



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

**Case No. EA/2012/0109**

**ON APPEAL FROM:**

The Information Commissioner's  
Decision Notice No: FS50409217  
Dated: 1 May 2012

**Appellant: BRENDAN MONTAGUE**  
**First Respondent: INFORMATION COMMISSIONER**  
**Second Respondent: LIVERPOOL JOHN MOORES UNIVERSITY**  
**Heard at: CENTRAL LONDON CIVIL JUSTICE CENTRE**  
**Date of hearing: 12 NOVEMBER 2012**  
**Date of decision: 13 DECEMBER 2012**

**Before**

**ROBIN CALLENDER SMITH**  
Judge

and

**ANNE CHAFER and MIKE JONES**  
Tribunal Members

**Attendances:**

Appellant: Mr Ben Amunwa, Voluntary Legal Officer, Request Initiative  
First Respondent: Ms Laura John, Counsel for the Information Commissioner  
Second Respondent: Ms Anya Proops, Counsel for Liverpool John Moores University

**Subject matter:**

**FREEDOM OF INFORMATION ACT 2000**

s.1, Whether information held

**ENVIRONMENTAL INFORMATION REGULATIONS**

Reg.2, Definitions: Environmental information

Reg.5, Request for information

**Cases:**

*University of Newcastle v IC and BUAV* [2011] UKUT185 (AAC).

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 1 May 2012 and dismisses the appeal.

**REASONS FOR DECISION**

**Background**

1. Mr Brendan Montague (the Appellant) asked Liverpool John Moores University (the Second Respondent) for copies of all the emails sent by a named lecturer at the University sent from his University email account.
2. The lecturer in question had worked at the University from November 1993 to July 2010 and – in November 2009 – had become Director of the Global Warming Policy Foundation (GWPF).
3. At the launch of the GWPF Lord Lawson had stated that it was “an all-party and non-party think tank and a registered educational charity which, while open minded on the contested science of global warming, is deeply concerned about the costs and the other implications of many of the policies currently being advocated. We are in no sense “anti-environmental’. There is a wide range of

important environmental issues, which call for an equally wide range of policy responses. Our concern is soberly with the possible effects of any future global warming and the policy responses that may evoke.”

#### The request for information

4. The Appellant’s request in relation to matters in this appeal was made on 3 March 2011. The University refused to disclose the information requested on the basis that it was exempt under section 40 (2) FOIA and maintained that position after an internal review.

#### The complaint to the Information Commissioner

5. When the matter came before the Information Commissioner (the First Respondent), the University revisited its position and asserted that the information requested was not held by the University for the purposes of FOIA.
6. During his investigation, the Commissioner explained to the Appellant that he had had sight of the information still stored in the ‘sent’ folder of the lecturer’s University email account. He explained further that the information in question covered a range of topics and the Appellant was asked to clarify if there were any categories of information in which he was particularly interested so that the scope of the investigation could be more clearly focused.
7. The Appellant stated that he was interested in the following information:
  - The energy industry, including but not limited to staff of BP, Shell or any other oil or energy company;
  - Climate change/global warming;
  - Any reference to CCNet;
  - To or from any academics working at UK, US or Australian universities, especially but not limited to the University of East Anglia;
  - Any correspondence with Lord Lawson;
  - Any correspondence with any member of the GWP of academic advisory council or board or trustees;

- The names of any persons who the lecturer had emailed;
  - Any correspondence with Farrer and Co; and
  - Any correspondence not previously released to the Appellant in respect of FOIA enquiries.
8. The Appellant was asked whether the 'refined' request could be summarised as being for "sent emails that can be linked to [the lecturer's] work with the GWPF (even if the GWPF is not explicitly referred to in the emails in question)".
  9. The Appellant confirmed that was case but added that he did not wish to be "limited to that particular information in the future". The Commissioner proceeded on the basis of the refined request.
  10. During the Commissioner's investigation the University provided the description of the lecturer's role at the University and correspondence between the University and the lecturer in which the University made it clear that there should be no affiliation between his work for the GWPF and the work that he did for the University.
  11. The Commissioner was advised by the University that none of the requested information arose from, or entered into, the former lecturer's work at the University and that none of the requested information would have been used by the University for its own purposes.
  12. Following that investigation the Commissioner concluded that, in all the circumstances, the University would not have had any interest in or control over any of the requested information and that the information was not held by the University pursuant to section 3 (2) FOIA.

