

Appeal to the Commissioner for Environmental Information

Case CEI/13/0008

**European Communities (Access to Information on the Environment)
Regulations 2007 to 2014 (the Regulations)**

Appellant: Oliver Cassidy, Cartron, Gaybrook, Mullingar, Co. Westmeath

Public Authority: Coillte Teoranta, Dublin Road, Newtownmountkenny,
Co. Wicklow (Coillte)

Issue: Whether Coillte was justified in refusing the appellant's request for access to environmental information relating to wind energy projects

Summary of Commissioner's Decision: The Commissioner found that the requested information is environmental information within the meaning of the Regulations and found that refusal to provide access was not justified

The Commissioner annulled Coillte's decision and directed Coillte to provide access to the information requested

Background

In December 2012, Element Power Ireland Ltd (trading as Element Power) issued a press release announcing that it had signed a land lease option agreement with Coillte. The release stated that “the deal gives Element Power the potential to incorporate a selection of Coillte sites within clusters of wind farms being developed for the Greenwire Project across the counties of Kildare, Laois, Meath, Offaly and Westmeath”. The Greenwire Project is a wind energy project aimed at constructing windfarms in Ireland to supply energy to the UK. Element Power is the parent company of Greenwire Ltd. For the purpose of my review I will regard Element Power and Greenwire as being a single corporate entity.

On 26 April 2013, the appellant wrote to Coillte requesting access to environmental information held by Coillte in relation to future wind energy projects including, but not limited to, the following points of information:

1. Details of locations (e.g. maps) currently being evaluated for future wind energy development.
2. Details of environmental (e.g. noise, ornithology, etc.) studies undertaken by Coillte for sites identified for future wind energy development.
3. Locations of land held by Coillte identified and agreed for use by Element Power in relation to wind energy export projects.

Coillte informed the appellant that it needed more time to respond to the request. On 28 June 2013 Coillte notified the appellant of its decision to part-refuse the request. Coillte provided access to information to answer point 1 of the request. In relation to point 2, Coillte said that environmental studies, once complete, would be submitted along with planning applications, where they would be available for public inspection. In relation to point 3, Coillte referred to the existence of a “Land Option Agreement” between Coillte and Element Power. Coillte refused to provide access to information which would identify the relevant locations on the grounds that “it would be premature to provide information on potential sites that might ultimately not be included in a planning application should they prove unfeasible”.

On 15 July 2013, the appellant sought an internal review “in particular with regard to the Land Option Agreement and initial list of potential locations as outlined” in the original decision.

On 9 August 2013, Coillte affirmed its original decision to refuse to provide access to information relating to point 3 of the request. The reasons given were that disclosure would adversely affect commercial and industrial confidentiality and because the request concerned both material in the course of completion and the internal communications of a public authority.

On 28 August 2013, the appellant appealed to this Office for a review of Coillte’s decision. I regret the delay that arose in dealing with this review. The delay was due to a shortage of resources, which has now been addressed.

Scope of Review

In conducting this review, I take account of: the submissions of the appellant and Coillte; the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the Regulations, dated May 2013 (the Minister's Guidance); Directive 2003/4/EC (the Directive), upon which the 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).

My function is to review Coillte's internal review decision and to affirm, vary or annul it in accordance with Article 12 of the Regulations.

A degree of "request-narrowing" took place in this case. Despite the original request being for information in relation to future wind energy projects "including but not limited to" three specific points, Coillte treated the request as having been limited to those three points. The appellant did not challenge this treatment of his request in either his request for an internal review or in his appeal and later submission to this Office. I therefore take it that the appellant acquiesced to this narrowing of his request.

