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: OCE-104048-N2R9G9

Date of decision: 16 September 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 on the basis that the request was manifestly unreasonable.

Summary of Commissioner's Decision: The Commissioner found that the Council was justified in refusing access to the information requested on the basis that the request was manifestly unreasonable. The Commissioner affirmed the Council's decision.

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

1. This case relates to complaint made by the appellant to the Council in respect of the development of Garracummer Wind Farm by Brookfield Renewable Ireland Limited, in accordance with the 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. The appellant maintains that the noise emanating from the wind farm is contrary to the planning permission for the development and is causing ill-health for the appellant and his family. The appellant has been engaged in communications with the Council about the development since 2016. Requests to the Council for information in respect of the development at Garracummer Wind Farm have been the subject of a number of appeals to this Office – see CEI/19/0013, CEI/19/0019, CEI/19/0022, CEI/19/0029, OCE-97484-R5V6V1 and OCE-104058-W7V4G8.

2. On 26 November 2020, the appellant requested from the Council:

    a. All correspondence with third parties and any written and electronic memos etc "relating to this noise nuisance and ill health case";

    b. All data that has reference to this case that your office held/holds or are entitled to obtain; and

    c. All emails to and from specified Council officials and any third parties concerning this case since we first made a complaint to the Council in 2016 through to 26 November 2020.

3. On 3 December 2020, the Council notified the appellant that it considered his request to be manifestly unreasonable, having regard to the volume and range of information sought, and invited the appellant to make a more specific request, including by excluding records already received or refused.

4. On 4 December 2020, the appellant submitted a revised request for "all correspondence with third parties and any written and electronic memos etc. relating to this noise nuisance at Garracummer wind farm", including all correspondence between identified Council officials and any third parties concerning this case.

5. On 23 December 2020, the Council notified the appellant that it refused his request on the basis that it was manifestly unreasonable. The Council stated:

    > "Having considered the time and resources involved in the search, retrieval, examination and supply of such a large volume and range of records, it is my opinion that your revised request remains manifestly unreasonable and would place an unreasonable demand on this Councils resources so as to cause a substantial and unreasonable interference with the work of the Council and its ability to perform its core functions".

6. In weighing the public interest, the Council concluded:

    > "While the public interest would be served by releasing the records in terms of openness and transparency, nevertheless the Council has statutory obligations under Planning and Environmental law, and the time and resources involved in this case would have a

significant adverse effect on the delivery of services to the public, specifically in the Planning Section and the Environment and Climate Action Section."

7. On 23 December 2020, the appellant sought an internal review of the decision. On 28 January 2021, the Council affirmed its decision to refuse the request.

8. The appellant brought this appeal to my Office on 19 February 2021.

9. 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 by the Department. I have also examined the contents of the records at issue. In addition, I have had regard to:

   - 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");
   - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the "Aarhus Guide"); and
   - 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").

10. 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

11. 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 solely concerned with whether the Council was justified in refusing access to the information requested on the basis that the request was manifestly unreasonable.

Preliminary matters

12. In combined submissions in relation to this appeal and appeal OCE-104058-W7V4G8, the appellant 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". As before, 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 this appeal.

The positions of the parties

13. The Council states that it conducted initial searches for the information requested in two sections within the Council, the Planning section and the Environment and Climate Action (ECA) section. The Council states that, in order to respond to the request, it would need to review a total of 1,150 hard-copy planning files, 750 hard-copy ECA files, 350 planning emails and 867 ECA emails. The emails from each section may themselves have attachments to be reviewed. The Council estimated that it would take approximately 97 uninterrupted hours of work to review these documents, including time spent on retrieval of documents and coordination of response. This time estimate includes search and retrieval of the documents, examination and consideration for relevance and application of the AIE Regulations, preparation of the documents to be supplied (copying / scanning) and preparation of a schedule of documents.

14. The Council submits that responding to the request under appeal would have a disproportionate impact on the other work of the Council, in particular its statutory functions, taking into account the size of the Council. The Planning section is comprised of 35 full-time equivalent staff, including planners, technicians, administrative staff and one engineer. It is responsible for the administration of the Planning and Development Act 2000, in the Council's capacity as a planning authority under that legislation. Its work is divided into three principal elements: development management, enforcement and forward planning / planning policy. Those elements cover activities ranging from dealing with applications for planning permission (1,599 in 2020) and investigating alleged unauthorised developments (244 in 2020) through to formulating strategies for future development, such as the County Development Plan 2022-28. The ECA section is comprised of 49 staff, 7 of whom are in the unit responsible for water and air. The section as a whole has statutory responsibility for the implementation and enforcement of various legislative frameworks in the areas of waste management and water, noise and air pollution monitoring and management. It is responsible for the implementation of inspection regimes and enforcement activities in response to these legislative frameworks, including a significant element of responsive unplanned work activities.

15. The Council submits that the work involved in dealing with the request in this appeal would, of necessity, be primarily carried out by senior officers of the Council rather than by administrative staff. Those senior officers have significant overall responsibility in ensuring the efficient and continuous operation of their sections. The Council states that its staff are already working under resource pressures in order to maintain satisfactory performance of its core functions. It submits that diverting staff to deal with the request in this appeal would inevitably lead to a significant adverse impact on the delivery of other core services to the public in both sections.

16. The Council submits that the time already spent considering requests for information by the appellant pursuant to AIE requests, freedom of information requests, subject access requests and Ombudsman investigations is relevant, as it has resulted in the release of a large amount of information to the appellant. Up to the date of this AIE request, the Council had responded to 15 AIE requests, 12 FOI requests, 2 subject access requests and 2 Ombudsman investigations in relation to the appellant's complaint. The Council provided my Office with detailed schedules of the information that has been disclosed and withheld pursuant to those requests and investigations. The Council submits that its experience of responding to those requests, and its resulting

knowledge of what is involved in examination of its files in order to respond to such requests, lends weight to its conclusions about the burden that responding to the request would entail in this case.

17. The Council submits that it is also relevant that it attempted to enable the release of further information by inviting the appellant to narrow his request, but that the revised request made no significant change to the records that would need to be retrieved and examined in order to meet the request.

18. The appellant provided my Office with a detailed description of his engagement with the Council in respect of the development of Garracummer Wind Farm. In summary, the appellant maintains that the wind farm has been emanating noise and vibrations for a number of years, which is affecting the appellant's health and that of his family. Following the appellant's initial complaint in January 2016, noise assessments were carried out by the operator of the wind farm, including two assessments at the appellant's residence, pursuant to the Council's investigation into compliance with planning permission for the development. The appellant received and sought independent analysis of those noise assessments, but the appellant understands that he needs access to data underpinning the noise assessments in order for a comprehensive analysis of them to be conducted. The appellant has repeatedly sought that data from the Council, but the Council refused on the basis that the relevant data is held by the operator of the wind farm and not by and for the Council (see my decisions in OCE-97484-R5V6V1 and OCE-104058-W7V4G8). The appellant submits that the Council ought to have obtained that information for the purpose of carrying out its functions as a planning authority. He submits that the Council ought not to be satisfied with the integrity of the noise assessments carried out in respect of the wind farm, pointing to issues that he has identified with the noise reports. He also submits that he has identified wider issues in relation to compliance with planning permission, all of which have a direct impact on him and his family. The appellant expresses deep concern about the Council's overall approach to assessing planning compliance, suggesting that the Council is in collusion with the operator of the wind farm.

19. In that context, and specifically in light of the impact of the noise and vibrations on the health of the appellant and his family, the appellant submits that his request cannot be considered to be manifestly unreasonable.

Analysis and Findings

20. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive.

21. The scheme of the AIE Directive is to provide for a general right of access to environmental information on request (Article 3) with specific, exhaustive exceptions to that general right of access (Article 4). Recital 16 informs the approach that must be taken to the Directive, providing that: "The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases."

22. Article 4(1)(b) of the AIE Directive provides that "Member States may provide for a request for environmental information to be refused if the request is manifestly unreasonable". The European Commission's First Proposal for the AIE Directive envisaged that the exception in Article 4(1)(b) would cover requests "variously described in national legal systems as vexatious or amounting to an *abus de droit*. Moreover, compliance with certain requests could involve the public authority in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities. Authorities should be able to refuse access in such cases in order to ensure their proper functioning." The Aarhus Convention Compliance Committee (ACCC) has emphasised that "whether or not a request is manifestly unreasonable relates to the nature of the request itself, for example, its volume, vagueness, complexity or repetitive nature, rather than the reason for the request, which is not required to be stated." (Report adopted on a request for advice by Belarus, ACCC/A/2014/1, paragraph 28)

23. In respect of a request which is voluminous or wide-ranging, within the meaning of article 9(2)(a) of the AIE Regulations, it is clear that more than simple volume or complexity is required. Both article 7(2)(b) of the AIE Regulations and Article 3(2)(b) of the AIE Directive specifically envisage that public authorities will deal with voluminous or complex requests, albeit in a longer timeframe. In this respect, I note the findings of the Court of Justice of the European Union in T-2/03 *Verein für Konsumenteninformation v. Commission*, at paragraphs 108-110, and the guidance at page 84 of the Aarhus Guide. I also note the parallel duty in Article 7(1) of the AIE Directive to ensure that public authorities organise environmental information with a view to its active and systematic dissemination to the public. In his Opinion in C-217/97 *Commission v Germany* at paragraph 30, Advocate General Fennelly stated that this duty indicates that individual requests should, in principle, be on matters of detail. As such, the fact that a request is detailed does not mean that it is necessarily unreasonable.

24. When considering whether a request is manifestly unreasonable, it is necessary to examine the impact on the public authority of dealing with the request. In particular, one must examine whether responding to the request would involve the public authority in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities. In light of the findings of the Court of Justice of the European Union in T-2/03 *Verein für Konsumenteninformation v. Commission*, at paragraphs 101-115, I consider that the exception in article 9(2)(a) is only available where the administrative burden entailed by dealing with the request is particularly heavy. The burden is on the public authority to demonstrate the unreasonableness of the task entailed by the request.

25. Where an exception applies, in every particular case a public authority must carry out the balancing exercise required by article 10(3) of the AIE Regulations (see C-266/09 *Stichting Natuur en Milieu*, paragraphs 55-59). The AIE Regulations do not permit public authorities to require an applicant to set out a specific interest justifying disclosure of the environmental information sought. However, where the applicant has provided information as to his particular interest the public authority must take those interests into account when considering the public interest balance in the particular case (see paragraphs 61 to 63, C-619/19 *Land Baden-Württemberg v D.R.*).

Does the exception in article 9(2)(a) apply in this case?

26. The appellant and the Council agree that the appellant's revised request may be properly understood as seeking:

    a. all correspondence between the Council (including specified officers) and third parties concerning alleged noise nuisance at Garracummer Wind Farm, between 27 January 2016 and 26 November 2020; and

    b. any internal written and electronic memos, concerning alleged noise nuisance at Garracummer Wind Farm, between the 27 January 2016 and 26 November 2020.

27. In respect of point (a) above, the Council has identified five third parties, as well as elected representatives.

28. In most appeals before my Office I require the public authority to search for and review all environmental information held, and to make this information available to my Office for the purposes of my review. However, where a public authority contends that a request is manifestly unreasonable with regard to volume or range, I must address this ground for refusal as a preliminary matter. It is my view that it would defeat the purpose of article 9(2)(a) to require a public authority to process an unreasonable volume or range of information for the purpose of providing it to my Office.

29. In essence, the appellant submits that his request cannot be manifestly unreasonable when his interest in obtaining the information is reasonable and genuinely held. 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, as outlined by the ACCC above, whether or not a request is manifestly unreasonable must relate to *the request itself* and not the reason for it. Accordingly, in assessing whether the request is manifestly unreasonable, I must examine the nature of the request, rather than the appellant's interest in receiving the information.

30. The appellant seeks all external correspondence between the Council and third parties, and all internal memos in hard or soft copy, over a four-year period concerning noise emanating from Garracummer Wind Farm. The Council has submitted that identifying the requested information would require a review of 1,150 hard-copy planning files, 750 hard-copy ECA files, 350 planning emails and 867 ECA emails. Having regard to the nature of the request and the period of time to which it relates, I accept this submission. I am satisfied that the information requested is both voluminous and wide-ranging.

31. The Council has estimated that its review would involve 97 uninterrupted hours of work (approximately 2.5 working weeks), primarily by senior officers of the Council. In light of the Council's experience of dealing with requests of this nature and the detail provided by the Council in response to queries from my investigator, I accept the Council's time estimate as reasonable. I have taken into account the size of the relevant sections in the Council and the other statutory functions of the Council. I accept that Council staff are already working under resource pressures in

order to carry out the Council's other core functions. I also accept that the effective operation of the other core functions of the relevant sections in the Council itself contributes to the objective of achieving a better environment, as those functions relate to the management and enforcement of development, planning policy and the monitoring and management of water, noise and air pollution. In that context, I consider that the amount of time that it would take the Council to respond to the request is significant, relative to the size of the Council. In my view, the fact that such work would need to be carried out primarily by senior officers of the Council would result in significant interference with the normal course of the Council's activities.

32. The exception in article 9(2)(a) is not intended to endorse any failure by public authorities to comply with their duties of dissemination of environmental information under article 5 of the AIE Regulations and Article 7 of the AIE Directive. Accordingly, it is relevant to consider whether the information requested is the kind of environmental information that one would expect to be organised by the public authority in a manner that enables its easy dissemination. The request in this case seeks all external correspondence and all internal memos relating to noise emanating from Garracummer Wind Farm over a four-year period. The Council has not organised its records so that all such information is capable of easy dissemination; instead the information is located in several hard copy files and email accounts across two sections of the Council. In my view, the Council would not be expected under the AIE Directive to organise this particular information in any other way, as the Council could not reasonably anticipate that all of its internal memos and external email correspondence in relation to a particular complaint would be requested under the AIE regime. This type of information can be contrasted with, say, the reports of any Council investigations into a particular environmental complaint or the Council's plans or policies in relation to dealing with environmental complaints, which one would expect to be organised in a manner that enables their easy dissemination.

33. I have had particular regard in this case to the volume and the range of information sought, the nature of the information requested, the task that must reasonably be undertaken to identify it, and the impact of dealing with the request on the Council's other functions. I am mindful that the exception in 9(2)(a) is only available where the administrative burden entailed by dealing with the request is particularly heavy. I note that the Council attempted to assist the appellant to make a more specific request, including by excluding records that the appellant had already received from the Council, but that the request was not substantially narrowed. On the facts of this appeal, I find that the threshold under article 9(2)(a) has been met and that the request is manifestly unreasonable.

34. I emphasise that my conclusion in this case should not be taken to mean that public authorities may rely on the exception in article 9(2)(a) in respect of every request for voluminous or wide-ranging information. Each request to a public authority must be considered on its own particular facts.

Does the public interest in refusal outweigh the public interest in disclosure?

35. Although I consider that the exception in article 9(2)(a) applies, that is not the end of the matter. Article 10(3) of the AIE Regulations requires that the public interest served by disclosure is weighed against the public interest served by refusal in each particular case. I have taken into account the following factors.

36. In favour of disclosure, there is an important general interest in the disclosure of environmental information to meet the purpose of the AIE Directive, in particular by contributing to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment, as set out in recital 1 to the AIE Directive. There is also a general interest in the openness and transparency of how local authorities carry out their planning functions, including how they deal with complaints by affected members of the public. In this case, although not required to state an interest, the appellant has in fact stated his interest in receiving the information, which is to hold the Council to account in respect of its planning functions on an issue which has a significant personal impact on him. I am satisfied that there is a public interest in holding planning authorities to account, in light of the substantial impact that planning and development is capable of having on the environment and on the lives of affected individuals.

37. In favour of refusal, in the circumstances of this case, it would have been possible to make a request with more precision and the Council attempted to assist the appellant to do so, in accordance with article 7(8) of the AIE Regulations. As I set out above, the other statutory functions that would be impacted by dealing with the request in this case are themselves functions which have a wide-ranging impact on the environment, including the delivery of public services. For example, the decisions of planning authorities impact on the air and the atmosphere, water, soil, land, landscape and natural sites, and the maintenance of biological diversity. They impact on whether there is pollution from substances, noise, radiation and waste. I do not consider that the Council has been unwilling, or even reluctant, to provide specific information to the appellant on the subject matter of this request. At the date of the request, the Council had responded to 15 AIE requests, 12 FOI requests, two subject access requests and two Ombudsman investigations. The Council has continued to substantively respond to further requests for information by the appellant, under both the AIE regime and the freedom of information regime, in relation to the same subject matter.

38. Having carefully considered all of these factors, it is my view that the public interest served by refusal of the appellant's request outweighs the public interest served by disclosure. Accordingly, I find that the Council was justified in refusing access to the information on the basis that the request was manifestly unreasonable.

39. I acknowledge that my decision will be disappointing to the appellant. However, I emphasise that my decision does not prevent the appellant from seeking further environmental information from the Council, on this subject or on any other. I expect the Council to continue to meet its obligations

under the AIE Regulations, including by offering assistance to applicants for information where requests are made in too general a manner, in accordance with article 7(8) of the AIE Regulations.

Decision

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

Appeal to the High Court

41. 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.

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Peter Tyndall
Commissioner for Environmental Information
16 September 2021