



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-110780-K9Y5K1

**Date of decision:** 14 December 2022

**Appellant:** Dr. Fred Logue

**Public Authority:** An Bord Pleanála [ABP]

**Issue:** Whether ABP was justified in refusing the request under article 8(a)(iv) of the AIE Regulations on the grounds that the disclosure of the information sought would adversely affect the confidentiality of the proceedings of ABP.

**Summary of Commissioner's Decision:** The Commissioner found that the refusal was not justified under article 8(a)(iv) as the release of the information sought would not adversely affect the confidentiality of the proceedings of ABP. He annulled the decision of ABP and directed the release of the information sought.

**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 appeal relates to the pre-application consultation process for strategic housing development planning applications, which was provided for in sections 5 and 6 of the Planning and Development (Housing) and Residential Tenancies Act 2016. The strategic housing development process was wound down in February 2022 and has since been replaced by an application process under the Large-scale Residential Development Act 2021. Pre-application consultation with ABP was mandatory for prospective applicants prior to making an application for a strategic housing development. Prospective applicants were required to consult first with the relevant planning authority and then with ABP. ABP was required under the legislation to hold a consultation meeting, after which it would form and issue an opinion as to whether documents submitted constitute a reasonable basis for an application, or whether further consideration or amendment to the documents are required.
2. The information to be submitted to ABP at this stage was set out in section 5(5) of the Planning and Development (Housing) and Residential Tenancies Act 2016, under which the submission essentially comprised a draft planning application. An applicant was required to submit three electronic copies of the application documents, usually by CD or USB.
3. There was no statutory public consultation at this stage; however, particulars of the application including the name of the developer and location of the proposed development were published on ABP website. Following the completion of the pre-application consultation process, a detailed inspector's report, together with an opinion and direction of ABP. was published on ABP's website.
4. The appellant's request concerned a proposed development of apartments in Dublin. The application for consultation was made in early July 2021. On 15 July 2021, the appellant requested access to the documents submitted with this case at the pre-application consultation stage. On the same day, ABP replied to the request stating that the appellant was not entitled to the information as the case was live at the time. In response, again on the same date, the appellant sought an internal review of the refusal of the request under article 11 of the AIE Regulations.
5. On 19 July 2021, ABP wrote to the appellant seeking to provide him with a first instance decision letter as the request had been "informally declined" by its public access section. This decision found that the information was exempt from release under article 8(a)(iv) of the AIE Regulations. The appellant requested that an internal review be carried out in respect of this decision. On 23 July 2021, the internal reviewer affirmed the original decision and the appellant appealed to my Office on 23 July 2021.
6. I am directed by the Commissioner for Environmental Information to carry out a review of this appeal. I have now completed this review under article 12(5) of the Regulations. In so doing, I have had regard to the submissions made by the appellant and ABP. 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’).
7. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

### **Preliminary Matters**

8. I note that in the time that this appeal has been with this Office, the development relevant to this appeal has proceeded through a full planning application before ABP. As noted above, the SHD planning process has also been wound down. On behalf of the Commissioner, I apologise to the parties for the delay in dealing with this appeal. We are taking steps to reduce the time in which appeals are dealt with by this Office. The appellant has indicated that regardless of these events, he wishes to proceed with this appeal.

### **Scope of Review**

9. The scope of my review in this case is whether ABP’s decision to refuse access to the documents sought was justified under article 8(a)(iv) of the AIE Regulations.

### **Analysis and Findings**

10. A number of elements must be satisfied before the question of refusal under article 8(a)(iv) arises:
- the case must involve the “proceedings” of public authorities;
  - those proceedings must have an element of confidentiality;
  - that confidentiality must be adversely affected by the disclosure of the information requested; and
  - that confidentiality must be protected by law.
11. In considering the application of article 8(a)(iv) to this appeal, the first step is to define the relevant “proceedings”. The CJEU in *Flachglas Torgau GmbH v Federal Republic of Germany* Case C-204/09 defined the concept of proceedings as the “*final stages of the decision-making process of public authorities*” at paragraph 63. A similar conclusion was reached by the CJEU in *Saint Gobain Glass Deutschland GmbH v European Commission* Case C-60/15 P. Although that case dealt with Regulations 1049/2001 and 1367/2006, rather than the current AIE Directive, it considered the provisions of the Aarhus Convention on which both the AIE Directive and the AIE Regulations are based. The Advocate General commented at paragraph 51 of his opinion that “*the concept of*



*‘proceedings’ must be understood as covering only the deliberation stage of decision-making procedures*”. The Court in that case also commented that the concept of a decision making process should only refer to the actual making of the decision, and not to the entire administrative procedure leading to the decision.

