Reference: FS50248660

Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 27 October 2009

Public Authority: Chemicals Regulation Directorate
Directorate of the Health and Safety Executive
Address: Redgrave Court
Merton Road
Bootle
Merseyside
L20 7HS

Summary

The complainant requested information clarifying which pesticides approved by the Chemicals Regulation Directorate ('CRD'), a directorate of the Health and Safety Executive, were parallel import approvals. The CRD initially refused the request under section 43(2) (commercial interests) and section 12(1) (cost of compliance) of the Freedom of Information Act ('the Act'). However, the Commissioner has found that the withheld information constituted environmental information for the purposes of the Environmental Information Regulations 2004 ('EIR'). The Commissioner therefore asked the CRD to reconsider the request under this legislation. Subsequently, CRD cited regulation 12(5)(e) (commercial confidentiality) as grounds for withholding the information but considered that regulation 12(4)(b) (manifestly unreasonable), the closest relative to section 12(1) of the Act, would not apply. The Commissioner has determined that regulation 12(5)(e) is not engaged. In addition, the Commissioner considers that CRD breached regulations 5(2) and 14(3) of the EIR in its handling of the request.

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.

Background

2. The requested information concerns parallel imports of pesticides. For the benefit of the Commissioner, the Health and Safety Executive ('HSE') has helpfully summarised the approvals process:

"In order to obtain a plant protection product approval, main approval holders (normally plant protection product manufacturers) are required to submit substantial data dossiers to HSE covering such things as toxicity, operator exposure, residues, plant protection product chemistry, fate and behaviour, ecotoxicology and efficacy…

The parallel trade in pesticides involves the importation from a foreign market of a plant protection product approved in the exporting Member State that is identical to a product already approved in the Member State into which the product is being imported. Providing the test of identicality is met, the imported product may be approved as a parallel import via a simplified procedure. Under this procedure applicants seeking approval for parallel import products are not required to submit any data, environmental or otherwise, to support their applications. All they required to do is to provide evidence to HSE that their product is currently approved in another Member State and that is identical to one already approved in the UK."

The Request

3. The Commissioner notes that under the Act, the Chemicals Regulation Directorate ('CRD') is not a public authority itself, but is actually a directorate of the HSE which is responsible for the CRD and therefore, the public authority in this case is actually the HSE, not the CRD. However, for the sake of clarity, this decision notice refers to the CRD as if it were the public authority.

4. The complainant contacted the CRD (or the Pesticides Safety Directorate ('PSD') as it was at the time of the request, until it merged on 1 April 2009 to form the CRD) on 25 November 2008, to request:

"…under the Freedom of Information Act for PSD to indicate which existing approvals are parallel import approvals."

5. In her correspondence, the complainant stated that a number of EU Member States made this information routinely available, therefore precluding the CRD from finding that the release of the information would prejudice commercial interests.

6. The CRD issued a refusal notice to the complainant on 12 January 2009. It explained that the information was being withheld pursuant to sections 43 and 12 of the Act. In regards to the exemption provided by section 43, the CRD commented that:

"…disclosure of the requested information could have a detrimental impact on the approval holders involved by threatening their commercial revenue, their ability to obtain supplies or by weakening their position in a competitive environment by revealing market-sensitive information or information of potential usefulness to competitors."

7. Having found that section 43 was engaged, the CRD explored the public interest in the release of the information but stated that, in this case, it would favour maintaining the exemption.

8. Turning to its application of section 12, the CRD indicated that the cost of complying with the request would exceed the appropriate cost limit of £600 prescribed by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

9. The complainant appealed the CRD's refusal on 26 January 2009. Amongst other points, the complainant disputed the CRD's claim that disclosure would undermine the integrity of the approvals process. Instead, the complainant stated her concerns "over illegal pesticides which have entered the UK under the cover of parallel import approvals." The complainant also pointed to the CRD's release of risk assessments upon which an approval is granted. The complainant argued that such information would also apparently contain commercially sensitive information if the CRD's reasoning was followed.

10. On 11 March 2009, the CRD informed the complainant that following its internal review, it had upheld its original decision to withhold the information under sections 12 and 43 of the Act.

11. In reference to section 12 and the cost of complying with the request, the CRD stated that the "work involved in retrieving and checking the relevant documentation" was prohibitive.

