

# Carlisle City Council

Department for Environment, Food & Rural Affairs

## Commercial Confidentiality and Appeals under Section 22 of the Environmental Protection Act 1990

- 1 There is a right of appeal to the Secretary of State for operators whose applications to have material excluded from the public register on grounds of commercial confidentiality are refused by an enforcing authority (The Environment Agency from 1 April 1996 formerly Her Majesty's Inspectorate of Pollution (HMIP) for processes subject to **Integrated Pollution Control**, IPC and normally local authorities for **Local Authority Air Pollution Control**, LAPC).
- 2 This note briefly explains how to appeal, but is also intended to help operators who are considering applying for commercial confidentiality. It has no legal status. The legal provisions it summarises are set out in section 22 of the **Environmental Protection Act** and in **The Environmental Protection (Applications, Appeals and Registers) Regulations 1991** (SI 1991 No 507). A separate note covers appeals under section 15 against decisions and notices in relation to IPC or LAAPC authorisations.

### Commercial confidentiality

- 3 Section 22(11) of the Act states that 'Information is, for the purposes of any determination under this section, commercially confidential, in relation to any individual or person, if its being contained in the register would prejudice to an unreasonable degree the commercial interests of that individual or person.'
- 4 The enforcing authorities have been informed that in the Secretary of State's view the following principles will generally apply for both IPC and LAAPC processes when consideration is being given to whether information justifies being classified as commercially confidential:
  - The guiding principle underlying the IPC and LAAPC systems is that information should be freely available to the public about applications for authorisation, the requirements for controlling releases from prescribed processes, the performance of operators in meeting such requirements, formal notices issued to operators, etc. The availability of this information will aid confidence in the systems and facilitate public participation, which is an important feature of them. It will enable

the public to ascertain that adequate pollution control measures are in force. It will also expose any failure to comply with the terms of an authorisation and bring into the open the enforcing authority's action.

- There will, however, be circumstances where the disclosure of information would prejudice to an unreasonable degree a person's commercial interests and where it would be proper to keep information from the public under section 22 of the Act.
- Any operator who seeks to have information kept from the public register for reasons of commercial confidentiality should demonstrate that disclosure of the information would negate or significantly diminish a commercial advantage. This might, for instance, relate to preserving the secret of a new process technology, or of a particular raw material or catalyst, or of the capacity of the process, or some other specific feature which if made public might seriously affect a legitimate commercial advantage.
- Such cases are most likely to arise in relation to the information contained in applications for authorisation or for variations which involve a substantial change, where the enforcing authority will need detailed information about the process. The onus is on the applicant to provide a clear justification for each item he wishes to be kept from the register. It will not be sufficient to say, for example, that the raw material to be used in the process is a trade secret and that consequently no details of the process must be made publicly available.
- It would not normally be appropriate to withhold information from the register in response to a general claim that disclosure might damage the reputation of the operator and hence his commercial competitiveness. Enforcing authorities will also take into account whether the information at issue could be obtained or inferred from other publicly available sources.
- Where information is withheld from the register this should be limited to the minimum amount necessary to safeguard the applicant's commercial advantage.

5 Enforcing authorities will therefore not treat information as commercially confidential unless there are sound reasons for doing so, nor will the Secretary of State when determining appeals under section 22(5). It should be noted that the Secretary of State has powers under section 22(7) to give authorities directions that the public interest requires certain information or types of information to be included in the register **even if that information is commercially confidential.**

### **Applying to an enforcing authority for commercial confidentiality**

- 6 Operators are therefore strongly advised to discuss questions of commercial confidentiality with the enforcing authority **before** making an application for it, and should consider in advance the possible consequences of a refusal, as explained below.
- 7 In particular, operators should check in advance that every part of the information really is required by the authority, and consider carefully whether it must be presented in a format for which confidentiality needs to be sought. For IPC processes, operators should ask the Environment Agency about the likelihood of particular types of information being treated as commercially confidential.
- 8 Operators are most likely to consider applying for confidentiality under section 22(2), for information which is furnished to the authority for the purpose of an application for authorisation, or for variation of an authorisation. However, under section 22(2) they may also seek confidentiality in respect of information provided for the purpose of complying with any condition of an authorisation, or complying with a notice served under section 19(2) of the Act (which gives various bodies powers to serve notices requiring information to enable them to discharge their functions under Part I of the Act).
- 9 If an authority receives information (in circumstances other than those in section 22(2)) which it believes may be commercially confidential, it must - under section 22(4) - give the person to whom or to whose business it relates notice that information has to be included in the register, and give that person a reasonable opportunity of objecting to this on the grounds that the material is commercially confidential.
- 10 Authorities normally have 14 days in which to determine applications for confidentiality. If the authority fails to determine the application within that period, the information is treated as commercially confidential. **Once the authority has determined that information is not commercially confidential, it cannot change its mind and formally accept the information as confidential, and the information must be placed in the register unless the operator appeals to the Secretary of State: if the appeal is dismissed, the information in question will be placed in the public register.**

### **Applying for information to remain commercially confidential after four years**

- 11 Section 22(8) of the Act states that after four years information which has previously been deemed commercially confidential will be placed on the

public register unless the operator applies for the information to remain excluded on the grounds that it is still commercially confidential.

- 12 Enforcing Authorities may contact relevant operators as the four year deadline approaches but operators should be aware

that the onus of responsibility is on them to apply for renewal. They should also ensure that every part of the excluded information is still confidential if they choose to reapply.

- 13 An enforcing authority has fourteen days in which to determine an application. If the authority determines that the information is not commercially confidential then the information shall be placed on the public register unless the operator appeals to the Secretary of State.

