



**IN THE FIRST-TIER TRIBUNAL**

**Appeal No: EA/2012/0051**

**GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**STEPHEN MCINTYRE**

**Appellant**

**And**

**THE INFORMATION COMMISSIONER**

**Respondent**

**And**

**UNIVERSITY OF EAST ANGLIA**

**Second Respondent**

**Subject**

Environmental Information Regulations 2004: reg.s 12(4)(d) and 12(5)(f)

**Hearing**

Held on 25 April 2013 at Field House.

**Decision**

The appeal is refused in that the public authority need not disclose to the Requestor the draft material, but for different reasons to those set out in the Decision Notice of 2 February 2012.

Decision Promulgated on 7 May 2013

## Reasons For The Decision

1. On 5 April 2010, the Appellant requested material of the University of East Anglia ('UEA') eight documents. The one that is the subject of this appeal was written by two authors based in the US<sup>1</sup> and was described as:

'Wahl\_MBH\_Recreation\_JClimLett\_Nov22.pdf'.<sup>2</sup>

2. In relation to that document, UEA refused disclosure on 2 June 2010, claiming that regulations 6(1), 12(4)(d) and 12(5)(f) Environmental Information Regulations 2004 ('EIR') applied. The Appellant pursued his request through the usual channels, and the Commissioner found in his Decision Notice that:
  - (a) The requested information had not been published and, hence, did not fall within the scope of regulation 6(1)(b) EIR.
  - (b) However, it was exempt from disclosure under regulation 12(5)(f) EIR. (The Commissioner did not consider the application of regulation 12(4)(d) EIR).

### **Ground of Appeal**

3. The Appellant appeals this decision on the grounds that the Commissioner erred in concluding that the requested information was exempt under regulation 12(5)(f) EIR.

### **The Relevant Law**

#### *FOIA or EIR*

4. This appeal concerns the EIR. Regulation 5(1) EIR requires a public authority holding 'environmental information' to make it available on request, subject to exceptions. Environmental information is defined in regulation 2(1) to include:

*"any information in written, ... electronic or any other material form on (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.."*

5. The parties agree that the requested information, which relates to climate change, is environmental information as it relates to the state of the elements of the environment.

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<sup>1</sup> Referred to below as the authors or individually 'co-author'.

<sup>2</sup> Other documents requested remained the subject of this appeal, but following certain events and preliminary hearings, the Appellant withdrew his appeal on save for in relation to this document on 17 March 2013.

### *Exceptions to Disclosure*

6. Regulation 12 EIR provides for exceptions to the duty to disclose environmental information, as follows:
  - (a) *A public authority may refuse to disclose information to the extent that:*
  - (b) *An 'exception' applies; and*
  - (c) *'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.'* (Regulation 12(1)(b))
  - (d) Under regulation 12(2) EIR *'a public authority shall apply a presumption in favour of disclosure.'*
7. The exceptions claimed to be of relevance to this appeal are where
  - (a) *'disclosure would adversely affect...the interests of the person who provided the information where that person... has not consented to its disclosure.'* (Reg.12(5)(f));
  - (b) *'the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.'* (Reg.12(4)(d))

### **The Task of the Tribunal**

8. The Tribunal's remit is governed by s.58 Freedom of Information Act 2000 ('FOIA')<sup>3</sup>. This requires it to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently.
9. The starting point for the Tribunal is the Decision Notice of the Commissioner, However, the Tribunal considers the matter afresh – we may receive evidence that was not before the Commissioner, and make different findings of fact from him.
10. The issues for the Tribunal are:
  - (a) Is the exception under Regulation 12(5)(f) engaged?**
  - (b) Is the exception under Regulation 12(4)(d) engaged?**
  - (c) If so, what is the weight of public interest in this case?**

### **Evidence and Submissions**

11. All parties opted for a paper hearing, which was held on 25 April 2013.
12. We were provided with witness evidence, submissions, a bundle of documents, and, the requested information in closed form. We have considered all that has been submitted, even if not specifically referred to below. We have not issued

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<sup>3</sup> See s.55 and s.57 of the Freedom Of Information Act 2000 and Regulation 18 EIR.

any part of this decision in confidential or 'closed' form. In summarising the submissions, we have added our own headings to these summaries, for ease of reference.

### Appellant's Evidence

13. The Appellant's evidence included the documents summarised below.
14. Intergovernmental Panel on Climate Change ('IPCC') Fourth Assessment Report ('AR4') First Order Draft citation of the requested document as highlighted:

14 Waelbroeck, C., S. Mulitza, H. Spero, T. Dokken, T. Kiefer, and E. Cortijo, 2005: A global compilation of  
15 late Holocene planktonic foraminiferal  $\delta^{18}O$ : relationship between surface water temperature and  
16  $\delta^{18}O$ . *Quaternary Science Reviews*, **24**, 853-858.  
17 Wahl, E., and C.M. Ammann, 2004: Robustness of spatial climate reconstructions. *Journal of Climate*, (in  
18 review).  
19 Wang, Y., H. Cheng, R.L. Edwards, Y. He, X. Kong, Z. An, J. Wu, M.J. Kelly, C.A. Dykoski, and X. Li,  
20 2005b: The Holocene Asian Monsoon: Links to Solar Changes and North Atlantic Climate. *Science*,  
21 **308**, 854-857.

