

Environmental Information Regulations 2004

Decision Notice

Date: 11 October 2007

Public Authority: Pesticides Safety Directorate (an executive agency of DEFRA)
Address: Mallard House Kings Pool
3 Peasholme Green
York
YO1 7PX

Summary

The complainant requested a copy of the advice provided by the PSD to Ministers following PSD's analysis and consideration of all the submissions made during a public consultation into various issues surrounding crop spraying, the consultation meeting having taken place on 30 March 2004. The PSD provided the applicant with a copy of the annexes to the advice which mainly consisted of statistical information but refused to provide the advice itself. The PSD claimed that the information was exempt from disclosure under the exception at Regulation 12(4)(e) of the Environmental Information Regulations. Having investigated, the Commissioner accepts that the exception at 12(4)(e) is engaged but does not accept that the public interest in maintaining the exception outweighs the public interest in disclosing the information and consequently finds that the exception was incorrectly applied.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of the EIR. This Notice sets out his decision.

The Request

2. The Commissioner has received a complaint from the above-named person who has stated that on 21 January 2005 she requested from the Pesticides Safety Directorate ("PSD") the following information:

The detailed advice that the PSD gave to Ministers following PSD's analysis and consideration of all the submissions to the DEFRA/PSD Consultations following a meeting held on 30 March 2004.

The Commissioner notes that for the purposes of the EIR, PSD is not a public authority itself, but is actually an executive agency of Defra and therefore, the public authority in this case is actually Defra not the PSD. However, for the sake of clarity, this decision notice refers to the PSD as if it were the public authority.

3. The information requested relates to the formulation and development of the government's policy with respect to the introduction of buffer zones in pesticide spraying areas and providing public access to information on such activities near residential properties. The information requested consists of the advice given by the PSD to Ministers following its analysis of submissions obtained through a public consultation process.
4. On 24 February 2005, the PSD sent the complainant a refusal notice. It advised the complainant that it believed the request should be dealt with under the EIR rather than the Act. It then advised the complainant it was withholding the information under the exception at regulation 12(4)(e) of the EIR as the information constituted internal communications. In accordance with Regulation 12(1)(b), the public interest test was carried out and the PSD found that the public interest in maintaining the exception outweighed the public interest in disclosing the information.
5. The complainant found the response of the PSD unacceptable and requested an internal review on the 22 April 2005.
6. On 24 June 2005 the PSD responded. It advised that it upheld the decision previously reached for the reasons stated at that time.

The Investigation

Scope of the case

7. On 1 July 2005, the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - PSD's application of regulation 12(4)(e) to the information and;
 - Whether the public interest test had been properly applied.

Chronology

8. The Commissioner began his investigation by obtaining a copy of the information withheld which consists of the following documentation:
 - Advice headed “Responses to the formal public consultation on the introduction of no-spray buffer zones around residential properties”, including:
 - Annex A – Bystander exposure and risk assessment
 - Annex B – Analysis of responses
 - Annex C – Buffer zone consultation
 - Advice headed “Responses to the informal consultation on public access to information on pesticide use”, including:
 - Annex A – Views expressed/further discussions arranged
 - Annex B – Statistical Information
9. After reviewing the documentation, the Commissioner made representations to the PSD as a result of which, the PSD agreed to release to the complainant the Annexes to both pieces of advice, but not the advice itself. These were forwarded to her on 13 July 2006.
10. The Commissioner sought views from both parties as to why the advice should continue to be withheld or released. Defra responded in a letter dated 5 July 2006 and the complainant responded in a letter dated 15 September 2006 . The Commissioner took full account of the views expressed in reaching his decision.

Findings of fact

11. On 21 July 2003, two public consultations were launched which sought views on:
 - the introduction of buffer zones around residential properties near farms and;
 - how residents can be best informed of the pesticides that are being sprayed.
12. In a press release on that date, the Rural Affairs Minister at that time, Alun Michael MP, advised that the reason for the consultation was that despite the safeguards in place in relation to pesticide spray drift, members of the public living near agricultural land remained concerned about their exposure..
13. In particular, Mr Michael advised that whilst the scientific evidence available suggested that there was no risk posed to people in the countryside from pesticide spray drift, it was thought spraying immediately adjacent to residents' boundaries might be considered socially unacceptable. The consultation was to explore what other controls on spray operations might usefully be introduced to increase public confidence in the current system and it was confirmed that once the consultation process was complete the comments would be taken into account in preparing the final recommendations to Defra Ministers.