In its original decision, Coillte made it clear that it had decided to grant access to the information which it held which was relevant to point 1 of the request. In relation to point 2, Coillte's position appeared to be that no such information was, at the time, held by or for it. Article 7(5) of the Regulations obliges a public authority, when the requested information is not held by or for it, to inform the applicant of that fact as soon as possible. The Regulations do not describe such an outcome as a "refusal", but Article 4(1)(a) of the Directive makes it clear that such an outcome constitutes a "decision to refuse". I therefore take it that Coillte, in its original decision, technically refused to provide access to information which would answer point 2 of the request. The appellant did not later claim that information which could address point 2 was in fact held by or for Coillte, in either his request for an internal review or in his appeal and later submission to this Office. In other words, he did not maintain that Coillte was withholding information of this type from him. I conclude that the appellant accepted this part of the decision.

In light of the above, I understand that the request for internal review was restricted to a request for access to information on point 3 of the original request, i.e. a request for access to information on the location of Coillte lands which had been agreed for use by Element Power in relation to wind energy export projects.

The Withheld Information

Following a request for the withheld records, Coillte provided this Office with a number of coloured maps. These maps are undated enlarged copies of Ordnance Survey Ireland 1:50,000 scale maps. Each map shows a number of named Coillte-owned forest properties. On each map, one or more of the forest properties is highlighted in yellow. According to Coillte, "the area highlighted in dark yellow on the maps is the area which has been optioned". In this context, "optioned" lands are Coillte-owned lands which were the subject of the Land Option Agreement previously mentioned. Following a request, Coillte provided

a copy of the agreement to this Office. It is an agreement between Coillte and Greenwire Ltd and it is entitled “Option Agreement for Lease”. I will refer to it as “the Agreement”. Under its terms, Coillte allowed Element Power to conduct “test surveys” on specified lands for the purpose of assessing the feasibility of including those lands in the Greenwire project. The "optioned lands" are depicted on black and white maps of a different scale to the maps previously provided by Coillte. My investigator compared the different maps and established that the coloured maps provided by Coillte show the same lands as those specified in the Agreement. I am therefore satisfied that the coloured maps provided by Coillte depict the withheld information. I will refer to them as “the maps”.

Plan of Review

Coillte has not argued that the maps do not contain environmental information. Nonetheless, I have decided to consider this question before proceeding to examine the decision to refuse access to the maps.

In light of the above, I consider that in conducting this review I should address three questions.

Question 1: Do the maps contain environmental information in the meaning of the Regulations?

Question 2: Was Coillte’s decision to refuse access to the maps justified for the reasons given?

Question 3: Is there any other reason why refusal to provide access is justified?

Statutory provisions

The Regulations provide for mandatory refusal (subject to Article 10) in circumstances covered by Article 8.

Article 8(a)(iv) provides that refusal is mandatory where disclosure would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law, including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts.

The Regulations provide for discretionary refusal (subject to Article 10) in circumstances covered by Article 9.

Article 9(1)(c) provides that refusal is discretionary where disclosure would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.

Article 9(2)(c) provides that refusal is discretionary where the request concerns material in the course of completion, or unfinished documents or data.

Article 9(2)(d) provides that refusal is discretionary where the request concerns the internal communications of public authorities, taking into account the public interest served by the disclosure.

Article 10(3) provides that the Public Authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.

The Appellant's position

The appellant's first argument is that Coillte failed to properly justify refusal on the grounds of confidentiality. He cites the Aarhus Guide, as follows:

“For public authorities to be able to withhold information from the public on the basis of commercial sensitivity, that information must pass several tests. First, national law must expressly protect the confidentiality of that information. That means that the national law must explicitly protect the type of information in question as commercial or industrial secrets. Second, the confidentiality must protect a “legitimate economic interest”. In this regard, it would be difficult for a State-run enterprise operating in a monopolistic manner, such as certain State-run enterprises, to assert a claim of commercial sensitivity since there are no competitors that could gain an advantage by access to the information.”

The appellant argues that Coillte failed, in its decisions, to demonstrate that the above tests were satisfied. He also argues that Coillte is within a class of public authority for which the scope of the commercial confidentiality exemption is limited.

He argues that Coillte failed to “document precisely what balancing test was undertaken when considering the public interest”, as required by the Aarhus Guide.