15. IPCC procedures for AR4 First Order Draft:

- (a) *4.2 General Procedures for Preparing IPCC Reports*

*'...The review process generally takes place in three stages: expert review of IPCC Reports, government/expert review of IPCC Reports, and government review of the Summaries for Policymakers and Overview Chapters and/or the Synthesis Report...'*

- (b) *4.3.3 Preparation of Draft Report*

*'... Experts who wish to contribute material for consideration in the first draft should submit it directly to the Lead Authors. Contributions should be supported as far as possible with references from the peer-reviewed and internationally available literature, and with copies of any unpublished material cited. Clear indications of how to access the latter should be included in the contributions. For material available in electronic format only, a hard copy should be archived and the location where such material may be accessed should be cited.*

*Lead Authors will work on the basis of these contributions, the peer-reviewed and internationally- available literature, including manuscripts that can be made available for IPCC review and selected non-peer review literature according to Annex 2 and IPCC Supporting Material (see Section 6). Material which is not published but which is available to experts and reviewers may be included provided that its inclusion is fully justified in the context of the IPCC assessment process (see Annex 2)...'*

- (c) *Annex 2: Procedure On The Use Of Literature In IPCC Reports*

*'This annex is provided to ensure that the IPCC process for the use of literature is open and transparent. In the assessment process, emphasis is to be placed on the assurance of the quality of all cited literature. Priority should*

*be given to peer-reviewed scientific, technical and socio-economic literature if available.*

*It is recognized that other sources provide crucial information for IPCC Reports. These sources may include reports from governments, industry, and research institutions, international and other organizations, or conference proceedings. Use of this literature brings with it an extra responsibility for the author teams to ensure the quality and validity of cited sources and information. In general, newspapers and magazines are not valid sources of scientific information. Blogs, social networking sites, and broadcast media are not acceptable sources of information for IPCC Reports. Personal communications of scientific results are also not acceptable sources.*

*The following additional procedures are specified:*

*...The author team is required to critically assess information they would like to include from any source. Each chapter team should review the quality and validity of each source before incorporating information into an IPCC Report. Authors who wish to include information that is not publicly or commercially available are required to send the full reference and a copy, preferably electronically, to the relevant Technical Support Unit...'*

16. Emails:

- (a) 13 Dec 2004: from: M Mann to Keith Briffa: subject: paper in review in J. Climate

*'This paper is in review, and can be referred to (just clear w/ Caspar or Gene first) for IPCC draft purposes ...*

*Attachment:"c:\eudora\attach\Wahl\_MBH\_Recreation\_JClimLett\_Nov22.pdf"*

- (b) 13 Dec 2004: from M Mann to Keith Briffa: subject: some background info first...

*'Hi Keith, Thanks again for your phone call, and the (informal) opportunity to help out where I can. I'm perfectly happy in that role (as an informal contributor and a formal reviewer, for example), if you and Peck, for example, are both comfortable with that. First, "RealClimate" should be helpful...'*

- (c) July 2012, From UEA to Co-author

*'... In order to assist the University, please would you consider Mr McIntyre's written submissions (copy attached as 'Appendix A\_McIntyre submission.pdf) in respect of the assertions he makes in respect of document 1 (your draft 2004 article titled "Robustness of spatial climate reconstructions") and confirm specifically whether it was ever your intention for document 1 to be cited/used in the First Order Draft of AR4 or at any stage of the AR4 process.*

*The University would also welcome any factual comments you may have more generally in respect of Mr McIntyre's assertions about document 1 in the attached submissions.'*

- (d) Co-Author reply to 16(c) above

*'... I do not recall my intention concerning citation of this document from the time it was produced over seven and one-half years ago.'*

**Second Respondent's Evidence:**

17. Emails:

(a) 30 Dec. 2004: From: Mann to Jones of UEA

*'... You've probably seen now the paper by [the authors] which independently exposes [the Appellant]... [the authors] is peer-reviewed and independent of us. I've attached it in case you haven't seen (please don't pass it along to others yet). It should be in press shortly. ...*

*Attachment Converted:*

*"c:\eudora\attach\Wahl\_MBH\_Recreation\_JClimLett\_Nov22. Pdf*

(b) 4 Jan. 2005: From Jones of UEA [presumably to Briffa]:

*"FYI. Just look at the attachment. Don't refer to it or send it on to anybody yet. I guess you could refer to it in the IPCC Chapter - you will have to some day!.."*

(c) 21 May 2010: From the authors to UEA dated

*'We believe release of [two other documents the Appellant requested]... is appropriate... these ... represent the 'in-press' version of this paper, as accepted for that status by the editor of Climatic Change on February 28, 2006. This in-press version was fully available to the IPCC AR4 Chapter 6 lead authors.*

*We have concern regarding the release of [the requested information] ... These ... documents represent early versions or drafts of work that was superseded by later published documents. In the case of [the requested information], this was a very early component of the much larger article later published by Climatic Change... Since all the material contained in this earlier draft is in the public domain by way of the later article mentioned, no additional clarity is served by making an early draft form of this information available. Nowhere in the literature under discussion (nor anywhere else, for that matter) is there a reference to this document, and therefore we see no need for any of its content to be released. Even if we exchanged such incremental drafts or unpublished manuscripts with colleagues at CRU, we believe it is our decision to make them public, rather than UEA....*

*More generally, our concern for [the requested information]... in particular is that these were made available to members of UEA staff as sharing of working documents for their edification on issues we were researching in our shared field of expertise. They were not intended for public dissemination. This kind of private sharing is a fundamental aspect of science, and is commonly associated with an expectation that the documents remain private, so that control of its content appropriately remains with its creator. Also, since the information in (1-3) is available in*

*the public domain in later published documents, we believe the proper place to access this information is in those documents, and not in preliminary versions..."*

(d) 1 May 2011: From Co-author to UEA:

*'...I have reviewed the document you sent in the matter cited ... (filename: "3rd Party input request\_Wahl\_110415.pdf")...1... concerning the document in question, ..."It is not helpful, and may be misleading or confusing, to release versions of non-finalised documents. They may contain expressions or errors which were later amended for what could be any number of valid reasons (e.g. errors of expression, typographical errors, poor or ambiguous wording, etc.) and that if taken out of context could misinform. The "final" version of any paper can be expected to be the most considered and "correct" version in the opinion of the author(s) at the time of release and it is certainly the version that the author would expect to be critiqued upon. If early versions of scientific papers were to be publicly distributed it is possible for extracts to be interpreted incorrectly or parts selectively extracted and even vexatiously presented in a manner that could either inadvertently or deliberately misinform public opinion... Additionally, ... I agree with the University's position that there exists a public interest consideration involved in terms of the extent to which there might be "disincentive to academics to produce and share drafts, given the knowledge that should a draft be kept, it may well be subject to release"..."*

18. A published article, ("*Robustness of the Mann, Bradley, Hughes...*"), which the co-author identified as the final published document is the ('2007 article').
19. Witness evidence included a statement from Professor Sir Hoskins, director of the Grantham Institute for Climate Change at Imperial College London, and professor of meteorology at the University of Reading, with many positions including being on Government's new Climate Change Committee. He stated that:
  - (a) He had not considered the specific content of the requested document, stated his position on the effect that any disclosure of draft documents and unpublished research in an academic context would be likely to have.
  - (b) He considered the process of undertaking academic research to be a continuum, or a journey. There were different iterations of how academic research was documented as it moved through that continuum. Typically, an idea might strike and the academic might capture it in writing. He/she might then:
    - i. have an informal discussion about it with others;
    - ii. develop the concept working up a fuller note to test with peers;
    - iii. seek more formal comment from peers on a refined paper setting out the concept; and
    - iv. then refine the concept further still, intending the research to be submitted for publication by an external academic journal at the point at

which the author considered the concept to have reached a stage where it was sufficiently settled to inform the wider sector and public of it.

