



Ministry of the Environment

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Sweden regarding access to information with respect to a pesticide report (ACCC/C/2019/173)

1. Sweden would like to thank the Aarhus Convention Compliance Committee for the opportunity to comment on the communication from a member of the public, Staffan Dahllöf (the communicant), regarding access to information.
2. The communication has been summarized by the Committee as concerning compliance by Sweden with article 4 of the Convention in relation to a request for access to information regarding a draft pesticide report.

Factual background

3. On 28 November 2018, the communicant filed a request to obtain a document from the Swedish Chemicals Agency (the Agency). The document in question was a draft Renewal Assessment Report regarding an approval of the active substance chlorpyrifos. The report was prepared by the rapporteur Member State, in this case Spain, in accordance with article 11 of the Commission Implementing Regulation (EU) No 844/2012¹. The Agency had received the report from the European Food Safety Authority (EFSA) in accordance with article 12 of Regulation (EU) No 844/2012. The Agency disclosed the draft Renewal Assessment Report, except for one section

¹ Commission Implementing Regulation (EU) No 844/2012 of 18 September 2012 setting out the provisions necessary for the implementation of the renewal procedure for active substances, as provided for in Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market.

detailing the proposed risk management decision by Spain (page 451-454). The grounds for rejecting to disclose the relevant section was that it could be assumed that Sweden's possibility to participate in the international work referred to in Regulation (EU) No 844/2012, would be impaired if the information would be disclosed². This assessment was made in accordance with chapter 15, section 1 a, paragraph 1 of the Swedish Public Access to Information and Secrecy Act (2009:400), given that the information is subject to confidentiality in Spain. Before deciding not to disclose the information, the Agency sent a request to the National Institute for Agricultural and Food Research and Technology (INIA) in Spain, asking whether Spain considered the recommendation, with regard to the renewal of the approval for chlorpyrifos, as confidential information. INIA replied that they considered the information confidential due to the on-going peer review coordinated by EFSA³.

4. The communicant appealed the decision to the Administrative Court of Appeal in Stockholm. In the appeal, the communicant stated that the decision not to disclose the section of the document in question was taken without consideration of Directive 2003/4/EC⁴. In a judgment on 19 February 2019, the Administrative Court of Appeal in Stockholm rejected the communicants appeal⁵. In its judgment, the Court concluded that it could be assumed that Sweden's possibility to participate in the current cooperation within the EU regarding the approval of chlorpyrifos would be impaired if the redacted pages would be disclosed. This part of the report was therefore covered by confidentiality in accordance with chapter 15, section 1 a, of the Public Access to Information and Secrecy Act. The Court then assessed whether the redacted pages had to be disclosed due to the special secrecy overriding provision regarding environmental information in chapter 10, section 5 of the Public Access to Information and Secrecy Act and found that this provision did not apply.

5. The communicant appealed the judgment to the Supreme Administrative Court which did not grant leave to appeal⁶. Rulings by the Supreme Administrative Court cannot be appealed.

² Decision 2018-12-05, case 2.4.2.a-H18-08227, annexes 1-2.

³ E-mail 2018-12-04, annex 3.

⁴ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003, on public access to environmental information and repealing Council Directive 90/313/EEC.

⁵ Judgment 2019-02-19, case 9983-18, annexes 4-5.

⁶ Decision 2019-05-16, case 1542-19, annexes 6-7.

6. In a decision on 27 September 2019, EFSA decided to disclose the draft Renewal Assessment Report in its entirety to the communicant. The decision to disclose the report was made after the communicant had appealed EFSA's decision dated 29 July 2019, not to disclose the section of the document in question. In its decision, EFSA stated that "when reassessing the request for public access to documents and taking account of recent statements published by EFSA on the two active substances in question identifying human health effects, EFSA is of the opinion that in this particular case the existence of an overriding public interest can be recognized"⁷.

