



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-116384-Y4R5W2

Date of decision: 15 December 2022

Appellant: Cllr. David Healy

Public Authority: Fingal County Council (the Council)

Issue: Whether the Council was justified, under articles 8(a)(i), 8(a)(iv), and 9(2)(d) of the AIE Regulations, in refusing access to certain records relating to compliance with a planning condition

Summary of Commissioner's Decision: The Commissioner annulled the Council's decision. He directed the Council to undertake a fresh decision-making process in respect of the appellant's request.

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. This case has its background in planning permission granted by An Bord Pleanála (ABP) (ABP reference: ABP-305619-19) in January 2020 for a Strategic Housing Development (SHD) in Portmarnock (Council reference: SHD/012/19). Condition 2 of ABP’s decision states:

“2. The following requirements of the planning authority shall be strictly adhered to:

 - a) The applicant shall provide a detailed design and costing for the upgrade of the two junctions – the R124/Station Road and Strand Road/Coast Road/Station Road, for the written approval of the planning authority.
 - b) The upgrade of the two junctions shall be provided prior to the construction of the proposed development.
 - c) Construction vehicles associated with the proposed development shall not access the site via the junction of the R124 and Station Road as the road width is insufficient for two HGVs to pass without mounting the footpath.

Reason: In the interest of proper planning of the area.”
2. The Council explained to this Office that subsequent to ABP’s decision, discussions commenced between the Council and the SHD developer to reach agreement on compliance with Condition 2, including discussions regarding the optimal junction layout design, associated costs, and how best to deliver the junction upgrades. It became clear that third party lands would be required to facilitate the junction upgrades, in particular, the Station Road/ Drumnigh road junction upgrade. Accordingly, it was evident that the developer would not be able to deliver the junction upgrade and the Council would be required to deliver the upgrade through a statutory planning process under Part 8 of the Planning and Development Regulations 2001 (as amended) and a statutory compulsory purchase order application to ABP. The Council explained that Condition 33 of the planning permission facilitates the collection of monies from the developer towards the costs of the junction upgrades under section 48 of the Planning and Development Act 2000 (as amended).
3. On 8 October 2021, the appellant submitted an AIE request to the Council seeking access to the following:

“All documents, notes, minutes, letters, emails, drawings internal or external correspondence, or other information, held by or on behalf of the Council in relation to compliance with [C]ondition 2 of SHD/012/19 subsequent to the granting of the permission by [ABP].”
4. On 8 November 2021, the Council issued its original decision, wherein it stated that it had identified 169 records relevant to the appellant’s request. The decision letter indicated that the Council was refusing access to all of the records identified in full under articles 8(a)(iv) and 9(2)(d) of the AIE Regulations. However, the accompanying schedule indicated that while it was, indeed, refusing access to the majority of the records identified under articles 8(a)(iv) and 9(2)(d), it was also refusing access to a small number of the records under article 8(a)(i) of the AIE Regulations.
5. On 9 November 2021, the appellant sought an internal review of the Council’s decision. He suggested that the public interest test in article 10 had not been appropriately carried out.



6. On 16 November 2021, the Council affirmed its original decision to refuse access to the records at issue under articles 8(a)(i), 8(a)(iv), and 9(2)(d) of the AIE Regulations.
7. The appellant appealed to this Office on 24 November 2021. He re-iterated his view that the public interest test in article 10 had not been appropriately carried out. He also asked that the appeal be prioritised and treated as an urgent matter, noting that it concerned public safety issues.
8. I am directed by the Commissioner to carry out a review under article 12(5) of the AIE Regulations. In so doing, I have had regard to the correspondence between the Council and the appellant as outlined above and to correspondence between my Office and both the Council and the appellant on the matter. I have also examined the content of the records at issue. 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)
9. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

10. 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.
11. As indicated above, the Council, in its original decision, stated that it had identified 169 records relevant to the appellant’s request. Having examined the schedules of records provided by the Council to the appellant and this Office, I note that the records are not numbered 1-169 and instead appear to be listed in 50 batches e.g. TP 1-9, TP 10-12, and TP 13-19, which seem to amount to 9 records, 3 records, and 7 records respectively. In counting the records on the schedules in this way, it appears that 167 rather than 169 records are listed. Furthermore, while the schedules seem to indicate that the records refused comprise a total of 425 pages, the copies of the records refused as provided to this Office by the Council comprise a total of 575 pages, some of which contain duplicate information and blank sheets. Notwithstanding the foregoing, I do not consider that this Office is precluded from making a decision at this stage. In referring to the records at issue I have adopted the numbering system used by the Council when processing the request.