- (c) Before respected journals publish researched they would subject the findings to a formal peer review process in order to satisfy themselves that the findings were of sufficiently high quality and requisite credibility in terms of rigor of analysis by which the findings are reached to justify publication.
- (d) The established system of informal and ultimately more formal peer comment and review provided academics with a safe space to explore concepts and debate the issues associated with them.
- (e) Publication in journals provided the ability for the large majority who did not have an opportunity to analyse a position taken at the early stages to critique the findings using the information within the publication, which should evidence sufficiently why a particular conclusion was reached. Indeed, such critique was relatively commonplace, particularly in the area of climate change, which was a highly tested area of science in light of its sensitivity. The published research was available to criticise or to build on.
- (f) If it became apparent to overseas scientists that sharing ideas and documents at the informal pre-publication peer discussion stage could lead to their public disclosure, then it is very likely that this would lead to the exclusion of UK scientists from such international peer groups. This would have a deleterious impact on UK science. Academics based in the United Kingdom would be hindered in engaging in the testing and probing process, but also that the reputation of the United Kingdom's ability to undertake effective research in what are critical aspects of science would be hindered on an international scale.
- (g) In general terms, if the process were interrupted by the thinking behind research outputs being disclosed before the concept was finalised and published, those undertaking research would feel it was very difficult, if not impossible to work and develop ideas in a safe space. This is particularly the case in the field of climate change which, for the reasons identified above, can be a particularly contentious area of scientific research and debate. It is conceivable and logical that if that was so, it would result in the development of concepts as part of a scientific process being pre-empted and/or distorted. I believe that the quality of output of published research (that is to say papers within academic journals) would also arguably be poorer, as there would be less inclination on the part of academics to test their ideas at a formative stage.
- (h) Those involved in academic research in the climate research field would be afraid to communicate their ideas to others in writing and the whole discussion of science would be disrupted.
- (i) Universities UK and the 1994 Group had recently made submissions to Parliament in the context of its review of the application of the FOIA and EIR.

### **Appellant's Submissions**

- 20. The Appellant's arguments included those set out below. He considered the evidential issues to include:



- (a) That the requested document was the article subsequently cited by Briffa in the AR4 First Order Draft (*see citation above*). He stated that the very name of the pdf (Wahl\_MBH\_Recreation\_JClimLett\_Nov22) linked it to the Journal of Climate submission.
- (b) Whilst one of the authors had told UEA that the paper should not be released because there was no reference to this document anywhere, this was not true. (*See email of 21 May 2010 above.*)
- (c) That the requested document was sent to UEA not as part of “normal” academic exchanges/chitchat:
  - i. It was sent with the expectation that the lead author of the IPCC AR4, would cite it in the forthcoming AR4 First Order Draft;
  - ii. it had already been “peer reviewed”; and
  - iii. in September 2005, the AR4 First Order Draft cited it

*(See emails of December 2004 and citation above).*
- (d) He did not claim that the requested document had finished its peer review process, but it was under peer review when submitted to the IPCC.

*Regulation 12(5)(f)*

21. He considered the evidential issues to include:

- (a) The IPCC rules permitted lead authors to cite unpublished documents under review, but required them to archive a copy. (*See his evidence above*). Contrary to UEA’s arguments, there was no implication that the hard copy should be accessible “*only to assist expert reviewers and only for only a limited period.*” Briffa had not complied with the rules.
- (b) Additionally, the relevant IPCC working group required that copies of unpublished literature cited in the First Order Draft be made available to interested reviewers:
 

*‘Literature to be cited will need to be published or available in draft form by this time [May 2005]. Copies of unpublished literature should be sent to the TSU so they can be made available to reviewers if requested.’*
- (c) The Technical Services Unit had established terms of access to this online library that were summarized by Solomon as follows:

*‘This site also provides access to copies of some submitted, in-press, or otherwise unpublished papers and reports that are cited in the draft WG I report. All such material is made available only to support the review of the IPCC drafts. These works are not themselves subject to the IPCC review process and are not to be distributed, quoted or cited without prior permission from their original authors in each instance.’*

- (d) However, Solomon's letter did not supersede the requirement that IPCC lead authors archive a hard copy of an unpublished article in an identified location.
22. The exemption in regulation 12(5)(f) was not engaged:
- (a) It required that disclosure of the requested document "*adversely affect ... (f) the interests of the person who provided the information*". No one had nor could reasonably argue that disclosure would adversely affect Mann's interest, as the person now known to have provided the information to UEA.
  - (b) In July 2012, UEA had asked one of the authors of the requested document whether he had intended that the requested document be cited in the AR4 First Order Draft. The co-author replied that he was unable to remember his intentions. UEA had conspicuously failed to provide any witness statement or other direct evidence from Briffa, as lead author, on these matters, including his own understanding of whether the authors had objected to the requested document being cited in the AR4 First Order Draft.
  - (c) The authors consented to disclosure of this article by their decision to submit the article to an IPC Lead Author for consideration (and eventual use) in the IPCC.
  - (d) By submitting the then unpublished article to IPCC lead author Briffa for consideration (and subsequent use) in the AR4 First Order Draft, the authors were not engaging in "ordinary" academic correspondence. Under IPCC rules, they consented to the archiving of a hard copy of the document. Briffa was not only entitled but obligated to archive a hard copy together with the location where it could be accessed.
  - (e) The Commissioner argued that the IPCC requirement, (to make unpublished documents available in hard copy or only in electronic form, etc.), was solely for the benefit of the lead author, as opposed to for the reviewers or to fulfil the IPCC's overarching commitment to openness and transparency. Nothing in the IPCC procedures supported this. IPCC policy did not require consent of the original authors to be cited. Thus, UEA's issue of whether the authors had consented to the use of their article in the AR4 process was entirely beside the point.
  - (f) The Commissioner had argued that the authors could be adversely affected by publication because their work as the authors would be misrepresented. There was of course a possibility of this but it was mere speculation. It was also possible that the work of the author would be better understood. In other decisions regarding adverse effect, the Commissioner had required that the adverse effect not merely be speculative.
  - (g) Further, because the Commissioner incorrectly presumed that the authors had provided the document to UEA, his analysis of adverse effect was directed to the effect on them and not Mann as the "person who provided" the information.

