

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 5 February 2007

Public Authority: Pesticides Safety Directorate
(an executive agency of the Department
for Environment Food and Rural Affairs)

Address: Mallard House, Kings Pool,
3 Peasholme Green,
York,
YO1 7PX.

Summary

The complainant requested the public authority to provide it with lists of safety studies carried out on two named pesticide ingredients. The public authority refused, relying upon an exemption under section 22 of the Freedom of Information Act 2000 ("section 22") indicating that the lists were to be the subject of future publication and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. After consultation with both parties the Commissioner is satisfied that the public authority correctly applied the exemption. The Commissioner did however, on a procedural point, find the public authority in breach of section 17 of the Act.

The Commissioner's Role

1. 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 Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 13 June 2005 the complainant invited the public authority to provide "*copies of full reference lists with claims for data protection, as supplied by the main notifiers for nicosulfuron*".

On 20 July 2005 the complainant invited the public authority to provide in relation to triadimenol "*copies of the public version of the DAR and separately.....a copy of the claim made by the main notifier for data protection*".

On 25 July 2005 the public authority, relying on the section 22 exemption, refused to provide the triadimenol information.

On 17 August 2005 the public authority, relying on the section 22 exemption, refused to provide the nicosulfuron information.

On 23 August 2005 the complainant requested an internal review of the decision not to release the triadimenol information. It indicated that its request was for the *“release of the data assessment report for triadimenol together with a reference list of data protection claims”*.

The parties subsequently agreed that the internal review should also include a review of the decision to withhold the nicosulfuron information.

On 23 September 2005 the public authority confirmed that the internal review had been undertaken in respect of both the triadimenol and the nicosulfuron information. The review upheld both refusals under the section 22 exemption.

Although various terminology has been used in the form of the requests the Commissioner notes that the requests are for the lists of safety studies carried out on the two named pesticide ingredients triadimenol and nicosulfuron (paragraph 20).

The Investigation

Scope of the case

3. On 8 November 2005 the complainant contacted the Commissioner to complain about the way its request for information had been handled in that it maintained that the public authority had incorrectly applied the section 22 exemption to withhold disclosure of the requested information.
4. During the course of the Commissioner's investigation the information requested by the complainant has been made available to it, albeit only recently, in circumstances that will be detailed.

The Commissioner has continued to proceed with the issuing of this notice at the request of the complainant in the knowledge that the issues raised between the parties are continuing.

Chronology

5. The Commissioner first made substantive contact with the public authority on 20 February 2006 following which there has been regular correspondence dealing with a number of issues. This culminated in a letter dated 12 June 2006 in which the public authority, after consultation with various third parties, provided the Commissioner with its definitive view of the matter.

The complainant, through its solicitors, has been invited to provide its views

throughout the Commissioner's investigation of the matter and has done so where appropriate.

Findings of fact

6. The public authority is the regulatory authority in Great Britain for legislative controls on plant protection products ("pesticides") used by farmers on their crops.
7. The complainant is the regional office of a group of companies involved in the manufacture and distribution of pesticides.
8. In July 1991 the European Council adopted Directive 91/414 the aim of which is to harmonise the placing on the market of pesticides thereby eliminating trade barriers. It established common rules for the review and inclusion of pesticide substances in a positive Community list of pesticide substances ("Annex 1") and provided for the re-registration of pesticides containing such pesticide substances at Member State level (without which the pesticide cannot be marketed).
9. Nicosulfuron and triadimenol are active substances in pesticides ("pesticide substances") and accordingly are subject to the review process.
10. For the review a Member State is appointed as a rapporteur and, in this case, the public authority was appointed the rapporteur for nicosulfuron and triadimenol.
11. In a typical review the data notifier will submit to the rapporteur a complete dossier containing prescribed information which will include the results of safety studies carried out to support the continued marketing and use of the pesticide substance based on the relevant pesticide.
12. The rapporteur evaluates the dossier and prepares a draft assessment report ("the draft report") which includes a list of the safety studies ("the data list") used in the assessment and contains a summary evaluation and recommendation.
13. The rapporteur then submits the draft report to the European Food Safety Authority ("the EFSA") who undertake a sanitisation procedure with the data notifier redacting any appropriate confidential information. This usually takes up to six weeks after which the draft report should be published on the EFSA's website.
14. Thereafter the EFSA undertakes a consultation on the draft report which involves peer review by all Member States. Once this process is complete the EFSA's conclusions (which will include the now finalised assessment report including the data list) are passed to the European Commission and placed on the EFSA's website.
15. Based on the review, the Commission either adds the pesticide substance to Annex 1 or it issues a non-inclusion notice.
16. The inclusion of the pesticide substance in Annex 1 constitutes the European Union's finding that the pesticide substance poses no unacceptable risks for man

- or the environment for at least one representative use and therefore can be marketed throughout the Community.
17. Full re-registration of all pesticides containing the pesticide substance, a process that can take several years, is later conducted by the Member states under full compliance with the criteria contained under Directive 91/414 and any other limitation imposed as a result of the Annex 1 inclusion at EU level.
 18. The assessment report should therefore be available on the EFSA's website at two stages in the review process. It is firstly available in draft form after the sanitisation process, and thereafter in its finalised form.
 19. In addition the EFSA is required under European Commission Regulation 1490/2002 Articles 11 and 20, paragraphs 3 and 6 respectively, to *make available at specific request or keep available for consultation by any person* (amongst other items) the data list, first as contained in the draft report and second as finalised by the EFSA. The draft report (except the confidential elements thereof) must also similarly be made available.
 20. The request for information in this case was a request for the data lists contained in the draft reports for both pesticide substances. It was not a request to be provided with the studies themselves. In the circumstances taking account of the nature of the exemption claimed the Commissioner has not found it necessary to view the actual lists themselves.
 21. In previous cases the public authority had released similar information to the complainant but had only done so where the data owner did not object. In this case at least one of the data owners had objected.

Analysis

22. It is necessary initially for the Commissioner to consider a matter of jurisdiction.
23. Where a request for information is made under the Act, section 39 provides an exemption where the Environmental Information Regulations 2004 ("the Regulations") apply and in those circumstances the public authority is obliged to deal with the case under the Regulations.
24. The definition of environmental information contained in the Regulations includes information in written form on *factors such as substances affecting or likely to affect the environment*.
25. The Commissioner taking due account of the Information Tribunal decision in the matter of Malcolm Kirkaldie v the Information Commissioner and Thanet District Council Appeal Number EA/2006/001 invited both parties to provide their respective views on whether the matter should be considered under the Act or under the Regulations.

26. The public authority indicated that, although some of the studies themselves were likely to contain “environmental” information, it did not believe that the actual data lists fell into this category. It felt it was a question of where to draw the line between environmental and non-environmental information since it could conceivably be claimed that practically everything is related to the environment as defined in the Regulations in some way or another. Here, although the data lists might be related to a “substance”, the information was not information about the substance’s release into the environment. It felt that there was a sufficient degree of remoteness from the environment for the lists to be most appropriately considered under the Act, a viewpoint shared by the complainant.
27. Where an identical result to a request for information would be given under either regime, the Commissioner’s general approach is to discourage an academic debate about whether information is or is not environmental. In this case the outcome under the two regimes is the same. Although it is arguable that the requested information was environmental information, the Commissioner considers that it is not necessary to decide the point. In line with the position of both parties, the Commissioner is therefore prepared to deal with the matter under the Act.
28. The Commissioner will now deal with this case by considering, firstly, the matter of a procedural breach and, thereafter, the public authority’s use of the section 22 exemption, including its application of the public interest test. A full text of the relevant statutes referred to is contained in the legal annex.

Procedural matters

29. The request for the information in relation to nicosulfuron was made on 13 June 2005.
30. As the public authority refused to release the information it was required to issue a refusal notice promptly and in any event not later than the twentieth working day following the date of receipt of the request.
31. The refusal notice issued by the public authority was dated 17 August 2005, clearly well outside the relevant timescale.
32. The public authority has indicated that the delay was due to the fact that it entered into two rounds of correspondence with the data owner regarding the question of consent before it decided to refuse the request. Although the Commissioner accepts that the complainant was kept advised of the position while this was being done, the public authority should nevertheless have issued the notice within the prescribed timescale. It could have quite separately thereafter continued its correspondence with the data owner.
33. The Commissioner accordingly finds the public authority in breach of section 17 of the Act.

Exemption

34. The section 22 exemption relates to information held by the public authority with a view to its publication, in this instance by the EFSA, at some future date (whether determined or not).
35. The Commissioner is satisfied that the information was held at the time of each request, and held with a view to subsequent publication by the EFSA on its website.
36. The Commissioner must now consider whether it was reasonable, in all the circumstances at the time of the refusal of the request, to withhold the information until the anticipated date of publication.
37. The complainant argues that there is a delay (over and above the anticipated normal six week period taken for the sanitisation process) between draft reports being sent to the EFSA and their subsequent publication on its website.
38. The draft report for nicosulfuron was submitted to the EFSA on 22 November 2005; that for triadimenol being submitted on 25 May 2006. Both were published for the first time on its website on 3 July 2006 and 9 August 2006 respectively.
39. Once a pesticide substance is included within Annex 1, companies such as the complainant must reregister at Member State level the pesticides they market which contain the pesticide substance. This requires a complete dossier to be provided in each case in full compliance and accordance with the regulations (paragraph 17). Failing this, the pesticides cannot be marketed.
40. However, there are prohibitions on the information contained in the draft reports being used by parties other than the original notifier and in the absence of agreement the complainant may find itself in the position of having to recreate the original studies in the draft reports. This is a costly and lengthy process in itself but it is a guaranteed method of completing the necessary dossiers.
41. The complainant argues that making the information available at the earliest possible date will give it the optimal opportunity to either recreate the studies or, if necessary, negotiate a data sharing arrangement. This would allow it to maintain its registrations once the pesticide substances have been added to Annex 1 which will ensure that the market for the sale of pesticides remains competitive, something which is in the public interest.
42. The elimination of the complainant from the triadimenol and nicosulfuron markets would, in addition to destroying competition in those markets, lead to the closing down of those parts of the complainant's business. This in turn would have an adverse effect on the economy in that jobs would be lost, which would not be in the public interest.
43. The public authority acknowledges that, dependent on the resources available to the EFSA at any given time, there is often a long and unpredictable period between the submission of a draft report and its subsequent publication on the EFSA's website.
44. However, it maintains that the complainant's claim as to the effect of the delay is

exaggerated because the disclosure arrangements built into the European system are specifically designed for the purpose of making information available in a timely fashion. This takes into account the fact that most reviews take several years (if not more) to complete, allowing a number of years for the generation of repeat or new data by new entrants to the market such as the complainant. A delay of a few months in obtaining the list of studies from it even before the draft report has been submitted to the EFSA should be seen in this context.

45. The public authority's argument is that there is a regulatory process that has been specifically designed to place the EFSA at the centre of the publication procedure.
46. The process has been designed to operate throughout Europe and the public authority points out the difficulties that might occur were Member States unilaterally to decide to release information earlier than the EFSA. This in effect would lead to Member States once again setting their own timetables for release.
47. While acknowledging the complainant's concerns about delay the Commissioner accepts the public authority's argument and accordingly finds that it was reasonable at the time of the requests, in all the circumstances, to withhold the information until the anticipated date of publication. The Commissioner accordingly finds in this case that the section 22 exemption is engaged.
48. Section 22, however, is a qualified, not an absolute exemption. This means that even where it is established that the exemption is engaged, the obligation to disclose will still arise unless, as stated in section 2(2)(b) of the Act, in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
49. The public authority's argument for not disclosing the information prior to its publication by the EFSA was the wish not to undermine the pesticides approval process by operating outside of European legislative arrangements which should in practice allow generic companies sufficient time to maintain their products on the market.
50. It believes that the public interest lies in maintaining confidence in the pesticides approvals process and considers that this interest is best served by maintaining the exemption.
51. The complainant's argument is that the early release of the information would allow it (and no doubt others) optimum opportunity to proceed with its work, thereby ensuring that it remains in the pesticide market place which ultimately provides the public with choice.
52. The complainant maintains that the public authority's reliance on the making available of information by the EFSA, which is not itself a body subject to the provisions of the Act and which has not always abided by its data access rules (at

least in a timely fashion), is not a satisfactory way to proceed for the purposes of the Act.

53. The EFSA, as already noted (paragraph 19), is under a duty to disclose the data lists in accordance with European Commission Regulation 1490/2002. This means that, upon receipt of the draft reports from the public authority, it must in effect make those lists available upon request quite irrespective of the matter of later publication on its website. The complainant has indicated that this does not happen in practice and has provided the Commissioner with copy correspondence between it and the EFSA in connection with other pesticide substances which illustrate that point.
54. The Commissioner has invited comment from the EFSA on the matter of early disclosure but regrettably it has failed either to provide any information or offer a view.
55. The Commissioner has carefully considered the arguments put forward by both parties.
56. Cases of this nature revolve around the issue of timing. The Commissioner takes the view that, had the request for information been made or repeated on the day the public authority had submitted the draft report to the EFSA or at any time thereafter then, in the light of the delays which are acknowledged by the public authority, the public interest test (irrespective of the question of consent) would almost certainly have favoured disclosure.
57. The effect of such a decision would be to provide the complainant with what it was entitled to within the European framework at the relevant time.
58. However at the time the requests were made, the public authority was actively undertaking the review processes in each case.
59. The release of the data lists would have had the effect of providing the complainant with information without the owner's consent that had not yet been made available to the EFSA which, in accordance with the relevant European legislation, has been placed at the centre of the regulation and publication process.
60. The Commissioner finds that, in all the circumstances of this case, at the time the requests were made, the public interest in maintaining the exemption outweighed the public interest in disclosing the information and that, accordingly, the public authority correctly applied the section 22 exemption.

The Decision

61. The Commissioner's decision is that the public authority dealt with the application of the section 22 exemption in accordance with the requirements of the Act.

However, the Commissioner has also decided that the public authority is in breach of section 17 of the Act.

Steps Required

62. The Commissioner requires no steps to be taken.

Right of Appeal

63. 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 5th day of February 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Section 1(1) provides that -

Any person making a request for information to a public authority is entitled -

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 2(2)(b) provides that -

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 10 provides that -

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 17(1) provides that -

“A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 22(1) provides that -

“Information is exempt information if -

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date

(whether determined or not),

(b) the information was already held with a view to such publication at the time the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

Statutory Instrument 2004 No. 3391 The Environmental Information Regulations 2004

PART 1

Interpretation

2(1) In these Regulations -

“the Directive” means Council Directive 2003/4/EC[4] on public access to environmental information and repealing Council directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely 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 referred to in (a).

(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 (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 (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 in as much as they are or may be affected by the state of the elements in the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).