

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 June 2012

Public Authority: University of East Anglia
Address: Norwich Research Park
Norwich
NR4 7TJ

Decision

1. The complainant made a series of requests to the University of East Anglia (UEA) for information concerning its Climatic research Unit (CRU) and the subsequent review into its conduct headed by Sir Muir Russell. The UEA responded to some of the complainant's requests but other requests were refused under various exceptions under the EIR. The Commissioner has investigated the UEA's handling of the complainant's requests and has found that the exceptions in regulations 12(4)(a) (Information not held), 12(4)(b) (Manifestly unreasonable), 12(5)(b) (Course of justice etc) and 12(5)(f) (Interests of confider of information) were applied correctly and the public interest in maintaining each exception outweighs the public interest in disclosure. Where the regulation 12(4)(e) (Internal communications) exception was applied the Commissioner found that some of the information was not covered by the exception and should be disclosed. Some information was found to be covered by the exception but the Commissioner decided that the public interest favoured disclosure.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The public authority shall disclose to the complainant the information falling within the scope of the second request which was withheld under the exception in regulation 12(4)(e) (Internal communications).
3. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 22 October 2010, the complainant made a series of information requests to the University of East Anglia for information relating to the UEA's Climatic Research Unit (CRU) and the involvement of its academics in the so called "Climategate" affair. This centred on allegations about the behaviour of scientists within the CRU, in particular that they had suppressed or manipulated data and had sought to destroy or delete information in order to frustrate potential requests for information under the Freedom of Information Act (FOIA) or the EIR. The request actually comprised 18 separate requests for information, some of which were complied with in full or else the complainant has not challenged the UEA's refusal. Only the particular requests at issue are repeated below. The Commissioner has referred to these as the 'first' and 'second' requests for ease of reference.
 - i) *Please provide me with copies of any [emails] that meet the terms of FOI_08-23 or 08-31.*
 - ii) *Please may I see all UEA email correspondence concerning FOI_08-31 or its subject matter, that was not addressed or copied to me, from 20 November 2009 to today.*
5. There then followed some further exchanges of correspondence during which the UEA sought to clarify the nature of the information requested by the complainant. It issued a substantive response on 19 November 2010 and dealt with the disputed requests under the EIR.
6. The first request was in effect resubmitting two requests which the complainant first made to the UEA on 5 May 2008 and 27 May 2008 for emails sent and received by members of the CRU as well as other information held in connection with their work on the Intergovernmental Panel on Climate Change (IPCC) – the leading international body for the assessment of climate change. In response the UEA confirmed that it held information but that it was being refused under the following exceptions:
 - 12(4)(a) (information not held)
 - 12(4)(b) (request is manifestly unreasonable)
 - 12(4)(e) (internal communications)
 - 12(5)(a) (adverse effect on international relations)

- 12(5)(f) (adverse effect on person providing information)
 - 13(1) (personal information)
7. For the second request the UEA confirmed with the complainant that the information he was seeking was for all correspondence about his previous request for information rather than information falling within the scope of that request. In response the UEA disclosed some of the information it held but some internal correspondence was withheld under the exception in regulation 12(4)(e) (internal communications) and some information was subject to legal professional privilege and therefore covered by the exception in regulation 12(5)(b) (course of justice etc.).
 8. On 12 January 2011 the complainant asked the public authority to carry out an internal review of its handling of his requests. As regards his first request the complainant said that he was willing to refine his request to the period 1 December 2005 to 1 September 2006. At the same time the complainant submitted another series of requests. In particular the complainant made the following request which he has also asked the Commissioner to review. The Commissioner has referred to this as the 'third' request for ease of reference.

iii) Given the lack of any provenance for what Briffa received as being my actual and complete Russell submission, please can you send me an exact copy of the document that Briffa received.
 9. The UEA presented the findings of its internal review on 8 March 2011. As regards the first and second request it said that it was upholding its initial response.
 10. The third request was for a copy of a submission which the complainant made to the Independent Climate Change Email Review chaired by Sir Muir Russell ("the Russell review") which had been set up to consider the allegations against the CRU. The complainant had previously been told that a member of the CRU, Professor Briffa, had received a version of this document and he now asked for a copy. In response the UEA said that it did not hold the information and therefore regulation 12(4)(a) applied.

Scope of the case

11. On 11 April 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

The complainant asked the Commissioner to review the UEA's response to the three requests referred to above.