### *Regulation 12(4)(d)*

23. The requested document was ‘finished’ for the relevant purpose when it was submitted to Journal of Climate for review and to IPCC Lead Author Briffa for citation in the IPCC First Order Draft. Although IPCC First Order and Second Order Drafts are steps in a process leading to the final assessment report, each document is carefully prepared and is ‘complete’ in the relevant sense when sent out to reviewers. The IPCC’s First Order Draft is professionally produced and intensely scrutinized. It is finished when sent out for external comment and review. The relevant standard for completeness is whether it was complete for the purposes of citation in the AR4 First Order Draft.
24. Many documents go through multiple versions. For example, legislatures frequently send draft legislation out for comment. Although the draft sent out is only one step in the process, such documents are generally carefully prepared, while ‘drafts’, are neither ‘in the course of completion’ nor ‘unfinished documents’ within the meaning of FOI/EIR legislation.
25. In the *Chichester District Council case (Ref. FER0256705) (‘Chichester’)*, an estimated cost was used to inform a decision or the development of policy such that this information constituted a completed figure for council purposes at that time. Whilst documents evolve, this case showed that if a document is cited even in an interim policy, the regulation 12(4)(d) exemption no longer holds.
26. He did not agree with UEA’s understanding of the IPCC rules as requiring archiving of draft papers referred to in draft reports ‘*only to assist expert reviewers of the reports during a limited review period and not so that they may be rendered accessible to the world at large*’. Even if it was accepted that IPCC authors are only required to archive during a limited review period and not for the world at large, this would be relevant only to a section 12(5)(f) claim – grounds which UEA has dropped. Salient to the 12(4)(d) issue is that UEA has here conceded that Briffa was required to *at least* archive the document for expert reviewers, signifying that it was sufficiently finished for citation.

### *Public Interest*

27. The arguments favouring disclosure were as stated in the Commissioner’s Guidance No 3:
  - (a) Furthering the understanding of and participation in the public debate of issues of the day. This would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority;
  - (b) Promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration; and
  - (c) Instead of carrying out the analysis of factors promoting disclosure, the Commissioner argued in his Decision Notice that the reports of the various inquiries made such an analysis superfluous, stating that he ‘*must acknowledge the work of these expert inquiries... and finds that he cannot*

*give further weight to the public interest in disclosure given the external validation of UEA's work'.*

28. As regards the argument to withhold the document to protect professional reputations:
  - (a) He was not interested in 'ordinary' academic exchanges or in the sharing of ideas in the early stages of their formation. The public interest in protecting individual academics who confidentially share their ideas in the early stages of their formation was reflected in the availability of the EIR confidentiality exemption.
29. As regards the argument of confidentiality:
  - (a) The requested document was not sent on a 'confidential' basis, but in his capacity as IPCC Lead Author with the expectation that it be cited in the forthcoming AR4 First Order Draft and that it was so cited. It was both reasonable and responsible that such views be dissected and challenged.
30. As regards the argument of a chilling effect:
  - (a) The article was provided to an IPCC Lead Author for citation in an Assessment Report First Order Draft and which is then so cited.
31. As regards the argument of the public being misinformed about climate change:
  - (a) The article was not a draft of the later 2007 document. It was the document that was used in the AR4 First Order Draft, as requested by Michael Mann, a close associate of the authors. If UEA had been concerned that 'if disclosed, it might be used to misinform the public', then Briffa should never have cited it in the AR4 First Order Draft.

### **Respondent's Submissions**

32. The Commissioner's arguments included that regulation 12(5)(f) was engaged, based on the following:

#### *Regulation 12(5)(f): Adverse affect*

- (a) Whilst in the decision notice, the Commissioner had presumed that the authors had directly provided the document to UEA, it now seemed that Professor Michael Mann had provided it. Although not entirely clear from the wording of the regulation, it could be argued that on a reasonable construction of the wording, the regulation applied to both the original authors of the information and a third party who subsequently passed that information on to the public authority. On the facts, the exception would then apply to both the authors of the document, and Professor Mann who forwarded the document to UEA. The interests of both would need to be considered and if either party were to be adversely affected by disclosure the exception may be engaged.
- (b) *Authors:* As the final published article significantly expanded on the information contained in the requested document, its disclosure could

misrepresent the authors' final publicised position. This was because if the authors' publicised standpoint were undermined by disclosing earlier thinking, this would adversely affect their interests.

- (c) *Professor Mann*: The Commissioner was not aware of whether disclosure of the requested document would adversely affect the interests of the authors. However, even if it could not be established that disclosure would adversely affect the interests of Professor Mann, as it would adversely affect the authors, the exception under regulation 12(5)(f) EIR would nevertheless still be engaged.

*Consented to disclosure*

- (d) The Appellant argued that the IPCC rules allowed UEA to disclose the document to external reviewers and that therefore regulation 12(5)(f)(ii) EIR was not engaged. The Commissioner maintained that the IPCC procedure could not necessarily be interpreted to mean that unpublished material contributed by experts in the preparation of the draft report should be archived and made available to the public. The IPCC rule could not be read as indicating that individuals who were invited to provide expert advice on discrete issues would have to invariably expect that any draft materials they provided in giving advice would find their way into the published report.
- (e) There was no evidence to suggest that either the authors or Professor Mann supplied the requested information in circumstances such that UEA was entitled apart from under the EIR to disclose it.
- (f) There was no evidence to suggest that the authors consented to the disclosure of the requested information for EIR purposes. Their implied consent could not be inferred from the IPCC rules as suggested by Appellant. By email from dated 30 December 2004, Professor Mann asked UEA not to pass on the requested document. In light of that and, in the absence of any evidence to the contrary, Professor Mann would not have consented to the disclosure to the public in response to a request under the Act.

