IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0098**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's
Decision Notice No: FER0387012
Dated: 2 March 2012

Appellant:	**David Holland**
First Respondent:	**Information Commissioner**
Second Respondent:	**The University of East Anglia**
Date of hearing:	**15 January 2013 at Field House**
Date of decision:	**29 April 2013**

Before

Anisa Dhanji
Judge

and

Henry Fitzhugh
David Wilkinson
Panel Members

Representation
For the Appellant: in person
For the First Respondent: Robin Hopkins, Counsel
For the Second Respondent: Anya Proops, Counsel

Subject matter
Environmental Information Regulations 2004 - Regulation 3(2)(b) - whether information is held on behalf of the public authority

Case law
Chagos Refugees Group in Mauritius & Chagos Social Committee (Seychelles) v IC & FCO (EA/2011/0300); **Councillor Jeremy Clyne v IC & London Borough of Lambeth** (EA/2011/0190); **McBride v IC and Ministry of Justice** (EA/2007/0105); **Montague v IC & Liverpool John Moores University** (EA/2012/0109); **University of Newcastle upon Tyne v IC & BUAV** [2011] 2 Info LR 54.

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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 Appellant had requested information held by the Independent Climate Change E-mail Review ("ICCER"), conducted by Sir Muir Russell, which was set up and funded by the University of East Anglia ("UEA") to inquire into allegations concerning the Climate Research Unit ("CRU"), a small unit operating as part of the UEA, which undertakes research in the area of climate change.

3. In November 2009, over 1000 e-mails relating to the work of the CRU appeared on various websites. The publication of the e-mails had not been authorised by the UEA. The UEA believed that they were obtained through unlawful hacking of CRU's back-up server.

4. Following publication of the e-mails, there were allegations made, in the media and elsewhere, to the effect that the e-mails showed a deliberate and systematic attempt by members of the CRU to manipulate climate data so as to support their particular preferred view of global warming. It was also alleged that individuals within the CRU had attempted to abuse the process of peer review to prevent the publication of research papers with conflicting opinions about climate change. One of the e-mails indicated that Professor Philip Jones, Director of the CRU, had asked colleagues to delete e-mails relating to the work of his deputy director which had been requested under freedom of information legislation. These events and allegations subsequently became known, colloquially, as "Climategate". In December 2009, in response to Climategate, the UEA instituted the inquiry led by Sir Muir.

5. The Appellant's request for information was made under the Environmental Information Regulations 2004 (the "EIR"). The UEA refused the request on the basis that the information was held by ICCER and not the UEA. The Commissioner upheld the refusal, and the Appellant has appealed to the First-tier Tribunal challenging the Commissioner's decision.

The Request for Information

6. The Appellant's request, made on 27 January 2011, was in the following terms:

   "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."

7. The Council replied on 27 February 2011 refusing the request on the basis of Regulation 12(4)(a) (information not held). It also said that other information that it did hold was publicly available and therefore fell within the exception in Regulation 6(1)(b).

8. On 11 April 2011, following an internal review requested by the Appellant, the UEA upheld its refusal. It asserted that it had no contractual relationship with the ICCER and that it was unable to "mandate release of information held by ICCER". It had no control over, nor access to, material held by ICCER, other than what was already in the public domain on the ICCER website.

The Complaint to the Commissioner

9. On 1 April 2011, 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. The Commissioner only addressed the UEA's refusal under Regulation 12(4)(a). It did not consider Regulation 6(1)(b) on the basis that the Appellant had made it clear that the focus of his complaint was the UEA's decision that it did not hold the unpublished information and that it was held by ICCER. The Appellant argued, in particular, that the ICCER was not truly independent of the UEA, that the ICCER should be seen as contractors of the UEA, and that any information it held was in fact held on behalf of the UEA.

10. The Commissioner sought information from the UEA as to the nature of its relationship with the ICCER. The UEA maintained that it had no contractual relationship with the ICCER and no control over the information held by the ICCER. The information received or generated by the ICCER was not held on its premises. Although Sir Muir had been appointed by the UEA, and although the ICCER's work was funded by the UEA, the UEA did not have access to, or knowledge of the material received or generated by the ICCER other than the information published on the ICCER's website. It also had no control over the retention or disposal of the information. No computer facilities of the UEA were used to store or display the information, and no administrative or secretarial support was provided to the ICCER by the UEA.

11. The Commissioner found that the fact that ICCER was entirely funded by the UEA and that its Chair was appointed by the UEA, did not itself mean that any information gathered or generated in the course of its investigations was held on behalf of the UEA. When considering whether information is held on behalf of a public authority, it is relevant to consider the public authority's level of interest and use of the information, as well as the control and access it exercised over the information. In the present case, the UEA's position was that the information held by the ICCER was held solely to provide evidence to the ICCER on the matters under investigation. In the Commissioner's view, funding by the UEA was clearly

given on the basis of an independent inquiry and Sir Muir was free to run that inquiry.

12. The Commissioner concluded that there was no evidence to refute the independence of the ICCER. He found that the requested information was not held by the ICCER, and accordingly, the exception in Regulation 12(4)(a) was engaged.

The Appeal to the Tribunal

13. The Appellant has appealed against the Decision Notice. He challenges, in particular, the Commissioner's findings that the UEA:

    (a) had no contractual relationship with the ICCER or its team members;

    (b) had no interest in the ICCER records which Sir Muir now holds as a private citizen;

    (c) exercised no control over the ICCER;

    (d) had taken no active part in the work of the ICCER; and

    (e) had not at any time created or held any information in respect of the ICCER.

14. The Appellant requested an oral hearing. Prior to the hearing, the parties lodged agreed bundles comprising some 1,242 pages. They also lodged a separate bundle of authorities. In addition, the Appellant lodged a further bundle of documents which he considered relevant but which the other parties did not. The parties also lodged skeleton arguments.

The Tribunal's Jurisdiction

15. 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.

16. 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

17. It is not in dispute that the correct access regime for the information requested is the EIR. As already noted, the Appellant had specified that his request was being made under the EIR. The Commissioner agreed, as we do, that the EIR is the correct access regime. The role of the ICCER was to investigate the conduct of climate change research and data within the

CRU. Much of the information submitted to or generated by the ICCER would therefore likely fall 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.

