



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-93408-H1B3M9

**Date of decision:** 08 December 2021

**Appellant:** Mr. David Healy

**Public Authority:** Fingal County Council (the Council)

**Issue:** Whether the Council was justified in refusing access to information on the basis of article 8(a)(iv) of the AIE Regulations.

**Summary of Commissioner's Decision:** The Commissioner found that the Council was not justified in refusing access to the requested information in reliance on article 8(a)(iv) of the AIE Regulations.

**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 14 October 2019, the appellant requested from Fingal County Council (the Council) “location maps for all pre-planning consultations with Fingal County Council in relation to proposed or potential Strategic Housing Developments which haven't yet led to planning applications”.
2. On 18 November 2019, the Council refused access to the requested information on the grounds that disclosure of the information would adversely affect the confidentiality of the Council’s development management proceedings, in reliance on article 8(a)(iv) of the AIE Regulations.
3. On 18 November 2019, the appellant requested an internal review of the Council’s decision. The appellant did not receive a response.
4. On 10 January 2020, the appellant brought this appeal to my Office.
5. On 20 January 2020, in a telephone call with my Office the Council stated that an internal review decision had issued on 17 December 2019 but that the appellant had later contacted the Council to say that it had not been received. The Council provided the appellant with its internal review decision, which affirmed its original decision on the same grounds.
6. I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and by the Council. In addition, I have had regard to:
  - (a) the [Guidance](#) provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations;
  - (b) [Directive 2003/4/EC](#), upon which the AIE Regulations are based;
  - (c) United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the [Aarhus Convention](#)); and
  - (d) [The Aarhus Convention: An Implementation Guide](#) (Second edition, June 2014).
7. What follows does not comment or make findings on each and every argument advanced but I have considered all materials submitted in the course of the investigation.

## **Context of the request**

8. Planning legislation envisages that a person intending to make an application for planning permission (known as a prospective applicant) may, or in some cases must, enter into consultation with the planning authority in respect of that development (see section 247 of the [Planning and Development Act 2000](#)). Where consultation takes place, the planning authority may give advice to the prospective applicant regarding the proposed development, must advise the prospective applicant of the procedures involved in considering a planning application, including any requirements of the planning permission regulations, and must, as far as possible, indicate the relevant objectives of the planning authority’s development plan which may have a bearing on the decision of the planning authority. This consultation does not prejudice the planning authority’s



other functions and cannot be relied upon in the formal planning process or in legal proceedings. Planning authorities must keep written records of any consultations or requests for consultations.

9. Consultation is mandatory, rather than discretionary, in relation to Strategic Housing Developments (SHDs), which are provided for by Part 2 of the [Planning and Development \(Housing\) and Residential Tenancies Act 2016](#) (the “2016 Act”). In broad terms, a SHD is a development of or containing 100 or more houses or 200 or more student or shared accommodation bed spaces (s.3, 2016 Act). Special rules apply to applications for permission for a SHD during the ‘specified period’, which is due to expire on 31 December 2021. In summary, an application for permission for a SHD must usually be made to An Bord Pleanála instead of the planning authority (s.4(1), 2016 Act) and must comply with the detailed pre-application consultation procedure set out in the legislation. First, the prospective applicant must consult the relevant planning authority (i.e. the mandatory pre-planning consultation described above), including at least one consultation meeting (s.5(2), 2016 Act). Then the prospective applicant must request that An Bord Pleanála enter into consultations in relation to the proposed SHD (s.5(1), 2016 Act). That request must comply with legislative requirements, for example it must include a site location plan, a brief description of the nature and purpose of the development and of its possible effects on the environment and a draft layout plan of the proposal. That request must also include details of the required consultations with the relevant planning authority and must be copied to the relevant planning authority (s.5(5)-(7), 2016 Act). If the applicant complies with the legislative requirements, An Bord Pleanála must accept the request to enter into consultations and a further consultation process begins (s.6(1)(a) and (4)(a), 2016 Act). As part of that further process, the relevant planning authority must provide An Bord Pleanála with copies of all records of the prior consultation between it and the prospective applicant. The planning authority must also give an opinion in writing to An Bord Pleanála, including reasons for its opinion, of what planning considerations may have a bearing on An Bord Pleanála’s decision in relation to the proposed SHD (s.6(4)(b), 2016 Act). The planning authority must attend a consultation meeting convened by An Bord Pleanála (s.6(5), 2016 Act). This further consultation process leads to An Bord Pleanála forming, and notifying the prospective applicant and the planning authority of, an opinion as to whether the documents provided by the prospective applicant form a reasonable basis for an application for planning permission for the SHD or whether they require further consideration or amendment (s.6(7), 2016 Act).