The appellant rejects the argument that the request concerns material in the course of completion. He cites the Aarhus Guide as making it clear that “the course of completion” “relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the information or document has been prepared”.

In relation to the argument that refusal is justified because the request concerns the internal communications of a public authority, the appellant once again cites the Aarhus Guide: “once particular information has been disclosed to a third party, it cannot be claimed to be an internal communication”.

The appellant did not address Coillte's argument that Article 8(a)(iv) applied, because Coillte did not cite that article as justification in either of its decisions: Coillte first raised this ground in its later submission to this Office. This is not satisfactory, since an appellant should know all of the grounds for refusal and should have an opportunity to make submissions on those grounds. Nonetheless, if Article 8(a)(iv) applies it would make refusal mandatory (subject to a public interest test in accordance with Article 10(3)), and I have therefore considered it in my review.

Coillte's position

Coillte argues that, since lease options might not be exercised for any given site, in fact no specific Coillte lands had been (at the relevant time) "agreed for use by Element Power in relation to wind energy export projects". However, Coillte stopped short of saying that, according to this view, it did not hold any information relevant to point 3 of the request. Coillte appears to have accepted that the internal review request had refined the request to include "potential sites" for use by Element Power in relation to wind energy export projects.

In notifying the appellant of its internal review decision, Coillte said that access to the maps was refused on the grounds that

- a. The request affects commercial or industrial confidentiality.
- b. The request relates to material still in the course of completion.
- c. The request relates to internal communications of a public authority.

While Coillte did not cite any articles in the Regulations, the above grounds of refusal are provided for in Articles 9(1)(c), 9(2)(c) and 9(2)(d), respectively.

Coillte offered the following reasons for its decision:

- a. The maps arise from and relate to an agreement which contains a confidentiality clause. Coillte is anxious to respect the commercial sensitivity around the transaction of the agreement and the long-term implications for similar agreements in the future.
- b. The Option Agreement has yet to be exercised /completed. To furnish information on the sites under Option might be misleading as the Option might not be exercised, and particular sites might not ultimately be included in the windfarm project. The exercise of the Option is dependent on the outcome of the feasibility studies and planning permission.
- c. The matter is still in the course of completion and is the subject of discourse within the company.

In a later communication to this Office, Coillte added Article 8(a)(iv) of the Regulations as a further ground for refusal. Coillte says that this Article "mandates a refusal where the confidentiality is protected by law, including where it is protected under the Freedom of Information Acts". In support of its position, Coillte provided a copy of the confidentiality clause from the Agreement and a copy of a pre-existing Non-Disclosure Agreement between Element Power Holdings LP (with a registered office in Edinburgh) and Coillte. The confidentiality clause provides that neither party shall disclose any information relating to the Agreement to any third party, while acknowledging that each party may disclose information "as required by law". The Non-Disclosure Agreement purports to bind subsidiary companies of the holding company, a description which apparently includes Element Power Ireland Ltd. The Non-Disclosure Agreement pertains to confidential information provided by Element Power to Coillte for the purposes of "the Greenwire Project". It acknowledges that Coillte is permitted to disclose confidential information if and to the extent that it is required by

applicable law, while acknowledging that the Non-Disclosure Agreement is governed by the laws of Ireland.

Coillte did not address the public interest in either of its decisions, in its submission to this Office, or in later written clarification of its position.

The position of the Third Party

Element Power was invited to make a submission to this Office but did not do so.

Analysis and Findings

Do the maps contain environmental information in the meaning of the Regulations?

The maps show the location of lands held by Coillte where Element Power is permitted to conduct “test surveys”. If Element Power is satisfied from the results of such surveys on a site-by-site basis, it would have the option of leasing parts of those lands as sites for windfarms.