18. 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").

19. The EIR creates a duty on public authorities to make environmental information available on request. They must do as soon as possible, and no 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).*

20. In refusing the Appellant's request, the UEA relied on Regulation 12(5)(a). This provides that a public authority may refuse to disclose information to the extent that it does not hold that information at the time an applicant's request is received.

21. As to the meaning of "held", Regulation 3(2) provides that for the purposes of the EIR, environmental information is held by a public authority if the information is:

(a) in the authority's possession and has been produced or received by the authority; or

(b) held by another person on behalf of the authority.

22. There are two other provisions that are relevant and which we have kept in mind. Regulation 12(2) requires public authorities to apply a presumption in favour of disclosure. Also, Article 4 of the Directive requires the exceptions to be interpreted "in a restrictive way".

Issues

23. Much of the information coming within the scope of the Appellant's request has been published on the ICCER's website. What has not been published and what he is seeking, essentially, is the working papers of the ICCER.

24. The UEA says that it does not hold this information. It did not hold that information when the Appellant's request was received, and indeed, it has never held it. The Appellant disputes this. He says that if the information is held by Sir Muir, his solicitors, or any members of the ICCER review team or its staff, then it is held on behalf of the UEA for the purposes of Regulation 3(2)(b).

25. The only issue in this appeal, therefore, is whether the information which the Appellant has requested, is held by another person on behalf of the UEA. If it is, then since no other exceptions have been relied on, the UEA must provide the information to the Appellant, subject only to the public interest balancing exercise provided for in Regulation 12(1)(b). If it does not hold the information, then it is exempt from the duty to disclose it and there is no meaningful public interest balancing exercise that can be undertaken.

Witness Evidence

26. At the hearing, we heard evidence from Professor Edward Acton and Sir Muir Russell on behalf of the UEA. Both adopted their witness statements, and were cross-examined by the Appellant and the Commissioner, and we also asked them some questions. We have summarised below the evidence of each witness. We have done so in some detail since the issue in this appeal turns, to a material extent, on the nature of the relationship between ICCER and UEA, and the evidence of these two witnesses is of particular importance in that regard. Because credibility was likely to be in issue, both witnesses were sworn, and also, it was agreed that Sir Muir would not be in the hearing room when Professor Acton, the first witness, gave evidence.

Professor Acton

27. Professor Acton is the Vice-Chancellor of the UEA. He has held the post since September 2009.

28. He says that in December 2009, in response to Climategate, the UEA wanted to know whether there was any substance to the allegations that were being made. There was urgency to this because until the UEA had had some answers, it could not be sure how to deal with the situation internally, and also, could not robustly respond to the media allegations. The UEA also wanted to make it clear to the public and to its own academic and student cohort, that it was taking the allegations seriously and was seeking to engage with the issues.

29. The UEA decided to set up an inquiry external to, and independent of the UEA, to be led by an individual of appropriate standing who would conduct the inquiry with a completely free hand, such that there would be no question of any undue influence being exerted by the UEA.

30. Acting on recommendations, he decided that Sir Muir was a person of proper standing to lead the inquiry. Before appointing him, the witness says that he had no prior knowledge of, nor any involvement with, Sir Muir. He made contact with Sir Muir by telephone in November 2009 to ascertain whether he would be willing to lead the inquiry, and during that call, he emphasised that the proposed inquiry would be independent.

31. Professor Acton says that he worked with others at the UEA to develop the terms of reference for the inquiry. It was decided, at an early stage, that Sir Muir should have the freedom to change the terms of reference as he considered appropriate without the consent or authority of the UEA, and this was expressly stated in the terms of reference.

32. The individuals appointed by Sir Muir to be part of the inquiry team were selected at Sir Muir's discretion. The UEA played no role in that. In relation to the Appellant's assertion that Professor Boulton, one of the members of the team, was the person who really controlled the ICCER on behalf of the UEA, with Sir Muir being primarily a credible figure head, Professor Acton reiterates that the UEA had no role in the appointment of Professor Boulton and no say on the degree of influence he would exert in the context of the inquiry.

33. There was no formal written agreement between Sir Muir and the UEA. Professor Acton says that this is because the focus at that time was not on formalities, but on getting the team up and running so that it could report at the earliest opportunity. In any event, the terms of reference themselves confirmed the essentially independent nature of the review.

34. Professor Acton says that the UEA also had no role in determining the working methods of the ICCER. He does not agree with the Appellant's assertion that the ICCER lacked independence because the inquiry was not conducted in public. The way in which the review was undertaken was established by Sir Muir; the UEA had no hand in that.

35. He says that Sir Muir also obtained his own legal advice when needed. The UEA has never sought, nor has been given access to, that advice.

36. He says that of course the UEA met the cost of the ICCER. There would have been no other way to fund the inquiry. However, this does not mean that the ICCER lacked meaningful independence. The UEA could only have harmed itself and its reputation had it sought to act as a puppet-master.

37. The ICCER's website was set up entirely at Sir Muir's instigation. The UEA played no role in that, nor in maintaining, servicing or overseeing the website at any stage.

38. The UEA had no knowledge of the scale, type or nature of the information generated or obtained by the ICCER. The only information the UEA had access to was what was placed on the ICCER's website, or which was provided to the UEA by the ICCER in the course of the discharge of its functions. By way of example, he says that the ICCER provided the UEA with certain third party submissions it had received in order to obtain the UEA's comments on those submissions. The UEA also had no access to the minutes of internal ICCER meetings except those published on the ICCER's website. It did, however, have sight of minutes of meetings between the ICCER and the UEA.

39. Although there was no specific discussion about this, it was the UEA's understanding that it would have no control over, possession of, or access to the information generated or received by the ICCER. The UEA considered that that information was owned by the inquiry team. The UEA did not consider itself entitled to demand general access to any such information.

40. Professor Acton disagrees with the Appellant's assertion that the information generated by the ICCER was for the "exclusive benefit" of the

UEA. He says that the UEA's only interest was in the outcome of the inquiry. It had no interest in the underlying information. Otherwise, the UEA would have structured its relationship with the ICCER very differently.

