

GM Freeze Response to the Justice Select Committee Enquiry into the Freedom of Information Act 2000

February 2012



1. GM Freeze

1.1 *The GM Freeze alliance*

GM Freeze is an alliance of 36 UK-based organisations calling for a moratorium on genetically modified (GM) foods, cultivation of GM crops for any purpose and patents on genetic resources in agriculture, food production and forestry until the need for and safety of GM technology has been established and alternative approaches have been fully evaluated.

1.2 *GM Freeze membership*

Our members include consumer groups, farming organisations, environmental groups, development agencies, religious groups, animal welfare groups and private companies.

2. Summary of evidence

2.1 GM Freeze has used the right to access information provided by the Freedom of Information Act (FOI ACT) when we felt it was important to do so.

2.2 Access to information has helped improve the enforcement of regulations and monitoring in some areas but not in others.

2.3 The use of exemptions for data protection, national interest and commercial confidentiality restricts the effectiveness of the FOI Act and prevent it fully achieving its objectives.

2.4 The presumption should be to publicly release information, and the onus should be on those seeking to restrict access on grounds of commercial confidentiality and national interest to prove their case. are

2.5 Charging should not be used as a means to restrict access to information.

2.6 Bodies holding information should post as much information on the web as possible to reduce the need for information requests.

2.7 Core costs of providing information (collation, redaction and assessment of public interest) should be borne by central government.

2.8 Copying charges should be at cost.

2.9 Information should be provided electronically if requested.

2.10 Redaction should not be used to render released documents meaningless.

2.11 Data should be made available in a form that allows them to be analysed statistically.

2.12 The FOI Act has only partially achieved its objectives, but there is some way to go before openness and transparency is universally adopted by all public bodies.

2.13 The FOI Act has the potential to improve decision making and democracy.

3. Background

3.1 *GM Freeze uses the Freedom of Information Act and Environmental Information Regulations*

GM Freeze has used the FOI Act and Environmental Information Regulations 2005 (EI Regulations) to request information related to GM policy, regulation, monitoring and enforcement of GM legislation on a number of occasions. GM Freeze staff also have experience dating back to the

2005 of making requests for information which pre-date the legislation, in particular for data held on the “Public Pollution Register”. The memorandum to the Committee from the Department of Justice largely reviews the Act from the perspective of official bodies receiving FOI requests, rather than of those making the requests. As the FOI Act was primarily aimed at assisting the electorate, not the executive or government, we are surprised more effort has not been made by the Department of Justice to survey the views of those making requests for information.

3.2 Types of request made under the FOI Act and EI Regulation

3.2.1 Our requests for information have related to the presence of GM contamination in the food/feed chain, the enforcement of legislation, the development of GM policy in the UK and the relationship between central government, statutory bodies and the private sector (eg, biotechnology companies). On several occasions we have appealed to the Information Commissioner’s Office (ICO) against decisions or proposed charges. On one occasion we appealed as far as an Information Tribunal. We have made requests to local government in all parts of the UK, the Food Standards Agency (FSA) and the GM Inspectorate.

3.2.2 To assist the Committee we list the majority of requests we have made, to whom and the reason behind the request in the Annex 1 to this evidence.

3.2.3 We will now address the questions posed by the Committee.

4. Does the FOI Act work effectively?

4.1 Framing of our reply

Our response to this question is framed by the objectives of the FOI Act as set out by the Memorandum to the Justice Committee by the Department of Justice and is based on our experience of making information requests between 2005 and 2011.

4.2 The objectives of the FOI Act are:

- To increase openness and transparency.
- To improve accountability.
- To improve decision making.
- To increase public involvement in decision making.

4.3 Openness and transparency

4.3.1 In our experience implementation of the FOI Act is very patchy across all the public bodies it covers, so the objective to improve openness and transparency is not always achieved. If those seeking information are persistent, useful information can be brought into the public domain which otherwise would not have been public. Sometimes this can be beneficial to the public bodies releasing the information because it shows them in good light and that they perform their duties and responsibilities in a lawful, responsible and inefficient manner. Sometimes the reverse is true. Sometimes it may lead to improvements in the way legislation is implemented.

