



Allihies, County Cork, Ireland

<http://www.friendsoftheirishenvironment.org>

*The Information Commissioner,
18 Lower Lesson Street
Dublin 2,
3 September, 2008*

AG Ref: AIE/2008/0001

Access to Information S.I. No. 133 of 2007: Request for Review
Office of the Attorney General: Former Irish Steel site on Haulbowline Island

Dear Sirs;

We wish you to review the refusal after an Internal Review requested by ourselves on 6 June, 2008 of the decision by Office of the Attorney General to refuse to provide us with a Memorandum on an Environmental Assessment prepared for KPMG Corporate Recovery in January 2002 [Record 5].

The refusal is dated 28 July, 2008 but due to the lengthy nature of the process, the number of authorities to which requests had to be made by this organization in relation to this matter [CEI/08/0009] and the August Holidays, this request for Review could not be made within the four week period. We would be grateful if this request is accepted notwithstanding under Article 12(4) b of S.I. No. 133 of 2007.

The reason given for the refusal to release the Memorandum is that this is an 'internal communication of a public authority and is covered by regulation 9(2)(d).'

The Attorney General states by way of explanation that as the environmental information contained in the Memorandum is 'effectively' contained in the Report which was released there is 'no over riding public interest in disclosing the Memorandum'. It is our understanding that the disclosure of environmental information should be the general rule. Is not the Attorney General is wrong in law to suggest that an over riding public interest is required to justify the release of environmental information?

According to the Guidance Notes

'Public authorities should bear in mind that the use of this exception is discretionary. It should not be resorted to as a simple expedient to protect all internal communications in circumstances where it would be unreasonable to do so (see also sub-articles 10(3) and 10(4)). Normally,

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public authorities would not be expected to invoke this protection for information unless there are good and substantial reasons – not otherwise available in Articles 8 and 9 – for doing so.'

The fact that the information contained in this Memorandum is 'effectively' the same as the Report it comments on which was released [after an Internal Review] suggests that the Memorandum on the Report should also be released.

If there are such 'good and substantial' reasons for a refusal they must, therefore, apply to material in this Memorandum that is additional to the information in the Report. But we have been refused this Memorandum without being told what it is that it contains that is not 'effectively' the same as the Report.

It is likely that it contains an assessment of the information in the Report, for example; the cost of the recommendations in the Report; the difficulties envisaged in acting on the environmental information in the Report; the liabilities arising to the State from the information in the Report. All of these are matters defined as information on the environment.

The Directive ensures that 'the disclosure of information should be the general rule' and that 'Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal' [Directive 2003/4/EC (14, 16)].

The weight of public interest in this case relates to the possibility of ongoing pollution from an industrial site with potentially serious consequences to the environment and public health.

No substantial reasons have been provided in any specific or clear way for the refusal of this Memorandum which could be balanced against the weight of this public interest. In the absence of any such reasons, we request that you recommend that the Memorandum be released.

Respectfully yours,

Tony Lowes

Enc: Check for €150.00.

Copy correspondence 22 April – 28 July, 2008

Tony,

As discussed by phone, please see following text of letter issued to you on 3 March 2009. Please confirm receipt of this email.

Regards

Brenda Lynch
Investigator
Office of the Commissioner for Environmental Information
18 Lower Leeson St
Dublin 2

Ph: 01-639 5716
Email: brenda_lynch@oic.gov.ie

Our Reference : CEI/08/0010

3 March 2009

Mr Tony Lowes
Friends of the Irish Environment
Allihies
Co. Cork

Dear Mr. Lowes

Re: Access to Information on the Environment Regulations, 2007 (the Regulations) - Appeal against decision of the Office of the Attorney General

I refer to previous communications regarding your appeal to the Commissioner for Environmental Information against a decision of the Office of the Attorney General on your request for access to information on the environment relating to the industrial cleanup at the former Irish Steel site on Hawlbowl Island, Cobh, Co Cork.

When the appeal was received by this Office, there was only one record at issue (Record No.5), which had not been released to you. The scope of the review was, therefore, limited to consideration of this record and whether the refusal to release the information was justified under the Regulations.

Following discussions between this Office and the Office of the Attorney General, that Office has now released the information to you.

As there is now no information which has not been released, I have no basis for continuing to review your appeal. I intend to close this case today and record it as settled.

