



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)**

Cases: OCE-104056-M4K5P6, OCE-104057-W6W7F1 and OCE-104058-W7V4G8

Date of decision: 20 July 2021

Appellant: Mr. Raymond Neilon

Public Authority: Tipperary County Council (the Council)

Issue: Whether the Council was justified in refusing access to the information requested in each case on the basis that it was not held by or for the Council.

Summary of Commissioner's Decision: In each case, the Commissioner found that the information was not held by or for the Council and 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 and context

1. This is a decision on three appeals in respect of three separate requests to Tipperary County Council (“the Council”) for information on noise assessments in relation to Garracummer Wind Farm. In all three appeals, the Council has stated that the information is not held by or for it. I have decided to consider the three appeals together in the interest of their timely resolution.

Context of the requests

2. Each of these appeals concerns a request for information relating to noise emanating from Garracummer Wind Farm, a wind farm operated by Brookfield Renewable Ireland Limited (“Brookfield”). The wind farm was developed in accordance with planning permission granted by the Council in its capacity as planning authority on 24 November 2005 and, on appeal, by An Bord Pleanála on 5 May 2006. The planning and appeal files (reference numbers 041259 and PL23.215597, respectively) are available on the Council’s website [here](#).

3. Conditions 9 and 18 of the planning permission granted on appeal are relevant to noise. Condition 9 provides:

“(a) Noise levels emanating from the proposed development when measured at the nearest noise sensitive locations, i.e. dwelling houses, shall not exceed 43 dB(A) LA₉₀ (10 minutes). Tonal or impulsive qualities in the noise shall be avoided. Measurements shall be made in accordance with ISO recommendations R 1996/1 (Acoustics – Description and Measurement of Environmental Noise, Part 1: Basic Qualities and Procedures).

(b) Prior to the commissioning of the plant, the developers shall arrange for the monitoring of noise levels within six months of the commissioning of the development. The nature and extent of the monitoring programme, and noise sensitive locations to be monitored, shall be agreed with the planning authority. Mitigation measures shall be submitted to the planning authority for written agreement in the event of noise levels exceeding the permitted levels and having an adverse impact on nearby noise sensitive properties.

Reason: In the interest of residential amenities.”

4. Condition 18 provides, insofar as relevant to noise and to enforcement by the planning authority:

“Within three months of the date of this order, the developer shall submit to, and obtain the written agreement of, the planning authority, a proposal for an Environmental Management System (EMS) in accordance with Section 4.6 of the Environmental Impact Statement (which identifies the requirement for a Construction Phase Environmental Management Plan is put into operation in addition to the employment of a geotechnical expert to approve methodology of construction and supervise the construction on site). This shall include provisions for the following:-

(a) proposals for the suppression of on-site noise,

(b) details of the instrumentation, means to be used and the method of measurement of noise,



...

(i) proposals for the provision of unhindered access to officials of the planning authority or its authorised agents to carry out inspections, sampling, monitoring or other investigations as deemed necessary.

In the event of Trigger Levels being reached or exceeded for any of the specified monitoring parameters, including those referred to above, the developer shall notify the planning authority without delay, and shall carry out any remedial measures specified by the planning authority, including, if necessary, cessation of works. The determination of appropriate “Trigger Levels” in relation to the conditions of this permission shall form part of the agreed Environmental Management System. All details shall be retained by the developer / operator of the 13 number wind turbines and shall be made available to the planning authority and/or their agents, following a request to the developer/operator to do so.

Reason: In the interest of safeguarding local amenities and the protection of public health.”

