

IN THE MATTER OF AN APPEAL TO THE (FIRST-TIER) TRIBUNAL (INFORMATION RIGHTS)

BETWEEN:

STEPHEN McINTYRE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE UNIVERSITY OF EAST ANGLIA

Additional Party

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ADDITIONAL PARTY'S RESPONSE

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INTRODUCTION

1. The Appellant, Mr McIntyre, has appealed against a decision notice ("DN") dated 2 February 2012. The Commissioner resists Mr McIntyre's appeal (see his Response dated 10 April 2012). The Additional Party ("UEA") has been joined to the appeal pursuant to directions made by the Tribunal on 17 April 2012. UEA agrees with and adopts the submissions contained in the Commissioner's Response. It further relies on the matters set out below in support of its case that the conclusions reached by the Commissioner in his decision notice were correct.

THE ISSUES

2. Mr McIntyre submitted his request to UEA on 5 April 2010. In his request, Mr McIntyre requested disclosure of 8 documents. Documents 2 and 4 were disclosed to Mr McIntyre by UEA. Documents 1 and 3 were withheld on an application of rr. 6(1)(b) (information publicly available), 12(4)(d) (unfinished documents) and 12(5)(f) (information provided voluntarily by a third party) EIR. UEA's position on documents 5-8 was that it did not hold the information at the time of the request and, as such, the exception provided for under r. 12(4)(a) applied. Mr McIntyre does not appeal against the Commissioner's decision in respect of document 3 (see §1 of Mr McIntyre's grounds of appeal ("GoA"), as set out in the Additional Notes to the Notice of Appeal) and, hence, no further reference is made to this document below.
3. In summary, the Commissioner reached the following conclusions in his decision notice:

*In respect of document 1*

- (1) The information contained in document 1 had not been published and, hence, did not fall within the scope of r. 6(1)(b) (§§25-27 and 29 DN).
- (2) However, the information contained in document 1 was nonetheless exempt from disclosure under r. 12(5)(f). (The Commissioner did not go on to consider the application of r. 12(4)(d)).

*In respect of documents 5-8*

- (3) UEA had been entitled to conclude that the requested information was not held for the purposes of the EIR and accordingly r. 12(4)(a) EIR applied (§§11-24 DN).
4. Mr McIntyre now challenges the Commissioner's decision in respect of documents 1 and 5-8.
5. The Commissioner contends that there are only two key issues at stake in this appeal, namely: (a) whether he erred in concluding that document 1 was exempt from disclosure under r. 12(5)(f) and (b) whether he erred in concluding that documents 5-8 were exempt under r. 12(4)(a) EIR (see §5.2 of the Commissioner's Response). UEA's position is that in fact there are three issues which fall to be determined in this appeal.

**DOCUMENT 1**

- (1) **Did the Commissioner err when he concluded that the information contained in document 1 was exempt from disclosure under r. 12(5)(f) EIR?**
- (2) **Was the information contained in document 1 otherwise exempt from disclosure under r. 12(4)(d)?<sup>1</sup>**

**DOCUMENTS 5-8**

- (3) **Did the Commissioner err when he concluded that the requested information was not held for the purposes of the EIR?**
6. UEA's position on each of these issues is set out below. UEA notes that, in §35 GoA, Mr McIntyre purports to import into his Grounds the arguments presented in his 'previous

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<sup>1</sup> Whilst the Commissioner did not consider this exception in the course of his decision, it is an exception which may properly be relied upon by UEA (see *Chief Constable of Devon & Cornwall v Information Commissioner & Mathieson* (GIA/1554/2011). Further and in any event, this additional exception becomes relevant in the context of the aggregation of public interest considerations, as per *Office of Communications v Information Commissioner* (Case C-71/10), [2011] 2 Info LR 1.).

appeals to the University and the Commissioner'. UEA contends that such broad allusions to arguments which are not specifically identified in the Grounds of Appeal are inappropriate. The scope of any appeal before the Tribunal should be clear and certain. Such clarity and certainty cannot be achieved in circumstances where an appellant fails to identify in his grounds the specific arguments he wishes to rely upon in support of his appeal. However, for the avoidance of doubt, UEA disputes that such arguments as were advanced by Mr McIntyre before it and the Commissioner in any event take his appeal any further.