Should you wish to discuss any aspect of this letter, please do not hesitate to contact me by return, by telephone to + 353 1 6395716 (direct), or by email to brenda_lynch@oic.gov.ie.

Yours sincerely

Brenda Lynch
Investigator



Allihies, County Cork, Ireland

<http://www.friendsoftheirishenvironment.org>

Emily O'Reilly,
The Information Commissioner,
18 Lower Lesson Street,
Dublin 2
15 April, 2009

ombudsman@ombudsman.gov.ie

'Settlement' of cases by the Office of the Information Commissioner

Dear Commissioner;

We have received a letter from your office dated 3 March 2009 in relation to a record which we sought from the Attorney General [CEI/08/0010]. This letter states that you intend to 'close this case today and record it as settled.'

The Record was a Memorandum prepared about an Environmental Assessment which Assessment had been prepared by KPMG Corporate Recovery for the Department of Natural Resources.

The record was refused and refusal confirmed on internal appeal. The grounds for refusal were that it was an internal communication.

The record in question is a Memorandum is from the Regional Inspector of the Environmental Protection Agency.

After 10 months, the Attorney General released the Memorandum but stated:

"I would stress that this Memorandum is an internal communication commenting on the report and can be withheld under the terms of the Access to Information on the Environment Regulations but is none the less being made available to you."

We suggest:

- We sought a ruling on if this document and therefore others of the same standing should be released as Memorandum prepared by experts on Reports are very useful.

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- The Regulations state that 'Applicants should be able to seek an administrative or judicial review of the acts or omissions of a public authority in relation to a request.'
- We have paid for and you agreed to this review and we have not agreed to any withdrawal or settlement of this appeal.

It is our view that you are failing to meet the requirements of the AIE Statutory Instrument which gives you no discretion and states:

- (5) Following receipt of an appeal under this article, the Commissioner shall—
- (a) review the decision of the public authority,
 - (b) affirm, vary or annul the decision concerned, specifying the reasons for his or her decision, and
 - (c) where appropriate, require the public authority to make available environmental information to the applicant,

There is no provision in the AIE legislation for settlement.

We note your comments in your 2007 Annual Report:

Settlements

During 2007, 55 cases were settled. This represents almost 17% of all reviews completed during the year, compared with some 9% in 2006, 10% in 2005, and 5% in 2004. I welcome this increase in the settlement rate, not least because settlements are often the most satisfactory outcome for the applicant.

We would fundamentally disagree with this view. We believe that in many cases, such as this one, the body holding the information knows from the first that they have no grounds to withhold a record but the information is of such sensitivity that they chose to refuse to release it, knowing that most applicants would neither use the internal appeal method or even less pay €150 to have an administrative review.

In the unlikely event that an applicant would do so they could then release it without being required to addressing their legal failure and to put in place procedures to ensure that withholding of information to which the public has a right is not repeated.

We believe that the effect of your use of 'settlements' in fact protect Departments and bodies such as the Attorney General's Office from public scrutiny of their decision making processes which is our right.

We believe you are wrong in law in refusing to rule on the refusal of the Attorney General to release to us a specific record and are by this letter seeking a reversal of your 'settlement'.

We are requesting you to conform to the legislation by affirming, varying or annul the decision concerned, specifying the reasons for your decision and giving us your assurance your current practice of agreeing settlements in lieu of decision will cease.

We place you on notice that no further warning will be issued if we should undertake legal action and that we will charge you with all expenses relating to this matter from this point onward.

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Yours, etc.,

Tony Lowes

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Oifig an Choimisinéara um Fhaisnéis Comhshaoil
Office of the Commissioner for Environmental Information

CEI/08/0010

7 May 2009

Mr. Tony Lowes
Friends of the Irish Environment
Allihies
Co. Cork

Re: "Settlement" of cases by the Commissioner for Environmental Information

Dear Mr. Lowes

I have been asked by the Commissioner, Emily O'Reilly, to respond in detail to your letter of 15 April 2009 regarding the issue of "settlements" of appeal cases. I note that the case to which you refer involved a record held by the Attorney General's Office. The appeal to this Office resulted in the release to you of the information requested following the efforts of the investigator on behalf of this Office which secured the agreement of the AG's Office to release the sole record at issue.

