



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2012/0193

**ON APPEAL FROM:
The Information Commissioner's
Decision Notice No: FER0429289
Dated: 9 August 2012**

Appellant: David Holland

First Respondent: Information Commissioner

Second Respondent: Department for Business, innovation and Skills

Date of hearing: 30 April 2013 at Field House

Date of decision: 26 July 2013

Before

**Anisa Dhanji
Judge**

and

**Henry Fitzhugh
David Wilkinson
Panel Members**

Representation

For the Appellant: in person

For the First Respondent: Charles Bourne, Counsel

For the Second Respondent: no attendance

Subject matter

Environmental Information Regulations 2004 - Regulation 12(5)(a) - whether disclosure would adversely affect international relations; whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Case law

Campaign Against the Arms Trade v. IC and MOD (EA/2006/0040); Plowden v FCC and IC (EA/2011/0225 & 0228); Sinclair v IC and DECC (EA/2011/0052).

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr David Holland (the “Appellant”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 26 March 2012.
2. The appeal concerns information requested by the Appellant from the Met Office (“MO”), in relation to a specific meeting of the Intergovernmental Panel on Climate Change (“IPCC”).
3. The MO is the UK's National Weather Service. It has been working in the area of climate change for many years. It advises the government on climate science issues and is regarded as one of the world's leading centres for climate science research. Its scientists make significant contributions to various climate science reports, including the assessment reports of the IPCC.
4. The MO is not itself a public authority. At the time of the Appellant's request, it was an executive agency of the Ministry of Defence. It is now an executive agency of the Department for Business, Innovation and Skills, which all parties accept is the correct public authority for the purposes of this appeal. For convenience, however, in this determination, we will refer to the Second Respondent as the MO.
5. The IPCC was established in 1988 by the World Meteorological Organisation and the United Nations Environment Program to assess the scientific, technical and socio-economic information relevant to understanding the risk of human-induced climate change. It does not carry out new research, but seeks to consolidate the state of scientific understanding on global climate change. To date, it has published four assessment reports (AR1, AR2, AR3 and AR4), in 1990, 1995, 2001, and 2007, respectively. The fifth assessment report (AR5) is due to be published in September 2013. The assessment reports are prepared as a result of a lengthy process involving three separate working groups, Working Group 1 (WG1), Working Group 2 (WG2) and Working Group 3 (WG3), each covering different aspects of climate change.
6. These assessment reports are regarded as very influential in the development of national and international policies on climate change, and are widely cited in debates on the subject. Authors, contributors, reviewers and other experts who participate in the preparation of the assessment reports, are selected by the IPCC from a list of nominations received from governments and participating organisations, and those identified by the IPCC as having special expertise. None of them is paid by the IPCC, although if they are employed by another organisation, they may continue to receive their salary even when undertaking any work in relation to the assessment reports.

The Request for Information

7. The Appellant's request which is the subject of this appeal, was made on 24th July 2011 and was for:

"... Exact copies of all the information held by you as a result of the participation of your employees in the Second Lead Authors Meeting (LA2), 18-22 July 2011, at Brest, France. In particular, but without prejudicing my rights to all the information I wish to have an exact copy of what is referred to as the zero order draft of the AR5 WG1 Assessment Report, together with the comments on [sic] of its reviewers and a list of their names..."
8. Subsequently, he clarified that his request was *"... limited to any and all ZODs of AR5 WG1 Chapters that you hold"*.
9. As already noted, WG1 stands for Working Group 1. The reference to ZODs is to the Zero Order Drafts, the preparation of which is the first stage towards the preparation of an assessment report. We will explain ZODs further, below.
10. The MO replied on 19 August 2011 refusing the request on the basis of regulations 12(3), 12(4) (d), 12(5)(a) and 12(5)(f) of the Environmental Information Regulations 2004 ("EIR). On 18 November 2011, following an internal review requested by the Appellant, the MO upheld its refusal on the same grounds.

The Complaint to the Commissioner

11. The Appellant complained to the Commissioner under section 50 of the Freedom of Information Act 2000 ("FOIA"). The Commissioner undertook inquiries, following which he issued a Decision Notice.
12. The Commissioner first considered the MO's refusal under regulation 12(5)(a) (disclosure would adversely affect international relations). Having found that this exception applied to all the information withheld, he did not go on to consider whether the other exceptions relied on by the MO were also engaged.
13. The Commissioner noted that when considering the adverse effect on international relations under regulation 12(5)(a), it is relevant to consider whether the information was obtained from a state other than the UK or from an international organisation or international court. In this case, the Commissioner was satisfied that the information in question was obtained from an international organisation, namely the IPCC.
14. He noted that the MO had explained that the information was regarded as being confidential and that divulging it would damage its reputation as a key contributor to the international debate on climate change. It would be excluded from any further participation in the IPCC process, thereby prejudicing the UK's standing in the international scientific community. The Commissioner also noted that the IPCC's WG1 Technical Support Unit had said that disclosure of the information would have a *"deleterious effect on the international relations between the IPCC and the United Kingdom"*, and

that if the information was disclosed, it would have to reconsider working arrangements with the MO and others within the UK.

