



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

Appeal No: EA/2012/0156

STEPHEN MCINTYRE

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

UNIVERSITY OF EAST ANGLIA

Second Respondent

Subject

Environmental Information Regulations 2004: reg. 12(4)(d)

Decision

We dismiss the appeal.

Date: 17 May 2013

Reasons For The Decision

Background

1. This appeal concerns research related to tree-ring dating, which is a method used to analyse wood from archaeological sites to determine past climates and global warming. We are told that the concentric rings found in a tree provide information about each year of the tree's growth and the weather conditions affecting it.
2. On 28 February 2011, the Appellant requested information from the University of East Anglia ('UEA') which its Climatic Research Unit ('CRU'). He has confirmed that for our purposes his outstanding request is for the:

“regional chronology being the single (nonbootstrap) chronology referred to in the UEA refusal letter of July 18 2011 or the regional chronology calculated from the list of sites listed in Annex A of the UEA letter of 27 April 2012, if this is different” ('the 2006 Chronology').
3. UEA refused to disclose the information and the Commissioner found they had correctly relied upon regulation 12(4)(d) Environmental Information Regulations 2004 ('EIR') in relation to the information being '*material in the course of completion*'.¹
4. The Commissioner commented in his decision notice that UEA had confirmed it would publish the requested information by October 2012, but that the Appellant had doubted UEA's sincerity and suspected this was a delaying tactic. The Commissioner thought that if a further request were made and there were delay beyond October 2012, such delay would need to be reasonably explained by UEA for the information to remain justifiably withheld by virtue of regulation 12(4)(d).

Grounds of Appeal

5. The Appellant now contends that:
 - i. The Commissioner erred in concluding that the requested information fell within the ambit of regulation 12(4)(d) EIR, because it was not '*material which is still in the course of completion, to unfinished documents or to incomplete data*' ('Ground 1') and / or
 - ii. The requested information did not otherwise fall within the ambit of regulation 12(5)(c) EIR because disclosure would not adversely affect intellectual property rights belonging to the Second Respondent ('Ground 2'); and/or
 - iii. To the extent that either or both exceptions in grounds (1) and (2) are found to be engaged, the public interest in maintaining the exceptions did not outweigh that of disclosure in the circumstances under regulation 12(1)(b) EIR ('Ground 3').

The Task of the Tribunal and relevant Law

6. This appeal concerns the EIR. For our purposes, under regulation 5(1) EIR, a public authority that holds 'environmental information' is required to make it available on request. Environmental information is defined in regulation 2(1) to include "*any information in written, ... electronic or any other material form on (a) the state of the elements of the*

¹ The application of regulation 12(5)(c) EIR (regarding intellectual property rights) which UEA had also relied upon was not considered because the Commissioner had found for UEA in any event.

environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements..” The parties agree that the requested information, which relates to climate change, is environmental information.

7. The Tribunal’s remit is governed by s.58 Freedom of Information Act 2000 (‘FOIA’)². This requires it to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently.

8. For the purpose of this appeal, a public authority may refuse to disclose information to the extent that an ‘exception’ applies and –

‘in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.’ (Regulation 12(1)(b))

9. One such exception is that the public authority may refuse to disclose information to the extent that –

*‘the request relates to material which is **still in the course of completion, to unfinished documents or to incomplete data.**’* (Regulation 12(4)(d).)

Evidence and Submissions

10. The parties provided witness evidence, submissions, bundles of documents, and the requested information. We have considered all that has been submitted, even if not specifically referred to below. We have not issued any part of this decision in confidential or ‘closed’ form.

11. All parties opted for a paper hearing, which we held and then posed further questions for the parties. We have not set out our consideration of Ground 2 because having found that the Appellant fails on Grounds 1 and 3, the appeal cannot succeed. We have added our own headings to these summaries, for ease of reference.

Second Respondent’s Witnesses

Witness 1: Dr Osborn

12. We received witness testimony from Dr Osborn of the CRU who researches natural climate variability and analyses tree rings. His statement included that:

Background

i. Variations to climate within the last two centuries are relatively well known from instrument-based observations. However, the information derived was insufficient to answer whether the changes are predictable and outside the range of natural climate variability. For earlier periods, scientists attempted to infer past climate changes and causes, from ‘climate proxies’ such as annual growth rings in trees, which allow for absolute dating of the material. Indicators included the width, density and chemical composition of the wood of each ring.

ii. The raw tree-ring data were the measurements of each individual ring of each sample. These showed only a weak relationship with the local climate because of other influences

² See s.55 and s.57 of the Freedom Of Information Act 2000 and Regulation 18 EIR.

such as insect infestations, species of tree, etc. Non-climatic influences affected individual trees in different ways.