#### The appeal to the Tribunal

13. The Appellant, in his grounds of appeal (Paragraph 3) points out that his original request had been for all emails 'sent' by the lecturer from his University email account. He had allowed his request to be narrowed by the Commissioner to the Requested Information detailed in Paragraph 8 above but

only on the basis that his complaint was not limited only to those emails at a later stage.

14. He maintained this position to the Commissioner (although not to the University) on 2 February 2012 and asked the Tribunal to proceed, wider basis.
15. The Commissioner's position was that he had not considered widened request, objected to the Appellant seeking to widen the original request to cover emails which may have been in the lecturer's inbox or draft folders at the time of the request for information and that the correct course for such widening would be for the Appellant to make a separate request to the University for that information.

#### The Appellant's Position

16. The Appellant's position in this appeal can be summarised as follows:
  - The individual in question was a senior lecturer at Liverpool John Moores University - employed from 1993 until 31 July 2010 – with an official staff profile describing him as a 'social anthropologist'. He was one of the UK's foremost deniers of climate change science and had been researching for more than 20 years how societies through the centuries had responded to real and imaginary natural disasters. Climate change came to his attention as a modern-day threat about ten years ago.
  - The lecturer had actively participated in the climate change debate while employed at the University, writing articles and papers, giving regular media commentary and submitting a memo to the Parliamentary Science and Technology Committee. On each of those occasions his affiliation was provided as 'Liverpool John Moores University'.
  - When, on 1 November 2009, the lecturer became the director of GWPF he continued to work at the University. GWPF was a prominent 'think tank', launched in November 2009 with a broad range of aims, including the promotion of scepticism about climate change science and influencing government policy on the environment. Its launch coincided with the 'climate-gate' controversy over emails leaked from the University of East Anglia Climatic Research Unit. GWPF grew out of the lecturer's long-established personal work on ancient and modern climate change.
  - The Appellant's position was that the University had a significant interest in the lecturer's work on climate change in general, and in the requested information in particular, irrespective of the capacity in which the lecturer created the information.

17. The Appellant regarded the issues in the appeal as being:
1. Whether the lecturer's work on climate change informed or over-lapped with his official activities at the University?
  2. Whether the lecturer's personal work on climate change benefitted the University?
  3. Whether it is reasonable and proportionate in the circumstances for the University to recover the GWPF emails?

In the alternative, if an interest is not established under Issue 1 and/or 2:

4. Whether the University's policies gave rise to an interest in the information?

### The University's Position

18. The University's position can be summarised as follows:

- LJMU received its first Freedom of Information request from the Appellant on 30 August 2010. The Appellant requested a copy of any emails or letters sent by the lecturer using a Liverpool John Moore's letter heading or email signature which had a subject heading or contained in the main body the term "Global Warming Policy Foundation" or was clearly about the Global Warming Policy Foundation". The Appellant went on to make subsequent requests and appeals in which LJMU has responded that the information requested is "not held" by the University.
- In normal circumstances no information would be available for scrutiny by the IC, as the information held within the lecturer's LJMU email account would have been deleted within the usual business processes carried out by the University. However, as LJMU had received a request for this information, it was anticipated by the University that the IC might wish to interrogate this information and therefore it was not deleted, and had subsequently been provided to the IC.
- No information held within the lecturer's closed email account had been used by LJMU other than to provide information to the IC. The University had no requirement for or interest in information held within that email account and awaited the Tribunal's decision before deleting these messages.
- LJMU provided scope for staff to utilise its IT structure to produce 'Personal Web Pages'. Personal web pages were not used for making available teaching, corporate, faculty or departmental information but rather for coursework or non-corporate information. Users were responsible for the contents of any web pages published using this facility. LJMU did not monitor or otherwise censor Personal Web Pages, but reported any complaints and potential illegal activities to the appropriate authorities. In using this service, users agreed to the Terms and Conditions of Use of the LJMU Website. The Help Desk of the University's IT. Department routinely set up email lists at the request of

University staff. Once the list was set up, the IT department did not administer or check the usage of lists.

