



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

**Case No. EA/2010/0010**

**ON APPEAL FROM:  
Information Commissioner  
Decision Notice ref FS50242937  
Dated 14 December 2010**

**Appellant:** David Holland

**Respondents:** (1) Information Commissioner  
(2) OFCOM

**Determined on papers**

**Date of meeting:** 14 May 2010

**Date of decision:** 17 May 2010

**Before**

**HH Judge Shanks**

**Roger Creedon**

**Nigel Watson**

**Decision on preliminary issue**

The Tribunal rules in relation to issue (i) identified in paragraph 1 of its directions dated 19 March 2010 that the “disputed information” does not fall within the scope of the Appellant’s request dated 23 July 2008.

## **Reasons for decision**

### **Background facts**

1. On 8 March 2007 Channel 4 broadcast “The Great Global Warming Swindle”, a programme which sought to challenge the proposition that human activity is the major cause of global warming. OFCOM received many complaints about the programme including various complaints sent to it by Dave Rado which OFCOM partly upheld on 21 July 2008 in their Broadcast Bulletin Issue 114 at pages 43-69 under the general heading “Complaint by the Intergovernmental Panel on Climate Change”. Mr Holland, the Appellant in this case, believes that that “Complaint” was not properly made on behalf of the IPCC: that is not an issue, however, on which the Tribunal needs to adjudicate any more than it does on the great issues raised by Channel 4’s programme.
2. On 23 July 2008 Mr Holland made an on-line request to OFCOM for information under the Environmental Information Regulations 2004 and/or Freedom of Information Act 2000. The relevant part of the request was in these terms:

**[1] Please email me a copy of the IPCC complaint referred to in your Broadcast Bulletin Issue 114 of 21 July 2008.**

**I wish to be sure that your quotations from it are entirely correct. This arises from your statements on page 51 of the bulletin where you say: “If the lead author then wishes to make the change he/she has to account for the decision to his/her review editor, who will make the final decision.” and also “The IPCC stated that no change could be made to the Summary for Policy Makers without the agreement of the IPCC scientists.”**

**The first statement entirely contradicts the internationally agreed Appendix A to the Principles Governing IPCC Work published at the IPCC website, and significantly misleads you and the public as to how the IPCC should operate.**

**The second statement is demonstrably false, if by “IPCC Scientists” Ofcom and the public is expected to believe this refers to the ‘thousands of experts’ usually**

**cited as agreeing to the IPCC conclusions. Just 33 scientists had sole responsibility for writing the published version of SPM.**

**[2] Please also indicate who at the IPCC sent the complaint.**

OFCOM replied on 20 August 2008 refusing the request on various grounds which do not concern us. They stated in the email: “You have requested a copy of the IPCC complaint referred to in our Broadcast Bulletin 114 of 21<sup>st</sup> July 2008 (pages 43-69).”

3. In due course Mr Holland complained to the Information Commissioner and appealed to the Information Tribunal about the way his request for information had been dealt with and on 19 March 2010 the Tribunal directed (on the basis of agreed draft directions supplied by the parties) that the following issue should be determined as a preliminary issue on the papers without an oral hearing:

**Whether the document at [www.ofcomswindlecomplaint.net](http://www.ofcomswindlecomplaint.net) in conjunction with paragraphs 5.2 and 5.3 of the letter dated 6 August 2007 from Mr Dave Rado to OFCOM comprise the entirety of the information held by OFCOM falling within the scope of the Appellant’s request dated 23 July 2008 or whether any of the documents subsequently disclosed by OFCOM to the Appellant in redacted form as attachments B-D to OFCOM’s letter dated 3 March 2010 and/or as annexes 1 and 2 to its letter dated 10 March 2010 (“the disputed information”), fall within the scope of the Appellant’s request dated 23 July 2008.**

The Tribunal’s task in relation to this preliminary issue is simply to determine whether the “disputed information” fell within the scope of the request we have set out in paragraph 2 above. We take it as clear law that a request must be interpreted objectively in the light of the surrounding circumstances and that the subjective intention of the requester and the subjective understanding of the recipient of the request are irrelevant. We will consider the various heads of disputed information in turn.

