



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-136180-Q6G7B9

Date of decision: 31 August 2023

Appellant: Dr. Fred Logue

Public Authority: Fingal County Council (the Council)

Issue: Whether the Council complied with its obligations under article 7(3) of the Regulations.

Summary of Commissioner's Decision: The Commissioner found that the Council had not complied with its obligations under article 7(3) as it had failed to provide environmental information to the appellant in the form or manner requested by him in circumstances where none of the exceptions contained in article 7(3) could be said to apply.

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 22 December 2022, the appellant requested online access to five reports concerning planning applications relating to the lands at Auburn House, Malahide, Co. Dublin, which in his view should have been available on the Council's planning portal website. Within his request the appellant asked "if the above documents could be put online by tomorrow at the latest".
2. On 23 December 2022, the Council responded to the appellant's request. It noted that following examination of the planning portal, the reports had failed to upload. The Council further noted that this was an IT issue that would not be resolved until the New Year and attached copies of three of the reports requested via email to the appellant. In addition, it outlined that "when the Planning Authority makes its decision in respect of the above planning applications all documents (No's 1 & 2 within your email) pertaining to same will be published on-line".
3. On the same day, the appellant requested an internal review on the basis that the Council refused to release two of the reports requested. No response was received.
4. The appellant submitted an appeal to this Office on 25 January 2023 on the basis of a deemed refusal by the Council.
5. What followed was a period of back and forth correspondence between this Office's support unit, the Council and the appellant, in an effort to clarify the position.
6. It transpired that the appellant was not issued with a response to his request for internal review as his request was not registered with the Council as an AIE request under the AIE Regulations. Although not explicitly referencing the AIE Regulations, the appellant's request made reference to "Directive 2003/4/EC on public access to information on the environment", along with reference to the Environmental Impact Assessment Report (EIAR) Directive.
7. On 3 February 2023, this Office wrote to the Council requesting that it provide the appellant with a letter specifying its position in relation to the appellant's internal review request and outlining reasons for this position, as soon as possible but no later than 21 February 2023.
8. The Council issued its updated position to the appellant on 1 March 2023. The Council noted that it confirmed with its Planning Section that while no Final Decision on the planning applications in question had issued, the remaining two reports had not yet been uploaded onto the Council planning portal. It also noted that the two reports had been added to the hard copy planning files, and that they were available for inspection at the public planning counter, pending their publication.
9. The appellant responded on the same day and outlined that he was not satisfied with the response from the Council and wished to appeal to this Office in relation to the form and manner of access.



He reiterated that his request was for access to be granted by putting the documents online on the planning portal.

10. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the Regulations. In so doing, I have had regard to the submissions made by the appellant and Fingal County Council. 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').

Scope of Review

11. In accordance with article 12(5) of the AIE Regulations, the role of this Office is to review the public authority's internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, the Commissioner will require the public authority to make available environmental information to the appellant.

12. In assessing the scope of this appeal, I consider it necessary to address the unfortunate confusion which occurred as a result of the Council not identifying the appellant's request as an AIE request. The Council outlined in correspondence to this Office that the appellant asked for notification of when records would be published online by the planning department as follows:

"I would be very much obliged if the above documents could be put online by tomorrow at the latest.

I would be obliged if you could let me know when these documents are online so that I can download them".

13. The Council noted that the above may explain why the planning department staff did not recognise it as an AIE request, and did not forward the communication to its AIE unit. It further noted that "no request was registered, no response was issued, so there was no decision to appeal via Internal Review". The result of this is that the intervention of this Office's support unit was required to ascertain the position of the case.

14. Although the Council did not explicitly rely on any article of the AIE Regulations at any stage of its decision-making, its effective position stated that the two reports requested by the appellant were available for inspection at the public planning counter of the Council offices. The appellant takes issue with this offer, which he believes to be noncompliant with the Council's obligations under



article 7(3) of the Regulations. The appellant's request for appeal to this Office also outlined that he wished for his appeal to be based on the form or manner of access. It does not deal with the administration of the request itself.

15. As such, the scope of this review is concerned with whether the Council was justified, under article 7(3) of the Regulations, in refusing access to the information requested by the appellant in the form or manner requested by him.

