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ENVIRONMENTAL INFORMATION REGULATIONS 2004 – INFORMATION REQUEST (FOI_11-047; EIR_11-04)

I hereby appeal your refusal of items 1-3 of my Environmental Information Regulations request. In addition, I am copying this appeal to the Information Commissioner's Office (ICO) as notice of a complaint against University of East Anglia(UEA).

Under the Environmental Information Regulations (EIR), you have a duty to make environmental information available as a matter of course, to interpret exemptions restrictively and to consider the public interest in favour of disclosure. You have not done so. Instead, you have done exactly the opposite, taking not only expansive, but fanciful, interpretations of exemptions, and, in doing so, flouted specific ICO guidance to the contrary. In doing so, you have also breached the Environmental Information Regulations and the recent agreement[1] between UEA and the ICO, in which UEA undertook to comply with the Environmental Information Regulations.

1. Your "Interpretation" of my EIR Request

First, I reject your "interpretation" of my request for the Polar Urals/Yamal regional chronology. Your "interpretation" was both unnecessary and incorrect. My request stated:

> *Climategate email 684. 1146252894.txt of Apr 28, 2006 refers to a tree ring composite identified as follows: "URALS" (which includes the Yamal and Polar Urals long chronologies, plus other shorter ones).*
>
> *Could you please provide me a digital version of this series together with a list of all the measurement data sets used to make this composite, denoting each data set by ITRDB identification or equivalent. For the Polar Urals site, would you please identify the individual data sets used by ITRDB identification or equivalent. If any of the data is not in a public archive, please provide the measurement data.*
>
> *It would probably simplify matters if you also provided the measurement data used for the "URALS" chronology in a digital form.*

Your interpretation of the request was as follows:

> *1. A digital version of the "composite" identified as "URALS". No such composite was attached to or identified by the 2006 email, which applied the term 'URALS' solely to groups of trees.*

[1] http://www.ico.gov.uk/~/media/documents/library/Freedom_of_Information/Notices/uea_foi_undertaking.ashx

However, 1,001 composites were later generated from the ringwidth data from these groups of trees, and we interpret your request to be for those 1,001 composites.

2. A list of all the measurement data sets used to make this URALS composite, including the ITRDB identifier or equivalent.

3. A list of the measurement data sets used to make the Polar Urals long chronology, including the ITRDB identifier or equivalent.

4. Any of the measurement data that are not in a public archive.

You state that the requested chronology was not attached to the email. This is irrelevant to my request. Dr Osborn knew what he was referring to in the email and is in a position to identify the chronology in question.

You "interpreted" my request as being for the 1001 bootstrap samples referred to, elsewhere in the email. If I wanted to request the 1001 bootstrap samples, I would have done so. I did not. I asked for the regional chronology, not the 1001 bootstrap samples and hereby re-iterate the request:

> the "URALS regional chronology" referred to in email 1146252894.txt, where it is described as a chronology consisting of "the Yamal and Polar Urals long chronologies, plus other shorter ones."

I also re-iterate my request for items 2-3, appealing your decision on the grounds set out below. At present, I am not appealing item 4.

2. Exemptions

2.1 Regulation 6(1)(b) - Information available to requester

Regulation 6(1)(b) is engaged only if "the information is already publicly available and easily accessible to the applicant". If the information were publicly available and easily accessible, then you could identify the location of the information and that would be the end of the matter. You have not done so.

Items 2 and 3 asked only for lists of sites, together with ITRDB identifiers or equivalent. Saying that the sites are located somewhere on four websites (one of which is in Russian) does not engage this exemption, as none of the websites contains the requested lists, nor is the information "easily accessible" on those websites.

A Climate Audit reader, also a UK barrister, observed that your attempted use of a manifestly inapplicable exemption was itself a breach of EIR.

2.2 Regulation 12(4)(d) - Material in course of completion

Regulation 12(4)(d) exempts "material which is still in the course of completion, to unfinished documents or to incomplete data".

While, in a theoretical sense, tree ring chronologies are always "work in progress"[2], at certain points in time, these chronologies are "photographed". Otherwise, the implication would be that institutions could permanently withhold tree ring chronologies as always being "work in progress", leading to an absurd result.