Reasons for decision

The first request

12. The first request can itself be separated into two distinct parts. This is because, as explained above, it is a request for information falling within the scope of two separate requests which the complainant had previously made to the UEA under the references FOI_08-23 and FOI_08-31, both of which the UEA had already refused. For the sake of clarity the Commissioner has repeated the requests below.

FOI 08-23

13. This request was originally submitted on 5 May 2008 and read as follows:

"Accordingly, I hereby request the following information under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004:

All letters, facsimile and email correspondence to or from Drs Briffa and Osborn in connection with their work as an IPCC Lead Authors, including, but not limited to correspondence between them and the following individuals involved in the assessment: Drs Susan Solomon, John Mitchell, Jean Jouzel, Philip Jones, Eystein Jansen, Jonathan Overpeck, Jean-Claude Duplessy, Fortunat Joos, Valérie Masson-Delmotte, Daniel Olago, Bette Otto-Bliesner, W. Richard Peltier, Stefan Rahmstorf, Rengaswamy Ramesh, Dominique Raynaud, David Rind, Olga Solomina, Ricardo Villalba, and De'er Zhang, and/or the following institutions: IPCC, IPCC Working Group I Technical Support Unit, IPCC Working Group II Technical Support Unit, DEFRA and/or the Met office.

I am also asking for copies of any internal CRU correspondence in connection with the IPCC WGI assessment process and discussion of IPCC Principles, rules, or procedures."

14. The UEA refused this element of the first request under various exceptions referred to at paragraph 5 above. However, the Commissioner considers it appropriate to first consider the application of regulation 12(4)(b) as it appears that this exception has been applied to

the totality of the information held in relation to this part of the first request.

Regulation 12(4)(b) – Manifestly unreasonable

15. When responding to the Commissioner's enquiries the UEA explained that it was likely that it held information falling within the scope of this element of the first request but that it had not yet undertaken a comprehensive search of its systems, because it considered this part of the request to be covered by the exception in regulation 12(4)(b). Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. The Commissioner is clear that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the information request must meet a more stringent test than being simply "unreasonable". "Manifestly" means that there must be an obvious or clear quality to the unreasonableness referred to.
16. The Commissioner is of the view that this regulation provides an exception to the duty to comply with a request for environmental information in two circumstances: 1) where it is vexatious and 2) where it would incur unreasonable costs for the public authority or an unreasonable diversion of resources. Depending on the circumstances of a particular case there may be other situations where regulation 12(4)(b) will apply. Therefore in this case the Commissioner has considered the cost of complying with the request and the burden this would impose on the UEA, whether the request can be considered vexatious and whether there are any other circumstances which mean that the request should be seen as manifestly unreasonable.
17. When considering whether the costs of complying with a request for environmental information are manifestly unreasonable the Commissioner recognises that just because a similar request may be refused under section 12 of the Freedom of Information Act does not mean that it will automatically be manifestly unreasonable. Regulation 12(4)(b) is not a direct equivalent to the cost exemption under FOIA and the Commissioner is mindful of the requirement to read exceptions under the EIR restrictively and to apply a presumption in favour of disclosure.
18. In this particular case the UEA has said that it considered the request to be manifestly unreasonable because of the significant costs involved in answering the request. It explained that the request was exceptionally broad and that even to establish the scale of the information that fell within the scope of the request would require an extensive search of all

electronic and paper documents held by every member of the CRU of which it said there were approximately 18 members of staff of CRU and 12 PhD students. The request asked for correspondence sent or received by the two members of the CRU, Professor Briffa and Dr Osborn but notably the request was not limited to correspondence with the named individuals but would also include any correspondence related to their work on the IPCC.

19. The UEA explained, and the Commissioner accepts, that it would not be possible to search for the information by searching a list of email addresses because the request also includes correspondence with unnamed individuals. It said that it estimates that the volume of in-scope information held at the time of the request is likely to run into "many hundreds of documents". Moreover, the UEA would need to search through a much larger volume of material in order to identify and extract the in-scope information. The UEA has said that this larger volume of information likely "runs into many thousands of documents".
20. The Commissioner accepts the UEA's position that a search for the requested information would be far from straightforward and would involve a significant amount of staff time. This is because the request is very broad and phrased in such a way that it could potentially capture almost all correspondence with members of the CRU in relation to the work of the IPCC. Furthermore, the UEA has explained that this information was not held on one central mail server and so a search for the information would have to include a search on local mail servers and other devices.
21. A search for the information would be further complicated by the fact that many of the emails that may be identified would not necessarily relate to the work of the IPCC and therefore not within the scope of the request. The UEA explained that Professor Briffa and/or Dr Osborn would likely have had extensive correspondence with some of the named correspondents on matters unrelated to the IPCC. Therefore, documents that matched the searched names would need to be inspected manually to determine whether they contained any information related to the IPCC or if they were entirely out of scope.
22. The UEA said that it estimated that the time taken to comply with the request, even when refined to cover the nine month period referred to by the complainant in his request for internal review, would be "significantly more than 20 hours time of CRU staff". In reaching this figure it said that it recognised that this time restriction would mean that an electronic search would return a smaller set of results and that therefore the time required to inspect the material to determine what is in scope would be reduced. However, it said that significant time and