#### Attachment B

4. Attachment B to OFCOM’s letter of 3 March 2010 is a substantial document headed “Reply to Channel 4’s Response to the Fairness Complaint Regarding *The Great*

*Global Warming Swindle*". It is, as we understand it, the document which is the basis for the section at pages 50-54 of the OFCOM Broadcast Bulletin 114 under the heading "The IPCC's response to Channel 4's first statement", which follows a section headed "The Complaint" (at pages 44-47) and a section headed "Channel 4's first statement in response to the complaint" (at pages 47-50) and which precedes a section headed "Channel 4's second statement in response to the complaint" (at pages 54-56) and a section headed "Decision" (at pages 56-69). It is Mr Holland's case that Attachment B falls within the scope of his first request for information ("a copy of the IPCC complaint referred to in Broadcast Bulletin 114")

5. It seems quite clear to us, based on the description we give above, that Attachment B, at least on the face of it, does not fall within the scope of the first request: it is not the "IPCC complaint" but rather the "IPCC's response to Channel 4's first statement". But Mr Holland relies on two points in particular.
6. First, he says that because in his request he specifically referred to errors which he believed had occurred at page 51 of the bulletin (ie in the section dealing with the IPCC response) the words "IPCC complaint" should be construed as including Attachment B. We doubt that a statement as to the motive for making a request for information can, otherwise perhaps than in rare cases, affect the clear meaning of a request; but, in any event, we do not read the words in Mr Holland's request starting "I wish to be sure that your quotations from it are entirely correct..." as necessarily indicating to a reasonable reader that he wanted to see Attachment B at all: they merely recorded the reason that he wished to check that quotations from "it" [ie the IPCC complaint] were correct.
7. Second, he relies on the fact that OFCOM stated in their initial response to his request that he had requested "the IPCC complaint referred to in our ... Bulletin ... (pages 43-69)", ie referring to the entire section of the bulletin dealing with the complaint, including that dealing with Attachment B. We make three observations on this: (a) OFCOM's subjective understanding is, as we have said, irrelevant; (b) in any event, it is clear that the "IPCC complaint" is obviously the subject matter of the whole of pages 43-69 of the Bulletin including the section dealing with Attachment B, since it is the complaint which starts the whole process leading to the "Decision"; (c) OFCOM went on to say in their initial response: "The complaint you refer to is

formal complaint of unfair treatment made by the IPCC”: clearly the “formal complaint” does not include the reply to Channel 4’s response to the complaint.

8. Whatever may have been Mr Holland’s subjective intention in making his request we are satisfied that he did not ask for Attachment B.

#### Attachment C

9. Attachment C to OFCOM’s letter dated 3 March 2010 consists of four letters or emails from people involved with IPCC approving or authorising all or part of the complaint to OFCOM. It is clear from the standard complaint form completed by Mr Rado and dated 6 August 2007 which OFCOM sent to Mr Holland on 4 May 2010 that those letters did not form part of the IPCC complaint which had been submitted in its final version before they came into existence (see section 5 of the form). It is also clear that those letters do not fall within Mr Holland’s second request (“who at the IPCC *sent* the complaint”). We are satisfied that Attachment C did not fall within the scope of Mr Holland’s request.

#### Attachment D

10. Attachment D to OFCOM’s letter dated 3 March 2010 consists of a series of emails dated 21 November 2007, long after the complaint was made, and one dated 26 February 2007 (ie prior to the broadcast of the programme) which OFCOM say in their letter of 3 March 2010 was provided to them in the course of their investigation. It is clear therefore that none of these emails formed part of the “IPCC complaint” or indicated who at the IPCC sent it: it does not therefore fall within either part of Mr Holland’s request.

#### Annexes to OFCOM’s letter dated 10 March 2010

11. These consist of two further letters of authorization written on 9 and 13 August 2007 respectively. They clearly did not form part of the “IPCC complaint” and do not show who *sent* the complaint. We are satisfied they do not fall within Mr Holland’s request.