- iii. The 'tree-ring chronology' combined tree-ring data from many individual trees to partially cancel out non-climatic influences. It represented the changing growth rate of trees across a site, rather than the growth rate of an individual tree. The aim was to develop a chronology that represented as best as possible the common tree growth changes across a region, with the greatest potential to act as indicators of variations in the local weather and climate over time. The utility of a tree-ring chronology was enhanced if an estimate of statistical confidence and uncertainty could also be made.
- iv. Creating a chronology involved the selection and processing of raw tree-ring data. More reliable tree chronologies could be developed by examining the characteristics of different types of draft chronologies to identify deficiencies or biases within those chronologies and the subsequent refinement of the selection criteria and the methods used to process the data.

The Research

- v. The research had been on-going for a number of years, and particular phases published when completed in 1995, 2000, 2002 and 2008. Professor Briffa had led the CRU component.
- vi. He became involved in the '2004 work', for which the 2006 Chronology was created. This phase of work was separate to, and initially ran parallel to, the work that was published by Briffa et al. in 2008 ('the 2008 paper'). It began in 2004 and continued through to 2007 with funding from the European Union. The object of the 2004 work was to obtain a more complete statistical assessment of the accuracy of the data and whether or how it could be improved. The importance of work in this area was recognised through further significant funding in 2009 from the Natural Environmental Research Council ('NERC') to investigate various issues associated with uncertainty in using tree-ring data to infer past climate changes, including the northern Eurasia region, which has allowed the project to continue to grow and develop.
- vii. In terms of the research process involving the 2006 Chronology, Dr Osborn led in assessing the uncertainties associated with the statistical models that are used for constructing a chronology from the tree-ring data and that are used to calibrate the chronology in order to represent temperature. Professor Briffa and Dr Melvin, of the CRU focused on issues associated with the selection of raw data and the identification and treatment of undesirable biases in the tree-ring chronologies.
- viii. Mr McIntyre's request arose following an email dated 28 April 2006 being published anonymously following the unlawful hacking of the CRU backup server. It had referred to the Yamal and Polar Urals chronologies.

2006 Chronology: not finished

- ix. CRU has developed innovative approaches to address the specific challenges of constructing tree-ring chronologies. Their characteristics are strongly influenced by the statistical methods for processing the raw data and the criteria for selecting it. This is because the raw measurement data indicate multiple populations of data with incompatible characteristics. A simple, naïve combination of all available data yields a chronology that is biased by the averaging of data with incompatible characteristics. CRU's approach is novel. It involves a more detailed consideration than previously applied of criteria for determining which sub-populations could be used; and which needed to be statistically

transformed so as to avoid introducing bias and reduce non-climatic influences as much as possible.

- x. The aim has been to create a number of tree-ring chronologies based on raw tree-ring data from the Polar Urals and the Yamal region of Russia and analyse these to draw findings in respect of climate change. Although the ultimate aim was to obtain the most reliable chronologies of tree-growth to make inferences about variations in climate for the last 2000 years, there was also much to be learned from comparing the differences between the various draft chronologies obtained from different choices and assumptions.
- xi. The 2006 Chronology formed part of the iterative, evolving process. It drew data from a much larger area than some other chronologies to address questions about averaging more data to see if it would yield better chronologies with lower uncertainty. For instance, if all the available data for a small region had already been incorporated, did drawing in data from a wider region reduce the uncertainty by increasing the size of the data sample?
- xii. The 2006 Chronology was not itself the finished, tested chronology. It was one of a number of draft chronologies, which formed (and still forms) part of an evolving scientific analysis of how a reliable chronology should be devised. These draft chronologies comprise the workings out of the research team to build up a picture of how the research has developed, focused and grown over the course of the project. The various iterations of chronologies have been retained by UEA to demonstrate the soundness of its research techniques and results, and analysis of them would form part of the intended publication of the research.
- xiii. The 2006 Chronology cannot meaningfully be viewed in isolation given that it is a draft chronology inextricably bound up in the on-going and evolving research. For example, as the project has progressed, the amount of raw tree ring-data being considered has expanded and a number of further uncertainties considered. The project has been shaped and directed by the evolution of the various forms of chronologies constituted over time, including the 2006 Chronology. The methods for processing the raw tree-ring data have been improved and refined. Comparing the draft chronologies and how they have developed and improved over time lies at the heart of drawing conclusions from the research project. The 2006 Chronology is an integral and non-extractable part of the unfinished process.

