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-109706-Y8Y0V3

Date of decision: 21 October 2022

Appellant: Dr Fred Logue

Public Authority: An Bord Pleanála (ABP)

Issue: Whether ABP was justified in refusing the appellant's request on the basis that no environmental information within the scope of that request is held by or for it.

Summary of Commissioner's Decision: The Commissioner found that information received by a staff member of a public authority orally and not recorded was not information in a "material form" and therefore did not come within the definition of "environmental information" contained in the Regulations. Nonetheless, he found that ABP had not conducted reasonable and appropriate searches to identify and retrieve environmental information within the scope of the appellant's request and he remitted the matter to ABP for further consideration.

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. The background to this case lies in a letter from a representative on behalf of an applicant for planning permission (the developer) for a strategic housing development (SHD) dated 8 October 2020 (the Letter). The Letter set out details of the development involved and that it had been the subject of a pre-application consultation with ABP on 5 March 2020. The Letter also refers to consultations between the developer, Fingal County Council, TII and the NTA, as well as "informal consultations" with ABP staff members, all of which resulted in a decision to submit a planning application for a phase of the development, as opposed to the entirety of the project, at that time.

2. On 1 May 2021, the appellant requested "all information relating to the 'informal consultations with staff members in the Board' referred to in [the Letter]". The appellant also asked "to speak to the staff members involved so that I can ask them questions about the consultations, particularly if it turns out that there are limited records". He noted that "under the AIE Regulations I am entitled to seek information orally from [ABP] particularly where there is an absence of records". The appellant specified that he would like to receive a response within two weeks of the date of the request.

3. The appellant received no response from ABP within the two-week timeframe, nor did he receive a response within the one-month timeframe provided for in article 7(2) of the AIE Regulations. He wrote to ABP seeking an internal review on 4 June 2021. He requested that the internal review be expedited so that he would receive "at least a partial response" by 11 June 2021 noting that "timely access to environmental information is an important component for participation in the planning process" and that ABP "has a statutory obligation to make information available as soon as possible following a request".

4. ABP responded to the appellant on the same date noting his original request and explaining that it had not been possible to provide him with a response to that request within the two-week timeframe requested. It also explained that "due to an oversight on our part the response has issued outside of the one-month period". It attached its original decision, in which it informed the appellant that the SHD team had carried out a search of their records "and none matching your request have been found". It explained that the SHD team dealt with queries from members of the public and parties to planning cases and that "any such communications dealing with matters of substance are included on the case file". It noted that while queries were dealt with by the SHD team over the phone "any matter of substance must be made in writing". It also informed the appellant that "[ABP] does not retain any records of queries raised by phone". ABP refused the appellant's request on the basis that no records matching the request were held by it.

5. The original decision also refused the appellant's request to speak to relevant staff members on the basis that it was not "appropriate to accommodate it" under the Regulations. ABP noted that "environmental information" was defined as "any information in written, visual, aural, electronic or any other material form". It went on to note that article 7(1) provided that requests pertained only to records "held by, or for, the public authority" which meant either "environmental information in the possession of a public authority that has been produced or received by that authority" or

"environmental information that is physically held by a natural or legal person on behalf of that authority". It concluded that neither of those definitions authorised questioning staff in the manner the appellant had suggested.

6. On 4 June 2021 the appellant requested an internal review. He submitted that the informal consultation referred to in the Letter clearly related to "matters of substance" since it resulted in the developer's decision to split its planning application into phases. He stated "at the very least there must be an explanation as to why there are no records relating to this informal consultation", particularly in circumstances where the applicant for planning permission had the option to engage in further formal consultations with ABP. He argued that the AIE Regulations were not limited to pre-existing records and that if no records were received or created relating to the consultation, ABP should identify the persons consulted and ask them to describe what occurred, commit that information to writing and disclose it to him. He also reiterated that he would be happy to speak to the individuals concerned directly and ask them questions about the meeting.

7. ABP issued its internal review outcome on 28 June 2021. It informed the appellant that a written record of the formal pre-application consultation meeting was available on the planning file and provided him with an email address from which such file could be requested. It reiterated that ABP had no record of "informal consultations" on the case. It continued that "it may be that the applicant made a phone call to staff members of the Strategic Housing Development team who deal with queries in relation to procedures for making a housing application" but that ABP "does not retain any records of queries raised by phone or make recordings of phone calls". It went on to note that it was "impossible to say with any accuracy whether such a phone call was received" given that nine months had elapsed since the lodging of the planning application on 8 October 2020. It therefore affirmed refusal under article 7(5) of the AIE Regulations on the basis that "there are no records held by [ABP] referring to 'informal consultations'".