#### Conclusion

12. For the reasons set out above we therefore determine the preliminary issue against Mr Holland. A further telephone directions hearing will be arranged in accordance with paragraph 14 of the directions given on 19 March 2010 for 1630 on 27 May 2010 unless the parties indicate that that date is inconvenient on receipt of this decision.
13. Our decision is unanimous.
14. Finally we note that, although this case started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5) the Tribunal dealing with it is now constituted as a First-tier Tribunal. Under the rules of procedure now applying an appeal against this decision on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk).

Signed

HH Judge Shanks

Dated 17 May 2010



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

**Case No. EA/2010/0010**

**ON APPEAL FROM:  
Information Commissioner  
Decision Notice ref FS50242937  
Dated 14 December 2009**

**Appellant:** David Holland

**Respondents:** (1) Information Commissioner  
(2) OFCOM

**Determined on papers**

**Date of meeting:** 5 July 2010

**Date of decision:** 8 July 2010

**Before**

**HH Judge Shanks**

**Roger Creedon**

**Nigel Watson**

**Subject area covered:**

Environmental Information Regulations 2004

Advice and assistance, Reg 9

**Ruling on further issue**

The Tribunal rules in relation to issue (iv) identified in paragraph 1 of its directions dated 19 March 2010 that OFCOM failed to comply with regulation 9 of the Environmental Information Regulations 2004 in dealing with Mr Holland's request dated 23 July 2008 and issues the following decision notice supplementary to that issued by the Commissioner dated 14 December 2009.

**SUPPLEMENTARY DECISION NOTICE**

**Dated 8 July 2010**

**Public authority:** OFCOM  
**Name of Complainant:** David Holland

**The Supplementary Decision**

(1) For the reasons set out below, the Public Authority failed comply with the requirements of regulation 9(1) of the Environmental Information Regulations 2004 in that it failed to advise the Complainant that he may wish to formally request the following information:

- (a) The "Reply to Channel 4's Response to the Fairness Complaint Regarding *The Great Global Warming Swindle*";
- (b) Information as to who sent the "IPCC Complaint";
- (c) Information as to who (if anyone) authorised it.



(2) No further step is required to be taken by the Public Authority.

Dated 8 July 2010

Signed

Deputy Chairman, Information Tribunal

### **Reasons for ruling**

#### **Background**

1. The background to this on-going appeal is to be found in the Tribunal's preliminary ruling dated 17 May 2010 which should be read with this ruling.
2. The relevant requests for information were as follows:

**[1] Please email me a copy of the IPCC complaint referred to in your Broadcast Bulletin Issue 114 of 21 July 2008.**

**[2] Please also indicate who at the IPCC sent the complaint.**

The effect of our ruling dated 17 May 2010 was that the "IPCC complaint" referred to in request [1] did not include the "Reply to Channel 4's Response to the Fairness Complaint Regarding *The Great Global Warming Swindle*" (which was referred to as Attachment B in that ruling and which we will refer to as the IPCC Reply). At a subsequent directions hearing on 25 May 2010 it was accepted by the parties (and recorded in the Tribunal's order) that the correct answer to request [2] was: "No-one *at the IPCC* (our emphasis) sent the complaint": it is implicit from this that OFCOM did not comply with its obligation to supply that information at the time of the request when it stated in its review decision letter dated 16 December 2008: "You have also asked us to indicate who at the IPCC *made* (our emphasis) the complaint. This information is also available on website..."

3. The issue now before the Tribunal is whether, in dealing with Mr Holland's requests, OFCOM complied with regulation 9(1) of the Environmental Information Regulations 2004<sup>1</sup> which requires a public authority to provide "...advice and assistance, so far as it would be reasonable to expect the authority to do so, to the applicant..." We accept OFCOM's submission that the duty under regulation 9 is not concerned with the actual provision of information which is governed by regulation 5; rather it is concerned with the provision of advice and assistance to the applicant in relation to a request, in particular to help the applicant to formulate his request in a way which will enable him to obtain the information he really wants (see in particular regulation 9(2)). The question the Tribunal must ask itself is what advice and assistance it would have been reasonable to expect OFCOM to provide to Mr Holland in all the circumstances at the time of his request for information.
4. In considering this issue it is clearly relevant to take into account what Mr Holland said at the time he made his requests. We refer to the words in the original request dated 23 July 2008 which are quoted in full at paragraph 2 of our ruling dated 17 May 2010. In his request for a review dated 25 August 2008 he also said:

**... I ask that you disclose who sent you the IPCC complaint and who if anyone from the IPCC PANEL or Secretariat authorised it.**

**One needs to be careful in dealing with the IPCC, which is the Intergovernmental PANEL on Climate Change. The Bureau and the thousands of scientists, a few of whom complained to you, are not the IPCC and can not speak for the PANEL unless specifically instructed to do so. The IPCC is governed by international (sic) agreement in what are called the Principles Governing IPCC Work and Appendix A to the principles, which state unambiguously, "Major decisions of the IPCC will be taken by the Panel in plenary meetings". As I have indicated I wish to see the names as I have some doubts that the complaint you say was from the IPCC was properly authorised under its international mandate but rather was a case of individuals 'freelancing'.**

It is clear from these statements that Mr Holland was telling OFCOM (a) that he was particularly concerned about the statements attributed to the IPCC at page 51 of OFCOM's Broadcast Bulletin 114 and (b) that he was concerned about the origin

---

<sup>1</sup> OFCOM takes no point as to whether the Regulations applied to the information requested.

of the IPCC complaint and whether it was properly authorised. We will consider what advice and assistance (if any) it would have been reasonable to expect OFCOM to provide to Mr Holland in response to these expressed concerns in turn.

5. As to (a), we consider that it should have been obvious to anyone at OFCOM dealing with the request that Mr Holland wanted to see not only the terms of the “IPCC complaint” but also the document which was the basis for the section at pages 50-54 of the OFCOM Broadcast Bulletin 114 (this was the IPCC Reply): we say this simply because he refers to two statements on page 51 of the Bulletin and states “I wish to be sure that your quotations from it are entirely correct.” Thus, although his request did not, as we have ruled, cover the IPCC Reply, we consider that it would have been reasonable to expect OFCOM to draw this to Mr Holland’s attention and invite him, if he so wished, to include that document in his request, and that they should have done so. Apart from the point about this complaint not having been raised before (which we address below) it appears to us from paragraph 15 of their submissions dated 11 June 2010 that OFCOM would broadly accept this conclusion.
6. As to (b), it is accepted, as we have already said, that the information requested was not supplied and that the correct answer was “no-one.” The failure to give this answer would have been a breach of regulation 5 and not regulation 9. However, in the course of the appeal Mr Holland and the Tribunal have been provided with a copy of the formal complaint form completed by Mr Rado dated 6 August 2007 and with details of a number of “letters of authorisation” from academics associated with the IPCC: it is quite clear from the contents of his request for a review quoted at paragraph 4 above (and in particular the opening sentence of the quotation) that this was material which Mr Holland was seeking and this would have been obvious to OFCOM. In those circumstances we consider that it would have been reasonable to expect OFCOM to advise Mr Holland that he may wish to formally request such information and that they should have taken this step.
7. OFCOM in their written submissions raise the point that Mr Holland failed to mention regulation 9 in earlier correspondence. For obvious reasons a complaint about regulation 9 is one which will often only be capable of being raised late in the day, but in any event the parties in this case including OFCOM expressly agreed

before the directions hearing on 19 March 2010 that the regulation 9 issue required to be determined by the Tribunal and we do not therefore consider that it is open to OFCOM to raise this point now.

8. We should also record that OFCOM object strongly to various allegations of bad faith in dealing with his requests which are made against it by Mr Holland. We make it clear that there is no need for us to reach any view on these allegations in making our decision on regulation 9 and we do not do so.

### Conclusion

9. We have therefore concluded that OFCOM were in breach of regulation 9 in the ways set out in the Supplementary Decision Notice which we issue. Since all the information we mention there has been supplied to Mr Holland in the course of this appeal no further action is required.
10. Our decision is unanimous.
11. Although this case started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5) the Tribunal dealing with it is now constituted as a First-tier Tribunal. Under the rules of procedure now applying an appeal against this decision on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law relied on and state the result the party is seeking. Relevant forms and guidance can be found on the Tribunal's website at [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk).

Signed

HH Judge Shanks

Dated 8 July 2010