Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **13 June 2022**

Public Authority: **Department for Environment, Food and Rural Affairs**

Address: **Nobel House**
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information about an application for the emergency use of a neonicotinoid seed treatment. The Department for Environment, Food and Rural Affairs (Defra) disclosed relevant information having redacted personal data from it and advised it does not hold some of the requested information. Defra directed the complainant to where other information is published. Defra withheld some of the requested information under EIR regulations 12(4)(e) (internal communications) and 12(5)(e) (commercial interests).

2. Defra subsequently withdrew its application of 12(5)(e) to some of the withheld information but applied regulation 12(5)(a) (public safety) and regulation 12(5)(b) (course of justice) to a small amount of the information.

3. The Commissioner's decision is as follows:

    - Defra was entitled to apply regulation 12(4)(e) of the EIR to the information in documents F1, F2, F3 and F5. However, the public interest favoured disclosing this information. The F4 document does not engage regulation 12(4)(e).

    - Defra incorrectly applied regulation 12(5)(e) to the name of a potential seed processor in document C2 and C4; citation

information in document C5 and D9; and the unpublished product/substance codes in documents D2 and D9.

- Defra is entitled to withhold the information in document D9 to which it has applied regulation 12(5)(a) and the public interest favours maintaining this exception.
- Defra is entitled to withhold some of the requested information in documents F1 and F2 under regulation 12(5)(b) and the public interest favours maintaining this exception.
- There was no breach of regulation 7(1) or 7(3) in respect of the timeliness of Defra's response.

4. The Commissioner requires Defra to take the following steps to ensure compliance with the legislation:

- Disclose the information in the F1, F2, F3 and F5 documents, having redacted the information in F1 and F2 that is excepted under regulation 12(5)(b).
- Disclose the F4 document to which Defra incorrectly applied regulation 12(4)(e), with any personal data redacted.
- Disclose the name of the potential seed processor in documents C2 and C4 to which Defra incorrectly applied regulation 12(5)(e).
- If it has not already done so, disclose the citation information that is not personal data and the product/substance codes in documents C5, D2 and D9 to which Defra incorrectly applied regulation 12(5)(e).

5. Defra must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 20 January 2021 the complainant wrote to Defra 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)."

7. The complainant did not go on to receive a response and on 1 March 2021 asked Defra to carry out an internal review about that matter.

8. Defra provided a response to the request on 18 March 2021. Defra disclosed information relevant to the request, directed the complainant to where relevant information was published and advised that it did not hold some of the requested information at the time of the request.

9. Defra confirmed it had withheld some personal data from the material it disclosed under regulations 12(3), 13(1) and 2(A) of the EIR. Finally, Defra confirmed it had also withheld some information falling within scope of the request under regulations 12(4)(e) and 12(5)(e).

10. In its response of 18 March 2021, Defra had included details of its internal review process and associated contact details, if the complainant was dissatisfied with its response.

11. On 24 March 2021 Defra provided the complainant with an internal review on the matter of its late response to the request; a review the complainant had requested on 1 March 2021.

Scope of the case

12. The complainant contacted the Commissioner on 27 April 2021 to complain about the way their request for information had been handled.

13. The Commissioner noted that the complainant had not asked Defra to carry out an internal review of its substantive response to their request. He advised the complainant that Defra would be entitled to seek to carry out such a review, and Defra subsequently advised the Commissioner that it did wish to carry out a review.

14. The Commissioner advised the complainant to request an internal review, but they refused to engage with the internal review process with regard to Defra's response to their request.

15. Since the complainant had refused to request an internal review of Defra's response, for reasons explained in 'Other Matters' below the Commissioner decided on this occasion to provide Defra with the grounds of the complaint. The complainant had provided these grounds to the Commissioner in correspondence dated 27 April 2021.

16. Defra subsequently advised the Commissioner that on reconsidering the request as a result of the complaint to him, it is now relying on two further exceptions: regulation 12(5)(a) and regulation 12(5)(b). Defra has also withdrawn its reliance on regulation 12(5)(e) with regard to some of the information it withheld. That information was subsequently published as the result of a 2022 emergency authorisation of the use of the pesticide in question.

