

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

Decision notice

Date: 28 August 2012

Public Authority: Committee on Toxicity of Chemicals in Food,
Consumer Products and the Environment

Address: COT Secretariat
Food Standards Agency
Aviation House
125 Kingsway
London
WC2B 6NH

Decision (including any steps ordered)

1. The complainant requested a copy of papers related to meetings of a joint working group of the Advisory Committee on Pesticides ("ACP") and the Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment ("COT"). Some information was provided at the time of the request and during the Commissioner's investigation. However, the public authority withheld details of the issues being considered by the joint working group under regulation 12(4)(e) (internal communications), the name of a company linked to particular pesticide under regulation 12(5)(e) (commercial confidentiality) and the names of officials contained in certain documents under regulation 13 (personal information) of the EIR.
2. The Commissioner's decision is that the public authority has incorrectly applied regulation 12(4)(e) and 12(5)(e) to the information withheld under these provisions but that it has correctly applied regulation 13 to the information withheld under that regulation.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant details of the issues being considered by the joint working group that were withheld under

regulation 12(4)(e) and the name of the company withheld under regulation 12(5)(e).

4. The public authority 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.

Background information

5. The Bystanders Risk Assessment Working Group ("BRAWG") was set up by ACP and COT after they agreed that a joint working group would be an appropriate way to take forward a Ministerial request to review the current approach to the assessment of the risk to bystanders from pesticides. Administrative support for the joint working group is provided by the Health and Safety Executive ("HSE").
6. ACP is an independent body set up to advise the Government on issues related to the control of pesticides. COT is an independent body set up to advise the Government on issues related to the toxicity of chemicals in food, consumer products and the environment.
7. COT and ACP are separate public authorities for the purpose of FOIA and EIR. As the complainant's request was made to BRAWG, a joint working group of COT and ACP, in the Commissioner's view the requested information is held by both ACP and COT. Consequently he believes that it is appropriate to issue a notice setting out his decision in respect of this complaint to both ACP and COT.

Request and response

8. On 27 January 2011, the complainant wrote to the Chair of BRAWG and requested information in the following terms:

"....I was speaking to [named official] about the BRAWG meeting and reiterating the point that I know when we spoke previously you said that I would be able to comment on the draft report which I will do, but I won't have seen or even know what papers the WG has considered for its meeting. Therefore please can you let me know if I am able to know what papers are being considered."

9. The request was interpreted by the public authority as a request under the EIR for certain papers related to meetings of BRAWG. On 4 March 2011, it provided the complainant with copies of the papers but redacted some information. No explanation was given for these redactions in the initial response. Following enquiries from the complainant as to why the various redactions were made, an explanation was provided on 4 April 2011.
10. On 18 May 2011 the complainant emailed to request that:

*"...**all** the redacted sections of the text to be disclosed to me under FOI/EIR."*
11. The complainant's email was treated as a request for an internal review. On 16 June 2011, she was provided with the outcome of the internal review. This upheld the original decision and explained that the redacted parts of the information had been withheld under regulations 12(4)(b), (d) and (e), 12(5)(e) and 13 of the EIR.

Scope of the case

12. The complainant contacted the Commissioner to complain about the way her request for information had been handled. Specifically, she asked the Commissioner to investigate whether the public authority was entitled to withhold the information that was referred to under the following headings in a letter of 16 June 2011:
 - (i) authors' names;
 - (ii) issues for the committee/working group; and
 - (iii) company names.
13. She also asked him to review the information that was redacted from the document "Written comments received from members unable to attend" (ACP 26 [338/2009]) to determine whether:
 - (iv) it was entitled to withhold the names of individuals whose comments are contained in that document; and
 - (v) whether any of the information that was withheld as falling outside the scope of the request related to the work of BRAWG.
14. Following disclosures of information by the public authority during the course of the Commissioner's investigation and discussions with the complainant, the scope of the complaint was limited to whether the public authority was entitled to withhold:

- (i) authors' names in certain documents;
- (ii) details of the issues for the consideration of BRAWG;
- (iii) the name of one company (the other two company names having been disclosed) referred to in the context of the approval of particular pesticide; and
- (iv) the name of an individual contained in a document concerning the approval of particular pesticide.

Reasons for decision

Regulation 12(4)(e) – Internal communications

15. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. In the Commissioner's view information communicated within a public authority will constitute an internal communication for the purpose of regulation 12(4)(e). Internal communication will also include communications between central government departments and between executive agencies and central government departments. However, it will not include communications between government departments and other public authorities.
16. The public authority explained that COT is an advisory committee to the Department of Health and the Food Standards Agency. ACP is a Defra sponsored statutory advisory committee set up under the Food and Environment Protection Act 1985. Both COT and ACP are listed as separate public authorities under FOIA and so constitute separate public authorities for the purposes of the EIR. These bodies were set up to provide Ministers with independent expert advice.
17. The public authority informed the Commissioner that the papers considered by BRAWG were largely prepared by members of the secretariat and government departments in response to requests for information from the committees (ACP and COT). The details of the "issues for the committee", which was the information that had been withheld under regulation 12(4)(e), were usually added by the authors of the papers and drew the members specific attention to points of particular concern for discussion or consideration. The "issues for the Committee" were all checked by the secretariat to ensure that the questions asked were not 'leading questions' in order to ensure compliance with the code of practice for scientific advisory committees.

18. In this case the information that has been withheld is details of the issues that BRAWG was to consider as part of its investigation of the assessment of the risk to bystanders from pesticides. From the information provided to him, the Commissioner understands that these issues were not generated from internal discussions between members of BRAWG but came from the relevant sponsoring government departments. They therefore constitute communications between government departments and the members of ACP and COT, which are both separate public authorities for the purposes of the EIR.
19. The public authority has argued that, as ACP and COT provide advice to Ministers, these communications are akin to communications between government departments and Ministers and therefore constitute internal communications. However, as these communications are between government departments and separate independent public authorities, the Commissioner does not accept that they constitute internal communications under the EIR. He has consequently decided that regulation 12(4)(e) is not applicable to the withheld information and that it should therefore be disclosed.

Regulation 12(5)(e) – Commercial confidentiality

20. The public authority initially refused to disclose the name of three companies under regulation 12(5)(e). During the course of the Commissioner's investigation, the public authority consulted with the current owners of the companies. Two company names were disclosed following the current owners raising no objections to this. No response was received from the current owner of the third company. The public authority continued to apply regulation 12(5)(e) to this name.
21. Regulation 12(5)(e) allows commercial or economic information which meets the criteria for either a statutory or common law duty of confidentiality to remain confidential if that duty is owed in order to protect the legitimate economic interests of any party.
22. In order for regulation 12(5)(e) to apply, a public authority needs to establish that:
 - (i) the information does not relate to emissions;
 - (ii) the information is commercial or industrial in nature;
 - (iii) it is confidential under either the common law of confidence, contract or a statutory bar;
 - (iv) the confidentiality is protecting a legitimate economic interest;

(v) the confidentiality will be adversely affected by disclosure;
and

(vi) the public interest in maintaining the exception outweighs
the public interest in disclosing the information.

23. The public authority argued that the disclosure of the company's name could provide commercially sensitive information about relationships between companies. However, as it had not consulted with the current owners of the company prior to responding to the request and had not received a response to its subsequent consultation, it informed the Commissioner that it was not able to say whether disclosure would or would not have an adverse commercial affect.
24. The Commissioner notes that the company concerned has provided no information to the public authority which would support the application of the exception to the name that has been withheld. The arguments presented by the public authority are consequently speculative in nature. As a result, the Commissioner has no evidence available to him that would suggest that criteria (iii)-(vi) (above) are satisfied. He notes that two of the three companies that were consulted agreed to the disclosure of the withheld names. He would assume that if the third company had significant concerns about the disclosure of its name, it would have provided a response to the public authority setting out its concerns. In light of the above, the Commissioner has determined that regulation 12(5)(e) is not applicable to the company name that has been withheld by the public authority and that it should therefore be disclosed.

Regulation 13 – Personal information

25. Under regulation 13 to the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority should not disclose the personal data if it would breach any of the data protection principles.

Does the withheld information constitute personal data?

26. In this case the withheld information is the names of the authors of specific documents and the name of an individual who wrote a letter in 1989 related to an application for a licence for a particular pesticide. All of the individuals concerned were officials working for the HSE at the time that the documents were created. All of the documents were created as part of the HSE's role to provide administrative support to the members of BRAWG, with the exception of the individual who wrote the letter in 1989. In the latter case, the reference to the individual

concerned was contained within a document which was created as part of the licencing process for a particular pesticide.

27. The Commissioner considers that the withheld names are personal data from which the data subjects would be identifiable. He therefore went on to consider whether disclosure would breach any of the data protection principles under the Data Protection Act ("DPA").

Would disclosure breach one of the data protection principles

28. The Commissioner considered whether the disclosure of the withheld information would be a breach of the first principle of the DPA. The first data protection principle requires that any disclosure of information is fair and lawful and that at least one of the conditions in schedule 2 is met.
29. The Commissioner initially considered whether the disclosure of the withheld information would be fair. In doing this he took into account the following factors:

- (i) the individuals' reasonable expectations of what would happen to their information;
- (ii) whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned; and
- (iii) whether the legitimate interests of the public were sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.