8. It also refused the appellant's request to speak with the staff members concerned. It referred to article 3 of the Regulations which defines "environmental information" as "any information in written, visual, aural, electronic or any other material form". Article 3 also provides that environmental information held by a public authority is information "in the possession of a public authority that has been produced or received by that authority" while environmental information held for a public authority is information "physically held by a natural or legal person on behalf of that authority". It concluded that the AIE Regulations did not allow for a requester to "speak to the individuals concerned" as the appellant had requested.

9. The appellant appealed to my Office on 30 June 2021.

Scope of Review

10. My review in this case is concerned with whether ABP was justified in refusing the appellant's request on the basis that no environmental information within the scope of the request was held by or for it.

Preliminary Matters

11. Before I proceed to consider the substantive issues in this appeal, I think it is necessary to address ABP's engagement with my Office. ABP made limited submissions to my Office in July 2021 after it was notified of the appeal. My Investigator wrote to ABP in August 2022, once the case had been assigned to her, seeking further information. No response was received from ABP. This is not acceptable.

12. I acknowledge that some of the delay experienced in this case has been due to resourcing issues in my own Office and I am continuing to take steps to address these issues. For this I apologise. However, it is highly unsatisfactory that I am now in a position where I must conduct a review in the absence of the additional information requested from ABP which makes it necessary for me to remit certain aspects of this decision, causing further delays to the appellant and leading to an inefficient use of resources. As I have previously indicated, it is not acceptable that ABP would refuse a request for environmental information and then not be in a position to provide detailed reasoning for such refusal when requested to do so by my Office. ABP should take steps to engage more fully with requests concerning the AIE Regulations.

Submissions of the Parties

13. The appellant takes issue with ABP's refusal of his request and his submissions in this regard may be summarised as follows:

    (i) He submits that the Letter clearly states that informal consultations were held between the developer and staff members of ABP in relation to the developer's application for a SHD.
    (ii) He notes that the Letter also makes it clear that as a result of those informal consultations it was decided to bring forward an application for Phase 1 of the development rather than one for the development in its entirety to avoid issues which might be caused by proposed upgrades to roads that border the site of the proposed development. He submits that the records of discussions between ABP staff members and the developer, which do appear on the planning file, make no reference to the submission of a planning application on a phased basis or to any issues relating to the roads' upgrade.
    (iii) The appellant submits that since the "informal consultations" led the developer to alter its planning application, it is clear that those consultations involved the discussion of substantive issues.
    (iv) He notes that ABP has informed him that any communication dealing with "matters of substance" is included in the planning case file while correspondence dealing with non-substantive matters (such as clarifications and scheduling) are kept by the SHD team.
    (v) He submits that the fact that ABP did not make or does not have records of the consultation is not a basis for refusing his request. He notes in this regard that ABP has not denied that the consultation took place, nor has it denied the subject matter of the consultation as described in the Letter.

(vi) He also submits that it would be easy for ABP to identify the staff members who handled the file since they would be identified on the planning case file and ask them to provide information on the consultation.

(vii) He also submits that failure on the part of ABP to ensure the consultation was recorded in writing, given that it involved "matters of substance", amounts to a breach of its own procedures.

(viii) He submits that ABP confirmed to him, in response to a separate AIE request, that it did not have a documented file management procedure but instead relies on the Planning and Development Act 2000 (the PDA) and retains all "substantive records" on the public planning file. He notes however that ABP did not provide an explanation as to what it considered to be "substantive" nor was it able to point to a specific provision of the PDA in which that term was defined.

(ix) He further contends that even ABP's procedures (which he says were not followed in this case) do not comply with the obligations set out in article 7 of the Directive. He submits that ABP has an obligation under article 7(1) of the AIE Directive to "organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public" while article 7(2) requires that the information to be disseminated be updated as appropriate.

(x) He argues that a public authority cannot rely on non-compliance with the obligation in article 7 of the Directive to create, retain and organise information relevant to its functions to refuse a request for access to environmental information. He therefore submits that the fact that ABP did not make or does not have records of the consultation is not a basis for refusing his request for information on those consultations.

