

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 7 July 2010

Public Authority: The Governing Body of University of East Anglia

Address: Norwich
NR4 7TJ

Complainant: Mr David Holland

Address: 6 St Marys Court
Gayton
Northampton
NN7 3HP

Summary

The complainant made a number of requests for information related to the involvement of some of the public authority's staff in the Intergovernmental Panel on Climate Change. The Commissioner has found that the public authority breached regulation 14(2) of the EIR by failing to provide a response to a request within 20 working days and breached regulation 5(2) by failing to provide a response to other requests.

The Commissioner's Role

1. The Environmental Information Regulations ("EIR") were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 ("FOIA") are imported into the EIR.

Background

2. The complainant made requests for information held by the public authority related to the involvement of some of its staff in the Intergovernmental Panel on Climate Change ("IPCC"). The IPCC was established in 1988 by two United Nations Organisations, the World Meteorological Organisation and the United Nations Environment Programme to assess the scientific, technical and socioeconomic information relevant for the understanding of the risk of human-induced climate change.
3. The IPCC does not carry out new research but seeks to summarise the state of scientific understanding with respect to global climate change. It has published four assessment reports. The first was published in 1990, the second in 1995, the third in 2001 and the fourth in 2007. The IPCC bases its assessments mainly on published scientific literature
4. The IPCC divides its work for the assessment reports between three separate working groups covering different aspects of climate change. Authors, contributors, reviewers and other experts who participate in the preparation of the reports are selected from a list of nominations received from governments and participating organisations and those identified by the IPCC as having special expertise. None of them are paid by the IPCC.
5. IPCC assessment reports have been very influential in the development of national and international policies on climate change and are widely cited in debates on the subject.

The Requests

6. The complainant made a number of requests for information to the public authority between March and July 2008 related to the work of its Climatic Research Unit ("CRU"). These requests were contained in five separate documents which are detailed below.

Email 1 – 31 March 2008

7. The complainant emailed a member of staff at the CRU on 31 March 2008 and asked a number of questions related to his role as a lead author for the IPCC's Fourth Assessment Report. The email also included the following request:

"During the writing of the final draft of Chapter 6 there must have been considerable email discussion between the authors and the review editors. May I see these emails?"

8. The complainant received a reply from the member of staff on 15 May 2008, providing a response to his questions and informing him that his request for copies of the emails was now under consideration by the relevant officers of the public authority.

Email 2 – 5 May 2008

9. On 5 May 2008 the complainant emailed the public authority and explained that he had received no response to his email 31 March 2008. He requested

"All letters, facsimile and email correspondence to or from [two named members of staff] in connection with their work as IPCC lead authors..."

10. He went on to specify that this included correspondence with certain named individuals and institutions. The complainant also requested

"...copies of any internal CRU correspondence in connection with the IPCC WGI assessment process and discussion of IPCC Principles, rules and procedures."

11. On 3 June 2008 the public authority issued a refusal notice under FOIA informing the complainant that his request could not be met as the cost of compliance would exceed the appropriate limit under the Act (section 12) and also that his request was for information provided in confidence (section 41).
12. On 4 June 2008 the complainant wrote to the public authority explaining why he believed its decision was incorrect and asking for an internal review. On 18 July the public authority informed the complainant that the result of its internal review was to uphold its decision not to disclose the requested information. It relied on sections 12 (cost limit), 27 (international relations), 36 (prejudice to the effective conduct of public affairs) and 41 (duty of confidence).

Email 3 – 27 May 2008

13. On 27 May 2008 the complainant emailed the public authority and reiterated the request contained in "Email 1" for all documents held by CRU relating to a member of staff's participation in the IPCC.

14. In addition, the complainant requested:

- (i) details of any suggestions received by the IPCC from reviewers of the second draft of the Working Group 1 contribution to the IPCC Fourth Assessment Report on issues of balance and citation of additional scientific literature, other than those published by the IPCC;
- (ii) copies of any submissions to the IPCC by reviewers of additional papers that are in press or published in 2006, along with chapter and section number to which the material could pertain; and
- (iii) copies of any emails or other documents from a named IPCC contributing author or the journal Climate Change that discuss any matters in relation to the IPCC assessment process.

15. On 20 June 2008 the public authority informed the complainant that it did not hold information falling within parts (i) and (ii) of his request. It withheld the information it held falling within part (iii) of his request under section 41 (duty of confidence).