effort would still be required because neither the number of persons named in the request nor the search terms needed to be employed would be altered. Furthermore, the request also included paper records and so a search for hard copy documents which have not been organised by date would not be affected by the restricted time period.

23. The Commissioner recognises that regulation 12(4)(b) is not a direct equivalent to the section 12 exemption in FOIA and therefore just because a request may exceed the appropriate limit under FOIA is not reason in itself to engage the exception in regulation 12(4)(b). However, the Commissioner has considered the burden complying with the request would impose on the UEA and he accepts that the time involved and the costs this would entail would impose a serious burden on the UEA and be a distraction from its core functions. In reaching this view the Commissioner has also taken into account the fact that complying with the request would require the involvement of members of the CRU itself, given the nature of the requested information. As the UEA itself explained, disclosure "would divert...the CRU academics identified in the request itself and the CRU-based PhD students from the mandated work that they undertake for this institution in relation to work on climate change". It added that "time spent locating the requested information is time taken away from research and teaching duties, in addition to representing the University and the CRU at external meetings, and conferences."
24. When deciding whether regulation 12(4)(b) may apply it is appropriate to also consider the wider context in which the request was received. In particular, the Commissioner notes that this request was submitted as part of a series of requests to the UEA. The Commissioner is also aware that the UEA has had extensive dealings with the complainant in the past and had already received significant numbers of information requests from him by the time this request was received. Indeed, in making his request the complainant had in fact re-submitted a request he originally made in 2008 and which the UEA had already refused and which he had previously referred to the Commissioner. This is a relevant additional factor in favour of characterising the request as manifestly unreasonable.
25. When the request is seen in the wider context of the complainant's involvement with the UEA it reinforces the case that the request was manifestly unreasonable. The Commissioner has taken into account the amount of work already involved in complying with the complainant's previous requests and the requests submitted during the course of this series of correspondence with the UEA. In the circumstances the Commissioner finds that it would be unreasonable to expect the UEA to comply with a request of this size which the complainant had previously

submitted and which it believed to have been resolved. In the Commissioner's view the UEA has taken a proportionate and measured response given that it has only sought to apply this exception to one element of one particular request which was especially burdensome. Therefore, in all the circumstances the Commissioner has decided that regulation 12(4)(b) is engaged.

Public interest test

26. All exceptions under the EIR are subject to the public interest test. Therefore, in deciding whether the information should be withheld the Commissioner has had to balance the public interest in maintaining the exception against the public interest in disclosure.
27. In carrying out the public interest test the Commissioner is in a somewhat difficult position as he has had to consider the public interest in disclosure without actually viewing the information. The Commissioner did not ask to be provided with copies of the requested information as to do so would be to expose the UEA to exactly the kind of prejudice which the 12(4)(b) exception is designed to protect against. Instead the Commissioner has considered the nature of the work carried out by the CRU in relation to the IPCC as well as what is already known about the exchanges between the academics concerned from emails that have already been made public after emails from the CRU were hacked.
28. As regards the public interest in disclosure the Commissioner accepts that releasing the emails would be likely to lead to a greater transparency in the work of the CRU and identify whether there was any potential wrongdoing. It would help to throw light on the contribution it made to the IPCC and increase understanding and transparency in this organisation. However, the Commissioner notes that allegations regarding malpractice or wrongdoing within the CRU have already been considered by Sir Muir Russell and other reviews and studies and therefore in the Commissioner's view any public interest in disclosure is somewhat reduced.¹ The UEA also explained that the IPCC already

¹ <http://www.uea.ac.uk/mac/comm/media/press/CRUstatements/independentreviews>

- [The Berkeley Earth Surface Temperature \(BEST\) study \(October 2011\)](#)
- [Deutsche Bank report \(September 2010\)](#)
- [Muir Russell Review \(July 2010\)](#)
- [US Environmental Protection Agency \(July 2010\)](#)
- [Lord Oxburgh Scientific Assessment Panel \(April 2010\)](#)
- [Parliamentary Science and Technology Select Committee \(March 2010\)](#)

publishes a great deal of information in pursuit of its aim to provide an open and transparent process. This also reduces the public interest in greater transparency although the Commissioner recognises that there will always be a public interest in releasing as much information as possible so as to give a full picture of events.