The communication

7. The communicant alleges, in summary, that Sweden does not, in this particular case regarding access to the draft Renewal Assessment Report, meet the requirements of article 4 on access to environmental information in the Convention due to three main reasons. Firstly, the wording in chapter 15, section 1 a of the Public Access to Information and Secrecy Act, "may deteriorate" regarding Sweden's possibility to participate in the current international cooperation, is not in compliance with article 4, paragraph 4(b) of the Convention, which states that non-disclosure can be justified if a disclosure "would adversely affect" international relations. Secondly, Sweden has not met the requirements of the Convention by disregarding article 4, paragraph 4(d), which states that information on emissions which is relevant for the protection of the environment, as in this case, shall be disclosed, in spite of the interest to protect commercial information. Thirdly, Sweden has not met the requirements of the Convention by disregarding the general provision in article 4, stating that grounds for refusal to disclose information shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

Sweden's response to the communication

Legal framework

8. Article 4 of the Convention guarantees the right to access to environmental information. According to article 4, paragraph 1, each Party shall ensure that public authorities, in response to a request for environmental information, make such information available to the public, within the framework

⁷ Decision 2019-09-29, PAD 2019/075 CA of 2019/041.

of national legislation. Furthermore, the article sets out the form for a request as well as time limits for the public authorities to respond to and supply the requested information (paragraph 1 and 2). In article 4, paragraph 3 and 4, a number of optional grounds for refusing disclosure are listed. According to paragraph 4(b), a request for environmental information may be refused if the disclosure would adversely affect international relations, national defence or public security. In paragraph 4(d), it is stated that a request for environmental information may be refused if the disclosure would adversely affect the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed.

9. In Sweden, the right to access to environmental information is guaranteed under the principle of public access to official documents. This principle is a fundamental principle in Sweden's form of government, prescribed in chapter 2 of the Freedom of the Press Act (1949:105), one of the fundamental laws of Sweden. According to this act, public access to information in official documents may only be restricted if it is justified in order to protect certain interests, for instance with regard to Sweden's relations with a foreign state or in the interest of protecting the personal or economic circumstances of private subjects. Any restriction of the right of access to official documents must be carefully specified in a provision of a special act of law.

10. The provisions regarding the extent to which official documents may be subject to secrecy are contained in the Public Access to Information and Secrecy Act. The majority of secrecy provisions in the act are subject to prerequisites regarding their applicability, which require certain special conditions to be met. One of the conditions is usually formulated as a "requirement of damage". Such a requirement means that secrecy applies provided that some stated risk of damage arises if the information is disclosed. There are two main types of requirements of damage: "straight damage" and "reverse damage". The straight requirement of damage indicates the presumption to be that secrecy does not apply and that the information shall be disclosed. The reversed requirement of damage is a presumption for secrecy.

11. Chapter 15 of the Public Access to Information and Secrecy Act contains provisions on Sweden's relations with foreign states or international organisations. Its section 1 a, paragraph 1⁸ states that:

Confidentiality applies to information, received by a government agency from a foreign body as a result of a binding EU legislative act or an agreement entered by the EU or an agreement approved by the Riksdag (the Swedish Parliament) with another state or with an international organisation, if it can be assumed that Sweden's possibility to participate in international cooperation referred to in the act or agreement is impaired if the information is disclosed.

12. This provision contains, as explained above, a straight requirement of damage which indicates the presumption that secrecy does not apply and that the information shall be disclosed. The public authority or court considering the request for access to public information is obliged to, in each individual case, make an independent assessment as to the consequences of making the information public. This is the first step in assessing access to information. Only if it can be assumed that disclosure would impair Sweden's possibility to participate in international cooperation the information is covered by confidentiality according to chapter 15, section 1 a, of the Public Access to Information and Secrecy Act. If so, the next step is to examine if there are any provisions overriding the confidentiality.

13. Chapter 10 of the Public Access to Information and Secrecy Act contains a number of provisions that override confidentiality. In section 5, paragraph 1⁹, there is a confidentiality overriding provision regarding environmental information as referred to in section 2 of the Act (2005:181) on Environmental Information Held by certain Private-Sector Bodies (the Environmental Information Act). Section 2 of the Environmental Information Act states that environmental information refers to information concerning, 1. the environment and factors that may affect the environment; and 2. how human health, safety, and living conditions as well as cultural environments and buildings and other constructions can be affected by the environment or by factors that can affect the environment.

14. From chapter 10, section 5, paragraph 1, follows that if such environmental information is classified, confidentiality does not apply if it is obvious that the information has such significance from an environmental point of

⁸ Annexes 8-9

⁹ Annexes 8-9

view that the interest of public knowledge of the information takes precedence over the interest which the confidentiality is to protect. Furthermore, it is stated that confidentiality according to chapter 19 to 40 of the act, regarding for instance the public economic interest and personal or financial circumstances of private subjects, does not apply if the requested information relates to emissions into the environment.