16. On 27 June 2008 the complainant emailed the public authority to express dissatisfaction with its decision in relation to his request. On 18 July the public authority informed the complainant that the result of its internal review was to uphold its decision not to disclose the requested information. It relied on sections 12 (cost limit), 27 (international relations), 36 (prejudice to the effective conduct of public affairs) and 41 (duty of confidence).

Email 4 – 27 June 2008

17. On 27 June 2008 the complainant emailed the public authority. His email contained requests for:

- (i) documents supporting the public authority's contention, made in relation to requests contained in "Email 2" and "Email 3", that it had consistently treated correspondence related to the IPCC as confidential;
- (ii) case law or precedents which supported the public authority's contention, contained in its letter of 20 June 2008, that the public interest favoured the withholding of information to protect the openness and confidentiality of academic intercourse prior to publication; and
- (iii) an estimate of the time and cost of locating correspondence he had requested in "Email 2" for the period 2004-8.

18. In addition the complainant expressed dissatisfaction with the public authority's failure to handle the request contained in "Email 1" properly, particularly that a copy of his request was sent to various people within the IPCC, in the UK and abroad, without consulting him.
19. The complainant did not receive a substantive response from the public authority to the above requests.

Email 5 – 31 July 2008

20. On 31 July 2008 the complainant emailed the public authority. During the course of his correspondence with the public authority, the complainant continued to express dissatisfaction with its handling of his requests under FOIA as he believed that they were requests for environmental information and therefore should have been considered under the EIR.
21. Related to the above the complainant asked:

how many individual items of information covered by his request had been examined and classified as not being "environmental information" as defined by the Regulations.
22. In addition he asked:

whether particular studies, which he named in his request, were mentioned in the correspondence with a named individual in connection with Chapter 6 of the IPCC report.
23. A response was provided by the public authority on 15 August 2008. This stated that it believed that the use of FOIA, rather than EIR, was appropriate and indicated that it had no further comment to make on the complainant's questions. It recommended that if he was dissatisfied with this response he should refer the matter to the Information Commissioner.
24. The complainant did not receive a substantive response from the public authority to the above requests.
25. On 20 August and 13 October 2008 the complainant again wrote to the public authority querying why it had not applied EIR to his requests and asking it to review its decision.

The Investigation

Scope of the case

26. The complainant made an initial complaint to the Commissioner about his requests on 8 December 2008. However this does not appear to have been received. He submitted a new complaint about the way that his requests had been handled on 9 March 2009.

Chronology

27. There were a number of communications between the Commissioner and the public authority, the most significant of which are outlined below.
28. On 2 June 2009 the Commissioner asked the public authority to provide him with copies of any withheld information and detailed arguments supporting the application of any exemptions.
29. On 14 August 2008 the public authority provided copies of some of the withheld information and submitted a detailed explanation as to why it believed exemptions under FOIA and exceptions under EIR were applicable to some of the requested information.
30. On 23 November 2009 the complainant wrote to the Commissioner to draw his attention to the fact that a substantial number of emails had been placed on the internet that were alleged to have originated from the CRU. He explained in detail how these were relevant to the complaint that he had made.
31. The Commissioner assessed all of the evidence that was available to him in order to determine what further steps to take in his investigation.
32. On 22 February 2010 the Commissioner wrote to the public authority outlining the requests that he believed had been made by the complainant and seeking information on its responses to those requests.
33. On 30 March 2010 the public authority provided the Commissioner with a response to his queries.

Analysis

Substantive Procedural Matters

Does the requested information fall within the definition of “environmental information” under the EIR?

34. The Commissioner notes that the public authority dealt with the complainant’s requests under FOIA. In a subsequent submission to the Commissioner it argued that this was the correct decision as the information requested by the complainant did not fall within the definition of “environmental information” contained in Regulation 2(1) of the EIR. In its view the complainant’s requests were for correspondence concerning work assessing the quality of environmental research and for information on IPCC principles, rules and procedures. It went on to explain why it did not believe this information fell within any part of the definition of environmental information.

35. Regulation 2(1)(a) provides

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, 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;

36. The Commissioner’s considers that it is not necessary for information to have a direct effect on the environment for it to fall within the definition in the EIR, only that it needs to be linked to a relevant subsection in regulation 2(1). He is of the view that the phrase “any information...on...” contained in regulation 2(1) should be interpreted widely and in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC which the EIR enact.

37. The Commissioner’s view, in line with the purpose expressed in the first recital of the Directive, is that “any information...on...” will usually include information concerning, about or relating to the element or elements in question. In other words information that would inform the public about the element or elements under consideration and would

therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

38. The Commissioner is of the view that information requested by the complainant relates to the involvement of CRU staff in the preparation of the IPCC reports on the causes of climate change clearly falls within the definition of environmental information for the purposes of regulation 2(1)(a) of the EIR. The requests are also for information on the operation of the EIR, environmental legislation that falls within the definition of measure in regulation 2(1)(c).