17. The Commissioner's investigation has focussed on Defra's reliance on regulations 12(4)(e), 12(5)(e), 12(5)(a) and 12(5)(b) of the EIR to withhold some of the information the complainant has requested, and the balance of the public interest associated with each exception.

18. Finally, the Commissioner has considered the timeliness of Defra's response.

Reasons for decision

Regulation 12(4)(e) – internal communications

19. Regulation 12(4)(e) of the EIR says that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

20. The exception is drafted broadly and covers all internal communications, not just those actually reflecting internal thinking. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. A wide range of internal documents will therefore be caught, although in practice the application of the exception will be limited by the public interest test.

21. In its initial submission to the Commissioner, Defra confirmed that it considers regulation 12(4)(e) applies to the majority of the information being withheld as this information comprises communications between Defra officials, and from Defra officials to Ministers.

22. Defra has provided the Commissioner with copies of the material that it is withholding in full under regulation 12(4)(e) – it has given the separate items of information the references F1 to F5.

23. The information comprises:

- F1 – a submission from Defra policy team to the Minister, Victoria Prentis (within which some information has also been withheld under regulation 12(5)(b))

- F2 – a 'final' submission from Defra policy team to the Minister (within which some information has again been withheld under regulation 12(5)(b)

- F3 – an email exchange between Defra policy team and the Chief Scientific Advisor.

  One of these exchanges has an Emergency Registration Report attached, which was produced by the HSE. Defra has not relied on regulation 12(4)(e) in respect of that report as it disclosed the report with some information redacted under 12(5)(e) of the EIR. That matter will be considered under the regulation 12(5)(e) analysis.

- F4 - a document which the Health and Safety Executive (HSE) sent to Defra; and

- F5 - email correspondence between Defra officials and the Minister's Private Office.

24. Defra says that the communications from Defra officials to the Minister contain advice to allow the Minister to consider policy options and ultimately make decisions on the authorisation of the pesticides referred to in the request. Defra considers that these communications are internal as they were only shared within Defra.

25. However, Defra has noted the additional document that it considers falls within scope of this exception – the F4 document which HSE provided to Defra "for information". Defra says that although it was of potential relevance to the matter in hand, its understanding is that the report was not relied on in Defra's decision making.

26. Defra told the Commissioner that the role of HSE in the approval process is that of "the public body carrying out many of the statutory regulatory functions on Defra's behalf". For that purpose, Defra said it considered that communications between HSE and Defra can be categorised as internal communications.

Conclusion

27. The Commissioner is satisfied that disclosing the submission and email exchange information - F1, F2, F3 and F5 - would involve the disclosure of internal communications and that this information therefore engages the regulation 12(4)(e) exception.

28. The Commissioner has finally considered F4 – a document HSE sent to Defra ('the document').

29. The Commissioner discusses forwarded communications and attachments in his published guidance on regulation 12(4)(e). At paragraph 33 of the guidance the Commissioner makes it clear that a report originating from a third party does not become an internal communication merely because it is circulated within an authority.

30. The Commissioner has considered whether he has grounds for accepting Defra's argument that communications between it and HSE should be regarded as internal communications for the purposes of authorising the emergency use of pesticides.

31. The Commissioner understands that the document was generated by a body that is external to Defra, and external to HSE. The HSE, who held a copy of the document which it forwarded to Defra, is a non departmental public body (NDPB) and, for the purposes of FOIA and the EIR, a separate public authority in its own right. Communications between a public authority and a NDPB are not, generally, internal communications.

32. However, there may be some exceptional cases where the particular circumstances of a case (the form and substance of the relationship between the parties and the nature of the information) might justify an argument that the communication should be seen as internal.

33. As noted, Defra initially advised the Commissioner in its submission that the HSE's role in the approval process is that of the public body carrying out many of the statutory regulatory functions on Defra's behalf. The Commissioner asked Defra for more detail on this point.

