



**OFFICE OF
ENVIRONMENTAL SUSTAINABILITY**

ENVIRONMENTAL LICENSING PROGRAMME

TO: Directors

FROM: Brian Meaney Environmental Licensing Programme

DATE: 1 April 2016

RE: Redaction of text from an inspector's report prior to its publication

1. Introduction

The Agency received a request on 29 February 2016 from Bord na Móna to amend licence register number W0201-03. I presented a report and recommended amendment to the Board of the Agency on 14 March 2016. The recommended amendment was accepted. My report contains information that was deemed by the Agency to be confidential. I was asked on 16 March 2016 to:

- prepare a memo to the Board seeking to redact the FP figure from my earlier report;
- append and refer to the attached document; and
- seek legal advice on this proposed approach.

The appended document (see pages 3 to 5 below) is a memo that was considered by the Board on 8 July 2014 and approved subject to legal advice. I was informed by OEE that agreeable legal advice was obtained and the memo has informed OEE's actions since.

I was also asked on 16 March 2016 to get legal advice on my inspector's report, specifically to address two questions the answers to which will allow the Agency to decide how to deal with my inspector's report:

1. Can ELRA and CRAMP agreed costings be considered confidential?
2. Should details of ongoing discussions and later the detail of agreed financial instruments (cash, bonds etc) be deemed confidential?

2. Recommendation

Having addressed the above requests and in accordance with legal advice received, I recommend that my original report be redacted prior to being made available to the public, by removal of figures relating to CRAMP and ELRA liabilities and gas income, and that part 8 of my report be amended to read as follows:

"The following summarises the factual position vis-à-vis financial provision at Dredge Landfill and is based on information provided by Mr Jim Moriarty, OEE.

CRAMP costings of €xx,xxx,xxx were agreed with the EPA in July 2014 and ELRA costings of €x,xxx,xxx were agreed in December 2015. The EPA sought financial provision proposals for these liabilities and, in response to this, OEE met with Bord na Móna personnel on 3 March 2016.

The company intend to address the ELRA liabilities by means of an environmental impairment insurance policy. It was noted at the 3 March 2016 meeting that all of the necessary information had been provided to their insurance company and that the company should be in a position to submit fuller details regarding a proposed policy before the end of March 2016.

In relation to the CRAMP liabilities, the company intends to address the financial provision obligations by means of a charge on gas assets at the landfill. The company said that gas revenues from engines at the landfill amount to some €x.xm per annum before tax and other deductions and, while this may fall off in later years, the gas asset, when aggregated over the longer term, exceeds the CRAMP liability. Detailed figures regarding gas revenues and projections remain to be submitted as do proposals for a suitable instrument to secure €xx.xm from the gas asset in a manner that complies with EPA guidance. This information is due by the end of March 2016."

Signed



Brian Meaney

Environmental Licensing Programme



Memo

This Memo has been cleared for submission to the Board by the Programme Manager.

Signed: *Kieran O'Brien*
Date: *1/7/14*

Date:	30 June 2014
To:	Each Director
From:	Waste and Land Team, Office of Environmental Enforcement
Subject:	Management of closure plans and environmental liabilities risk assessments in light of detailed costing information required
Recommendation	<p>That the Board categorise the detailed costings¹ in closure plans and environmental liabilities risk assessments as confidential information.</p> <p>That the Board approves the categorisation and management of closure plans and environmental liabilities risk assessments as Category 3 documents in accordance with OEE <i>Policy regarding publication of the enforcement records</i>.</p>

Strategic context

The EPA Strategic Plan 2013–2015 includes as a priority *Preventing environmental damage: Prevent future environmental damage from the closure of activities and drive the remediation of contaminated sites*. The Board approved a *Strategy for Regulation of Environmental Liabilities and Financial Provision* on 09/04/13. Task 15, which is to establish rules regarding confidentiality in relation to ELRA/CRAMP/FP, is the subject to this memorandum.

Current practice

In terms of public access versus confidentiality, documents are categorised and managed in Licensing, Enforcement, Monitoring and Assessment (LEMA) as follows:

- Category 1:** public access via public portal, e.g. monitoring returns.
- Category 2:** delayed public access via public portal, e.g. documents related to on-going cases.
- Category 3:** documents not to be published, e.g. financial provisions, financial charges queries. [There is scope for Category 3 documents to be made publicly available in redacted form obscuring the confidential material]

Licensees can also make individual requests to have information kept confidential. These must be considered separately and require Board decisions.

