



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 CEI/19/0019

Date of decision: 26 May 2020

Appellant: Mr B

Public Authority: Tipperary County Council (the Council)

Issue: Whether the Council was justified in refusing the appellant's request for information relating to compliance with the planning permission for a wind farm development under article 7(5) of the AIE Regulations on the basis that the requested information is not held by or for it

Summary of Commissioner's Decision: The Commissioner found that it was reasonable to conclude that the information requested was not held by the Council following its carrying out of adequate searches and, thus, article 7(5) of the AIE Regulations applied

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

On 28 December 2018, the appellant requested the following:

"All reports and associated noise, SCADA, and wind speed & direction data which is being used to determine Planning Condition 9 of Planning app 041259 and which is governed by the ABP appeal reference PL 23.215597".

SCADA stands for 'Supervisory Control and Data Acquisition'. There was correspondence between the appellant and the Council on foot of his request. On 26 February 2019, the Council wrote to the appellant informing him that it had requested documentation from the wind farm operator regarding compliance with conditions no. 9 and 18 of An Bord Pleanála's decision under planning reference PL 23.215597 (04/1259). It disclosed to the appellant a Compliance Noise Monitoring and Assessment Report, with redactions, which had been prepared by consultants engaged by a third party. Later on that day, the appellant applied for an internal review on the basis of a deemed refusal. The internal review request stated that, in addition to seeking information held by the Council, the request also included data that is available to the Council in the performance of its functions and duties.

On 19 March 2019, the Council wrote to the appellant informing him that on 26 February 2019 the planning authority had provided him with information from the wind farm operator concerning compliance with conditions no. 9 and 18 of the relevant planning permission. The internal reviewer stated that the Council had disclosed to the appellant (all of) the information (it held) relating to the relevant planning conditions.

On 21 March 2019, the appellant responded to the Council's internal review decision stating that he understood that the Council had in its possession copies of the SCADA data he requested. He also noted that the Council might have limited its search to the planning file as opposed to all data held by it.

The Council responded to the appellant on 26 March 2019 re-iterating its position that it had released information to the appellant on 26 February 2019. It stated that in its role as planning authority, it was in the process of evaluating that information to determine compliance with the conditions of the planning permission, and that the report of the planning authority would be made available to the appellant in due course. In relation to the SCADA data, it stated that the wind farm operator provided the Council with the data in February 2019, subject to the Council signing a non-disclosure agreement (NDA). The Council accepted that there was a public interest in the accountability of administrators and the scrutiny of the decision making process but having regard to the NDA it had signed; it found that on balance the preservation of confidentiality outweighed the public interest in disclosure of the SCADA data.

My Office received the appellant's appeal of the Council's internal review decision on 29 March 2019.

I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the correspondence between the appellant and the Council and to the submissions made by the appellant, the Council and the relevant third party to my

Office. I have also 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).

The SCADA data at issue in this case and whether or not that information is held by or for the Council was also at issue in a review I carried out in Case CEI/19/0013 (Mr A and Tipperary County Council), available at www.ocei.ie. I carried out a fresh review of the issues arising from the separate request in this case in light of the scope of the new request and the arguments put forward in the applicant's and Council's submissions in this case. The third party relied in this review on the submissions it made in Case CEI/19/0013.

Scope of Review

In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it. I note that in response to queries made by the appellant prior to his appeal to this Office, the internal reviewer provided the appellant with a further explanation for his decision on 26 March. However, the decision under appeal to this Office is the Council's internal review decision dated 21 March 2019. My review is concerned solely with whether the Council was justified in refusing access to the information requested on the basis that the information, including the SCADA data, was not held by or for it,

Analysis and Findings

Article 7(5) of the AIE Regulations is the relevant provision to consider where the question arises as to whether the requested information is held by or for the public authority concerned. This Office's approach to dealing with cases where a public authority has effectively refused a request under article 7(5) is set out in previous decisions published on our website at www.ocei.ie, such as [CEI/13/0015](http://www.ocei.ie/cases/CEI/13/0015) (Mr. Lar McKenna and EirGrid plc) and [Case CEI/11/0009](http://www.ocei.ie/cases/Case%20CEI/11/0009) (Ms. Rita Canney and Waterford City Council). As these decisions explain, I must be satisfied that adequate steps have been taken to identify and locate relevant records, 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 information.

Article 3(1) of the Regulations defines "environmental information held by a public authority" as meaning "environmental information in the possession of a public authority that has been produced or received by that authority". It defines "environmental information held for a public authority" as meaning "environmental information that is physically held by a natural or legal person on behalf of that authority". As I stated in Case CEI/19/0013 the purpose of the distinction introduced in the current AIE Directive between environmental information "held by" and that "held for" is to make sure that a public authority provides access to environmental information which it is entitled to hold but is not

actually in its possession because it is kept physically on their behalf by other persons or bodies.

The relevant date in determining whether information was held by or for a public authority is the date the AIE request was received (see [Case CEI/18/0042](#) (Lar McKenna and Kildare County Council), available at www.ocei.ie). A public authority is not under an obligation to obtain information that is not held by or for it at the time it receives an AIE request (see Case [CEI/16/0033](#) (An Taisce and the Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs), available at www.ocei.ie). I see no reason to depart from these positions in the current case.