14. On 16 June 2004, Defra issued a news release following the consultation. The news release confirmed future actions to be taken and gave some information about the responses received but did not explain how the responses had been interpreted by PSD in their advice to Ministers following the consultation.
15. In this news release Mr Michael said, "The Government's top priority is to ensure that the safety arrangements we have in place protect the public. The independent scientific advice to me is very clear that the existing system provides full reassurance on that score. For this reason I have decided against the introduction of compulsory no-spray "buffer zones" around agricultural land. But despite existing advice there is a clear perception that current arrangements are inadequate. I have listened to the concerns of campaigners who hold strong views about how crop spraying has affected their health. I believe the time is now right for a fresh and independent appraisal of the basis for risk assessment. That is why I have asked the Royal Commission on Environmental Pollution ["RCEP"] to examine the evidence on which the current system is based and the reasons for people's concerns. The Commission, as an independent body, will adopt its own approach to the question."
16. RCEP published its report entitled "Crop Spraying and the Health of Residents and Bystanders" in September 2005. In a press release dated 11 September 2005 accompanying the report, the outgoing Chair of RCEP, Sir Tom Blundell, said:

"Government policy on exposure of bystanders and local residents is currently inadequate. Although pesticides are heavily regulated by government, there is significant uncertainty in the science available about whether pesticide spraying can cause ill health and whether some members of the public are being exposed to high enough doses of pesticides from normal use in farming to make them ill. Until research clarifies the extent to which the public is at risk from crop spraying, we recommend that extra precautionary measures are taken by government. Measures such as five metre no-spray zones between fields and homes will deliver a significant improvement in the risk management by government."
17. RCEP considered scientific evidence in a number of areas in the report, including health, exposure and risk. Grounds for concern were identified in respect of all of these areas. It called for:
 - a better system of advice within the NHS for members of the public who believe that their ill health is a result of pesticide spraying, as well as improved methods of reporting these cases to the regulator;
 - more research to reduce the uncertainties related to the effects of pesticides on the health of those living near to sprayed fields;
 - development of an improved model of exposure of residents and bystanders to pesticides;
 - information about what pesticides are being used to be more freely available to all who ask for it;
 - improvement of the approval process for pesticides and strengthening of the scientific advice available to government;

- tightening and better enforcement of the rules governing the use of pesticides on farms;
 - introduction of precautionary measures to give further protection to the public.
18. In the press release referred to at paragraph 16 above, outgoing Chair Sir Tom Blundell said:

"No-one can dispute that those individuals who have reported ill health, which they claim is due to pesticides being sprayed, are genuinely ill. Based on our personal examination of some of these cases, and on our current understanding of the effects that pesticides can have on the body system, it is not implausible that there may be a link between pesticide spraying and chronic ill health. The Commission has found at the least that such a link cannot be summarily dismissed without new evidence.

We therefore recommend that a more precautionary approach is taken, so as to safeguard the safety of the public. The existing lack of knowledge and uncertainties indicate an urgent need for research to be undertaken to investigate whether there really is a problem, how many people are affected if there is, and which pesticides may be causing any ill health.

We have identified a number of areas where more information is needed that should lead to improved protection of human health, including which symptoms might be caused by pesticides and whether pesticides are able to drift away from the field into people's property. The many tests that are currently undertaken before pesticides are approved by regulators for use by farmers should be expanded to try to address the chronic symptoms that the public are describing to us. There needs to be improved investigation of reported ill health by regulators, combined with better observation of the ill health the public are reporting.

We also have concerns about the way that exposure is assessed. Although the current process used by regulators is cautious and there are wide safety factors built in to it, the way this assessment works is by considering a simple situation and looking at exposure from breathing and through the skin, which the assessment assumes to be the main routes into the body in all cases. More sophisticated and modern models are urgently needed to allow the regulators to assess the likelihood that unusual but serious situations could arise and to manage exposure risks accordingly.

We feel that the protection of the health of the British public needs to be strengthened. Precautionary measures need to be taken, such as no-spray zones between fields and neighbours. It is clear that there is a demand from the public for better access to information about the chemicals being used. We recommend that the code of practice used by farmers is strengthened so that residents living next to fields that are to be sprayed should be given prior notification of spraying activity. Records of which pesticides, and when and where they have been used, should be directly available to residents and bystanders from the persons responsible for crop spraying. Better controls should be imposed upon training and the accessibility of sprays."