Analysis and Findings

16. Article 6(1)(e) of the AIE Regulations provides that if an applicant desires access to environmental information in a particular form or manner, the request shall specify the form or manner of access desired. In this case, the appellant requested online access to five reports concerning planning applications for the proposed development at Auburn House in Malahide, Co. Dublin. Accordingly, I am satisfied that that the appellant specified the form or manner of access desired in accordance with article 6(1)(e) of the AIE Regulations.
17. Article 7(3)(a) of the AIE Regulations requires a public authority to provide information in the form or manner requested by an appellant unless the exceptions provided for in that article apply. As outlined above, the appellant outlined that he was seeking online access to the reports he requested. Instead, the Council informed the appellant that the two reports that were not yet available on the Council planning portal "have been added to the hard copy planning files, which are available for inspection at the public planning counter, pending their publication". It did not, therefore, provide him with the information he requested in the form or manner requested by him.
18. In order for the Council to have complied with its obligations under article 7(3)(a) of the Regulations, it must therefore be established either:
 - 1) that the information requested by the appellant was already publicly available in an easily accessible form or manner; or
 - 2) that the access provided by the Council was reasonable.
19. Article 7(3)(b) of the AIE Regulations provides that "where a public authority decides to make available environmental information other than in the form or manner specified in the request, the reason therefore shall be given by the public authority in writing".
20. The Council did not specify a reason for refusal when providing its updated position, following the intervention of this Office. It did not acknowledge that informing the appellant that he could attend the public planning counter to view the hard copy planning files did not provide him with the information requested in the form or manner requested by him. Nor did it set out the basis on which the Council considered: (i) that the availability of these reports at the planning counter meant that the information requested by the appellant was already publicly available to him in an easily accessible form; and/or (ii) that pointing the appellant to the existence of the reports for



inspection at the planning counter rather than providing him with the information in the form or manner he requested was reasonable.

21. During the course of the investigation the Investigator navigated the Council's website to ascertain the process for viewing hardcopy files at the planning counter. She found that in order to view, buy or request copies of files the appellant would incur a number of charges. To retrieve the Planning Reports requested, he would be charged €10 per report along with further charges, should he wish to photocopy the reports. Accordingly, I do not consider access to the reports via the planning counter for inspection to be an easily accessible alternative to online access for the appellant.
22. The Investigator also found that the Council's website outlines that "planning applications are available to view, both online and at the planning counter in our office. All documents (with the exception of confidential information) submitted as part of a planning application are available for viewing by the public". It also states the following in relation to planning applications:

"Please be advised that there are statutory procedures which Fingal County Council is required to follow when a planning application is lodged. This means that planning documentation cannot be published on our website until these procedures have been completed so it may take several days from the receipt of an application before planning documents appear on our website".

23. In correspondence with this Office, the Council noted that different local authorities publish records relating to planning applications at different stages of the process, and that the Planning and Development Act 2000 states they must be published within a reasonable time after the decision has been made. As referenced by the appellant, *SI 180 of 2020 (Planning and Development Act 2000 (Section 38) Regulations 2020)* provides that:

"2. (1) Where a planning application is made to a planning authority, the planning authority shall –

(a) not later than 5 working days after the day on which it receives the application, or

(b) where exceptional circumstances exist, as soon as practicable after the expiration of the period of 5 working days referred to in paragraph (a),

publish the application and all documentation accompanying the application on its internet website".

It is therefore clear that the Council is legally obliged to have the facilities in place to publish planning documentation online meaning the placing of the material requested by the appellant could not be seen as an overly onerous or unreasonable burden from an operational perspective.

24. Article 5(1)(b) of the AIE Regulations provides that a public authority shall "make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily



reproducible and accessible by information technology or by other electronic means". The Council has demonstrated that it has the means to collate the two additional reports manually to be available at the planning counter for inspection. It has also shown that the same information can be provided electronically by means of copies supplied via email to the appellant. In addition, the remaining reports are already available on the planning portal.

25. I note that the appellant has since received copies of the two reports in question via email on 27 March 2023. However, it was only following the triggering of the appeal process by the appellant that copies were furnished to him via email. The Council also noted that the decision due date for the planning applications concerned was 30 March 2023 and that the reports would then be published on the planning portal. It also reiterated that hardcopies of the reports were available on the planning files which were available to view at the Council Offices in County Hall, Swords, Co. Dublin.
26. Based on the information before me, I do not think it is reasonable for the Council to provide the appellant with the information in a different form or manner, to that which he specifically requested, when it has already shown that it can provide the remaining reports online. I also do not think it is reasonable for the Council, as set out on its website, to say that planning applications and all relevant documentation will be available both online and at the planning counter and then not be able to provide same as requested.
27. Failure to supply the appellant with the information in the form or manner requested in the first instance, greatly reduced the time he had to consider the documents before the final decision on the applications was made. In circumstances where online access does not seem to pose any difficulties from an operational perspective and where the Council has not provided any reason for its position that providing in person access is reasonable or makes the information in question easily accessible, it does not appear reasonable for it to have adopted a position which makes obtaining access more onerous for the appellant.
28. Taking all of the above into account, it would appear to me that the Council did not comply with its obligations under the AIE Regulations because it did not provide the appellant access in the form or manner which he requested (online access).
29. At the time of writing this decision the Investigator confirmed that all five of the reports concerning this case are now available to view online via the Council's Planning Portal. On this basis, I am not making a direction to release the information as they are now also publicly available to view online, as requested by the appellant.
30. However, I annul the Council's decision to not provide online access to the reports at the time the request was made.



Decision

31. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I annul the Council's decision.

Appeal to the High Court

32. 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.

Deirdre Gallagher

on behalf of the Commissioner for Environmental Information