- LJMU's Staff Handbook stated under the heading ACADEMIC FREEDOM that it "fully supports the right to academic freedom. All staff at LJMU are free to explore, research and publish opinions, including controversial opinion, based on fact, but should note that academic freedom does not give immunity from the law or from personal liability. *Any views expressed in public are always those of the individual and are not to be expressed as those of or on behalf of the University.* Comments, opinions and statements made in the public domain should always be cleared by the press office staff who can provide advice and guidance on dealing with journalists in print and broadcast media. For further information contact the Press Office."
- The lecturer's press work for the University was largely focussed on football hooliganism, human behaviour and sports science. He represented the University on current events, becoming a popular commentator for the media on a range of topics. The University's Press Office has advised that there were two things that the lecturer was involved with that the University specifically did not support or promote, one being comets and the other the climate change project. The University would only discover the lecturer's involvement in those areas when they appeared in the press.
- The University's position was that, while the lecturer was an employee of LJMU for some of the time he promoted his personal views on climate change, he was not "representing" the University on climate change.
- Any information produced by the lecturer in his personal capacity, or as Director of the GWPF, was not held by the University.
- The University's backup tape retention period was 4 weeks. Emails deleted by the lecturer from his email account on or before 31 July would only have been available on backup tapes up until 28 August 2010 at the latest. The initial request from the Appellant was received on 30 August 2010 when no backup tapes would have contained the deleted information. On further checks on 9 September it was found that the lecturer's generic user account was still registered on the system due to it not being removed in accordance with the University's usual procedures, due to workload priorities within the IT department. Once that had been established the Data Protection Officer advised that it should not be deleted whilst there was an FOI request extant. However, the majority of email messages had already been deleted and were no longer retrievable due to the 4 week backup retention period.
- The lecturer was requested by his line-manager, Professor Tim Cable, to create a folder of all documents and correspondence that he held on GWPF on his M Drive and email. This was to ensure that GWPF business was kept separately from the lecturer's university business and to ensure the information would be available if legally required under the Freedom of Information Act 2000. The University can categorically state that no information was subsequently provided to the Information Department in relation to these requests, other than information the

university did hold at the time and was not in relation to GWPF. At the time of the lecturer's leaving the University there were no on-going Freedom of Information requests in relation to the emails. The IT Department did not know that the lecturer had left the University.

- The University had not funded the lecturer's personal work nor had it provided administrative support for any personal work. The University had provided evidence to show that no research was submitted from the lecturer on behalf of the University.

### Evidence

19. The Tribunal read and considered detailed written evidence submitted by the Appellant and the University in terms of the lecture's written and published work, University policies, information on webpages, staff profiles and external press releases.
20. The Appellant adopted his written witness statement dated 15 October 2012, maintaining that the University had mis-handled his requests from the outset.
21. He believed that, when the University engaged the lecturer in its research activities, it appeared to have found a compromise between his personal work and the Department by producing four papers relating to climate change. As a result of the lecturer's exceptional role, "the University gained significant media coverage (both mainstream and online), additional publicity and increased academic breadth." It was wrong in principle for the University to shield information "by imposing a neat line of separation" between the lecturer's roles when in reality that line was blurred on a regular basis to the benefit of the University.
22. The Tribunal heard direct oral evidence from Professor Tim Cable – the lecturer's Head of Department and Director of the School of Sport and Exercise Sciences – and Mark Wynne, the Head of Technical Services at the University. Both of these witnesses adopted their written witness statements and were cross examined in detail on them by the legal representative for the Appellant, Mr Amunwa.



23. The Tribunal found both witnesses to be cogent and credible and the evidence that they presented both in their statements and in answers to the detailed questions in cross-examination both helpful and instructive.
24. It is not proposed to set out the detail of their evidence because it effectively corroborated the University's position as summarised at Paragraph 18 above.
25. The Tribunal also considered closed material in relation to the information contained in the lecturer's private email account and considered submissions in relation to this in closed hearing. The Tribunal has also had the benefit of considering – at the conclusion of the oral portion of the appeal and before arriving at its final decision – the detail of the closed material presented to it on CD.