*Regulation 12(4)(d)*

- 33. The Commissioner argued that regulation 12(4)(d) was engaged, because the requested document was unfinished:
  - (a) The Appellant had described the requested document as '*an unpublished article submitted to IPCC for consideration in the first draft of the IPCC Fourth Assessment Report*' obtained by the lead Author (the recipient of the emails). Based on the email from the co-author, (*see email of 21 May 2010 above*), and in the absence of evidence to the contrary, the requested document seemed to be in draft form, with the final version being published in the form of the 2007 article.
  - (b) There were significant differences between the requested and published document such that the former was a draft document; and

- (c) It remained unfinished even upon completion of a final version. This was the position taken by the Tribunal in the case of *DFT v ICO*<sup>4</sup>.

### *Public Interest*

34. The Commissioner's arguments on the public interest included:

- (a) On the facts of the case, there was a strong public interest in disclosure of which could further public understanding of climate change. However, this was outweighed by arguments in favour of maintaining the exception: the final published article significantly expanded on the information contained in the requested draft, and disclosure of the requested information would have a chilling effect upon the sharing of draft research in the peer review process and could misrepresent the authors' final publicised position.
- (b) Regulation 12(4)(d) EIR inherently contained a public interest argument in favour of avoiding un-adopted positions being exposed to public scrutiny even after drafting is complete. This was so as to avoid public resources being expended in explaining or justifying draft documents or interim positions.
- (c) The evidence suggested that the requested document was in a form which was significantly different to the later published version, adding considerable weight to the public interest in favour of maintaining the exception.

### **Second Respondent's Submissions**

35. UEA withdrew its reliance on regulation 12(5)(f) EIR, and their submissions included those set out below.

#### *Background: The IPCC*

36. Professor Phil Jones, Dr Tim Osborn and Professor Keith Briffa worked within the Climatic Research Unit ('CRU') of UEA.
37. In 1988, the World Meteorological Organisation and United Nations Environment Programme established the IPCC, to assess the information relevant for understanding the risk of human-induced climate change. Its fourth report (AR4) was published in 2007. It based its assessments primarily but not exclusively on published literature. Professor Briffa was the lead author in respect of chapter 6 of AR4. Since AR4 was published, UEA received a number of requests for the disclosure of information.

#### *Climategate*

38. In 2009, many CRU related emails were published online without UEA authorisation. UEA believed they were obtained by unlawfully hacking its backup server. Climate change sceptics then alleged that these published emails

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<sup>4</sup> EA/2008/0052

showed a deliberate systematic attempt by CRU to manipulate climate data to support members' global warming claims. It was also alleged that individuals within CRU might have attempted to abuse the process of peer review to prevent publication of opposing research papers and that UEA may not have complied with the requirements of the Freedom of Information Act 2000. This widespread controversy and was called 'climategate'.

39. UEA took climategate extremely seriously and commissioned independent inquiries chaired by (a) Sir Muir Russell to consider the allegations; and (b) Lord Oxburgh to consider the science which had been conducted within CRU.
40. Additionally, the House of Commons Science and Technology Committee ("STC") inquired into the allegations made against the members of CRU.
41. The inquiries concluded that the allegations of CRU improperly manipulating climate change data and/or abusing the peer review process were unfounded. The Muir Russell inquiry confirmed the rigour and honesty of the scientists within CRU. However, both it and the STC concluded that certain members of the CRU ought to have been more open and forthcoming in responding to requests for disclosure of information.

*The requested document*

42. The requested information was a draft of an academic paper written by experts in climate change based in the USA. UEA contended that Professor Mann, a climatologist based in the USA sent the paper to Professor Jones by email dated 30 December 2004, and this was how it came into CRU's possession. Professor Mann made clear in his email that the paper was to be treated as a confidential document pending publication of the final version by the authors. The final version of the paper was published in the Journal Climatic Change in 2007. The email from Professor Mann did not indicate either expressly or implicitly that the document's authors intended for it to be used as part of the process of producing AR4.
43. UEA contended that this document was sent under cover of an email sent by a Professor Michael Mann (who is a US based climatologist) to Professor Phil Jones (an academic within CRU) on 30 December 2004.
44. The Appellant's challenge to the Commissioner's decision was based on the requested document being obtained by Professor Briffa from the authors in his capacity as IPCC lead author. However, Professor Briffa only obtained it as a result of it being forwarded by Professor Jones, under cover of an email dated 4 January 2005. Professor Jones obtained the requested document as a result of it having been sent to him by Professor Mann on 30 December 2004. It was entirely unclear how Professor Mann obtained a copy of the paper and on what terms, save that Professor Mann was clearly of the view that the paper should be treated as a confidential document. In the circumstances, there was no basis for inferring that the authors had consented to the publication of the document.

*Regulation 12(4)(d)*

45. The requested document was an unfinished document or document in the course of completion because (a) the co-author confirmed it was an early draft of

the 2007 article (see above email of 21 May 2010); and (b) when comparing it, there were substantial differences in the length and overall complexity of the finished 2007 article.