(xi) He concludes that ABP should be required to carry out internal investigations and to create a record of the consultation for the purpose of responding to his request. He submits that if ABP's recollection is incomplete it would be open to it to ask the developer to assist it with recording the consultation as it appears the developer has an accurate record of it given the description contained in the Letter.

14. The submissions received from ABP may be summarised as follows:

(i) It acknowledges that the appellant's original request sought a response within two weeks but explains that it was not possible for it to draft and issue its response within a two-week period due to workload constraints.

(ii) It submits that the failure to provide the appellant with a decision within the one-month timeframe set out in article 7(2) of the Regulations was due to a clerical oversight and notes that the appellant was provided with that decision immediately following his request for an internal review.

(iii) It reiterates that the request had been refused under article 7(5) of the AIE Regulations as the information requested was not held by it. It explains that the pre-application process for planning matters is documented in accordance with the Planning and Development Act 2000 (as amended). It submits that all records are contained within a case file which is made publicly available on completion of the planning process. It notes that the appellant viewed the case file in question at its offices.

(iv) ABP's submissions go on to note that "all matters of substance are carried out through the formal process and the records are contained within the case file". It submits that "the only

informal correspondence which may occur" involves "clarification of administrative matters or clerical details".

(v) It submits that the SHD section of ABP was contacted on receipt of the appellant's request. The SHD section confirmed that all records concerning the pre-application process were contained within the publicly available case file and that, to their knowledge, no "informal consultations" had taken place in relation to the matter.

(vi) It explains that it was possible that the applicant for planning permission had sought clarification on a matter by phone but notes that ABP did not maintain records of phone calls as any matters of substance are required to be submitted in writing. It also notes that "the SHD section indicated that they had no recollection of such a call".

(vii) It submits that the arrangement of interviews with staff does not "come within the scope of environmental records as defined by the [AIE] Regulations" such that this request was "deemed not to be appropriate within the scope of the Regulations".

15. As indicated above, my Office sought further information from ABP but no response was received to this request.

Analysis and Findings

16. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and ABP. In addition, I have had regard to:

- 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);
- the Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the Aarhus Guide); and
- the decisions of the Superior Courts in *Minister for Health v The Information Commissioner* [2019] IESC 40 (*Minister for Health*) and *NAMA v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*) and of the Administrative Appeals Chamber of the Upper Tribunal in the UK *Holland v. The Information Commissioner* [2016] UKUT 260 (AAC) (*Holland*).

What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Obligations under article 7(2) and 7(10) of the Regulations

17. In the first instance, I wish to address ABP's submissions on the timeframe within which it provided its initial response. I note that it submits that its failure to comply with the one-month timeframe set out in article 7(2) for provision of its original decision was due to a clerical error. I accept that mistakes and genuine errors can occur but I think it necessary to address ABP's position that it did not comply with two-week timeframe for response requested by the appellant "due to workload

constraints". There is no obligation on ABP under the Regulations to comply with the timeframe specified by a requester but article 7(10) does require it to have regard to the timeframe specified by a requester. It is not apparent from ABP's submissions that it did so. Its submissions merely note that compliance was not possible. It is not clear whether this conclusion was reached at the outset of the request or only at the stage a response was being provided. In addition, while I accept that ABP carries out a number of important public functions and has many demands on its resources, its obligations under AIE are part of its workload and should be appropriately prioritised.

Is ABP entitled to refuse the request on the basis that no environmental information within the scope of the request is held by or for it?

18. Article 7(1) of the Regulations provides that "a public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the applicant any environmental information, the subject of the request, held by, or for, the public authority". Article 7(5) of the Regulations provides that if a request is made to a public authority for information that is not held by or for it, it must inform the applicant as soon as possible.

19. In this case, ABP contends that it does not hold any environmental information which comes within the scope of the appellant's request and it is therefore entitled to refuse the request. The appellant argues that if ABP does not deny that the "informal consultations" which were the subject of his request took place, then it is obliged to explain why no record exists of those consultations and provide him with details of the content of the conversations either by making a record of them now or by providing him with the opportunity to speak directly to the staff members involved.

