

**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 2014 (the AIE
Regulations)
Case CEI/16/0021**

Date of decision: 6 July 2017

Appellant: Councillor Michael Kilcoyne (the appellant)

Public Authority: Coillte Teoranta (Coillte)

Issue: Whether Coillte was justified in deciding that the information requested by the appellant was publicly available for the purposes of article 7(3)(a) of the AIE regulations. Whether the exception to disclosure under article 9(1)(c) of the AIE Regulations applied to the appellant's request.

Summary of Commissioner's Decision: In accordance with article 12(5) of the AIE Regulations, the Commissioner reviewed Coillte's decision on the appellant's request. He found that Coillte was not justified in deciding that the information requested by the appellant was available in another form or manner for the purposes of article 7(3)(a). Notwithstanding this, the Commissioner found that refusal of the AIE request was justified under article 9(1)(c) of the AIE Regulations. The Commissioner found that the public interest in disclosure was outweighed by the interest served by refusal. Accordingly, the Commissioner affirmed Coillte's decision to refuse the appellant's AIE request, but for different reasons to those stated by Coillte.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision 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

Coillte is a private company established under the Forestry Act 1988 to manage the State's forests on a commercial basis. On 28 March 2016, the appellant emailed an AIE request to Coillte for access to "the mean wind speeds measured for each anemometer on your Cluddaun wind mast" The appellant also requested information on the height of each measurement instrument and the dates of measurement.

Coillte responded on 20 April 2016. It stated that it carried out wind speed measurements at Cluddaun between January 2013 and May 2014, using a temporary "Metmast" weather station. In its decision, Coillte did not disclose the wind speed data collected by the on-site Metmast, but stated the wind data gathered from the Metmast "accords with" the wind speed information contained in Section 2 of the Environmental Impact Statement prepared for the development. Coillte stated that the EIS statement of wind speed was taken from the Irish Wind Atlas published by the Sustainable Energy Authority of Ireland (SEAI). Coillte stated that the SEAI Wind Atlas "confirmed the site as a very good wind resource and suitable for wind energy generation."

The appellant requested an internal review on 24 April 2016, pursuant to article 11 of the AIE Regulations. In an internal review decision of 13 May 2016, Coillte affirmed its earlier decision not to disclose the on-site wind speed measurements on the basis that the exception to disclosure under article 9(1)(c) applied to the information. Coillte clarified that the on-site measurements accorded with the 2003 wind atlas, and not the later 2013 wind atlas. Coillte also suggested that the exceptions to disclosure under articles 8(a)(iv) and 9(1)(d) could apply to the information. Coillte stated that it had taken the public interest into account in refusing the appellant's request.

The appellant appealed Coillte's decision to my Office on 12 June 2016.

Scope of review

Under article 12(5) of the AIE Regulations, my role is to review Coillte's internal review decision and to affirm, annul or vary it. Coillte provided my Office with copies of the Cluddaun Metmast data for the purpose of my review. I have also had regard to submissions made to my Office by the parties.

The AIE Regulations transpose Directive 2003/4/EC into Irish law. This Directive implements the first pillar of the 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). In making this decision I have had regard to the *Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) published by the Minister for the Environment, Community and Local Government [the Minister's Guidance]; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide].

Coillte's Position

Coillte made two submissions to my Office on this appeal. Coillte contended that information on wind speed did not fall within any of the six categories set out in the definition of "environmental information", as provided by article 3(1) of the AIE Regulations.

Article 7(3)(a) of the AIE Regulations provides that, where an AIE request is made in a particular form or manner, access shall be given in that form or manner unless the information is already available to the public in another form or manner that is easily accessible, or access in another form or manner would be reasonable. Coillte submitted that the wind speed measurements recorded at Cluddaun were "effectively the same" information as the data contained in the 2003 SEAI Wind Atlas. Coillte submitted that "no case has been made out to Coillte as to why the publicly available SEAI Wind Atlas is insufficient".

Article 9(1)(c) provides that an AIE request may be refused where disclosure would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest. Coillte characterised its wind speed data as commercial and industrial, on the basis that this information informed the design, financing and business case for a wind farm development. Coillte contended that the common law duty of confidence provides for the confidentiality of this information in national law. Coillte also submitted that section 33 of the Forestry Act 1988 protected commercial and industrial confidentiality for the purpose of article 9(1)(c)

9(1)(d) provides that a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect intellectual property rights. Coillte submitted that it holds the copyright in this information. Coillte stated that the data has ongoing prospective value to Coillte and its partners "only for so long as the data remains confidential and not publicly available".

Coillte brought to my attention its statutory functions as set out in the Forestry Act 1988, and stated that it is obliged to carry on the business of forestry and related activities on a commercial basis. Coillte stated that the public interest was not served by disclosure of information which would interfere with its commercial objectives.

The Appellant's Position

In his appeal to my Office, the appellant submitted that disclosure of the wind speed information would not adversely affect commercial or industrial confidentiality. The appellant submitted that the wind speed data requested is specific to Cluddaun, a forested area, and is of little or no relevance to locations with different topology. The appellant also submitted that as planning permission for the development has been refused, commercial considerations no longer applied with regard to the information. The appellant also submitted that Coillte disclosed aspects of the wind speed information in its planning application and at an oral hearing held by An Bord Pleanála. The appellant submitted that a nearby wind farm disclosed detailed wind speed data in its Environmental Impact Statement.

The appellant submitted that public interest in disclosure outweighed the interest served by refusal, and referred to the public ownership of Coillte in this regard.

Analysis and findings

Consideration of the definition of "environmental information"

Coillte contended that the information requested was not "environmental information" as defined in article 3(1) of the AIE Regulations. With regard to paragraph (a) of the definition, which includes any information on the state of the elements of the environment, including air and atmosphere, Coillte stated that information on wind speed "does not impart any knowledge or insight" on the content or quality of the air or atmosphere. Wind is the movement of air caused by differences in atmospheric pressure. Wind speed data is therefore information on the state of air and the atmosphere, as a description of the movement of air in the environment at a particular place and time, and atmospheric conditions. I am therefore satisfied that information on wind speed falls within the definition of "environmental information" set out in article 3(1).

Consideration of article 7(3)(a)

Article 7(3)(a) provides that, where an applicant requests access to information in a particular form or manner, a public authority may instead provide access in a more reasonable form or manner, or may refer the applicant to easily accessible sources of published information. However, it is important to note that article 7(3)(a) does not allow a public authority to provide access to different information; only the form or manner of access can be modified.

In purporting to grant the appellant's request for information, Coillte referred the appellant to wind speed information contained in the 2003 Irish Wind Atlas published by the SEAI. Coillte sought to rely on article 7(3)(a) in this regard, and contended that providing access to the wind atlas data was sufficient, as this information was the same or similar enough information to the wind speed data recorded at the Cluddaun site. Coillte stated that the 2003 wind atlas "accords with" the wind speed data it recorded at Cluddaun. However, although the wind atlas and the Metmast information is similar, I do not consider the information to be identical for the purposes of the AIE Regulations. In particular, I note that the wind atlas was a modelling exercise, and not a specific and long term measurement of wind speed at Cluddaun. The project report for the 2003 wind atlas states that the standard error rate of the model is 7% when compared to high-quality wind measurements from tall towers. I also note that the 2003 wind atlas was modelled at different heights to the Metmast at Cluddaun, and at a different time. In summary, I am satisfied that the 2003 wind atlas is materially different information to the Cluddaun Metmast data, and not the same information in a different form. As a consequence, I find that Coillte's decision to substitute public wind atlas data for the requested Metmast data was not justified by article 7(3)(a) of the AIE Regulations, or otherwise. Notwithstanding this, I acknowledge that Coillte endorsed the accuracy of the 2003 Irish Wind Atlas readings when compared to the Metmast data.

Consideration of article 9(1)(c)

The exception to disclosure under article 9(1)(c) of the AIE Regulations applies where disclosure of information would adversely affect commercial or industrial confidentiality. In order for this exception to apply, commercial or industrial confidentiality must be provided in national or European Union law in order to protect a legitimate economic interest.

Is confidentiality provided by law to protect a legitimate economic interest?

Coillte contended that a common law duty of confidence prevents the disclosure of the wind speed information. Coillte clarified to my Investigator that the Metmast data was collected by a specialist firm subject to contract. Coillte stated that under this contract, it had discretion to disclose the recorded wind data, subject to some conditions. In light of this discretion to disclose, I am not satisfied that Coillte owes a common law duty of confidence to another person in respect of the wind speed information.

I note that Coillte was established as a company by the Forestry Act 1988. Section 12 of the Forestry Act sets out the objects of Coillte as a company. Under section 12, Coillte must carry on the business of forestry and related activities on a commercial basis, and must utilise and manage the resources available to it in a manner consistent with its commercial objectives. Section 33 of the Act provides that it is an offence for a person to disclose confidential information obtained by him while performing duties as a director or member of staff of Coillte unless he is duly authorised to do so. Section 33 does not expressly refer to commercial or industrial information, however it is reasonable to interpret this section as including confidential information on commercial and industrial aspects of Coillte's activities.

I am satisfied that the effect of these provisions is to create a statutory duty of confidentiality on the part of Coillte staff. I am therefore satisfied that under Section 33 of the Forestry Act, commercial and industrial confidentiality is provided to protect Coillte's legitimate economic interests.

