



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/19/0029

Date of decision: 26 May 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 Garracummer wind farm on the basis that the information was not held by or for it

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 29 March 2019, the appellant requested the SCADA data from Garracummer Wind Farm that is held by the Council. SCADA stands for 'Supervisory Control and Data Acquisition'.

On 23 April 2019, the Council notified the appellant that it had requested the SCADA data earlier that year. It explained that the wind farm operator emailed the Council a link to the SCADA data in February 2019 and asked the Council to sign a non-disclosure agreement (NDA). The Council stated that despite its numerous requests to the wind farm operator to withdraw the non-disclosure condition, it refused to do so.

On 24 April 2019, the appellant requested an internal review of the Council's decision. He stated that the Council had the SCADA data in its possession at the time of the request. In its internal review decision of 21 May 2019, the Council stated that it was unable to disclose the SCADA data because of the NDA it had signed and that it no longer had access to the data.

The appellant appealed the Council's internal review decision to my Office on 18 June 2019 on the basis that the Council held the SCADA data at the time of his request.

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, 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).

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 in this case in light of the facts and submissions made by the parties. The Council relied on the submissions it had made in CEI/19/0013 and CEI/19/0019 and the third party relied on the submissions it had made in 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. 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.

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. 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”. The relevant date in determining whether information was held by or for is the date the AIE request was received (see [Case CEI/18/0042](#) (Lar McKenna and Kildare County Council), available at www.ocei.ie).

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 appellant submits that Council held the SCADA data at the time he made his request for it. He states that the Council did not tell him at any stage that the SCADA data was not in its possession. He says that the Council confirmed in a phone call to his wife that the SCADA data was in its possession.

In Case CEI/19/0013, of which the appellant is aware, I found that the SCADA data was not held by or for the Council.

As set out in detail in that case, the submissions of the Council and 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 Council states that on 4 February 2019 the third party advised it that the SCADA data could not be disclosed, as this would be a breach of the NDA. 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. I note that the appellant requested the SCADA data on 29 March 2019, which is after the Council’s access to the data through the link expired. The Council states that on 8 April 2019 the third party verbally informed the Council that pursuant to legal advice, the third party would no longer be granting the Council with the means to access to the SCADA data and that it confirmed this in writing on 11 April 2019. The Council and the third party both provided my Office with a copy of the letter it sent to the Council on 11 April, which reiterates what the third party told the Council on 8 April. The third party’s submissions also support the Council’s position that it did not download the SCADA 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. The third party also confirms that the SCADA data was not available, or provided, to the Council in any other format or medium. Accordingly, I am satisfied 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 under condition no. 18 of the planning permission “[a]ll recorded data shall be submitted to the planning authority on a 6 monthly basis”. The relevant planning conditions in this case are no. 9 (noise) and 18 (environmental management systems) of An Bord Pleanála’s decision (PL23.215597), a copy of which the Council has provided to my Office. Having examined condition no. 18 of the Council’s planning permission and compared the text with that quoted by the appellant in his submission, I am satisfied that he is quoting from the Council’s decision to grant planning permission ([04/1259](#)) and not An Bord Pleanála’s appeal decision (PL23.215597) which supersedes the Council’s decision. Condition no. 9 of the appeal decision (PL23.215597) provides that the developer must arrange for the monitoring of noise within six months of the commissioning of the development and for mitigation measures to be submitted to the planning authority if noise levels exceed those permitted. It does not provide that the noise levels be provided to the Council. Condition no. 18 of that decision 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”. The information relevant to noise which condition no. 18(b) provides must be made available to the planning authority is “details of the instrumentation, means to be used and the method of measurement of noise”. I have not seen a corresponding provision in the appeal decision to the part of condition no. 18 of the Council’s superseded decision quoted by the appellant.

The Council clarifies that it is entitled to request the 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 states that it 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 data, 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. As I state above, I do not see anything in conditions no. 9 and 18 of the planning permission granted on appeal 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 the Council to 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. 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

26 May 2020