12. I am satisfied that the Council refused access in full to the 575 pages of records at issue under the provisions of the AIE Regulations as follows:
- a. records refused under article 8(a)(i) of the AIE Regulations – EN1; EN2; EN10-11; EN14-19; EN20; and EN24.
 - b. records refused under articles 8(a)(iv) and 9(2)(d) of the AIE Regulations – TP 1-9; TP 10-12; TP 13-19; TP 22-23; TP 24-25; TP 26-33; TP 34; TP 35-36; TP 37-38; TP 39; TP 40-42; TO 43-44; TP 45-50; TP 51-58; TP 59; TP 60-64; TP 65-68; TP 69-82; TP 83-84; TP 85-86; TP 87-88; TP 89; TP 90-91; TP 92-97; TP 98-110; TP 111-113; TP 114-115; TP 116-122; TP 123-124; TP 125; TP 126-127; TP 128-129; TP 130-138; EN3; EN4-5; EN6-7; EN8; EN9; EN12-13; EN21-22; EN23; EN25; EN26; and EN27-31.
13. The scope of this review is confined to whether the Council was justified in refusing access to the records referenced at 12.a above under article 8(a)(i) of the AIE Regulations and in refusing access to the records referenced at 12.b above under articles 8(a)(iv) and 9(2)(d) of the AIE Regulations.

Preliminary Matters

14. During the course of this review, the appellant informed this Office that the urgency of receiving the records sought had passed. I note that the importance of timely access to information in the context of planning and development was highlighted by the European 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 Délégés du conseil de la Région de Bruxelles-Capitale (see paragraph 24 of the Opinion and 28 of the judgment). On behalf of the Commissioner, I wish to apologise to the appellant for the delay in reaching a conclusion on this case. We are committed to concluding appeals in a timely manner, as required by the Aarhus Convention. This Office continues to make inroads on the current backlog of cases so that the delays experienced by the appellant are not repeated.

Analysis and Findings

Records EN1; EN2; EN10-11; EN14-19; EN20; and EN24

15. The Council refused access in full, under article 8(a)(i) of the AIE Regulations, to records EN1; EN2; EN10-11; EN14-19; EN20; and EN24.
16. Article 8(a)(i) 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 personal information relating to a natural person who has not consented to the disclosure of the information, and where that confidentiality is otherwise protected by law. This provision seeks to transpose Article 4(2)(f) of the AIE Directive, which in turn is based on Article 4(4)(f) of the Aarhus Convention.



17. Article 8(a)(i) must be read alongside article 10 of the AIE Regulations. Article 10(1) of the AIE Regulations provides that notwithstanding articles 8 and 9(1)(c) of the AIE Regulations, a request for environmental information shall not be refused where the request relates to information on emissions into the environment. Article 10(3) of the AIE Regulations requires a public authority to consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal and article 10(4) of the AIE Regulations provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest served by disclosure. Article 10(5) of the AIE Regulations provides that nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information.
18. When relying on article 8(a)(i) of the AIE Regulations a public authority must show that the information at issue is personal information relating to a natural person, who has not consented to its disclosure; that the personal information has an element of confidentiality, that the confidentiality of that personal information is provided by law; and that the disclosure of the information at issue would adversely affect that confidentiality. The public authority must demonstrate a clear link between disclosure of the information that has actually been withheld and any adverse effect. The risk of the confidentiality being undermined must be reasonably foreseeable and not purely hypothetical.
19. In this case, the Council seems to have merely referred to article 8(a)(i) in seeking to refuse access in full to the records at issue. There is no evidence to suggest that the Council carried out any examination of the records to determine if the particular information contained therein is, in fact, personal information which has the quality of confidence required to engage article 8(a)(i) of the AIE Regulations. The Council also provided no explanation as to where the confidentiality of any such information is provided by law, nor did it identify any law upon which it was relying. Furthermore, the Council made no attempt to demonstrate a clear link between disclosure and any adverse effect.
20. It seems to me that the Council adopted a blanket approach to the refusal of the records at issue by claiming that article 8(a)(i) of the AIE Regulations applied to all of the records and did not conduct a record by record examination. It may be the case that article 8(a)(i) is applicable in respect of certain records, or parts thereof, subject to article 10. However, I am not satisfied that the Council has undertaken any substantial consideration of the content of the individual records, as is required, before refusing access to environmental information under the AIE Regulations.

Remaining Records

21. The Council, under articles 8(a)(iv) and 9(2)(d) of the AIE Regulations, refused access in full to records TP 1-9; TP 10-12; TP 13-19; TP 22-23; TP 24-25; TP 26-33; TP 34; TP 35-36; TP 37-38; TP 39; TP 40-42; TO 43-44; TP 45-50; TP 51-58; TP 59; TP 60-64; TP 65-68; TP 69-82; TP 83-84; TP 85-86; TP 87-88; TP 89; TP 90-91; TP 92-97; TP 98-110; TP 111-113; TP 114-115; TP 116-122; TP 123-124; TP 125; TP 126-127; TP 128-129; TP 130-138; EN3; EN4-5; EN6-7; EN8; EN9; EN12-13; EN21-22; EN23; EN25; EN26; and EN27-31.