15. The Commissioner considered that under regulation 12(5)(a), it was necessary to ask whether there would be an adverse effect on the UK's international relations with the IPCC, not just whether there would be an adverse effect on the MO's relationship with the IPCC. The Commissioner accepted that there would be a broad, overall effect on the UK's relations with the IPCC. While he did not necessarily accept that the MO would be completely excluded from the IPCC process, he accepted that disclosure of the information would adversely affect international relations between the UK and the IPCC.
16. As regards the public interest balance, the Commissioner accepted the Appellant's argument that there was a very strong public interest in openness and transparency regarding the work of the IPCC, and that there was also a very strong public interest in the disclosure of information which would further inform public debate on the issue of climate change, and in relation to research on that subject. He noted, however, that the evidence did not point to a fundamental problem with the science nor did it show, for example, that the IPCC was ignoring important evidence. If it did, that would have raised the public interest in disclosure to a higher level. The Commissioner also considered that there was a very strong public interest in not impeding the working relationship between UK researchers or institutions and international organisations or international scientists, and in not disregarding the IPCC's rules, regulations and agreements by disclosing information which the IPCC clearly regards as confidential. For all these reasons, the Commissioner found that the public interest in favour of disclosure was outweighed by the public interest in maintaining the exemption.

The Appeal to the Tribunal

17. The Appellant has appealed against the Decision Notice. He challenges, in particular, the Commissioner's findings that disclosure of the information would adversely affect international relations. He says that WG1 should be distinguished from the IPCC itself and that WG1 does not have any authority on behalf of the IPCC to state that disclosure of the information would adversely affect the IPCC's relations with the UK. The Appellant also argues that the requested information is not an official IPCC document, and that it becomes so only when the IPCC itself votes in a plenary meeting to accept the final report.
18. He further says that the public interest balance favours disclosure. The public should be able to see, for itself, that each stage of the IPCC process has been undertaken in accordance with the IPCC rules, before the respective governments accept the results on behalf of their public, particularly since there have been, in the past, numerous breaches of the IPCC rules by scientists in their research.

The Tribunal's Jurisdiction

19. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
20. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

The Statutory Framework

21. It is not in dispute that the correct access regime for the information requested is the EIR. The disputed information clearly comes within the definition of "environmental information" in regulation 2(1)(c) of the EIR as comprising "activities affecting or likely to affect" factors of the environment.
22. The EIR implements Council Directive 2003/4/EC (the "Directive") on public access to environmental information. The Directive is made pursuant to the EU's obligations under the UN/ECE Convention on Access to Information, Public Participation in Decision – Making and Access to Justice in Environmental Matters ("the Aarhus Convention").
23. The EIR creates a duty on public authorities to make environmental information available on request. They must do as soon as possible, and not later than 20 days after receiving the request. If they refuse, they must do so within the same time frame. Under Regulation 14(3), they must also specify their reasons for refusal 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).*
24. As already noted, the Commissioner reached his decision on the basis of the exception contained in regulation 12(5)(a). This provides that a public authority may refuse to disclose information to the extent that its disclosure "*would adversely affect international relations, defence, national security or public safety*".
25. If this or any other exception is engaged, it is still necessary to consider whether "*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information*" (regulation 12(1)(b)).

26. There are two other provisions it is necessary to keep in mind. First, regulation 12(2) requires public authorities to apply a presumption in favour of disclosure. Second, Article 4.2 of the Directive requires the exceptions to be interpreted “in a restrictive way” (see also Recital 16 of the Directive and Article 4.4 of the Aarhus Convention).

Issues

27. There are two issues to be decided in this appeal in relation to regulation 12(5)(a), namely:
- a) whether disclosure of the requested information would adversely affect relations between the IPCC and the UK? If it would, then:
 - b) whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
28. As already noted, the MO also refused the request on the basis of regulations 12(3) (personal data), 12(4)(d) (material still in the course of completion or unfinished documents), and 12(5)(f) (adverse effect on the interests of the person who provided the information). In the appeal before us, the respondent’s evidence and submissions have concentrated on regulation 12(5)(a). The Second Respondent had addressed the other exceptions in only a limited way and the Commissioner did not address them at all. We pointed out to the parties, at the start of the hearing, that if we decided against the MO in respect of regulation 12(5)(a), we would need to go on to consider the other exceptions (to the extent that they were still being relied on), and that it was for the respondents therefore, to make out their case on those exceptions. In the event, very little more was forthcoming in submissions. However, we have reached our findings on the basis of regulation 12(5)(a). It has not been necessary, therefore, to consider the other exceptions further.
29. We are not called upon to consider whether the disputed information is held by the IPCC. The Appellant’s request was made to the MO and the MO accepts that it holds that information.

Evidence

30. The Appellant requested an oral hearing. Prior to the hearing, the parties lodged an agreed bundle comprising some 400 pages. The parties also lodged skeleton arguments/written submissions. In addition, the Appellant lodged a further set of papers, following the hearing, comprising extracts from the various web pages he had referred to in his written submissions. We have considered all the material submitted, even if not specifically referred to in this determination.

Dr Stott

31. At the hearing, we heard evidence from Dr Peter Stott who is the Head of Climate Monitoring and Attribution, at the MO. He has held this position

since 2008, although has been employed by the MO since 1996. He adopted his witness statement and was examined, and cross-examined, and we also asked him a few questions. We summarise his evidence below.

32. In addition to writing numerous scholarly works on the subject of climate change, Dr Stott says that he has been closely involved with the fourth and fifth assessment reports of the IPCC. In relation to the fifth assessment report (AR5), in particular, he is the “co-ordinating lead author” of one of the 14 chapters which, together with the Summary for Policy Makers, the Technical Summary, and three annexes, make up the WG1 AR5 Report. He is responsible, together with a professor from the University of Tasmania, for leading a team of 15 scientists from 9 countries to produce that chapter. WG1 involves about 205 scientists. There are approximately two lead authors per chapter.
33. Dr Stott explained that the final assessment reports are produced following 3 drafts of each chapter. The first draft is the Zero Order Draft (“ZOD”), followed by the First Order Draft (“FOD”), and the Second Order Draft (“SOD”).
34. The ZOD for each chapter is written by a new author team starting with more or less a blank piece of paper. Many scientists in the team are entirely new to IPCC’s work and he says that this stage, therefore, serves as a training exercise for the author team. Dr Stott describes the ZODs as an “interim internal document”. Although the ZODs are circulated externally, this is only to a small group of five or six designated experts, who are asked to provide informal comments on the text.
35. The feedback received is then included in the further work done to produce the next draft, the First Order Draft. The FOD is a more mature document than the ZOD in which the higher level messages get developed. The FOD is sent out to self-declared experts to review. Anyone can declare themselves to be an expert and then receive and comment on the FODs.
36. The next stage is the SOD. This follows a similar process as for the FOD, but at this stage, the draft is reviewed by the various governments involved and experts on their behalf. That then leads to the final report.
37. Once the final assessment report is complete, approved and published, the FODs and the SODs are also published, but the ZODs are not. As to why the ZODs are treated differently, Dr Stott says that it is a more immature document. It is the stage at which the scientists can explore their ignorance and make mistakes.
38. As to why disclosure of the ZODs would damage relations between the IPCC and the UK, he says that the authors of the WG1 AR5 have agreed to abide by the IPCC WG1 principles of confidentiality. Releasing the ZODs would be a breach of trust in relation to their international colleagues on the author team who were told that the document would remain confidential. Those colleagues would no longer be able to trust them with documents which are regarded as confidential.

39. Dr Stott acknowledged, however, that the consequences of disclosure would be different if disclosure was made in bad faith, as opposed to disclosure made pursuant to a legal obligation. He also conceded that UK scientists would likely not be excluded entirely from involvement with the assessment reports if the ZOD is released, but says that they may be excluded from certain discussions and exchanges of views that had not reached a mature stage. He considers that it would be more difficult for UK scientists to participate in those kinds of frank discussions.
40. He also acknowledged that it is very important that the public should be fully informed about the processes leading to the production of the IPCC WG1 AR5. Dr Stott says, however, that a ZOD is, by its nature, incomplete in terms of coverage of the literature and is premature in terms of its assessments, and that because of this, it is not suitable for wider dissemination. No judgements should be based on it, other than by the author team in developing their view on how to move forward to preparing the FOD. The publication of an interim internal document that contains preliminary and incomplete information and that was produced solely for the purposes of the lead author team would serve no purpose for the public. It could also be misused, putting the integrity of the whole report at risk. Whatever claims there may have been in the past of scientific malpractice, that is not relevant to the issues in this appeal. Assessment reports have to withstand the sceptical scrutiny of the scientific community at large and when AR5 is published, all official drafts, review comments and responses will also be published, except for the ZODs.
41. He conceded, however, that there has been no such fall-out nor any particular adverse consequences for the work of WGI as the result of the unauthorised publication, on the Gallopingcamel website, of 7 of the 14 ZODs, and the unauthorised publication of all 14 SODs. Dr Stott said he was also not aware that the publication of these drafts caused any particular unrest or concern amongst the IPCC scientific community.
42. As regards the Appellant's assertion that the ZODs do not belong to the IPCC, he says that as a lead author, he does not regard the ZOD as being his property, nor the property of his employer (the MO), but the joint product of an international team of scientists.

