Kemikalieinspektionen
Swedish Chemicals Agency

MEMO

Date
13 August 2020

Legal Matters

Public access to official documents in Sweden

In this paper, there is brief information about Swedish legislation on public access to official documents. Also, the paper presents the outcome of a general discussion the Swedish Chemicals Agency (KemI) has had on how to apply these rules when there is a request for access to documents of the Glyphosate dossier. It should be stressed that the conclusions we have made so far may be reviewed and that there will be no binding assessment until KemI has decided on the disclosure of documents in a decision regarding a specific request. Also, there is a possibility for the requestor to appeal to the Swedish administrative court against a decision to deny access to information.

Legislation on public access to official documents

The principle of public access to official documents is provided for in the Freedom of the Press Act[1]. It gives the public the right to read and to have copies of official documents submitted to or drawn up by the authorities.

Access to public documents may be restricted to protect certain interests, such as personal or economic circumstances of private subjects. Provisions regarding secrecy[2] for information found in official documents are laid down in the Public Access to Information and Secrecy Act[3].

The Act provides for secrecy for information where secrecy applies according to a confidentiality clause in an EU legislative act, such as Article 63 of Regulation (EC) No 1107/2009. Secrecy for such information is "absolute", meaning that it is secret regardless of whether the disclosure would cause any economic damage or personal harm. Information contained in a document is secret for a maximum time of 20 years after the document has been completed.

More than one provision of the Act may state secrecy for information submitted to an authority. The Act also provides for the application of secrecy to be in line with EU legislation on environmental information.

[1] Tryckfrihetsförordningen.
[2] "Secrecy" has the same meaning as "confidentiality".
[3] Offentlighets- och sekretesslagen (2009:400).

Swedish Chemicals Agency

Mailing address	*Visit & delivery*	*Invoicing address*	*Phone & fax*	*Internet*	*VAT No*
Box 2 SE-172 13 Sundbyberg Sweden	Esplanaden 3A SE-172 67 Sundbyberg Sweden	FE 124 SE-838 80 Frösön Sweden	Phone +46 8 519 41 100 Fax +46 8 735 76 98	www.kemi.se kemi@kemi.se	SE202100388001

A request to obtain an official document must be handled promptly by the authority. The document does not have to be released immediately, but unnecessary delay is not permitted. One reason for some delay may be that the authority needs to consider whether the information contained in the document is secret.

The matter of secrecy must be considered each time an authority receives a request to obtain a document. The extent to which information is to be kept secret might depend on the purpose of obtaining the information. Thus, it is not possible for the authority to take a legally binding decision on secrecy for a document in advance.

Also, the Swedish authority must always make an independent decision regarding which information is to be kept secret, even when secrecy is laid down in a confidentiality clause in EU legislation. However, the opinion of other member states, EU bodies and those which the information concern, can be considered, when possible. In this context, it has to be considered that the application of a confidentiality clause in EU legislation, such as Article 63 (2) and (3) of Regulation (EC) No 1007/2009, is a matter of interpreting EU law.

The person who has made a request of access to public documents may appeal to a decision not to disclose information. Appeals are tried by the administrative courts. It should be underlined that, although the entire dossier is sent to the court when an appeal is filed, the court procedure does not include any right for the requestor to access any additional information in the dossier. The disclosure of further information may only be decided by the court in its final decision. Those which the information concern are not considered to be parties.

How to apply the rules for the Glyphosate dossier

Although, there will be no binding decision in advance, KemI has had a general discussion on secrecy for the documents of the Glyphosate dossier. KemI has so far arrived at the following conclusions.

The procedure

As mentioned above, KemI must answer promptly to a request for access to documents of the Glyphosate dossier. It is not possible to wait for the opinion of the other reporting member states, EFSA or GRG. If their opinion is known, it can be considered, but KemI must always make an independent decision on what information is to be disclosed.

Secrecy for personal data

Secrecy for names and addresses of persons involved in testing on vertebrate animals is laid down in Article 63, paragraph 2, point g.

In addition, the Public Access to Information and Secrecy Act provides for secrecy for names and other personal data of the applicants' business associates, consultants and sub-contractors, and their staff.

Secrecy may also be applied for names and other personal data where the disclosure might harm the commercial interests of the applicant, the applicant's business

associates, consultants or sub-contractors. In this case, there normally have to be specific reasons why disclosure of the information would harm the applicant's commercial interests and those reasons have to be known by the authority in order to be considered. One example of a reason that might be considered is when it is in the interest of a competitor to get information on key persons employed by the applicant.

Secrecy for information on installations

Normally, KemI considers information on installations for the production of an active substance to be secret. We believe that information on such installations of a sub-contractor falls under Article 63, paragraph 2, point e. Secrecy for such installations of the applicant is laid down in a provision of the Public Access to Information and Secrecy Act. This national provision could also render confidentiality to information on the address of a laboratory that has carried out a study for an applicant.

Secrecy for study reports

As follows from the above, secrecy applies to certain information contained in a document, not to a specific document as such. When it comes to studies, KemI normally considers other information than the information mentioned above (such as information under Article 63, paragraph 2), to be public. This practise is connected to the possibility for tests and study reports to benefit from data protection provided for in Article 59 of Regulation (EC) No 1107/2009 and previous legislation on data protection. The possibility of data protection has been considered to give enough protection for the commercial interests of the owner of a study.

We also believe that this practice is in line with the jurisprudence of the European Court of Justice (cf. Case C-616/17).

The applicable secrecy provisions provide for secrecy for a maximum period of 20 years, meaning that study reports older than 20 years will be disclosed in all parts. Published research articles submitted in the dossier, will also normally be disclosed in all parts, including the names of the authors.

The application of GDPR

GDPR, gives responsibilities to the different controllers of personal data, i.e. the legal persons or public authorities, etc., that determine the purposes and means of the processing personal data (Article 4 (7) of GDPR). Processing of personal data, including disclosure by transmission, dissemination or otherwise making available, can only be justified by the controller if there is an applicable legal basis, as provided for in Article 6 of GDPR.

This means that a legal person can only submit personal data to a public authority if there is such legal basis. The legal basis for submitting personal data in a dossier under Regulation (EC) No 1107/2009 could, when such data is required, possibly be found in point (f) of Article 6 (1) of GDPR. However, this is for the applicant/controller to decide.

Once the information has reached the public authority, it is for that authority in its capacity as controller to comply with Article 6 of GDPR. There is an exception in Article 86 of GDPR, which provides for personal data in official documents to be disclosed by an authority in accordance with Union or Member State law. If there is a request for access to an official document that includes personal data, under Swedish law this data has to be disclosed by the authority, unless it can be presumed that the recipient will process the data in a way that is not in compliance with GDPR. The authority is not supposed to make any inquiries in that respect unless a breach of GDPR can be suspected due to specific circumstances.

As mentioned above, there is a national confidentiality provision providing for KemI not to disclose names or other personal data on other grounds than GDPR. This provision is often applicable to personal data of other persons than the employees of the applicant, but does not normally cover names and other personal data of the applicant's employees, although their names will be kept confidential when involved in testing on vertebrate animals.

Documents that are disclosed on request are not published by KemI. It would normally not be possible for KemI to publish personal data submitted in a dossier, as the processing in most cases cannot be considered necessary for the performance of a task carried out in the public interest by KemI or in the exercise of official authority vested in KemI (cf. point (e) of Article 6 (1) of GDPR).