<u>**IN THE FIRST-TIER TRIBUNAL   Case No.** EA/2010/0112</u>

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

<u>**ON APPEAL FROM:**</u>

The Information Commissioner's

Decision Notice No: FER0260420

Dated: 20th.May, 2010

Appellant:	**G.M.Freeze**
Respondent :	**The Information Commissioner**
Additional Party :	**The Department for Environment, Food and Rural Affairs**
Hearing :	**6th. December, 2010**
Date of Decision:	**8th. March, 2011**

Before

David Farrer Q.C.(Judge)

and

Marion Saunders

and

Suzanne Cosgrave

Subject matter: **EIR Regulation 13, Directive 2003/4/EC Environmental Information and Personal Data**

Cases: Corporate Officer of the House of Commons v ICO and Others *EA 2007/0060 and others*

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 20th. May, 2010 and dismisses the appeal.

Dated this 8th. day of March, 2011

Signed D.J. Farrer Q.C.

Judge

REASONS FOR DECISION

Introduction

1. The request for information giving rise to this appeal could not be more straightforward. It sought disclosure by the Additional Party ("DEFRA") of the six – digit National Grid reference of the site of a sowing of a trial crop of a variety of oilseed rape undertaken in Somerset in 2008. The crop proved to be contaminated, to a very slight extent, by genetically modified ("GM") seed.

2. That contamination was discovered and reported to DEFRA in the course of routine examination of a sample of seed provided by the seed company concerned to an independent tester. It provoked concern in the farming and beekeeping communities of Somerset, where the trial took place and led to questions in the House of Commons.

3. The appellant is the Campaign Director of GM Freeze, an alliance of UK -based organisations from the voluntary and private sectors, concerned about the rapid introduction of genetically modified ("GM") crops and foods. He made the request for information as to the grid reference on 8th.January, 2009. It was followed by an exchange of correspondence, including a letter to GM Freeze dated 4th. February, 2009, referred to in paragraph 7.

4. DEFRA refused the request by letter of 10th. February, 2009, relying on the exemption contained in Regulation 13 of the Environmental Information Regulations, 2004 ("EIR"), that is to say that the grid reference was personal data and its disclosure would breach the first data protection principle. By letter of 17th. August, 2009, DEFRA maintained its refusal on review.

5. The Appellant complained to the Information Commissioner ("the ICO") on 16th. July, 2009. By a Decision Notice dated 20 May 2010, that complaint was dismissed. A Notice of Appeal was served on 15th. June 2010.

The Background and the evidence

6. We heard evidence at a hearing on 6th. December, 2010 and received final submissions in writing. They were considered by the Tribunal with earlier evidence and skeleton arguments, on 4th. January, 2011. The primary facts were not in dispute. A trial sowing of supposedly conventional oilseed rape took place in the Winter of 2007 – 8 at a farm in Somerset over an area of 0.9 hectares. Unknown to the farmer and the seed manufacturer, the seed was contaminated with seed with a genetically modified (GM) trait at a concentration of 0.05% (5 plants in 10,000). The GM seed, known as GT73, was licensed for animal feed but not for commercial cultivation in the EU. The Advisory Committee on Releases into the Environment, ACRE, an independent body providing advice to government departments, had earlier reported that GT 73, if, as here, adventitiously sown within a conventional sowing, posed no threat to human health nor the environment. A GM plant grown on the affected site could cross – pollinate with similar conventional plants or wild relatives but such cross - pollination diminishes with distance and is likely to be confined to neighbouring sites. In this case, it affected a neighbouring oilseed rape crop producing a content of 0.01% GM plants. EU directive 2001/18 and subsequent EU regulations require that food or feed products be sold as GM products where the level of unintended GM content exceeds 0.9%. So far as is known, no other conventional oilseed rape crops were grown in the vicinity of the affected site in 2008. GT73 is resistant to the herbicide, Glyphosate, which is widely used by farmers.

7. As required by EU regulation, DEFRA published information as to the accidental GM sowing in December, 2008. It did not identify the farmer or the farm since it concluded that these matters amounted to personal data and could not be published consistently with data protection principles. It took the view that there was here no threat to health and that the risk of further contamination was very slight. In response to inquiries from the appellant it provided further information by letter of 4th. February, 2009, setting out all the matters referred to in paragraph 6 and the steps taken to minimise the spread of GM contamination from the affected site. It further indicated the DEFRA view as to the very low risk of measurable

contamination. Questions to the minister followed from local MPs and questions were asked in Parliament.

