inspection file, I consider that environmental information contained in Council correspondence with SWR can be disclosed (subject to the separation of some commercial information from that information). I am satisfied that disclosure of correspondence between the Council and SWR concerning inspections substantially meets the public interest in transparent enforcement, as the letters provide a clear account of how the Council has fulfilled its statutory duties. Accordingly, I am not satisfied that the public interest requires disclosure of the commercial or industrial elements of the inspection file that I have identified above.

I therefore find that the exception under article 9(1)(c) does not apply to information set out in Schedule 1. I find that the exception under article 9(1)(c) applies to all information contained in Schedule 2. I consider that article 9(1)(c) applies to information contained in Schedule 3. Specifically with regard to Schedule 3, I find that article 9(1)(c) applies to all information on the identities of persons or undertakings with commercial links to SWR, all information on amounts or types of waste processed or shipped by SWR, all information on the value of material processed or shipped by SWR and all information on sources of supply of SWR. I find that the information in Schedule 3 to which article 9(1)(c) relates can be separated from other environmental information with which it is held.

Decision

The request for access to environmental information made by the appellant was of a very general nature and, as a result, a wide range of documents fell to be considered. In the circumstances, it would have been appropriate for the Council to invite the appellant to make a more specific request under article 7(8) of the AIE Regulations. In any event, the Council did not seek to refine the appellant's request, which has added significantly to the complexity of my review.

In accordance with article 12(5) of the AIE Regulations, I have reviewed the decision of the Council. I found that the Council was justified in refusing to provide information on prior written notifications of waste shipments, as well as documents supporting such notifications and an internal database of notifications, on the basis that the exception under article 9(1)(c) applied to this information. I found that the Council was justified in refusing to provide information supporting the application process in connection with the register of brokers and dealers, on the basis that the exception under article 9(1)(c) applied to this information. I found that the Council was not justified in refusing to provide access to the inspection file on the basis of article 8(a)(iv). I found that the Council was justified in part in refusing access to some of the information contained in the SWR inspection file, as the exception under article 9(1)(c) applied.

I therefore vary the decision of the Council, and require the Council to make available to the appellant environmental information set out in Schedule 1 to this decision. I also require the Council to make available to the appellant environmental information set out in Schedule 3, subject to the separation of information to which article 9(1)(c) applies, in the manner I have specified above. I require the Council to make available to the appellant such parts of the three public registers it maintains as are relevant to the appellant's request, together with copies of any certificates of registration of brokers and dealers relevant to the request.

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 November 2016