### **Preliminary Matters**

10. The Council originally provided two documents to this Office for review, only one of which was held by the Council at the date of the appellant’s request. The Council stated that it only began carrying out mapping exercises in relation to pre-planning consultations in January 2020, after the date of the appellant’s request, but that the two hard copy maps had been located by means of a manual search.
11. The appellant submitted to this Office that the Council must have been provided with additional maps in the form of “site location plans”, in accordance with section 5(5)(a)(ii) and (7)(b) of the 2016 Act. The appellant noted that, on 14 October 2019, there were 14 SHDs in the formal pre-planning process (see p. 262 of the [report of the Council meeting](#)), so the Council must have been provided with at least 14 site location plans in advance of that date, copied to the Council in accordance with section 5(7)(b) of the 2016 Act. In light of the appellant’s submissions, my Office



sought clarification from the Council as to the documents held by the Council falling in scope of the request.

12. On 21 September 2021, the Council wrote to the appellant to provide access to the information requested, namely site location plans in relation to 14 pre-planning consultations with the Council on SHDs.
13. Where information requested has been provided in whole or in part to an appellant, article 15(5) of the AIE Regulations empowers me to deem an appeal withdrawn and to waive or refund all or part of the appeal fee. In this regard, the appellant submits that I should not exercise this power. The appellant submits that the lack of availability of information about pre-planning consultations, particularly in relation to SHDs, is an ongoing problem for public participation in environmental decision-making. Although the information has now been provided to him, it was provided almost two years after the AIE request was made, meaning that the information is no longer of any value in relation to public participation.
14. I have carefully considered the appellant's submissions. In this case, by the time the information requested was made available to the appellant, the information was no longer valuable for the purpose of engagement by the appellant in environmental decision-making. I note that the importance of timely access to information in the context of planning and development was highlighted by the Commission in its First Proposal for what is now the AIE Directive, and again by Advocate General Kokott and the Court of Justice of the European Union (the CJEU) in case C-186/04 *Housieaux v Délégués du conseil de la Région de Bruxelles-Capitale* (see paragraph 24 of the [Opinion](#) and paragraphs 24 and 28 of the [judgment](#)). I consider that, in the circumstances of this particular case, the appellant should be provided with a decision as to whether the Council's decision on internal review to refuse him access to the information was justified. Accordingly, I have decided not to exercise the power under article 15(5) of the AIE Regulations to deem the appeal withdrawn.

### **Scope of Review**

15. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it. At the time of its internal review decision, the Council refused access to the requested information in reliance on article 8(a)(iv) of the AIE Regulations, on the grounds that disclosure would adversely affect the confidentiality of the Council's proceedings. As such, the question before me is whether the Council was justified in refusing access to information on the basis of article 8(a)(iv) of the AIE Regulations.

### **Analysis and Findings**

16. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive. The scheme of the AIE Directive is to provide for a general right of access to environmental information on request (Article 3) with specific, exhaustive exceptions to that general right of access (Article 4). Recital (16) informs the approach that must be taken to the Directive, providing that: "The right to information means that the disclosure of information should



be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases.”