#### Conclusions and Remedy

26. The Tribunal, as a preliminary point, decided in open session at the appeal in favour of the Appellant that issues of "climate change" should be considered in their broadest sense.
27. This meant that, for the purposes of the appeal, global warming was viewed not just as a modern, post-industrial phenomenon but as an issue that reflected both ancient, historical events as well as those in a more modern and contemporary sense.
28. The Tribunal is also acutely aware that it has seen closed material and considered closed submissions which the Appellant has not seen or heard. The Tribunal always adopts a sceptical rigorous approach when considering such material – mindful of its duty to represent the public interest in deciding whether such material should or should not be made public – and in the context of this appeal does not feel it necessary or relevant to explore in a closed annex to this decision any of the material it has considered. The Tribunal reviewed the emails both in the lecturer's draft folder as well as in the sent folder.

29. For the record however the closed bundle in the appeal contained all of the following:
- emails that were stored in the lecturer's University email account;
  - emails that were discovered by the University after the lecturer left his employment with the University;
  - emails that appeared to relate to his interests in man-made global warming; and
  - emails that appeared to have been sent by the lecturer.
30. The Tribunal notes that the Commissioner recently issued guidance under FOIA on 'Official information held in private email accounts' [7/387 – 392]. That guidance makes it clear that information contained in emails sent via private email accounts will only fall within the scope of FOIA if that information effectively compromises public authority business (i.e. the Commissioner's decision in the Michael Gove MP case FS50422276). The Upper Tribunal gave guidance on how Tribunal's should approach the question of whether a public authority 'holds' information for FOIA purposes and – for the purposes of the appeal in question – this Tribunal applies that guidance to the elements of the request falling within EIR.
31. The relevant paragraphs of that Upper Tribunal judgement in *University of Newcastle v IC and BUAV* [2011] UKUT185 (AAC) are Paragraph 28 and Paragraph 29. The Upper Tribunal, unsurprisingly, held that a common sense approach should be adopted to the question of whether particular information was 'held' by a public authority and that the following principles should be considered:
- 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.

32. The Tribunal in this appeal has found that guidance particularly helpful.
33. The Appellant believed that there was a strong connection between the lecturer's private research and the work he did within the University. The Tribunal does not find this was the case. This lecturer was pursuing the subject of global warming in his own free time and exclusively in his own private interest. It had no bearing on his role as an academic employed within the School of Sport and Exercise Science. This private research was not funded by the University and the University had no interest in the research and did not seek to benefit from it. Attempts by Mr Amunwa in cross-examination to pull Prof Cable towards such propositions – when examined against the actual evidence being referred to – came nowhere near to establishing that was the case. Rather the opposite, because this was a lecturer who was using – in a private sense – his connection with the University without any endorsement for his work in a completely separate field from his employment at the University.
34. In terms of the lecturer's work within the School of Sport and Exercise Science, the four papers which the lecturer co-authored were not concerned with the issue of man-made global warming and were the only research papers authored by him in his capacity as an academic at the University. The Tribunal finds that there is absolutely no evidence that the lecturer's role within GWPF grew out of the work he was conducting as an employee of the School of Sport and Exercise Science at the University.
35. In terms of the personal webpages – and the material placed on them by the lecturer – he was the person who determined what information went on those pages. The University had no input at all. That allowed the lecturer to use his webpage to advertise his private interests in climate change and global warming but in no sense was that an endorsement by the University of his interests or roles in that field. The Tribunal found no evidence to support the Appellant's view that the University sought to gain a collateral benefit from the material on these pages.
36. The Tribunal found no evidence to support the contention that the University had authorised the lecturer's conduct in media appearances and public speaking in relation to climate change and global warming. The University gave

the lecturer no credit for these activities in so far as his contracted hours were concerned and – in any event – had a limited ability to regulate how academics used their job titles when speaking to the media and public events.

37. Similarly there was no evidence to support the proposition that the lecturer's involvement in GWPF was something in which the University was concerned or had an interest. The evidence, in fact, confirms that this was a wholly private endeavour on the lecturer's part.

38. Having considered the emails in question the Tribunal is satisfied that these were completely private and that there was no "crossover" between the lecturer's contracted University work and the private work he was dealing with in terms of global warming and climate change.

39. In short, the Tribunal is satisfied that the emails in question were private emails sent by the lecturer in a purely private and personal capacity. The information they contained did not relate to or remain to University business. They were not emails falling within the scope of the EIR and the University did not 'hold' the emails for EIR purposes in the context of the original enquiry by the Appellant.

40. Our decision is unanimous.

41. There is no order as to costs.

Robin Callender Smith

Judge

13 December 2012