Coillte has suggested that, since lease options might not be exercised for any given site, no specific Coillte lands could be said to have been “agreed for use by Element Power in relation to wind energy export projects”. I do not accept this argument. In my view, all of the lands identified in the Agreement were agreed for use by Element Power in relation to wind energy export projects. The use of those sites for the conduct of “test surveys” would in itself, even if no sites were ever found suitable for windfarms, constitute “usage in relation to wind energy export projects”. This view is reinforced by the terms of the Agreement, which I have examined. Accordingly, I am satisfied that the decision by Coillte to permit test surveys amounted to the adoption by Coillte, as a public authority, of a “measure” (in the meaning of the Regulations) affecting or likely to affect elements of the environment, such as soil, land, water, and landscape, while the works themselves would constitute “activities” in the meaning of the Regulations. Since the maps show the lands to which the measure relates and where the activities would take place, I am satisfied that the maps contain environmental information in the meaning of Article 3(1) of the Regulations.

Since I find that the answer to Question 1 is “yes”, I will proceed to consider Question 2.

Was Coillte’s decision to refuse access to the maps justified for the reasons given?

I will consider each of Coillte’s grounds of refusal in turn, beginning with mandatory grounds.

The Confidentiality of Proceedings of a Public Authority

Coillte cited Article 8(a)(iv) in its submission to this Office, despite not having notified the appellant of any decision to rely on this Article. According to Article 8(a)(iv) refusal is mandatory (subject to a public interest test) where disclosure would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law, including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts.

In support of its argument in favour of Article 8(a)(iv) applying in this case, Coillte says that the information was imparted in confidence, and points to the confidentiality clause in the Agreement and the Non-Disclosure Agreement as evidence of this.

For this ground of justification to be established, disclosure of the maps would have to adversely affect the confidentiality of the proceedings of a public authority in the first instance.

What is meant by the expression “the proceedings of a public authority”? No interpretative assistance is to be found in the Regulations, the Directive, the Aarhus Convention, or the Minister’s Guidance. The Aarhus Guide (which is not a binding authority) suggests that “one interpretation is that these may be proceedings concerning the internal operations of a public authority ...”. Unfortunately, this guidance does not expand on the meaning of the word “proceedings”. In the absence of any clear indication that the word “proceedings” is to be given some special meaning, I propose to rely on its plain meaning. The Oxford Dictionary defines the meaning of the word “proceedings” as “an event or a series of activities involving a set procedure”, or as “a published report of a set of meetings or a conference”. I therefore consider that the word “proceedings” concerns a process. In the current context, a process of deliberation (presumably) led to a decision by Coillte to enter into an agreement with Element Power. As a general proposition, I consider that information about an agreement does not necessarily include or reveal information about the proceedings which led to a decision to enter into the agreement. The maps at issue say nothing about the proceedings which led Coillte to decide to enter into the Agreement. I conclude that the release of the maps could not adversely affect the confidentiality of the proceedings of a public authority in the meaning of the Regulations. I therefore find that refusal to provide access to the maps was not justified under Article 8(a)(iv).

I will now proceed to consider the discretionary grounds for refusal cited by Coillte.

Commercial or Industrial Confidentiality

Coillte relied, as one reason for refusal, on Article 9(1)(c), which provides that refusal is discretionary where disclosure would adversely affect commercial or industrial confidentiality. I do not accept that Coillte has a monopoly on providing windfarm sites. Even if it did, it could have legitimate concerns about any duty of confidence that might be owed to its partners. In my view, Coillte’s concerns about commercial or industrial confidentiality merit serious consideration.

The issue is whether disclosure would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest. Coillte says that it would be detrimental to its reputational interests and standing to breach the terms of the confidentiality clause and the Non-Disclosure Agreement. I note that both agreements permit Coillte to disclose confidential information to the extent that is required by law. It follows that if disclosure is required under the Regulations, such disclosure would not constitute a breach of the confidentiality clause or the Non-Disclosure Agreement. I accept that these agreements demonstrate that it was the wish and the intention of the contracting parties to maintain confidentiality, except where the law requires disclosure. At this point in the review, I am

endeavouring to determine if the Regulations require disclosure despite the existence of private confidentiality agreements.

Coillte argues that disclosure of the maps would adversely affect commercial or industrial confidentiality. I have to consider this issue from the perspectives of both Coillte and Element Power.