The 2008 paper

- xiv. The Appellant's Grounds of Appeal referred to an article published by Professor Briffa et al. in 2008 titled "*Trends in recent temperature and radial tree growth spanning 2000 years across northwest Eurasia*". The Appellant stated that "*In September 2009, when data for Briffa et al 2008 became available, I speculated that ... [the 2006 Chronology] had been calculated in the preparation of Briffa et al 2008, but that the authors had not reported either that they had calculated such a chronology or its results*". The 2008 paper and research work were separate phases of CRU work, focusing on different and distinct objectives and funded by separate bodies. He (Dr Osborn) was not an author of the 2008 paper and had no involvement in it, including the choice of which sites *might* be used in the context of tree-ring analysis.
- xv. The 2006 Chronology was not considered for the purposes of Briffa et al 2008. It was not complete nor appropriate for the purpose of the 2008 paper and was effectively an untested chronology at that date. It would have compromised the integrity and value of the work which Professor Briffa and others were conducting in the context of the 2008 paper if they had sought to incorporate the 2006 chronology into their work.

- xvi. The focus of the 2008 paper was the description and analysis of changes in temperature in the northern Eurasian region, by making use of data that was already directly interpretable as evidence of temperature change. They used instrument-based temperature readings for the last 150 years and, for the last 2000 years of data from existing tree-ring chronologies that had already been shown (by previously published work) to have a relationship with temperature.
- xvii. Although Professor Briffa, the lead author of the 2008 article, was aware of the general approach being taken for the new phase of research that led to the creation of the 2006 Chronology, the witness was doubtful that Professor Briffa was familiar with the details of the 2006 Chronology including the specific selection of which tree-ring data were used to construct it. However, even if he had known about the chronology, he could not have been expected to refer to it in the 2008 paper. The 2006 Chronology was part of an initial exploration of the uncertainty arising from one aspect of tree-ring data processing and to discover how wide a region can sensibly be used to produce a chronology representing the common tree-growth signal by using sites from a significantly larger region (spanning more than 20° of longitude) than the immediate Urals-Yamal region. Further, this chronology was preliminary, had not been examined in any detail and could be biased by inconsistencies between some of the measurement data. The 2006 Chronology was, therefore, neither complete nor appropriate for the purposes of the 2008 paper.
- xviii. Further, the 2008 paper required data that could usefully represent evidence of past changes in temperature. The 2006 Chronology could not be used for this purpose as it did not reliably evidence past changes in temperature, since it did not deal with the biases inherent in the additional data that were incorporated into it. The on-going work within the research project to which the 2006 Chronology related had been focussed on finding a more effective way to identify and take into account the existing biases in the 2006 Chronology.
- xix. Simmons and Simonsohn's recommendations on reporting the full research process including failed manipulations, to reduce academic fraud etc., are reasonable. However, the Appellant was wrong to apply them to the 2008 paper because he wrongly assumed that the 2006 Chronology used data considered for the 2008 paper or was part of that study and represented a failed manipulation that was then not disclosed. The additional data used in the 2006 Chronology was not initially considered for the 2008 work and subsequently eliminated; it was never considered for the 2008 work at all. Thus there was no requirement to report or justify the elimination.
- xx. By publishing the work in the scientific literature the CRU will be 'reporting the process' as recommended by Simmons and others. Premature release of incomplete, draft chronologies in isolation, and in advance of the article that will describe how the research process has unfolded would not meet the need to 'report the process'. A piecemeal disclosure of individual draft chronologies was entirely at odds with the comprehensive reporting process recommended by Simmons et al.

The 2009 publication

- xxi. The Appellant referred to the articles published on the CRU website in 2009, stating: "*the website articles need to be closely examined in light of UEA reliance in their refusals on the premise that they would be "adversely affected" by disclosure of the 2006 Chronology on the internet. UEA willingly published the 2009 chronology on the internet, together with supporting information and data for more extensive than that requested in the present EIR appeal*". The University's 2009 online 'disclosure' was undertaken with the objective of rebutting incorrect and potentially defamatory allegations, triggered by online commentary by the Appellant, that the version of the Yamal tree-ring chronology published by Professor

Briffa in 2000 was not “robust” and that CRU had deliberately selected tree-ring data to produce a preconceived and erroneous picture of tree-ring variations in this region using those data. Thus, the University did not “willingly publish” the 2009 online article but was compelled to do so to counter the damage to its reputation from these allegations, which were demonstrated to be false. The 2009 online article consisted of details of an analysis of tree-ring data, exclusively from the Yamal peninsula. It contains examples of various alternative chronologies that could be produced using one statistical approach to chronology construction, but applied to different subsets of those data, including a subset that had formed the basis of the Yamal chronology already published in Briffa (2000). It did not contain the 2006 Chronology which is the subject of this request.

- xxii. The 2009 article and chronology data were not unfinished or incomplete and they did not involve the development and application of new chronology construction methods. The 2009 release is significantly different from the chronology at issue in the current request, which represents a fundamental part of the research in which the University is currently engaged, specifically the development and application of new chronology constructions methods to overcome the challenges associated with the combined use of wider (i.e. from the Yamal Peninsula and the Urals) datasets from the “greater Urals” region.

The effect of incomplete publication

- xxiii. Had the 2006 Chronology been released at the time of Mr McIntyre's request: without the completed research findings also being published, including an explanation of how this draft chronology had been constructed, the chronology would inevitably have been misconstrued and misunderstood, and the public misled as to the scientific implications of the 2006 Chronology. This would in turn have warped the climate change debate - particularly in the use of climate proxies, and the perception amongst the public and scientists of the research being conducted. The 2006 Chronology has effectively evolved over time through the creation of new chronologies, as the processing of the raw tree-ring data has been refined and developed.
- xxiv. These risks could not have been meaningfully reduced, by making it clear that the research tool was still a work in progress. In any event, given that, at the time of Mr McIntyre's request, the research was still in a considerable state of flux, it would have been difficult to devise clear and reliable caveats in respect of the 2006 Chronology.
- xxv. The climate change arena is highly charged and scientific research is always heavily contested. If the chronology had been disclosed following the request, then even with suitable caveats, it would inevitably have been taken out of context and misused by individuals whose intention is to distort the climate change debate. Disclosure of the chronology without the surrounding completed research could also have led to inaccurate and unreliable information potentially being used as the basis for further scientific research.
- xxvi. There would inevitably have been adverse reputational consequences for the individual scientists involved in the work and UEA, because biases in the chronology limit its value as evidence of past temperature changes, and would doubtless be seized upon by climate change sceptics as demonstrating that there were fundamental failings in CRU's approach to the science of climate change. Whilst such charges would be entirely unfair, they would serve to damage the reputation of individual CRU scientists as well as CRU's reputation as a leading centre of excellence in the field of climate change research.
- xxvii. If a university is forced to release unfinished segments of scientific research, that is bound to have a chilling effect on the ways in which scientists more generally engage in scientific research. They would be seriously concerned about having to defend their unfinished

thoughts. This would be an unwelcome distraction from the work, and result in serious concern about the reputational damage which might result from scientists having to defend themselves against challenges that their research ideas were 'half-baked' or 'misconceived'. These concerns are more profound as in the present case, where the context is of a hotly contested and often extremely hostile scientific debate.

