

Re: Reply to the confirmatory application for access to documents under Regulation (EC) N° 1049-2001 - GESTDEM 2012-4179 – CAULFIELD / Complaint to EU Commission

To: Paul Simon, Unit SG.B.5, Transparency, European Commission / Philip Lowe, DG Energy

From: Joseph Caulfield, Rathrobin, Mountbolus, Co. Offaly, Ireland

Date: 4/3/2013

1. BACKGROUND

On 30th July, my near neighbour Jerry Waugh requested from the consultation website for the 'Projects of Common Interest'¹.

- "Please advise where the detailed project information may be obtained in relation to electricity projects in Ireland".

This was on the same day refused by Thomas Barrett, DG Energy, Unit B1:

- "More detailed technical information is controlled by the individual project promoters and we cannot release it due to commercial confidentiality. Given that each project promoter is named for each project, what I can suggest is that you contact each one and request information from them. Some have quite a lot of data already available on their website and will be better able to advise you. Unfortunately, it is not in the power of the Commission to release this data on their behalf".

In reply it was then pointed out by Jerry Waugh in his reply of 30th July 2012:

I have also researched the websites of the companies responsible for the Irish projects and none of them provide any useful/detailed information to allow a citizen to evaluate projects as requested in the questionnaire.

Some examples:

- E151: <http://www.gaelectric.ie/index.php/energy-storage/>
- E150: <http://www.organicpower.ie/>
- E149: <http://www.naturalhydroenergy.com/>

This consultation process does not seem to meet the basic requirements for public participation as per Regulation 1367/2006

- <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:264:0013:0013:EN:PDF>

¹http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm

I would appreciate if you could advise, that in the absence of any project information, how a citizen is supposed to participate in the consultation process?

A reply to this was received from on the 23rd August 2012 from Marija Mrdeza, Policy Officer, DG Energy, Unit Internal Market I: Networks and Regional Initiatives.

Again there was a refusal to provide the necessary information, the reason being 'Personal and Sensitive Data'.

As I myself am highly concerned about the situation in my own area of the Irish midlands, where over two thousand wind turbines of 185 meters in height are not only in planning and development, but form part of the above consultation (E156 Element Power), I therefore lodged on the 20th August a formal request for information under Regulation 1049/2001. Currently we have reached the situation, some seven months after Jerry Waugh made his first request, that I received on the 28th February 2013 a reply from the Secretary General herself², with nothing other than the EU Commission's 'blank questionnaire', as my reply to the information request.

2. THE AARHUS CONVENTION AND THE AARHUS REGULATION 1367/2006

The Aarhus Convention is part of Community Law as a result of Decision 2005/370³. I would therefore like to point out the following:

In the Preamble to the Convention it is stated:

- "Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations".
- "Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights".
- "Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns".
- "Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information".

² SG.B.5/JMLC/mbp - sg.dsgl.b.5(2013)276468

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:124:0001:0003:EN:PDF>

- “Acknowledging that public authorities hold environmental information in the public interest”.

Furthermore, Article (3) of the Convention is clear:

- “Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters”.

Specifically as it applies to EU Institutions, Article 1(2) of Regulation 1367/2006 states:

- “In applying the provisions of this Regulation, the Community institutions and bodies shall endeavour to assist and provide guidance to the public with regard to access to information, participation in decision-making and access to justice in environmental matters”.

If we consider Articles 5(1) and 5(2) of the Convention, which state:

- “Each Party shall ensure that: (a) Public authorities possess and update environmental information which is relevant to their functions”.
- “Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible.”

Then in Article 4(1) of Regulation 1367/2006 one can see:

- “Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public”.

While in Article 5(1) of Regulation 1367/2006 the wording is also clear:

- “Community institutions and bodies shall, insofar as is within their power, ensure that any information that is compiled by them, or on their behalf, is up-to-date, accurate and comparable”.

One does not need to be qualified as a Senior Judge to be able to deduct, that after seven months, the receipt of a blank questionnaire from the Secretary General herself, following previous repeated refusals, does not remotely meet the above requirements. Indeed, the ‘Aarhus Convention: An Implementation Guide⁴’, states in page 57 in relation to Article 3 (a) of the Convention (a request for environmental information may be refused if the public authority to which the request is addressed does not hold the environmental information requested):

- “If the public authority does not hold the information requested, it is under no obligation to secure it under this provision, although that would be a good practice in conformity with the preamble articles 1 and 3. However, failure to

⁴ <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>

possess environmental information relevant to a public authority's responsibilities might be a violation of article 5, paragraph 1 (a)".

If we further consider the definition of environmental information, which is provided in an identical manner in Article 2(3) of the Convention and Article 2(d) of Regulation 1367/2006, then this is very broad and includes:

- "Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making".

If we consider the blank questionnaire provided, then there is very little of the questionnaire, if indeed any at all, which does not fall under definition of environmental information. Again with reference to the fact that one does not have to be qualified as a Senior Judge, those filled in questionnaires for the projects concerned, should have by right been provided on the first occasion of requesting this information. Instead what we have is a clear breach of the Access to Information provisions of the Convention (Articles 4 and 5) and of the equivalent Title II (Articles 3 to 9) of Regulation 1367/2006.

This is not just a matter of legalese connected with the above, as the 'Aarhus Convention: An Implementation Guide' states on page 49 in relation to 'Access to Information':

- "Access to environmental information ensures that members of the public can understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner".

Indeed one can also see this theme in Recital 90 of Directive 2009/28/EC on the EU's 20% renewable energy by 2020 programme:

- "The implementation of this Directive should reflect, where relevant, the provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, in particular as implemented through Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information".

3. THE LACK OF AVAILABLE INFORMATION AND THE CONDUCT OF THE CONSULTATION ON PROJECTS OF COMMON INTEREST

For EU Institutions, the general principles and minimum standards for consultations are laid out in COM (2002) 704⁵: "Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission". Furthermore, in Article 2 of the Annex to Commission Decisions 2008/401/EC⁶, which defines the rules of procedure for application of the

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:en:PDF>

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:140:0022:0025:EN:PDF>

Aarhus Regulation 1367/2006, COM (2002) 704 is defined as the means for implementing public participation. Indeed, the document itself states:

The Commission believes that the processes of administration and policy-making must be visible to the outside world if they are to be understood and have credibility. This is particularly true of the consultation process, which acts as the primary interface with interests in society.

Thus consultation processes run by the Commission must also be transparent, both to those who are directly involved and to the general public. It must be clear:

- *What issues are being developed;*
- *What mechanisms are being used to consult;*
- *Who is being consulted and why;*
- *What has influenced decisions in the formulation of policy.*

Indeed the first three of the Minimum Standards comprise:

- *All communications relating to consultation should be clear and concise, and should include all necessary information to facilitate responses.*
- *When defining the target group(s) in a consultation process, the Commission should ensure that relevant parties have an opportunity to express their opinions.*
- *The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultations should be published on the Internet and announced at the “single access point”.*

None of the above was complied with, in particular, the people of the Midlands of Ireland, who are to be massively impacted by the scale of these wind turbine developments around them, were simply not engaged with. This was not an isolated case, on a greater European scale, less than 70 million of the 470 million citizens have English as a mother tongue, yet the consultation was restricted to that language, a point for which the EU Commission has already been reprimanded by both the European Parliament and the EU Ombudsman⁷.

It is if those to be affected by the environmental decision-making, and who are expected to carry both the financial and environmental costs of the projects being promoted, simply don't count. In Com (2002) 704 it is further stated:

- *“The Commission has underlined, in particular, its intention to “reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access[...].” This means that the target groups of relevance for a particular consultation need to be identified on the basis of clear criteria”.*

⁷ <http://www.ombudsman.europa.eu/en/press/release.faces/en/12029/html.bookmark>

- “The Commission will avoid consultation processes which could give the impression that “Brussels is only talking to Brussels”, as one person put it”.

In no uncertain terms this consultation on projects of common interest was run for the professional lobbyists, who benefit from these projects. The interests of the citizens to be affected by this decision making were not a consideration. Is it not surprising that there is growing anger in the manner in which wind turbines in a massive scale are being rammed into the countryside around us by nothing short of diktat from yourself and your colleagues in Brussels⁸, so much for COM (2002) 704:

- “Each of the EU institutions must explain and take responsibility for what it does in Europe”.

In fact nothing could be further from the truth, the UNECE Aarhus Convention Compliance Committee has already ruled against the EU in Communication ACCC/C/2010/54 in the manner in which it is implementing the renewable energy Directive 2009/28/EC, in particular its implementation in Ireland⁹, by failing to complete the necessary environmental assessments and procedures of democratic accountability. A ruling the EU Commission is determined to ignore. Furthermore, in Complaint 1892/2012/VL at the EU Ombudsman, the EU Commission is currently being investigated in relation to:

- “The Commission has failed to ensure that the Republic of Ireland carried out a strategic environmental assessment pursuant to Directive 2001/42/EC, prior to adopting its National Renewable Energy Action Plan based on Directive 2009/28/EC”.