20. The obligation on public authorities provided for in article 7(1) of the Regulations is to make available any environmental information held by or for it which is the subject of a request. In this case the appellant has made a request for information about informal consultations between a developer and ABP which, according to the developer, led it to change its approach as to the its planning application for a SHD. The developer's assertion that those consultations took place is set out in the Letter and is a matter of public record. ABP has not confirmed that these consultations took place. However, it has not clearly denied that they occurred, despite being asked to clarify its position. It has instead made vague assertions that those informal consultations may have taken place over the phone. It has also submitted that "the SHD section indicated that they had no recollection of such a call" without providing detail as to the steps taken to consult the SHD team. It has also outlined that it is not the practice of ABP to record its phone calls. It has not provided details of the individuals consulted in order to reach the conclusion that none of its staff members recall being engaged in informal consultations nor has it provided any details on the responses received from those individuals or the searches carried out by those individuals in order to ascertain whether they were in possession of environmental information within the scope of the appellant's request. I am therefore satisfied that the evidence before me suggests, on the balance of probabilities, that informal consultations did take place between the developer and staff members in ABP.

21. The question then is, if no record of those consultations existed at the date of the request, is the appellant nonetheless entitled to be provided with information as to the content of those consultations either through the creation of a record by ABP or through ABP's facilitation of discussions between the appellant and the staff members who took part in those discussions.

22. Before I address the second part of that question, I think it is useful to address whether ABP has taken reasonable steps to ascertain whether a record of the informal consultations existed. ABP refused the appellant's request in this case, under article 7(5) of the Regulations, on the basis that no information is held by or for it within the scope of that request. My approach to dealing with such cases is that I must be satisfied that adequate steps have been taken to identify and locate relevant environmental information, having regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances I consider that a standard of reasonableness must necessarily apply. It is not normally my function to search for environmental information.

23. My Investigator wrote to ABP requesting further detail on the steps it had taken to search and retrieve information held by or for it in relation to the appellant's request. This included a number of specific queries as to the locations searched, the search methods used and the individuals consulted as well as queries relating to ABP's guidelines, practices, procedures and arrangements in relation to the storage, filing, archiving and retention of information. No response to these requests was received.

24. In the absence of a response from ABP, I cannot be satisfied that reasonable and appropriate searches have been carried out as I have been provided with no detail as to the steps taken to search and retrieve information within the scope of the appellant's request. I am therefore left with no option but to remit this matter to ABP.

25. I consider it appropriate however, notwithstanding my decision to remit this matter, to deal with the second part of the question posed at paragraph 21 above. I will therefore now consider whether, if no record exists, the appellant is entitled to be provided with information as to the content of the informal consultations either through the creation of a record by ABP or through ABP's facilitation of discussions between the appellant and the staff members who took part in those discussions.

26. ABP argues in this case that if it did not create a record of informal discussions between its staff members and an applicant for planning permission. If this is the case, then it does not hold information on those discussions and it is entitled to refuse the appellant's request. The appellant argues for a wider interpretation of the AIE Regulations, which would require ABP to provide him with information on those discussions regardless of whether that information was recorded before his request.

27. These arguments require me to consider the meaning of "environmental information", "environmental information held by a public authority" and "environmental information held for a

public authority" as those terms are defined both in article 3 of the Regulations and in article 2 of the Directive.

28. Environmental information is defined in identical terms in article 3(1) of the Regulations and article 2(1) of the Directive as "any information in written, visual, aural, electronic or any other material form" on a number of items identified at parts (a) to (f) of the definition (which are not of direct relevance in this case). Article 2(2) defines the term "information held by a public authority" as "environmental information in its possession which has been produced or received by that authority" while article 3(1) defines "environmental information held by a public authority" as "environmental information in the possession of a public authority that has been produced or received by that authority". Similarly, article 2(2) and 3(1) define the terms "information held for a public authority" and "environmental information held for a public authority" as "environmental information which is physically held by a natural or legal person on behalf of a public authority".

29. As the Supreme Court held in *NAMA* "the interpretation of legislation in implementing a directive" must be approached "so far as possible, teleologically in order to achieve the purpose of the directive" (para 10). The Court of Justice held in *Fish Legal* that "it is apparent from Article 1(a) and (b) of [the Directive] that its objectives are, in particular, to guarantee the right of access to environmental information held by or for public authorities, to set out the basic terms and conditions of, and practical arrangements for, exercise of that right and *to achieve the widest possible systematic availability and dissemination to the public of such information*" (para 66, emphasis added). Recital 1 of the Directive notes that "increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment". It is clear therefore that the purpose of the Directive is to promote wide-scale access to environmental information so that the public can be better informed about environmental matters, can participate more effectively in environmental decision-making and so that these factors in turn will contribute to a better environment. Interpretation of the Regulations and the Directive must be approached with this purpose in mind.