8. Mr. Riley gave oral evidence as and for the appellant. He is a graduate in ecological science, a veteran of GM campaigns and very knowledgeable as to the essentials of the debate. He is not, however, an expert and could not speak with the authority of one who deals with these issues professionally and with direct experience of dealing with the aftermath of contamination. In addition to a description of his organisation and its aims, he gave evidence as to the effects of contamination and his contention that they might increase rather than diminish with time. The risk, he said, would never disappear.

9. He produced calculations as to the likely GM plant population at the site on the basis of a 0.05% contamination rate. Unfortunately, he had made a significant error in his calculation, which completely undermined his argument on this point[1]. He cited examples of contamination of up to twenty - six miles, though this was an extreme case and involved plants which, unlike the GM plants in this case, could not self pollinate and might therefore travel much further. He raised the possibility of contamination by dispersal by farm machinery and the dispersal of seed by wind.

10. He further countered the arguments as to the possible prejudice to the farmer of disclosure of the identity of his farm, hence of himself.

11. His case was supported in some degree by a statement from Professor Martin Wolfe dealing with the general issues surrounding GM contamination, especially in the case of oilseed rape. Its value was limited by its inevitably limited reference to this case. Professor Wolfe thought there could be a spread of pollen but rated the risk of contamination here as “low”. He advocated greater “transparency” to enable other landowners and affected parties to take protective measures.

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[1] In applying the contamination rate to the area of the site and the expected density of sowing, he misplaced the decimal point by two places, inflating a predicted population of 600 to one of 60,000. The Tribunal accepts, of course, that this was simply an arithmetical error made in good faith.

12. Mr. Oliver Dowding, an organic farmer in South Somerset also made a statement expressing his concern at possible contamination of his crops and opposition to the refusal to give the information sought.

13. A statement from two sociologists, Dr. Laurence Reynolds and Dr Bronislaw Szerszynski was also put in evidence to emphasise public concern over GM issues. We do not doubt that there is such concern but are not guided by it in making our decision.

14. Evidence for DEFRA was given by Mr. Renaud Wilson, a Senior Executive Officer in the GM Policy and Regulation Team. He has worked on GM issues arising in relation to crops and food since 2000 and takes a leading role in instances of suspected GM contamination. He handled the original request and subsequent refusal. He provided by his evidence almost all the agreed facts surrounding this incident and the statistics quoted above. Plainly, he spoke with authority. He emphasised DEFRA`s wish to be as informative as possible when dealing with such incidents. In summary, he concluded that the incident required no further measures to be taken beyond those already adopted by DEFRA, because the contamination by GM seed was at a very low level.

The Law

15. It is agreed that the requested grid reference amounts to personal data for the purposes of the Data Protection Act, 1998 and that it is "environmental information" as defined in EIR reg.2(1), though whether solely as information on *"biological diversity and its components, including genetically modified organisms, and the interaction among these elements;"*(paragraph (a)) or additionally information on *"emissions"* (paragraph (b)), is an issue between the appellant and the other two parties. The general duty of disclosure imposed by EIR reg.5 therefore applies.

16. It is further common ground that EIR reg.13(1) is engaged and, that, if that

exception is made out, it imposes an absolute prohibition on disclosure. So far as material, reg. 13 provides :

"(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is –

(a) in a case where the information falls within any of the paragraphs (a) to (d)of the definition of "data" in section 1(1) of the Data Protection Act, 1998, that the disclosure of the information to a member of the Public otherwise than under these regulations would contravene –

(i) Any of the data protection principles;

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17. The relevant data protection principle is the first ("DP1")[2] which, as to personal data requires

"personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met," - - -

18. The only Schedule 2 condition which might be satisfied in this case was Condition 6 which reads

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

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[2] DPA Schedule 1 paragraph 1.

19. EIR Reg.4(4)(b) provides that "the data protection principles" shall have the same meaning as in DPA 1998.

20. Ignoring for the present the exception, condition 6 requires that (here) the appellant should be pursuing a "legitimate interest". Clearly, he is – the scrutiny of an adventitious contamination by GM seed of a trial sowing of conventional oilseed rape, so that any available and effective measures to prevent or limit adverse consequences can be taken. This is a matter of widespread public concern.

21. More significantly, in the context of this appeal, the disclosure of the requested information must be <u>necessary</u> for the purposes of that interest, which must mean that, without it, such scrutiny will be frustrated or significantly impaired. That imports the familiar principle of proportionality. Could the legitimate interest be served without the disclosure of the requested personal data.