41. He denies any suggestion that the UEA was trying to ensure that the information was held in such a way that it would not be accessible under the FOIA or the EIR. The reason the UEA did not seek any ownership or access rights in respect of the information obtained and generated by the ICCER is because that would have compromised the ICCER's independence, and indeed, the public's perception of that independence. In addition, had the UEA sought to exert control over the ICCER in that way, it may have adversely affected the extent to which third parties were prepared to engage with and contribute to the inquiry.

42. He also says that the ICCER had sole control and authority over what information was published and when such publication would take place. He refers to one particular e-mail sent by Sir Muir to Professor Trevor Davies on 20 June in respect of the factual accuracy of certain minutes. In that e-mail, Sir Muir stated that the ICCER disagreed strongly with the UEA participants' recollection on at least two issues and would not accept their wholesale rewriting of the minutes. Professor Acton says this clearly illustrates the high level of autonomy enjoyed by the ICCER.

43. The UEA was given a brief opportunity to consider the final draft of the ICCER's report prior to publication in order that it would have notice of any serious criticism. The UEA in fact only had one weekend to consider the draft and only made points of factual inaccuracy. It did not know what changes, if any, would be made to the final form of the report prior to its publication.

44. The ICCER published its report in July 2010. It concluded that whilst the honesty and rigour of the CRU scientists was not in doubt, there was evidence of a consistent pattern of failing to display the proper degree of openness. Professor Acton says that the fact that the ICCER was prepared to criticise the UEA further demonstrates its independence.

45. The ICCER's work was not carried out at the UEA's premises. Members of the ICCER only attended the UEA when it was necessary in order to meet with individuals from the UEA, for example, relevant witnesses. They were not provided with access or log-in details to the UEA's computer systems and did not use UEA e-mail addresses. Aside from information that was generated by the UEA itself during the course of the review, no information was held on the UEA's computer systems in respect of the ICCER's work. Professor Acton says that as far as he knows, the ICCER made all their own arrangements for the security and storage of their information. Had the UEA regarded the ICCER's information as being its own information, it would have insisted on having oversight of the security and storage arrangements, not least of all because it would be exposed under legislation such as the Data Protection Act 1998 if the arrangements were not suitably secure.

46. He says that it is incorrect for the Appellant to assert that the ICCER relied heavily on the UEA to provide administrative support. Administrative

support was only provided in relation to communications between the UEA and the ICCER or, at Sir Muir's request, to assist with note taking at certain meetings between the UEA and the ICCER. That aside, the ICCER had its own administrative and secretarial support provided by William Hardie, an individual who was not previously known to the UEA.

47. The UEA did liaise with the ICCER in respect of proposals to retrieve from CRU's back-up server (the server which had been subject to the illegal hack), certain e-mails which were potentially relevant to the work of the ICCER. The e-mails were extracted and then analysed by an independent forensic expert, under the control of the Norfolk Constabulary. The UEA played no role in that apart from consenting to the extraction taking place. Professor Acton understands that relying on the report prepared by the forensic expert, Sir Muir decided not to take any further steps in respect of the extracted information. That was his decision. At the hearing, Professor Acton said that he only became aware that the ICCER had decided not to include the extracted information within the scope of its review when he saw the ICCER's report. He says that this was foreshadowed by what Sir Muir had said to the Parliamentary Select Committee but it had not been explicit.

48. As regards the current status of the information in issue, he says that it is entirely a matter for Sir Muir, as Chair of the inquiry, as to where and how to store the information generated and obtained by the ICCER. He understands that the information is held by Sir Muir's solicitors on Sir Muir's behalf. He believes that Sir Muir had previously considered passing the ICCER's website to the British Library for historical preservation, but he is not sure whether this is still the proposal and if so, when this transition will take place. The UEA considers that it has no right to make any request as to the retention or disposal of the information.

49. As regards the Appellant's concern that his submission to the ICCER should have been published in its entirety, Professor Acton says that his understanding is that after taking legal advice, the ICCER concluded that it could not publish the submission in full because of the risk of defamation proceedings. He says this was a decision taken by Sir Muir upon obtaining his own legal advice. It was not a decision in which the UEA had any involvement. Had the information belonged to the UEA, the UEA would have been involved in taking a view on the liability issues and in deciding whether or not to publish that material.

50. At the hearing, in examination in chief, he was asked why there was nothing in writing as regards the ownership of the information collected or generated by the ICCER. He says that the only reason to have had a written document would be if the UEA had been trying to limit the ICCER's ownership of the information. He also says that at the time the ICCER undertook the work, it did not know who would come forward to give information and whether or not they would seek to do so on a confidential basis. As to why there was nothing stating that the information belonged to the ICCER, he says that it is because this was implicit. As to whether any confidential submissions had in fact been received, he says that there was only one.

51. As to what involvement the UEA had in the ICCER's decision not to look at the material held on the CRU server, he says that the decision was entirely the ICCER's. He did not become aware until he saw the draft report, a week before its publication, that it had not dealt with that issue.

52. He was asked who the laptop in the possession of William Hardie, belonged to. He says that he assumes that it belongs to the UEA on the basis that it was purchased with funds provided by the UEA. He confirmed, however, that no discussion had taken place between the UEA and Sir Muir as to who would own any of the assets purchased by the ICCER to undertake its work.

53. It was put to him that the UEA registered the ICCER domain name, as evidenced by the document at page 456 of the agreed bundle which names the registrant as Lisa Williams (UEA's Assistant Registrar) and gives the registrant's address as that of the UEA. He says, that in fact, Sir Muir used the services of Luther Pendragon, a communications agency, to register the domain name.

54. He accepted, in cross-examination, that the inquiry could have been conducted internally. It was put to him that in the press release on November 2009, there is no mention of the inquiry being independent of the UEA. He says that in fact, it was always intended that it would be independent.

55. He was asked why, if it was desired that the world should have confidence in the team, had there not been an effort to select people who were entirely independent? It was also put to him that Professor Boulton, in particular, could not be said to be truly independent because he had worked for the UEA for 18 years. Professor Acton says that he only became aware of Professor Boulton's appointment after he had been appointed, and that in any event, he had had no say in the selection of the team.