Compliance with time limits for responses

Email 1 – 31 March 2008

39. Under regulation 14(2) of the EIR a public authority is required to provide a refusal to a request for information within 20 working days of the date of the receipt of the request. The complainant made his requests on 31 March 2008 and did not receive a response within the time limit provided by the EIR. The public authority therefore breached regulation 14(2).

Email 4 – 27 June 2008

40. Under regulation 5(1) of the EIR a public authority that holds environmental information should make it available on request. Regulation 5(2) states that this information should be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
41. Under regulation 14(2) of the EIR a public authority is required to provide a refusal to a request for information within 20 working days of the date of the receipt of the request.
42. The complainant made his request on 27 June 2008 and did not receive a response. The public authority has breached regulation 5(2) by failing to provide a response compliant with regulation 5 or regulation 14 within twenty working days of the receipt of the request.

Email 5 – 31 July 2008

43. Under regulation 5(1) a public authority that holds environmental information should make it available on request. Regulation 5(2) states that this information should be made available as soon as possible and no later than 20 working days after the date of receipt of the request.

44. Under regulation 14(2) of the EIR a public authority is required to provide a refusal to a request for information within 20 working days of the date of the receipt of the request.
45. The complainant made his request on 31 July 2008 and did not receive a response. The public authority has breached regulation 5(2) by failing to provide a response compliant with regulation 5 or regulation 14 within twenty working days of the receipt of the request.

The Decision

46. The Commissioner's decision is that the public authority did not deal with some of the requests in accordance with the requirements of the EIR in the following respects:
 - it failed to provide a refusal within 20 working days in respect of the request of 31 March 2008 and therefore breached regulation 14(2); and
 - it failed to provide responses in respect of the requests of 27 June and 31 July 2008 and therefore breached regulation 5(2).

Steps Required

47. As the complainant has indicated that he is content not to proceed with his complaint in relation the public authority's failure to provide him with the information he had requested on 27 June and 31 July 2008, the Commissioner requires no further steps to be taken with regard to these requests.

Other matters

48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
49. The Commissioner notes the delays in compliance on this particular case. It is also of concern that the requests in this case were not considered under the EIR when the subject matter quite clearly falls within the definition contained in regulation 2(1).

50. The wider circumstances of this case, in particular the placement of a substantial number of emails allegedly from CRU onto the internet, has attracted considerable attention¹ (November 2009). The emails suggested that some requests for information were considered an imposition, that attempts to circumvent the legislation were considered and that the ethos of openness and transparency the legislation seeks to promote were not universally accepted. This is of considerable concern to the Commissioner and in keeping with his duty to promote observance of the legislation he will now consider whether further action is appropriate to secure future compliance.
51. The complainant made an allegation that an offence under regulation 19 of the EIR had been committed. Although the emails referred to above indicated prime facie evidence of an offence, the Commissioner was unable to investigate because six months had passed since the potential offence was committed, a constraint placed on the legislation by the Magistrates Court Act 1980.

¹ A wider inquiry has been undertaken into issues arising from “climategate”: the Independent Climate Change Email Review <http://www.cce-review.org/>. Aim 3 of the review covers - “Climatic Research Unit’s compliance or otherwise with the University of East Anglia’s policies and practices regarding requests under the Freedom of Information Act (‘the FOIA’) and the Environmental Information Regulations (‘the EIR’) for the release of data.”. This review was due to be published 7 July 2010.

Right of Appeal

52. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 7th day of July 2010

Signed 

Christopher Graham
Information Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, 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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 11 - Representation and reconsideration

Regulation 11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3) The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 11(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

Regulation 19 Offence of altering records with intent to prevent disclosure

(1) Where -

(a) a request for environmental information has been made to a public authority under regulation 5; and

(b) the applicant would have been entitled (subject to payment of any charge) to that information in accordance with that regulation,

any person to whom this paragraph applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to which the applicant would have been entitled.

(2) Subject to paragraph (5), paragraph (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.

(3) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) No proceedings for an offence under this regulation shall be instituted -

(a) in England and Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions; or

(b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland.

(5) A government department is not liable to prosecution in relation to an offence under paragraph (1) but that offence shall apply to a person in the public service of the Crown and to a person acting on behalf of either House of Parliament or on behalf of the Northern Ireland Assembly as it applies to any other person.