34. Defra did not take the opportunity to expand on its initial submission. In a further submission that it provided, Defra merely noted the above and added:

> "… the HSE is the national regulator to carry out retained Regulation 1107/2009 on behalf of the UK government and the devolved administrations and is the delegated Competent Authority through agency agreements. This particular decision, as an Emergency Authorisation, is done under Article 53 of Regulation 1107/2009. The following link[1] provides an explanation of this process, with the section 'Taking the decision' at the base of the page providing reference to the Secretary of State being able to be the decision-maker."

35. Included in the information on the GOV.UK website to which Defra directed the Commissioner, is the statement:

> "The functions in respect of decision-making (for England) on emergency authorisations under Article 53 may be exercised by HSE on behalf of the Secretary of State under an Agency Agreement, or by the Secretary of State."

36. The gist of Defra's argument appears to be that because HSE is undertaking the regulatory functions of the Defra Secretary of State when considering emergency authorisations, whether this is merely contributing to process, or when, on occasions, HSE is the decision maker, HSE should be viewed as if it is part of Defra itself. However Defra has not explained why this is the case.

37. The Commissioner has noted the reference to an 'Agency Agreement' in the GOV.UK published information. Defra has not provided any details

[1] https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application/guidance-on-the-approach-to-handling-applications-for-emergency-authorisation-of-plant-protection-products

on whether there is an Agency Agreement in place or provided the Commissioner with the terms of any such Agreement. If such an Agreement had a bearing on the application of regulation 12(4)(e), the Commissioner would expect Defra to have explained how and why it has a bearing. It has not done so, and the Commissioner is left to speculate whether it has any relevance at all.

38. All the Commissioner can glean from the GOV.UK link that Defra provided is that the Secretary of State has a function in respect to the emergency authorisation of pesticides. And that HSE has been delegated a role within that authorisation process. In some situations HSE may approve the emergency use of a pesticide and in others it will be the Secretary of State. It is not clear why when either contributing to the decision making process of the Secretary of State, or when approving the emergency use of a pesticide itself, HSE is not, at least in part, fulfilling its own functions. Therefore it is not clear why for pesticide authorisation purposes, communications between Defra and HSE should be considered internal communications.

39. It may be that if Defra had explained fully what HSE's role is in this matter and how HSE is tasked with carrying out that role, there would be grounds for thinking that in performing that role, HSE's relationship with Defra is fundamentally different from when it is carrying out functions such as those assigned to it by statute.

40. The onus is on Defra to make its case. In the absence of a full explanation from Defra, the Commissioner cannot say with any confidence that, in this case, communications between HSE and Defra should be considered internal communications.

41. The Commissioner therefore finds that the F4 document as communicated to Defra by HSE is not an internal communication and regulation 12(4)(e) cannot be applied to that particular information.

42. In respect of F1, F2, F3 and F5, the Commissioner has gone on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

43. Defra has acknowledged the public interest in promoting accountability and transparency about the authorisation of pesticides into the environment.

44. It recognises that there is a public interest in disclosing what discussions have taken place within Defra and between Defra officials around this policy issue. Defra considers there is a clear public interest in this issue because of the links to the environment, public health and food

production. Disclosing the information could help public understanding around the issue and there is a public interest in providing a fuller picture around the policy decisions made. Defra has acknowledged that the potential use of this class of pesticides is particularly emotive, with strong views held by the public and a range of stakeholders regarding what should or should not be permitted and under what circumstances.

45. In responding to this information request Defra says it has released as much information as reasonably possible to be transparent and open on the decision made. In addition, for this year's emergency authorisation (not the subject of this particular request) Defra says it has proactively published more information on the decision making process, as well as the decision itself. This is because of the strong public and stakeholder interest.

46. In their complaint to the Commissioner, the complainant argued that Defra had not applied the public interest correctly. They said that Defra had applied the first stage only, and incorrectly. In their view Defra had asked itself if the public interest in maintaining the exception outweighed the public interest in disclosure. But it did not consider, for example, the public interest in a sustainable environment. Nor did Defra sufficiently acknowledge the value of transparency in decision-making. As such Defra underestimated the public interest in disclosure. The complainant also considers that Defra also did not apply the second stage of the public interest test; it did not ask if the presumption in favour of disclosure meant disclosure should happen.

