

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 2014 (the AIE Regulations)

Case CEI/17/0006

Date of decision: 14 February 2018

Appellant: Right to Know CLG

Public Authority: Transport Infrastructure Ireland (TII)

Issues: Whether TII was entitled to refuse the appellant's request. In particular, whether TII was entitled not to process the appellant's AIE request on the basis that Meath County Council (the Council) was the relevant designated authority for producing the noise maps; whether the appellant's request was granted by the disclosure of information by TII during the review; and whether TII provided an adequate account of searches for relevant information.

Summary of Commissioner's Decision: In accordance with article 12(5) of the Regulations, the Commissioner reviewed TII's decision. The Commissioner found that TII was not justified in refusing the appellant's request. The Commissioner accordingly annulled TII's decision. However, as TII granted the appellant access to the information it requested during the course of the review, the Commissioner did not make any other findings on this appeal.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision 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

Transport Infrastructure Ireland (TII) was established through the merger of the National Roads Authority (NRA) and the Railway Procurement Agency under the [Roads Act 2015](#).

Directive 2002/49/EC relating to the assessment and management of environmental noise requires Member States to publish noise maps and noise management action plans at least every five years. Pursuant to article 7 of Statutory Instrument No. 140 of 2006 Environmental Noise Regulations 2006, Meath County Council (the Council) is the designated action planning authority and noise-mapping body for major roads located within its functional area. In 2013, the Council and Navan Town Council jointly prepared a noise action plan for major roads within their respective functional areas. This noise action plan included two maps (referred to as figure 12 and figure 13 in the noise action plan).

These two maps were as follows:

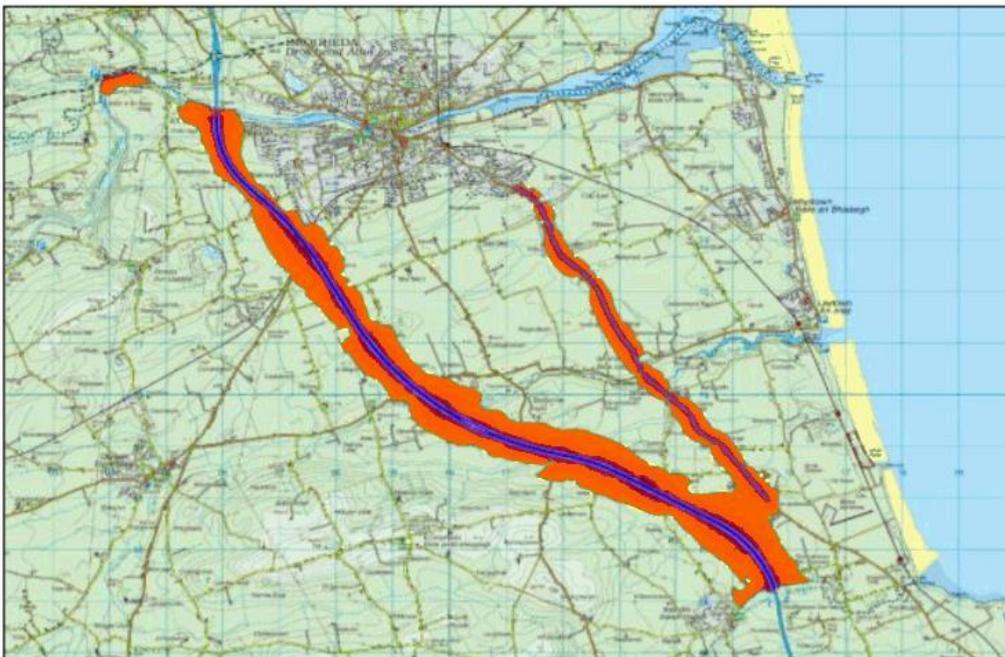


Figure 12: L_{DEN} for M1 motorway and R132

Figure 12 - A map entitled "Lden for M1 motorway and R132". The term "Lden" refers to a day-evening-night noise indicator, an indicator for overall annoyance.