30. The CJEU in *Fish Legal* also noted that Recital 5 of the Directive confirms that "in adopting [the] directive the European Union legislature intended to ensure the consistency of European Union law with the Aarhus Convention with a view to its conclusion by the Community" such that "for the purposes of interpreting [the Directive], account is to be taken of the wording and aim of the Aarhus Convention, which the directive is designed to implement in European law". This is turn means that the Aarhus Convention Implementation Guide may be used as an explanatory document for the purpose of interpreting the Convention albeit it that "the observations in the guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention" (paras 36 to 38).

31. It seems logical to look firstly at the definition of "environmental information" contained in the Regulations, the Directive and the Convention. The definitions contained in the Regulations and Directive are set out at paragraph 28 above. The Aarhus Convention defines "environmental

information" in a similar manner. While it differs slightly in terms of the issues it describes at (a) to (c) of its definition, it provides, in identical terms to those set out in the Regulations and the Directive, that environmental information consists of "any information in written, visual, aural, electronic or any other material form", which can be considered information "on" those issues. The definition of environmental information in the Regulations, the Directive and the Convention thus sets out that environmental information can be in any material form, once it is information on one of the categories set out in those definitions. If information is held by or for public authorities in any material form and is "on" one of the categories set out at parts (a) to (f) of the definition in the Regulations and Directive (which mirror and expand on those set out at (a) to (c) of the Convention), a requester is entitled to access such information from the public authority unless one of the grounds for refusal set out in the Regulations or Directive applies.

32. The question to be addressed then is what is meant by "material form". In interpreting that term, regard must be had to the overall purpose of the Directive as well as to the wording of the Regulations, the Directive and the Aarhus Convention. As the CJEU in *Fish Legal* note, the Aarhus Guide can also be used for explanatory purposes although it is not of normative effect. The Aarhus Guide notes that:

> "Environmental information may be in any material form, which specifically includes written, visual, aural and electronic forms. Thus paper documents, photographs, illustrations, video and audio recordings and computer files are all examples of the material forms that information can take. Any other material forms not mentioned, existing now or developed in the future, also fall under this definition […].
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> It is also important to distinguish between documents and information. The Convention guarantees access to *information*. The "material form" language is not meant to restrict the definition of environmental information to finished products or other documentation as that may be formally understood. Information in raw and unprocessed form (sometimes referred to as "raw data") is covered by the definition as well as documents.
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> By way of contrast, in Case T-264/04 *WWF-EPO v Council of the European Union*, the European Court of First Instance ruled that the "concept of document must be distinguished from that of information". Thus, under the Transparency Regulation, the Community institutions were only obliged to disclose information held in the form of a formal document, as opposed to "…any information in written, visual, aural or electronic or any other material form" as defined in article 2, paragraph 3, of the Aarhus Convention (and article 2, paragraph 1(d), of the Aarhus Regulation). At the time the case was brought, the Aarhus Regulation had not yet been promulgated and today this unduly narrow interpretation of document/information would no longer apply" (see p 51).

33. The Aarhus Guide thus indicates that information does not need to have been completed or formalised in order to come within the definition. It does not go so far as to indicate, however, that information which has not been recorded, that is information that remains in the mind of a representative or staff member of a public authority, would come within scope. Although it does

not explicitly rule out the latter possibility, what it seems to suggest is that the use of the phrase "in any material form" was intended to bring unfinished documents and raw data within the scope of the Aarhus Convention (and in turn the Directive and the Regulations), but not necessarily information in an abstract, as opposed to a material, form.

34. The Cambridge Dictionary contains a number of definitions of the term "material" demonstrating the variety of ways in which the term can be understood. Those definitions include "a physical substance that things can be made from", "relating to physical objects or money rather than emotions or the spiritual world", "important or having an important effect" and "information used when writing something such as a book". The first two of those definitions lend support to ABP's argument that if the information does not exist in recorded form, it does not come within the scope of its obligations under AIE. On the other hand, the latter two lend support to the appellant's argument that he should be granted access to information on the content of discussions with staff members regardless of whether those discussions were recorded. It is also possible to interpret "material form" as being the opposite of abstract. In that case, the definition of "abstract" contained in the Cambridge Dictionary would suggest that the information at issue in this case, is not information in a "material form". The Cambridge Dictionary definition of "abstract" is "existing as an idea, feeling, or quality, not as a material object".