29. On the other hand the Commissioner recognises that there is strong public interest in maintaining the exception as the burden imposed on the UEA is significant especially when aggregated with the burden placed on the resources of the UEA by the complainant's many other requests made during a short period of time. Having taken all the circumstances of the case into account the Commissioner has decided that whilst there is likely to be a public interest in disclosure in terms of greater transparency and accountability, the public interest is best served by allowing the UEA to continue with its core functions without the distraction, in terms of time and expense, that disclosure would cause.

FOI_08-31

30. This request was originally submitted to the UEA on 27 May 2008 and read as follows:

1. The IPCC stated on July 1, 2006:

"We are very grateful to the many reviewers of the second draft of the Working Group I contribution to the IPCC Fourth Assessment Report for suggestions received on issues of balance and citation of additional scientific literature."

Did the IPCC receive any such "suggestions" in a written form other than those reported in the documents for each chapter entitled "IPCC Working Group I Fourth Assessment Report: Expert and Government Review Comments on the Second-Order Draft"? If so, please provide them.

2. The IPCC also stated on July 1, 2006:

"Reviewers are invited to submit copies of additional papers that are either in-press or published in 2006, along with the chapter and section number 1 to which this material could pertain, via email to ipcc-

wg1@al.noaa.gov, not later than July 24, 2006. In the case of in-press papers a copy of the final acceptance letter from the journal is requested for our records. All submissions must be received by the TSU not later than July 24, 2006 and incomplete submissions can not be accepted."

Please provide a copy of all such responses.

Any such responses described in 1 and 2 above are clearly "written expert and government review comments" as defined in "Procedures for the Preparation, Review, Acceptance, Adoption, Approval and Publication of IPCC Reports" in the Principles Governing IPCC Work.

3. Please also supply any emails or other documents from IPCC contributing author Caspar Ammann or the Journal Climatic Change that discuss any matters in relation to the IPCC assessment process.

31. In its response of 19 November 2010 the UEA said that it did not hold the information in the first two parts of this particular request and that therefore the exception in regulation 12(4)(a) was being applied.

Regulation 12(4)(a) – Information not held

32. As regards the first two questions the UEA explained that it did not hold the suggestions or submissions referred to in the request because any information would have been submitted to the IPCC not the UEA and therefore it would not know what this information was. As regards the first question the UEA said that it had verified that if any suggestions were received by the IPCC they were not passed on to any staff member within the UEA.
33. In addition, the UEA said that in 2006 it did not at that time have agreed record retention or disposal policies and that it was routine for emails and other documents to be disposed of when no longer required. Therefore it said that it was highly likely that any information if it were ever held would have been deleted by the time the complainant's request was received. Notwithstanding this, the UEA confirmed that it had asked the relevant staff members within the CRU to search for the information. They confirmed that no information was held and furthermore it was unlikely to have ever been actually received by the University from the IPCC.
34. Whilst the complainant said that he wished to appeal the UEA's response to the first request he did not specifically challenge the application of regulation 12(4)(a) and offered no reasons as to why he believed the information he requested was held. In the circumstances, and without

any evidence to the contrary, the Commissioner is satisfied that the information in questions 1 and 2 are not held and that regulation 12(4)(a) is engaged. Regulation 12(4)(a) is subject to the public interest test but since the Commissioner has found that the information is not held he finds that the public interest clearly favours maintaining the exception.

Regulation 12(5)(f) – Adversely affect interests of provider of information

35. In response to the third question the UEA confirmed that the requested information was held but that it was being refused under the exception in regulation 12(5)(f) (interests of the provider of the information) of the EIR and regulation 12(5)(a) (International relations). The Commissioner has first considered the application of regulation 12(5)(f) which provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(f) the interests of the person who provided the information where that person-

- (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
- (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
- (iii) has not consented to disclose it.

36. In explaining why it considered the exception to be engaged the UEA said that the persons who supplied the information had supplied it voluntarily as there was no legal obligation to draft or send the correspondence referred to in the request. It also said that it did not believe that there were any circumstances that would allow it to release the information and moreover, it had not received the individuals' consent to release the information.

