



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/19/0022**

**Date of decision:** 26 May 2020

**Appellant:** Ms C

**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 1 March 2019, the appellant 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 appellant stated that she understood that the SCADA data was “now in the possession of” the Council. SCADA stands for ‘Supervisory Control and Data Acquisition’.

On 19 March 2019, the Council notified the appellant that it had requested information from the wind farm developers under conditions no. 9 and 18 of the planning permission for the wind farm (PL23.215597 (04/1259)). It said that it was assessing the contents of their response in order to determine compliance with conditions no. 9 and 18. It stated that upon completion of that process, the environment section of the Council would review the matter of compliance in order to determine if it should take any further action on the matter. The decision did not make any specific reference to the SCADA data or whether that was included in the information requested or the information that the wind farm developer had provided the Council with in response.

On 23 March 2019, the appellant requested an internal review of the Council's decision. The appellant queried why the Council had neither granted nor refused access to the SCADA data she had requested. In its internal review decision of 17 April 2019, the Council stated that “it never held this specific data set nor were they entitled to do so”. It explained that the wind farm operator emailed the Council a link to the SCADA data in February 2019, subject to the Council signing a non-disclosure agreement (NDA). The Council stated that it asked the wind farm operator to withdraw the non-disclosure condition but that the operator refused to do so and on 8 April 2019 it informed the Council that it had terminated access to the data.

The appellant appealed the Council's internal review decision to my Office on 6 May 2019 on the basis that the Council refused access to the SCADA data despite this having been in its possession at the time of her 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](http://www.ocei.ie). I carried out a fresh review of the issues arising in this separate request in light of the facts and submissions made by the parties in this case. The Council relied on the submissions it made in CEI/19/0013 and

CEI/19/0019 and the third party relied on the submissions it made in CEI/19/0013 in this review.

### **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](http://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 its behalf by other persons or bodies.

The appellant submits that the SCADA data was in the Council’s possession at the time she made her request for it. She states that the Council did not tell her at any stage that the SCADA data was not in its possession. She says that the Council confirmed to her in a phone call that the SCADA data was in its possession.

In Case CEI/19/0013, to which my Investigator referred the appellant when inviting her to make a submission, I found that the SCADA data was not held by or for the Council. As set out in detail in that Case CEI/19/0013, the submissions of the Council and the 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 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.

While it appears that the Council may have had the means to download the SCADA data at the time the appellant made her request on 1 March, it maintains that it never downloaded the data. As I stated in Case [CEI/16/0033](#) (An Taisce and the Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs), available at [www.ocei.ie](http://www.ocei.ie), a public authority is not

under an obligation to obtain information that is not held by or for it at the time it receives an AIE request. As noted above, the Council submits that it did not download the SCADA data from the link provided. By way of explanation, it 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. It also 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 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 re-iterates 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 at the time it received the request or at any time during its processing of the request.

The Council explains 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 it 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 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 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. I have also reviewed conditions no. 9 and 18 of the planning permission for the wind farm (PL 23.215597), which provide that the developer shall make arrangements for the noise monitoring of the wind farm development. I do not see anything in conditions no. 9 and 18 of that planning permission 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 requirement that the Council 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