A URALS regional chronology had been calculated as of April 2006. This was a version of the regional chronology which remained unchanged for many years (together with the associated list of sites). Subsequent statements by CRU clearly state that work on the regional chronology was discontinued. The Polar Urals/Yamal regional chronology was not used in Briffa et al 2008 (Phil Trans B), although this article purported to report regional chronologies. In Oct 2009, CRU's Keith Briffa stated[3] that they "simply did not consider" the inclusion of the shorter chronologies:

> Our current practice when selecting data to incorporate in a regional chronology, is to include data exhibiting high levels of common high-frequency variability (i.e. on the basis of high inter-site correlations, where these are calculated using high-pass filtered data). Judged according to this criterion it is entirely appropriate to include the data from the KHAD site (used in McIntyre's sensitivity test) when constructing a regional chronology for the area. However, we simply did not consider these data at the time.

Similar evidence was given by CRU to the Muir Russell panel[4]:

> We had never undertaken any reanalysis of the Polar Urals temperature reconstruction subsequent to its publication in 1995…
>
> McKitrick is implying that we considered and deliberately excluded data from our Yamal chronology. The data that he is referring to were never considered at the time because the purpose of the work reported in Briffa (2000) and Briffa et al. (2008) was to reprocess the existing dataset of Hantemirov and Shiyatov (2002).

The regional chronology has not been a "work in progress" for years. Should CRU re-calculate the regional chronology in 2011 using the same or different lists of sites, such calculations constitute new research and would not mean that the earlier work was still "in the course of completion", "unfinished" or "incomplete".

Further, in presenting this excuse, you have failed to consider the recent case of *Keenan v Queen's University Belfast*, in which the ICO rejected the university's attempt to avoid disclosure of tree ring measurement data under regulation 12(4)(d). In the case at hand, you have made no attempt to demonstrate why a tree ring regional chronology and the associated list of sites should be treated any differently, nor, in my view, can such a distinction be plausibly argued.

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[2] **Oxburgh Report:** "4. Chronologies (transposed composites of raw tree data) are always work in progress. They are subject to change when additional trees are added; new ways of data cleaning may arise (e.g. homogeneity adjustments), new measurement methods are used (e.g. of measuring ring density), new statistical methods for treating the data may be developed (e.g. new ways of allowing for biological growth trends)."

[3] http://www.cru.uea.ac.uk/cru/people/briffa/yamal2009/

[4] http://www.cce-review.org/evidence/17%20June%20CRU%20comments%20on%20McKitricks%20FT%20article.pdf

2.3 Regulation 12(5)(c) – intellectual property rights

Again, you failed to show that this exemption was engaged or to distinguish your exemption claim from the ICO decision in *Keenan v Queen's University Belfast*, in which regulation 12(5)(c) was also considered. Regulation 12(5)(c) is engaged only if you can show that the disclosure "would adversely affect … intellectual property rights". ICO Guidance No 20 requires you to show that the alleged harm is "at least probable rather than merely likely":

> In other words, with environmental information, in order to engage an exception, some harm must be at least probable rather than merely likely. This is a significant difference. This has been confirmed by the Information Tribunal which has stated that to satisfy the test of "would" it has to be shown that the adverse effect is more likely than not, and that it is not enough to say that the disclosure could or might have such an effect

In your discussion of this exemption, you argued that disclosure of the requested tree ring data would cause "financial harm" to the university as follows:

> The 'adverse affect' to intellectual property rights is based upon the fact that release of these data sets and the methodology used in their construction would, effectively, be publication of the creative work of the CRU staff. This would seriously reduce the likelihood that any high impact journal would publish the results pertaining to this work, thus effectively causing the University financial harm via adverse impact upon reputation, ability to attract research funding, and funding arising from the citation of the publications within the REF process by which universities in the United Kingdom receive funding based on the quality of research undertaken.

The ICO recently considered a virtually identical argument, also involving tree ring data, in *Keenan v Queen's University Belfast*, summarized by the ICO as follows:

> 55. QUB also argued to the Commissioner that the intellectual property rights of the University's dendrochronology research are central to the attraction of external funding and that although much of the raw tree ring data is available through the ITRDB, the release of the raw data requested by the complainant would seriously impact on QUB's ability to attract funding to undertake further research or submit publications to peer reviewed journals.

In this case, the ICO rejected the University's argument (without the need to refer to the public interest test):

> 59... QUB has not established how the withheld information attracts intellectual property rights nor has QUB provided sufficient argument or evidence on the application in the present circumstances of the principles and practice of intellectual property law...

Instead of offering substantive reasoning to support your exemption claim, you have merely re-iterated the same reason as Queen's University Belfast, a reason already rejected by the ICO.

2.4 Reg. 12(4)(a) - Information not held at time of request

This exemption is not engaged in respect to the requests for (1) regional chronology or (2-3) the lists of sites and, at this time, I am not appealing item (4).

3. Public Interest Test

Section (12)(1)(b) contains the additional requirement that:

> in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Your analysis of the public interest not only fails, but even flouts ICO guidelines on multiple counts.

3.1 Failure to Consider Factors in Favour of Disclosure

First, you failed to consider **any** factors in favour of disclosure, not even ones listed in ICO guidance documents. The ICO's "Introduction to EIR Exemptions" states that "furthering the understanding of and participation in the public debate of issues of the day" is a factor in favour of disclosure:

> We have identified several generic points to take into account when considering the public interest test (for more details see our FOI guidance on The public interest test: Awareness guidance 3), e.g.:
> • Furthering the understanding of and participation in the public debate of issues of the day.
> • Promoting accountability and transparency of public authorities and decisions taken by them.
> …
> This list is not intended to be exhaustive and authorities should take care to consider all aspects that may be relevant to the public interest and be able to justify reliance on these aspects when withholding information.

In ICO Guidance No 3 ("The Public Interest test)", the ICO similarly listed:

> • furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority
> • promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration..

The ICO added:

> This list is, of course, not exhaustive and there may be other factors which should be taken into account depending upon the request for information. For instance, the disclosure of information may contribute towards scientific advancements ….

In the case at hand, an earlier version of CRU's data from Yamal was illustrated in the IPCC Fourth Assessment Report (2007) and was used in multiple multiproxy temperature reconstructions illustrated in the IPCC 2007 report and other academic articles.

Disclosure of the requested data would clearly "further the understanding of and participation in the public debate of issues of the day", the issue in this case being the understanding of climate change. Indeed, it is difficult to contemplate an "issue of the day" that better meets the criteria.

Disclosure of the requested information may also "contribute to scientific advancement" of the understanding of the relationship between tree rings and climate.

In the case at hand, there is a public interest in "promoting accountability and transparency" by the University of East Anglia. There have already been multiple inquiries into the conduct of CRU at the University of East Anglia, including hearings by the House of Commons Science and Technology Committee, with one of the concerns being whether data had been "manipulated" or "suppressed". These inquiries would not have been commissioned had there not been overwhelming public interest. This public interest was expressed by Climate Audit readers as follows.

> the over-riding public interest is dispelling or confirming allegations that CRU cherry-picked data that supported the existence of a cool MWP and buried data that contradicted this conclusion[5]

and here

> the entire planet in informing itself on the information used (or in this case omitted) in presenting a picture to policy makers of unprecedented 20th century temperatures (and possibly the existence or not of the MWP, or at least its extent and/or its similarity with today)[6].

3.2 No public interest in release of "unfinished or incomplete" data

Instead of considering factors in favour of disclosure, even ones listed in ICO Guidance, the UEA limited itself to arguments against disclosure, but even here ignored or flouted ICO Guidance documents.

The first such example is in your discussion of the release of "unfinished or incomplete data", where you argue:

> There is little public interest in the release of unfinished or incomplete data – i.e. which does not contain a description of how it was created or why the "selected" methods were chosen – and so does not reflect the full breadth of academic rigour and thought applied

[5] http://climateaudit.org/2011/04/25/cru-refuses-foi-request-for-yamal-climategate-chronology#comment-264564
[6] http://climateaudit.org/2011/04/25/cru-refuses-foi-request-for-yamal-climategate-chronology#comment-265032

> to it. The information may well be incorrect, untested, unreviewed and may not accurately reflect the proper outcome of the research. Incorrect or misapplied conclusions could be drawn from the publication of unfinished data and any assessment of the merit of the work should be based upon a final, approved version of the data.

This directly flouts ICO Guidance No 3, in which the ICO stated:

> It may sometimes be argued that information is too complicated for the applicant to understand or that disclosure might misinform the public because it is incomplete (for instance because the information consists of a policy recommendation that was not followed). Neither of these are good grounds for refusal of a request. If an authority fears that information disclosed may be misleading, the solution is to give some explanation or to put the information into a proper context rather than to withhold it.

That clearly applies in the present case. If you are concerned that the existing "description of how [the regional chronology] was created or why the "selected" methods were chosen", then, as the ICO suggests, the solution is to "put the information into a proper context rather than to withhold it".

Furthermore, on other occasions, CRU has apparently published "incomplete" data, making the present claim opportunistic. In CRU's evidence to Muir Russell, it stated that it did not include the Polar Urals/Yamal regional chronology in Briffa et al 2008 because "it was felt that this work could not be completed in time"[7]. Nonetheless, CRU went ahead and published using a chronology only from Yamal, rather than a regional chronology, without providing an explanation of why the "selected" Yamal chronology was chosen in preference to the regional chronology.

You observe that "incorrect or misapplied conclusions could be drawn from the publication of unfinished data", but nonetheless CRU went ahead with the publication of Briffa et al 2008

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[7] In evidence to the Muir Russell panel, CRU stated that they had been unable to complete the planned Polar Urals/Yamal regional chronology and therefore elected to publish using an older dataset:

> Some time ago we began work on a multi-institution paper intended to describe the sensitivities in producing tree-ring-based climate reconstructions to the methods of chronology construction and subsequent climate calibration, illustrated using the examples of various tree-ring chronologies across northern Eurasia. When we later received a request to submit a paper to a planned themed issue of the Philosophical Transactions of the Royal Society about 'The boreal forest and global change', Briffa and colleagues decided to use some of the material to hand in preparing a draft. It was intended that this should describe 3 continuous 2000-year ring-width series, each originally planned to represent the integration of a large-regional data set of subfossil and living tree data. The focus was to be on representing large-regional growth signals and initial comparisons with equivalent regional temperature data. The western, 'Fennoscandia', series would incorporate near tree-line pine data from northern Sweden and Finland; the Avam-Taimyr series would integrate larch data from near the Taimyr peninsula tree-line region. Between these we had intended to explore an integrated Polar Urals/Yamal larch series but **it was felt that this work could not be completed in time** and Briffa made the decision to reprocess the Yamal ring-width data to hand, using improved standardization techniques, and include this series in the submitted paper. [my bold]

without completing the Polar Urals/Yamal regional chronology as originally intended. Release of the requested regional Polar Urals/Yamal chronology and the list of sites will reduce, rather than increase, the risk of "incorrect or misapplied conclusions".

3.3 Financial Interests of University and University Staff

Your third "public interest" argument is nothing of the sort. In it, you describe only the **private** financial interests of the university and its staff, an interest already recognized by the exemption in regulation 12(5)(c). You stated:

> Additionally, the intellectual property rights of the copyright holder in the final version are protected by ensuring that earlier, non-published versions of copyrighted work are not made available 'in competition' with the copyrighted version that the copyright holder has an expectation of making financial gain from…
>
> Premature release of material that has both copyright and a database right attached to it would harm the interests of the CRU and University by denying them the economic and professional benefits arising from their work.

This argument fails on multiple counts. The requested disclosure cannot reasonably be characterized as "premature release". The regional chronology in question was calculated in 2006. Disclosure in 2011 is not "premature". In addition, as noted above, the financial interests of the University and its staff are **private** interests, not a **public** interest.

3.4 Willingness of Academics to Engage in Published Research

Your final "public interest" is baldly asserted as follows:

> Were premature release of such material to become common, the willingness and ability of academics to engage in published research would be harmed and this cannot be in the public interest.

Once again, the requested disclosure cannot be characterized as "premature release". As previously noted, the regional chronology was calculated in 2006. Nor has the University complied with the ICO Guidance on the demonstrating adverse effect under EIR. ICO Guidance requires that the University demonstrate that the supposed adverse effect is "more likely than not". The University made no attempt to show that, "more likely than not", the requested disclosure would diminish "willingness and ability of academics to engage in published research". Nor is there any reason to believe that it would do so.

Yours truly,

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