37. The Commissioner has reviewed the withheld information and considered the context in which it was sent and received as part of the IPCC process. It is clear that this was done voluntarily and he is satisfied with the assurances of the UEA that there were no circumstances that would otherwise have entitled it to disclose the information. He notes that whilst it is necessary for participants to exchange information and correspondence for the work of the IPCC to proceed there is no legal obligation to do so.

38. For the exception to be engaged disclosure must also adversely affect the interests of the provider of the information. The UEA informed the complainant that it had contacted the individual referred to in the

request and had been assured by him that he considers the information to be confidential and he believed disclosure would adversely affect his interests. When considering this test it is necessary to establish some harm that is real, actual and of substance (i.e. more than trivial) and that this would (on the balance of probabilities) be caused. It is relevant for the Commissioner to take into account that the provider did not want the information to be disclosed but this fact alone is not enough alone to engage the exception. Having considered the information and its nature the Commissioner accepts that disclosure would be an intrusion into an informal academic discussion and it would impact on the safe space the provider needs to carry out his work. In general the Commissioner does not accept that public authorities should speculate about harm that may be caused to third parties but in some cases the Commissioner accepts that some arguments are formulated and argued by a public authority, based on its prior knowledge of the third party's concerns. He accepts that this is such a case. The Commissioner therefore accepts that the "would adversely affect the interests of the provider" test is met. The extent and severity of the adverse affect on the provider is considered as part of the public interest test.

Public interest test

39. As with the information held in relation to the FOI 08-31 request the complainant has argued that the public interest favours disclosure as it would shed light on the work of the CRU, its work with the IPCC and the whole climategate affair.
40. The UEA's arguments for maintaining the exception were that the requested information is "informal, personal correspondence passing between academics engaged in IPCC work" and that a safe space is required in which employees of public authorities can "work, and exchange views that are excepted from public disclosure in order to provide an arena for views and discussions that would not be appropriate in a public venue but are essential to academic work, collegiality, the progress of science". It argues that to disclose the requested information would be to close off this space and would inhibit academics from exchanging such views and discussions, which would alter the content of such exchanges.
41. The UEA also argued that the public interest in disclosure was reduced as there was already a great deal of information about the IPCC process in the public domain.
42. The Commissioner has considered the competing arguments and finds that the reasons for withholding the information are more compelling. The information in this case is informal and candid communications

between academics, clearly not intended for publication. He accepts that disclosure would be likely to affect the candour with which academics involved in the work of the IPCC communicate in future which would inhibit their exchanges. The Commissioner has also taken into account submissions provided by the IPCC and featured academics demonstrating that they have objected to disclosure and would view the disclosure of the information unfavourably which would be likely to make them more reluctant to share information with their UK based colleagues in the future, to the detriment of the CRU and its work on climate science.

43. On the other hand, the Commissioner has not found a strong public interest in disclosure focused on the specifics of the information. The Commissioner recognises the general public interest in openness around climate science as an environmental issue. As the UEA noted, there is already a great deal of information about the work of the IPCC already in the public domain. Draft documents are published, meeting documentation is published as well as the draft and final reports produced by the IPCC. Formal comments on the work produced by the IPCC are also made available. The UEA has argued that "the information currently available clearly allows both public participation and understanding of the IPCC process and outputs". In the Commissioner's view disclosure of this information would not add significantly to the information already in the public domain or add significantly to the public's understanding of the IPCC process. This finding is made on the specifics of this case.
44. Furthermore, the Commissioner is mindful that the conduct of the CRU has already been considered by the Russell Review and a number of other reviews and studies none of which have called the science of the CRU into question. This reduces the public interest in disclosure given the external validation of the CRU's work although the Commissioner would also say that he has seen nothing in the emails he has been sent which would suggest any kind of wrongdoing.
45. The Commissioner has decided that in all the circumstances of the case the public interest in maintaining the exception in regulation 12(5)(f) outweighs the public interest in disclosure. The Commissioner is satisfied that the information should be withheld and therefore has not gone on to consider the regulation 12(5)(a) exception.

The second request

46. In his correspondence with the UEA the complainant clarified that what this particular request was asking for was any information regarding the previous request he had made to the UEA to which the reference

number he quoted referred. He explained that this information would include letters sent to the Information Commissioner, emails between members of the CRU, other academics and the Russell review. The reference to "subject matter" was, he said, included in order to capture any emails that are "obviously about my requests or how you might comply, refuse, resist, or otherwise block them, but do not specifically use your references".