5. Since the grant of planning permission, a number of noise reports have been commissioned in respect of the wind farm and provided to the Council for consideration. The reports that are relevant to the information requested in these appeals are:
 - a. DK/09/4858NR01 (“the 2009 Report”): This report was completed on 6 October 2009 by AWN Consulting Limited on behalf of SWS Energy (the then operators of Garracummer Wind Farm).
 - b. DB/17/9417NR02 (“the 2018 Report”): This report was completed on 24 January 2018 by AWN Consulting Limited on behalf of Brookfield (the current operators of Garracummer Wind Farm) in response to a complaint in relation to noise. The report included a noise assessment at the appellant’s residence in May 2017.
 - c. DB/20/11377NR01 (“the 2020 Report”): This report was completed on 12 June 2020 by AWN Consulting Limited on behalf of Brookfield in response to an enforcement letter issued by the Council on 13 August 2019. The report included a noise assessment at the appellant’s residence between 7 February and 20 March 2020.
6. The purpose of each noise report was to assess the potential or actual noise impact of the development. Each report was submitted to the Council in order that it could assess compliance, or predicted compliance, with conditions 9 and 18 of the planning permission.
7. As set out in detail below, the appellant has requested both “primary data” and “SCADA data” from the Council. The Council understands “primary data” to mean the noise and windspeed data from noise monitoring carried out at locations at a windfarm. The Council understands “SCADA data” to mean Supervisory Control and Data Acquisition data, which is data produced by a software programme that takes noise monitoring information from wind turbines and feeds it back to a centralised system that monitors the data collected. The appellant has not challenged such an interpretation and I adopt it for the purpose of this decision.



Previous related appeals

8. Requests to the Council in respect of noise data relating to the development at Garracummer Wind Farm have been the subject of five previous appeals to this Office:
 - a. In [CEI/19/0013](#), on 23 December 2018, the appellant (Mr. Neilon) requested an electronic copy of all the SCADA data held by the Council for Garracummer windfarm. The Council disclosed some information to the appellant, but notified the appellant that the SCADA data requested was not held by or for the Council.
 - b. In [CEI/19/0019](#), on 28 December 2018, the appellant (Mr. B) requested all reports and associated noise, SCADA, and wind speed & direction data which is being used to determine compliance with planning condition 9. The Council disclosed to the appellant a Compliance Noise Monitoring and Assessment Report, with redactions, which had been prepared by consultants engaged by a third party, but notified the appellant that the other information requested was not held by or for the Council.
 - c. In [CEI/19/0022](#), on 1 March 2019, the appellant (Ms. C) requested the SCADA data from noise monitoring of Garracummer Windfarm that was carried out by a third party at the wind farm between 16 May and 5 July 2017. The Council notified the appellant that, in effect, the information requested was not held by or for the Council.
 - d. In [CEI/19/0029](#), on 29 March 2019, the appellant (Mr. Neilon) requested the SCADA data from Garracummer Wind Farm that is held by the Council. The Council notified the appellant that, in effect, the information requested was not held by or for the Council.
 - e. In [OCE-97484-R5V6V1](#), on 8 July 2020, the appellant (Mr. Neilon) requested all recorded data and audio files collected at his home between 7 February and 20 March 2020 during a noise assessment required by the Council in relation to Garracummer Wind Farm. The Council notified the appellant that the information requested was not held by or for the Council.
9. In each of the cases above, I affirmed the Council's decision on appeal.

The appeals now under consideration

OCE-104056-M4K5P6

10. On 18 November 2020, the appellant requested the SCADA data from the noise assessment that was carried out at his residence between 7 February and 20 March 2020 (resulting in the 2020 Report). On 15 December 2020, the Council notified the appellant that the Council does not hold the information requested. The Council stated that its noise consultant had confirmed that he did not need the SCADA data when carrying out his review of the 2020 Report, so it was not requested. On 29 December 2020, the appellant requested an internal review of the Council's decision. On 28 January 2021, the Council stated that it had reviewed the relevant file and checked its records and it found that the information requested is not held by the Council.