Commissioner for Environmental Information (CEI)

Article 12(1) and 12(2) of the Access to Information on the Environment Regulations, 2007 (AIE Regulations) provide for the establishment of the Office of the Commissioner for Environmental Information and also that the holder of the office of Commissioner shall be the person who, for the time being, holds the office of Information Commissioner under the Freedom of Information Acts, 1997 and 2003. Therefore while Emily O'Reilly holds both the office of Information Commissioner and Commissioner for Environmental Information, her functions and powers for each office derive from the relevant, separate, legislation.

Freedom of Information Acts, 1997 & 2003 - Settlements

As Information Commissioner, her powers are as set out in Part IV of the Freedom of Information Acts, 1997 and 2003 (FOI Act). In particular, Section 34(7) of the FOI Act specifically provides for the Commissioner to effect a settlement of a review. I note that the figures you quote from the 2007 Annual Report relates to the activities of the Information Commissioner and not to the Commissioner for Environmental Information. Having operated the FOI Act since 1998, the Office of the Information Commissioner has built up considerable experience of handling reviews and appeals involving information/records held by public bodies.

AIE Regulations - Settlements

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As you are probably aware, the Office of the Commissioner for Environmental Information was established with effect from 1 May 2007. Since then, only three appeals under these regulations have been closed as settled, two in 2007 and one in 2009. The one appeal settled in 2009 is CEI/08/0010 which was from Friends of the Irish Environment. I understand that you have received information on these settlements on foot of your recent application for access to information under the AIE Regulations. Each case is judged on its merits and particular circumstances; the Commissioner is happy to go to formal decision where this is necessary.

I accept that there is no specific provision in the AIE Regulations for settlement of appeals. However, neither is there any specific provision for withdrawals yet it could hardly have been the intention that the Commissioner would be prevented from accepting an appellant's right to withdraw his/her appeal at any stage in the process. This Office operates on the general premise of obtaining as satisfactory an outcome as possible for all parties to an appeal and considers that settlements have a valuable role to play in achieving such outcomes. It is fair to say that we operate on the basis that an appellant is entitled to have access to the information unless the Commissioner is satisfied that one of the exceptions in the Regulations applies. As you will see from the decisions published to date, the Commissioner has, in several cases, found against public authorities who withheld information. In your particular case, intervention by this Office led to the one record at issue being released to you. I consider that this is in the spirit of the AIE Regulations in that access to the information sought was obtained. In fact, Article 12(5)(c) of the Regulations allows the Commissioner to require the public authority to make available environmental information to the applicant and that, in effect, is what happened in your case.

In relation to the other points made in your letter, I would make the following comments:

1. While any formal ruling given on an appeal may have precedent value in other cases, the fact remains that the Commissioner's decision would be binding only in relation to the circumstances of the individual appeal and the information at issue. Therefore, once the sole record at issue was released, there is no requirement for a formal ruling directing such release.
2. It is not accepted that you were prejudiced by the procedures followed. I believe that a formal ruling could have resulted in the release of the information taking longer than it did. If resources were unlimited, it is arguable that the Commissioner's office should, in each and every case, prepare a formal written analysis of the legal issues in cases which have settled. However, the Commissioner is not in a position to do this; formal rulings are, of their nature, time consuming and difficult to prepare. They need to be as legally sound as possible given the right of appeal to the High Court on a point of law. At present the Commissioner is not in a position to devote resources to issuing formal rulings where the information at issue has already been released.
3. I accept that, as you say, there is a risk that public authorities might withhold information without justification on the basis that most applicants might not pursue the internal and external review route. However, it seems to me that this could happen even if all cases were the subject of formal decision by the Commissioner. In relation to this Office's experiences of public authorities' handling of AIE requests, we will consider including short commentaries on issues arising in settlement cases on our website www.ocei.gov.ie.

The Commissioner will keep all of her current practices, including those on settlements, under review. I cannot give you the assurance you seek that her current practice on settlements "will cease". I do not propose to reopen your appeal (CEI/08/0010). As explained, the Commissioner considers that the procedures adopted in your case were a proper and fair exercise of her discretion. As regards legal action, I note what you say and would hope that this will not prove necessary. Ultimately, of course, it is your prerogative to initiate any action as you see fit.

Yours sincerely


Elizabeth Dolan
Senior Investigator

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Tony

We have exactly the same problem here in the UK.

In many cases public authorities decline to release information. They then wait until the Information Commissioner is a considerable way through his investigation (which could be two years after the original request) and then agree to release the information 'without prejudice' to their view that we have no right to it. The effect is that the information is much less valuable than it once was.