12. Following the guidance provided by the CJEU, I find that in this case the “*proceedings*” in question are confined to the decision-making process or deliberations of ABP leading to the issuing of an opinion under s.6(7) of the 2016 Act. Therefore, I find that the proceedings at issue are limited to the final stage of the pre-application consultation process, rather than including all of the steps leading up to this decision.
13. The information sought by the appellant consists of the documents submitted by the applicant to ABP pursuant to section 5(5) of the 2016 Act. Such an application is subject to discussion at a minimum of one consultation meeting to be held between ABP, the applicant and the relevant planning authority.
14. While the application documents were not made public at the consultation stage, the fact that the application had been made was published on the “weekly lists” section of ABP’s website. ABP’s website stated that “The public are informed about pre-application consultations but cannot take part in the consultations”. The details published included the location of the proposed development, a description of the development and the name of the applicant.
15. The appellant argues that access to the application documents affects neither the confidentiality of ABP’s proceedings, nor its deliberations on the application. The appellant contrasts this with a scenario where one might seek access to internal records relating to the procedure that might interfere with ABP’s internal consideration of the application or inhibit a frank and full exchange of views on it.
16. ABP argues that the release of records may be injurious to the impartiality of ABP in determining the case and that the release of the pre-application consultation records before an opinion is formulated or issued could impair the decision making process. The investigator in this case sought further submissions from ABP on how the release of the information sought would adversely affect the confidentiality of the decision making process in particular, as required to rely on article 8(a)(iv). In response to this query, ABP stated that due to the oftentimes contentious nature of these housing applications, the release of information on a proposed SHD prior to ABP giving its opinion on the proposal could lead to a widespread discourse in a public forum on the matter, which could be viewed to impair the impartiality of the decision making process of ABP.
17. The CJEU case of *Saint Gobain*, which I have referred to above, provides useful guidance in assessing whether the protections of article 8(a)(iv) extend to the type of information requested in this appeal. The Advocate General at paragraph 56 of his opinion adopted the approach taken by the German courts after the CJEU’s ruling in *Flachglas*, namely that information forming the factual basis for decisions taken should be protected only if it allows clear conclusions to be drawn regarding the deliberation process.



18. I am not satisfied that the release of the information requested would allow for clear conclusions to be drawn regarding the deliberation process of ABP. Given that the making of an application for pre-application consultation was a matter of public record, such discussion as ABP wishes to avoid would take place regardless of whether or not the draft application documents are released under an AIE request. Without sight of the draft documents, any discussion takes place on an uninformed basis. Indeed, it would appear to be in keeping with the aims of the Aarhus Convention and the AIE Regulations to inform the public as to the exact nature of the proposed development and to allow for informed discussion, where this can be done while also protecting the confidentiality of the decision making processes of ABP. Public discussion might involve speculation as to how an application will be treated by ABP, but I am not satisfied that this of itself would undermine the decision-making process.
19. Given that I have found the confidentiality of the proceedings would not be adversely affected by the disclosure of the information sought, it is not necessary for me to consider whether or how that confidentiality is protected by law.
20. This does not mean that there might not be circumstances where particular factors relating to an individual application that may justify a decision to refuse access to information relating to a case that has yet to be determined by ABP. As per the CJEU in *Land Baden Wurttemberg v Deutsche Bahn AG* Case C-619/19, a public authority which adopts a decision refusing access to environmental information must set out the reasons why it considers that the disclosure of that information could specifically and actually undermine the interest protected by the exceptions relied upon.
21. I considered whether it was necessary to contact the developers in advance of issuing a decision on this appeal. Given the large amount of information that is already in the public domain regarding the outcome of the pre-application consultation process and subsequent planning application, I am satisfied that there is no possibility of adverse impact on the developer from the release of this information at this stage.

#### Other matters

22. This Office has recently referred a question to the High Court on the interplay between article 8(a)(iv) of the AIE Regulations and the provisions of the Freedom of Information Act 2014. If I were satisfied that the other conditions set out in article 8(a)(iv) had been satisfied, it would perhaps have been necessary to put this aspect of the appeal on hold, pending the outcome of those proceedings. However, in circumstances where no adverse effect has been established, I do not believe it is necessary to await the outcome of the High Court proceedings in order to reach a decision on whether article 8(a)(iv) applies to the information sought in this request.



Coimisinéir um Fhaisnéis Comhshaoil  
Commissioner for Environmental Information

### **Decision**

23. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I annul the decision of ABP and direct release of the information sought.

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

24. 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 Commissioner for Environmental Information**

14 December 2022