

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 March 2012

Public Authority: The University of East Anglia

Address: Norwich Research Park
Norwich
NR4 7TJ

Decision (including any steps ordered)

1. The complainant made a request to the University of East Anglia (UEA) for information held by the Independent Climate Change Email Review. The UEA refused the request under regulation 12(4)(a) on the basis that it did not hold the requested information. The Commissioner has investigated the complaint and upheld the UEA's application of regulation 12(4)(a). The Commissioner requires no steps to be taken.

Request and response

2. On 27 January 2011 the complainant wrote to the University of East Anglia (UEA) to request copies of information held by the Independent Climate Change Email Review (ICER) led by Sir Muir Russell which was set up to look into the work of the University's Climate Research Unit (CRU). In doing so the complainant specified that he was making his request under the Environmental Information Regulations 2004 ("the EIR"). The request read as follows:

"I...request copies of all the information held by the Independent Review carried out by Sir Muir Russell on your behalf and at public expense. This will include but is not limited to the basis upon which the Review refused to publish my submission to it and information on how grotesquely altered parts of it were entered into the public record of the Review."

3. The Independent Climate Change Review was set up by the UEA after emails from the CRU were hacked and published on line. The emails raised concerns 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 Act or the EIR. Full details of the remit of the review are available on its website:

<http://www.cce-review.org/About.php>

4. The UEA responded to the request on 27 February 2011 when it informed the complainant that it did not hold the requested information and therefore the exception in 12(4)(a) applied. Regulation 12(4)(a) is subject to the public interest test and the UEA said that as it did not hold the information the public interest clearly lied in non-disclosure. The UEA did, however, say that it was aware of submissions which it had made to the UEA and that therefore this information was held but as it was available on the ICCER website this particular information fell under the exception in regulation 6(1)(b) as it was publicly available.
5. The complainant asked the UEA to carry out an internal review of its handling of his request and it presented its findings on 11 April 2011. At this point the UEA upheld its original decision to refuse the request. It explained that there was no contractual relationship with the ICCER it was "unable to mandate release of information held by ICCER". It went on to say that the UEA has "no control over, nor access to, material held by ICCER, other than what is already in the public domain on the ICCER website".

Scope of the case

6. On 15 April 2011 the complainant contacted the Commissioner to complain about the UEA's decision to refuse his request for information under the exception in regulation 12(4)(a). In particular the complainant argued that the ICCER or "Russell review" was not truly independent of the UEA and that therefore any information it held should be seen as being held on behalf of the UEA.
7. The Commissioner has not considered the UEA's application of regulation 6(1)(b) as the complainant made it clear that the focus of his complaint was on the UEA's decision that it did not hold the unpublished information held by ICCER rather than its decision to withhold the information that the ICCER had already made available on its website. The Commissioner is also aware that the complainant has already accessed and made full use of the information available on the ICCER website.

Reasons for decision

Environmental information?

8. The Commissioner has first considered whether the requested information would, if held, be environmental information and therefore whether the EIR was the correct access regime to apply. Environmental information is defined in regulation 2(1) of the EIR of which the relevant sections provide that:

“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;

(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 designed to protect those elements.

9. The UEA has explained that it considered the request under the EIR because it concluded that as the role of the ICCER was to investigate the conduct of climate change research and data within the CRU it assumed that much of the information submitted to the review “would be an assessment of the quality and management of the research conducted, the data collected, and the manner in which that was done”. Therefore, it said that in its view any such information would fall within the definition of environmental information within regulation 2(1)(c) of the EIR as “activities” affecting or likely to affect factors of the environment. The UEA also highlighted the fact that in a previous case involving the University the Commissioner had decided that a request for information regarding the Intergovernmental Panel on Climate Change (IPCC) process should be considered under the EIR. In that case the request related to research about the environment and comments upon such research. It said that, given the similarities between the two cases, it felt justified in addressing the request under the EIR.
10. The Commissioner is mindful of the fact that since the UEA maintains that it does not hold the requested information, or at least the

information not already publicly available, it is impossible to say with absolute certainty what the nature of the information may be. However, the Commissioner has considered the remit of the ICCER and the information published on its website to better understand the types of information it would be likely to hold. The Commissioner notes that the focus of the ICCER is the work of the CRU and its climate change research and therefore he considers it is reasonable to conclude that most of the information it held would be likely to be on the state of elements of the environment, namely the causes of climate change and its effects. In reaching this view the Commissioner considers 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. The Commissioner has therefore decided that, on balance, the requested information would fall within the definition of environmental information in regulation 2(1)(a) of the EIR and that therefore it was appropriate for the UEA to consider the request under this legislation.

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

11. The UEA has refused the request under the exception in regulation 12(4)(a) which provides that a public authority may refuse to disclose information to the extent that it does not hold that information when a request is received.
12. Regulation 3(2) of the EIR provides that environmental information is held by a public authority if the information:
 - (a) is in the authority's possession and has been produced or received by the authority; or
 - (b) is held by another person on behalf of the authority.
13. The UEA has explained that the information generated by the ICCER was not held on its premises and when asked by the Commissioner to confirm where the information was held it said that it believed that the information was held by Sir Muir Russell's solicitors. Therefore the Commissioner has decided that the information was not in the possession of the UEA but has instead gone on to consider whether the information was held by Sir Muir Russell and the ICCER on behalf of the UEA, in accordance with regulation 3(2)(b).
14. The complainant has argued that the information should be seen as being held on behalf of the UEA because the ICCER was never truly independent of the UEA. The complainant questioned the impartiality of the review and suggested that Sir Muir Russell and the review team should be seen as contractors of the UEA and that therefore any

information they held was in fact held on behalf of the UEA. The complainant offered a number of reasons to support his view including the following:

- Sir Muir Russell was appointed by the UEA and the review was entirely funded by the University.
 - The UEA was given the opportunity to view and comment on the report prior to publication.
 - The review failed to behave openly and transparently.
 - Members of the review team had previously worked at the UEA.
 - The review had not published a submission sent by the complainant and, the complainant alleged, had put only an edited version of his submission to the UEA for it to answer.
 - The review was not truly independent as it had to seek the consent of the UEA to view certain emails it held.
15. In the course of his investigation the Commissioner asked the UEA to comment on the complainant's suggestion that the ICCER was a contractor of the university and the information was held on its behalf. The Commissioner also asked the UEA for further information on the nature of the relationship between the UEA and the Russell review. In particular, the Commissioner asked the UEA the following questions:
- What was the process by which Sir Muir Russell was appointed?
 - How was the ICCER funded?
 - What input, if any, did the UEA have into the findings of the ICCER?
 - Was the ICCER provided with a secretariat or premises from which to operate by the UEA?
 - Is the UEA aware of where the information accumulated by the review is now held?
16. In response the UEA maintained that there was no contractual relationship with the ICCER and therefore it had no control over the information the review team held. Whilst Sir Muir Russell was appointed by the UEA's Vice Chancellor and the review funded by the University, the UEA explained that it did not have access to, or knowledge of the material gathered by the ICCER and that no university IT facilities were

used to store or display information gathered by the ICCER. It explained that the ICCER controlled access to the report and the only input the UEA had was a brief opportunity to consider a final draft of the report prior to publication in respect of points of factual accuracy. The Commissioner was also told that submissions made to the review, the final report, as well as some other documents were available on the ICCER website. However, the internal correspondence and workings of the review were, it believed, held by Sir Muir Russell's solicitors, although it said that it could not be certain of this.

17. The Commissioner recognises that the ICCER was entirely funded by the UEA and that its Chair, Sir Muir Russell, was appointed by the UEA's Vice Chancellor. However, in the Commissioner's view this does not in itself mean that any information gathered or generated in the course of its investigation is held on behalf of the UEA.
18. When considering whether information is held on behalf of a public authority the Commissioner will consider the public authority's level of interest and use of the information as well as the control and access exercised over the information. Dealing first with the UEA's level of interest and use of the information the Commissioner notes the UEA's argument that the information held by the ICCER was held solely to provide evidence to the ICCER on the matters under investigation "to provide a factual foundation for the findings and recommendations of the ICCER".
19. As regards the control over and access to the information the UEA explained that, other than the information published on the ICCER website, it did not have access to, or knowledge of, the material gathered by the review at any time. The UEA confirmed that the ICCER team controlled access to the information it held and no access was granted to the University other than by the ICCER publicising the information submitted or otherwise providing it to the University. The UEA had, it said, no control over the retention or disposal of the information held by the ICCER. The Commissioner is also mindful of the fact that no University IT facilities were employed to store, or display the information gathered by the ICCER and that no administrative or secretarial support in relation to the information was provided by the UEA. Instead the UEA paid expenses for Sir Muir Russell to hire his own secretariat, team members and other support services.
20. In this case the funding by the UEA was clearly given on the basis of an independent inquiry and that Sir Muir Russell was free to run that inquiry. It does not necessarily follow that supplying funding will mean the funding body will automatically have the relevant control or access to the information.

21. The Commissioner recognises the complainant's concerns about the conduct of the review and his reservations about its independence. However, whilst noting his concerns the Commissioner has no valid evidence to refute the independence of the ICCER. Moreover, it is outside the remit of the Commissioner to question the impartiality of the review's findings or the manner in which it conducted its enquiries.

22. Having considered all the circumstances of the case the Commissioner has decided that the requested information is not held and so the exception in 12(4)(a) is engaged. Regulation 12(4)(a) is subject to the public interest test but since the Commissioner has decided that the information is not held he finds the public interest clearly favours maintaining the exception.

Right of appeal

23. 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

24. 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.
25. 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