17. Article 4(2)(a) of the AIE Directive permits Member States to provide for requests for environmental information to be refused if disclosure of the information “would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law”. Article 4(2) provides that “The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure.”
18. Article 8(a)(iv) of the AIE Regulations, which seeks to implement Article 4(2)(a) of the AIE Directive, provides for the refusal of information where its disclosure “would adversely affect ... the confidentiality of the 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)”. Article 10(2) of the AIE Regulations requires grounds of refusal to be interpreted restrictively, so where two interpretations of an exception are possible, the more restrictive interpretation must be adopted.
19. In [Case C-204/09 Flachglas Torgau GmbH v Bundesrepublik Deutschland](#), the CJEU treated as separate issues the question of whether confidentiality is ‘provided for under national law’ and the question of whether the confidentiality of ‘proceedings of public authorities’ would be adversely affected by disclosure (see paragraphs 59-65). As a result, I consider that article 8(a)(iv) of the AIE Regulations requires me to examine the impact of disclosure in three stages. I must consider:
  - (a) Are there ‘proceedings of public authorities’ which could be affected by disclosure?
  - (b) If yes, would disclosure adversely affect the confidentiality of such proceedings?
  - (c) If yes, is such confidentiality provided for (or protected) by law?

(a) Are there ‘proceedings of public authorities’ which could be affected by disclosure?

20. The CJEU has given some consideration to the meaning of the term ‘proceedings of public authorities’ in article 4(2)(a).

21. In her [Opinion](#) in Case C-204/09 *Flachglas Torgau GmbH v Bundesrepublik Deutschland*, Advocate General Sharpston opined, at paragraph 83:

“In the spirit of restrictive interpretation applicable to the Directive as a whole, and to Article 4(1) and (2) in particular, it seems to me that the concept of ‘proceedings of public authorities’ should be confined, at the broadest, to expressions of view and discussions of policy options in the context of decision-taking procedures within each such authority. The concept should, of course, not be dependent on the form of the proceedings (written or oral), and it should be remembered that Article 4(4) of the Directive requires, wherever possible, information not covered by a ground for refusal to be separated out from information which is covered. Finally, in my view, communications between public authorities, whatever their nature, cannot be regarded as proceedings of such authorities.”



22. In its [judgment](#) in that case, while the CJEU did not expressly endorse the Advocate General's Opinion, it adopted a similar stance. The CJEU stated at paragraph 63 that the concept of 'proceedings of public authorities' "refers to the final stages of the decision-making process of public authorities".
23. In his [Opinion](#) in case C-60/15 *Saint-Gobain Glass Deutschland GmbH v European Commission*<sup>1</sup>, Advocate General Szpunar opined that "the concept of 'proceedings of public authorities' cannot ... be interpreted as relating to the entire procedure before a public authority" (paragraph 47). He considered, in reliance on the French, German and Italian versions of the AIE Directive, that the concept of 'proceedings' covered "only the deliberation stage of decision-making procedures" (paragraph 51). He continued at paragraphs 56-57, and later at paragraph 76:

"56. In a ruling given following the judgment in *Flachglas Torgau*, cited by the applicant, the Bundesverwaltungsgericht (Federal Administrative Court, Germany) interpreted the ground for refusal at issue as being confined to the deliberation process as such, namely the actual reflection process, to the exclusion of information forming the factual basis for the decisions taken, which is protected only if it allows clear conclusions to be drawn regarding the deliberation process.

57. I propose that the Court adopt essentially the same interpretation in the present case. This approach will make it possible to ensure consistency in the application of the same ground for refusal which is applicable, under the Aarhus Convention, both to Member States and to EU institutions. ...

76. Under Article 4(4)(a) of the Aarhus Convention, a request for environmental information may be refused if it adversely affects the 'confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law'. In my view, this ground for refusal must be understood as relating to the deliberation process in decision-making procedures and does not cover an entire administrative procedure."

24. In its [judgment](#) in that case, the CJEU expressly endorsed the Advocate General's Opinion, stating at paragraph 81:

"... as observed by the Advocate General in point 76 of his Opinion, Article 4(4)(a) of the Aarhus Convention provides that a request for environmental information may be refused where disclosure of that information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law, and not the entire administrative procedure at the end of which those authorities hold their proceedings."