This approach was approved by the Board through the approval of the OEE *Policy regarding publication of the enforcement records* on 06/11/12. The Board noted that the approach is in line with legislation relating to Data Protection, Freedom of Information (FoI) and Access to Information on the Environment (AIE). Licensees were informed of this system and there is a *Guidance Note on Submission of Confidential Information to the OEE* available on the EPA website.

Financial provisions (FPs) are Category 3 documents which effectively deal with the issue of confidentiality in so far as FP is concerned.

Closure plans (CPs) and environmental liability risk assessments (ELRAs) are Category 1, so they are publically available by default via LEMA. The core point of this memorandum is to change them to Category 3.

¹ The term 'detailed costings' does not refer to the overall closure plan or ELRA cost, rather the more detailed breakdown given as per Table 2.2 (p. 16), Table 2.4 (p. 23) and Table 3.10 (p.40) of *Guidance on assessing and costing environmental liabilities*.

The driver for the proposed change

The Board is aware of efforts to improve the quality of CPs and ELRAs through the issue of new *Guidance on assessing and costing environmental liabilities* in April 2014. One of the main changes is the increased level of financial detail required. Costs must be broken out line by line with the quantities, unit rates and sources detailed. This approach has led to a marked improvement in CPs. At last measure, the approach had brought initial proposed costings by Licensees up from 43% to 73% of final agreed costings. It has resulted in major gains in 2013-14 with €217 million in CP costs now agreed across 34 priority sites.

However, the level of financial detail now required has prompted a number of requests from Licensees (ENVA, RILTA and Bord Na Mona Dredge Landfill) for the detailed costings to be kept confidential. The Licensees' reason in all cases is that the information is commercially sensitive. We agree, both in the individual cases and in general, that the detailed costings contain financially/commercially sensitive information that should be kept confidential, e.g. figures which reflect revenue and real or quoted costs for services and waste management. We expect the number of confidentiality requests to increase.

The issue that then arises is the practicality of dealing with this information given there are about 400 EPA licences with a CP requirement and 300 with an ELRA requirement, with most on a 1-3 year review cycle.

The proposed change

We have looked at a number of options to deal with this issue including managing each case individually, managing the detailed costings separately and delegating decisions down from Board level. However, we feel the best option is to re-categorise CPs and ELRAs as Category 3. The advantages to this approach are that:

- It can be implemented relatively simply within the current automated system (LEMA) without additional procedural/administrative burdens on the OEE or the Licensee.
- It maintains the integrity of documents by not splitting out costings.
- It avoids the creation of multiple documents potentially in different formats, handled in different ways and possibly with the need for separate secure storage.
- It mitigates the risk of confidential information been inadvertently disclosed because, for example, the Licensee failed to identify it as such or realise LEMA information is publically available.
- It avoids case-by-case Board referrals/decisions.

We believe this approach is warranted by the imperative of ensuring costings are accurate, the need for simple, clear and efficient systems in the context of the number of submissions involved, the consistent commercially sensitive nature of the information as dictated by EPA guidance and the need to ensure no inadvertent disclosure.

The main disadvantage is that CPs and ELRAs will not be available by default to third parties, but this is mitigated because reports, if requested, can still be released with the detailed costings redacted.

Section 39 of the EPA Act and AIE/FoI requests

Section 39 of the Environmental Protection Agency Act, 1992 (as amended) requires that a person shall not disclose confidential information obtained by him in his capacity as Director General, other director, an employee of the Agency, a member of the Advisory Committee or of a committee or consultative group established by the Agency, a consultant, adviser or other person engaged by the Agency, or a person whose services are availed of by, or supplied to, the Agency under section 44 or who exercises or performs any function on behalf of the Agency under an agreement under section 45, unless he is duly authorised to do so. It further describes confidential information to include information that is expressed by the Agency to be confidential either as regards particular information or as regards information of a particular class or description. The proposed approach to handling CPs and ELRAs is consistent with Section 39.

This memorandum and the requested Board approvals are intended to be without prejudice to individual requests under AIE and FoI law, which we believe must be considered on their own merits at the time they arise. However, there are exemptions relating to financial and commercial information under those legal codes which would likely lead to similar refusals to disclose detailed costings. We will make AIE and FoI decision makers aware of the outcome of this memorandum.

Recommendations

That the Board categorise the detailed costings in closure plans and environmental liabilities risk assessments as confidential information.

That the Board agree the categorisation and management of closure plans and environmental liabilities risk assessments as Category 3 documents in accordance with OEE *Policy regarding publication of the enforcement records*.

END.