Public interest in maintaining the exemption

47. Defra considers that the public interest lies in favour of withholding the information. In its submission it says that this is because the communications concerned submissions made to a Defra Minister about a third party's application to use a particular pesticide. It also concerned internal discussions between policy officials, the Chief Scientific Advisor, and with the Ministerial offices. These discussions concern the potential emergency use of these pesticides and the boundaries permitting their use.

48. Defra argues that it is important for there to be a safe space within which it can discuss whether an application should be authorised, consider all views and formulate options frankly before decisions are made. This is especially important in this case, as this is an emotive policy area with polarised views. Given the temporary nature of emergency authorisations and the potential for yearly applications to be made, it is a live policy area, which continues on a yearly basis, and on which decisions are actively made on each application.

49. When they write submissions to Ministers, Defra says, officials are always expected to set out the options candidly for the Minister to consider. Anything less could impact on the ability of respective Ministers to make an informed and evidenced final decision. A lack of informed detail in communications within Defra, including those with the Chief Scientific Advisor, due to officials fearing their discussions will be made public through information requests, may result in a less candid approach to essential conversations before a decision is made. Retaining a space to think in private ultimately helps to ensure decision making is done well and that robust advice and views can be exchanged and tested.

Balance of the public interest

50. With regard to the ministerial submissions and email correspondence, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.

51. However, he does not consider that safe space arguments automatically carry much weight in principle. The weight accorded to such arguments depends on the circumstances of the specific case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question.

52. With regard to the timing of the request and whether the issue was still live, Defra has noted that emergency authorisations of pesticide use is of a temporary nature. There is the potential for yearly applications to be made. Defra therefore considers that it is therefore a live policy area, which continues on a yearly basis, and on which decisions are actively made on each application.

53. In this case, the requested information concerns an application for the emergency authorisation of the use of Syngenta's Cruiser SB neonicotinoid seed treatment on sugar beet. An application that the Secretary of State had approved on 8 January 2021 ie shortly before the complainant submitted their request.

54. The Commissioner appreciates that emergency authorisations are subject to review and that decisions about such authorisations may change. In this case, the Commissioner understands from the GOV.UK website that the seed treatment authorised on 8 January 2021 did not, in fact, go ahead in 2021. However, at the point of the request, a specific application for emergency authorisation had been approved.

55. The Commissioner has noted the recent decision of the First-tier Tribunal (Information Rights) ('the FTT') in EA/2021/0156 which concerned the public interest test associated with section 36 of FOIA.

Section 36 of FOIA concerns the effective conduct of public affairs and is broadly comparable to regulation 12(4)(e) of the EIR.

56. The FTT noted that the Annual Retention Fee (ARF) for dentists and dental care professionals (the focus of the request in that case) is a sensitive and controversial issue that was likely to come round again for discussion within a relatively short period of time.

57. To that extent the FTT considered that the issue of the ARF remained live at the date of the request, even though a particular decision about it had been taken at the time. The FTT accepted that there is significant public interest in maintaining a 'safe space' for these types of soundings to take place to enable the General Dental Council, in that case, to work efficiently and effectively.

58. As noted, while a specific application had been approved, approving emergency authorisations of pesticide use continues on a yearly basis and authorisations are subject to review and change. This is a similar situation as that considered by the FTT in its decision. However, unlike FOIA, a presumption in favour of disclosure is inherent in the EIR.

59. The Commissioner has next considered the content and sensitivity of the information being withheld under regulation 12(4)(e). Within the context of the controversial and sensitive nature of the matter being considered, he does not consider that the submissions to the Minister contain anything that is particularly surprising. The first submission (F1) 'sets the scene' in advance of the application to make the emergency authorisation decision. The 'final' submission (F2) discusses issues associated with a decision to approve the application for the emergency use of a neonicotinoid pesticide. The email correspondence – F3 and F5 - concerns associated matters.

60. Given their experience, knowledge and seniority, the Commissioner is not persuaded by Defra's argument that officials **may** [Commissioner's emphasis] be less candid in writing if they believe their views, advice and discussions could be put in the public domain before a decision is made. This argument will carry greater weight where it can be shown that this chilling effect will apply to future discussions on the subject matter at hand rather than as an argument that disclosure would impact all future discussions.

