

**DECISION OF THE CHAIRMAN OF THE BOARD OF APPEAL
OF THE EUROPEAN CHEMICALS AGENCY**

26 June 2012

Request for confidential treatment of certain information

(Confidentiality request in a procedural document - Information allegedly outside the scope of appeal proceedings - A document originating from a third party)

Case number	A-005-2011
Language of the case	English
Appellant	Honeywell Belgium N.V. Belgium
Representative	Messrs. Herbert Estreicher and Marcus Navin-Jones Keller and Heckman LLP Avenue Louise 523 B-1050 Brussels Belgium
Intervener (I)	DuPont de Nemours (Nederland) N.V. The Netherlands Represented by: Ms. Teny Nicoghossian DuPont de Nemours International Sarl 2, Chemin du Pavillon CH – 1218 Le Grand Saconnex Geneva Switzerland
Intervener (II)	European Coalition to End Animal Experiments United Kingdom Represented by: Dr. Katy Taylor 16a Crane Grove London N7 8NN United Kingdom
Contested decision	CCH-D-0000001396-72-03/F of 22 March 2011 adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 41 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ L 396, 30.12.2006, p. 1; corrected by OJ L 136, 29.5.2007, p. 3; hereinafter the 'REACH Regulation')

THE CHAIRMAN OF THE BOARD OF APPEAL

gives the following

Decision

SUMMARY OF THE FACTS

1. On 21 June 2011, the Appellant filed an appeal at the Registry of the Board of Appeal against certain parts of the Contested Decision.
2. On 16 May 2012, the Board of Appeal invited the Appellant and the Agency to submit certain further information and documents relating to the Agency's decision-making process. On 21 May 2012, the requests for further information were notified to the parties and to the interveners DuPont de Nemours (Nederland) B.V. and the European Coalition to End Animal Experiments (hereinafter together the 'interveners').
3. On 12 June 2012, the Agency filed a reply (hereinafter the 'Reply') to the request for further information set out by the Board of Appeal. The Agency's Reply contained requests to treat certain information as confidential vis-à-vis the Appellant and the interveners.

GROUNDS OF THE REQUEST

4. As regards the Appellant, the Agency has requested information to be treated as confidential on the grounds that it was not part of the Agency's decision-making process, it is outside the scope of the present appeal proceedings, or it is contained in a third party document that does not belong to the Agency. The Agency's grounds for the request for confidential treatment with respect to the Appellant can be summarised as follows:
 - The documents that contain comments submitted by certain MSCAs were not part of the Agency's decision-making process. More specifically, only proposals for amendments (as opposed to comments) are relevant for the decision-making under the evaluation process, and trigger additional steps in the procedure, pursuant to Article 51(2) to (7) of the REACH Regulation. Comments submitted by the MSCAs do not have the same effect.
 - The comments and responses submitted by the Appellant and the Agency that relate to the uncontested parts of the Contested Decision are outside the scope of the present proceedings, and thus not relevant.
 - The third party document does not belong to the Agency.
5. Insofar as the interveners are concerned, the Agency's request is also based on arguments that certain information falls outside the scope of the present appeal proceedings, it is not part of the Agency's decision-making process, or it amounts to a third party document that does not belong to the Agency. In addition, the Agency has claimed the following as confidential with respect to the interveners:
 - The electronic correspondence with the Appellant, which may, according to the Agency, contain information the disclosure of which could be potentially harmful to the Appellant's commercial interests. Furthermore, the Agency considers that some of this information is outside the scope of the present proceedings and even relates to another dossier. Moreover, the Agency argues that this

information had no bearing on the Agency's decision-making with respect to the Contested Decision.

- The registration and submission numbers, which, according to the Agency, have not been disclosed to third parties either during the Agency's decision-making process or in the course of the present appeal proceedings.
- Certain personal data.

REASONS

6. It should be noted that Commission Regulation (EC) No 771/2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency (OJ L 206, 2.8.2008, p. 5; hereinafter the 'Rules of Procedure') is silent on who should decide on a confidentiality request contained in a procedural document other than a notice of appeal. Therefore, the present confidentiality request should be decided by analogy with the second subparagraph of Article 6(6) of the Rules of Procedure, which provides that the Chairman shall decide whether information indicated by an appellant in a notice of appeal as confidential should be regarded as such.
7. As regards the request with respect to the Appellant, the Chairman observes that in accordance with Point 41 of the Practice directions to parties to appeal proceedings before the Board of Appeal of the European Chemicals Agency (hereinafter the 'Practice Directions'), '(...) *confidential treatment cannot be accorded to an appellant vis-à-vis ECHA or vice versa.*' Thus, a request for confidential treatment between the parties is an exception to the general rule whereby matters to be considered by the Board of Appeal must be disclosed to the principal parties to the proceedings.
8. It follows that the Chairman's assessment in this present decision shall be confined to addressing the Agency's request for confidential treatment with respect to the Appellant. The issue to be decided by the Chairman is whether or not to regard as confidential with respect to the Appellant the information and documents specified in paragraph 4 above, as requested by the Agency.
9. As regards the Agency's request with respect to the interveners, the Chairman shall continue to apply the prior practice of notifying directly the non-confidential versions of the procedural documents to the interveners.

Information allegedly not part of the Agency's decision-making process

10. The Agency has claimed that comments submitted by certain MSCA representatives on the draft Contested Decision were not part of the Agency's decision-making process. For this reason, the Agency considers that these comments are not relevant to the present proceedings and therefore should be kept confidential vis-à-vis the Appellant. This claim applies to Documents 7 to 11 in Annex 3 to the Agency's Reply.
11. The Chairman observes that the Agency's characterisation of Documents 7 to 11 in Annex 3 to its Reply seems in part incomplete insofar as a number of these documents contain not only comments but also proposals for amendments. More specifically, Documents 8, 9 and 10 in Annex 3 to the Agency's Reply contain both proposals for amendments and comments.
12. Insofar as the MSCA proposals for amendments are concerned, and in accordance with the Agency's Reply, the Chairman notes that these were already notified to the

Appellant in full during the Agency's decision-making process. Moreover, at the time of this notification, the Agency also disclosed, for each proposed amendment, the MSCA that had made the proposal.

13. It follows from the fact that the proposals for amendments have already been disclosed to the Appellant and that the Agency's request for confidential treatment is confined to MSCA comments that Documents 8, 9 and 10 in Annex 3 to the Agency's Reply cannot benefit from confidential treatment insofar as they contain also MSCA proposals for amendments.
14. As regards the MSCA comments, the Chairman understands the Agency's justification to be based on a distinction between the effects that MSCAs' proposals for amendments, on the one hand, and MSCA comments, on the other, have with respect to the decision-making process. However, the Chairman considers the Agency's justification to be excessively formalistic. Although MSCA comments do not trigger the involvement of the Member State Committee in the decision-making procedure for dossier evaluation, such comments must nonetheless be considered as forming part of the decision-making process. Even though the Agency may not be required to amend a draft decision in light of MSCA comments, it is reasonable to expect that the Agency carefully considers any such comments and, if appropriate, evaluates its findings in light thereof. Therefore, it would be excessively rigid to treat MSCA comments as separate from the decision-making procedure pursuant to Article 51 of the REACH Regulation.
15. It follows that for the above reasons, the Chairman rejects the Agency's request for confidential treatment of Documents 7 to 11 in Annex 3 to the Agency's Reply.

Information allegedly outside the scope of the present appeal

16. The Agency requests confidential treatment for information that it considers to be outside the scope of the present appeal proceedings. The Agency considers such information not to be relevant to the present proceedings and therefore requests it to be kept confidential vis-à-vis the Appellant. This claim applies to Documents 1 and 5 in Annex 2 and Documents 4 and 12 in Annex 3 to the Agency's Reply.
17. The Chairman finds the Agency's claim under this heading to lack reasoning. More specifically, information cannot be considered to be confidential merely by reason of the fact that it allegedly falls outside the scope of specific appeal proceedings. It may be that the documents in question contain information that is confidential vis-à-vis the Appellant but this cannot be based merely on the grounds that, in the Agency's opinion, they are irrelevant for the present appeal. At the same time, the Agency has not provided other reasons for the claimed confidential nature of these documents.
18. All four documents specified in paragraph 16 above relate to the Agency's decision-making process in the present case, and address, in particular, the part of the Contested Decision that has been contested in the present proceedings, that is the 90-day repeated dose toxicity study in the rabbit, by inhalation. Thus, based on a review of the documents in question, and having regard to the succinct justification provided by the Agency, it is not clear that the information in these documents falls outside the scope of the present proceedings, as maintained by the Agency.
19. Accordingly, for the above reasons, the Chairman rejects the Agency's request for confidential treatment of Documents 1 and 5 in Annex 2 and Documents 4 and 12 in Annex 3 to the Agency's Reply.

Third party document

20. Finally, the Agency has claimed confidential treatment for one document, which according to the Agency is a third party document that does not belong to the Agency. This claim relates to Document 6 (Part V) in Annex 2 to the Agency's Reply, which is a statement appended by a MSCA representative to the Final Minutes of the 16th Meeting of the Member State Committee (MSC-16) of 1-3 February 2011. The document, to which these Final Minutes of the Member State Committee meeting (MSC-16) also refer, contains further considerations and scientific arguments in support of the MSCA's view that a shorter term study could provide relevant information for the further assessment of the Appellant's substance.
21. The Chairman notes, first, that based on information submitted to the Board of Appeal, the MSCA representative has not claimed its statement as confidential vis-à-vis the Appellant. Moreover, the Agency already disclosed during its decision-making process a copy of the same MSCA's proposal for amendment to the draft Contested Decision, together with the identity of that MSCA. Based on a review of Document 6 (Part V) in Annex 2 to the Agency's Reply and the same MSCA's proposal for amendment as already previously provided to the Appellant, the Chairman observes that the two documents address, in essence, the same scientific issues although the documents may emphasise different aspects.
22. Furthermore, the Chairman observes that the right to access documents is generally founded on possession and not ownership. Thus, for instance, in Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding the public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43; hereinafter 'Regulation 1049/2001'), the right to access documents is based on possession. In accordance with Article 2(3) of Regulation 1049/2001, the right applies to '(...) *all documents held by an institution, that is to say, documents drawn up or received by it and in its possession (...)*'.
23. Therefore, and having regard to the above considerations, the Chairman rejects the Agency's request for confidential treatment of Document 6 (Part V) in Annex 2 to the Agency's Reply.

ORDER

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

- 1. Rejects the Agency's request to treat certain documents as confidential with respect to the Appellant.**
- 2. Orders the confidential version of the Agency's reply dated 12 June 2012 to be notified to the Appellant.**
- 3. Orders the non-confidential version of the Agency's reply dated 12 June 2012 to be notified to the interveners.**

Mercedes ORTUÑO
Chairman of the Board of Appeal