Documentary evidence

43. The parties have lodged extensive documentary evidence in the agreed bundle. They have drawn our attention to various items, including in particular, the documents we refer to below.
44. Document headed "Principles Governing IPCC Work". It was approved on 1 October 1998 and was amended in November 2003 and again in April 2006. Appendix A sets out the procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC reports. It explains, *inter alia*, the review process at each stage. It articulates three principles governing the review being first, the best possible technical and scientific advice which should be included, second, a wide circulation process ensuring representation of independent experts, and third, that the review process should be objective, open and transparent.

45. Document headed "Guidance Note for Holders of Functions and Offices in IPCC Working Group 1". It is dated 8 October 2010 and is from the two Co-chairs of WG1. Its purpose is stated to be to address issues of confidentiality, and to provide individuals who hold office or who are employed at the WG1 Technical Support Unit during the AR5 assessment cycle, with a set of recommendations to facilitate their work for IPCC. It is intended to ensure transparency and to avoid situations which could endanger the integrity of the work. It says that it is IPCC's practice that all drafts of the assessment reports are confidential and should not be cited, quoted or distributed. This principle is clearly stated when drafts are sent out for expert and government review and also applies to the review comments and author team responses. Upon completion of the assessment report, the review comments and responses are made publicly available.
46. There is a series of communications between Stuart Mathews who manages the Freedom of Information Unit at the MO, and Pauline Midgley, Head of the WG1 Technical Support Unit. In an email from Mr Mathews dated 9 May 2011, he says that the MO has received a request for information for the detailed timetable for the IPCC AR5 WG1 assessment process and any instructions sent to authors and reviewers. He asks whether this information can be released. In a subsequent email, he says that the information must be disclosed under the EIR unless it can be shown that it is confidential to the IPCC.

This is then followed by a letter dated 18 May 2011 to Mr Mathews signed by the two WG1 Co-chairs. They say that all report drafts are confidential and should not be cited, quoted or distributed. They go on to say that:

"As a final comment, a decision to disclose information when WG1 has specifically indicated that it would adversely affect our interest to do so would force us to reconsider our working arrangements with those experts who have been selected for an active role in WG1 AR5 from your institution and others within the United Kingdom. It would therefore have a deleterious effect on the international relations between the IPCC and the United Kingdom".

47. Document dated 30 August 2011 signed by the two Co-chairs of WG1. It is headed "Working Group 1 Position on Confidentiality of Draft Reports, Other Documents and Communications". It states, "*inter alia*" that:

"The IPCC Principles state that the assessment process should be on an open and transparent basis and that review is an essential part of the process. Transparency implies that the public should be informed about the mechanism of an IPCC assessment and about the framework within which an IPCC Working Group (WG) carries out its assessment. Therefore, WG1 proactively releases such information in the form of WG1 Guidance Notes. Furthermore WG1 is committed to a broad expert review of report drafts at the stages in the development of the Fifth Assessment Report (AR5) described in the IPCC Procedures...".

It goes on to refer to refer to an amendment to the IPCC procedures which was approved in May 2011 and which states that "*the drafts of IPCC*

Reports and Technical Papers, which have been submitted for formal expert and/or government review, the expert and government review comments, and the author responses to those comments will be made available on the IPCC website as soon as possible after the acceptance by the Panel and the finalisation of the Report”.

It then deals specifically with ZODS as follows:

“As is common practice in developing IPCC assessment reports, WG1 AR5 authors have produced an interim internal document, the so-called Zero Order Draft (ZOD). This was sent for review to invited experts who provided comments that are now being taken into account in the drafting of the FOD. The ZOD is a preliminary, internal draft only that is not subject to a formal review and is clearly a pre-decisional document. It is therefore not in accordance with the IPCC procedures for this draft, and documents associated with its development such as the review comments and list of reviewers to be made public”.

It then says that the premature release of draft reports is not in the public interest because they may be incomplete. Premature disclosure could adversely affect international relations because it would be contradicting a decision of the Panel that was agreed by all member governments. It would also adversely affect the interests of WG1 because it would affect the ability of the authors to work in a free and undisturbed way towards a comprehensive and unbiased assessment.

48. Document from the 33rd session of the IPCC in May 2011. It is headed “Review of the IPCC Processes and Procedures, Proposal by the Task Group on Procedures”. It explains that the Task Group on Procedures was established at the 32nd session in October 2010 and relates to Appendix A to the Principles Governing IPCC Work (Procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC Reports”). Paragraph 6.3.2 records an issue raised by the WG1 Co-chairs. It notes that clear guidance is needed on what the rules are for the confidentiality of draft reports and other documentation during drafting and review. It states that on the one hand, there is a need for transparency and openness of the assessment process. On the other hand, publicising drafts has serious drawbacks. There is a risk that drafts contain errors or statements that are still unbalanced and that have to be corrected at a later stage. It goes on to state that these could prematurely circulate in the public domain, creating confusion and this would be “a bad service” of IPCC to society. It states that the Task Group believes that the drafts should be kept confidential until acceptance of the full report. This is followed by a proposed decision that all drafts of IPCC assessment reports (including the final draft) will be considered to be confidential material, not for public distribution, quotation or citation until acceptance by the Panel of the final IPCC report. The first order draft, second order draft and final draft, the expert and government review comments and the author responses to those comments on both drafts will be made available on the IPCC open website on a clearly visible place after acceptance of the report by the Panel.

49. Document headed “IPCC 33rd Session, 10 - 13 May 2011, Abu Dhabi, Decisions Taken with Respect to the Review of IPCC Processes and Procedures”. This states, *inter alia*, at paragraph 8, that:

“...the Panel decided that the drafts of IPCC Reports and Technical Papers which have been submitted for formal expert and/or government review, the expert and government review comments, and the author responses to those comments will be made available on the IPCC website as soon as possible after the acceptance by the Panel and the finalisation of the Report. IPCC considers its draft reports, prior to acceptance, to be pre-decisional, provided in confidence to reviewers, and not for public distribution, quotation or citation”.

It then notes that there was a sentence preceding this paragraph that had been deleted in error and it proposes an amendment reinstating it to make it clear that the decision only pertained to the open availability of drafts, comments and responses, and not to the availability to reviewers on request. The deleted words are as follows:

“All written expert, and government review comments will be made available to reviewers on request during the review process.”

50. Series of email communications between IPCC Secretariat, and Peter Morcombe. It begins with an email dated 4 January 2012 from an unnamed individual at the IPCC Secretariat stating that they have learnt that a number of ZOD chapters have been posted on Mr Morcombe’s gallopingcamel website and they requested that they be immediately removed. It goes on to say that these preliminary drafts will undergo many changes during the IPCC’s revision process and it could be misleading, therefore, to draw conclusions from them which is why they are not widely circulated. It makes reference to the IPCC Procedures in Article 4.2 of the Principles Governing IPCC Work to the effect that IPCC considers its draft reports to be provided in confidence to reviewers and are not for public distribution, quotation or citation.

Mr Morcombe replied by email on 8 January agreeing to restrict access to the files posted on the website, but asking to know the authority of the IPCC representative. As to how the ZODs came into his possession, he says that:

“... there are insiders who believe that the deliberations of government working groups should be open to the public unless matters of national security are involved. It follows that you can no longer count on maintaining secrecy, especially given the huge financial implications of your work”.

He goes on to say that *“it is clear that IPCC’s review procedures have some shortcomings given the large number of serious errors that were found in AR4. Many of these embarrassments would have been avoided if early drafts had been open to the public.”* He ends by proposing that if his team is allowed to receive updates of the WG drafts, they will undertake to send comments without making them public.

There is then a further email from Mr Morcombe dated 26 March 2012 stating, *inter alia* that since his earlier e mail has been ignored, the information in question will be re-posted.

Findings and Reasons

51. The first question we must address is whether disclosure of the information the appellant has requested, namely the ZODs, would have an adverse effect on international relations. It is not in dispute that the international relations in question are relations between the IPCC and the UK (rather than the MO's relationship with the IPCC).
52. In order for regulation 12(5)(a) to be engaged, it must be shown that disclosure *would* affect international relations. To that extent, it is a high threshold. This is in contrast to the exemption in section 27(1) of FOIA which is engaged where disclosure "would or *would be likely* to prejudice relations between the United Kingdom and any other State".
53. The effect must also be *adverse*. However, there is nothing in the wordings of regulation 12(5)(a) that requires the adverse effect to be significant. It follows that even a modest adverse effect is sufficient to engage the exception. This does not mean that the extent of the adverse effect is not relevant. Indeed, it is likely to be a key issue when undertaking the public interest balancing exercise under regulation 12(1)(b), but that of course is a consideration that arises only after it is found that the exception is engaged.
54. The MO says that there would clearly be an adverse effect. It relies largely on the statement from the Co-chairs of WG1 that disclosure of the information would have a "deleterious effect" on relations between the IPCC and the United Kingdom. The Co-chairs have not been more specific as to the nature and extent of any such effect. For this, the MO relies on the evidence of Dr Stott who says that in the event of disclosure, his international colleagues would no longer be able to trust the UK scientists involved in AR5 with confidential documents. They may be excluded from certain discussions and exchanges of views which had not reached a mature stage and this would have an adverse effect on the UK's role in and influence on the climate change debate. He concedes however that the consequences of disclosure would likely be different if it was made in bad faith, as opposed to disclosure made because of a legal obligation to disclose. He also concedes that in the event of disclosure of the ZODs, particularly disclosure made pursuant to a legal obligation to disclose, it is unlikely that UK scientists would be entirely excluded from involvement with the assessment reports.
55. The Appellant disputes the MO's assertion that it is clear from what the WG1 Co-chairs have said that that the IPCC does not wish the ZODs to be disclosed. He says that WG1 is not the IPCC itself and that the Commissioner erred in not understanding this distinction. He also says that the ZODs have not been produced by the IPCC and do not represent their views.
56. We accept that there is a distinction between WG1 and the IPCC. The IPCC is a panel of governments. WG1 is a group of scientists who have

volunteered to work in accordance with the “Principles Governing IPCC Work” referred to above. However, we do not agree with the appellant that there is much of a point to be made in the fact that the MO relies on the position as expressed by the Co-chairs of WG1 rather than by the IPCC itself. There is nothing to suggest that the Co-chairs of WG1 were not acting within the proper scope of their authority or doing anything other than expressing the wider views of the IPCC on the disclosure of the draft reports. The Commissioner says, and we agree, that there is no basis for inferring that WG1’s decision with respect to whether the withheld information should be disclosed was a decision of the kind that could only be taken by the panel in plenary meetings.

57. We also note that the two co-chairs of WG1 sit on the IPCC Executive Committee. Had it been the case that what they had said did not represent the views of the IPCC, we would have expected that to have been made clear by the IPCC. On the contrary, what they said is echoed by what is said by the IPCC Secretariat in its communications with Peter Morcombe as referred to at paragraph [] above following the unauthorised publication of several ZODs on his gallopingcamel website. Although the evidence suggests that the IPCC Secretariat did not follow through on that exchange of communication, their position as expressed is in line with the position of the Co-chairs.

58. As to how we should approach the question of whether disclosure would give rise to an adverse effect on international relations, the MO has referred us to the following passage in the decision of a differently constituted Tribunal in **Campaign Against the Arms Trade v. IC and MOD (EA/2006/0040)**:

“...we would make clear that in our judgement prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk” (paragraph 81)

59. Although that case was decided under FOIA rather than the EIR, we accept that the comments apply equally in an EIR context. However, as we indicated to the MO at the hearing, the decision is of the First-tier Tribunal. Not only are we not bound by it, but it is inappropriate to seek to distil from it a legal test and then attempt to show how that test is met in the present case, as the MO has sought to do. It cannot be more than an indication of how a differently constituted Tribunal has approached a similar issue. That is not to suggest that we do not find the comments in that case to be helpful. We do, and we agree that it is not necessary to demonstrate actual

harm or any quantifiable loss or damage, and further that it is enough if it makes relations more difficult.

60. In the present case, we accept that in the event of disclosure, there would be some adverse effect on the UK's relations with the IPCC (although in due course, we will need to look more closely at what that might entail). We find, in short, that the exception is engaged. Indeed to find otherwise would be to find that the position expressed by the Co-chairs of WG1 is no more than posturing. There is no evidence to support that. It may be that the MO is overstating the reality of that "deleterious effect", but that is a separate issue.
61. This brings us to the key issue in this appeal, and that is whether "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information". In considering this, we are mindful that although the request relates to the ZODs for WG1, both sides have put forward their arguments in relation to ZODs generally. It has not been suggested that there is anything unique about the ZODs for WGI in particular.
62. We will consider first the public interest in disclosure. Climate change and the part played by human activity, is a controversial and multi-faceted subject. Views differ but it is clear that there is a strong public interest in the work of the IPCC in relation to AR5. Indeed the MO accepts that anything to do with climate change and in particular, the work of the IPCC, is of strong public interest.
63. The public interest is not limited to those in the scientific community with a particular interest in the subject of climate change. Although they may have an expertise in the subject matter, given the widespread public concern on the subject of climate change, we find that the interest likely extends well beyond the scientific community to a great many in the public at large. We also accept that it is in the public interest that there should be a well-informed understanding and debate on a subject of potentially very significant implications for the future of our planet.
64. We accept that this interest extends not just to the final report, but to the various drafts of AR5, including the ZODs. These drafts allow the public, and particularly those with a sufficient knowledge of the subject, to understand how certain views contained in the final report were arrived at, and on that basis, to form an informed opinion on whether those views were arrived at on a sound basis. In other words, disclosure of the drafts would help to promote the democratic accountability of the final report and this would add to and further inform the debate on climate change. While we note that the IPCC and indeed, the MO, do place a considerable amount of information into the public domain such that there is already a reasonable level of transparency, there is still a public interest in openness and transparency regarding the work of the IPCC generally, and indeed this is recognised in IPCC's own principles (see paragraph 44 above).
65. Although the Commissioner considered that there is no evidence to point to any fundamental problems with the science that would indicate, for example, that the IPCC is ignoring important data, the Appellant sets out at

paragraph 20 *et seq* of his grounds of appeal, what he says is evidence of breaches of IPCC rules by scientists. He says, in particular, that in November 2009, the public were alerted, through the Climategate and Glaciargate affairs, to the numerous breaches of IPCC rules by scientists with agendas of their own. He maintains that it is clear that despite the IPCC rules requiring it and despite the public being repeatedly told that the assessment process is open and transparent, the reality revealed in the leaked emails was of conspiracy, concealment and refusal by the scientists to disclose any information. The Appellant's concerns about the integrity of the science is echoed in an article he has submitted by John R. Christie at the University of Alabama headed "Examining the Process Concerning Climate Change Assessments". We do not need to reach any findings about whether such concerns are well-founded. What is clear is that there has been considerable public debate about the validity of different scientific techniques used to assess climate change and that questions have been raised about whether climate science is as open as perhaps it should be, and for this reason too, there is a public interest in disclosure of all the drafts.

66. The evidence, as already noted, is that the FODS and SODs are disclosed after publication of the final report, but the ZODS are not. We consider that there is a public interest in the drafts being disclosed earlier. Disclosure before publication of the final report would mean that the public might understand, discuss and assess the work of the IPCC WG1 AR5 at an early stage in the process. We consider and indeed the MO acknowledges and that there is a public interest in that.
67. We turn now to the nature and extent of the public interest in maintaining the exception, and whether this outweighs the public interest in disclosing the information. The public interest in maintaining the exception as put forward is two-fold. First, there is the public interest in ensuring that those working on AR5, whether in the UK or elsewhere, are able to carry out their work effectively. Second, there is the public interest in there being good relations between the IPCC and the United Kingdom so that the scientific community here can continue to play an active role, make a meaningful contribution to, and influence the global debate on climate change.
68. The two issues are of course related. The reason for the claimed "deleterious effect" is because, as it is argued, disclosure would compromise the work of WG1. However, it may be useful to consider the two issues separately.
69. Looking first at whether and how disclosure of the ZODs would compromise the ability of those working on AR5, whether in the UK or elsewhere, to carry out their work effectively, the MO argues that the ZODs are very early drafts and that the author teams are still developing their views. Some of them may be working on an assessment report for the first time and need a safe space in which to make mistakes without public scrutiny. The MO also says that the ZODs could be misused. These preliminary drafts will undergo many changes and it could be misleading to draw conclusions from them. The early thoughts may be taken out of context and misunderstood. The

scientists may be expected to account for work that is still in progress and for views that are still being developed.

70. In our view, the fact that the ZODs represent a very early draft will be apparent to anyone considering their contents. It can be explicitly stated if this is felt necessary. We do not see that this is a reason for why it is not in the public interest that the ZODs should be disclosed. Likewise, we accept that some of the scientists working on ZODs may be working on an assessment report for the first time, but again that is no more than saying that the ZODs are an early and immature draft.
71. The evidence is that a number of ZOD chapters were published on the gallopingcamel website. Dr Stott says that he is not aware that the publication of these drafts caused any particular unrest or concern amongst the IPCC scientific community. We expect that if there had been any adverse consequence, he would have known and we take it from this evidence, that there was none. It does not of course follow that issues would never arise from the publication of ZODs, but the fact that publication of 7 of the 14 ZODs did not give rise to any of the claimed difficulties does suggest that the concerns raised relate to possible, rather than probably consequences.
72. Looking now at the public interest in good relations between the IPCC and the United Kingdom, the MO argues that a specific harm arising from disclosure would be the damage caused to its reputation as a key contributor to the international debate on climate change if it divulged information that had universally been agreed as confidential. The MO says that the relationship between it and the IPCC allows for the free and frank exchange of views on the understanding that it would be treated in confidence. If the UK does not respect such confidences, its ability to protect and promote UK interests will be adversely affected. It says that disclosure would mean that UK scientists would be excluded from any further participation in the IPCC process, thus prejudicing the UK's standing in the international scientific community. Disclosure would also deter participant organisations from sharing confidential information with UK institutions in the future.
73. The MO also argues that if the IPCC were to become reluctant to use UK scientists in international research processes, this would adversely affect the UK's standing in the scientific community, and adversely affect the development of cutting-edge internal scientific dialogue in the UK. Furthermore, if UK experts are denied the opportunity to participate in international projects of this nature, they might choose to seek employment in Universities and institutions outside the UK. This would undermine the UK's ability to undertake science and participate in international scientific research projects such as IPCC.
74. The Appellant says that the UK government has not confirmed that the official view of the IPCC itself is that any disclosures of WG1 information will result in UK scientists being treated differently from those of other IPCC member countries. He also says that given the central role that the MO and

other British institutions have played in IPCC assessments, such a threat is absurd.

75. We accept that there is a very strong public interest in not impeding the working relationship between UK researchers or institutions and international organisations or international scientists and that there is a strong public interest that the UK's involvement in the IPCC process is not damaged by disclosure of this information. We consider that these are legitimate and important public interests.
76. In our view, the real issue is how the IPCC would in fact respond if the information were to be disclosed and to what extent the harm that the MO says would arise, would actually arise. The MO accepts, as does Dr Stott, that there is a significant difference between the situation in which the information is disclosed pursuant to a legal requirement to disclose on the one hand, and the unauthorised act of an individual or a group of individuals on the other. We find it likely that the former would be met with greater acceptance and with consequently less deleterious effect. We do not find it likely that the UK would be completely excluded from the IPCC process if this information were to be disclosed. We find it likely that the IPCC would take a balanced view, considering the leading role the UK plays in the process.
77. Where does the balance of the public interest lie? We remind ourselves that the presumption under the EIR is in favour of disclosure. We consider that the public interest considerations in favour of disclosure as outlined above, are strong and clear. We also consider that there is legitimate concern about the consequences of disclosure. However, in our view, some of those concerns are hypothetical. We do not find that there is a real likelihood that the UK and its scientists would be excluded, either informally by international scientists, or formally by the IPCC, if the ZODs are disclosed pursuant to the EIR. There were no such adverse consequences flowing from publication of the ZODS on gallopingcamel, and IPCC's own response to that unauthorised publication was muted, at best.
78. Nevertheless, we find that the public interest balance favours maintaining the exception. We give weight in this regard to the IPCC's own position as regards early disclosure of draft reports. It is clearly the IPCC's position that drafts should not be disclosed prior to the publication of the final report. We are mindful that it is their processes that are in issue and we accept, from the evidence before us, that their position as regards publication of draft reports is a carefully considered position. We consider that there is a strong public interest in the UK not disregarding the IPCC's rules and processes by ordering disclosure against the express policy position of the IPCC. We consider that as part of the IPCC, it is in the public interest that the UK should respect its rules and processes and that failure to do so, would damage the UK's standing and relationship with this international organisation. That, in our view, would not be in the public interest, even if UK scientists are not actually excluded from the IPCC process as a result. We consider that the countervailing public interest in disclosure of the ZODs before publication of the final report are not such as to outweigh those considerations.

79. The position would likely be different if disclosure was sought after the publication of the final report. We note that the Commissioner likewise took into account the timing of the request and the specific impact disclosure would have while the IPCC fifth assessment process was on-going (paragraph 27 of the Decision Notice). The evidence is that after the final report is published, all drafts, except for the ZODs are made available to the public. We note that IPCC's own policy documents do not distinguish between ZODs and other drafts and there appears to be no clear policy nor a clear rationale for why the ZODs are not published at that time. Certainly, once the final report is published, any concerns about misuse of the ZODs or the information being taken out of context, falls away, as does, in our view, the concern about scientists new to the assessment report process having a safe space in which to develop their views without being held to account for views that are still in progress. At the point at which the assessment report is published, the FODs and SODs become available to the public and they are able to assess the robustness of the final report. Publication of the ZODS at the same time would have the effect, therefore, of promoting the public interest considerations in favour of disclosure as identified above, without compromising, to any significant extent, the concerns about disclosure relied on by the respondent.
80. What it would not do is to allow the public to put forward their views while the report is in draft stage and therefore, to influence the final report. However, we bear in mind that they can do so in relation to the FODs. Any person can declare themselves an expert and comment on the FODs. To the extent that there is a public interest in such contributions being made, we consider that that can reasonably be met through that process.
81. Although on the evidence before us, we consider that the public interest balance would favour disclosure after the final report is published, that can be no more than an indication. It is not within in our jurisdiction to order disclosure at any future date. We can only consider the circumstances as at the date of the request. Disclosure at a later date, would have to be subject to a request at that time and would have to be considered in light of the evidence and circumstances at that time. Given that we are not yet at that stage, our decision can only be in relation to disclosure as at the date of the request, ie, before the publication of the final report. In that regard, and on a balance of probabilities, and for the reasons given, we find that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Decision

82. This appeal is dismissed. Our decision is unanimous.

[Signed on the original]

Anisa Dhanji
Judge
26 July 2013