The appellant in his follow up email to the Council on its internal decision states that the Council had in its possession copies of the SCADA data he requested. In Case CEI/19/0013, to which my investigator referred the appellant when inviting him to make a submission, I found that the SCADA data was not held by or for the Council

As set out in detail in that Case CEI/19/0013, the submissions of the Council and the third party explain that on 1 February 2019 the third party provided the Council with a link to a web-based storage service from which the SCADA data could be downloaded and that this was subject to the Council signing a NDA. My Office is aware that it is only after the Council signed the NDA that it was provided with the link to where the data could have been downloaded. The link provided to the Council was valid until 20 March 2019 after which time the link expired and could no longer be used by the Council. It is important to note that the Council maintains that it never downloaded the SCADA data. The third party's submissions support the Council's position that it did not download the SCADA data. It also confirms that the SCADA data was not available or provided to the Council in any other format or medium. I further note that the appellant made his AIE request to the Council on 28 December 2019, which was before the third party provided the Council with a link from which it could download the SCADA data. Accordingly, I am satisfied that the SCADA data did not come into the Council's possession at the time it received the request or at any time during its processing of the request.

The appellant submits that the Council has the power to request the SCADA data and, therefore, it is held by or for it. He asserts that the Council needs the SCADA data in order to perform its environmental and planning statutory functions. In support of his position, he references an unnamed UK judgment, which he contends held that "if a public authority had the legal power or means to obtain the information then it has to be classed 'held by or for' the public authority". He further contends that the legal power or means to request the information alone is sufficient and the public authority does not have to exercise or use its power. Unfortunately, the appellant was not able to provide any details for that judgment such as its citation or the names of the parties. My Investigator searched for the case however, she was unable to locate it or otherwise determine its existence.

The Council explains that it is entitled to request the SCADA data if it is required in relation to its planning functions. The third party acknowledges that the Council is entitled to ask for the SCADA data; however, it maintains that the Council is not entitled to the data on its own account nor does the Council have an entitlement to receive or be provided with the data.

As I stated in Case CEI/19/0013, while the Council may be entitled to request the SCADA data for a limited purpose that does not, in my view, equate to the data being held for the Council within the meaning of article 3(1). I note that the Council initially requested the SCADA data in December 2018 as part of its planning functions. The Council's submissions explain that it subsequently appointed a consultant qualified in Acoustics and Noise Control to report on compliance or otherwise with planning conditions no. 9 and 18. It states that its consultants advised the Council that the SCADA data was not required in order to determine compliance or otherwise with the relevant planning conditions. I further note that the Council's planning enforcement process under the Planning and Development Act 2000 (as amended) in relation to the wind farm at the centre of the case has proceeded without it requiring the SCADA data in order to carry out its planning functions.

The third party unequivocally denies that it holds the SCADA data on behalf of the Council. The third party, which is not a public authority, submits that the SCADA data is held by it for its own purposes. It states that it voluntarily provided the Council with the means to access the SCADA, subject to the terms of a NDA. It explains that one of its employees collected the SCADA data and, that the data forms part of a wider collection of SCADA data that it collects on an on-going basis as part of its commercial operations. I have reviewed conditions no. 9 and 18 of the planning permission for the wind farm (PL 23.215597), which provide that the developer shall make arrangements for the noise monitoring of the wind farm development. I do not see anything in conditions no. 9 and 18 of that planning permission explicitly requiring the third party to provide the Council with the SCADA data. Thus, I accept the third party's position that it produced the SCADA data primarily for its own purposes. In my view, the third party's requiring that the Council sign a NDA before agreeing to provide it with the means to access to the SCADA data supports its position.

For the reasons above, I am satisfied that the SCADA data is not held by or for the Council.

The appellant in his follow up email to the Council on its internal review decision states that the internal reviewer may have limited his search to the relevant planning file rather than to all information held by the Council. As I noted above, a standard of reasonableness must necessarily apply when determining whether the steps taken to identify and locate relevant information are adequate. I have previously held that it is reasonable for a public authority to limit its search to divisions which the authority has determined may hold information relevant to the request, in circumstances where a public authority holds vast quantities of information and a search for information in all divisions would involve considerable staff resources (see Case [CEI/17/0027](#) Ms A & the Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs, available at www.ocei.ie).

I note that the request in this case was for information being used to determine compliance with conditions imposed in a planning permission. I also note that the Council's internal review decision of 19 March 2019 stated that the relevant planning file was examined. In response to enquiries from my Investigator regarding its search, the Council states that when processing the AIE request the planning and environment sections were thoroughly searched. It explains that as the information requested related to environmental data and planning compliance, these sections are the relevant sections in the Council that would hold the information requested. It provided a detailed description of the searches that were

carried out including the names of the officers who conducted the searches, details of where was searched and the manner in which the searches were carried out. It states that they conducted manual and electronic searches for information falling within the scope of the request, including searches of the relevant planning file (which was retrieved from the Council's local archive as the planning application was made over seven years ago) and the planning enforcement file. It also states that the officials who carried out the searches are familiar with the matters the subject of the request and that they were satisfied that no relevant information was misfiled or misplaced. It says that a second person in both the environment and planning sections double-checked to ensure there were no misplaced or misfiled records.

In determining whether the steps taken to look for the records are adequate, I consider that a standard of reasonableness must necessarily apply. In all the circumstances, having regard to the Council's accounts of its search efforts, I am satisfied that it took reasonable steps to identify and locate information falling within the scope of the appellant's request. I find, therefore, article 7(5) of the AIE Regulations applies.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I affirm the Council's decision in this case on the basis that article 7(5) applies to the information sought.

Appeal to the High Court

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.

Peter Tyndall
Commissioner for Environmental Information

26 May 2020