22. 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 the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts). This provision seeks to transpose Article 4(2)(a) of the AIE Directive, which in turn is based on Article 4(4)(a) of the Aarhus Convention.
23. Article 9(2)(d) of the AIE Regulations provides that a public authority may refuse to make environmental information available where the request concerns internal communications of public authorities, taking into account the public interest served by the disclosure. This provision transposes Article 4(1)(e) of the AIE Directive, which in turn is based on part of Article 4(3)(c) of the Aarhus Convention.
24. As with article 8(a)(i), articles 8(a)(iv) and 9(2)(d) must be read alongside article 10 of the AIE Regulations.
25. When relying on article 8(a)(iv) of the AIE Regulations a public authority must identify the proceedings to which the information at issue relates and show that those proceedings have an element of confidentiality, that the confidentiality of those proceedings is protected by law, and that the disclosure of the information at issue would adversely affect that confidentiality. Again, the public authority must demonstrate a clear link between disclosure of the specific information that it has withheld and any adverse effect. The risk of the confidentiality being undermined must be reasonably foreseeable and not purely hypothetical.
26. The term “proceedings” is not defined in the AIE Regulations, the AIE Directive, or the Aarhus Convention. However, the CJEU in C-204/09 Flachglas Torgau GmbH v Bundesrepublik Deutschland set out that the concept of proceedings “refers to the final stages of the decision-making process of public authorities” (paragraph 63). A similar conclusion was reached by the CJEU in C-60/15 Saint-Gobain Glass Deutschland v Commission. Although that case dealt with Regulations 1049/2001 and 1367/2006 rather than the AIE Directive, it considered the provisions of the Aarhus Convention, upon which both the AIE Directive and the AIE Regulations are based. The Court noted “...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” (paragraph 81). Also, Advocate General Szpunar in that case indicated that “the concept of ‘proceedings’ must be understood as covering only the deliberation stage of decision-making procedures (see paragraph 51 of the Opinion).
27. In its original and internal review decisions, the Council indicated that it was refusing access in full to the records at issue under article 8(a)(iv) of the AIE Regulations. In so doing, it noted that release of the records at issue would be contrary to the public interest as the records had previously been refused in response to a separate FOI request under sections 29(1)(a), 29(1)(b), 30(1)(c), 36(b), and 36(c) of the FOI Act 2014. The Council noted generally that the records related to an ongoing deliberative processes concerning compliance in relation to Condition 2 and enforcement matters, as well as ongoing investigations and examinations.



28. Additionally, in its submissions to this Office, the Council provided background detail, which I have summarised at paragraphs 1 and 2 above. The Council further explained that the records at issue relate to the discussion/analysis investigation of the various junction upgrade options with a view to reaching agreement on potential detailed design and costs. The Council outlined that, in 2022, it intended to commence the Part 8 planning process and simultaneously make the application to ABP for a compulsory purchase order to deliver the Drumnigh/Station Road junction upgrade. It noted:

“Whilst the negotiations with the developer included discussion/analysis/investigation of various upgrade options, these options were to facilitate an estimation of costs. The final junction layout can only be agreed through the Part 8 planning process which facilitates public consultation and ultimate decision on permission by the elected members of the Council. In addition, a [c]ompulsory [p]urchase [o]rder application to the ABP is required to acquire third party lands, if agreement with the relevant third party landowners cannot be reached. It is the opinion of the Council that if the records were to be released as requested, both of these required statutory processes may be put in jeopardy of failing, being delayed, or in the very least may incur significant additional costs to the Council and in turn the citizens of Fingal. This would be to the detriment of the public interest.”

“A public consultation will be undertaken as part of the Part 8 [p]lanning application affording the general public and elected members full disclosure of the proposed works and a right to make submissions thereon.”

“The Council is of the opinion that releasing information containing both sensitive material in relation to third party lands and commercially sensitive data in relation to construction costs, prior to the undertaking of the required statutory processes would not be in the public interest as it may derail both processes, with potential knock on negative impacts such as delaying the delivery of a significant piece of infrastructure for the benefit of the communities in Portmarnock, and incurring increased costs.”