Reasonable expectations of the individuals concerned

30. The officials whose names were withheld were named as authors of some of the documents that were provided to the complainant. These documents were the minutes of BRAWG meetings, a summary of a research paper, a four page history of ACP discussions on the assessment of risks to bystanders from pesticides since 2001 and a record of the issues which were to be considered by BRAWG. The name of an individual who had written a letter as part of the licensing process for a pesticide was also withheld.
31. The complainant argued that that any official that enters the civil service is supposed to be, in principle, serving the public. This was especially the case on an issue such as this one, where officials were involved in decisions relating to a serious public health issue which were of significant public importance. In order for there to be full transparency and accountability, the names of any officials involved should be disclosed.

32. She argued further, that if any of the civil servants names that had been redacted were of high enough level to be representing the Government in the Royal Courts of Justice during the legal case *Georgina Downs v Defra* and/or who were present on behalf of the Government during any of the court hearings then it could not possibly be argued that the names of those officials should not be disclosed.
33. The Commissioner notes that the public authority has confirmed that none of the officials whose names have been withheld are at the senior civil service grades. It explained that the authors' names record junior officials carrying out administrative tasks. The tasks consisted of the typing of minutes of meetings, recording the issues to be considered by the working group, detailing the history of the ACP's consideration of related issues, summarising a research paper and writing a letter as part of the licensing process for a pesticide.
34. The Commissioner accepts that where information relates to an employee of a public authority carrying out their professional duties, there is a greater expectation that such information will be disclosed than if it relates to their private life. The information that has been withheld in this case clearly relates to the professional duties of the officials concerned.
35. However, the Commissioner notes that the tasks being undertaken by the officials were very much administrative in nature and were not public facing in the sense that they were not centred on engagement with the public. The officials were not involved in decision making in terms of determining relevant policy lines or approaches. In light of this, and that the officials concerned were not at senior grades, the Commissioner believes that they would have had a reasonable expectations that their names would not be disclosed.

Consequences of disclosure

36. Given the nature of the information in this case, the Commissioner accepts that disclosure would be unlikely to cause significant distress or damage to the officials concerned. However, he does acknowledge that the disclosure of their names in connection with BRAWG could result in increased communications directed to them from members of the public, for example seeking to influence policy in this area or seeking to obtain more information about issues under consideration. This may not be appropriate as it may result in them being diverted from carrying out their normal duties.

Balancing the rights and freedoms of the data subjects with legitimate interests of the public

37. The complainant argued that it was important to know the identity of any of the authors of the papers that had been prepared for the working group. The working group had only been set up following a request by Ministers as a result of a legal case that was taken against the Government on the issue of the exposure, risks and adverse impacts on residents and bystanders from the use of pesticides. She believed that, in light of the amount of residents and other members of the public affected by this issue of spraying pesticides in their localities, there is a significant public interest in knowing the identity of all of those involved with the preparation of documentation on this issue.
38. The Commissioner accepts that the officials whose names have been withheld were not involved in a decision making role when undertaking the duties to which their names are linked. Given that the duties involved were of an administrative nature, the Commissioner does not see any significant public interest in the disclosure of those names sufficient to override the reasonable expectations of the officials concerned. He has therefore determined that it would not be fair to disclose the officials' names and that the public authority correctly withheld their names under regulation 13.

Other matters

39. The public authority initially withheld the names of three companies linked to particular pesticides under regulation 12(5)(e) (commercial confidentiality). When the Commissioner commenced his investigation, it became apparent that the public authority had not consulted with the named companies, or the companies that had superseded them, to ascertain whether those companies believed any harm would be caused by disclosure. Once a consultation did take place, two of the companies raised no objections to disclosure. Their names were therefore disclosed. The third company did not respond.
40. The Commissioner would expect if similar situations arose in future that the public authority would consult with any relevant companies to ascertain their views before applying an exception. The failure to do so in this case not only unnecessarily delayed the Commissioner's investigation, but also led to information being withheld from the complainant without any sound basis for doing so.
41. The Commissioner also notes that the public authority withheld the names of two individuals whose comments were contained in a set of minutes under regulation 13. After the Commissioner commenced his

investigation, it became apparent that one of the individuals was deceased at the time that the request was made and therefore regulation 13 could not apply. In relation to the other individual, the public authority had not consulted with that individual to ascertain their views. When consulted, the individual confirmed that they had no objection to their name being disclosed. The public authority subsequently disclosed both names.

42. The Commissioner would expect the public authority in future to consider the circumstances carefully before applying regulation 13. This may include consulting with any relevant parties to seek their views. Failure to do so in this case, as with application of regulation 12(5)(e), led to information being inappropriately withheld from the complainant and unnecessary delays in the Commissioner's investigation.

Right of appeal

43. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

44. 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.
45. 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

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