46. The Appellant disputed that the requested document was a draft of the 2007 article. His case was at odds with the confirmation from the co-author.
47. That the requested document may have been through a process of peer review was neither here nor there. As Sir Brian Hoskins made clear, the point of the peer-review process was that it allowed academics to develop their ideas prior to publishing them to the world at large. It cannot be inferred that the mere fact that the requested document may have been peer reviewed meant that it was a finished document or that it was a document, which the authors were intending to publish. UEA in any event made no admissions as to whether the requested document had been peer reviewed and, if so, to what extent.
48. The Appellant contended that Professor Mann provided the requested document to Professor Jones in the expectation that it would be referred to in AR4. However, there was no evidence to suggest that the authors consented to the draft paper being used in this way.
49. The Appellant ignored that Professor Mann had stated in his covering email to Professor Jones: *'please don't pass it along to others yet'*. (See email of 30 December 2004 above.) UEA contended that Professor Mann requested this because he knew that the document could not be treated as a document for general public consumption. They contended that this was confirmed by email from Professor Jones to Professor Briffa, (See email of 4 January 2005), and that if the document had been a finished article ready and available for general public consumption, Professor Jones would not have insisted that it should not be referred to or sent on to anyone by Professor Briffa.
50. The fact that the document was referred to in the IPCC first order draft of AR4 was neither here nor there because it did not feature in the final published version. A first order draft was merely a draft and did not express the final views of the IPCC. The final version was the version relied upon by Governments since that time. That it was referenced in the first draft report did not convert it from an incomplete, unfinished academic paper into the finished product. Further and in any event, it was referenced in AR4 as being 'in review' which necessarily indicated that it was not the finished product.
51. If the Appellant's case was that draft academic papers referred to in the First Order Draft must according to the IPCC rules be archived such that they were generally accessible to the public at large, this was wrong. The IPCC required archiving of draft papers referred to in draft IPCC reports only to assist expert reviewers of the reports during a limited review period and not to be rendered accessible to the world at large. This had been drawn to the Appellant's attention by the IPCC in 2005 from Solomon, the Co-Chair of the IPCC WG1 dated 30 September 2005 as cited on the Appellant's blog, Climate Audit.
52. The Appellant sought to compare the requested document with published versions of draft legislation. One could not read across from the fact that draft legislation may be made available to the public as part of the legislative process



that draft academic papers must therefore be treated as 'complete' or 'finished' products for the purposes of regulation 12(4)(d) EIR.

53. The Appellant's reliance on the *Chichester* case was inapt because the facts were incomparable to the present case and there was no evidence before the Tribunal to suggest that the authors of the requested document ever sanctioned its use for the purposes of the AR4 process.

*Public Interest*

54. UEA argued that the public interest weighed heavily in favour of maintaining the regulation 12(4)(d) EIR exception, because of the following interests:

(a) *Protecting the professional reputations of the authors:*

Ensuring that individual academics who confidentially shared their ideas in the early stages of formation be protected against having those views dissected and challenged by the community. Otherwise, the ideas could be taken out of context, unfairly damaging their academic reputations.

Climategate illustrated how hostile and combative the climate-change environment could be, reinforcing the need to ensure that the reputations of academics were not unfairly prejudiced through the premature disclosure of draft work.

(b) *Protecting the confidentiality of the document*

The requested document was provided to UEA in confidence and was plainly a confidential draft document in the hands of UEA. There was a public interest in avoiding disclosures of draft academic papers circulated within a narrow academic community on a confidential basis.

(c) *Avoiding misinforming the public about climate change science*

The risk of draft academic papers being used to misinform public debate was very real. This was because of the public importance of the overall debate on climate-change; the hostile and combative nature of the debates; and parties (e.g. within the energy sector) with strong vested interests.

(d) *Avoiding disclosures which were likely to have a chilling effect on the culture of sharing on a confidential basis*

If unpublished draft works of academics provided to fellow academics on a confidential basis could be exposed to the public gaze under the EIR (or FOIA) that was bound to have a very chilling effect on the culture within academia of sharing ideas and unpublished research. This was particularly where the issues were hotly contested. Such a chilling effect would undermine the quality of academic output and have adverse knock-on effects in holding back the development of scientific understanding of climate-change. *Camden v Voyias [2012] UKUT 190 (AAC)*, ('*Voyais*') highlighted the need for the Tribunal to consider not only the immediate consequences of a particular disclosure but also those indirect consequences which are 'realistic possibilities' in all the circumstances.

55. The interests in favour of disclosure, UEA argued were relatively weak:
- (a) At the time of the Appellant's request, he would have had access to the finished article. Thus, if he had concerns that the science being undertaken by the authors was questionable, he could test those concerns by reference to their published work.
  - (b) The Appellant argued that there was a particularly strong public interest in disclosure in view of the fact that the document had been included as part of the IPCC process of drafting AR4. UEA accepts that there is a public interest in creating accountability and transparency around the IPCC process. However, that interest was substantially outweighed because:
    - 1. The document did not feature in the final version of AR4.
    - 2. The requested document was not provided to the AR4 review team by the authors themselves and there was no evidence before the Tribunal to suggest that they had authorised its use in the AR4 process as part of the AR4 review process or that they sought to place it in the public domain; or had otherwise taken action which might indicate that it was to be treated as anything other than a confidential draft academic paper.
    - 3. In his email to UEA dated 21 May 2010, the co-author made clear that he objected strongly to disclosure of the requested document because it amounted merely to an early draft of one component of the published paper.
    - 4. The Appellant's reliance on the IPCC procedures was a red herring. There was no evidence that the authors were treating it either as a finished product or that they had consented to its being used in AR4. Further Solomon confirmed that unpublished papers were not made available to the public at large insofar as they were used for the purposes of generating initial drafts of IPCC reports. Instead, they were placed within an archive for a limited period of time solely in order to assist expert reviewers in reviewing the particular draft report.

## **Our findings**

56. It is clear that:
- (a) The requested document was that cited in the AR4 First Order Draft, and that for the reasons outlined by the Appellant it was sent to the lead author for this purpose and not as part of 'normal academic chitchat'. This also seems clear from the emails of 13 December 2004.
  - (b) The requested document was first sent to UEA on 13 December 2004, by email from Professor Mann.
  - (c) On the balance of probability, there was at the very least some form of tacit consent from the authors to have the requested document submitted for the AR4 First Order Draft. We base this on our assessment of the academics

working relations gleaned from a reading of the papers, and our view that if there were any question about this, the lead author would have sought (and perhaps did seek) such consent before citing unpublished material in line with the email advising him to do so. It is not clear whether the authors explicitly consented to their paper being submitted because UEA have not provided evidence on this, but we suspect it was within UEA's gift to do so.

- (d) One of the authors to the requested document has confirmed that the all the material contained in the requested information is in the later article.

