

**Decision of the Commissioner for Environmental Information
on an appeal made under article 12(5) of the European Communities
(Access to Information on the Environment) Regulations 2007 to 2018
(the AIE Regulations)**

Case CEI/19/0034

Date of decision: 20 November 2019

Appellant: Percy Podger

Public Authority: Department of Defence

Issue: Whether the number of sheep permitted to graze on the Curragh by the Department in 2015 is environmental information within the meaning of article 3 of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that the information is environmental information and he required the Department to make it available to the appellant

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Background

On 24 April 2019 the appellant wrote to the Ministers for Defence and submitted an AIE request asking for:

“All correspondence/documentation/pieces of paper generated, and all information known by you, that in any and all ways relate to the total figure of actual sheep branded for the year 2015, including but not limited to, the precise figure of actual Curragh sheep branded by your staff for the year 2015”.

The Department refused the request because it did not consider the requested information to be “covered by the Regulations”.

The appellant wrote to the Department requesting a review. He argued that the information is clearly environmental information.

The Department issued a review decision which found that the requested information does not fall within the definition of environmental information in the AIE Regulations.

The appellant appealed to my Office, saying:

“I requested from the Minister of Defence information on the number of sheep branded:

‘Provide to me ... the total figure of actual branded for the year 2015, including but not limited to, the precise figure of actual Curragh sheep branded by your staff for the year 2015’.”

In carrying out my review I had regard to the submissions made by the appellant and the Department. I also had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister’s Guidance); Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and *the Aarhus Convention—An Implementation Guide* (Second edition, June 2014) (‘the Aarhus Guide’).

What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

It was clear that the scope of appeal was narrower than the scope of the AIE request. The appeal challenged only the refusal of access to the number of sheep branded by the Department in 2015 for the purpose of authorising the owners of those sheep to allow them to graze on the Department's land at the Curragh. I will refer to this as "the information at issue". In effect, what is sought is the number of sheep permitted to graze on the Curragh in 2015.

Settlement attempt

My investigator explored the possibility of a settlement. The Department indicated its willingness to provide the information at issue to the appellant. The appellant indicated his willingness to accept this provided that the Department formally accepts that the information is environmental information. He expressed his concern that, unless this was done, taxpayers' money would be wasted if every similar request made by him to the Department led to an appeal to my Office. However, the Department was unwilling to accept that the information is environmental information. As that was the case, settlement efforts were concluded and the matter fell to be determined by formal decision.

The law

Article 3(1) provides that "environmental information" means any information in written, visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect

the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,

(d) reports on the implementation of environmental legislation,

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

The appellant's position

The appellant submitted that the information is clearly environmental information. He cited the Curragh of Kildare Acts and said they provide that only sheep branded by people appointed by the Minister for Defence may be grazed on the Curragh. He submitted that:

“The target of said legislation is clearly to limit the number of sheep hence a measure ‘affecting or likely to affect the environment’ and are ‘designed to protect it’.”

He submitted that the information at issue therefore falls within subparagraph (c) of the definition.

The Department's position

The Department submitted that “the case for environmental concern, arising from the sheep on the lands, is not made”.

It provided me with a submission which included information intended to assist me in understanding the “nature of the Curragh and the origins and activities associated with sheep grazing on the lands”. This stated:

“grazing of the Curragh by sheep is essential to the maintenance of the ecology of the area”.

It explained that its sheep branding process:

“enables the total number of sheep permitted to graze the Curragh annually to be monitored by the Department so as to ensure that overgrazing is not taking place”.

The Department also submitted that:

“the wording ‘state of the elements’ in sub-para (a) of article 3(1) is a key consideration. The information now being sought does not relate to the state of the land”.

Analysis and finding

The Department’s references to “environmental concern” and “the state of the land” suggest that it does not regard the information at issue as environmental information because of a belief that its sheep grazing regime on the Curragh does not lead to overgrazing. If that is the basis for its position, it results from a failure to appreciate both the purpose of the AIE legislation and the definition of environmental information. Environmental information is not confined to information relating to environmental degradation.

The following are the key facts:

1. Sheep grazing is an activity which affects the flora, biological diversity and landscape of the Curragh. The Department acknowledges that it is *essential* to its ecology.
2. Information on how many sheep were permitted to graze on the Curragh in 2015 is clearly “information on” that activity of the most basic kind. The Department acknowledges the need to manage sheep numbers to avoid overgrazing.

It follows that the information at issue is environmental information falling within category (c) of the definition of environmental information provided in the AIE Regulations. It may well also be information on a measure designed to protect elements of the environment, but it was not necessary for me to determine that.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul the Department’s decision on access to the information at issue. I require the Department to provide the appellant with the following information (while noting that it has already indicated its willingness to do so):

The number of sheep branded by the Department in 2015 for the purpose of authorising the owners of those sheep to allow them to graze on the Department's land at the Curragh.

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

20 November 2019