61. Defra has not specifically linked its arguments to the information in this case but rather, has presented more general arguments relating to the quality of future discussions.

62. In addition, the Commissioner considers that Defra will be aware that information it holds, and which is subject to an exception, is at risk of disclosure in the public interest – whilst noting that this is considered on a case by case basis.

63. The Commissioner acknowledges that there are farming organisations and farmers that consider neonicotinoid pesticides to be an important tool in ensuring productive agriculture. However, research on the matter has also led to growing concern about the harms that these pesticides may cause to pollinating insects, birds, mammals and aquatic life, and this type of pesticide's possible contribution to biodiversity decline.

64. Having considered all the circumstances, the Commissioner finds that, on balance, the public interest favours disclosure in this case. In reaching this view he has taken account of the presumption of disclosure under the EIR, the fact that the decision regarding a specific application of the pesticide had been taken at the time of the request and the serious and credible concerns that exist about the potential environmental harms caused by the use of neonicotinoid pesticides. In the Commissioner's view, the public is entitled to know what factors and advice the Minister considered when they made their decision. He is not persuaded that disclosing the submissions in this case will have a chilling effect on senior officials' and ministers' future discussions and decisions – about use of neonicotinoid pesticide applications, or generally. He assumes that ministers will make decisions on future applications to use a neonicotinoid pesticide on the circumstances, facts, science and evidence that are current at that time, deciding each application on a case by case basis. All the information in the ministerial submissions and the communications between Defra's policy team and its Chief Scientific Advisor would therefore not necessarily have a direct influence on future decisions.

65. Since the Commissioner has found that none of the information to which Defra has applied regulation 12(4)(e) can be withheld under that exception, he will elsewhere consider Defra's application of regulation 12(5)(b) to a little of that same information. He will also consider Defra's application of regulation 12(5)(e) to some of the information in the Emergency Registration Report that was attached to one of the emails; the remainder of which Defra released to the complainant.

Regulation 12(5)(e) – commercial confidentiality

66. Regulation 12(5)(e) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

67. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial in nature?

68. In his published guidance on regulation 12(5)(e)[2], the Commissioner states that for information to be commercial in nature, it needs to relate to a commercial activity, either the public authority's or a third party's. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit.

69. With its initial submission Defra provided the Commissioner with copies of the information it originally withheld under regulation 12(5)(e). It is information that was redacted from information that Defra disclosed to the complainant and Defra has given it the following references: C2, C4, C5, D2, D9 and E3.

- C2 – the name of a product under development, names of two potential seed processors and two universities, and a 'taskforce strategy timeline' in an application submission
- C4 – the names of two potential seed processors in an application timeline document
- C5 – citations in an application supporting document
- D2 – substance product codes in the HSE Emergency Registration Report
- D9 – citations and substance product codes in a HSE ecotoxicology report

  E3 – a 'taskforce strategy timeline' in an attachment to a letter.

70. Defra advised that all of the information in C2 to which it had applied regulation 12(5)(e) except for "some" of the information about the potential seed processors has been published as a result of the new emergency authorisation for the same product. The Commissioner

[2] https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/

understands that the remaining information in C2 that has not been published is the name of one of the potential processors.

71. Defra also advised that the E3 information was subsequently published as a result of the above emergency authorisation for the same product.

72. In its initial submission to the Commissioner Defra had confirmed its view that the withheld information is commercial in nature because it is about "the development and production of a key product by a third-party organisation". In its discussion of the associated public interest test, Defra summarised some of the information it is withholding under regulation 12(5)(e) as comprising "commercial product and active substance codes which are confidential to the data owner".

73. The Commissioner noted that the bulk of the above information was disclosed originally (and a good deal of what was redacted was subsequently published, albeit as a result of a separate emergency authorisation). He asked Defra to explain why substance product codes, citations, the name of a potential seed processor and the strategy timeline information is commercial in nature.

74. In a further submission dated 28 April 2022, Defra told the Commissioner it had redacted the information at the request of the applicant and data owners. In the case of the substance/active codes, the data owner gave the following reasoning: "We consider Syngenta product (or substance) code as a confidential information. Therefore, it should be redacted". Defra says it accepted this at the time.