This is not an idle matter; Ireland, including the midlands, has a distributed rural population. One simply cannot put that number of turbines into the landscape without having a serious adverse impact on the adjacent residential dwellings. Indeed, it does not take a genius to deduct, that it should have at least been worked out, where exactly all these wind turbines were going to be placed, before a National Renewable Energy Action Plan was implemented, to build 7,145 MW on the export scenario. Yet all these legal procedures associated with proceeding with due care and attention were bypassed, to the point that now we have the EU Commission running a consultation supporting its COM(2011) 658 Proposal for a Regulation on guidelines for trans-European energy infrastructure¹⁰, which aims at:

- “Streamlining permit granting procedures to significantly reduce their duration for projects of common interest and increase public participation and acceptance for the implementation of such projects”;
- “Facilitating the regulatory treatment of projects of common interest in electricity and gas by allocating costs depending on the benefits provided and ensuring allowed returns are in line with risks incurred”;

⁸ <http://www.laois-nationalist.ie/2013/02/28/ballyroan-public-meeting-on-wind-turbines-this-monday/>

⁹ <http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html>

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0658:FIN:EN:PDF>

- “Ensuring implementation of projects of common interest by providing necessary market-based and direct EU financial support. In this latter regard, the proposal provides the basis for eligibility of projects of common interest for EU financial assistance under the "Connecting Europe Facility", which is subject to a separate legislative proposal”.

Yet at the same time the planning authorities refuse to recognise the rights of the citizens to participate in decision-making. In my own case in a recent planning Submission, the authorities simply ignored the points raised in relation to the legal failures of the programme and failed to do a proper environmental assessment of the factors specified in Article 3 of the Directive on Environmental Impact Assessment¹¹. Similar circumstances occurred recently in another project in Co. Donegal¹², in which the planner stated¹³:

- Such legal failures of National and EU policy were not a material consideration in the determination of the subject application.
- That the applicant should direct her attention to the Courts.

It is well known that Ireland does not provide access to justice provisions in environmental matters and despite the ruling in Case C-427/07 (*Commission v Ireland*), current provisions fall far short of the minimum required, a point even acknowledged by the Commission itself in the manner in which Formal Notice under Article 258 has been sent in May 2012 to the Irish Authorities¹⁴. Yet here we are having these completely disproportionate and unsuitable projects rammed in by diktat, as if there is some overwhelming planetary emergency and there are simply no alternatives, a plainly ridiculous notion.

4. EU OMBUDSMAN’S CODE OF GOOD ADMINISTRATIVE BEHAVIOUR

This Code states among others¹⁵:

Article 4 - Lawfulness

The official shall act according to law and apply the rules and procedures laid down in Community legislation. The official shall in particular take care that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law.

¹¹ Kilkenny Co. Council Planning Application 12/378 (Foylatalure Wind farm – ART Generation)

¹² Donegal Co. Council planning application Plan. Reg. No. 12/50757 (GDNG Renewables)

¹³ <http://dccwebr8.donagalcoco.ie/R8miniweb/providedoc.aspx?username=webview&SessionID=55f9b038-7a05-4023-80c9-65677576441e&Index=Planning&DocID=10439328>

¹⁴ http://ec.europa.eu/eu_law/eulaw/decisions/dec_20120531.htm#ie

¹⁵ <http://www.ombudsman.europa.eu/en/resources/code.faces>

Article 7 - Absence of abuse of power

Powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest.

Article 12 - Courtesy

1. The official shall be service-minded, correct, courteous and accessible in relations with the public. When answering correspondence, telephone calls and e-mails, the official shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked.

These Articles have not been complied with to date, as documented by the previous sections of this letter. Indeed if we consider the Secretary General's response of the 28th February 2013, in which it is stated:

- "I consider that your confirmatory application is devoid of purpose. Indeed, a confirmatory application is a request to review a position by which access to one or more documents has been fully or partially denied. This is obviously not the case with regard to your request".

I consider this discourteous, environmental information requested has been withheld and is still being withheld; these are the facts of the matter.

5. NEXT STEPS

Firstly I would like to point out that the filled in questionnaires, which are environmental information, should be provided as per the Regulations 1367/2006 and 1049/2001.

Secondly, there is already a Complaint 181/2013/(JF)RT with the EU Ombudsman in relation to the failure to comply with the provisions of Regulation 1367/2006 in providing the environmental information requested.

Thirdly, it proposed to lodge a second complaint with the EU Ombudsman in relation to the manner in which the consultation on Projects of Common Interest was conducted, as already highlighted in the previous sections. In accordance with the rules of the EU Ombudsman, it is first necessary to "contact the EU institution or body concerned, for example by letter, in order to obtain redress". This letter fulfils this purpose.

Yours truly,

Joe Caulfield