47. In response the UEA disclosed a number of emails and other documents falling within the scope of the request. However some information was withheld under the exceptions in regulation 12(4)(e) (Internal communications) and 12(5)(b) (Course of justice etc.). Where the information was covered solely by the regulation 12(4)(e) exception the Commissioner was provided with copies of the information. However, where the information was subject to regulation 12(5)(b) the UEA declined to provide the Commissioner with copies of the information because it said that the information was covered by legal professional privilege and it was unwilling to disclose this information since it related to a previous request which had been referred to the Commissioner. The Commissioner has first dealt with the information withheld under regulation 12(4)(e).

Regulation 12(4)(e) – Internal communications

48. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. In the Commissioner's view information communicated within a public authority will constitute an internal communication covered by regulation 12(4)(e). However, communications between a public authority and a third party will not constitute an internal communication for the purposes of regulation 12(4)(e). The unique feature of an internal communication is that it is only circulated internally. If it is also sent outside the public authority, it is not purely internal and will not be covered; an email which has been sent or copied to a third party will not constitute an internal communication, even if it has also been sent or copied within the public authority
49. It is clear that most of the information to which this exception has been applied is an internal communication insofar as it is information communicated within the UEA, for instance emails passed between members of the CRU and those members of staff within the UEA with responsibility for dealing with the complainant's earlier request. This information engages 12(4)(e). However, the Commissioner also found that 2 emails were sent to or received from individuals outside of the public authority and therefore cannot be classed as an internal

communication. In the absence of any further arguments as to why this information should be withheld the Commissioner has decided that the information should be disclosed.

50. Where the Commissioner has decided that the information is an internal communication the exception is engaged and there is no further test to apply. However, since there are no absolute exceptions under the EIR the Commissioner has gone on to carry out a public interest test in respect of the information to which regulation 12(4)(e) has been applied.

Public interest test

51. In favour of maintaining the exception the UEA said that it considered that there is a public interest in allowing it a safe space in which to “formulate policy, debate live issues, and reach decisions without being hindered by external comment and/or media involvement”. It suggested that there was an inherent confidentiality associated with discussions on the formulation of a response to a request under FOIA or the EIR to allow for a private “free and frank” thinking space that allows for open and robust discussion.
52. The UEA went on to say that the prospect of disclosure could inhibit the ability of its staff “to exchange views, propose alternatives and have an open and honest discussion that leads to better decision making”. This is the “chilling effect” argument which has been considered by various Information Tribunals and is well understood.
53. For his part the complainant argued that the public interest favoured disclosure as this would allow for greater transparency and in particular would shed light on why the UEA’s handling of the 08-31 request had not been considered by the Russell review in its report. The complainant is concerned about the thoroughness of the Russell review due to its alleged failure to consider the UEA’s handling of his previous request he refers to. However, the Commissioner should say that he has seen nothing in this particular information which would in his view allow for a better understanding of the UEA’s relationship with the Russell review or expose any wrongdoing with regard to the UEA’s handling of the request, as implied by the complainant. Whilst there is a public interest in ensuring that public authorities meet their obligations under FOIA and the EIR, it is the role of the Commissioner to ensure compliance with the legislation and there is a clear process which an applicant can follow if they are dissatisfied with a public authority’s handling of a request for information. The only public interest arguments of significance are therefore more general, in terms of the importance of openness related to climate change.

54. However, at the same time the Commissioner considers that the arguments for maintaining the exception carry little weight. The Commissioner's accepts the need for a safe space where a live issue is being debated to protect the decision making process from being hindered from external comment and interference. However, in this case the need for a safe space has diminished as the information dates from 2008 and relates to the UEA's handling of the previous request. The decision had already been made and so a safe space is no longer required. Whilst the complainant has re-submitted the 08-31 request as part of request 1, the UEA's response to the request is essentially the same and he does not consider that disclosure of this information would in any way prejudice how the UEA responds to the current request.
55. As regards any possible 'chilling effect' caused by disclosure the Commissioner does not accept that disclosure would inhibit the candour with which the UEA's staff discuss how to respond to requests under the FOIA or EIR. The information here is essentially administrative; it is not candid or sensitive and in the Commissioner's view would be unlikely to influence how UEA's officials contribute to any future discussions. Therefore, mindful of the presumption in favour of disclosure the Commissioner has decided that the public interest in maintaining the exception does not outweigh the public interest in disclosure and the information should be released.