75. Defra went on to confirm that, subsequently, information was released proactively as part of the separate, 2022 emergency authorisation (which was not the subject of this request), with personal data remaining redacted[3]. Therefore, similar documentation containing some of the information that was redacted in this case is now in the public domain; namely some of the product/substance codes (D2 and part of D9), the university names (part of C2) and the strategy timeline (C2/E3).

76. As has been noted, in its initial submission, Defra had also advised that the name of the product under development (in C2) and the name of one of the potential seed processors (in C2 and, the Commissioner

[3] https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application

notes, also in C4) had subsequently also been put into the public domain.

77. In its correspondence of 28 April 2022, Defra told the Commissioner that in respect of the information now in the public domain it therefore has no reason to continue to withhold that information. It says it has advised the complainant that it has released information relating to the 2022 emergency authorisation.

78. It therefore appears to the Commissioner that the information that Defra continues to withhold under regulation 12(5)(e) comprises the name of one of the potential seed processors (in C2 and C4), citations (in C5 and D9) and the remaining product/substance codes (in D2 and D9).

79. Taking the information about the name of the potential seed processor first, the Commissioner is satisfied that this information can be categorised, in this context, as commercial information. This is because the company in question was identified as a company that could be engaged on a commercial basis to process seed.

80. The Commissioner has considered the citations in documents C5 and D9 next. Some of the citations comprise what Defra has described as unpublished authors' names. The Commissioner understands that these were redacted under regulation 13. However, some of the redacted citations comprise both an author's name with the name of their paper. Defra has now advised that these citations were redacted in full as being unpublished studies. It says it now recognises that "for this information it may be more appropriate to redact the personal details only." The Commissioner therefore understands Defra to consider that the element of the citations that is not authors' names is not information that is commercial in nature and can be disclosed.

81. Finally, with regard to the remaining product/substance codes, Defra says it has no further arguments to provide on the economic or commercial harm that would result from disclosure. It says it asked the data owners as part of the letter consulting on this EIR request to provide as much information as possible about the harm of disclosing the information. Defra had also pointed out that the final decision on disclosure rested with Defra.

82. Neither the data owners nor Defra have adequately explained why the unpublished product/substance codes is information that is commercial in nature. Some of the product/substance codes that were originally withheld were subsequently published in respect of the 2022 emergency authorisation. The Commissioner must deduce that Defra and the data owner therefore did not consider those product/substance codes to be commercially sensitive information. In the absence of any compelling

explanation as to why the remaining withheld product/substance codes in D2 and D9 can nonetheless be categorised as being commercial in nature and commercially sensitive, the Commissioner finds that they are not.

83. The Commissioner will therefore consider the remaining criteria below, and the public interest test, in respect of only the name of the potential seed processor (C2 and C4).

Is the information subject to confidentiality provided by law?

84. In its submission Defra confirms that the information "is subject to the common law duty of confidence and has been provided by the third party on that understanding".

Is the confidentiality provided to protect a legitimate economic interest?

85. Defra's submission refers back to the first of the criteria, on this point – that the circumstances of this case concern a legitimate economic interest.

Would the confidentiality be adversely affected by disclosure?

86. In their complaint to the Commissioner, the complainant has said that Defra justified non-disclosure owing to **possible** adverse effects – for example by advising that disclosure "may undermine confidentiality" in the case of its reliance on the regulation 12(5)(e) exception - rather than **certain** adverse effects. The complainant noted that the Commissioner's published guidance advises that **potential** adverse effects won't engage an exception.

87. In its submission, Defra has addressed this point. It has conceded that its response to the request should have been clearer, and it should have advised that disclosure **would** have adverse effects, rather than indicating that there would 'likely' be adverse effects.

88. Defra has told the Commissioner that "this" (by which the Commissioner understands Defra to mean the pesticide sector) is a commercially competitive area and disclosure into the public domain would have an adverse effect "on confidentiality". In addition, Defra says, breaking confidences by disclosing the confidential information would give other companies in this sector a commercial advantage. This would be through providing them with information to which they would not have a legitimate right. In Defra's view, this would harm the business's reasonable expectation that their commercial and industrial information would remain confidential.