OCE-104057-W6W7F1



11. On 19 November 2020, the appellant requested:
 - a. the complete noise report DK/09/4858 NR01 (the 2009 Report) from Garracummer Windfarm; and
 - b. all the primary data that belongs with this report.
12. On 17 December 2020, the Council provided the appellant with a copy of the 2009 Report pursuant to the first part of the request, but notified the appellant that the Council does not hold the primary data in relation to the 2009 Report. On 30 December 2020, the appellant requested an internal review of the Council's decision on the second part of the request, stating that "this data is part of the report". On 28 January 2021, the Council stated that it had reviewed the relevant files and checked its records and it found that the primary data requested is not held by the Council.

OCE-104058-W7V4G8

13. On 24 November 2020, the appellant requested:
 - a. all primary data collected at his residence from two noise assessments, one in 2017 (resulting in the 2018 Report) and one in 2020 (resulting in the 2020 Report); and
 - b. the SCADA data that was used by AWN Consulting to analyse these reports.
14. On 18 December 2020, the Council notified the appellant that the Council does not hold any of the information requested, stating that its noise consultant had confirmed that when carrying out his reviews of the 2018 Report and the 2020 Report he did not need the primary data or SCADA data, so they were not requested. On 28 December 2020, the appellant requested an internal review of the Council's decision. On 28 January 2021, the Council stated that it had reviewed the relevant files and checked its records and it found that the information requested is not held by the Council.
15. The appellant brought an appeal to my Office in respect of each refusal described above on 19 February 2021.
16. I have now completed my review of each appeal under article 12(5) of the AIE Regulations. In carrying out my review of each appeal, I have had regard to the submissions made by the appellant, the Council and the relevant third party, Brookfield. The Council relied on the submissions it had made in [OCE-97484-R5V6V1](#) and Brookfield relied on the submissions made in both [CEI/19/0029](#) and [OCE-97484-R5V6V1](#). In addition, I have had regard to:
 - a. the [Guidance document](#) provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations;
 - b. Directive 2003/4/EC ([the AIE Directive](#)), upon which the AIE Regulations are based;
 - c. 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



- d. The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ([the Aarhus Guide](#)).
17. It is important to note that although the previous appeals described above are relevant due to the same public authority and third party and the similar subject matter, I am not bound to follow my previous decisions. I have conducted a fresh review of all aspects of each of these appeals, in light of the facts and the submissions made by the parties.
18. What follows does not comment or make findings on each and every argument advanced but I have considered all materials submitted in the course of the investigation.

Scope of Review

19. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decisions and to affirm, annul or vary them. This review is solely concerned with whether the Council was justified in refusing access to the information requested in each case on the basis that the information was not held by or for it.

Preliminary matters

20. The appellant provided my Office with detailed submissions as to his personal interest in receiving the requested information. The appellant entreated me to take into account the impact that noise emanating from Garracummer Wind Farm is having on him and his family and the purpose for which he seeks the requested information. I have no doubt that the circumstances surrounding the appellant's requests for information are a cause of great distress to him and that his interest in receiving the information requested is genuine. However, the duties of public authorities to disclose environmental information held by or for them apply irrespective of whether the applicant has a particular interest. In each of these appeals, my remit under the AIE Regulations is limited to a review of the Council's decision to refuse access to the information on the basis that the information was not held by or for it. The appellant's particular interest in receiving the information is not relevant to that determination.
21. The appellant has provided me with detailed submissions about the exercise of the Council's planning functions in relation to Garracummer Wind Farm. It is not part of my functions as Commissioner to review any action taken by public authorities otherwise than under the AIE Regulations. As such, I have no power to review the Council's exercise of its planning functions.
22. The appellant has expressed concern that I am biased in my decision-making, in that I am "not looking for reasons to grant these AIE appeals", but that I am "finding ways of not granting us data that is affecting our lives and the lives of others as [the Commissioner] knows that the only way for us to receive this data is to go to court". I wish to assure the appellant that I do not have an interest in the outcome of any given appeal. My function is to carry out a fresh review of public authorities' decisions in accordance with the AIE Regulations and the AIE Directive, which is what I will do in relation to each of these appeals.