Is the exception under Regulation 12(5)(f) engaged?

57. We do not think that this regulation is engaged. It requires disclosure to adversely affect the interests of the person who provided the information.
58. Professor Mann clearly provided the requested information to UEA, and we have been given no reason to think disclosure of the document would adversely affect his interests. Even if we accepted the Commissioner's (unexplained) position that we should look at the adverse interests of the authors as opposed to the provider of it, we have been given no compelling reason why disclosure would adversely affect the authors. The Commissioner speculated that disclosure could misrepresent the authors' final publicised position in the 2007 article and that the latter could be undermined by disclosing earlier thinking. However, we have been given no reason to think this was the case. UEA has provided no such evidence, when it would be in their gift to do so. Regulation 12(2) EIR requires us to '*apply a presumption in favour of disclosure.*' Accordingly, we would think that something more than speculation would be needed for the exception to be considered engaged.

Is the exception under Regulation 12(4)(d) engaged?

59. We think this regulation is engaged, such that it is necessary to consider the balance of public interest below. It requires the request to relate to material that is still in course of completion, to unfinished documents or to incomplete data. We accept that the requested document was in draft form and not the finished article at the time of the request.
- (a) As at the time of the request, there existed the published article, i.e. the 2007 article. It is clear from reviewing both, that the latter was an expanded more detailed version of the former, and that the former is the draft document. These are the deciding factors making it most clear to this Tribunal that the authors had not finished the draft that was the subject of the request and that it was in the course of completion. They intended and did expand on it, and then published the finished version.
- (b) We accept the Appellant's statement that IPCC First Order Drafts are professionally produced and intensely scrutinized documents. This does not necessarily indicate that cited material within those drafts is 'finished' when sent out for external comment and review.
- (c) The Appellant argued that the requested article had been submitted by Professor Mann to the IPCC and therefore was finished. We disagree. It was cited as 'in review'. Further, whilst the IPCC rules, (*as quoted above*),

make clear that contributions for draft reports should be supported as far as possible with references from peer-reviewed and internationally available literature, but do not expressly require only completed articles to be referenced in draft reports. Their preference for using published articles is aspirational.

- (d) That the requested document may have been undergoing or been through a process of peer review did not necessarily mean that it was the finished document. We accept the Appellant's point that Professor Mann stated in his email of 30 December 2004 that the article had been peer reviewed and '*should be in press shortly*'. However, he was not the author of the article, and we do not know what stage of peer review the article had reached, because UEA has not provided that information. We do know that by the time of the request in April 2010, on the balance of probabilities, the requested document was still in the course of completion. (See *sub-paragraph 59(a) above*). Accordingly, speculation about what stage of peer review the article had reached is unnecessary. (However, we think it relevant to the public interest in protecting professional reputations, discussed below.)
- (e) The Appellant argued that many documents go through multiple versions. He compared this version of the authors' work to draft legislation, which he says legislatures often send out for comment. We agree with the UEA's position on this. (See *paragraph 52*). That the legislature chooses to publish draft legislation does mean that the draft is the 'finished version', or that the requested information having been 'sent out for comment' within the IPCC process is the completed version.
- (f) The Appellant argues that we should be swayed by the *Chichester* case, where an estimated cost was held to be a completed figure for council purposes when used to inform a decision or the development of policy. The Appellant has not assisted us in explaining how to apply this logic in this case, and we have struggled to do so. In that case, the council argued that estimates were unfinished because they did not remain static or relevant as the market evolved over time. Here, we have different versions of an academic article, one clearly having been developed beyond the other to become a final version that was published. Briffa choosing to cite other authors' draft paper in the AR4 First Order Draft did not change its status into a finished article. In any event, we are not bound by that decision.

*What is the weight of public interest?*

- 60. We find that the public interest in maintaining the exception outweighs the public interest in disclosing the information. This is within the context that no party has presented us with a weighty public interest in either withholding or disclosing this *particular* document. Even after having taken into account that when weighing the public interest regulation 12(2) EIR requires a '*presumption in favour of disclosure*', we have found that such public interest as there is in this document still weighs in favour of withholding the information.
- 61. In relation to the public interests that have been put to us in favour of non-disclosure, our findings are as follows:

(a) *Protecting the professional reputations of the authors*

It is clear that the environment for climate change scientists can be hostile and combative. The respondents argued that prematurely disclosing their work and ideas could result in it being taken out of context, and unfairly damage their academic reputations. Likewise, the Commissioner argued that disclosure could misrepresent the authors' final publicised position. However, we have been given no evidence to show why any of this could be the case in relation to disclosing this report. Furthermore, the draft article was submitted and cited in the AR4 First Order Draft, which is a professionally produced and intensely scrutinized document. Whilst the report may not express the final views of the IPCC, neither is the cited material likely to be so raw that its state could cause professional embarrassment. In the circumstances, we consider this public interest to be weak.

(b) *Protecting the confidentiality of the document*

UEA argued that the requested document was provided to UEA in confidence and there was public interest in avoiding disclosures of draft academic papers circulated within a narrow academic community on a confidential basis. For similar reasons to sub-paragraph 61(a) above, we find their arguments unconvincing. The article was provided for use in the IPCC draft report (a significant intergovernmental report), and we strongly suspect with at least the tacit consent of the authors. As such, it would have been available to a group of experts who would not differ substantially in academic acumen from those interested in the requested material being published. In the circumstances, we consider this public interest to be weak.

(c) *Avoiding misinforming the public about climate change science*

It was argued that the risk of draft academic papers being used so as to misinform public debate was very real because of the public importance of the overall debate on climate-change; the hostile and combative nature of the debates; and that there were various parties (e.g. companies within the energy sector) with strong vested interests. Whilst we suspect that any opportunity to take advantage of any inconsistency, error or embarrassment that the requested material might show, would so be taken if the material were disclosed, we were given no evidence that this could in fact happen. This area of science would already seem sufficiently confusing to those not expert in the field, that we would think that publishing the article would be unlikely to make any real difference.

(d) *Avoiding disclosures which were likely to have a chilling effect on the culture within academia of sharing on a confidential basis, ideas and unpublished research –*

The respondents argued that if the unpublished draft works provided to fellow academics on a confidential basis could be exposed to the public gaze under the legislation, this was bound to have a very chilling effect on the culture within academia of sharing ideas and unpublished research. This was particularly the case in the hotly contested context of climate

change science. This they said would undermine the quality of academic output and hold back the development of scientific understanding of climate-change. They referred us Judge Jacobs' ruling *Voyais*, who explained that in considering the scope of the Tribunal's enquiry for the purposes of the public interest test, we are not be limited to direct or immediate consequences of a disclosure:

*"The Tribunal should take account of any consequences that can readily be anticipated as realistic possibilities..." (Para.11).*

Professor Hoskins gave his view (*summarised above*) that if it became apparent to overseas scientists that sharing ideas and documents at the informal pre-publication peer discussion stage could lead to their public disclosure, then it was very likely that this would lead to the exclusion of UK scientists from such international peer groups, which would have a deleterious impact on UK science an international scale, impacting the UK's ability to undertake effective research in the area.

Professor Hoskins' testimony was not based on any consideration of the requested document and we do not believe that disclosing it would directly result in a chilling effect. When viewed against the contents of the documents, these arguments seem somewhat exaggerated. Nevertheless, we do accept a realistic possibility that if the requested document were required to be disclosed by virtue of the EIR, this could contribute to a reputation being established within the international peer community of climate change science being that they were exposed under the information regime and so contribute to a chilling effect in the culture within academic sharing, thereby undermining the quality of academic output within the UK. The chilling effect argument does have some force in the context of a document created in the US and sent to a UK public body in the spirit of academic sharing. We consider this argument to be relatively weak, but nevertheless stronger than those in sub-paragraphs 61(a), (b) and (c) and than those advanced in favour of disclosure.

(e) Public Interest contained in Regulation 12(4)(d)

The Commissioner argued that the regulation inherently contains a public interest in favour of avoiding un-adopted positions being exposed to public scrutiny even after drafting is complete. It was suggested that this interested reflected the need to avoid public resources being expended in explaining or justifying draft documents or interim positions. Professor Hoskins also spoke of the need for academics to have a safe space to explore concepts and debate the issues associated with them.

The co-author described in his emails, (*see above*), that disclosing non-finalised versions would not be helpful, and may contain expressions or errors which were later amended for what could be any number of valid reasons such as errors of expression, typographical errors, poor or ambiguous wording, etc. The authors alluded to the need for a safe space when stating their concern that the requested document and others that had also been requested for disclosure. They stated that these documents were sent for:

*'sharing of working documents for their edification on issues we were researching in our shared field of expertise. They were not intended for public dissemination. This kind of private sharing is a fundamental aspect of science, and is commonly associated with an expectation that the documents remain private, so that control of its content appropriately remains with its creator.'*

We consider these arguments, (*in this sub-paragraph 61(e)*), to carry the most weight of all interests presented to us in this appeal. It seems implicit in the regulation that there is value in allowing a safe space for work to be developed and completed.

62. We have considered the public interests put to us by all in favour of disclosure. Whilst the Appellant criticised the Commissioner for not carrying out an analysis of factors promoting disclosure, we could not find any sustained analysis of his own within his submission.
63. The Appellant quoted the Commissioner's guidance furthering the understanding of and participation in the public debate of issues of the day and seemed to assert that disclosure would allow a more informed debate of issues under consideration by the Government or a local authority. As stated by the co-author, all the material contained in the requested document was in the public domain by way of the 2007 article mentioned. Therefore it is difficult to see any value in publishing the requested information.
64. The Appellant also quoted the Commissioner's guidance in stating that disclosure would promote accountability and transparency by public authorities for decisions taken by them. It is difficult to see how he would apply this to the present case, and he did not provide analysis. We note that the requested material was not written by anyone from UEA and the only decision taken that might be relevant to this argument would be that of Professor Briffa in citing the unfinished document in the IPCC draft document. Without any arguments having been put to us on this, we fail to see any related significant interest in disclosing a draft document that Professor Briffa chose to cite in the IPCC draft but not final paper. We note as an aside that the requested document was not created by a UK public body using UK public funds.
65. Since the Appellant has placed great emphasis on the article having been passed over to the IPCC, it might be inferred that he was arguing that as the unpublished article was cited in the AR4 First Order Draft, then in the interest of transparency, it should be made publicly available. We consider this to be the strongest argument favouring disclosure. Nevertheless, it still seems extremely weak. Regardless of disagreements between the parties as to whether the relevant IPCC rules on unpublished material being made available are or are not "*only to assist expert reviewers and only for only a limited period*", the rules clearly do not provide for making available to the public unpublished documents used to support IPCC draft reports. In any event, a later more expanded version was publicly available at the time of the request.
66. The Commissioner suggested that there was a strong public interest in disclosure to further public understanding of climate change and of exposing draft positions so that the public were given a fully informed picture of the policy making process. For the reasons explained above, this did not seem applicable

here. We have been given no reason, (and could not find any of our own), to find that the disclosure would aid any form of understanding in this area. As stated by UEA, at the time of the Appellant's request, he would have had access to the finished article. Thus, if he had concerns that the science being undertaken by the authors was questionable, he could test those concerns by reference to their published work.

67. In summary, we have failed to find any significant interest at all in disclosing to the public the requested information. Even having taken into account the presumption in favour of disclosure required under regulation 12(2) EIR, there is weightier value in withholding the information, because it was an unfinished document, and there is an inherent public interest within regulation 12(4)(d) not to disclose unfinished material.

### **Other Matter**

68. We do not consider that either UEA or the Appellant fully assisted this court as required under Tribunal rules such that Tribunal time was spent unnecessarily in addressing this. The Appellant frequently did not comply with deadlines such that the Tribunal needed to chase him. He also did not respond to Tribunal directions, including to make clear (given the changing remit and complexity of his appeal) within his final submissions what his arguments were, such that the Tribunal had to look throughout the many papers to try to find his arguments as to what public interest favoured disclosure. The Second Respondents seemed needlessly to not be forthcoming on facts that were within their gift to clarify such that their arguments could have been more clear cut, less confusing and quicker to follow.
69. Our decision is unanimous.

**Judge Taylor**  
7 May 2013