Conclusion

89. The information being withheld under regulation 12(5)(e) that the Commissioner is considering is the name of one of the potential seed processors. The Commissioner has found that the first of the criteria at paragraph 67 has been met and he will accept Defra's argument in respect of the second criteria - that the withheld information is subject to the common law duty of confidence. However Defra has not persuaded him that the remaining two criteria have been met.

90. Defra's argument is that disclosing the name of the company identified as a potential seed processor – and thereby "breaking confidences" by disclosing the "confidential information" - **would** give other companies a commercial advantage. Defra has made a statement, but it has not made a case to support that statement. It has not explained why disclosing the seed processor's name would give other companies a commercial advantage and therefore prejudice the seed processor's own commercial interests. The Commissioner therefore finds that this information does not meet all the criteria at paragraph 67 and that Defra is not entitled to withhold this particular information under regulation 12(5)(e) of the EIR. It therefore follows that the Commissioner does not need to consider the associated public interest test.

Regulation 12(5)(a) – public safety

91. Regulation 12(5)(a) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.

92. Under this regulation, Defra has redacted the names of vertebrate study test sites from document D9, the ecotoxicology report produced by HSE. Defra has explained it has applied regulation 12(5)(a) to that information because placing the location of the facility in the public domain along with information on the nature of its work would have an adverse effect on the safety of staff at that location.

Conclusion

93. Many members of the public strongly oppose testing on animals. In view of Defra's arguments below, the Commissioner accepts that disclosing the name of the site at which certain animal testing took place would adversely affect the safety of people working at that site. He is satisfied that Defra is entitled to apply regulation 12(5)(a) to the small amount of information to which it has applied that exception.

Public interest test

94. Defra says it recognises a general public interest in knowing that locations exist where the third parties test the use of the chemicals [on vertebrates]. However, it considers there is a far stronger public interest

in withholding the information because disclosure has the potential to allow both the identity of individuals working at these facilities and the nature of their work to be revealed.

95. Defra notes that it is widely known that campaigners protest against the use of animals for testing, not only at Defra sites, but throughout UK when details of sites are in the public domain. These protests have the ability to escalate, leading to sabotage to property and threats against the people carrying out legitimate, although controversial, scientific work. This will inevitably put individuals who work at the premises at risk. Defra has concluded that in all the circumstances of the case, the information should be withheld.

96. The Commissioner accepts Defra's reasoning. The information to which it has applied regulation 12(5)(a) would add very little to the public's understanding of the decision on the emergency use of a neonicotinoid pesticide, which is the focus of the request. He considers that the public interest in transparency about that matter has been met through the information Defra has disclosed. In the circumstances the Commissioner agrees that there is a far greater public interest in minimising the potential risk to staff and property at a particular facility.

Regulation 12(5)(b) – course of justice

97. Regulation 12(5)(b) says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

98. Defra has withheld a small amount of information in the two submissions from its policy team to the Minister (in documents F1 and F2) under this exception.

99. In its submission Defra has confirmed that this information is legal advice to ministers provided by Defra's internal legal advisers.

100. The Commissioner recognises that legal professional privilege (LPP) exists to ensure complete fairness in legal proceedings. LPP protects advice given by a lawyer to a client and confidential communications between them about that advice.

101. Furthermore, the Commissioner considers that maintaining the integrity of the legal process is one of the core intentions behind the course of justice exception. Previous decisions issued by the Commissioner and the Information Tribunal have recognised that where the process is ongoing, disclosure would likely prejudice this integrity.

102. The Commissioner also recognises that the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

Conclusion

103. In this case, having considered the matter and having viewed the withheld information, the Commissioner is satisfied that the withheld information relates to legally privileged information. In addition, although the associated decision had been made at the time of the request, authorising applications for the emergency use of neonicotinoid pesticides is a process that happens annually. As such, the legal advice under consideration here could be drawn on in the future. In that sense, the Commissioner considers that, in respect of the legal advice, the advice is still 'live' and that disclosing that information would have an adverse effect on the course of justice.