4.3.2 We also recognise that release of information has the potential to produce better legislation and policies, but in our experience this has so far not applied to GM crops.

4.3.3 Below we provide details of cases in which we have been involved where the existence of the FOI Act has shed light on how different parts of national and local government implement regulations.

GM LL601 rice contamination

4.3.4 In the contamination incident involving the GM trait LL601 (see Annex 1) the information released to us suggested the FSA was not acting entirely in the public interest in the way it handled the recall of products and in its relations with the food industry. Documents revealed confused messages regarding the need to recall contaminated products despite the fact that marketing an unapproved GM organisms (GMOs) in the EU is illegal. The FSA only took appropriate action it received notice that a Judicial Review of its handling of the case would be

sought after FOI requests were made. Although the Judicial Review (brought by Friends of the Earth) found that the FSA's actions had been lawful, the written judgment made several criticisms of the Agency's conduct clearly aimed at improving its response to similar incidents in the future. These criticisms included the FSA's:

- Failure to issue any Food Alerts to local authorities.
- Failure to notify the public of which batches of rice were contaminated.
- Failure to provide legal guidance to local authorities at the start of the incident.

4.3.5 The judgment also recommended an internal review of the LL602 case by the FSA.

4.3.6 One positive outcome of the release of information related to the LL601 case was that it cast light on the risk of GM contamination from unforeseen sources and how ill prepared the authorities were to deal with such incidents. It was clear to us that minimal forward planning had been carried out and that the FSA had little idea which food/feed imports were at risk from GM contamination and so might merit routine monitoring to prevent contaminated cargoes entering supply chains and avoid the potentially huge cost of withdrawing products from sale. GM Freeze used these insights to produce a reportⁱ identifying as many "at risk" food/feed imports as possible given the information available globally. The report recommended to the EU and UK a number of measures that should be taken to minimise the risk of future contamination incidents occurring.

Contamination incidents since LL601

4.3.7 GM contamination incidents since the LL601 case include the contamination of Chinese rice imports in 2008 with the unapproved trait Bt63 and the contamination of Canadian flax imports with the unapproved GM trait CDC Triffid in 2009. In both cases the UK response has been more urgent and effective than for LL601 rice, possibly as a result of the use of the FOI Act to obtain documents showing the lack of coherence and urgency of the FSA's initial response to LL601.

4.3.8 We have made further requests to the GM Inspectorate (GMI) regarding the possible import of flax seed from Canada potentially contaminated with CDC Triffid (having first checked the GMI's website for relevant information and found none). The GMI's initial response was reassuring but lacked any detail to back up its position. We had to make a second request to obtain the risk assessment documents showing in detail the measures taken to ensure that seed lots from Canada were free from GM contamination. We concluded that the GMI measures would probably have prevented contaminated seed being sown in the UK. This begs the question why the GMI had not posted its risk assessment on its website as soon as it was available, as it would certainly have helped farmers and other interested parties to make judgements about the risk of GM contamination and saved the costs of dealing with two information requests from GM Freeze.

4.3.9 From our own experiences, we have concluded that the FOI Act has gone some way to make the monitoring and enforcement of the GMO regulations more open and transparent, but there is still a reticence to be fully transparent about what has happened, where, why and what remedial measures were taken in cases involving contamination.

Somerset GM oilseed rape contamination

4.3.10 Reluctance to release all relevant information is illustrated by the case of the 2008 Somerset oilseed rape (OSR) field contaminated with Monsanto's unauthorised GM trait GT73. Our interest was to ensure that the local environment and farmers/beekeepers were protected from a prolonged contamination, as we were aware that OSR seeds are persistent in the soil, that the plant can cross out into other crops and wild relatives of the crop and that GM pollen could be transported over several kilometres by wind or pollinating insects including honey bees. Our concerns grew when Defra revealed in its initial notification of the incident that the trait had already crossed into a neighbouring OSR field. In addition we felt the case may also throw useful light upon the issue of the coexistence of GM and non-GM crops, suitable separations distances between them and liability for any harm caused by GM contamination.