My investigator carried out an internet search and readily found examples where Coillte had made public its future plans to conduct feasibility tests for windfarms. When operating alone, Coillte is evidently not secretive about such issues. I understand also that it is Coillte's policy to work closely and openly with local communities as stakeholders, and that such a policy is required of Coillte under the terms of its certification by the Forest Stewardship Council (which Coillte mentioned in its original decision). I conclude from this that Coillte's concerns about commercial or industrial confidentiality, in this context, arise from its wish to safeguard the confidentiality interests of its current partner, Element Power, and of potential future partners.

Greenwire's website provides a "Greenwire Information Booklet". Page 15 of that booklet shows that the company had scheduled "summer 2013" for "Community Engagement" activities. One of the scheduled activities was "show the areas under study". I understand this to mean that Element Power intended to reveal the information which is now at issue in this review to the public in the summer of 2013. Greenwire's website (accessed 7 September 2015) states that "the exact list of sites will be finalised in 2014", demonstrating that it was not the case that Element Power was waiting for a fully finalised list of selected suitable sites before releasing information identifying locations. The website *windireland.com* reported on 12 June 2013 that the first in a series of Element Power public information days had taken place in the Midlands that week, and added that "public information days will continue throughout the month with more dates being finalised in counties Kildare, Offaly and Laois". I understand from the Greenwire Information Booklet that the intention was to reveal the locations of the "areas of study" at these meetings. The *Leinster Leader* newspaper carried a story on 12 July 2013 with the heading "Greenwire reveals map of proposed Kildare turbine locations." The sub-heading was "Greenwire, the wind generation company has announced details of where it is considering constructing wind-turbines in Kildare". The story said that the meeting had been "the fifth in a series of such days they're planning to hold throughout the Midlands". Coillte refused access to the same information on 28 June 2013 on the grounds of concerns about commercial or industrial confidentiality. It is striking that Coillte refused access to information (apparently in the belief that the confidentiality of the information was important to its partner) at a time when its partner was working to make the same information available to the public.

In light of the above, I am not satisfied that it was reasonable for Coillte to have believed that disclosure of the maps would have adversely affected commercial or industrial confidentiality. Article 10(4) requires that the grounds for refusal shall be interpreted on a restrictive basis. While it is understandable that a public authority might wish to facilitate its partner in managing the release of information to the public, so as to release it at a time and in a manner of its own choosing, it can only do so if that is compatible with its legal obligations, including its obligations as a public authority under the Regulations.

I find that refusal to provide access to the maps was not justified under Article 9(1)(c) because it was not reasonable to believe that disclosure would have adversely affected commercial or industrial confidentiality.

Material in the Course of Completion

Coillte cited the fact that the request related to material in the course of completion as one ground for refusal. This ground is recognised in Article 9(2)(c) which provides that refusal is discretionary where the request concerns material in the course of completion, or unfinished documents or data. Coillte maintains that “the exercise of the lease option is dependent upon the outcome of uncompleted feasibility studies”. This is correct, but the request concerns information on sites referred to in the Agreement, and the Agreement is (and was, at the time of the request) a completed document. The Agreement is not "material in the course of completion" and I do not accept that the request "concerns" material in the course of completion or unfinished documents or data in the meaning of the Regulations. The fact that it remained to be seen if Element Power would opt to lease lands in reliance on the Agreement does not alter the fact that the Agreement itself was complete.

I find that refusal to provide access to the maps was not justified under Article 9(2)(c) because the request did not concern material in the course of completion.

For completeness, I should add that the fact that environmental information might be misleading is not a justification for refusal to provide access. It would, in any case, be open to Coillte, when releasing information which it feared might be misleading, to provide explanatory information to help recipients of the information to understand its limitations and thereby avoid being misled.

Internal Communications of Public Authorities

Coillte cited the fact that the request related to the internal communications of public authorities as a ground for refusal. This ground is recognised in Article 9(2)(d) of the Regulations which provides that refusal is discretionary where the request concerns the internal communications of public authorities, taking into account the public interest served by disclosure. In support of this argument, Coillte says that the matter is (or, at least, was at the relevant time) “the subject of internal discourse within the company”.