Regulation 12(5)(b) (Course of justice etc.)

56. Some of the information falling within the scope of the second request has been withheld under the exception in regulation 12(5)(b) which provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal nature

57. As he explained above, the Commissioner asked the UEA to be provided with copies of the information which it claimed was subject to legal professional privilege and which it was withholding under regulation 12(5)(b). However, the UEA declined to provide this information and the Commissioner was unable to compel the UEA to provide him with copies as his powers in this regard are limited by section 51(5) of FOIA which provides that:

(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of-

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities, or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

58. In light of this, the Commissioner instead asked the UEA to provide him with a schedule of all the information to which regulation 12(5)(b) was being applied together with a summary description of the contents outlining the subject matter.

59. The Commissioner is of the view that the exception in regulation 12(5)(b) may be relied on to refuse to disclose information to which a claim for legal professional privilege could be maintained in legal proceedings. The Information Tribunal has supported this approach when it said that it considered that this exception:

"...exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial." It added that to do this, the exception "...covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".²

60. Firstly, the Commissioner has considered whether the information withheld under this exception is covered by legal professional privilege and secondly, whether there would be an adverse effect as a result of disclosure.

61. Legal professional privilege is a common law concept designed to protect the confidential relationship between a legal advisor and client. The Information Tribunal described legal professional privilege as:

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, or hers or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the

² Kircaldie v The Information Commissioner & Thanet Borough Council [EA/2006/001], para.21.

client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation."³

62. Information will attract privilege where it constitutes legal advice between a legal advisor and a client in a professional capacity and is held for the dominant purpose of providing legal advice. There are two types of legal professional privilege. Legal advice privilege can be claimed where no litigation is contemplated or pending. Litigation privilege can be claimed where litigation is contemplated or pending.
63. The Commissioner has reviewed the schedule of withheld information and is satisfied that it is covered by legal professional privilege. It is apparent that the information is legal advice obtained in a professional capacity or else communications related to that legal advice. The information relates to the UEA's handling of the complainant's previously submitted FOI request and his subsequent complaint to the Commissioner. The Commissioner is satisfied that this information attracts legal advice privilege.
64. It is noted that legal professional privilege can be waived where the party which owns the information decides to waive the privilege. Waiver of legal professional privilege occurs where permission is given by a client to make the information available to a third party without restriction or where the information is treated or presented in such a way that it can be implied from that action that privilege has been waived. However, the Commissioner has seen no evidence to suggest that legal professional privilege has been waived in respect of any of the information that has been withheld from the complainant under this exception and the UEA has confirmed that the content of the legal advice has not previously been disclosed.
65. Even if information is subject to legal professional privilege, regulation 12(5)(b) will only be engaged if disclosure of that information would have an adverse effect on any of the factors listed in the exception. Arguments that disclosure "might" or "could" have an adverse affect will not be sufficient.
66. The Commissioner has considered the interpretation of the word "would". In doing so the Commissioner concludes that the Information

³ Bellamy v Information Commissioner & The Secretary of State for Trade and Industry [EA/2005/0023], para.9.

Tribunal's interpretation of "would prejudice" is relevant in this context.⁴ The Information Tribunal has explained that in considering "would prejudice" it may not be possible to prove that prejudice would occur beyond any doubt whatsoever but that the likelihood of prejudice must at least be more probable than not.

67. The Commissioner is of the view that legal professional privilege is an important principle and that any disclosure of legally privileged information will undermine this principle to a certain extent. Therefore the Commissioner accepts that the test of would adversely affect is met by the harm which would be caused to the principle of legal professional privilege. This approach has been confirmed by the Tribunal in *Woodford v Information Commissioner* where it found that:

*"There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice".*⁵

68. Therefore, the Commissioner has decided that the exception in regulation 12(5)(b) is engaged and he has gone on to balance the public interest in maintaining the exception against the public interest in disclosure.

Public interest test

69. The Commissioner considers that there is a strong element of public interest inbuilt in legal professional privilege and notes the comments of the Information Tribunal when it stated that:

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..."*⁶

70. In that case legal professional privilege was described as "a fundamental condition" of justice and "a fundamental human right".

⁴ Hogan & Oxford City Council v Information Commissioner [EA/2005/0026 & EA/2005/0030]

⁵ Woodford v Information Commissioner [EA/2009/0098], para. 27.

⁶ Bellamy, para.35.