The Commissioner will then drop the case without issuing a binding decision.

The problem is particularly serious in cases where we are trying to demonstrate that a company (such as an airport authority or a waste company) is a company falling within Art. 2(2) of Directive 2003/4/EC. In those cases we want the Commissioner to issue a decision that the company is a public authority for environmental information purposes. That would be of benefit not just to the current requester but to all future requesters. However, if the company voluntarily agrees to release information to us then the Commissioner will not pursue the case. The effect of this is that the next time someone wants information from that company it will simply deny that it is subject to environmental information laws – thereby putting the requester through the entire process again.

We have considered judicial review and have not ruled it out – in the right case.

Regards

Phil

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Hello!

In Austria we have not yet recognized this as a problem. Nevertheless common practice of authorities and companies falling under the Austrian freedom of information act is to first withhold the information and only release it after the applicant has signaled he/she will launch an administrative review procedure or has actually taken steps in this direction.

In any case the review procedure is basically free of charge, an "independent administrative tribunal" decides over the complaints. What is problematic in Austria is that the authority can stay inactive for 6 months before the applicant can demand that the competence for deciding over the issue devolves to the independent administrative tribunal. This is true even though the

time limit for answering is fixed at 2 month maximum in the freedom of information act. There is no possibility for the applicant to enforce this time limit.

Best,
Clemens

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Hello,

The Flemish “openness of government” law does not have a ‘settlement’ provision.

We have an administrative review procedure that is free of charge. A body of appeal (not an individual but a group of 4 people, we wanted a collective decision) has to reach a decision on the appeal. The explanatory memorandum accompanying the law states that “ – *in accordance with European law - this has to be an explicit decision*”.

This sentence refers to decisions of the European Court of Justice on environmental licensing (e.g. 28 February 1991, Commission /Italia, C-360/87, Jurispr. Page I-791, paragraph 31 and 28 February 1991, Commission/Germany, C-131/88, Jurispr. Page I-825, paragraph 38). A request for a licence has to be concluded by an explicit administrative action (license or prohibition).

When the body of appeal decides that a document should be released, but the holder does not do so within the period granted by the law, the body of appeal gives a warning. When the holder still refuses to release the document, the body has the power to send a civil servant to the office of the holder. The civil servant will carry out the decision of the body of appeal (and release the document), even against the will of the holder.

The “openness of government” law does not contain a clear cut solution for your ‘what if’ case. But surely, in that case, somebody did not do his/her job. We would have to fall back on general sanction-provisions in the regulation for Flemish Government personnel.

Other general mechanisms are a complaint procedure, the ombudsservice and, if personnel from the holder would like to come forward with information (not very likely), whistleblower protection. I guess those mechanisms essentially come down to publicity. Another publicity mechanism is that the case would be mentioned in the yearly report that the appeal body has to draw up and that is presented to the Flemish Government and the Flemish Parliament. All decisions of the body of appeal are posted on a website anyway (<http://www3.vlaanderen.be/openbaarheid/beslissingen.php>, sorry, in Dutch).

But the body of appeal could spot trouble earlier on. When an appeal is launched, the body has some specific rights

- It can demand all government documents from the holder, or it can go to the office of the holder to go through all documents itself
- It can hear all parties, all experts and all personnel of the holder

When the body of appeal already has the requested document and the holder refuses to release it, the body can do so itself.

The long UK-procedures would be unthinkable. The body of appeal has to notify its decision to the person requesting the information within 30 days (with possibility to extend this period to 45 days in total). In case of a positive decision, the document has to be released within 40 days after the request (55 days in case of an extension). All requests have to be registered immediately. Starting point of the periods is the day after registration. (the first instance procedure is similar)

I also looked into the latest yearly report of the body of appeal. In practice the body of appeal can and will also conclude a procedure with the decision that the appeal is without purpose. The body will do so if the initial request is fully granted during procedures. This happened in about 25% of the appeal-cases. Usually there are two 'key' moments, e.g. the moment when the holder is notified that an appeal is launched and the moment when the appeal-body contacts the holder to get the information it wants to be able to reach a decision.

But this is not comparable with the Irish case, since those decisions will show up in the yearly report and are published on the website. The government-entity is named in the decision, so there is a publicity-sanction.

Pieter

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