7. Also for the avoidance of doubt, it appears to be common ground that the legislation which governs the information in issue in this appeal is the EIR rather than the Freedom of Information Act 2000.

## **BACKGROUND<sup>2</sup>**

### **The Climatic Research Unit & the IPCC**

8. The Climatic Research Unit ("CRU") is an academic scientific research unit operating as part of UEA. A number of academic scientists work within the unit, including Professor Phil Jones, Dr Tim Osborn and Professor Keith Briffa. Work done by academics within the CRU includes work in the area of climate change. This is an area where very strong and opposing views are held.
9. The Intergovernmental Panel on Climate Change ("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. The IPCC does not carry out new research but seeks to summarise the state of scientific understanding with respect to global climate change. To date, it has published four assessment reports. The fourth report (AR4) was published in 2007. The IPCC bases its assessments mainly, although not exclusively, on published scientific literature. Professor Briffa was the Lead Author in respect of chapter 6 of AR4. In this capacity, he worked with a team of authors who collectively drafted chapter 6.
10. Since AR4 was published in 2007, UEA has received a number of requests for the disclosure of information relating both to the work of the IPCC and the work of the CRU.

### **Email Storage**

11. The email system which has operated within CRU for more than ten years is the Eudora system. The Eudora system does not store any attachments to emails together with the relevant emails. Instead, at the point when they are received onto an individual CRU

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<sup>2</sup> To assist the Tribunal, a chronology of events has been included as an appendix to this Response.

computer, emails and attachments are automatically separated into different files within the computer's directory.

12. As at the date of Mr McIntyre's request (5 April 2010) all emails sent or received by CRU members were stored on local drives within CRU. They were not stored on UEA's central mail servers (Exchange). CRU emails only came to be transferred onto the Exchange in late May 2010, as part of a programme of improving the security arrangements surrounding the CRU email system.
13. Up until November 2009, CRU had its own designated backup server which was designed to be of use in case of disaster ("the backup server"). The backup server was designed to make and store multiple backups of computerised data stored on the individual PCs used by academics within CRU, including email data, documents and other data. On 24 November 2009, the backup server was seized by the Norfolk Constabulary ("the Constabulary"). The circumstances surrounding the seizure are described below. After this date, CRU ceased to have a dedicated backup server. Indeed, CRU had no backup system at all operating over the period 24 November 2009 until late May 2010, at which point CRU's computer system was effectively backed up via UEA's central servers.

#### **The 'Climategate' Affair**

14. In November 2009, a large number of emails relating to the work of CRU appeared on various websites. The publication of the emails had not been authorised by UEA. Indeed, UEA believes that they were obtained following one or more unlawful hacks of CRU's backup server, which took place sometime in or around October 2009. Following publication of the emails, allegations were made, particularly by climate change sceptics, that the emails showed a deliberate and systematic attempt by members of CRU to manipulate climate data so as to support their global warming claims. It was also alleged that individuals within CRU may have attempted to abuse the process of peer review to prevent the publication of research papers with conflicting opinions about climate change and, further, that UEA may not have complied with the requirements of the Freedom of Information Act 2000. These allegations caused widespread controversy. These events subsequently became colloquially known as 'climategate'.
15. The Constabulary promptly commenced an investigation into the alleged hacking. On 24 November 2009, the Constabulary seized the backup server as part of its investigation into 'Operation Cabin'.
16. The climategate controversy was taken extremely seriously by UEA. In response to the controversy, it sought to institute a number of inquiries designed, in essence, to address the allegations made against CRU members. In particular, in December 2009, UEA commissioned an independent inquiry, chaired by Sir Muir Russell, to consider the allegations

("the Muir Russell Inquiry"). In March 2010, UEA commissioned an independent panel of scientific advisers, chaired by Lord Oxburgh to consider the science which had been conducted within CRU ("the Oxburgh Inquiry"). The Oxburgh Inquiry reported its findings on 14 April 2010. The Muir Russell Inquiry reported its findings in July 2010.