56. As to why he had not thought it desirable that after the review was completed, the UEA should have custody of the information, he says that the issue was not considered. Also, it may have deterred whistle-blowers who may have wished to give information on a confidential basis.

57. He was asked what the position would have been if the review had uncovered wrongdoings on the part of UEA's staff, such that the UEA may have needed to take disciplinary action against them. Would it not have needed the evidence obtained by the ICCER? He said he was not sure. They had not thought about that.

58. He confirmed that legal advice had been taken on the terms of reference but says that there was no discussion or advice about the ownership of the information and the custody of records after the review.

<u>Sir Muir Russell</u>

59. Sir Muir says that he had no prior involvement with the UEA, the CRU, or "Climategate" before he was appointed to lead the inquiry. He believes he

was chosen as a suitable candidate because of his background in higher education and his experience as a senior civil servant.

60. In November 2009, he was contacted by Professor Acton who explained that the UEA wished to commission an independent inquiry into the allegations made against the CRU scientists and to look at the broader issues arising out of "Climategate". Professor Acton made it clear that the proposed inquiry would be independent of the UEA. Sir Muir received the draft terms of reference for the ICCER on 30 November 2009. Professor Acton made it clear that he was free to amend or add to them.

61. He told Professor Acton that he would need a team to assist him. He selected a team based on a mix of experience in the higher education sector and relevant experience in private industry. He appointed Professor Geoffrey Boulton, Professor Peter Clarke, David Eyton and Professor Jim Norton. The UEA had no input into these selections.

62. The UEA paid for the setting up of the ICCER and the costs associated with running it. The UEA also paid the fees for the ICCER team. However, he says this did not in any way affect the independence of the ICCER and that throughout, the ICCER was independent and autonomous of the UEA.

63. Sir Muir says it was necessary for the UEA to provide an administrative contact because the ICCER had to contact the UEA on a regular basis in order to arrange meetings and meet employees. The ICCER's contact at the UEA was Lisa Williams, the Assistant Registrar. She assisted in organising meetings with individuals at the UEA and took notes at initial meetings held with the UEA. However, she did not attend internal ICCER meetings. She also did not hold any information on behalf of the ICCER, nor did she have any role in preparing the ICCER's findings.

64. He says that it was important for the inquiry to be as transparent as possible. To that end, the ICCER engaged a communications firm to assist in setting up a website to allow the publication and sharing of minutes of meetings, evidence and ultimately the findings of the ICCER. The UEA had no involvement in the selection of that firm, or the setting up of the website.

65. During the course of the ICCER's work, the team reviewed e-mail correspondence, sought written submissions and took external advice where appropriate. Although the team met regularly, most of its work was done remotely. Any information was held by the individual team members on their own e-mail accounts. No information was held on the UEA's computer systems and the UEA did not have access to the information generated or obtained by the ICCER. Had they requested such access, he would not have given it. He only granted them access in limited circumstances. For example, he asked the UEA to check some of the minutes taken in meetings with the UEA staff to ensure they were factually accurate in order to ensure that the ICCER made its findings based on factually sound material. The UEA was also provided with a copy of the final draft report to check its factual accuracy and also so that the UEA would be aware of any findings in the report that had any immediate impact on its staff. However, the UEA did not in any way influence the findings of the report. He says he believes the UEA respected the independence of the

inquiry and was keen to allow the ICCER to reach its own findings, and the ICCER did not flinch from critical findings when appropriate. For example, it concluded that the UEA failed to display the appropriate degree of openness in disclosing information.

66. As regards the Appellant's submissions to the ICCER, he says that having taken external legal advice, they decided it could not be published. However, they did offer to publish a redacted version or to publish his contact details in order to allow people to obtain the submission directly from him. He says the Appellant did not consent to that. The ICCER made its reasons for not publishing the Appellant's submissions quite clear on its website.

67. At the hearing, he was asked why the ICCER had decided not to investigate the issue of potential illegality in connection with the withholding or attempted withholding of information that had been requested under freedom of information legislation, including the allegation that e-mails had been deleted to avoid disclosure. He says that it was obvious to the ICCER at the outset that any investigation into illegality was an issue for the ICO. He confirms that he did not discuss the decision not to investigate the issue of potential illegality with the UEA. He also says that had the ICCER pursued it, it would have been necessary to conduct interviews under caution. As to why interviews would have needed to be under caution, he says he believed this would be necessary.

68. It was put to him that the issue of potential illegality was a significant aspect of the investigations the ICCER was to carry out, as set out in the terms of reference, and that it would be expected that if it was not going to be pursued, they would have been at least some discussion with the UEA about it. Sir Muir reiterated that they had in fact been no such discussion with the UEA.

69. He was referred to Professor Peter Sommer's report (dated 17th of May 2010 at page 847 of the agreed bundle) in which Professor Sommer explains that he had been asked by the UEA to look at the back-ups of the computers of the key researchers in CRU to see if it was feasible to identify e-mail traffic which had not been hacked, but which nonetheless related to the same issues and might justify further investigation by the ICCER into the allegations of inappropriate scientific and other practices. Sir Muir was asked why it had been decided not to pursue this investigation. He says that the decision was taken jointly between him and the UEA. He says it would have been a monumental task and also, it was clear from Professor Sommer's report that they would not have obtained the required information in time.

70. As to Professor Acton's explanation that one of the reasons the UEA did not seek ownership of the information was so that the confidentiality of any information provided to ICCER would not be compromised, he was asked whether in fact, any confidential submissions had been received. He says that there was only one such submission. However, the ICCER did not know how many people would come forward to give it information and whether or not they would seek to do so on a confidential basis.

71. He was asked what information received or generated by the ICCER was not published on its website. He says that most of the information was published. What was not published were the private deliberations between members of the review team. He is satisfied, therefore, that if the public want to test the robustness of the ICCER's findings, they can do so from the information on the website.

72. He does not believe Professor Boulton was compromised in his independence because of his previous relationship with the UEA. He does not know when he first came to know that Professor Boulton had previously been employed by the UEA. As to why this previous relationship was not set out in the CV given to the press, he says he does not know, but that people don't put everything in their CVs.

73. He says that the ICCER came into existence in late December/early January. He was asked when it ceased to exist. No clear answer emerged. As to how he would characterise the ICCER, he says it was not a limited company, nor partnership. It was just an ad hoc group.