15. The provision in chapter 10, section 5, of the Public Access to Information and Secrecy Act was introduced to ensure Sweden's compliance with the Convention and Directive 2003/4/EC which implements the Convention at the EU level. According to the provision in chapter 10, section 5, of the Public Access to Information and Secrecy Act, even when a public authority has made an independent assessment as to the consequences of making the information public, and concluded that the requirement of damage is met, a second assessment must be made as to whether there are any environmental interests overriding confidentiality, before being able to conclude that the information should not be disclosed.

Conclusions on the communication

16. Sweden would like to begin by emphasising the importance of access to information in environmental matters. As described in the previous section, the Swedish legal framework gives extensive access to information in general, and in particular to environmental information such as information which relates to emissions into the environment.

17. With regard to access to information, the presumption in the Swedish legal system is that information in official documents shall be disclosed. According to the Freedom of the Press Act, public access to information can be restricted only if it is justified in order to protect certain specified interests, and any restriction must be carefully specified in a provision of a special act of law. The assessment whether to disclose the information or not is made in several steps which means that refusal to disclose information is restricted, in accordance with the Convention.

18. According to the Convention, Parties may refuse a request for environmental information under certain circumstances, for instance, if it could adversely affect international relations. Sweden has this optional ground for non-disclosure in chapter 15, section 1 a, of the Public Access to Information and Secrecy Act. This provision states that confidentiality applies to

information only if it can be assumed that Sweden's possibility to participate in international cooperation is impaired if the information is disclosed. The presumption is therefore that the information shall be disclosed.

The wording of chapter 15, section 1 a, of the Public Access to Information and Secrecy Act

19. The communicant alleges that the wording in chapter 15, section 1 a, of the Public Access to Information and Secrecy Act, "may deteriorate" Sweden's possibility to participate in international cooperation, is not in compliance with the wording of article 4, paragraph 4(b) of the Convention, "would adversely affect" international relations.

20. Sweden would like to challenge this claim. Firstly, as explained above, the presumption in the provision in chapter 15, section 1 a of the Public Access to Information and Secrecy Act, is that secrecy does not apply and that the information shall be disclosed. According to the preparatory works, the term "may deteriorate" (or "is impaired" as the attached translation of the provision states, annex 9) must not be construed as a lower threshold for denial of disclosure, compared to if the term "damaged" had been used in the provision instead. On the contrary, the term "impaired" indicates that there is a certain type of damage that can be assumed to occur in order for the damage requirement to be fulfilled¹⁰. Thus, the term "may deteriorate" ("is impaired") in the Public Access to Information and Secrecy Act provides the same high threshold for non-disclosure as the term "would adversely affect" in article 4, paragraph 4(b) of the Convention. Furthermore, the Convention does not require that the same wording as is used in article 4, paragraph 4(b) shall be used in the national regulation. Sweden would like to stress that the provision in the Public Access to Information and Secrecy Act does not provide a lower threshold for non-disclosure than article 4, paragraph 4(b) of the Convention.

21. Secondly, the situations in which disclosure of information can be refused are limited even further due to secrecy overriding provisions. As already stated, the Swedish legal framework on access to environmental information is constructed in a way that the assessment is made in several steps. This means that if confidentiality applies to information in accordance with the provision in chapter 15, section 1 a, on the grounds that Sweden's

¹⁰ Preparatory works, Government Bill 2012/13:192, p. 43-44, annexes 10-11

possibility to participate in international cooperation “may deteriorate” (“is impaired”), another assessment must be made as to whether any secrecy overriding provision is applicable. For example, there is a secrecy overriding provision specifically for environmental information in chapter 10, section 5 of the Public Access to Information and Secrecy Act. Consequently, due to the numerous assessments that must be made in accordance with the secrecy overriding provisions in the Public Access to Information and Secrecy Act, Sweden is of the opinion that the provision in chapter 15, section 1 a, complies with article 4, paragraph 4(b) of the Convention.

Disclosure of information on emissions

22. The communicant further alleges that Sweden has not taken into consideration the provision in article 4, paragraph 4(d), of the Convention stating that information on emissions which is relevant for the protection of the environment shall be disclosed, in spite of the interest to protect commercial information.

23. According to the case law of the European Court of Justice and the General Court, the concept of “emissions into the environment” has a broad meaning (C-673-13 P, C-442/14 and T-716/14¹¹). The concept of “emissions into the environment” shall be interpreted as including the release into the environment of products or substances such as plant protection products or biocides and substances contained in those products, to the extent that that release is actual or foreseeable under normal or realistic conditions of use. The concept also includes information enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct, and the data relating to the effects of those emissions on the environment (C-673-13 P).

24. Sweden acknowledges that the information requested by the communicant could be considered as information on emissions into the environment and that the public authorities cannot refuse disclosure of such information by virtue of protecting commercial interest. In the Swedish legal framework, this has been implemented through the exception in chapter 10, section 5, second paragraph. However, the reasons to why the communi-

¹¹ Judgment 2016-11-23, *Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, judgment 2016-11-23, *Bayer CropScience SA-NV and Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden*, C-442/14, EU:C:2016:890 and judgment 2019-03-07, *Anthony C. Tweedale v European Food Safety Authority (EFSA)*, T-716/14, EU:T:2019:141.

cant's request for information was denied were not due to commercial interests but international relations, on which there is no such exception in neither the Convention, nor in the Swedish provision. According to the Convention, Parties may refuse a request for environmental information under certain circumstances, for instance, if it could adversely affect international relations. Sweden has this optional ground for non-disclosure in chapter 15, section 1 a, of the Public Access to Information and Secrecy Act.

Grounds for refusal shall be interpreted restrictively

25. Finally, the communicant alleges that Sweden is non-compliant with the Convention by disregarding the general provision in article 4, stating that grounds for refusal to disclose information shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

26. As explained above, the presumption in the Swedish legal system is that information in official documents shall be disclosed, and every decision not to disclose environmental information is based on an assessment made in several steps and in a restrictive way. This means that a balance is struck several times between the interest served by disclosure and the interest to be protected by confidentiality. Sweden is therefore of the opinion that the grounds for refusal to disclose information is interpreted in a restrictive way, hence the Swedish legal framework complies with article 4 of the Convention.

Summary

27. As set out in the Preamble of the Convention, every person has a right to live in an environment adequate to his or her health and well-being, as well as a duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations. Access to information is fundamental in asserting this right and meeting this obligation. Increased public access to environmental information and the dissemination of such information enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

28. In Sweden, the principle of public access to official documents has a long history and is by tradition very strong in Swedish law. On the basis of what has been described in the previous sections, Sweden is of the opinion that the Swedish legal framework regarding access to information complies with article 4 of the Convention regarding access to information.

29. Sweden hopes that the information in this response provides useful clarification to the Aarhus Convention Compliance Committee. However, should the Committee require any further information, please do not hesitate to contact us.

On behalf of the Swedish Government,



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Acting Director-General of Legal Affairs

Annexes

1. Decision 2018-12-05, the Swedish Chemicals Agency, case 2.4.2.a-H18-08227, original language (Swedish)
2. Decision 2018-12-05, the Swedish Chemicals Agency, case 2.4.2.a-H18-08227, English translation
3. E-mail 2018-12-04, between the Swedish Chemicals Agency and the National Institute for Agricultural and Food Research and Technology (INIA) in Spain
4. Judgment 2019-02-19, the Administrative Court of Appeal in Stockholm, case 9983-18, original language (Swedish)
5. Judgment 2019-02-19, the Administrative Court of Appeal in Stockholm, case 9983-18, English translation
6. Decision 2019-05-16, the Supreme Administrative Court, case 1542-19, original language (Swedish)
7. Decision 2019-05-16, the Supreme Administrative Court, case 1542-19, English translation
8. Chapter 10, section 5 and chapter 15, section 1 a of the Public Access to Information and Secrecy Act, and section 2 of the Environmental Information Act, original language (Swedish)

9. Chapter 10, section 5 and chapter 15, section 1 a of the Public Access to Information and Secrecy Act, and section 2 of the Environmental Information Act, English translation
10. Relevant sections of the Preparatory Works, Government Bill 2012/13:192, p. 43-44, original language (Swedish)
11. Relevant sections of the Preparatory Works, Government Bill 2012/13:192, p. 43-44, English translation