The Minister’s Guidance states that the internal communications of public authorities “could include internal minutes or other communications, between officials or different public authorities”. The Aarhus Guide states that: “... the internal communications exception ... does not usually apply to factual materials even when they are still in preliminary or draft form..... Moreover, once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an internal communication." I am satisfied that an agreement entered into by a public authority with a private entity cannot be characterised as an internal communication of a public body. However, the issue in this case is not whether the information is an internal communication but whether it concerns an internal communication. In a democracy, virtually every decision by a public authority follows at least some prior internal consideration and communication. It cannot be the case that the Convention, Directive and Regulations intended that, simply because a decision to enter into an agreement follows from a period of internal communication, access to information about

what has been agreed can be refused because the request “concerns” those earlier internal communications. This must be especially so when, as in this instance, information about the agreement reveals no details about the earlier internal communications. I am also satisfied that this Article does not provide a discretion to refuse access to information about a legal agreement between a public authority and a private company simply because the agreement continues to be discussed within the public authority.

I find that refusal to provide access to the maps was not justified under Article 9(2)(d) because the request did not concern the internal communications of a public authority in the meaning of the Regulations.

Is there any other reason why refusal is justified?

Article 8(a)(ii) provides that refusal is mandatory (subject to Article 10) where disclosure would adversely affect the interests of a person who, voluntarily and without being under or capable of being put under a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information. Coillte did not cite this Article, but did say in its submission to this Office that “the information was imparted in confidence” to Coillte. I take this to mean that Element Power provided Coillte with the list of sites in which it was interested and which subsequently appeared on the maps. Coillte did not refuse access on this ground. Nonetheless, I will consider it, since I must be satisfied that the decision which I make is fully consistent with the Regulations.

The Minister’s Guidance says that Article 8(a)(ii) is intended to safeguard informal and voluntary communications between public authorities and third parties, which are essential to good public administration generally. I take the view that, once the provider of the information elects to enter into a legally-binding contractual agreement with the public authority to allow it (the information provider) to carry out activities on public lands which other persons are not permitted to carry-out, Article 8(a)(ii) could not justify refusal to provide the public with access to information about the agreement. I therefore find that refusal on the grounds of Article 8(a)(ii) would not be justified.

The Public Interest

I wish to make an observation on the public interest test in this case. While Articles 8 and 9 allow public authorities to refuse a request in certain circumstances, refusal is only permitted following a public interest test. Contrary to what appears to have happened in this case, a public authority is not mandated to refuse, and does not have a discretion to refuse, access to information under Articles 8 or 9 without first conducting a public interest test.

Having completed my review and found no interest served by refusal, there is no need for me to separately consider the public interest served by disclosure.

Final considerations

My investigator found a page on Greenwire’s website (<http://greenwire.ie/>), accessed on 7 September 2015, entitled “Counties”. That page shows five maps, each depicting “study areas” in counties Offaly, Kildare, Laois, Westmeath and Meath. The sites shown on these maps include the sites depicted on the withheld records in this case. However, these maps do

not distinguish Coillte-held land from other land. Therefore the information which was the subject of the request is not, to my knowledge, currently in the public domain.

Decision

I have reviewed Coillte's decision in accordance with Article 12(5) of the Regulations. I find that the withheld information is environmental information in the meaning of the Regulations and that refusal to provide access was not justified for the reasons given under Articles 8(a)(iv), 9(1)(c), 9(2)(c) and 9(2)(d) or under Article 8(a)(ii) of the Regulations.

Accordingly, I annul Coillte's decision of 9 August 2013 and direct Coillte to provide access to the 1:50,000 scale maps which show the locations of land held by Coillte which were agreed for use by Element Power in relation to wind energy export projects, including for feasibility testing purposes.

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 is given.

Peter Tyndall
Commissioner for Environmental Information

1 October 2015