19. On 20 July 2006 Defra published its response to the issues raised by RCEP. In its press release of the same day, Defra stated:

“Of the 35 recommendations in the report the Government has accepted, will consider, or are already doing 25 of them,

The Government recognises the clearly genuine concerns of some residents and bystanders about the spraying of pesticides, Government can, and will, do more to address these concerns. Minister with responsibility for Pesticides, Jeff Rooker, said:

“I firmly believe that the concerns of residents are best addressed at the local level through dialogue between residents and farmers to identify and understand the issues and develop mutually agreeable solutions. I also believe that this can be achieved most rapidly through a voluntary approach that allows for innovative and flexible solutions.

Existing voluntary schemes such as Farm Assurance and the Voluntary Initiative have demonstrated how effective non-statutory approaches can be in changing behaviour. I want to see schemes such as these playing a crucial role in ensuring that both farmers and the public can have a greater mutual understanding of the problems they each face. These schemes have the potential to provide farmers both with the practical support and the incentive to be good neighbours in this regard and I will be discussing with these organisations and others how this might be achieved.

I believe that the proposals set out in the Government's response, a number of which are already underway, can achieve the majority of outcomes envisaged by the Royal Commission without the need for additional burdensome regulation on the agricultural sector.”

The Government has also noted the concern of both the Royal Commission and some members of the public with how the risks to residents and bystanders are considered in the approvals process. To address this second area of concern, Defra's Chief Scientific Adviser Howard Dalton said:

“We are completely reviewing the model used to assess resident and bystander exposure as part of the pesticide approvals process. The current approvals process is adequate with clear safety margins built in, however, I recognise that it needs to be more clearly demonstrated to the public that approvals are based on high quality underpinning science. To address this the revised exposure model will give more explicit consideration to a wider range of possible exposure routes and will reflect modern farming practices. The research to develop this model has already begun. A former member of the Royal Commission was one of the peer reviewers for the proposal before it was approved and I will ensure the development of the model meets acceptable scientific standards.”

The UK is also taking a primary role on this issue in Europe, taking the lead in revising the guidance on acceptable exposure limits, including the assessment of resident and bystander exposure, for the European Commission.

The findings of the report were considered very thoroughly alongside independent scientific advice. The Department of Health sought views on the health recommendations from the Committees on Toxicity and on Carcinogenicity of Chemicals in Food, Consumer Products and the Environment. Defra also considered advice from the Chief Scientific Adviser and the Advisory Committee on Pesticides on the wider recommendations of the report. The views of interested parties from all sides of the debate were equally considered.

The scientific advice received is clear that there is insufficient evidence to support the Royal Commission's recommendations for additional regulatory measures on safety grounds. Introducing regulations for other reasons such as perceived nuisance from spraying would be incompatible with the Government's Better Regulation policy. Government has therefore decided against introducing any new regulations at this time."

Analysis

20. The Commissioner is satisfied that the information requested falls within the definition of environmental information under regulation 2(1) of the EIR.

Exception

Regulation 12(4)(e)

21. Having considered the information, the Commissioner is satisfied that the advice given by the PSD to Ministers on the issues of the introduction of no spray buffer zones and public access to information on pesticide use are internal communications which fall within the exception detailed at regulation 12(4)(e).

Public Interest Test

22. Having decided that the exception is engaged, the Commissioner must then consider whether the public interest in maintaining that exception outweighs the public interest in disclosing the requested information, in accordance with regulation 12(1).

Thinking Space

23. The Commissioner recognises that frank and honest debate is necessary for high quality policy formulation and that there is a public interest, in certain circumstances, in maintaining private space for such discussion away from public scrutiny. That is, the EIR will protect internal communications when it is sufficiently in the public interest to do so.
24. The PSD argued that the impartiality of the civil service might be undermined if advice was routinely made public which could lead to poorer decision making – good government depends on good decision making and that needs to be based on the best advice and a full consideration of the options. It is also noted that

Ministers and officials feel the need to conduct rigorous and candid risk assessments of their policies and programmes including consideration of the pros and cons without there being premature disclosure which might close off better options. The PSD further argues that the requested information concerns an area in which policy continues to develop. Therefore, the requirement for thinking space is ongoing.

25. The Commissioner notes that the Ministerial statement issued following receipt of the advice from the PSD was published on 16 June 2004. The request for information was made on 21 January 2005, PSD's refusal notice was issued on 24 February 2005 and the internal review on the 24 June 2005. Although the Commissioner has not taken the following into account in reaching a decision in respect of the balance of the public interest at the time of the request he does note that since that time, RCEP has published its findings and Government policy has developed further concluding with its announcement on 20 July 2006 (see paragraphs 14 -19 above).

Public debate

26. The Commissioner notes that it is also in the public interest to disclose information where this would help further the understanding of and participation in government decision making on matters of significant public importance. This may assist in increasing the public's understanding of how government decisions affect them and, where appropriate, allow the public to challenge these decisions. The Commissioner considers that for the public to participate meaningfully in future decision making on the issues raised by the request in this case, the options considered should be made known to the public..
27. The PSD maintains that there is little public interest in providing additional information on the policy adopted since it has already published a large amount of information and the Minister gave a detailed explanation of the reasons for adopting such policy. The Commissioner accepts that there is a large amount of information in the public domain and notes that each representation made during the consultation process is available from the Defra library.
28. However, this should be balanced against the fact that there is a high degree of public concern in relation to matters of public health, the importance of which was acknowledged by holding the consultation.
29. The Commissioner understands that there may only be a small proportion of the public that has an interest in the release of the information. However, that does not mean that the public interest arguments in favour of release are minimal. The Commissioner notes that the issues under discussion have potentially serious consequences for public health which places a greater weight in favour of disclosure.
30. The Commissioner accepts that it is necessary to strike a balance between disclosing sufficient information to allow informed debate and protecting the space within which Ministers are advised and formulate policy. However the Commissioner has also considered that at the time of the request the RCEP had not yet completed its review and access to the requested information may have

allowed the public to engage more meaningfully in the public debate in advance of the publication of RCEP's findings.

Transparency and accountability

31. The Commissioner recognises that there is an inherent public interest in public authorities being transparent in the decisions they take in order to promote accountability. If reasons for decisions are made public, there is a strong argument that this will improve the quality of future decisions and that allowing the public access to relevant information helps to ensure that public authorities are acting appropriately.
32. PSD argue that as all of the responses to both consultations have been placed in the Defra library and all the advice of the scientific Advisory Committee on Pesticides on bystander exposure to pesticides is in the public domain, there is sufficient information in the public domain to meet the public interest in transparency and accountability of decision making on these issues.
33. The PSD stated in their letter to the complainant dated 24 February 2005, "Ministers have made it clear that no new evidence came forward as a result of the consultations that would justify the introduction of buffer zones on scientific grounds and this is the basis on which the decision was made. Ministers have also made it clear that further exploratory work will need to be carried out before any new provisions relating to providing public access to information on pesticide spray activities could be introduced."
34. The complainant has queried this view as scientific evidence was not requested for the consultation and in any event, she believes that a volume of material/evidence which was not just anecdotal in nature was presented. As the PSD was the only body who had access to all the consultation submissions, the complainant believes that the explanation of the reasons behind policy decisions provided by former Minister for Rural Affairs, Alun Michael MP, was inadequate without also disclosing PSD's advice.
35. The Commissioner believes that in this case, as there has been a considerable degree of public concern and views have been sought via a public consultation, it is in the public interest for the public to have access to further information upon which a decision was formulated. Consequently, to ensure transparency and accountability and to increase public confidence that Government decisions being made on a sound basis, there is a strong public interest in releasing the information.

Record keeping

36. Poor decision making and inadequate recording are to be avoided. The Commissioner accepts that there is a public interest in accurate record keeping. However, he does not accept that disclosure of advice in this case would lead to inadequate recording of decisions. The Civil Service has a duty to carry out its duties effectively. In accordance with the Civil Service Code, it should follow best

practice in records management, which includes making, maintaining and managing proper records of decisions.

Conclusion

37. It is the Commissioner's decision that in all the circumstances of this particular case, after carrying out a balancing exercise of the public interest arguments, the public interest in disclosure is not outweighed by the public interest in maintaining the exception. The Commissioner considers that disclosure will assist the public to understand more about the way in which government has reached its decision on the particular issue and enable citizens to understand and participate more fully in debates on issues of public importance from a more informed standpoint. The Commissioner does not believe there is likely to be a detrimental impact on future policy making, especially as it was recognised at the time of the request that further studies were to be undertaken and the policy to be reviewed in the light of the findings.

The Decision

38. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with its obligations under regulation 5 of the EIR in so far as the public authority incorrectly applied the public interest test in relation to the exception under regulation 12(4) of the EIR.

Steps Required

39. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:

The Pesticides Safety Directorate shall disclose to the complainant the PSD's advice to Ministers referred to in paragraph 8 of this notice.

40. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

41. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

42. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 11th day of October 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 12 of the Regulations provides:

“ (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if-

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(4) For the purposes of Paragraph (1)(a), a public authority may refuse to disclose information to the extent that-

- (e) the request involves the disclosure of internal communications.”