104. The Commissioner is satisfied that Defra has correctly applied regulation 12(5)(b) to some of the requested information. He has gone on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

105. Defra says it recognises that there is a public interest in understanding what legal advice it received and considered regarding approval of Syngenta's Cruiser SB neonicotinoid seed treatment.

Public interest in maintaining the exception

106. Defra has confirmed that it considers that there is a stronger public interest in favour of withholding information that comprises legally privileged advice that it was given. Defra argues that there is a need for legal advisors to be able to provide high quality comprehensive advice for the effective conduct of Defra's business. This advice needs to be given with a full appreciation of the facts and will include arguments that consider various options and related legal advice. Accordingly, such advice needs to be treated with the confidentiality required while the subject matter is still live. Without comprehensive legal advice Defra says the quality of its decision making on the emergency authorisation of pesticides would be reduced because it would not be fully informed of the legal risks around potential outcomes, and this would be contrary to the public interest.

Balance of the public interest

107. It has been noted that there is a high level of public interest in the matter of the use of neonicotinoid pesticides. However, very significant public interest is apportioned to the principle of legal professional privilege; that is, protecting communications between a professional legal adviser and their client from disclosure without the permission of the client. That is particularly so while the issue remains live and, as discussed, the Commissioner has determined that, with regard to legal advice, on the annual authorisation of emergency use of neonicotinoids, the issue remains live.

108. The Commissioner considers that the information Defra has disclosed goes some way to satisfying the public interest in how decisions on the use neonicotinoids are made. He is satisfied that the balance of the public interest favours maintaining the regulation 12(5)(b) exception on this occasion.

Procedural matters

Regulation 7 – extension of time

109. In their complaint to the Commissioner, the complainant expressed dissatisfaction with the time it had taken for Defra to respond to their request.

110. Under regulation 7(1) of the EIR, where a request is made under regulation 5, the public authority may extend the period of 20 working days for a response and/or refusal provided by regulation 5(2)and regulation 14(2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

111. Under regulation 7(3) the public authority must notify the applicant accordingly as soon as possible and no later than 20 working days after the date of receipt of the request.

112. The complainant submitted their request to Defra on 20 January 2021. On 17 February 2021 Defra advised the complainant it would need a further 20 working days to provide a response to the request. It went on to provide that response on 18 March 2021.

113. The Commissioner has noted the volume of material within scope of the request and the complexity of a great deal of that material. He has taken account of Defra's need to identify the relevant information, to consider whether any information was exempt information and to consider the associated public interest tests. In the Commissioner's view it was entirely reasonable for Defra to believe it needed a further

20 working days to comply with the request and therefore to rely on the provision under regulation 7(1) of the EIR.

114. The Commissioner finds that Defra complied with both regulation 7(1) and 7(3) as it provided a response to the request within the 40 working day timescale provided under 7(1) and advised the complainant within the timescale under regulation 7(3) that it would need a further 20 working days.

Other Matters

115. As has been noted, the complainant would not ask Defra to conduct an internal review of its substantive response to their request. Defra confirmed it was willing to carry out such a review and the Commissioner advised the complainant to request one. They refused on the basis of the length of time that had passed since they submitted their complaint to the Commissioner, and the further delay that they considered would be caused by going through the review process.

116. The complainant first submitted their complaint to the Commissioner on 27 April 2021. After a regrettable delay progressing the case further, the Commissioner advised the complainant to request a review on 12 October 2021.

117. Regulation 11(1) of the EIR, which concerns internal reviews, states:

> "… an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request."

118. Regulation 11(1) states that an applicant **may** make representations; it does not state that an applicant **must** make representations. However, the Commissioner nevertheless expects an applicant to have exhausted a public authority's review process before he will accept a complaint as eligible for further consideration. An extraordinary set of circumstances, which included the impact of the COVID-19 pandemic and which the Commissioner does not expect to encounter again, led him to progress the complaint in this case without Defra having had the opportunity to carry out a substantive review of its response. The Commissioner observes that omitting the review process did not prevent a delay to the case being concluded. More likely, it caused an additional delay as it necessitated additional and protracted communications between Defra and the Commissioner.

Right of appeal

119. 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

120. 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.

121. 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

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF