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/17/0011

Date of decision: 18 December 2017

Appellant: Mr. X

Public Authority: Coillte Teoranta (Coillte)

Issus: Whether Coillte's decision to refuse to provide the appellant with access to further information was justified on the ground that the requested information was not held by or for Coillte

Summary of Commissioner's Decision: The Commissioner found that Coillte's decision was justified by the reason given. He therefore affirmed Coillte'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

Raheenleagh Wind Farm

This case concerns information about a wind farm located at Raheenleagh in County Wicklow. The website https://raheenleaghwind farm.ie/ says that;

> "Raheenleagh is a wind energy project owned in equal partnership by Coillte and ESB. It is located within the Raheenleagh forest, Ballinvalley, County Wicklow and it became operational on the 20th September 2016".

Raheenleagh wind farm is owned by Raheenleagh Power DAC (RPDAC), which is jointly owned by Coillte and ESB Wind Development Ltd.

The AIE request

On 15 December 2016 the appellant emailed an AIE request to Coillte, asking for the following:

1. "All noise data and associated wind speed/direction data in excel format to include all noise descriptors captured for the Coillte development at Raheenleagh Wind Farm. Specifically the detailed data, graphs and analysis which was used as input into the very brief set of information contained within the EIS [Environmental Impact Assessment] documentation submitted to Wicklow County Council as part of the planning submission.
2. Any post construction noise, wind speed and direction data captured along with its analysis.
3. The full output from the WindPro s/w [i.e. software] showing calculations for noise compliance.
4. The report which should have been filled in regard to Condition 12 of 10/2140 in regard to noise measurements – Wicklow County Council at this stage have been unable to find this for me.
5. The planning permission lodged to cover condition 26 of 10/2140 noting that despite any Section 5 determination which might have been issued by the council this cannot be used to counter a condition laid down at the time of the planning permission and which went unchallenged within the normal time limits. Such a Section 5 gives no protection when it comes to planning permission compliance."

The applicant added:

> "I have been unable to find any lodged planning permission. This request covers inter-alia planning permissions 10/2140, 12/6049 and any others associated with the site.
>
> Coillte clearly own this development—
>
> See http://www.coillte.ie/coillteenterprise/renewable_energy/raheenleagh_windfarm/
>
> See https://raheenleaghwindfarm.ie/ - the Coillte logo is clearly displayed on this page.
>
> Coillte is a State-owned body set up under statute and is clearly a public authority under the AIE regulations. Subsidiaries of a public authority are by default a public authority."

On 19 January 2017 the appellant wrote to Coillte and pointed out that, as he had not been notified of a decision on his AIE request within the legal timeframe, his decision was deemed by law to have been refused. He requested an internal review of that refusal.

Coillte acknowledged receipt of that request and explained that it had not responded to the original request in time "due to an oversight in calculating the time period over the Christmas period".

On 15 February 2017, Coillte notified the appellant of its internal review decision. It said that Coillte had decided to grant access to three documents and refused to provide access to any other information, on the basis that no further relevant information was held by or for Coillte.

The appeal

The appellant appealed to my Office on 19 February 2017, saying that "Coillte have failed to provide all of the information asked for which I believe is held for or by Coillte – a public authority".

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review Coillte's internal review decision and to affirm, annul or vary it. If I find that refusal was not justified for the reason given in that decision, my role is to decide whether it would be appropriate for me to require Coillte to make environmental information available to the appellant.

In conducting my review I took account of the submissions made by the appellant and Coillte. I 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).

Coillte's position

Coillte made a detailed submission to my Office. I will not reproduce it here, but I have fully considered its contents. Coillte's position is that it has not withheld any information captured by the AIE request at issue, because:

- It provided the appellant with access to copies of the relevant information which it held (although Coillte maintained that, as these records were publicly available, they were "not strictly covered by the AIE Regulations"), and

- No further relevant information was held by or for Coillte. Coillte's decision to refuse to provide the appellant with further information therefore relied on article 7(5) of the AIE Regulations (although Coillte did not cite that article in its review decision). Article 7(5) provides that:

> "Where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it."

In its submission, Coillte explained how it had decided that no further relevant information was held either *by* it or held elsewhere *on its behalf*, and it offered its view that some of the requested information might not have existed.

With respect to the first point, Coillte provided a detailed description of how it went about searching for any relevant information which was held by it. It explained how its search had extended to all potentially relevant locations at Coillte Headquarters and elsewhere. It explained that the search included consultation with members of staff who had been involved in the wind farm project over the years of Coillte's involvement. As a result of this search, Coillte's decision-maker was satisfied that no further relevant information was held by Coillte.

With respect to the second point, Coillte submitted that, in order for information to be 'held for' Coillte, Coillte would have to own it while it was held by another entity. Coillte said that it assumed that at least some information of the type requested existed and was "most likely held by a third party, RPDAC, which is a private company limited by shares". It said that RPDAC is an entirely separate legal entity. Coillte submitted that the requested information relates to Raheenleagh wind farm, which is owned and operated by RPDAC and such information would have been generated by RPDAC on its own behalf. Coillte said that it is not in a position to obtain the information and it has no power to control that third party. Coillte explained that it is a 50% shareholder in RPDAC. It said that there are four directors on the Board of RPDAC, two of whom are nominated by Coillte and two of whom are nominated by ESB Wind Development Limited. Coillte maintained that RPDAC carries out its business in accordance with its memorandum and articles of association as set out in its Constitution (a copy of which Coillte provided to my investigator). Coillte's stated that its shareholding in RPDAC is a shareholding in a private company and the information generated by that private company is owned and held by it for its own purposes and cannot be said to be 'owned' or 'held for' Coillte. Coillte said that RPDAC is not a 'public authority' within the meaning of the AIE Regulations and the AIE Regulations do not apply to it.

In relation to the third point made in Coillte's submission, Coillte expressed the view that some of the requested information might not have existed. Coillte explained that it understood that the information requested in part 2 of the AIE request did not exist since post commissioning noise compliance monitoring had "not formally taken place" but was "scheduled to be completed". Coillte added that "contact between Wicklow County Council and RPDAC continues in this regard".

Coillte said that it was its understanding that the document requested in part 5 of the AIE request did not exist because, since no planning application had been made in relation to grid connection, no such planning permission could have existed.

The appellant's position

The appellant argued that subsidiaries can be emanations of the State and, for that reason, can be public authorities for the purposes of the AIE Regulations. He argued that the Advocate General's Opinion in case C- 413/15 (which concerned a request from the Irish Supreme Court for a preliminary ruling by the CJEU and which is easily available on the internet) "made it clear that bodies which are set up to be an instrument of the State cannot be beyond the State". In that Opinion, the Advocate General identified certain criteria that should be taken into account when

a court is determining if an entity is an 'emanation of the State' for the purpose of the vertical direct effect of EU directives.

The appellant argued that where a public body such as Coillte 'controls' or 'owns more than a controlling share (typically 50%)' of another entity, that entity either holds data on behalf of Coillte or it is itself a public authority for AIE purposes. He provided my Office with a document published by the Central Statistics Office entitled: "*Methodological Note 2016 Register of Public Sector Bodies*", dated October 2017. This document lists Raheenleagh Power Ltd (i.e. the company that is now called Raheenleagh Power DAC) as a Public Sector Body.

He argued that the State should not be able to set up entities which can create other entities which are 'generically and by default beyond AIE'.

Analysis

In his appeal, the appellant said that Coillte had failed to provide all of the information asked for and expressed his belief that the information was held by or for Coillte.

Coillte denied that any additional information captured by the AIE request was held by it. The appellant did not put forward any argument to cast doubt on this position. In the absence of any reason to believe otherwise, I accept that Coillte did not directly hold any further relevant information.

That leaves the issue as to whether any further relevant information might have been held by a natural or legal person on behalf of Coillte. The appellant did not argue that it was held by a natural person. In the absence of any reason to believe otherwise, I therefore accept that no further relevant information was held by a natural person on behalf of Coillte. The appellant argued that my review should focus on a specific legal person, RPDAC. He argued that such a "sub body" either holds information on behalf of Coillte or is itself a 'Public Authority' within the meaning of the AIE Regulations.

My task does not require me to determine if RPDAC is a 'Public Authority' within the meaning of the AIE Regulations. It requires me to determine, *if* RPDAC held any of the requested information, whether it would hold it *on behalf of* Coillte. In setting about this task, it would be of no assistance to me to first determine if RPDAC is an emanation of the State, as the appellant has argued. Similarly, it is not necessary for me to reconcile Coillte's description of RPDAC as a private limited company with the CSO's listing of that company as a Public Sector Body. I consider that I should focus on the relationship between Coillte and RPDAC, to see if there is anything in that relationship that could allow me to conclude that RPDAC holds information on behalf of Coillte.

The appellant argued that where a public body such as Coillte 'controls' or 'owns more than a controlling share (typically 50%)' of another entity, that entity holds data on behalf of Coillte (or else it is itself a public authority for AIE purposes – an argument that does not fall to be considered in this review).

The essential argument that I must consider is that a company in which Coillte holds a 50% shareholding holds its information on behalf of Coillte. I am not aware of any legal authority which would support that argument. The appellant did not cite any Irish authority, either by reference to legislation such as the Companies Act 2014 or by reference to Irish case law. In a recent associated appeal case (CEI/17/0010), the appellant cited two CJEU judgments: those in

cases C-172/12 P and C-179/12 P (both of which are easily available on the internet). I examined those judgments and was not satisfied that they provide legal authority for the general proposition that I am entitled to regard parent companies and their joint-venture company as constituting a single 'undertaking'. The rulings in those cases were distinguished by their circumstances: Both concerned the attribution of liability for infringements of EU competition law, and both judgments relied heavily on findings that the parent companies had in fact exercised 'decisive influence' on the subsidiaries. In neither case did the Court rule that information held by a subsidiary company was held on behalf of a parent company. Having re-considered those judgments in the light of my current review, I conclude that they are so far removed from the subject of my review that they do not support the appellant's argument.

The appellant also submitted that: "Although [subsidiary] entities can enjoy commercial separation, AIE transcends this". In my view, the AIE regime 'transcends' legal personality only in the sense that what matters under AIE is whether a subsidiary entity holds relevant information *on behalf of* the public authority to which an AIE request was made. If it does, the AIE regime will hold *the public authority* to account in that regard, not *the subsidiary entity*.

I examined RPDAC's Constitutions, Memoranda and Articles of Association and found nothing which supported the appellant's argument.

Accordingly, I have not been persuaded by the appellant's argument that I ought to regard information held by RPDAC as being held on behalf of Coillte. It is my understanding that Coillte's position properly reflects the law.

Decision

Having reviewed Coillte's internal review decision, I find that its refusal was justified by the reasons given. I therefore affirm Coillte's decision.

Comment. In the course of processing the AIE request at issue in this appeal, Coillte informed the appellant that certain information was "not strictly covered by the AIE Regulations" because it was already publicly available. This is a common misconception. Environmental information does not fall outside the scope of the AIE Regulations simply because it is publicly available information. Article 4(1) provides that:

> These Regulations apply to environmental information other than, subject to sub-article (2), information that, under any statutory provision apart from these Regulations, is required to be made available to the public, whether for inspection or otherwise.

From this it can be seen that what puts information outside of the scope of the AIE Regulations (subject to sub-article (2)) is the existence of a legal requirement for it to be made available to the public, not whether it has actually been made available to the public.

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
18 December 2017