71. Therefore the Commissioner's approach is to adduce an initial weighting in favour of maintaining the exception due to the importance of the concept behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. However there are also factors specific to this case that favour maintaining the public interest.
72. In particular the Commissioner has taken into account the fact that the information is relatively recent and relates to an issue that is still 'live', namely this request which of course has been resubmitted but which was earlier the subject of the legal advice and the subsequent complaint to the Commissioner. Disclosure in these circumstances would put the UEA at a disadvantage in any future legal proceedings and would also be unfair in the sense that it would reveal their strategy of handling complaints to the Commissioner. Similarly, where legal advice is recent the Commissioner considers that the public interest will generally favour withholding the information because advice is still likely to be used in a variety of decision-making processes and the Commissioner accepts that such processes would be likely to be affected by disclosure.
73. As regards the public interest in disclosure the complaint has suggested that the legal advice would shed further light on the Russell review, its relationship with the UEA and how it reached its findings. Whilst the Commissioner has had to rely on the schedule of information and the summary of the contents provided by the UEA when considering the public interest in disclosure, he considers it unlikely that the legal advice would reveal anything which would aid understanding of the decisions taken by the Russell Review beyond what is already in the public domain. Whilst there is still a general public interest in disclosure in terms of promoting transparency and accountability, in the Commissioner's view there is no pressing need for disclosure which would equal or outweigh the inherent public interest in protecting the principle of legal professional privilege and on the particular circumstances of the case. In reaching this view the Commissioner has also taken into account the fact that, as regards the UEA's handling of the complainant's requests this has already been considered by both the Commissioner and the Russell Review. In light of this the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining the exception in regulation 12(5)(b).

The third request

74. As explained above, this particular request was seeking a copy of a version of a submission which the complainant made to the Russell review and which he understood had been passed to a member of the CRU, a Professor Briffa. In response the UEA said that it no longer held

the information and therefore the exception in regulation 12(4)(a) applied.

75. In its response to the complainant the UEA gave an account of how and why it had obtained a copy of the complainant's submission. It explained that the Russell review had written a letter asking it to respond to a number of questions and allegations concerning the 'climategate affair' which were based on the complainant's submission to the Russell Review. These were presented to the UEA in the form of an annex to the letter which contained an (incomplete) version of the complainant's submission. The UEA explained that a member of the CRU separately obtained a copy of the full submission from a third party which was then used to help it respond to the questions from the Russell Review but which was then destroyed.
76. The Commissioner had asked the UEA to confirm when the submission was destroyed and to outline what steps it took to establish if the information was held. In response the UEA said that no exact record exists as to when the submission was destroyed. It explained that the submission had been held on a memory stick which was then "discarded" after it completed its response to the Russell review. It confirmed that the information on the memory stick was never transferred to a UEA owned machine.
77. The UEA went on to say that in its view it had no obligation whatsoever to retain this particular document. It said that its obligation was to respond to the letter from the Russell Review and that it had no obligation to retain any information that would have been used to help construct that response. For his part, the complainant appeared to accept the possibility that the submission would have been deleted by the time he made his request but also argued that the UEA ought to have ensured that the information was retained. If the information had been deleted then the complainant argued that this was a breach of article 5(1)(a) of the Aarhus convention, a multilateral agreement committing its signatories to, amongst other things, promoting public access to environmental information. Article 5(1)(a) requires that parties to the convention shall "ensure that public authorities possess and update environmental information which is relevant to their functions".
78. Whilst the UK is a signatory to the Aarhus convention the Commissioner can only make a decision on whether or not a public authority has dealt with a request in accordance with the EIR, the UK legislation implementing its obligations under the convention into law. In any event the Commissioner does not accept that the UEA would have been required to retain a copy of the submission. A submission which it had

obtained from a third party which it used to help format its response to the Russell Review cannot be said to be relevant to the function of the UEA.

79. Clearly a public authority cannot be expected to retain every single piece of information which comes into its possession. This is neither practical nor desirable and in this case there appears to be no business need to keep a copy of the complainant's full submission. Whilst it would have been preferable if the UEA had kept a record of when the submission was destroyed, the Commissioner is satisfied with the explanation as to why it was not retained. Therefore, without any evidence to the contrary the Commissioner has decided that the information in the third request was not held by the UEA and consequently regulation 12(5)(a) is engaged. Again, the Commissioner has found that since the information is not held the public interest clearly favours maintaining the exception.

Right of appeal

80. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

81. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
82. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF