



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/19/0013

Date of decision: 28 February 2020

Appellant: Mr Raymond Neilon

Public Authority: Tipperary County Council (the Council)

Issue: Whether the Council was justified in refusing access to SCADA data relating to a wind farm on the basis that it was not held by or for the Council

Summary of Commissioner's Decision: The Commissioner found that the SCADA data was not held by or for the Council 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 23 December 2018 the appellant requested the following information from the Council:

"an electronic copy (ideally in Excel format) of all the SCADA data held by Tipperary Co. Council for Garracummer windfarm at Hollyford County Tipperary".

As the Council's offices were closed on 23 December and only re-opened on 28 December 2018, the Council did not receive the request until 28 December 2018.

On 24 January 2019 the Council made a decision granting access to records which it stated were available to it. The SCADA data was not included in the information which the Council released to the appellant.

On 26 January 2019 the appellant requested an internal review of the Council's decision on the basis it had failed to include the SCADA data in the information released. In its internal review decision of 21 February 2019 the Council affirmed its original decision. That decision stated that no additional SCADA data was available to the person who made the initial decision on the request. The appellant appealed the Council's internal review decision to my Office on 12 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 submissions made by the appellant and the Council and the relevant third party. 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).

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. This review is concerned solely with whether the Council was justified in refusing access to the SCADA data on the basis that the information was not held by or for it. My remit as Commissioner does not include adjudicating on how public authorities carry out their functions generally.

Analysis and Findings

Article 7(1) of the AIE Regulations requires public authorities to make available environmental information that is held by or for them on request. 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. Article 7(5) of

the AIE Regulations provides that, where a request is made to a public authority and the information requested is not held by or for the authority concerned, it shall inform the applicant as soon as possible that the information is not held by or for it.

In line with Article 2(3) and (4) of the Directive, article 3(1) of the AIE Regulation distinguishes between information "held by" and information "held for" a public authority. Article 3(1) of the AIE Regulations provides that:

"environmental information held by a public authority' means environmental information in the possession of a public authority that has been produced or received by that authority;

'environmental information held for a public authority' means environmental information that is physically held by a natural or legal person on behalf of that authority".

The previous AIE Directive (Directive 90/313/EEC) referred only to access to environmental information "held by" public authorities. According to the Explanatory Memorandum for the Proposal for a Directive of the European Parliament and of the Council on public access to environmental information (COM/2000/0402 final), available at www.eur-lex.europa.eu, the purpose of the distinction introduced by the current AIE Directive is to ensure that public authorities provide 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 appellant submits that the Council held or holds the SCADA data. He states that he was informed by an official at the Council that it was due to receive a copy of the SCADA data from the wind farm operator (the third party). The Council's submissions clarify that one of its officials - the official whom the appellant states informed him that the Council was due to receive the SCADA data - asked the third party for the data in December 2018. The Council states that the third party advised it that the SCADA data was commercially sensitive and that "it could only be issued on foot of a confidentiality agreement". It explains that this was "tentatively agreed" with a view to completing the process in January 2019. However, according to the Council, that official subsequently went on leave and the matter was referred to a colleague in the Council.

The Council submits that on 1 February 2019 it again requested the SCADA data from the third party and that, subject to the Council signing a non-disclosure agreement (NDA), it was provided with a link from which the data could be downloaded. However, it states that on February 2019 the third party informed the Council that the SCADA data could not be released as this would be a breach of the NDA. The Council maintains that it did not download the SCADA data from the link provided, that access to the link has since expired, and that, pursuant to legal advice, the third party is no longer granting and will not grant the

Council access to the data. I accept the Council's written assurance that it did not download the SCADA data from the link the third party provided to it, and that its access to the data has since been rescinded. In any case, the Council maintains that it did not have any access to the SCADA data at the time the request was made in December 2018. The Council's position is supported by the third party whom my Office invited to make a submission in this case.

The third party submits that it voluntarily made the SCADA data available to the Council under, and subject to the terms of, a NDA, by providing the Council with a link to web-based storage service on 1 February 2019 from which the data could be downloaded. It explains that the link was valid from 1 February to 20 March 2019 after which time the link expired and could no longer be used by the Council. It states that the Council did not download the SCADA data from the link it provided to the Council. It also confirms that the SCADA data was not available, or provided, to the Council in any other format or medium. I accept that the SCADA data was produced by the third party and not by the Council. I also accept that the SCADA data did not come into the Council's possession either at the time it received the request or at any time during its processing of the request.

The appellant submits that the SCADA data must be made available to the Council pursuant to the planning permission for the wind farm. The Council clarifies that it is entitled to request the data if it is required in relation to its planning functions. 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).

The third party unequivocally denies that it holds the SCADA data on behalf of the Council. It 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. It explains that the SCADA data was collected by one of its employees 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. In the circumstances, I accept that the third party does not hold the SCADA data on behalf of the Council. I note that it submits that it holds the SCADA data for its own commercial purposes. In my view, its requiring the Council to sign a NDA before agreeing to provide it with access to the SCADA data supports its position. The third party is not a public authority and the SCADA data held by it is held for its own purposes.

In the circumstances, I accept that the SCADA data is not held by or for the Council. I am therefore satisfied that article 7(5) of the 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

28 February 2020