Is the specific information requested confidential or industrial in nature?

Section 33 of the Forestry Act defines "confidential" for the purposes of that section as "that which is expressed to be confidential either as regards particular information or as regards information of a particular class or description". I note that, in the course of replying to the appellant's AIE request and this appeal, staff on behalf of Coillte have expressed the position that the Cluddaun wind speed data is confidential, on the basis that it is commercially sensitive. Coillte submitted that the wind speed data recorded by the Cluddaun Metmast constitutes high quality information on the viability of a wind energy undertaking at that location, which formed an essential part of the business case for the development.

The appellant submitted that the wind speed data has lost its commercial or industrial quality because planning permission was not granted for the Cluddaun wind farm. Coillte submitted that the wind data collected at Cluddaun has enduring commercial value in terms of potential future development at the site, as well as possible application to wind energy projects in adjacent sites. I accept that the data has not lost its commercial or industrial quality in circumstances where Coillte may decide to develop the land in future.

The appellant also submitted that the information was partially disclosed by Bord na Móna in the course of the planning application and oral hearing for the wind farm. The appellant did not state precisely what information was disclosed in this regard. My Investigator emailed the appellant and asked him to provide more detail on disclosures, however no reply was received to clarify the appellant's statement. I note that the Environmental Impact Statement prepared by Coillte in the course of its planning application did not contain the wind speed data recorded at Cluddaun, and instead referred to the 2003 Wind Atlas. Coillte provided my Office with a note of An Bord Pleanála's oral hearing; however, it is not clear from this record that specific wind speed data was disclosed. Accordingly, I am not satisfied that Coillte has otherwise published or disclosed the exact wind speed data in question.

I have also considered whether the Metmast data lacks confidentiality on the basis that public sources of meteorological information record wind speed for similar times and locations. I am satisfied that the exact wind speed values recorded at the development site at Cluddaun are not available to the public, and are known only to Coillte and its agents. The information collected by the Metmast can be distinguished from other wind data for same geographic area on the basis that it is a precise, long-term, and localised measurement of wind information, recorded by a specialist firm for the express purpose of wind farm development.

I am therefore satisfied that the Cluddaun wind speed information is confidential. I am also satisfied that disclosure of the information in the context of an AIE request would adversely affect such confidentiality.

Does the public interest in disclosure outweigh the interests served by refusal for the purposes of article 10(3)?

Article 10(3) of the AIE Regulations provides that a public authority must consider each AIE request on an individual basis, and weigh the public interest served by disclosure against the interest served by refusal. The public interests served by disclosure in this instance include the transparent operation of State owned companies, and the public interest in transparent planning and development. I consider the interests served by refusal to include Coillte's interest in effectively pursuing its commercial objectives, and the public interest in effective management of commercial undertakings owned by the State. In this instance, Coillte has refused to disclose detailed meteorological information. This information was collected to support the business case for a wind farm development. Planning permission was subsequently not granted for this development. Coillte submitted that disclosure would interfere with its commercial objectives, and stated that alternative meteorological information was widely available to the public. The appellant contended that there is a strong public interest in the transparent operation of Coillte as a publicly owned company. The appellant submitted that the commercial interest served by refusal was limited in circumstances where planning permission was refused, and the development did not proceed.

I agree that the commercial interest served by refusal is reduced because the proposed Cluddaun development did not proceed. Nevertheless, I acknowledge that Coillte may wish to rely on the

Cluddaun wind speed data in future. I consider that the public interest in disclosure was substantially met in this case by Coillte's Environmental Impact Statement, which disclosed general meteorological information for the Cluddaun site. In particular, I note that Coillte has endorsed the accuracy of the 2003 SEAI Wind Atlas when compared to the detailed wind speed survey at Cluddaun (albeit without disclosing the detailed information). On balance, I am satisfied that the interest served by refusal outweighs the public interest served by disclosure on this occasion.

Decision

In accordance with article 12(5) of the Regulations, I have reviewed Coillte's decision on the appellant's request.

I find that Coillte was not justified in deciding that the information requested was available to the public in another form or manner for the purposes of article 7(3)(a). Notwithstanding this, I find that Coillte was justified in refusing the appellant's request on the basis of article 9(1)(c) of the AIE Regulations. I find that the public interest in disclosure is outweighed by the interest served by refusal on this occasion. Accordingly, I affirm Coillte's decision to refuse the appellant's AIE request, but for different reasons to those stated by Coillte.

In circumstances where I am satisfied that the exception to disclosure under article 9(1)(c) applies, it is not necessary for me to consider the application of article 9(1)(d). I therefore make no findings in this regard.

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
July 2017