4.3.11 However in response to our request for basic information about the incident, Defra did not

provide the full picture. It withheld the precise location of the contaminated field and the distance between the contaminated crop and the contaminated neighbouring field, on the grounds that this information was the landowner's personal data under the Data Protection Act and the case was not of sufficient public interest to merit the Data Protection Act being waived to reveal it. We appealed against this decision to Defra and then to the ICO and finally requested an Information Tribunal. The judgment of the Tribunal upheld Defra's position because the level of contamination was felt to be too low to bring public interest into play. We do not consider that using the level of contamination or pollution to decide whether the Data protection exemption should apply is in the spirit of the FOI Act.

4.3.12 Using what information Defra did provide, along with more (provided by a host of sources including Ministers' letters to Somerset MPs, Parliamentary Answers, answers in the Scottish Parliament – the seed was also sown in Scotland but destroyed before it flowered, the GM Inspectorate's annual report and information available on the internet) we were able to identify the company that owned the contaminated seed and the Parliamentary constituency where the field was located. The company, Aardvark Investments, went into liquidation in 2010 following this incident, but it is not certain if the two events are connected because of the lack of openness and transparency throughout this case.

4.3.13 We still believe that it is in the public interest for the full facts of this case to be made public because they may have some bearing on future policies relating to GM crops coexistence, seed and honey purity, separation distances between GM and non-GM crops and liability for health, environmental and economic harm.

4.3.14 All these are contentious areas of GM policy where Defra is in dispute with the administrations in Wales and Scotland as to what UK policy should be, including at EU level. As we indicate in Annex 1, we have tried to obtain information on the nature of the discussions between the four UK administrations by requesting copies of the minutes of the UK's GM Policy Coordination Group, which Defra refused to provide. We eventually obtained these from the Scottish Executive (via a request from a Scottish member of GM Freeze), however they were heavily redacted (see Annex 2 for some examples) in all aspects including the complete agendas of some meetings. The value of these documents is therefore very limited. As a result of the lack of openness about the GM contamination in Somerset and the heavy redaction of the GM Policy Coordination group documents, GM Freeze was left wondering whether an open and transparent discussion on the issues of GM coexistence, contamination and liability was in fact the last thing in which Defra was prepared to engage.

The use of redaction

4.3.15 GM Freeze fully accepts the need sometimes to protect the identities of employees and individuals when releasing materials under the FOI Act, although in cases of serious maladministration by individuals we believe releasing this information could be justified. We cannot accept that redaction should be used to render released documents meaningless. The recipients of heavily redacted documents are not in a position to judge whether or not the redactions are justified in the public or national interest or for reasons of commercial confidentiality. It is also very uncertain whether or not going to the expense of an Information Tribunal would resolve the matter because it is unclear whether those appealing would see be able to see the original unredacted documents as part of the case (which would render the initial redaction pointless). The extent to which redaction is sometimes used is illustrated by the examples we have seen in Annex 2.

Pricing groups and individuals out of accessing information under the FOI Act

4.3.16 Civil society groups and individuals pursuing information request under the FOI Act may require a large number of documents to establish the facts of the case in which they are involved. This may require the organisation to which the request has been sent expending a considerable amount of staff time in collating the information, undertaking an assessment of public/national interest, data protection and commercial confidentiality tests for each document and then redacting sensitive information. Some of the time needed to carry out these tasks may result from the way in which information and data are held by the authority concerned and are not the fault of those

seeking release of the information. Poor record keeping and filing which could make collation a longer job than should be necessary, yet the cost burden of releasing the information can be used as grounds for refusal.

4.3.17 Members of the public making information request should not be expected to pay costs stemming from poor recordkeeping (eg, of enforcement procedures) or data management. A basic requirement of all recordkeeping by public authorities should be to ease (for everyone) dealing with information and data requests by the public, other departments and elected representatives.

4.3.18 GM Freeze believes that charging staff time for FOI requests breaches the spirit of the FOI Act (especially if the hourly rate is £36, as indicated by the Department of Justice Memorandum to the Committee). It is wrong because it uses price as a means to limit access to information. GM Freeze has on two occasions been asked to pay unacceptable amounts to obtain basic information about the enforcement of the GMO Traceability and Labelling Regulations 2005. Both cases were resolved in our favour following the intervention of the CIO. However for an individual or local community group the possibility of very high charges may deter them from making requests and so result in vital facts remaining secret. For example in the case of diffuse pollution of air and water a large amount of data may be required to pinpoint sources resulting in very high collation and copying charges for the authority holding the data. Such high charges could be enough to deter individuals or community groups from pursuing their request or getting to the truth.

4.3.19 In our view the costs of staff time for collating information to answer FOI requests should not be passed on to those making the request. Such a policy may encourage bodies holding information to post more information on websites to avoid receiving so many requests as well as to improve their recordkeeping and filing systems so that information can be accessed more efficiently. In paragraph 4.3.8 above we provide an example an information request that could have been avoided altogether if the relevant report had been posted on the GMI website in the first place.

4.3.20 We would recommend that charges for FOI requests are kept to a minimum to cover copying (ie, cost price per sheet). Where possible documents should be provided free of charge in an electronic format if requested (not all petitioners can use electronic information). Given the potential for the FOI Act to create more open and democratic systems of government, we believe that the costs of administration of FOI requests should be borne by central government so that price is not a barrier to obtaining information for either the requester or those responding to the request.

Improving accountability

4.3.21 GM Freeze believes the FOI Act has made a small contribution to making politicians and public servants more accountable for their actions and policies, but there is still some way to go. There is still a risk that those seeking to hide their failures to carry out their duties in a lawful and efficient manner may also be able to influence national/public interest, data protection and commercial confidentiality tests or decisions. Using political reasons to justify not releasing information under the guise of national or public interest or data protection cannot be ruled out. It is therefore very important that decisions relating to release of information by public bodies can easily be challenged and reviewed by qualified persons with no involvement in the topic/issue covered by that request. At present the ICO perform this role based on their own guidance documents and some case law. The public interest test is applied on a case-by-case basis, and the explanations for refusal tend to be in legal language, which may not assist in providing a fully transparent answer or understanding.

4.3.22 In our view the public interest, national interest and commercial confidentiality tests should favour disclosure. In our experience do not. Those wishing to prevent the release of information should make the case for not releasing the information rather than vice versa.

Better decision making

4.3.23 From our perspective the existence of the FOI Act has made no difference to the quality of overall decision making on GMOs. We fear the public will become extremely sceptical about their

ability to influence decisions, even when armed with the information that undermines or should change the current political thinking. Take, for example, the outstanding work on buffer zones near residential properties to protect residents from pesticide spray drift by Georgina Downsⁱⁱ, which was backed by the Royal Commission on Environmental Pollution only to be rejected by Defra. This illustrates very clearly that even with a very strong case a member of the public can find it impossible to change government policy because of the role of companies and other bodies with a vested interest in maintaining the *status quo* or protecting reputations. In the case of Georgina Downs the views of the pesticides companies and the Advisory Committee on Pesticides prevailed.

Public involvement in decision making

4.3.24 There is no indication that the FOI Act has encouraged participation in decision making by the public in a dramatic or meaningful way. In the time since the Act came into force there are very few examples of policies changed because the public reacted to new information becoming available via FOI Act requests alone. The obvious exception is MP's expenses, which generated some significant changes because of the huge public outcry generated by unprecedented media coverage. In other areas of policy the impact of the FOI Act has been less dramatic. Above we have detailed several cases in which we have been involved where the FOI Act may have improved decision making as well as cases where it appears to have no impact at all.

4.3.25 In the regulations for approval and enforcement of GM food and crops there is little sign that access to information has allowed the public to influence decisions any more than before because of the political nature of decisions. Government ministers choose to hide behind "science" in order to make political decisions even when the science shows a great deal of uncertainty and gaps in data. GM approvals are claimed to be "science based" but often long-term health and environmental safety studies are lacking so cannot be the basis for such a claim. Recently we looked at two scientific opinions for GM maize by the GM Panel of the European Food Safety Authority (EFSA), which the UK Government will use for the basis of its decisions to approve (or not) new GM authorisation applications. Both opinions^{iii and iv} admit to data or knowledge gaps, yet if past performance is followed the UK will approve them when it comes to voting at EU level. The raw data used to justify approvals is generated by the applicants themselves – all the more reason for it to be in the public domain.

4.3.26 However obtaining raw data to allow independent scientists to re-examine the conclusions of companies and/or scientific advisors has proved difficult. Following legal action in 2005 some data were released in Germany relating to an application to grow GM maize MON863. This allowed a team of independent scientists from outside EFSA to scrutinise them. However the data were not supplied in a form that could be loaded into statistical software so had to be retyped to allow this to take place.^v The group that did this found significant factors that could impact on the conclusion of the risk assessment including poor use of statistics, different reactions between the sexes to feeding GM maize, differences in kidney weights and conditions which could impact on health.

4.3.27 This case demonstrates the potential value of access to information in improving decisions. However access to raw data is likely to be subject to the commercial confidentiality test and is therefore difficult to obtain in a form that allows straight-forward statistical analysis. This makes it far more likely such cases will result in appeals and legal cases by companies who supplied the data to regulators in the first place. This was the case in Bayer CropScience v Defra in 2001 in which the company sought to prevent Defra releasing data to Friends of the Earth which they had submitted in support of an application to approve their herbicide glufosinate ammonium for use on GM crops. In this case Friends of the Earth found that it was possible to obtain much of the information being blocked in the UK in other EU countries (eg, Sweden and Denmark). Bayer embarked on legal action against Friends of the Earth to prevent it from informing people how to obtain this information via other EU governments but eventually withdrew the case.^{vi}

4.3.28 As these cases illustrate, public involvement in decision making (eg, the approval of a GMO or pesticide) has not automatically followed the introduction of the FOI Act. Barriers are still being erected by industry and bodies holding information, which prevents the level of access needed to

ensure the members of the public who wish to engage have the information they need to fully participate.

5. Is the Freedom of Information Act operating as intended?

5.1 GM Freeze believes that the answer to this question is “partially”

Fulfilment of the intentions of the Act requires complete support from those holding information and administer the Act within the bodies it covers. This requires a sea change in attitudes of some bodies and staff to presume information should be released instead of the reverse.

5.2 Burden on Government

The notion that government will grind to a halt if information is fully available has to be challenged and replaced by the view that ultimately FOI is good for democracy and makes for better decision making.

5.3 Justifying refusal to release

To address this issue fully the Justice Committee may have to examine a significant number of cases where exemptions have been used to refuse the release of information and decide whether release would have caused any lasting harm to a public body or person. We hope our evidence has provided the Committee with some small insight.

6. What are the strengths and weaknesses of the Freedom of Information Act?

6.1 GM Freeze believes that the strengths of the FOI Act are:

- It opens up the possibility that important information will enter the public domain and lead to wrongs being righted, better enforcement of regulations and ultimately better policies and governance.
- It is open to anyone to obtain information.
- It could improve trust in government if there is a further significant step towards openness.

6.2 We believe the weaknesses are:

- The exemptions to releasing information are employed too readily.
- Exemptions can be used for political reasons to hide maladministration or protect vested interests.
- There is a lack of clarity about charging for information.
- Information requests could be avoided altogether if bodies used their websites to make information and data more accessible.
- So far it has only partially succeeded in achieving its objectives.

Notes

ⁱ GM Freeze, May 2007. [GM Contamination – imports of food and feed at Risk. Measures needed to reduce the threat](#)

ⁱⁱ Georgina Downs Pesticide Campaign. [Pesticide Exposures for People in Agricultural Areas](#)

ⁱⁱⁱ GM Freeze, December 2011. [Papering Over the Cracks EFSA’s opinion on cultivating GM MON88017 maize in Europe – Mitigation is not enough](#)

^{iv} GM Freeze, December 2011. [In Two Minds EFSA GMO Panel concedes Bt crop risks to non-target moths and butterflies, but hangs hopes on unproven mitigation](#)

^v Seralini G-E, 2007. [Controversial Effects on Health Reported after Subchronic Toxicity Test: A confidential rat 90 day feeding study](#)

^{vi} Friends of the Earth press release, 30 June 2004. [“GM Pesticide”](#)