25. I draw the following guidance on the meaning of 'proceedings of public authorities' from those sources:

(a) 'Proceedings' may be written or oral;

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<sup>1</sup> Although that case was concerned with Regulations 1049/2001 and 1367/2006 rather than the AIE Directive, the [Advocate General's Opinion](#) noted at paragraph 42 that: "The same ground for refusal is laid down in Article 4(2)(a) of Directive 2003/4" [i.e. the AIE Directive].



- (b) 'Proceedings' must be internal to a public authority and do not include communications between public authorities;
- (c) 'Proceedings' must involve a decision-making process by a public authority;
- (d) Within that decision-making process, 'proceedings' covers only the deliberation process (in other words, the actual reflection process involving expressions of view and discussion of policy options) and not the entire administrative procedure leading up to that deliberation process; and
- (e) That 'deliberation process' does not include information forming the factual basis for the decisions taken, unless that information allows clear conclusions to be drawn regarding the deliberation process.

#### *Positions of the parties*

- 26. The appellant submits that the requested information does not affect the 'proceedings' of the Council. In summary, the appellant submits that the concept of 'proceedings of a public authority' cannot encompass all activities of a public authority, but applies only to a public authority's internal deliberations and then only at the deliberation or final stages of decision-making. In this case, the activities in question relate to the external activities of the Council, namely its engagement with prospective applicants for SHD development. The Council does not have a deliberative or decision-making role and is merely a consultee.
- 27. The Council submits that the proceedings at issue in this case comprise the pre-planning process, which forms part of the Council's overall development management proceedings. My Office sought further submissions from the Council as to the nature of the 'proceedings' but, following provision of access to the requested information, the Council declined to provide any further submissions on this issue.

#### *Conclusions*

- 28. I have carefully considered the pre-application process in relation to SHDs, summarised at paragraphs 8 and 9 above and the guidance from the CJEU described at paragraphs 20-25 above, as well as the submissions of the parties.
- 29. I accept that a series of 'proceedings of public authorities' may take place during the pre-planning consultation process. The Council (as planning authority) may undertake a deliberation process in order to make a decision as to what advice it will provide to the prospective applicant during the consultation under section 5(2) and as to the opinion that it will provide to An Bord Pleanála under section 6(4)(b). Similarly, An Bord Pleanála may undertake a deliberative process in order to make a decision as to whether it must accept the prospective applicant's request for consultations under section 6(1) and as to its opinion on whether the documents form a reasonable basis for a planning application under section 6(7).
- 30. However, each such deliberation process is confined to the actual reflection process of the Council or An Bord Pleanála, as the case may be, involving expressions of view and discussions of options. The deliberation process does not include information forming the factual basis for the decisions



taken by the Council or by An Bord Pleanála, unless that information allows clear conclusions to be drawn regarding the deliberation process.

31. In this case, the appellant sought the 'site location plans' provided by the prospective applicant for a SHD, whether those plans were provided to the Council for the purpose of the consultation under section 5(2) or copied to the Council as part of the consultation with An Bord Pleanála under section 5(5)-(7). In my view, such information can only be described as information forming the factual basis for decisions taken by the Council or by An Bord Pleanála. It is not information which describes or indicates what occurred during the deliberation process itself. I cannot see how such information could possibly allow any clear conclusions to be drawn regarding the deliberation process of the Council or of An Bord Pleanála. Accordingly, such information is not information relating to the 'proceedings of public authorities' and disclosure of such information could not have any effect on the 'proceedings of public authorities'.
32. As I have concluded that there are no proceedings of public authorities which could be affected by disclosure, it is not necessary for me to go on to consider whether disclosure would have an effect on the confidentiality of such proceedings, or whether the confidentiality of such proceedings is protected by law.
33. Accordingly, I find that the Council was not justified in refusing access to the information requested in reliance on article 8(a)(iv) of the AIE Regulations.

#### **Decision**

34. Having carried out a review under article 12(5) of the AIE Regulations, I find that the Council was not justified in refusing access to the requested information in reliance on article 8(a)(iv). As the information at issue has already been made available to the appellant, I see no reason to make further directions.

#### **Appeal to the High Court**

35. 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.

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**Peter Tyndall**  
**Commissioner for Environmental Information**  
08 December 2021