22. Like the Tribunal in *The Corporate Officer of House of Commons v ICO and Others EA 2007/0060 and others*, we do not regard this test as analogous to the balancing of public interests which is required in FOIA cases where a qualified exemption is engaged[3]. The Tribunal stated at paragraph 59 –

" - - *we accept, that the word "necessary" as used in the schedules to the DPA carries with it connotations from the European Convention on Human Rights, including the proposition that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim being pursued":*

We gladly adopt those words as an accurate description of the proper approach.

23. Ms. Proops, on behalf of the appellant argued, boldly and skilfully, that, since this appeal involves environmental information, the approach to Regulation 13 must take account of Directive 2003/4/EC which was implemented by EIR and of the

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[3] See paragraphs 52 - 62

presumption in favour of disclosure contained in EIR reg.12(2). She spoke of this process as viewing Reg.13 and the data protection principles “through the prism” of the Directive.

She relies particularly on the interpretative steer and the prohibition spelt out at the end of Article 4(2):

“ *The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a),(d),(f)*[4]*,(g) and (h),provide for a request to be refused where the request relates to information on emissions into the environment”*

She very properly acknowledges that the following paragraph within Art.4(2) requires continuing compliance with Directive 95/46/EC (“the Directive”) relating to the protection of the processing of personal data.

24. Her argument involves the submission that reg.13 must be interpreted by reference to the principles contained in Art.4(2) of the Directive. The three principles that she identifies are -

    (i) Any disclosure of environmental information is to some degree in the public interest, given the presumption in reg.12(2), the restrictive steer in Art.4(2) of the Directive and the whole thrust of the Directive in favour of transparency.

    (ii) An assessment of the fairness of processing of personal data requires a consideration of the public interest in the disclosure of environmental information.

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[4] Paragraph 2(f) relates to personal data where the data subject, as here, has not consented to disclosure.

(iii) If the requested information relates to "emissions", its disclosure is inevitably necessary in the public interest.

25. Whether or not the public interest is a factor in judging what is fair processing of personal data, it is far from clear that it is relevant to the question whether disclosure of such data is necessary to the pursuit of a legitimate interest, which is undisputed.

26. Likewise, the presumption might be applicable where the judgement as to whether disclosure was necessary was very finely balanced but it does not modify the test itself.

27. In our judgment, the question whether condition 6 is satisfied, is to be decided without reference to the fact that we are dealing with environmental information. The data protection principles are the same, whether for the purposes of DPA 1998 or EIR. DP1 stipulates that an indispensable element in fair processing of data is satisfaction of one of the conditions. If no condition is satisfied, then DP1 is contravened, however slight the apparent prejudice to the data subject and however weighty the public interest in disclosure.

28. The argument that, if the requested information is information on emissions, then its disclosure must be necessary in the public interest finds no obvious support in EIR. On the contrary, it is significant that, whereas EIR reg.12(9) enacts the required exclusion from the exception of the classes of information referred to in Article 4(2)(a),(d),(g) and (h) of the Directive, personal data (paragraph 2(f)) are not excluded but expressly protected in reg. 13, which makes no separate provision for emissions information. Regulations 12 and 13 are unambiguous. The parliamentary draftsman evidently construed the apparent tensions between the last two paragraphs of Article 4(2) as removing personal data from the requirement to exclude from the exception where emissions information was involved.

29. If, however, this construction of the Directive in its role as an aid to interpretation of EIR and of EIR Regs. 12 and 13 is wrong, we do not consider that the sowing of seed, even in ignorance of its nature, is properly described as an "emission". To

emit is defined in the Shorter Oxford Dictionary as to

> *"give off, send out from oneself or itself (something imponderable, as light, sound, scent, flames etc); discharge, exude a fluid".*

30. That definition is reflected in the inclusion of emissions with "energy", "noise", "radiation", "discharges" and "other releases into the environment" in category (b) of the definition of environmental information in Reg. 2 of EIR. Genetically modified organisms appear in

    (a) Sowing is not a release into the environment of the kind listed in category (b) but a deliberate act.

31. We conclude therefore that the act of sowing was not an emission and that, if it had been, that would not affect the proper interpretation of Reg. 13 and DP1.

32. We accept the analysis of DEFRA that, in relation to environmental as to all other information which is personal data, the correct sequence of questions, where there are, as here, legitimate interests to be served, is precisely as set out in condition 6(1) –

    (i) Is disclosure of the personal data necessary for the purposes of the pursuit of those interests?

    (ii) If so, is it nevertheless unwarranted because of the prejudice to the interests of the data subject (here, the farmer) which would result from such disclosure ?

    If the answer to (i) is no, (ii) does not require an answer.