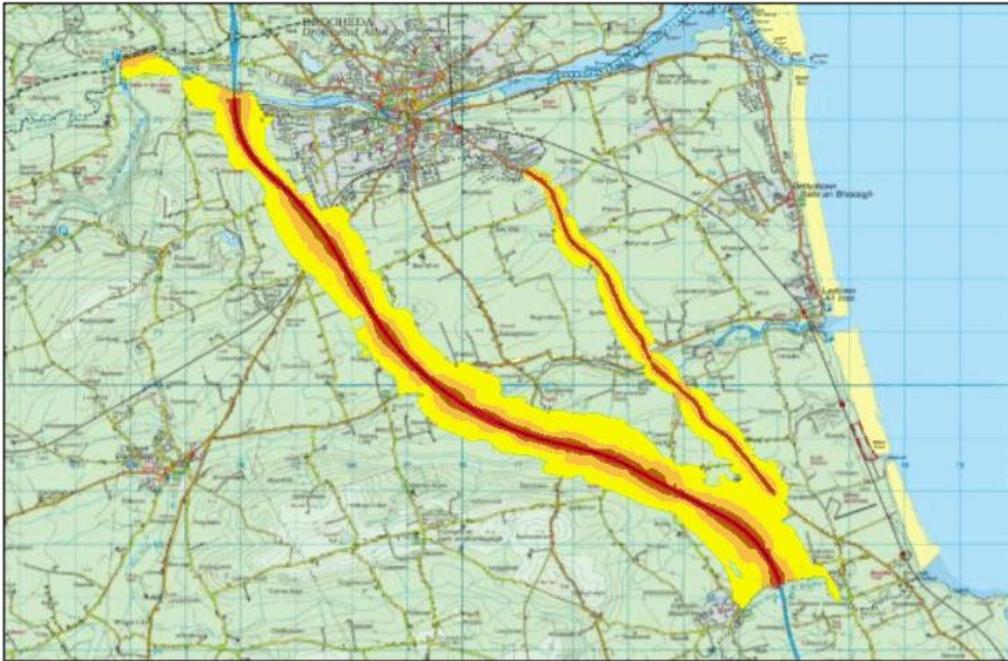


Figure 13: L_{NIGHT} for M1 motorway and R132

Figure 13 - A map entitled " L_{night} for M1 motorway and R132". The term " L_{night} " refers to a night-time noise indicator, an indicator of sleep disturbance.

On 2 November 2016, the appellant made an AIE request to the Council for the "raw data used to generate" the noise maps reproduced above. In a letter of 21 December 2016, the Council advised the appellant that the raw data used to provide the maps was not held by it. The Council stated that the information was held by TII and that it had "forwarded" the appellant's request to TII.

On 5 December 2016, TII received an AIE request from the appellant by email, in the following terms:

“We were informed by Meath County Council that TII holds the raw data used to generate the noise maps in the County Meath Noise Action Plan 2013 ... The request is for:

1. the raw data used to generate the noise maps in Figs 12 and 13 of the above noise action plan approximately within the 50km/h zone in Julianstown Co Meath i.e. between point (53.676745, 6.288459) and (53.666321, 6.276056)

We request the data be provided in a format that can be accessed and viewed with commonly available software such as Excel.”

TII acknowledged the appellant's AIE request in the normal manner. However, TII did not make a decision on the AIE request. Pursuant to article 10(7) of the AIE Regulations, as TII

failed to make an initial decision on the appellant's AIE request, a decision refusing the request was deemed to have been made by TII at midnight on 4 January 2016.

On 5 January 2017, TII received an internal review request from the appellant on the basis that no decision had been made on the AIE request of 5 December 2016. Later the same day, TII emailed the appellant a scanned letter, acknowledging the appellant's internal review request. It stated that the Council was "responsible for preparing strategic noise maps" and that it understood that the Council would address the AIE request directly with the appellant. TII stated its view that "this matter is now resolved". TII's letter dated 5 January 2017 did not meet the standards required in order to be a decision in accordance with the AIE Regulations. It did not state whether the AIE request was being granted or refused nor did it inform the appellant of the right to appeal to me. Accordingly, TII was still required to notify the appellant of its internal review decision.

On 10 January 2017, the Council wrote to the appellant stating that after consulting with TII it had identified a data source for the information requested in the appellant's AIE request to it on 2 November. The Council disclosed an extract of the traffic count data to the appellant and stated that "the raw data used to produce the noise maps comes from the information on the attached spreadsheet". The Council did not explain the meaning of terms used in this spreadsheet, however the "notes" field of the spreadsheet contains the statement "NRA Website 2011 Figures".

On 11 January, the appellant contacted TII and stated that it was not satisfied that the information disclosed by the Council was sufficient to meet its request. The appellant noted that the information disclosed by the Council appeared to have been supplied by TII, (presumably on the basis of the NRA reference in the data).

An internal review decision on the appellant's AIE request fell due on 4 February 2017. In a late internal review decision of 8 February 2017, TII stated that the appellant's AIE request had been referred to it by the Council on an "erroneous basis". TII stated that the raw data for the noise maps was "generated" by the Council. It stated that it "understands that Meath County Council ... has provided the required information to you". TII did not state whether any relevant information was held by it or on its behalf. As TII's internal review decision was not notified to the appellant within the one month time frame set down in the article 11(3) of the AIE Regulations, it is not a valid internal review decision.

Right to Know CLG appealed to my Office on 9 February 2017 against TII's processing of its AIE request. No appeal was made in respect of the Council's decision.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review a public authority's decision to refuse a request and to affirm, annul or vary that decision. The scope of my review in this case concerned whether TII was entitled to refuse the appellant's request.

As TII did not issue a valid internal review decision, the decision under review is the deemed refusal that arose on 4 January 2016. If I find that refusal was not justified, my role includes deciding whether it would be appropriate for me to require the public authority to make the environmental information available to the appellant.

The AIE Regulations transpose Directive 2003/4/EC on public access to environmental information (the AIE Directive) into Irish law. The AIE Directive implements the first pillar of the 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). In making this decision I have had regard to the Guidance for Public Authorities and others on implementation of the Regulations (May 2013) published by the Minister for the Environment, Community and Local Government (the Minister's Guidance), and The Aarhus Convention: An Implementation Guide (Second edition, June 2014) (the Aarhus Guide).

Whether TII was justified in refusing the AIE Request

Recital (16) of the AIE Directive highlights the importance of giving reasons for refusing an AIE request. It states that “[t]he reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive”. The last paragraph of Article 3(4) of the AIE Directive states that “[t]he reasons for a refusal to make information available, in full or in part, in the form or format requested shall be provided to the applicant within the time limit referred to in paragraph 2(a)”. Article 7(4)(c) of the AIE Regulations provides that where a public authority makes a decision to refuse a request (in whole or in part) it must specify reasons for the refusal.

TII's refusal of the appellant's AIE request was a deemed refusal. A deemed refusal, of its nature, does not set out reasons for the refusal. As I stated in [CEI/16/0046](#) (Killross Properties Ltd and EirGrid plc) (available at <http://www.ocei.ie/decisions/>), the refusal of an

AIE request without reasons is never justified. Accordingly, I must conclude that TII's refusal to grant this AIE request was not justified.

Consideration of articles 7(5) and 7(6) of the AIE Regulations

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. Article 7(6) provides that, where article 7(5) applies and the public authority concerned is aware that the information requested is held by another public authority, it must transfer the request to the other public authority or inform the applicant of the public authority to whom it believes the request should be directed to.

In this case, the Council initially stated that the information requested was not held by or for it. This position was incorrect, as the Council subsequently disclosed traffic count information used in making the maps to the appellant. The Council advised the appellant that TII held the raw data requested, and on foot of this statement the appellant made a new AIE request to TII. TII did not inform the appellant whether any relevant information was held by it or on its behalf, and stated that the matter had been addressed by the Council.

TII submitted that the Council's request was referred to it on an "erroneous basis". It stated that it would undermine the spirit and letter of the AIE Regulations to require a public authority to process a request which had been referred on an erroneous basis. The appellant submitted that where multiple public authorities hold the same information, the AIE Regulations place a duty on each authority to grant access to the information requested. I do not share TII's view in this regard. I note that the appellant made a separate AIE request to TII (based on the suggestion by the Council that TII held the relevant information). Article 10(3) of the AIE Regulations provides that a public authority must consider each request on an individual basis. It necessarily follows that TII was obliged to account for relevant information held by or for it, notwithstanding any error on the part of the Council. The fact that the Council is a designated body for the purpose of preparing the noise maps does not mean that TII was entitled to rely on the Council to address the appellant's request, or to refer the appellant to the Council as an alternative to processing the request.

If TII did not hold any information relevant to the request it would have been obliged to notify the appellant of its decision that the information was not held by or for it. In addition to notifying the appellant of its decision to refuse the request and the reasons for that refusal, it

would also have been required to transfer the request back to the Council or refer the appellant accordingly. However, it has emerged in the course of this review that TII holds extensive raw data on the maps in question, which was not acknowledged in the context of the AIE request made to TII. I will proceed to consider whether it would be appropriate for me to require TII to make environmental information available to the appellant.

Consideration of information disclosed by the Council during this review

To facilitate my review of this matter, an investigator with my Office asked TII to provide an account of information held by or for TII relevant to the appellant's request. TII clarified that it had contributed to the preparation of the maps in question, in conjunction with the Council and a mapping specialist retained by the Council. It stated that it received certain geospatial information, and processed this information using noise modelling software to create preliminary noise maps, which it then provided to the Council to be completed.

On 6 October 2017, TII disclosed five sets of information to the appellant. This information was in the form of electronic files in geographic information system (GIS) formats. The email from TII to the appellant contained a link to where the information could be downloaded at. It stated in that email disclosing the information “[p]lease note that interpretation of the data would require the use of proprietary software”. That information was in the form of electronic files in geographic information system (GIS) formats, which were capable of being opened with free, open source software. TII disclosed maps containing topographical data, building location data, and road location data. It also disclosed maps "Lden" and "Lnight" noise maps displaying contoured bands of sound levels. TII stated that this information represented the geospatial information it received, and the processed maps that it delivered to the Council for final processing.

My investigator asked the appellant if it was satisfied with the five maps disclosed. The appellant drew my attention to a document titled "Guidance Note for Strategic Noise Mapping" published by the Environmental Protection Agency (EPA) in August 2011. This technical guide outlined how designated noise mapping bodies should create noise maps for the purpose of the Directive. At page 78, in a section titled "Post Processing and Analysis", the EPA Guide describes an intermediary stage of processing after the creation of the noise model, where a grid of noise values is validated and checked for errors, prior to the production of a map with noise contour bands. On this basis, the appellant contended that TII should hold additional information, preliminary to the contoured noise maps.

My investigator put the appellant's query to TII. TII initially responded by stating that it had disclosed the relevant data, and again suggested that the appellant should direct its request to the Council. My investigator was not satisfied with this response, and asked TII to expressly clarify whether it held additional information. My investigator provided TII with excerpts of the EPA Guide and its electronic maps, all of which suggested that additional information would be created in the normal course of producing the noise maps. In a second response, TII stated that it had reviewed the data disclosed by it to the appellant during this review, and had found that information disclosed inadvertently "comprised the data that was sent by the local authority GIS specialist to the Council, rather than the output data from the TII noise model application". It acknowledged that it holds noise model output data in relation to the Julianstown area, and disclosed this additional information to my Office. TII's explanation is unsatisfactory - even if it inadvertently disclosed information produced by the GIS specialist - TII clearly holds this information. The scope of the AIE Regulations is not limited to information created by a public authority. TII was obliged to account for all information it holds, whether it created it or not.

My investigator wrote to TII on two occasions and asked TII to indicate whether this newly identified information could be disclosed to the appellant. TII subsequently disclosed the noise model information to the appellant on 15 December 2017 in shapefile format (a type of GIS file format).

Consideration of the format of information to be disclosed

Under article 7(3)(a)(ii) of the AIE Regulations, where a request is made to a public authority for access to environmental information in a particular form, access must be given in that form unless access in another form would be reasonable. Article 7(9) provides that where in a request for information on factors affecting or likely to affect the environment, the applicant specifies that he or she requires information on the measurement procedures used in compiling that information, the public authority shall, either make the information available to the applicant or refer the applicant to the standardised procedures.