29. The Council also indicated that some of the records at issue are held on a planning enforcement file and although no enforcement action had commenced, there had been interaction between the Council’s planning enforcement section and the developer of the SHD.
30. The Council seems to have refused access to all of the records at issue on the basis that they were previously refused under the FOI Act 2014 and due to their relationship to, at the time, future planning processes and possible enforcement action, regardless of their specific nature or content. There is no evidence to suggest that the Council carried out any examination of the individual records at issue to determine if article 8(a)(iv) of the AIE Regulations properly applies.
31. I also note that the Council does not appear to have considered the concept of proceedings as set out in article 8(a)(iv), nor has it identified specific relevant proceedings which have the quality of confidence required to engage the exemption. While the Council referred to the FOI Act, it did so in the context of its consideration of the public interest and not in its application of article 8(a)(iv) of the AIE Regulations. Furthermore, while the Council also made speculative claims in respect of harms resulting from disclosure in its consideration of the public interest test, it made no attempt to demonstrate a clear link between disclosure of the particular information at issue and any



adverse effect in its application of article 8(a)(iv). In the circumstances, I do not consider that the Council carried out an appropriate application of the provision.

32. When relying on article 9(2)(d) of the AIE Regulations, the public authority should show that the information at issue is an “internal communication” such that it falls within the scope of the exception. It is then for the public authority to weigh the public interest served by disclosure against the public interest served by refusal.
33. The term “internal communications” is not defined in the AIE Regulations, the AIE Directive, or the Aarhus Convention. However, the decision of the CJEU, in C-619/19 Land Baden-Württemberg v DR, gives some guidance on the internal communications exception. It notes that the term “communications”, should be given a separate meaning to the terms “material” or “document” (paragraph 40), and that it can be interpreted as relating to “information addressed by an author to someone, an addressee who or which may be an abstract entity – such as ‘members’ of an administration or the ‘executive board’ of a legal person – or a specific person belonging to that entity, such as a member of staff or an official” (paragraph 37). It further notes that not all environmental information held by a public authority is necessarily “internal” and states that the “internal communications” exception:
- “...must be interpreted as meaning that the term ‘internal communications’ covers all information which circulates within a public authority and which, on the date of the request for access, has not left that authority’s internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received” and
- “...must be interpreted as meaning that the applicability of the exception to the right of access to environmental information provided for by it in respect of internal communications of a public authority is not limited in time. However, that exception can apply only for the period during which protection of the information sought is justified”.
34. In this case, the Council also seems to have merely referred to article 9(2)(d) of the AIE Regulations in seeking to refuse access in full to the records at issue. A brief inspection of the records indicates that they include, for example, emails between the Council and third parties. The Council does not appear to have carried out any examination of the records to determine if the particular information contained therein is, in fact, an internal communication. Again, this is not an appropriate application of the provision.
35. It seems to me that the Council adopted a blanket approach to the refusal of the records at issue by claiming that articles 8(a)(iv) and 9(2)(d) of the AIE Regulations applied to all of the records and did not conduct a record by record examination. It may be the case that articles 8(a)(iv) and/or 9(2)(d) are applicable in respect of certain records, or parts thereof, subject to article 10. However, I am not satisfied that the Council has undertaken any substantial consideration of the content of the individual records, as is required, before refusing access to environmental information under the AIE Regulations.



Conclusion

36. Articles 7(4) and 11(4) of the AIE Regulations require public authorities to provide reasons for refusal at both original and internal review decision stages, consistent with Article 4(5) of the AIE Directive. It is clear that the Council did not provide adequate reasons for refusal of the appellant's request.
37. I am satisfied that the Council adopted a blanket approach to its refusal of the records at issue under article 8(a)(i) of the AIE Regulations and to its refusal of the records at issue under articles 8(a)(iv) and 9(2)(d) of the AIE Regulations, without having regard to the nature or content of the records.
38. In such circumstances, I am not required to go on and assess further the Council's consideration of article 10 in respect of the records refused under the various provisions cited. However, I do wish to highlight that, while the Council referred to article 10(1) of the AIE Regulations and noted that the request did not relate to information on emissions into the environment, it made no reference to any analysis carried out under article 10(5) of the AIE Regulations as to whether or not partial disclosure of requested environmental information was possible.
39. Finally, it is important to note that, while it is very clear that the records refused contain third party information, no third parties appear to have been consulted or notified by the Council when processing the request.
40. Where the Council has not fully engaged with its obligations under the AIE Regulations and properly undertaken its role of assessing each of the records at issue, I do not believe that it is appropriate to direct the release of information at this point. I therefore consider that the most appropriate course of action to take is to annul the Council's decision in its entirety and direct it to undertake a fresh decision-making process on the appellant's request in accordance with the provisions of the AIE Regulations. In so doing, in light of the time that has passed since the appellant made his request, it may be relevant for the parties to liaise before the request is considered afresh. In addition, any records considered by the Council should be properly identified as coming within the scope of the appellant's request and scheduled accurately.

Decision

41. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information I hereby annul the Council's decision in this case. I direct the Council to undertake a fresh decision making process in respect of the appellant's request.



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Appeal to the High Court

42. 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 McGoldrick
On behalf of the Commissioner for Environmental Information
15 December 2022