Analysis and Findings



23. Public authorities are only required by the AIE Regulations to make available environmental information which is held by, or for, the public authority (see article 7(1) and (5) of the AIE Regulations). I will consider separately whether the requested information was held by the Council or for the Council.

Was the information held by the Council?

24. 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. It is clear to me from this definition that the relevant date in determining whether information was held is the date the AIE request was received by the public authority.

OCE-104056-M4K5P6: SCADA data from noise assessment 7/2/20-20/3/20

25. The appellant submits that the Council should have been provided with the SCADA data from the noise assessment at the same time as the 2020 Report. The appellant relies on a copy of a noise monitoring survey report submitted to South Tipperary County Council in 2014 in a similar matter relating to Garracummer Wind Farm on behalf of a different third party, which was accompanied by a CD containing raw survey data. The Council submits that, in this case, the 2020 Report was not accompanied by the SCADA data when it was provided to the Council. The Council relies on its submissions in case [OCE-97484-R5V6V1](#), which concerned a request for the primary data underpinning the 2020 Report.
26. The appellant submits that the Council subsequently received the SCADA data, relying on internal correspondence between two officials in the Council on 6 July 2020. In this correspondence, the officials agreed to seek clarification from Brookfield on the following, to assist the Council's noise consultant in his review:
- “Given the elapsed time since the installation of the GWF meteorological mast and its anemometers, and the likely absence of any intervening calibration, it would be useful to carry out a short exercise whereby wind speed and direction data recorded by anemometers on onsite masts, and/or nearby turbines, are retrieved from the GWF SCADA system for one or more random periods and compared, thus providing increased confidence or otherwise in mast M2 data.”
27. In subsequent correspondence between the Council and Brookfield in relation to the appellant's request in case [OCE-97484-R5V6V1](#), Brookfield indicated that it intends to answer the clarification questions raised by the Council on its report. The appellant submits that these pieces of correspondence demonstrate that the Council must have sought and received the SCADA data in respect of the 2020 Report.
28. The Council states that the SCADA data in respect of the 2020 Report was neither requested nor received. In respect of the correspondence described above, the Council submits that it wrote to Brookfield requesting it to “carry out a short exercise whereby wind speed direction data recorded by anemometers on onsite masts, and/or nearby turbines, are retrieved from the GWF SCADA system for one or more random periods and compared, thus providing increased confidence or



otherwise in Mast 2 data”. The Council submits that Brookfield responded to this request by providing a further report from AWN Consulting, dated 24 July 2020 (DB/20/11377NT01), which provided the requested clarification and summarised the outcome of the requested exercise, but did not attach the SCADA data. The relevant correspondence and the 24 July report were provided to my Office for review.

29. I have carefully considered the submissions and documents provided by the appellant and the Council. While I accept that in some previous instances a noise report submitted to the Council may have been accompanied by SCADA data, I find no evidence that the Council received the SCADA data at the same time as the 2020 Report or thereafter. Indeed, the correspondence and documents provided by both the appellant and the Council indicate the contrary. I am satisfied that the SCADA data from the noise assessment at the appellant’s home between 7 February and 20 March 2020 was not held by the Council at the time of the request.

OCE-104057-W6W7F1: primary data relating to noise report DK/09/4858 NR01

30. The appellant submits that the Council should have been provided with the primary data from the noise assessment at the same as the 2009 Report.
31. The Council submits that it did not receive the primary data at the time of submission of the 2009 Report or at any time thereafter. The Council states that its noise consultant has confirmed that the Council did not require this data to confirm compliance with planning conditions, so it was not requested by the Council.
32. While I accept that in some previous instances a noise report submitted to the Council may have been accompanied by primary data, I have not seen any evidence of the 2009 Report having been so accompanied. I am satisfied that the primary data relating to the 2009 Report was not held by the Council at the time of the request.