17. In addition to these inquiries, the House of Commons Science and Technology Committee ("STC") has conducted a wide-ranging inquiry into the allegations made against the members of CRU. The inquiry commenced in January 2010. The Committee published its first report on this matter on 31 January 2010. A further report was published on 17 January 2011. The latter report specifically considered and analysed the content of the reports produced by the Muir Russell Inquiry and the Oxburgh Inquiry.
18. The conclusions reached by these various inquiries confirmed that the allegations that members of CRU had been improperly manipulating climate change data and/or abusing the peer review process were unfounded. The Muir Russell Inquiry confirmed that the 'rigour and honesty' of the scientists within CRU was not in doubt. However, both the Muir Russell Inquiry and the STC concluded that certain members of the CRU ought to have been more open and forthcoming when it came to responding to requests for the disclosure of information relating to their research.

#### **The Thumb Drives**

19. In early March 2010, the Muir Russell Inquiry team decided it would assist the inquiry if access to a forensic copy of the backup server could be granted by the Constabulary. On 5 March 2010, the Constabulary confirmed to Professor Jim Norton, a member of the independent inquiry panel, that it would not be able to provide a forensic copy of the server as it contained data pertinent to its inquiry. However, it went on to indicate that one way of solving the access problem might be for it to ask a forensic IT contractor used by the Constabulary, namely Qinetiq, to navigate the server in order to retrieve relevant emails. It was subsequently agreed that: the Constabulary would instruct Qinetiq to run certain searches of the server in order to retrieve emails which may be relevant to the inquiry; Qinetiq would place any information obtained from these searches on a storage device; the content of the storage device would then be analysed by an independent forensic IT expert instructed by UEA, albeit in a secure setting which was stringently controlled by the Constabulary.
20. Thereafter:
  - (1) Qinetiq conducted a search of the backups of three CRU PCs (namely those of Professor Jones, Professor Briffa and Dr Tim Osborn); copied wholesale the emails it had located following these searches onto three thumb drives (essentially memory

sticks); and then submitted an invoice to the Constabulary for £8,910 ex vat for the work it had done (UEA subsequently covered the cost of the invoice);

- (2) Professor Sommer, a recognised and independent forensic IT expert who had been instructed by UEA to review the content of the thumb drives for the benefit of the Muir Russell Inquiry, was permitted by the Constabulary to review the content of the thumb drives. The review took place on 14 May 2010. At the Constabulary's instigation, Professor Sommer's review had to be conducted at secure facilities and in accordance with stringent security protocols. It is understood that Professor Sommer was not permitted to and did not take possession of the thumb drives which at all material times remained in the possession of the Constabulary.
  - (3) On 17 May 2010, Professor Sommer issued a report in which he confirmed that there were substantial technical problems hindering his ability to analyse the information on the thumb drives and that, when coupled with the stringent security controls imposed by the Constabulary, these problems resulted in a situation in which it would take weeks to analyse the content of the thumb drives; even then the outcomes of the analysis were uncertain.
  - (4) In light of this report, no further steps were taken by the Muir Russell Inquiry in order to advance the process of analysing the information on the thumb drives.
21. For the avoidance of doubt, so far as UEA is aware, Professor Sommer was the only person outside of the Constabulary who was afforded access to the three thumb drives. He did not retain the thumb drives or any information which they contained. Nor further did he provide the thumb drives or the information which they contained to any member of UEA staff.<sup>3</sup>
  22. On 7 October 2010, the Constabulary confirmed in an email to UEA that: *'both the servers that were seized by Norfolk Constabulary at the start of this investigation are currently evidential exhibits in this investigation Operation CABIN. Therefore any data that currently sits on the items remain part of this process and at this stage we are unable to say when the servers or any data can be released. Upon conclusion of this investigation the data and servers will be returned to UEA expeditiously'*. As at the date of this pleading, the Constabulary has yet to return the server.<sup>4</sup>

### **The Keiller Decision**

23. On 14 August 2009, which is to say some months before climategate and two months before the backup server was seized by the Constabulary, Dr Keiller submitted a request for disclosure of a copy of: *'any instructions or stipulations accompanying the transmission of*

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<sup>3</sup> See further appendix 6 to the Muir Russell Inquiry report.

<sup>4</sup> The second server referred to in this email is CRU's web server. That server is not relevant to the instant appeal.