12. The CRD also detailed the reasons why, in any event, the requested information would be exempt by virtue of section 43 (the Commissioner notes that in the body of the correspondence, the CRD refers to sections 43 and 41 but has since confirmed that the section 41 reference was a mistake). The CRD rejected the complainant's arguments for disclosure on the basis of two principal points:

- The CRD disagreed that in releasing risk assessments, it already 'commonly' made information about the basis of approvals public. The CRD stated that such assessments were bound by commercial confidentiality and, whilst redacted risk assessments were sometimes made available upon request, this did not extend to parallel imports.

- That whether other EU Member States made the status of parallel imported products known was not of direct relevance to the UK situation. "Markets are very different and it is the exploitation of the differences between markets that lies at the heart of the parallel import trade."

The Investigation

Scope of the case

13. On 8 May 2009, 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:

> "[The Crop Protection] Association's review [of the publication of approvals], whilst not exhaustive, included Germany, Belgium, Nertherlands, Italy, France and Finland and found that in each case parallel imports could be identified…The fact that this information is routinely made available in other countries clearly indicates that it has not been found to harm parallel importers' interests. Similarly, although not referred to by CRD, information identifying the status of parallel import approvals was freely available until the final quarter of 2008…
>
> If evidence exists to support CRD's belief that commercial interests will be harmed then we would have expected it to have been provided in CRD's responses to our letters but none has."

Chronology

14. The Commissioner wrote to the CRD on 17 July 2009 to put forward his considered view that the relevant access-regime would be the EIR and not the Act. The Commissioner therefore invited the CRD to reconsider its response in light of this change of legislation.

15. Further to the possibility that the CRD would consider that the requested information should be withheld under the EIR, the Commissioner also sought confirmation that the requested information had, until recently, been in the public domain.

16. The CRD responded to the Commissioner on 27 August 2009. In the first place, the CRD disagreed with the Commissioner's view that the information in question would fall under the EIR. However, owing to the Commissioner's recommendation, the CRD did consider the request as if the EIR applied.

17. In its original decision, the CRD had relied on section 12 of the Act as one of the pillars of its refusal. The equivalent, but not identical, exception in the EIR is regulation 12(4)(b), which provides that an authority may refuse a request on the grounds that it is 'manifestly unreasonable.'

18. The CRD stated that the estimated cost of complying with the request would total approximately £1000. Whilst this would allow an authority to refuse a request under section 12(1) of the Act, the CRD considered that the differences imposed by regulation 12(4)(b) would prevent it being relied upon. As the CRD withdrew its reliance on regulation12(4)(b) the Commissioner has not considered this exception in his investigation.

19. Nevertheless, the CRD maintained that the information should not be released pursuant to regulation 12(5)(e) of the EIR, the closest relation to the section 43 (2) exemption. The CRD also went on to examine in some depth the reasons why the exception would apply.

20. On 1 October 2009, the complainant telephoned the Commissioner for an update on the case. Amongst other points discussed, the complainant explained how it was previously possible to identify products approved as a parallel import on the CRD's website.

Analysis

Substantive Procedural Matters

21. The CRD originally processed the complainant's request for information under the Act. However, the Commissioner considers that the pesticides parallel import data constitutes environmental information and that the correct access-regime is therefore the EIR.

22. In coming to this view, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. .The Commissioner therefore considers that "any information …on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment.

23. The Commissioner has determined that the requested data would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This provides that:

"'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 on—

(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." The full text of regulation 2(1) is included in the legal annex to this notice.

24. In its representations to the Commissioner, the CRD stated that in assessing whether the records constituted environmental information, it has looked at the proximity/remoteness of the information to see if it is sufficiently connected to the definitions set out by the EIR. The CRD suggested that "although the requested information might be related to a 'regulatory measure' or 'substance' the

information itself (names of products that are parallel imports) is not information about that [sic] the substance's release into (or effect) on the environment."

25. The Commissioner, however, has concluded that the CRD interpreted the wording of regulation 2(1) in too narrow a fashion. Instead, to serve the definition provided by regulation 2(1)(c), the Commissioner considers that the measure or activity (not the information itself) must affect or be likely to affect environmental elements and factors, and that the information itself must be information on (concerning, relating to or about) that measure or activity. In this case, the parallel import approvals process will directly influence what pesticides will be used, with the differing pesticides likely to affect the soil, land, biological diversity and the interaction of these elements. The Commissioner considers that the names of the approved parallel import products qualify as information on the approval process.

