



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 7 2003

OFFICE OF
GENERAL COUNSEL

Ms. Mary Lou Dickerson
State Representative
Washington House of Representatives
314 16th Ave., S.W.
Olympia, WA 98504

Re: Freedom of Information Act Appeal HQ-RIN-01620-02-A

Dear Ms. Dickerson:

This letter constitutes the final determination by the U.S. Environmental Protection Agency ("EPA" or "Agency") concerning your April 23, 2002 request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for the identities of the inert ingredients in the pesticide product Foray 48B, EPA Registration No. 73049-46. On June 5, 2002, the EPA Office of Pesticide Programs, Information Resources and Services Division, sent you an interim response in which your FOIA request for this information was initially denied under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). EPA furnished Valent BioSciences Corporation ("Valent"), the entity that submitted to EPA this information, the opportunity to substantiate its claim, under 40 C.F.R. § 2.204(d)(1)(i), that the identities of the inert ingredients in Foray 48B are trade secrets or confidential business information ("CBI"). The interim response triggered an automatic appeal to EPA's Office of General Counsel of the initial denial of the FOIA request under 40 C.F.R. § 2.205(a)(2)(ii).

Pursuant to EPA's regulations at 40 C.F.R. § 2.205(a)(2), I recently made a final determination regarding Valent's claim for confidential treatment of this information. I determined that the identities of the inert ingredients in Foray 48B, except water and 1,2-Benzisothiazoline-3-one, were entitled to confidential treatment. I determined that the identity of 1,2-Benzisothiazoline-3-one was not entitled to confidential treatment. In its substantiation, Valent did not claim that the identity of water was confidential. Accordingly, in response to your request for the identities of the inert ingredients in Foray 48B, the Agency hereby informs you that Foray 48B contains water and 1,2-Benzisothiazoline-3-one. However, the Agency must withhold the identities of the remaining inert ingredients.

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Trade Secrets and Confidential Business Information

While the FOIA and EPA's regulations impose upon the Agency a broad duty to disclose records, that duty is not without exception. Exemption 4 of the FOIA exempts from disclosure matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Furthermore, the information at issue was submitted under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and is therefore subject to section 10(b) of FIFRA, which similarly protects from disclosure information that contains or relates to "trade secrets or commercial or financial information obtained from a person and privileged or confidential." 7 U.S.C. § 136h(b). Because Congress used essentially the same language of FOIA Exemption 4 to define the scope of protected information in section 10(b) of FIFRA, the same standards apply to both. Northwest Coalition for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 201 n.1 (D.D.C. 1996). Therefore, if EPA finds that the information is a trade secret or CBI and thus exempt from disclosure under FOIA Exemption 4, the information is similarly protected under FIFRA section 10(b).¹ EPA's regulations implementing FOIA require the Agency to initially withhold documents that may be entitled to confidential treatment pending an opportunity for the submitter of the information to substantiate the confidentiality claim(s), and a final confidentiality determination by the appropriate legal office. 40 C.F.R. §§ 2.204(d)(1), 2.204(e), and 2.205(a)(2)(ii).

After careful review, on January 30, 2003, I issued a final confidentiality determination for the information. I determined that the identity of 1,2-Benzisothiazolinc-3-one is not protected from disclosure under FOIA Exemption 4 or FIFRA section 10(b). Having disclosed the use of this ingredient in a patent, Valent failed to demonstrate that the identity of this ingredient qualifies as a trade secret or CBI. However, I determined that the identities of the remaining inert ingredients, except water, met the requirements for confidential treatment under Exemption 4 of the FOIA and FIFRA section 10(b). I found the information to be a trade secret and commercial information, obtained from a person, and confidential. The information is a trade secret because disclosure would allow the identification of a secret and commercially valuable process used for the making, preparing, compounding, or processing of a trade commodity and that can be said to be the end product of either innovation or substantial effort. Pub. Citizen Health Research Group v. Food and Drug Admin., 704 F.2d 1280, 1288 (D.C. Cir. 1983). The information is also CBI because (1) the Agency, under section 3(c)(1)(D) of FIFRA, 7 U.S.C. § 136a(c)(1)(D) required Valent to submit the information; and (2) disclosure of the information is likely to cause substantial competitive harm to Valent. Nat'l Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). As such, the information is being withheld under Exemption 4 of the FOIA and section 10(b) of FIFRA.

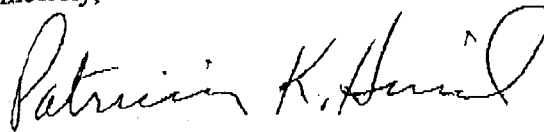
¹FIFRA permits disclosure of trade secrets and CBI in limited circumstances which are not applicable in this case.

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Conclusion

In summary, I have determined that the identities of the inert ingredients in Foray 48B, except water and 1,2-Benzisothiazoline-3-one, constitute trade secrets and CBI and are properly withheld under Exemption 4 of the FOIA and section 10(b) of FIFRA. This letter constitutes EPA's final determination of your appeal. In accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or have your principal place of business, or in which the Agency records are situated, or in the District of Columbia.

Sincerely,



Patricia K. Hirsch
Assistant General Counsel
Finance and Operations Law Office

cc: Betty Lopez, HQ FOI Office
Sherri Street, OPP