Date of Publication of the 2006 chronology

- xxviii. The CRU were committed to publishing the research involving the 2006 chronology once the analysis, findings and interpretation were all complete. It had stated that “*UEA has undertaken to publish the fully evolved version of the 2006 chronology, as part of a finished piece of research, in a peer reviewed publication in October 2012*”. This was the original end date of the NERC funding contract for this phase of the work. However, Professor Briffa, who is the lead author for the articles that are currently being prepared for publication, had unavoidably to take a 5-month period of absence in 2012, returning in early October. His absence delayed the preparation of the intended publication of the work. Following his recent return to UEA, they decided to publish the phase of the work in two articles. There would be a full-length article giving explanation of the many variants of the CRU approach which would include the 2006 Chronology. There would also be a short article highlighting one of the key findings that related partly to the 2006 Chronology, but without the chronology being presented. The short article had been completed (at the time of the statement) and submitted to an academic journal, Nature Geosciences, for consideration. However, the journal’s editor did not think it appropriate, in its current form, for publication in their journal and the CRU intended revising it for submission to an alternative journal. UEA was working to complete the longer article for submission to Quaternary Science Reviews by the end of November 2012. The completed research would materially add to the existing debate by setting out a full, thorough overview of the research process, methods used, analysis undertaken, development and refinement of analytical process and the reasoning and conclusions.

Public interest

- xxix. If the 2006 Chronology had been disclosed to the Appellant, he would not have hesitated to publish it online and use it as a platform for attacking CRU's work. This would have had serious adverse effects contrary to the public interest, and not have served any meaningful public interest. Mr McIntyre had been clearly dissatisfied with the way that the CRU had conducted its research. He had made this clear to various inquiries that investigated CRU following the so-called ‘Climategate’ controversy, though these independent inquiries subsequently considered their research conduct and “*found that [CRU’s] rigour and honesty as scientists are not in doubt*”.
- xxx. Anyone else interested in this area had been free to undertake their own analysis of the published tree ring data because the raw data was publicly available. It was misleading to imply that because the chronology was not published the CRU had restricted or distorted the advance of scientific knowledge in the area, and that releasing the 2006 Chronology would correct this.
- xxxi. There was a strong public interest for scientific research to be the subject of scrutiny, but not prematurely whilst incomplete. The public interest was met by the publication of properly informed and peer-reviewed scientific research.
- xxxii. As stated by Universities UK, in its submission to the Justice Committee, “*the early release of research findings and data can have potentially serious implications for the quality and reputation of UK research, universities’ competitive position nationally and internationally, and relationships with commercial partners*”.

Further Statement

xxxiii. After further questions from the panel, he clarified:

- a) Research or data might be considered complete when ready for publication after it has been peer reviewed or when it has been abandoned.
- b) Additionally, in determining whether the research is finished, key elements are whether the scientists have self-critically examined their research in detail, are satisfied that it is reliable, have considered alternative analysis techniques, and have identified and addressed potential biases that might be present in the data or in the methods used to analyse the data. This could be a never-ending task because there is always more to discover and new knowledge or data to apply.
- c) In a case such as the present one involving technical subject matter and containing information which may be open to misinterpretation if released in an incomplete form, it is appropriate to accept that it is the scientists involved who should make the judgement as to when a particular phase of their research is 'complete' and in a satisfactory state for public release. Scientists' contribution to advancing society's knowledge is determined principally through the esteem with which their published output is viewed, and thus there is a very strong public interest argument that in such circumstances they are in the best position to make the judgement call over what and when to publish. Indeed, it is hard to see how someone could make such a judgement without a full understanding of the underlying science and the methodology used.
- d) The requested work had never been abandoned as not being worth pursuing. There was no period of complete inactivity, but there was much reduced activity during 2007 and 2008. Funding from NERC had enabled this work to progress to the stage where we consider publication is warranted. This funding was sought via a research proposal that was formally submitted to NERC on 1 December 2008. NERC awarded the requested funding in 2009. The project officially began on 1 May 2010. Work with the Yamal and Polar Urals tree-ring data made up only part of this project, and that work had proceeded in parallel with other components of the project.

13. **Witness 2: Professor K Briffa provided an open and closed statement. The former included:**

- i. The work involving the 2006 Chronology had always been his paper as he was primarily responsible for designing the work, supervising it and writing the manuscript describing the results. However, it was a large, complex and collaborative effort involving colleagues in the CRU, Russia, and Germany.
- ii. NERC had in December 2011 granted an extension to the end of April 2013 of the contract for funding CRU work that included the data to be used for the publication in question.
- iii. The draft of the paper was complete, but it was essential in collaborative research to allow collaborators in Russia and Germany sufficient time to review what was a large amount of work and a complex and detailed manuscript. There was also considerable supplementary material that had to be reviewed, commented on and revised in the light of their remarks.