### **Rights of appeal**

- 14 The Secretary of State must receive notice of the appeal with 21 days of the enforcing authority's determination that information should not be withheld from the public register. During that 21-day period the information cannot be placed in the register, and if an appeal is made the information cannot be placed in the register until the appeal is determined or withdrawn.
- 15 The Secretary of State has no powers to order payment of costs incurred in connection with section 22(5) appeals.

### **How to appeal**

- 16 There is no appeals form, and no charge for appealing. For an appeal to be valid, appellants are legally required to provide:
- a notice of appeal; a statement of the grounds of appeal; a statement about whether the appellant wants the appeal to be dealt with by a written representations procedure or a hearing - a hearing must be held if either the appellant or enforcing authority requests this, or if the Secretary of State decides to hold one (appellants must copy these three items to the authority when the appeal is made);
  - copies of the decision or notice appealed against; any relevant authorisation (only likely to be relevant in a few cases); any relevant application; any relevant correspondence between themselves and the authority.
- 17 **The wording of the notice of appeal and of the grounds of appeal must avoid any ambiguity.** In all cases it is essential that the appellant

makes it quite clear what information is the subject of the appeal. For example, an appellant may decide to appeal in respect of only part of the information which the authority has refused to accept as confidential. If an operator is appealing in respect of several different items of information he should give reasons for wanting **each** item withheld from the register, because **the Secretary of State will consider the case in respect of each item, and may allow the appeal in respect of some items but not others.**

- 18 Appeals should be despatched on the day they are dated (appellants are strongly recommended to use recorded delivery), and addressed to:
- for processes in England : The Planning Inspectorate, Environmental Pollution Appeals, Room 14/13 Tollgate House, Houlton Street, Bristol, BS2 9DJ : telephone 0117 878812;
  - for processes in Wales: IPC Appeals, Environment Division 3, Welsh Office, Cathays Park, Cardiff, CF1 3NQ : telephone 01222 825546.
- 19 On receipt of an appeal and during the appeal process the Secretary of State will inform both main parties about the next steps, and will also normally provide them with additional copies of each other's representations.
- 20 Withdrawal of an appeal will normally mean that information will not be regarded as commercially confidential and so will be placed in the register. To withdraw an appeal the appellant must notify the Secretary of State in writing, and copy the notification to the authority.

### **Enforcing authority's notification of interested parties**

- 21 There are no requirements for third parties to be notified that an appeal has been made, but in the event that any material third party representations about the appeal are received by the Secretary of State, these will be copied to both parties, and may be read out at a hearing if one is subsequently held.

### **If the appellant has asked for written representations**

The Secretary of State will ask the authority if it agrees to a written procedure. If so, it has **28 days** (from first receiving copies of the appeal documents) in which to send its representations to the Secretary of State. The authority must copy them at the same time to the appellant, who then has **17 days** to submit further representations, starting from the date of the authority's representations. The Secretary of State can require further

representations to be made, and can alter these deadlines in particular cases.

- 22 When the exchange of representations is completed an Inspector may make an accompanied site visit and make a report to the Secretary of State, although these are not statutory requirements.

### **If a hearing is to be held**

- 24 The Secretary of State will ask the two main parties to submit well in advance details of the case they wish to make at the hearing, and will copy this 'statement of case' to the other party.

A date is fixed for the hearing, after consultation with both parties, and an Inspector is appointed. The Secretary of State formally notifies the two main parties of the hearing arrangements **at least 28 days** in advance.

- 25 Hearings of section 22(5) appeals are held in private. The Inspector has powers to allow third parties to speak at hearings, and might use these powers in exceptional circumstances, but would not permit third parties otherwise to attend the hearing or to listen to the evidence given by the two main parties.
- 26 Hearings may be relatively small and informal, or may need to be conducted in a more formal manner, depending on the circumstances of the case. They may include a site inspection. Afterwards the Inspector must make a report to the Secretary of State.

### **Decision by the Secretary of State: 'the balance'**

- 27 The Secretary of State will take into consideration all relevant information and give the parties the opportunity to comment on any new material evidence which he proposes to take into consideration.
- 28 In determining appeals under section 22(5) the Secretary of State will take several considerations into account and balance them against each other. His main concerns will be:
- i to determine whether inclusion of the information in the register would 'prejudice to an unreasonable degree' an appellant's commercial interests;
  - ii in assessing 'prejudice', to take into account both the extent of any damage that might be caused and the likelihood of such damage in fact being caused, looking at 'the balance of probabilities' rather than demanding 'conclusive proof' of prejudice;

- iii in determining whether any prejudice would be caused 'to an unreasonable degree', to balance, against prejudice to an appellant's commercial interests, any benefits to the public interest that would arise from inclusion of the material in question in the register. The assessment of the public interest and the carrying out of the balancing process are matters for the judgement of the Secretary of State;
- iv in assessing the public interest in having the information in the public register, to assess directly the importance to the public of the information at issue. This might involve establishing, among other things, in what way the information might enable the public to be better informed on the likely environmental impact of the process and the relative importance of this information. There may be instances where the information submitted to an enforcing authority is no more than peripheral to the application and subsequent .

authorisation, and in such cases the degree of prejudice which would be required to make entry in the register unreasonable might be relatively slight. The nature and significance of the information are therefore relevant considerations.

### **Notification of determination**

- 29 When the Secretary of State has considered and determined the appeal his decision letter is copied to the two main parties, with the hearing report if a hearing was held. He must also send a copy of the decision letter to anyone else who made representations at the hearing.

### **Registers**

- 30 If the appeal is dismissed, the information for which confidentiality was claimed will be placed in the public register, but the decision letter and any hearing report are not made public. Where information has been excluded on grounds of commercial confidentiality, registers must contain a statement indicating the existence of that information. Where monitoring information is excluded by virtue of section 22, the authority must include in the register a statement indicating whether or not any relevant condition has been complied with.