

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 7 November 2022

Public Authority: Health and Safety Executive
Address: Redgrave Court
Merton Road
Bootle
Merseyside
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested the application to the Health and Safety Executive (HSE) for the emergency authorisation of the use of Syngenta's Cruiser SB neonicotinoid seed treatment on sugar beet and any related correspondence. HSE was initially unable to provide some documents relating to part of the request but stated that it would do so when it could. It later provided information within the scope of the request in a redacted form. HSE cited regulations 12(5)(e), 12(5)(a) and 12(3)/13(1) of the EIR regarding the withheld information. After the Commissioner began his investigation, HSE withdrew its reliance on any exception apart from personal data.
2. The Commissioner's decision is that HSE was entitled to rely on regulation 13 to withhold personal data. However, HSE breached regulations 5(2) and 14(2) of the EIR by failing to handle the request within the statutory timeframe.
3. The Commissioner does not require HSE to take any further steps.

Request and response

4. On 20 January 2021 the complainant wrote to HSE and requested information in the following terms:

"1. Please confirm that you hold the following and provide us with copies electronically:

a. The application to the Health and Safety Executive ("HSE") for the emergency authorisation of the use of Syngenta's Cruiser SB neonicotinoid seed treatment on sugar beet (the "Application"), which was approved by the Secretary of State on 8 January 2021. For the avoidance of doubt, the authorisation referred to is described in this statement from the Department of Environment, Food and Rural Affairs ("DEFRA"):

<https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application/statement-on-the-decision-to-issue-with-strict-conditions-emergency-authorisation-to-use-a-product-containing-a-neonicotinoid-to-treat-sugar-beet>

b. Any documents, letters or other materials submitted relating to, or in support of, the Application, including all of the following:

i) the advice to ministers from the HSE;

ii) any risk assessment carried out by the HSE;

iii) the advice to ministers provided by the UK Expert Committee on Pesticides ("ECP");

iv) the advice to ministers of DEFRA's Chief Scientific Adviser;

v) full details of the mitigation measures and conditions attached to the authorisation, including treatment application rates and the industry recommended herbicide programmes to limit flowering weeds;

vi) any guidance to the users of the treated seeds about implementation of the mitigation measures; and

vii) any plan or proposal to monitor the efficacy of the derogation and its mitigation measures.

c. Any correspondence from the applicants concerning the

Application. d. A list of all such items (as set out paras. a)- c) above)."

5. There was various correspondence between the HSE and the complainant as to whether HSE would be able to respond by 17 February 2021. HSE told the complainant that it required an extension.
6. The complainant made a request for an internal review on 1 March 2021 querying the HSE's extension of the deadline for a response.
7. HSE responded on 17 March 2021 and explained that it was unable to provide some documents relating to part b) and stated that it would do so when it could (ultimately providing the information on 8 April 2021).

HSE provided some information within the scope of the request in a redacted form and cited regulations 12(5)(e) and 12(5)(a) of the EIR regarding the withheld information. HSE concluded that the public interest in maintaining the exceptions outweighed the public interest in disclosing the information. HSE also cited regulation 12(3) of the EIR for redactions it had made for personal data.

8. The complainant made a second internal review request on 18 March 2021 regarding the exceptions that had been cited.
9. The Commissioner subsequently issued a decision notice concerning the failure to provide an internal review [IC-103474-K3S4](#).
10. The HSE provided an internal review on 16 August 2021 in which it maintained its original position regarding the exceptions cited and acknowledged that it had not met the statutory deadline for a response.

Scope of the case

11. The complainant contacted the Commissioner again on 10 September 2021 to complain about the way their request for information had been handled.
12. The Commissioner sent his investigation letter to the HSE on 8 June 2022, requiring a response date of 6 July 2022.
13. On the date the response was expected HSE asked for an extension but with no indication of when it would actually be able to respond, eventually emailing on 21 July 2022 to explain that it would get back to the Commissioner with a realistic date.
14. Having chased a response, HSE wrote to the Commissioner on 27 July 2022 stating that it would respond by 11 August 2022. This did not occur and the Commissioner had to continue asking for a response.
15. The HSE rang the Commissioner on 16 August 2022 and explained that circumstances meant that it was unable to provide a response to his investigation letter and could not be certain when it would be able to respond.
16. On 18 August 2022 the Commissioner sent HSE an information notice requiring it to respond to his investigation letter and provide the withheld information.

17. After various chaser emails, the HSE sent its response and the withheld information to the Commissioner on 24 October 2022. In its response HSE withdrew its reliance on regulation 12(5)(a) but maintained that regulation 12(5)(e) had been cited correctly but that it was no longer relying on it as some of the information was now in the public domain and no longer considered confidential. HSE had decided to release the requested information with redactions made for personal data (regulation 13) solely.
18. HSE confirmed that it had disclosed the redacted information to the complainant on 2 November 2022.
19. The Commissioner considers the scope of this case to be HSE's citing of the exception for third party personal data. He does not intend to look at whether HSE should have released the requested information earlier. The lateness of the internal review has already been considered (see paragraph 9) but he will consider any other procedural issues that arose.

Reasons for decision

Regulation 13 - personal data

20. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
21. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
22. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

23. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

24. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
27. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
28. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information is the names, contact details and signatures of external individuals and internal staff. These names also include authors who have put their names to unpublished studies. He is satisfied that this information both relates to and identifies the living individuals concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
29. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
30. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

31. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

32. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
33. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

34. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful **only** if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.

35. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

36. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
37. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

38. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
39. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
40. The complainant argued that the exception for personal data had not been applied correctly. They stated that HSE appeared to have reached a conclusion that, because there had been no consent disclosure would be unlawful, without having considered the legitimate interests.
41. HSE argues that-
- "As the statutory body responsible for approving the use of pesticides within the UK, HSE's lawful basis for processing the personal data of third parties associated with this process is Article 6(1)(e) – public task – the processing of this data is necessary to perform a task that has a clear basis in law."
42. HSE would breach data protection legislation if it disclosed into the public domain the names and contact details of third parties processed by it as part of the application process. It would be "unfair and unlawful". HSE's view is that these individuals are acting in their official capacity in communicating with HSE in the expectation that their personal data will remain confidential and will not be disclosed.

43. Moving on to the withholding of staff names, HSE explains that "ordinarily HSE would not oppose disclosing the names" of its staff. However, it argues that, "The approval of pesticides for use in the UK is generally a highly emotive topic" and the approval of this pesticide is "extremely emotive" as it has been banned by the EU but approved for use by the UK government. HSE did not approve use in the UK. This decision was overturned by the DEFRA minister.

Is disclosure necessary?

44. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
45. The complainant has not provided a reason why disclosure of the withheld personal information is necessary but is clearly disputing whether HSE had considered legitimate interest. HSE has now set out its reasons for withholding personal data and does not accept that disclosure would "add any merit" to the information. The Commissioner accepts that the requester's interests are not trivial and that there are wider societal interests involved. From this point of view the disclosure of personal data is necessary for accountability and transparency.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

46. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
47. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.

48. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
49. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
50. HSE withheld the names of authors because these authors have put their names to unpublished studies that have not undergone peer-review as part of the usual process for published studies. HSE contends that it would be unfair, cause detriment to these individuals, and breach data protection legislation to put their names into the public domain.
51. HSE is concerned that staff involved in the assessment and, presumably, the external individuals acting on behalf of the applicant may be harassed "and or targeted by members of the public who oppose the use of this pesticide". HSE suggests that these staff members might be contacted "through private social media links". Release of these names "would not add any merit to the information" disclosed "but could cause significant detriment to the data subjects involved". Additionally, since the decision was taken by a DEFRA minister there is limited legitimate interest in these names being released into the public domain.
52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
53. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

54. The Commissioner has therefore decided that HSE was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 5(2) – time for compliance

55. Regulation 5(1) of the EIR states that: "a public authority that holds environmental information shall make it available on request."

56. Regulation 5(2) of the EIR states that: "Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
57. The complainant submitted their request for information to HSE on 20 January 2021. HSE did not provide the complainant with a response until 17 March 2021 and the response was not complete as information was disclosed on 8 April 2022. HSE disclosed further information on 2 November 2022. HSE therefore breached regulation 5(2) of the EIR.
58. As HSE has now disclosed all the information it holds within the scope of the request, apart from the information withheld under regulation 13(1), the Commissioner does not require any further steps.

Regulation 14 – refusal of request

59. Regulation 14(2) of the EIR places an obligation on a public authority to issue a refusal in respect of exempt information as soon as possible and no later than 20 working days after the date of receipt of the request.
60. The complainant submitted their request on 20 January 2021 and the HSE did not issue a refusal until 17 March 2021. HSE therefore breached regulation 14(2) of the EIR.

Right of appeal

61. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. 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.

63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Janine Gregory
Senior Case Officer
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Wycliffe House
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