OCE-104058-W7V4G8: primary data and SCADA data from noise assessments in 2017 and 2020

33. The appellant submits that the Council should have been provided with both the primary data and the SCADA data from each noise assessment at the same as the 2018 Report and the 2020 Report.
34. In relation to the noise assessment in 2017 (resulting in the 2018 Report), the Council’s position in relation to both the primary and SCADA data requested is that it did not receive that data at the time of the report or thereafter. The Council states that the operators of the windfarm and/or its consultants may hold the primary data and the SCADA data.
35. While I accept that in some previous instances a noise report submitted to the Council may have been accompanied by primary data and/or SCADA data, I have not seen any evidence of the 2018 Report having been so accompanied. I am satisfied that the primary data and the SCADA data relating to the 2018 Report was not held by the Council at the time of the request.
36. In relation to the noise assessment in 2020 (resulting in the 2020 Report), the request for primary data seeks the same information as the appellant previously requested from the Council in case [OCE-97484-R5V6V1](#). It is open to the appellant to make repeated requests to a public authority for the same information, as it is possible that a public authority may obtain information after the date of the first request. However, the Council submits in this case that it did not obtain the information



at any time between the date of the request for information in case [OCE-97484-R5V6V1](#) and 24 November when the appellant made the request, which is the subject of this appeal. I have seen no evidence to suggest that the Council did receive the primary data during this time. In the absence of evidence to the contrary, I am satisfied that the primary data relating to the 2020 Report was not held by the Council at the time of the request.

37. The request for SCADA data relating to the 2020 Report seeks the same information as in the first appeal described above - OCE-104056-M4K5P6. As set out above, I am satisfied that the SCADA data from the noise assessment at the appellant's home between 7 February and 20 March 2020 was not held by the Council at the time of the request.

Whether or not the information ought to be held by the Council

38. In all three appeals, the appellant's position is that the Council's conclusion that it did not require the requested information in order to assess compliance with planning permission was unreasonable and that the Council ought to have obtained that information from Brookfield for the purpose of carrying out its functions as a planning authority. The appellant emphasises the importance to him of receiving the requested information, so that he can seek his own expert analysis of the relevant noise reports. However, as I set out above, my remit is limited to review of the decisions of public authorities under the AIE Regulations. It is not my function to consider whether a public authority *ought* to hold information, but whether, as a matter of fact, a public authority held the information at the relevant time.
39. As set out above, in respect of each of the appeals, I am satisfied that at the time of each request the information was not held by the Council. Accordingly, I will now consider whether or not the information was held for the Council.

Was the information held for the Council?

40. Article 3(1) of the AIE Regulations provides that 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.
41. Both the Aarhus Guide and the preparatory documents for the AIE Directive, available at <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:32003L0004&qid=1612959952354>, provide assistance in interpreting the term "on behalf of".
42. The Aarhus Guide states:
- "In practice, for their own convenience, public authorities do not always keep physical possession of information that they are entitled to have under their national law. For example, records that the authority has the right to hold may be left on the premises of a regulated facility. This information can be said to be "effectively" held by the public authority."
43. Similarly, the European Commission's First Proposal for the AIE Directive defined information held for a public authority as meaning "environmental information which is held by a legal or natural person on behalf of a public authority under arrangements made between that authority and that person". The Proposal explained:



“In many cases, experience shows that environmental information which public authorities are entitled to hold on their own account is kept physically on their behalf by other entities. Access to such information may be requested by the public. Public authorities should not be entitled to refuse access to this information simply on grounds that it is not physically in their possession. The proposal ensures that, if such information exists and is kept for the public authority concerned under arrangements with another person or body, it should be made available by the public authority in the normal way.”