*data to Peter Webster and/or any other person at Georgia Tech between January 1, 2007 and June 25, 2009 limiting its further dissemination or disclosure*'. In effect, Dr Keiller's request presumed that Professor Phil Jones had sent written instructions or stipulations to persons at Georgia Tech (a university in the United States) limiting the dissemination or disclosure of data which, so far as UEA understands, Dr Keiller believed was at odds with theories of climate change. UEA does not accept that any written instructions or stipulations of the kind presumed by Dr Keiller were ever generated or sent by Professor Jones. At the time of Dr Keiller's request, the backup server was still in UEA's possession and control.

24. The request was refused by UEA in September 2009 on the ground that the requested information was not held. By way of a decision notice dated 23 June 2011, the Commissioner decided that UEA had been entitled to conclude that the requested information was not held.
25. Dr Keiller appealed the Commissioner's decision to the First-Tier Tribunal ("FTT"). The central issue at stake in Dr Keiller's appeal was whether the requested information was likely to have been stored on the backup server. The Tribunal was of the view that, if on the balance of probabilities the information had been stored on the server, then it would have been 'held' by UEA for the purposes of the EIR. By way of a decision dated 18 January 2012, the FTT concluded that, on the balance of probabilities, the email was stored on the server, and hence UEA should have concluded that the information was held for EIR purposes (*Keiller v Information Commissioner & UEA* (EA/2011/0152), [2012] 1 Info LR 128).

#### **Mr McIntyre's Request**

26. Mr McIntyre submitted his request for information to UEA on 5 April 2010. Critically this was after the backup server had been seized by the Constabulary. Mr McIntyre requested disclosure of 8 documents. The documents were identified in the request by means of computer filenames. Only documents 1 and 5-8 are relevant for present purposes.
27. Document 1 is a draft of an academic paper written by Dr Eugene Wahl and Dr Caspar Ammann, both of whom are scientists and experts in the area of climate change based in the United States. The paper came into CRU's possession as a result of its having been sent to Professor Jones by Professor Michael Mann, a climatologist based in the United States. The paper was sent to Professor Jones under cover of an email from Professor Mann dated 30 December 2004. 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. Document 5 is likewise understood to be a draft academic paper. Documents 6-8 are understood to be documents containing proposed re-wording of elements of a draft of chapter 6 of the IPCC report. Documents 5-7 were attached to an email sent to Professor Briffa by Dr Wahl on 21 July 2006. Document 8 was attached to an email from Dr Wahl to Professor Briffa dated 12 August 2006.

28. By way of a refusal notice dated 2 June 2010, UEA refused to disclose document 1 on an application of rr. 6(1)(b), 12(4)(d) and 12(5)(f). UEA also confirmed in its refusal notice that, in its view, documents 5-8 were not 'held' by it. UEA took the view that it did not hold documents 5-8 following extensive searches of relevant personal computers, local drives and the Exchange server. No search was made of the CRU backup server which, at the time of Mr McIntyre's request, and indeed throughout 2010, was in the possession and control of the Constabulary. An internal review concluded that UEA's response to Mr McIntyre's request was a lawful response. This was confirmed to Mr McIntyre by letter dated 10 August 2010.
29. Following Mr McIntyre's complaint, the Commissioner conducted an investigation into UEA's handling of Mr McIntyre's request. The Commissioner issued his decision notice on 2 February 2011. In summary, he concluded that the information contained in document 1 was exempt from disclosure under r. 12(5)(f) EIR and that, on the balance of probabilities, the information contained in documents 5-8 was not held by UEA at the time of the request.

### **DOCUMENT 1**

#### **Application of r. 12(5)(f)**

30. Mr McIntyre's challenge to the Commissioner's conclusion that document 1 was exempt from disclosure under r. 12(5)(f) EIR is based, in essence, on the following arguments:
- (1) by sending a copy of document 1 to Professor Briffa in his capacity as Lead Author of AR4, Dr Wahl and Dr Ammann must be deemed to have consented to the disclosure of the document to the public. This is particularly the case having regard to the IPCC rules governing the submission of materials to the IPCC (§§20-26 GoA);
  - (2) further, the Commissioner misapplied the public interest test under r. 12(1)(b):
    - (a) by taking into account the conclusions reached in a number of independent inquiries into and studies of the climategate affair (§§27-29 GoA) and/or
    - (b) by assuming incorrectly that those inquiries and studies effectively validated the climate science undertaken by CRU (§§30-34 GoA).
31. These arguments are not sustainable.

#### *The IPCC Rules*

32. Mr McIntyre's case on this issue is misconceived. Mr McIntyre's case proceeds on the basis that document 1 was obtained by Professor Briffa in circumstances where it had been sent to him by Drs Wahl and Ammann in his capacity as IPCC Lead Author (§21 GoA). However, document 1 was not sent by Drs Wahl and Ammann to Professor Briffa. In fact, Professor Briffa only obtained a copy of document 1 as a result of it having been forwarded to him by



Professor Jones, under cover of an email dated 4 January 2005. Professor Jones obtained his copy of document 1 as a result of its having been sent to him by Professor Mann on 30 December 2004. It is entirely unclear how Professor Mann obtained a copy of the paper and on what terms, save that Professor Mann is clearly of the view that the paper should be treated as a confidential document. In the circumstances, there is no basis for inferring that Drs Wahl and Ammann had consented to the publication of document 1, whether under the IPCC rules or at all.

33. Further and in any event, the rule identified by Mr McIntyre (at §22 GoA) does not support the proposition he advances. The rule in question is directed at ensuring that, where contributors submit material for consideration in the report, they ensure: (a) that the material is properly grounded in relevant academic literature; and (b) that, insofar as any academic literature relied upon is unpublished, a clear indication of how to access that literature is included with the submission. The rule can in no circumstances be read as indicating that individuals who are specifically invited by the IPCC to provide expert advice on discrete issues must invariably expect that any draft materials they may provide in the course of giving that advice will find their way into the published report.

#### *Application of the Public Interest Test*

34. The Commissioner considered the public interest issues at stake in respect of document 1 in §§39 DN. He noted that there was a strong public interest in disclosing information which would reveal how thinking on a specific piece of climate change research had developed. He went on to identify a number of inquiries and studies which had looked at the science being undertaken by CRU and which '*had not called the validity of the climate science at UEA into question*'. He went on to conclude that, in light of these inquiries and studies, it was not possible to give further weight to the public interest in disclosure.
35. There is no basis for impugning the Commissioner's analysis of the strength of the public interest in the disclosure of document 1.
- (1) UEA contends that the Commissioner's conclusion that the various inquiries and studies had not called the validity of the climate science at UEA into question was fair comment. UEA in any event disputes Mr McIntyre's characterisation of the overall conclusions reached by the various inquiries and studies.
- (2) The important facts are that the Muir Russell Inquiry, the Oxburgh Inquiry and the STC inquiry all engaged with the way in which the science within CRU had been conducted and, further, created significant transparency around this issue. The inquiries all concluded that the integrity of the scientific processes adopted within CRU could not be impugned. It is these facts which necessarily substantially diminish the strength of the public interest in disclosure.

- (3) Further or alternatively, it appears from Mr McIntyre's grounds that he is focussing on the disclosure of information which would validate (or invalidate) the science conducted by CRU. The disclosure of document 1 would not materially have advanced any such validation process, particularly given that: (a) it amounts to a draft paper written by two American academics who were not themselves employed within CRU and (b) the final version of the paper was already available to the public at the time of Mr McIntyre's request.
- (4) Mr McIntyre appears in his grounds effectively to be inviting the Tribunal to make findings as to the quality of the conclusions reached by the various independent inquiries and studies. UEA's position is that any such invitation should be refused by the Tribunal on the grounds that: (a) the Tribunal lacks the expertise, if not the jurisdiction, to make such findings; and, further, (b) it is in any event not open to the Tribunal to challenge or question the conclusions reached by the STC as any such activity would breach Parliamentary Privilege (*Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin)).

36. In the alternative, even if the Commissioner was wrong to rely on the various studies and inquiries in the context of the analysis of the public interests in disclosure, UEA contends that the strength of the public interests in favour of maintaining the exception were such that they in any event continued to outweigh any public interests in the disclosure of document 1.

**Application of r. 12(4)(d)**

37. Further or alternatively, document 1 would have been exempt from disclosure under r. 12(4)(d).

- (1) Document 1 was an unfinished document and, as such, r. 12(4)(d) was engaged in respect of that document.
- (2) Any public interest in disclosure of this document would have been substantially outweighed by the public interests in favour of maintaining the exceptions. Those interests include in particular:
  - (1) protecting the professional reputations of the document's authors;
  - (2) protecting the confidentiality of the document;
  - (3) avoiding a situation in which the draft paper is used in such a way as to misinform the public about climate change science; and

- (4) avoiding disclosures which are likely to have a chilling effect on the culture within academia of sharing, on a confidential basis, ideas and unpublished research.

### **Aggregation of the Public Interests**

38. UEA adds that, given that multiple exceptions are in play in respect of document 1, consideration must be given to aggregating the public interests in maintaining the exceptions provided for under r. 12(5)(f) and r. 12(4)(d), as per the approach approved in *Office of Communications v Information Commissioner* (Case C-71/10), [2011] 2 Info LR 1. UEA contends that, on an aggregated approach, the public interest balance weighs very heavily in favour of maintaining the exceptions. However, for the avoidance of doubt, UEA contends that the same result would equally obtain if the exceptions were considered discretely and in the absence of any aggregation.

### **DOCUMENTS 5-8**

39. In light of §§1-15 GoA, it would appear that Mr McIntyre relies on the following arguments in support of his case that documents 5-8 were held by UEA:
  - (1) so far as the back-up server is concerned, the Commissioner has misapplied the decision in *Keiller* (§§4-7 GoA);
  - (2) other locations were not searched including in particular thumb-drives extracted from the backup server in April-May 2010 (§§8-10 GoA);
  - (3) there is evidence that documents 5-8 were specifically retained, along with the relevant covering emails, on 'private computers', particularly Professor Briffa's private computer (§§11-15 GoA).
40. Mr McIntyre otherwise contends that UEA provided the Commissioner with 'untrue evidence' in the course of his investigation (§§16-19).

### **The Backup Server**

41. With respect to Mr McIntyre's argument that the Commissioner misapplied the decision in *Keiller*, UEA agrees with and adopts the arguments set out in the Commissioner's Response, particularly §§7.3-7.11. It is a critical feature of the instant case that, at the time of Mr McIntyre's request, the backup server was in the possession and control of the Constabulary. That feature was not present in the *Keiller* case as UEA still held the backup server as and when it was responding to Dr Keiller's request.
42. UEA accepts that a common sense and non-technical approach must be adopted in respect of the question whether information is 'held' by a public authority (*University of Newcastle v IC*

& *British Union of Anti-Vivisectionists* [2011] UKUT 185 (AAC), [2011] 2 Info LR 54). However, it contends that, on any common sense, non-technical view, UEA cannot be said to have held the information contained on the backup server after the point that it was seized by the police. In particular, this is so having regard to the following matters:

- (1) following its seizure by the Constabulary, UEA ceased to be in physical possession of the server;
- (2) not only was UEA not in physical possession of the server after 24 November 2009 but, so far as access to the server is concerned, the Constabulary had, in March 2010, specifically refused to allow UEA to have even a copy of the server;
- (3) at no point during the period it was dealing with Mr McIntyre's request did UEA enjoy an unfettered right to access information on the server. Indeed, UEA had no right of access to the server at all:
  - (a) access to information on the server was only granted by the Constabulary in respect of a third party (Qinetiq), which copied data from the server and then placed it on certain thumb drives;
  - (b) even access to the information which had been copied onto the thumb drives was tightly controlled and regulated by the Constabulary;
- (4) as a matter of common sense, it cannot be said in these circumstances that UEA 'held' the information on the backup server at any time when it was dealing with Mr McIntyre's request.

### **The Thumb Drives**

43. Mr McIntyre has assumed in his grounds of appeal that UEA held the thumb drives and has gone on to argue that, accordingly, it should have searched the thumb drives in response to his request. Mr McIntyre's case on this issue is without merit.

- (1) No access to the thumb drives was granted by the Constabulary until 14 May 2010, when the Constabulary permitted an independent third party, Professor Sommer, to review the content of the thumb drive as part of the process of supporting the Muir Russell Inquiry.
- (2) Given that no access was afforded to the thumb drives prior to 14 May 2010, it follows that there was no question of UEA even arguably holding the thumb drives at the time of Mr McIntyre's request.

- (3) In any event, in view of the way in which access to the thumb drives was controlled and restricted by the Constabulary, it cannot be said that the information on the thumb drives was 'held' by UEA.
- (4) The email referred to in §9 GoA does not take Mr McIntyre's case on this issue any further.
- (a) The email itself confirms that the thumb drives were not even arguably held by UEA at the time of Mr McIntyre's request (see further the reference to the thumb drives only being made available on 26 April 2010, which is to say three weeks after Mr McIntyre's request).
- (b) In fact, the thumb drives were never provided to 'a contact at UEA'. Instead, they were provided to an independent third party, Professor Sommer, at secure premises operated by the Constabulary and subject to stringent controls imposed by the Constabulary. The thumb drives effectively never left the Constabulary's possession and control. In the circumstances, they cannot reasonably be deemed to have been 'held' by UEA at any time.
- (5) It is in any event not admitted that attachments, as opposed to emails, were ever placed on the thumb drives.

#### **Transfer of Data by Professor Briffa**

44. Mr McIntyre's argument that documents 5-8 would have been retained on 'private computers' does not take his case any further. It is right to say that, in 2008, Professor Briffa transferred certain information from his work PC onto a memory stick. However, the information which was transferred was limited to emails and did not include any email attachments, such attachments having been stored in a separate file to the emails on Professor Briffa's PC. For the avoidance of doubt, UEA retains a copy of the memory stick in question. A review of the contents of that device confirms that it contains only emails and not attachments.<sup>5</sup> It follows that documents 5-8 were not transferred onto the memory stick used by Professor Briffa and that the 'private storage' issue is a 'red herring'.
45. It is denied that the content of the email referred to at §12 GoA operates to undermine UEA's case on this issue. This email was sent by Mr Tom Melvin, a CRU Senior Research Associate, to Mike Salmon (IT Manager of CRU) on 12 October 2009. It was sent in the following circumstances: following a serious illness, Professor Briffa was obliged to work from home; in order to assist Professor Briffa during the period of his recuperation, on or around 12 October 2009, Mr Melvin copied various materials from Professor Briffa's work PC onto his

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<sup>5</sup> Notably, the copy of the memory stick contains the emails to which documents 1-4 were attached but not the emails to which documents 5-8 were attached.

(Mr Melvin's) laptop so that Professor Briffa could access his computerised CRU records from home; the materials which were copied included attachments (it is not admitted that they included documents 5-8); the only materials which were deleted from Professor Briffa's work PC by Mr Melvin were 'temporary .gif files' (these files do not amount to attachments but are instead icons which appear embedded within the body of individual emails); the email cited in §12 GoA merely records this process. Following Professor Briffa's recovery, the laptop was returned to Mr Melvin. Mr Melvin wiped all the Briffa material from the laptop before he attended a conference on 26 October 2009. These events have no bearing on the transfer of data by Professor Briffa in 2008. Nor are they relevant to the instant appeal, particularly as any information which was transferred to the laptop was deleted in October 2009, some months before Mr McIntyre's request.

46. Paragraph 19 GoA is not understood. It is alleged in this paragraph that documents 1-4 *'were the heart of [Professor Phil] Jones' notorious deletion request in May 2008, which sought the destruction of documents containing AR4 review correspondence from Wahl, Amman and Mann to Keith Briffa of CRU'*. However, documents 1-4 have been located by UEA and documents 2 and 4 have been disclosed.

#### **Allegations of 'Other Untrue Evidence'**

47. In §16 GoA, Mr McIntyre alleges that a statement made by UEA to the Commissioner in the course of his investigation was untrue.<sup>6</sup> He relies on the matters set out in §17 in support of this allegation. UEA denies that it gave untrue evidence to the Commissioner. The evidence which Jonathan Colam-French (Director of Information Services) gave to the Muir Russell Inquiry cannot be taken as confirming that the attachments to which Mr McIntyre's request specifically relates were retained by Professor Briffa.<sup>7</sup> The transfer of data by Professor Briffa in 2008 is in any event not relevant to Mr McIntyre's request as that transfer did not include the transfer of attachments. Further Mr McIntyre's reliance on the email referred to at §12 GoA is misplaced for the reasons outlined above. UEA's position is that, in its letter to the Commissioner, it was merely seeking to explain why documents 5-8 could not be found on Professor Briffa's work PC or elsewhere on its computer system in the period following Mr McIntyre's request.
48. In §§18-19 GoA, Mr McIntyre makes allegations to the effect that evidence given by UEA's Vice-Chancellor, Professor Acton, to the STC as part of its inquiry into climategate was untrue. UEA does not accept that these allegations are well-founded. However, the doctrine of Parliamentary privilege in any event means that these are not allegations which can or should be countenanced by the Tribunal.

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<sup>6</sup> The extract cited by Mr McIntyre is drawn from a letter to the Commissioner dated 7 March 2011.

<sup>7</sup> Mr Colam-French merely stated to the Inquiry that: 'For example Keith Briffa took home emails that were subject to FOI to ensure their safekeeping'.

## **CONCLUSION**

49. In summary, UEA invites the Tribunal to dismiss Mr McIntyre's appeal on the grounds that:
- (1) UEA was entitled to treat document 1 as exempt from disclosure under r. 12(5)(f) and/or under r. 12(4)(d) EIR;
  - (2) UEA was entitled to conclude that it did not hold documents 5-8 for the purposes of the EIR;
  - (3) in the alternative, it was entitled to refuse Mr McIntyre's request on the ground that the exemption provided for in r. 12(4)(b) EIR applied.
50. For the avoidance of doubt, UEA reserves its position on the question of whether, had documents 5-8 been held by UEA, the information they contain would in any event have been subject to relevant exceptions, such as those provided for in rr. 12(5)(f) and 12(4)(d).

**ANYA PROOPS**

**11KBW**

**9 May 2012**

## APPENDIX - CHRONOLOGY

|                   |   |
|-------------------|---|
| 2007              | IPCC Fourth Assessment Report is published.   |
| 2008              | Professor Briffa transfers emails (but not attachments) onto a memory stick.  |
| 14 August 2009    | Dr Keiller submits an information request   |
| 11 September 2009 | Keiller request refused by UEA.   |
| 12 October 2009   | On or about this date, Tom Melvin (Senior Research Associate at CRU) copies material from Professor Briffa's PC onto his laptop so that Professor Briffa could use the laptop to work from home following a serious illness.                              |
| October 2009      | Prior to the week commencing 26 October, Professor Briffa returns the laptop to Tom Melvin who then removes all the Briffa material.  |
| 30 October 2009   | UEA internal review upholds refusal notice in respect of Keiller request.   |
| November 2009     | Emails relating to the work of CRU are published online thus sparking the climategate controversy.  |
| 24 November 2009  | Norfolk Constabulary seizes the backup server   |
| December 2009     | UEA commissions Muir Russell Inquiry  |
| January 2010      | HoC Science and Technology Committee ("STC") commence investigation into climategate.   |
| 4 March 2010      | Professor James Norton (member of the Muir Russell Inquiry panel) emails the Constabulary asking to be provided with a copy of the backup server.   |
| 5 March 2010      | The Constabulary emails Professor Norton confirming that it was unable to provide a copy of the server as it contained data pertinent to its investigation but was prepared to consider provide responses to further inquiries via a report from Qinetiq. |
| 31 March 2010     | STC publishes initial report.   |



|                 |   |
|-----------------|---|
| 5 April 2010    | Mr McIntyre submits his information request to UEA.   |
| 14 April 2010   | Oxburgh Inquiry reports findings.   |
| 14 May 2010     | Professor Sommer is given access to the three thumb drives by the Constabulary at a secure location.  |
| 17 May 2010     | Professor Sommer reports on the technical and logistical difficulties attendant on analysing the information on the thumb drives.   |
| July 2010       | Muir Russell Inquiry reports findings.  |
| 7 October 2010  | The Constabulary confirms in an email to UEA that the backup server was an evidential exhibit in its investigation; that the data sitting on the server remained part of this process and, at that stage, it was unable to say when the server or any data on it would be released. |
| 17 January 2011 | STC publishes further report.   |
| 23 June 2011    | Information Commissioner issues decision notice in respect of Keiller complaint.  |
| November 2011   | A further tranche of emails are published online thus sparking the controversy which came to be known as climategate II.  |
| 18 January 2012 | First-Tier Tribunal hands down decision in <i>Keiller</i> .   |
| 2 February 2012 | Information Commissioner issues decision in McIntyre complaint.   |