35. However, these sources alone are not authoritative. There does not appear to be guidance in case law on the interpretation of "material form" but regard can be had to other provisions of the Directive in order to glean its purpose and ensure a teleological interpretation of the phrase.

36. The most logical place to start in this case would appear to be by examining the definitions of "environmental information held by a public authority" and "environmental information held for a public authority", both of which are set out at paragraph 28 above.

37. Environmental information held by a public authority is defined as information which is "in the possession of a public authority that has been produced or received by that authority". The circumstances in which environmental information can be considered to be held by a public authority have been considered by the UK Courts in *Holland* with regard to the Environmental Information Regulations 2004, through which the UK transposed the AIE Directive. The issue has also been considered to some extent by the Irish Courts with regard to Freedom of Information legislation in *Minister for Health*. Those cases suggest that in order for information to be held by a public authority, that authority must be in possession of that information in connection with or for the purposes of its business or functions. In other words, there must be a sufficient connection between the information and the authority to warrant a conclusion that it "holds" the information, although it is not necessary that the information is held by the public authority solely or predominantly for its purposes. In *Holland* the Upper Tribunal noted that the inclusion of the specific and important word "by" in the phrase "produced or received by" showed that "the authority itself must be the producer or recipient of the information". This meant "a factual determination is required as to how the information has come to be in the possession of the authority" such that it must be ascertained "whether it was produced or received by means which were connected with the authority" and whether the connection was "such that it can be said that

the production or receipt of the information is attributable to ("by") the authority" (see para 48). This definition and the case law which considers it are of limited assistance, in my view, as it is arguable that information which has been communicated orally to a representative or an official of a public authority and which is relevant to the functions of that authority has been produced or received by it.

38. Environmental information held for a public authority is information that "is physically held by a natural or legal person on behalf of that authority". The use of the term "physically held" in this definition along with the use of the term "material form" in the definition of environmental information would appear to suggest that environmental information does not include information which only exists in the abstract i.e. in respect of which there is no concrete or physical record.

39. Assistance can also be gleaned from other provisions of the Directive including article 7 (which is referred to by the appellant in his submissions) and article 3(5). Article 3(5) of the Directive requires Member States to ensure that "officials are required to support the public in seeking access to information" and that "the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised". Article 7(1) seeks to ensure that public authorities are required "to organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available". Article 7(2) provides that "the information to be made available and disseminated shall be updated as appropriate".

40. Having considered these provisions, it appears to me that the purpose of the Directive is to require Member States to put in place, through their national legislation, arrangements to ensure that public authorities maintain information on environmental matters in a way that ensures its wide-scale dissemination and facilitates public access, so that members of the public can be better informed about those matters. This would mean that public debate and environmental decision-making can be more robust and that these factors in turn will contribute to the promotion and creation of a better environment. The Directive sets out the practical arrangements to be put in place in each Member State at a high level with matters of detail being left to the Member States. This is the essence of what a directive seeks to achieve as an instrument of European Union law which "shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method" (see article 288 of the Treaty on the Functioning of the European Union). Included in those high level directions contained in the AIE Directive are obligations on Member States to ensure that practical arrangements are defined to ensure the effective exercise of the right of access and to organise and maintain environmental information with a view to its active and systematic dissemination. In addition to this, environmental information is defined as that which exists in any "material form".

41. Having considered the guidance contained in the Aarhus Guide, the plain and ordinary meaning of the words and the provisions and overall purpose of the Directive, I cannot escape the conclusion that the word "material" would be redundant if the definition were to encompass information held in a more abstract form such as in the mind of a staff member or official of a public authority. In my

view, the provisions of article 3(5) and article 7 support this position as they require Member States to put in place systems to ensure that public authorities properly maintain and record environmental information so that it can be disseminated and made available to the public. The extent to which the obligations contained in articles 3(5) and 7 have been transposed by the Regulations has not been fully explored but it is clear from the jurisprudence of the Court of Justice, in cases such as C-188/89 *Foster v British Gas plc*, that those obligations have direct effect on public authorities to the extent that they can be considered emanations of the state.

42. In that regard, a policy or practice of not recording or making a note of any phone call made to a public authority does not appear to comply with the obligations in article 3(5) of the Directive which seek to ensure that "officials are required to support the public in seeking access to information" and that "the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised". Nor does it appear to comply with the obligation in article 7 of the Directive which seeks to ensure that public authorities are required "to organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available" and that such information is updated as appropriate.

43. Neither does such practice appear to comply with ABP's own policy of requiring that any communications dealing with "matters of substance" are included in the case file. It appears from ABP's submission that it seeks to achieve compliance with this policy by requiring applicants or members of the public who make enquiries on matters of substance over the phone to instead correspond with ABP in writing in order to receive a response to their enquiry. However, that did not occur in this case and the Letter indicates that the applicant developer did receive a response to its enquiry on a matter of substance (i.e. whether planning permission for the SHD should be applied for at once or in phases) and used this response to determine its approach to the SHD application. If ABP provided an applicant with advice or information in informal consultations which led it to change its approach to a planning application in order to improve its chance of approval, those consultations are relevant to ABP's environmental decision-making functions. However, neither the enquiry which led to those informal consultations nor the response to it appear to have been recorded in writing or included on the planning file and thus neither are available to the public for examination to inform public debate as to the exercise of ABP's environmental decision-making functions both generally and in this particular case.

44. The issue in this case therefore is that ABP does not appear to have complied with its obligations under article 3(5) or article 7 of the Directive to maintain information as to the content of discussions between an applicant for planning permission and a planning authority which led to the applicant determining that a change of approach to its planning application was necessary. As a result, it is not subject to the obligations under article 3(1) of the Directive to provide such information to the appellant. This gives rise to a paradoxical situation whereby failure to comply with certain obligations set out in the Directive with regard to the maintenance of environmental information may allow a public authority to circumvent its obligations to provide access to information which would enable greater awareness of environmental matters and more effective

participation by the public in environmental decision-making, in accordance with the objectives of the Directive.

45. However, the Regulations do not provide me with jurisdiction to close that loophole. Article 12(5) of the Regulations permits me to do the following on receipt of an appeal:

    (a) review the decision of the public authority,
    (b) affirm, vary or annul the decision concerned, specifying the reasons for [my] decision, and
    (c) where appropriate, require the public authority to make available environmental information to the applicant.

46. The decision of ABP, in this case, is its decision to refuse to provide the appellant with details of the informal consultations between its staff members and the developer as referred to in the Letter because no information in "material form" is held by or for it relating to those discussions. If ABP does not hold the information in a "material form" because it has not recorded it, I cannot require it to make that information available to the appellant as it does not come within the definition of "environmental information" contained in the Regulations or the Directive.

47. That being said, I am not satisfied that ABP has taken reasonable and adequate steps to search for information in "material form" which comes within the scope of the appellant's request and I am directing ABP to undergo further searches to that effect. Neither am I satisfied that it has complied with its obligations to provide reasons for its refusal as it is required to do under articles 7(4)(c) and 11(4)(a) of the Regulations. As noted by the Courts on a number of occasions, the reasons given must be sufficient to "disclose the essential rationale on foot of which the decision is taken" (see *Meadows v Minister for Justice, Equality & Law Reform* [2010] IESC 3). The appellant is therefore correct to point out, as he did in his request for an internal review, that, if having conducted further searches ABP finds that it has not maintained records of the informal consultation, "at the very least there must be an explanation as to why there are no records relating to this informal consultation". ABP should also, now, provide the appellant with details of the searches undertaken by it to retrieve information relevant to his request.

Decision

48. Having carried out a review under article 12(5) of the AIE Regulations, I annul ABP's decision on the basis that I am not satisfied that reasonable and appropriate searches have been conducted to identify and retrieve environmental information within the scope of the appellant's request. I am directing ABP to take all reasonable steps to identify and retrieve any environmental information held by or for it within the scope of the appellant's request, if it has not already done so. I am also directing it to set out in detail to the appellant the steps it has taken and, if no relevant records are found, to provide him with an explanation as to why information on the informal consultations has not been recorded or maintained in a "material form".

49. Given the unusual circumstances of this case, once this decision has been published, I intend to draw it to the attention of the Minister for the Environment, Climate and Communications as it is his Department which is responsible for the implementation and operation of AIE. To the extent that it highlights potential shortfalls in the policies and procedures of ABP with regard to the organisation and maintenance of environmental information, I also intend to draw it to the attention of the Minister for Housing, Local Government and Heritage.

Appeal to the High Court

50. 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.

Ger Deering
Commissioner for Environmental Information

21 October 2022