44. The proposal was later amended by the European Council to its current wording. The European Council explained that “information held” means “physically held” and deleted the First Proposal's limitative requirement for an arrangement between the holder and an authority. The European Commission noted that by the European Council's amendments the definition was simplified, but the “underlying principle of the definition in the Commission proposal is however ensured”.
45. These sources indicate that the purpose of the provision is to ensure that public authorities cannot avoid their obligations under the AIE Directive by simply outsourcing the storage of that information to a third party.
46. In relation to the primary data and SCADA data relating to the 2018 Report and the 2020 Report (appeals OCE-104056-M4K5P6 and OCE-104058-W7V4G8), the appellant submits that the information is held by Brookfield for the Council, to show compliance with planning conditions. In relation to the data relating to the 2020 Report, the appellant refers in his submissions to the enforcement letter dated 13 August 2019, which requested at point (n) that the noise survey should include “Provision for logging of audio and data in a format to allow export to and analysis by third parties”. Condition 18 of Brookfield's planning permission provides that “all details shall be retained by the developer/operator of the 13 number wind turbines and shall be made available to the planning authority and/or their agents, following a request to the developer/operator to do so”.
47. In my view, the requirements in the enforcement letter and in planning condition 18 do not indicate that the information is held by Brookfield on behalf of the Council. Rather, they indicate that the Council's entitlement to access the information is for the limited purpose of assessing compliance with planning conditions. In this context, I note that planning condition 18 originally required that recorded data in relation to noise surveys would be submitted to the Council on a rolling six monthly basis, but on appeal to An Bord Pleanála that requirement was removed.
48. The Council submitted that that if, having carried out due diligence in relation to any records requested or received, the Council considered that such records had been altered, deleted or not retained, then enforcement action could be taken under the Planning and Development Act 2000 in respect of non-compliance with planning conditions.
49. Brookfield relies on its submissions in case [OCE-97484-R5V6V1](#), where it insisted that it holds the requested information for its own purposes as part of its commercial operations. It states that Brookfield has no obligation, and cannot be compelled by the Council, to provide the information to the Council, and is not under or capable of being put under a legal obligation to provide it. Brookfield states that the Council has no legal entitlement to access the requested information or



any powers to decide whether the information requested is retained, altered or deleted by Brookfield.

50. In respect of appeals OCE-104056-M4K5P6 and OCE-104058-W7V4G8, I have given fresh consideration to the question of whether the primary data and SCADA data relating to the 2018 Report and the 2020 Report are physically held by Brookfield on behalf of the Council. I am satisfied that the Council's ability to access the requested information in each case arises from its function as a planning authority and is confined to that purpose. Although the Council may request the information to establish compliance with planning conditions, and would expect to be provided with it, the Council has no power to require Brookfield to provide it with the information. Similarly, the Council has no power to decide whether the information is retained, altered or deleted by Brookfield. Should Brookfield refuse to provide the information on request, or alter or delete the information, the Council could take action for non-compliance with planning conditions in accordance with Part VIII of the Planning and Development Act 2000, including requiring the development to cease entirely. However, those powers relate to the authorisation of the development to which the information relates, rather than access to, or the integrity of, the information itself. I also note that the Council is not responsible for dealing with queries about the content of the information and the costs arising from holding the information are not borne by the Council. While the Council may be able to access the information for a limited purpose, that does not, in my view, equate to the information being held for the Council, within the meaning of article 3(1) of the AIE Regulations.
51. In respect of appeal OCE-104057-W6W7F1, my Office asked the Council to set out its view as to what person or body holds, or may hold, the information requested. The Council responded that "the operators of the windfarm and/or its consultants may hold the primary data requested by the appellant". In circumstances where the Council is not aware of who holds the information, the question of whether it is held for the Council does not arise. If it did, I would give consideration to the circumstances in which the information is held by the third party and the basis on which the Council could access the information, as I have done above.

Decision

52. Having carried out a review under article 12(5) of the AIE Regulations, I affirm the Council's decision in each appeal.

Appeal to the High Court

53. 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

[Date]