74. As to the allegation that he and other members of the review team had now deleted the information requested by the Appellant, he says that the intention had always been that there would be only one complete set of information, to be held by him through his solicitors.

75. Sir Muir was referred to the UEA's Skeleton Argument at paragraph 21 to 26 in which the UEA says that until 14 December 2012, it had been under the impression that the disputed information was held by Sir Muir's solicitors on his behalf. However, on 14th of December 2012, the UEA's solicitors received notification from Sir Muir's solicitors that certain information (comprising e-mails relating to the ICCER's work) had been deleted by Sir Muir after his solicitors had contacted the UEA on 8 May 2012 to inquire about whether an appeal had been lodged and had been told that no appeal had been lodged. The UEA says that it was not aware of an appeal being lodged and, did not discover that the Appellant had lodged an appeal until it was notified of this on 2 July 2012. Sir Muir confirmed that he had in fact deleted the e-mails on legal advice. However, his solicitors continue to hold disks containing copies of the e-mail accounts of other members of the team, including e-mails to and from Sir Muir. He also says that he has now become aware that many or all of the e-mails he deleted would also be on the laptop still in the possession of the ICCER's administrative assistant, William Hardie. This laptop has now been retrieved and has been placed with his solicitors, and therefore much of the information he deleted may still in fact be held.

76. As to the Appellant's allegation that his submission had been mutilated, Sir Muir says that excerpts of the submission were put to Professor Briffa at the UEA with a view to reducing the submissions to its essentials, without transgressing on the matter is that led the ICCER not to publish the submissions. He confirms that the decision not to publish it was made on the basis of legal advice from a firm of solicitors and that the UEA had no involvement in that decision.

The Parties' Positions

The Appellant

77. The Appellant says that on any common sense view, the disputed information must be held on behalf of the UEA. The information was created or collected entirely at the expense of the UEA, a public authority, for its exclusive benefit. The public authority is sufficiently closely connected to the information that it should be taken to hold it.

78. He says that the Aarhus Convention requires a finding that the information is held on behalf of the UEA. In particular, Article 5(1)(a) requires member states to ensure that public authorities possess environmental information relevant to their functions. He says that where environmental information is created or received at the expense of a public authority, by persons paid by the authority specifically to do so, and where that information is relevant to the function of that authority, then in law, it is required to possess it. Otherwise, a public authority can simply outsource any embarrassing environmental matters to casual employees and private companies who might do the authorities' bidding and then destroy any inconvenient information that the authority wishes to ignore.

79. He also says that the implication of any reasonable reading of the contractual arrangement between the UEA and Sir Muir, is that the information is held on behalf of the UEA. He points out that on 27 November 2009, in its first public comment on Climategate, the UEA published a statement on its website in which it stated that it would itself be conducting a review, with external support, into the circumstances surrounding the theft and publication of the information and any issues emerging from it. He also says that the terms of reference for the review stated that Sir Muir would be provided with "appropriate administrative support", and that the discretion to amend or add to the terms of reference were only if it was felt necessary "in order to investigate the accusations fully". He further says that by offering Sir Muir a flat fee of £40,000, rather than a per diem rate as Sir Muir had requested, the UEA put him under its control by encouraging him to allow others, such as Professor Boulton who was working on a per diem basis, to do the bulk of the work. In addition, he says that communications between Professor Acton and Sir Muir suggests that the core members of the ICCER team were settled at the start.

80. He says that while the ICCER may have been able to determine its own methods of working, it does not follow from this that it owned the information and had the right to withhold it from the UEA or to delete it as it saw fit. He also says that as a private, retired individual, it would make no sense for Sir Muir to want the long-term responsibility for the safe preservation of this information.

81. The Appellant considers that the ICCER was a sham, and that it was always under the control of the UEA, and that it was set up to exculpate its scientists of any criminal offences and protect its reputation. In particular, he says that the close association between the individuals being investigated and the ICCER team investigating them undermines the claimed independence of the ICCER. He points out, in particular, that Professor

Boulton had previously worked for the UEA from 1968 to 1986 and had taught in the Environmental School, of which the CRU is a part. He was well known to Professor Trevor Davies who was Director of the CRU until 1998. In 2000, Professor Davies had suggested Boulton for the post of Research Director for the new Tyndall Centre at the UEA. He also says that in the CV Professor Boulton gave to the press, he made no mention of the fact that he had worked for the UEA for such an extended period of time. In his Skeleton Argument, the Appellant says that "it would be difficult to find an individual less likely than Boulton to be seen as impartial" and that he is linked in one way or another to every member of the ICCER team. The Appellant also sets out the connections between the other members of the review team to underline his point that the independence of the team must be questionable.

82. The Appellant further says that the fact that one of the allegations the ICCER was supposed to investigate, namely, the withholding or attempting to withhold information illegally under the terms of FOIA or the EIR, was not investigated, further demonstrates the ICCER's lack of independence. He says that although the Commissioner considered that section 77 of FOIA had been breached, (offence of altering records with intent to prevent disclosure), it could not prosecute for any such offences because the six-month time limit for bringing such prosecutions had expired and therefore it should have been investigated by the ICCER. He says it is not plausible that Sir Muir decided not to undertake this investigation simply because he would have had to interview people under caution. He says that there is no such requirement under FOIA and also, that it has no application in a situation where, as here, the answers given could not be used in a prosecution because any such offences were time-barred.

83. In addition, the Appellant says that the most compelling evidence that the ICCER was in no sense independent of the UEA lies in its treatment of the Appellant's submissions to it. He says that no other submissions give the detailed sequence of events leading to the deletion of information that he had provided. He offered to rewrite any section the ICCER believed would put it at risk of being sued for defamation and he also offered an alternate letter that he was happy to be published with an e-mail address at which he could be contacted. He says that they refused the alternate letter unless the summary of his complaint was redacted. However, somebody produced a mutilated version of his submissions to create the impression that the original full evidence submission had been considered. He says this could not have been done without the assistance of the CRU scientists and that the UEA and ICCER must have collaborated in the mutilation of his evidence.

84. He is not persuaded that the independence of the ICCER is demonstrated by its findings against UEA. In reality, it only made trivial findings against the CRU scientists. Remarkably, it claimed that it had "seen no evidence of any attempt to delete information in respect of a request already made."

The Respondents

85. There are some nuanced differences between the positions of the UEA and the Commissioner, although they both of course ask the Tribunal to find that the information is not held on behalf of the UEA. We have taken their particular arguments into consideration but have not sought to distinguish the differences between them in the summary set out below.

86. Both say that it is key to recognise that the ICCER was truly independent. This independence was at the core of the relationship between the ICCER and UEA and extended to the information. They say that there is no evidence of any collusion or conspiracy.

87. The key issue the UEA was concerned about was the investigation into whether the science was corrupted. The handling of issues relating to information requests was important, but when setting up the ICCER, the UEA was focused on the bigger picture. That is why there was no specific discussion about the ownership of the information. The fact is, however, that the UEA had no right to control or access the information and had no other rights over the information, except when they were asked to undertake factual checks. They also had no right to control what was or was not published. It was important for the independence of the ICCER that the UEA had no control over or access to the information because it could not have known, at the outset, how many people would wish to give information on a confidential basis.

88. The fact that the UEA paid for the ICCER's work and expenses did not compromise its independence, in the same way that the Commissioner's independence is not compromised by the fact that his office is funded by the Ministry of Justice. At all times, the ICCER operated on an arms length basis. What the UEA was paying for was for the ICCER to undertake an independent investigation and produce a report. To find that the information was held on behalf of the UEA, it would be necessary to find that the ICCER was acting as agent for the UEA and that is not supported by the evidence.

89. They point out that Sir Muir had no prior involvement with the UEA, that members of the review team were selected by him without any input from the UEA, and that the ICCER had its own legal advisers and its own administrative and secretarial support. Also, it determined its own methods of working, and indeed, was able to amend the terms of reference. Most importantly, the report contained findings critical of the UEA which they say is further and strong evidence of the ICCER's independence.

90. As regards the information which is the subject of this appeal, they stress that during the course of the review, the ICCER managed all the information which it received and generated. The UEA only had access to the information with the consent of the review team, and only for limited purposes. The UEA had no right to control or dictate what the ICCER did with the information.

91. They say that while it is important not to approach the issue too legalistically, it is necessary to look not just at the factual matrix, but also at the legal relationship between the parties. The Aarhaus Convention does

not preclude a public authority from entering into a genuinely independent relationship and does not require that the public authority must hold all relevant environment information.

Findings and Reasons

92. Climate change is a controversial subject. Some consider that the hypothesis that the earth's climate is changing as a result of human activity is not sufficiently supported by scientific data; others are convinced it is. "Climategate" encapsulated that controversy. If some of CRU's researchers had improperly suppressed or manipulated data to support their scientific conclusions about climate change or had deleted or destroyed information to prevent its disclosure under FOIA or the EIR, then the scientific conclusions they had reached would be significantly discredited. It was clearly of utmost importance to UEA's reputation to get to the bottom of what had happened.

93. It decided to do this by setting up an inquiry, and a group was formed, chaired by Sir Muir. The respondents say that not only was the group external, but that it was also independent of the UEA and that it held all the information it received and generated on its own behalf and not on behalf of the UEA. The UEA had no claim to that information. The Appellant regards the ICCER as "a sham" run by the UEA, and says that any information held by the ICCER at the time of his request should properly be regarded as being held by it "on behalf of" the UEA and must be disclosed by virtue of Regulation 3(2)(b).

94. The key issue we are called upon to decide is whether the information which it is accepted is in the possession of the ICCER (whether in the hands of Sir Muir, his solicitors or members of the review team), is in fact held on behalf of the UEA.

95. What is the proper test when deciding whether information is held by another on behalf of a public authority? This issue was considered the Upper Tribunal ("UT") in **University of Newcastle upon Tyne v IC and BUAV** [2011] 2 Info LR 54. At paragraph 28, Judge Wikeley set out the test in the following terms:

"The test that FOIA uses is whether the public authority "holds" the requested information. The choice of statutory language must be significant. The test is not whether the public authority "controls" or "possesses" or "owns" the information in question; simply whether it "holds" it (as was observed by the information tribunal in Quinn v Information Commissioner [EA/2005/0010 at [50]). "Hold", as the present tribunal also noted, is an ordinary English word and is not used in some technical sense in the Act. That construction is also supported by one of the leading texts, Information Rights: Law and Practice by Philip Coppel QC (3rd edn, Hart Publishing, 2010), which observes that FOIA "has avoided the technicalities associated with the law of disclosure, which has conventionally drawn a distinction between a document in the power, custody or possession of a person" (p.339, para. 9-009). The tribunal's comments are consistent with the approach taken by Lord Reid in Brutus v Cozens [1973] AC 854 (at 861), namely that "The meaning of an ordinary word of the English language is

not a question of law. The proper construction of a statute is a question of law'."

96. The UT went on to say that a common sense approach should be adopted to the question of whether information was "held" by a public authority. We note here that **BUAV** concerned a request for information under the FOIA rather than the EIR. However, there is no reason why the principles set out in **BUAV** would not apply equally in the context of the EIR and indeed, that was the conclusion reached by the FTT in **Chagos Refugees Group in Mauritius and Chagos Social Committee (Seychelles) v IC and FCO** (EA/2011/0300), which we will discuss further, below.

97. In **Montague v IC and Liverpool John Moores University** (EA/2012/0109), the FTT applied **BUAV** when considering whether the e-mails of a former University lecturer were held on behalf of the University. It found that they were not, and it drew on the following points of guidance, in particular, in **BUAV**:

- *"mere physical possession was not enough to establish that information was 'held';*
- *the Tribunal should avoid adopting an unduly legalistic approach in individual cases;*
- *the Tribunal should look at all the factual circumstances of the particular case and take a view as to whether, as a matter of common sense, the information in question was sufficiently meaningfully connected to the public authority, such that it could be taken to 'hold' that information; and*
- *each case must ultimately turn on its own particular facts."*

98. There are a number of other FTT decisions which have also considered the "held on behalf of" issue. Although decided prior to **BUAV,** they are broadly in line with it. These decisions are not of course binding upon us, and they turn on their own facts, but it may be helpful to mention them briefly.

99. In **McBride v IC and Ministry of Justice** (EA/2007/0105), at paragraph 27, the FTT stated:

"In our view, the issue before us [whether information is held on behalf of the public authority] is not one that turns on their status. It is also not an issue that turns on who owns the information, nor on whether the PCO has exclusive rights to it, nor indeed on whether there is any statutory or other legal basis for the PCO to hold the information. Rather, the question of whether a public authority holds information on behalf of another is simply a question of fact, to be determined on the evidence."

100. In **Councillor Jeremy Clyne v IC and London Borough of Lambeth** (EA/2011/0190), the issue was whether external solicitors acting for the local Council, held information on its behalf. It was argued that since the Council did not have sufficient in-house expertise, they had instructed external solicitors to act as their legal department and it followed that the

solicitors were holding information on behalf of the Council. The FTT found that the solicitors did not hold the information on behalf of the Council. It examined the relationship between the local authority and the solicitors, and their working practices. It noted that the solicitors were an independent firm of solicitors. They were not controlled by the Council and were not acting as the Council's legal department. There was no evidence that the solicitors had agreed to keep records on behalf of the Council.

101. In **Chagos**, the requesters sought draft versions of a report which some years earlier, the FCO had commissioned external consultants to compile on the viability of resettlement in parts of the Chagos Archipelago. The drafts were in the possession of the consultants. Based on the nature of the relationship between the FCO and the consultants, including the applicable contractual terms, the FTT found that the drafts were not held by the consultants "on behalf of the FCO".

102. At paragraph 61, the FTT in **Chagos** qualified **McBride** (above) as follows:

"We would also wish to qualify the proposition in McBride v IC and Ministry of Justice (EA/2007/0105) that whether information is held on behalf of a public authority is "simply a question of fact". In some cases it will be important to determine the exact nature of the legal relationship between a person holding information and the public authority, or to determine the legal structure pursuant to which information was created and held".

103. We return now to the present case to examine the nature of the legal relationship between Sir Muir and the ICCER on the one hand, and the UEA on the other, as well as the nature of the relationship as it operated in practice.

104. The inquiry could, of course, have been conducted internally by the UEA. Had it done so, there would be no issue that it holds the information the Appellant has requested. However, the UEA decided to externalise the inquiry. There is nothing on the evidence before us to suggest that that decision was taken in order to ensure that the UEA did not hold and therefore did not have to disclose any resulting information. We accept that the decision was taken at a time when UEA's credibility was very much at stake, in order to inspire confidence in the independence of the findings.

105. We accept that the Tribunal must give effect to the principles of access to information and public participation rising from the Aarhus Convention. However, there is nothing in the Aarhus Convention, nor in the EIR itself, which, properly construed, either prevents the UEA, as a public authority, from externalising a function that could have been carried out internally, nor that would support a finding that any environmental information thereby arising must be taken to be held on behalf of the public authority.

106. The ICCER is not a legal person. The UEA has described it as an ad hoc group and we accept that that is an appropriate description. Clearly, the key relationship was between the UEA and Sir Muir and any contractual relationship informing the issue in this appeal would be between the UEA and Sir Muir.

107. Had there been a contractual document setting out the terms of their relationship, that would have been the logical starting point in any analysis. However, there was no such contractual document, nor indeed was there anything in any other communication between them on the subject of how the information received and generated by the ICCER was to be owned, managed, stored, archived or otherwise dealt with.

108. The respondents assert that because there was no contractual document, it follows that there was no contract between the UEA and Sir Muir. We disagree. A contract does not, of course, need to be in writing. The fact that there was no single document setting out all the terms does not mean there was no contract. It simply means that the precise terms of the contract have to be deduced from any other documentary evidence there may be, and from the way in which the parties conducted themselves.

109. An essential part of the contract between the parties was that Sir Muir and any team he appointed would undertake the work identified in the terms of reference, albeit that he had the discretion, to a certain extent at least, to change those terms of reference. It was also part of the contract that Sir Muir could appoint a team, that he and they would be paid by the UEA on the basis of agreed rates, that the UEA would co-operate with the ICCER's inquiry and make available to it the personnel and information as requested. Another essential term was of course that the ICCER would produce a report at the end of its investigation.

110. That said, we find it surprising that there was no contractual document, and in particular, that there was no discussion between them about the information that would be received or generated by the ICCER. Professor Acton's evidence is that he had the advice and input of other senior colleagues at the time he was setting up this inquiry. We would have thought, in any event, that it would be almost instinctive for Professor Acton, as an historian, to have taken an interest in the question of what would happen to the information after Sir Muir's work was concluded, even if he wanted to ensure that it was held independently during the course of the inquiry itself. His evidence as to why there was no specific agreement on this issue, nor even any discussion, appears to be somewhat contradictory. On the one hand, he says that he and his colleagues did not turn their minds to it because they were focused on getting the inquiry up and running. On the other hand, he says that it was important that the UEA not have any claim to the information because that would have compromised the information people might have been prepared to give to the inquiry, and in turn, would have compromised its independence. The second position suggests that the issue was actively considered; the first suggests that it was not. Given that Professor Acton has stressed, throughout, the importance of the inquiry not only being independent, but being seen to be independent, we would have thought that a clear statement to the effect that the UEA would not have control over, nor even sight of the information received or generated by the ICCER, would have been important.

111. Sir Muir's evidence in this regard is equally surprising. His witness statement sets out his previous experience and shows an impressive track record in senior positions in the civil service and in academia. By his own

evidence, he took legal advice at the outset, and at various stages to ensure, for example that data protection laws were complied with and also, took advice on a possible action in defamation had the ICCER published the Appellant's submissions. He also ensured that there was legal liability insurance in place. There is no explanation for why, given Sir Muir's extensive and relevant experience, his attention to detail in other respects, and his access to legal advice (there is no evidence that he was under any financial constraint in the extent of the advice he was able to obtain), neither he nor his advisers considered the practical, even if not the legal issue of the control and ownership of the information at the end of the inquiry, let alone during the inquiry itself.

112. Nevertheless, although we would have expected the issue to have been expressly considered, that does not mean that we have found either witness lacking in credibility. There is no evidence before us to support a finding that the witnesses have been untruthful. Dishonesty cannot be inferred simply from shortcomings or oversight. We accept that there was no documentary evidence on the subject, and that the parties did not discuss the subject at any time.

113. What then can we deduce from the course of dealings between the parties as to their expectations and understanding about this information? Both witnesses state with conviction that they were always clear that the UEA had no claim to the information and that it was held by the ICCER on its own behalf. Professor Acton says that the UEA would never have expected to have access to the information, much less control over it, and Sir Muir says with equal conviction that had the UEA ever sought access to the information, it would have been refused.

114. Given the complete absence of any discussion between them on the subject, it may seem surprising that they are so clear about their understanding in relation to the information. Be that as it may, we find that the course of dealings between the parties supports a finding that they acted in keeping with the understanding that they say they each had. We accept that during the course of the inquiry, and afterwards, the information was not physically held by the UEA and the UEA had neither control over, nor access to the information. The ICCER did not operate from UEA premises and it had its own administrative and support staff which would have acted as a further barrier to the UEA having any access to the information. We accept that except in relation to the UEA staff who were interviewed, the UEA had no knowledge of the information obtained by the ICCER other than when certain information was given to them by the ICCER for specific purposes, including in particular, to check its factual accuracy.

115. The Appellant's case that the information was held on behalf of the UEA rests largely on his claim that the ICCER was a sham, and was not in fact independent of the UEA. Clearly, if the evidence showed that the UEA controlled and directed the ICCER, then that would support a finding that it held the information on behalf of the UEA. However, we do not find that was the case.

116. There was clearly a strong incentive on the part of the UEA to safeguard the independence of the ICCER. As we have already noted, its credibility was very much an issue. Its actions were being scrutinised by parliament, the media, and the public, and we do not find it likely that it would have compounded its problems so greatly, and risked its credibility so completely, by setting up an inquiry that was independent in name only. We note, in this regard, that Sir Muir and the UEA had no prior dealings with each other. The UEA could not plausibly, therefore, have expected his compliance or loyalty if the intention had been to set up an inquiry that was independent in name only.

117. The Appellant has been highly critical of the involvement of Professor Boulton in the inquiry. The evidence is that he is an individual with a long prior history of involvement with the UEA and also prior dealings with many of the other members of the ICCER team. The Appellant says that this gave the UEA a way of controlling the ICCER, particularly given that Sir Muir was receiving a fixed payment, creating an incentive for him, therefore, to delegate more work to Professor Boulton. We accept, however, from the evidence of both witnesses, that the UEA had no say in the appointment of Professor Boulton, nor indeed of other members of the team. We further accept that it was necessary, in order to maintain both the perceived and actual independence of the ICCER, that Sir Muir should have had a relatively free hand in engaging those individuals he considered were most appropriate. Although, we would have expected that that freedom might have come with the proviso that nobody would be engaged, whose involvement might put the independence of the inquiry in jeopardy, and although we would have expected that even without any such proviso, Sir Muir would have steered clear of appointing any such individuals, it does not follow that the appointment of Professor Boulton means that the inquiry was not independent. The decision to appoint him may have been unwise, but that is not the same as saying that by virtue of his appointment, the ICCER was effectively controlled by the UEA, with Sir Muir acting only as credible figurehead, as the Appellant asserts. There is no evidence before us that would support such a finding.

118. We have also not been swayed against a finding of independence on the basis that the ICCER decided not to publish the Appellant's submission. We have been provided with an entirely plausible explanation for why the decision was taken not to publish it. The legal advice was that to do so would have risked an action in defamation. It matters not for present purposes, whether that legal advice was correct or not. We accept that that is the advice that was received. On the evidence before us, we do not find that there was an attempt to conceal those submissions and indeed, we note from the series of e mails between the Appellant and William Hardie at pages 818 to 821 of the agreed bundle, that an offer was made to publish the Appellant's e mail address so that the submissions could be accessed without giving rise to the risks of legal liability.

119. The respondents say and we agree that the independence of the ICCER in the sense of whether it was impartial in its scrutiny of the issues is a matter outside the scope of our jurisdiction. It is only if ICCER's conduct of the inquiry and its resulting findings show that it was under the control of the

UEA, that that becomes relevant to the issue of whether the information was held by the ICCER on behalf of the UEA. They say that the fact that the report contained findings adverse to UEA shows that the ICCER conducted itself impartially and independently. The criticism of the UEA as contained in the report is of quite a moderate nature. We do not say that the UEA should have been criticised more severely. That is clearly not a matter for us and we have formed no view on it. We simply observe that that modest level of criticism does not itself constitute persuasive evidence of independence. On the other hand, the fact that the ICCER did not criticise the UEA more severely is also, of course, not evidence that it was not independent.

120. The Appellant is highly sceptical of the explanation given by Sir Muir as to why the inquiry decided not to investigate the issue of potential illegality, when it was part of the original terms of reference. We find it surprising that that such a fundamental reduction in the scope of the review was not discussed with the UEA, given that the UEA was paying for the review, and had commissioned Sir Muir to look into the matters set out in the terms of reference. However, there is no evidence before us to suggest that that matter was not pursued because of any influence or direction in that regard from the UEA. The Appellant's allegations in that regard are no more than conjecture. We accept it as plausible that the ICCER did not investigate the issue because it regarded matters of illegality to be more properly for the Commissioner and the police.

121. In short, although as we have indicated quite frankly, there are certain matters concerning how the inquiry was set up and conducted which we have found to be surprising, we do not find that this is because the inquiry was controlled or directed by the UEA.

122. Having considered all the evidence in the round, we accept, on the balance of probabilities, and for the reasons set out above, that the inquiry was intended to be and was in fact independent of the UEA, and that the information received or generated by the ICCER was and is not held on behalf of the UEA. It may be that the information should be held by the UEA and there may be good reason why, barring anything provided in confidence, the information should be passed to the UEA to form part of its historical records. Were that to happen, then in the future, the information may be held by the UEA. At the present time, however, and specifically at the date the request was received, we find that the information was not held on behalf of the UEA.

Decision

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

[Signed on original]

Anisa Dhanji
Judge

29 April 2013