On this occasion, the appellant's written AIE request asked that information be provided in "commonly available software such as Excel". The AIE request did not expressly include a request for information on measurement procedures under article 7(9).

All of the information held by TII is in the form of electronic GIS files. All of these files can be opened and manipulated using QGIS, a free, open source software application, sponsored

by the Office of Public Works. My investigator, without any guidance or assistance from TII, was able to open and manipulate the information disclosed by TII, using publicly available instructions.

Format of the initial set of five maps

With regard to the first set of five maps disclosed by TII during this review in October 2017, the appellant stated:

"R2K [Right to Know] has no idea what information was released. TII provided files that supposedly can be read on an open source GIS viewer but offered no explanation as to how to use that software to interrogate the data and to read actual noise values at particular locations. While the files can be read and viewed, R2K has no idea if any of the underlying data is accessible in these files. It assumes that it is not. To all intents and purposes, without specific assistance R2K cannot access this information since it doesn't have the technical capacity to operate this specialised GIS software."

The appellant correctly points out that TII's approach to disclosure on this occasion was to provide information without any instructions on how the information could be accessed. No schedule was provided. On disclosure, TII stated that the GIS files were in "proprietary format", and offered no account whatsoever of what the files contained. It stated that it was not aware if the files could be opened in open source software. My investigator, again without any guidance or assistance from TII, subsequently accessed the files, identified the file formats, and referred the appellant to the appropriate software application to open the files.

In circumstances where my investigator was able to easily access the information contained in the disclosed maps using free, open source software and publicly available instructions, without referring the matter for technical assistance, I am not convinced by the appellant's suggestion that the information disclosed is inaccessible. It is disappointing that TII did not provide any useful assistance to the appellant or to my Office on disclosure of the GIS files, as this has unnecessarily complicated this review. Notwithstanding this, I note that the appellant sought access to "raw data", that is, preliminary data used in the production of the final published map. It is to be expected that "raw data" produced by GIS specialists will be stored in GIS formats. The AIE Regulations provide a right of access to data, however, there is no automatic corresponding right to an explanation of the information disclosed. Article 7(9) provides a limited right to information on measurement procedures; however an AIE

applicant must expressly request such information for this obligation to exist. While I accept the appellant's request was for information on a factor affecting the elements of the environment, I am not satisfied that appellant also requested information on measurement procedures on this occasion under article 7(9).

Although open source GIS software is freely accessible and can be used to access the formats disclosed, I accept that GIS software is relatively specialised and would not fall within the description of “commonly available software such as Excel”. However, I note that the five maps initially disclosed to the appellant convey geospatial information on topology, buildings, and road location. This information cannot easily be presented in spreadsheet format to meet the appellant's request. Therefore, I find that in accordance with article 7(3)(a)(ii) it is reasonable for TII to disclose the five maps in their original formats.

Format of noise model information

The format of the noise model information disclosed by TII during this review in December 2017 can be distinguished from the first set of maps. The information in this file is organised as a field of geospatial points. In disclosing the information to the appellant, TII stated:

"Following further communications with the OCEI, please find attached the data that was output from the TII noise modelling exercise. ... In relation to the format of the data, please note that the shapefile can be saved as a .csv file which may then be read by Excel".

My investigator reviewed the noise model information disclosed by TII. It transpired that the noise model database could be opened directly as a spreadsheet, without the need to convert the file to a different format in the manner suggested by TII. My investigator notified the appellant of this fact, and explained how to access the information. The appellant confirmed to my investigator that it was able to read the information in Excel in the manner described by my investigator and that it appeared to contain the information requested in its AIE request. I am therefore satisfied that TII has disclosed the noise model information in a format that can be opened in commonly available spreadsheet software.

Decision

I find that TII was not justified in refusing the appellant's AIE request. I therefore annul TII's decision.

During this review, TII located information which I am satisfied was within the scope of the appellant's request. However, I note that TII has disclosed the newly identified information to

the appellant. In the circumstances where I am now satisfied with TII's account of the information it holds, I make no further findings on this appeal.

I wish to add however that I am surprised and disappointed at the handling of this case by TII. At both the request stage and in dealing with my Office on the appeal, TII appears to have had little regard to its statutory obligations.

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

14 February 2018