26. The Commissioner therefore finds that the Council's refusal notice breached the condition contained in regulation 14(3). This requires that a public authority seeking to withhold information must specify the relevant exception it is relying on.

27. In addition, by failing to provide a response and the requested information within twenty working days of receipt of the request, the CRD breached regulation 5(2) of the EIR.

Exception

28. Regulation 12(5)(e) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

"(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."

29. The 'adversely affect' condition can be regarded as working as a harm test. It must therefore be established that there would be an adverse effect in disclosure for the exception to be engaged. The Commissioner recognises that the threshold to justify non-disclosure because of adverse effect is a high one. Significantly, it is necessary to show that disclosure would have an adverse effect, not that it might or could have such an effect.

30. In this instance, the Commissioner is of the view that it has not been shown that disclosure would adversely affect the confidentiality required to protect a legitimate economic interest. Accordingly, the Commissioner has found that the exception provided by regulation 12(5)(e) is not engaged and has therefore not gone on to consider the public interest in disclosure.

31. This finding rests partly on the Commissioner's awareness that information identifying parallel imports had been freely available between June 2004 (when pesticide approvals were first published on the CRD website) and October 2008.

32. During this period, the list of approved products published on the CRD's website was accompanied by information stating the technical specifications and formulation of a given product. Owing to the different approval requirements for

parallel imports, this information was not needed and was therefore omitted. As a consequence, the CRD conceded that:

"although these differences were not obvious to the untrained eye, those who knew what they were looking for could identify with a reasonable degree of probability those approvals that were parallel import approvals."

33. The Commissioner understands that since October 2008, the CRD has introduced a single standard template for pesticide approvals that would prevent the identification of parallel import products. However, the Commissioner is mindful that the previously used template, which would indicate parallel import approvals, had been publicly accessible for a significant length of time and was not simply a momentary aberration. Also, while the Commissioner accepts that the parallel import approvals might not be identifiable to an untrained eye, he considers that they would be identifiable to competitors within the market. He notes that the basis of the CRD's refusal is that prejudice would occur as a result of "revealing market-sensitive information or information of potential usefulness to competitors."

34. In a commercial context, the Commissioner considers that there has to be a tangible detriment that arises through disclosure in order to conclude that there has been an adverse effect on the confidentiality of information. The CRD has failed to demonstrate that prior to October 2008, any such detriment occurred.

35. For instance, the Commissioner has not been presented with any evidence that the disclosure affected the commercial viability of any of the companies that sought the approval of a product as a parallel import. Similarly, no evidence has been provided that any business has pursued this disclosure as an actionable breach of confidence.

36. Although the Commissioner accepts that there may be cases where, due to a change in circumstances, the level of prejudice flowing from historic disclosures may not be indicative of future prejudice, he has been given no reason to believe that this applies in this case. He would note that he has not received any arguments suggesting that the potential for an adverse effect in disclosure has been heightened since it introduced the standard template in October 2008. As a result, the Commissioner considers that there is not any substantive difference in publishing the parallel import information before and after October 2008.

37. Through these considerations, the Commissioner is not satisfied that the confidentiality required to protect a legitimate economic interest would be adversely affected by the release of the requested information. Therefore, he finds that the exception at regulation 12(5)(e) is not engaged.

The Decision

38. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR.

In failing to respond to the complainant's original request, or disclose the requested information, within 20 working days of receipt of the request, the public authority breached regulation 5(2) of the EIR.
In addition, by providing a refusal notice that referred to exemptions under the Act rather than exceptions under the EIR, the Council breached regulation 14(3), in that it did not cite a relevant exception it relied upon.

Steps Required

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

- Disclose the requested information to the complainant.

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

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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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 27th day of October 2009

Signed ……

Lisa Adshead
Senior FOI Policy Manager

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

Legal Annex

Freedom of Information Act 2000

Section 12(1) provides that –

> "Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

Section 43(2) provides that –

> "Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Environmental Information Regulations 2004

Regulation 2(1) In these Regulations –

"the Act" means the Freedom of Information Act 2000(c);

"applicant", in relation to a request for environmental information, means the person who made the request;

"appropriate record authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"the Commissioner" means the Information Commissioner;

"the Directive" means Council Directive 2003/4/EC(d) 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 inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 12(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 in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(b) the request for information is manifestly unreasonable.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.