33. We now apply that approach to the facts of this appeal.

34. The legitimate public interests at stake here can, in our opinion, be summarised as in paragraph 20. In his closing submission the Appellant argued that there was a further public interest, namely an interest in testing for itself the assessments made by DEFRA as to the possible adverse results of this contamination, presumably by measuring independently the population of volunteer GM plants on the affected and

neighbouring sites and correcting any error in the DEFRA conclusions which was thereby exposed. This might enable neighbouring landowners to take remedial action which DEFRA had not contemplated.

35. It is hard to see how such an exercise could be performed without the consent of the farmer and, assuming such consent, which seems improbable, how members of the public could identify GM plants without the benefit of the necessary expertise and laboratory facilities. We were told that GM oilseed rape plants are visually indistinguishable from their conventional relatives. In the density predicted, they would be like needles in a haystack within the conventional crop.

36. However, more fundamentally, the public interest is in having access to relevant information which may enable other farmers to protect their land and crops. It is not in conducting its own parallel research, certainly not in this case where DEFRA`s findings have not been undermined or indeed seriously questioned. Parliament routinely empowers particular agencies to enter private land to test and control commercial activity in the public interest. It is accepted that no private body will enjoy comparable rights and that the findings of the authorised agency, whilst open to challenge, will be the primary source of public information.

37. Asserted public interests in transparency in environmental matters add nothing to the interest identified above.

38. So the focus is on the legitimate interest in information that could enable third parties, farmers, beekeepers or any other affected person, to take steps to prevent or mitigate adverse consequences from the contamination. The more general legitimate interest in learning lessons that might influence future practice is clearly not served by information as to the grid reference of a particular event.

39. Following the report of contamination, DEFRA published to the Appellant and other concerned parties the information referred to in the forms described at paragraph 6 above. The only relevant information which it omitted was the information requested.

40. If disclosure is to be deemed necessary, the first question must be whether, on the evidence, there is a real risk that the contamination will have adverse consequences. If there is, then would knowledge of the exact location of the sowing permit remedial or preventative action to be taken ?

41. In our judgement, this request failed at the first hurdle, given the very low levels of contamination and the fundamental weakening of the Appellant's case, when his major miscalculation as to the predicted GM plant population on the site was exposed in cross examination. The contamination level on the site was 0.05% and at the adjacent site 0.01%. The harvested seed, according to Mr. Wilson, produced 0.03%. He acknowledged that the risk of cross – pollination cannot be ruled out but contended that, where the volunteer GM population is such a small part of the whole crop, that risk diminishes with time. We accept that evidence. He concluded that there was "no measurable risk" of dilution of a conventional crop within the vicinity of the contamination, a view fully justified by these statistics. There was no realistic likelihood of adverse consequences from the incident.

42. The same assessment clearly applies to the interests of beekeepers, given the low level of contamination.

43. If there was any risk to neighbouring farmers or beekeepers, there was no evidence that any further countermeasures could usefully have been taken beyond those instigated by DEFRA in the Autumn and Winter of 2008. The seed was sealed for destruction. The site was cultivated with a different crop. A check was made as to any proximate oilseed rape crops that might be affected and none was found. The farmer was advised as to other steps that he should take, in particular, how to deal with oil seed rape volunteers.

44. The Appellant did not, in our view, demonstrate that the requested disclosure was necessary nor even very helpful to the interests that he entirely legitimately pursues.

45. That being so, the second question, as to which we received extensive submissions, does not strictly require an answer. We shall therefore add only a very brief summary of our views in deference to the arguments advanced.

46. A number of possible threats to the farmer's interests and the public interest were identified, namely, adverse publicity, risk of vandalism or trespass by anti – GM campaigners, reduced land value and/or crop price and, more generally, discouragement of self – reporting in cases of potential contamination.

47. Uninformed and possibly emotive publicity seems to us a possible and damaging result of identification.

48. Given that there is and was by January, 2009 no growing oil seed rape crop at the site, protesters or vandals would find nothing on which to focus, though that might not discourage action.

49. The evidence as to the effect on land values, whether at the site or in the vicinity, such as it was, seemed to us too tenuous to be taken into the reckoning.

50. Likewise, the apparent shortage of self – reporting farmers suggests that the public interest might not be significantly prejudiced by disclosure in this case.

51. In summary, it is doubtful whether the prejudice demonstrated in this case would suffice to bring the exception into play, were disclosure necessary to protect third parties from potentially damaging contamination. However, that is of no practical consequence in the light of our answer to the first question.

52. For these reasons we dismiss this appeal.

53. Our decision is unanimous.

Signed

David Farrer Q.C.,
Judge

8th. March, 2011