



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-119334-J1N2B3

**Date of decision:** 14 June 2022

**Appellant:** Dr Fred Logue

**Public Authority:** An Bord Pleanála (“ABP”)

**Issue:** Whether ABP is entitled to rely on article 8(a)(iv) of the AIE Regulations to refuse the appellant’s request.

**Summary of Commissioner's Decision:** The Commissioner found that article 8(a)(iv) did not provide grounds for refusal of the information requested and directed release of that information to the appellant.

**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 15 December 2021, the appellant requested an electronic copy of the recording of the oral hearing held by An Bord Pleanála (ABP) on 14 December 2021 in Case 311059 (Corballis East SHD).
2. On 10 January 2022, ABP responded to the appellant refusing his request under article 8(a)(iv) of the AIE Regulations which 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)”. The decision also referred to section 29(1) of the Freedom of Information Act 2014 and concluded that the information requested constituted “exempt records” within the meaning of that Act. The decision outlined that, having carried out the public interest test mandated by article 10(3), ABP had concluded that “the factors in favour of the refusal of these records outweigh those in favour of release, as the release of these records may be injurious to the impartiality of [ABP] in determining this case”. The decision continued: “it is [ABP’s] assessment the release of these records, as the case is ongoing, and decision has not yet been formulated by [ABP] could impair a future decision of [ABP]” and “the premature release of same may contaminate the decision-making process”.
3. The appellant requested an internal review of the decision which was provided by ABP on 2 February 2022 and reiterated the decision outlined in paragraph 2 above.
4. The appellant appealed to my Office on 8 February 2022.

## **Scope of Review**

5. ABP has refused the appellant’s request on the basis of article 8(a)(iv) of the AIE Regulations and the appellant has appealed such refusal. My review in this case is therefore concerned with whether ABP is entitled to rely on article 8(a)(iv) of the AIE Regulations to refuse the appellant’s request.

## **Analysis and Findings**

6. 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 parties. In addition, I have had regard to:
  - the Access to Information on the Environment (AIE) Regulations 2007 to 2018 (the Regulations)
  - Directive 2003/4/EC (the AIE Directive);
  - the 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);
  - the Aarhus Convention: An Implementation Guide (Second edition, June 2014) (the Aarhus Guide);
  - the Guidance provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations (the Minister’s Guidelines); and



- national and EU case law in particular the decisions of the Court of Justice of the European Union in [C-204/09 Flachglas Torgau GmbH v Federal Republic of Germany \(Flachglas Torgau\)](#), [C-619/19 Land Baden-Württemberg v DR \(Land Baden-Württemberg\)](#) and [C-60/15 Saint-Gobain Glass Deutschland GmbH v European Commission \(Saint Gobain\)](#) and the decision of the High Court in *Right to Know v An Taoiseach* [\[2018\] IEHC 372](#).

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

7. The appellant made submissions to my Office on 28 March 2022 which can be summarised as follows:
  - (i) He submitted that his request did not relate to “proceedings” since it was not concerned with the final stages of a decision-making process.
  - (ii) He submitted that the information requested is a recording of a public meeting and therefore not confidential.
  - (iii) He submitted that ABP had not provided adequate explanation of its public interest balancing exercise and, in particular, had not explained how the release of a recording of a public meeting in a process subject to public participation could impact ABP’s impartiality, impair a future decision of ABP or contaminate the decision making process. He also argued that what in fact is at issue in this case is an Environmental Impact Assessment procedure which requires all relevant information to be published within a reasonable time of receipt and which is based on public participation.
  - (iv) He argued that ABP’s refusal to release information “while the case is still live” amounted to a blanket refusal of a certain category of information which is not in accordance with either the letter or spirit of the AIE Regulations and is entirely inconsistent with article 6 of the EIA Directive which requires publication of information within a reasonable time after it is received.
8. My Investigator wrote to ABP summarising the submissions of the appellant and raising queries with regard to its position. A separate request for the environmental information which forms the subject of this appeal had also been made by my Office a number of weeks earlier. Although the information was provided to my Office, no submissions were received from ABP. A Schedule of Records was received, which repeated the basis for refusal set out in ABP’s original decision and internal review. It is regrettable and unacceptable 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 more fully engage with requests concerning the AIE Regulations, both from the public and from my Office.
9. Article 8(a)(iv) provides for refusal of 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)”. There are therefore a number of elements which must be satisfied before the question of refusal under article 8(a)(iv) arises:



- (i) the case must involve the “proceedings” of public authorities;
  - (ii) those proceedings must have an element of confidentiality;
  - (iii) that confidentiality must be adversely affected by the disclosure of the information requested; and
  - (iv) that confidentiality must be protected by law.
10. I will deal with each of these elements in turn. If those elements are satisfied then the next question to be addressed is whether the interest to be protected by reliance on article 8(a)(iv) to refuse the environmental information requested, outweighs the public interest in disclosure of that information.
11. ABP was requested, in the invitation for submissions sent by my Investigator, to set out the “proceedings” it considered to be at issue in this case. However, as outlined above, it did not do so and it therefore it falls to me to identify the “proceedings” at issue in this case in light of the limited information provided. In its original decision, ABP indicated that “the case is still in the course of completion and information on the case file will not be released while the case is still live”. The case to which ABP’s decision refers is Case 311059 i.e. its decision on the Strategic Housing Development (SHD) at Corballis East, Donabate, Co Dublin. SHDs go directly to ABP for decision and such decisions cannot be appealed. Members of the public are entitled to participate in SHD decisions through the making of observations and the facility to request oral hearings. My understanding is that the holding of an oral hearing is at the discretion of ABP and that oral hearings are relatively rare in the context of SHDs although one did take place in this case. My Investigator asked ABP to provide detail in its submissions on the current status of Case 311059 however, as outlined above, no submissions were received from ABP. However, I note that the case details contained on ABP’s website provide that a decision has yet to be made and that the proposed decision date is “not available at this time” (See: <https://www.pleanala.ie/en-ie/case/311059>). Thus, it seems that although the oral hearing on the case has concluded, ABP has yet to reach a decision on the SHD.
12. It can therefore be said that there remain some additional deliberations, or at least some additional steps which must be taken, before ABP issues its decision on Case 311059. However, the appellant is seeking a recording of an element of Case 311059 which has already taken place i.e. the oral hearing. The Court of Justice in *Flachglas* have made it clear that “the concept of ‘proceedings’” referred to in article 4(2)(a) of the Directive (transposed by article 8(a)(iv) of the Regulations) “refers to the final stages of the decision-making process of public authorities” (para 63). A similar conclusion was reached by the Court of Justice in the *Saint-Gobain* case. Although that case dealt with Regulations 1049/2001 and 1367/2006 rather than the AIE Directive, it considered the provisions of the Aarhus Convention on which both the Directive and the Regulations are based. Indeed, the Advocate General, when referring to the ground for refusal at issue in *Saint Gobain* noted that “the same ground for refusal is laid down in article 4(2)(a) of [the AIE Directive]” before concluding that “the concept of ‘proceedings’ must be understood as covering only the deliberation stage of decision-making procedures” (see para 51). The Court of Justice found that “as observed by the Advocate General at 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” (see para 81).

13. As the oral hearing took place in December 2021 and a decision has yet to be made by ABP, it can be assumed that the oral hearing does not form part of the final stages of the decision-making process of ABP and therefore does not satisfy the definition of “proceedings” at paragraph 63 of the decision in *Flachglas Torgau*. Nor does the hearing satisfy the “confidentiality” requirement set out in the Regulations and the Directive. Indeed it would appear contradictory that an oral hearing, which ABP describes on its own website as “a public meeting about an An Bord Pleanála case that anyone can attend” could be considered “confidential”.
14. It must be acknowledged that the wording of article 8(a)(iv) does appear to provide that were release of the recording of the oral hearing to have an adverse impact on the confidentiality of the final stages of ABP’s decision-making process then there would be a *prima facie* basis for refusal (subject to the application of the public interest test mandated by articles 10(3) and 10(4) of the Regulations). Indeed, this is what ABP appears to be suggesting when it states that “the release of these records, as the case is ongoing and a decision has not yet been formulated by [ABP] could impair a future decision of [ABP] [and]...may contaminate the decision-making process”.
15. However, Recital 16 of the AIE Directive clearly outlines that “disclosure of information should be the general rule” and that “public authorities should be permitted to refuse a request for environmental information” only “in specific and clearly defined cases”. It also outlines that “the reasons for a refusal should be provided to the applicant”. The Court of Justice in *Land Baden-Württemberg* have made it clear that “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. The risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical” (see para 69).
16. ABP has provided no reasoning for its conclusion that release of a recording of a publicly accessible oral hearing “could impair a future decision” or “may contaminate the decision process”. The limited information provided by ABP is not sufficient, in my view, to warrant a conclusion that refusal would “specifically and actually” undermine the interest sought to be protected by article 8(a)(iv) of the Regulations which, as outlined in Recital 16 of the Directive “should be interpreted in a restrictive way”. In any case, it is difficult to imagine, even if the broadest interpretation possible were applied, the circumstances in which – even hypothetically – disclosure of a recording of the oral hearing would have an adverse impact on ABP’s decision-making, given that such hearings are held in public and that the documents submitted to ABP by the developer at the oral hearing are publicly available on the Corballis SHD website (see: <https://corballiseastshd.ie/>).
17. I should also acknowledge that the Court of Justice in *Flachglas Torgau* has made it clear that by specifying in article 4(2)(a) of the AIE Directive that the protection of the confidentiality of public



proceedings must be “provided for by law”, the European legislature had made it clear that it wanted “an express provision to exist in national law with a precisely defined scope”. The Court therefore held that “national law must clearly establish the scope of the concept of ‘proceedings’ of public authorities referred to in that provision” (see paras 61 and 63). In this case, there is a suggestion that ABP is relying on the Freedom of Information Act (and, in particular, section 29 of that Act) as the national law which provides for the confidentiality of proceedings which it considers to exist in this case. This is not entirely clear, however, from the original decision, internal review decision or Schedule of Records as ABP have dealt with identical requests from the appellant under the Freedom of Information Act and AIE Regulations in the same correspondence.

18. I have recently referred a question to the High Court on the interplay between article 8(a)(iv) of the Regulations and the provisions of the Freedom of Information Act. If I were satisfied that the other conditions set out in article 8(a)(iv) (as identified in paragraph 9 above) had been satisfied, it would perhaps have been necessary for me to put my decision in this case on hold pending the outcome of those proceedings. However, in circumstances where none of the other conditions are fulfilled, I do not believe it is necessary for me to await the outcome of the High Court proceedings in order to reach a decision in this case.
19. In my view, there is no basis in the evidence before me to justify ABP’s refusal of the information requested on the basis of article 8(a)(iv) of the Regulations.

### **Decision**

20. Having carried out a review under article 12(5) of the AIE Regulations, I annul ABP’s decision and direct release of the information requested.

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

21. 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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**Ger Deering**  
**Commissioner for Environmental Information**  
14 June 2022