- iv. After further questions from the panel, he clarified:
 - a) When drafting the 2008 article (which specifically focussed on analysis of data for a restricted region, the Yamal Peninsula) he was not aware of the precise make-up of the data that had been included in the 2006 chronology. When the 2006 chronology was produced, he was aware that data were to be drawn from a wider region of northern Siberia than just the Yamal Peninsula but he did not know what particular data had been included, and this remained the state of his knowledge whilst drafting the 2008 article - the 2006 chronology was not relevant to that article.

Respondent's Evidence

14. Amongst the evidence provided, the Commissioner noted the CRU's evidence to the Muir Russell Inquiry³, which stated that it did not include the 2006 Chronology in the 2008 paper because "*it was felt that this work could not be completed in time*".

Appellant's Submissions

15. The Appellant's submissions on Ground 1 included:
 - i. That he had published academic articles on the topic in peer-reviewed academic literature, and his work had been cited by the Intergovernmental Panel on Climate Change. In 2010, he was named by the *New Statesman* as one of "50 People Who Mattered in 2010".
 - ii. He raised questions as to UEA's credibility, including that:
 - a) UEA had provided inconsistent excuses and failed to live up to an undertaking to make the information available as part of an academic publication by October 2012. UEA asserted that at the time of his original FOI request, UEA intended to publish the 2006 Chronology. The Appellant did not believe this.
 - b) Dr Osborn's evidence should not be accepted uncritically or without independent verification as he was one of the participants in a scheme in which UEA employees removed documents requested under FOI from work computers to personal memory sticks to subvert FOI compliance.
 - c) Further, on important factual points concerning the preparation of the 2008 Paper, Dr Osborn was reduced to mere speculation on what Professor Briffa might or might not have known. Briffa's own evidence on the preparation of the 2008 paper was conspicuously absent. Dr Osborn's speculations should be discounted.
 - iii. To show academic fraud and failed manipulations:
 - a. The information requested would show long-standing academic fraud by the CRU, explaining why UEA so vigorously opposed release of the information.
 - b. The CRU, especially Professors Briffa and Jones, produced reconstructions purporting to show the temperature history of the past 1000 years. Both had been prominent supporters of the position that 20th century temperatures are

³ We are told the Muir Russell Inquiry was an independent inquiry commissioned by the UEA to look into the events surrounding what was termed 'Climategate' – See The Independent Climate Change E-mails Review July 2010.

unprecedented in the past 1000 years.⁴ In 2000, Briffa had published a Yamal chronology which was subsequently widely used in other temperature reconstructions. He did not reveal that it was based on a very small number of cores. Subsequently, he attempted to develop more robust chronologies.

- c. In early 2006, as later revealed in 'Climategate' correspondence, CRU developed a regional chronology for the region. In an earlier stage of the present information request, the ICO required CRU to disclose the identity of the 17 sites, which it had previously refused. Although this regional chronology gave profoundly different results to the original chronology, CRU did not disclose these results. Indeed, Briffa prominently showed the original Yamal reconstruction as one of only eight proxies purporting to illustrate the difference between modern and medieval temperatures.
- d. In 2008, Briffa and others published an article purporting to present regional chronologies for three high-latitude Eurasian regions, one of which was Yamal. In the other two regions the authors dramatically expanded measurement data from that used in the previous Briffa work of 2000, but not for Yamal-Urals, instead continuing to use the very small data set used in the 2000 article, rather than reconstruction that CRU had calculated in 2006. Briffa et al (2008) did not disclose that they had calculated a regional chronology for the Yamal-Urals area nor did they discuss why they had elected not to use this regional chronology.
- e. Subsequently, the CRU implausibly claimed that they had not been able to complete the Yamal-Urals regional chronology in time for the 2008 article, not explaining what, if anything, was "incomplete" about the 2006 calculation other than a result that they did not match their prior result. The existence of the 2006 regional chronology became known as a result of the 'Climategate' emails. The Muir Russell Inquiry neglected to examine the 2006 regional chronology, despite the Appellant's request.
- f. When UEA refused the request, they did not hint that they had the slightest intent of publishing the 2006 Chronology, as opposed to leaving it buried and unreported. However, they subsequently argued that the 2006 regional chronology was valuable intellectual property which they undertook to the Commissioner that would publish no later than October 2012, using this planned future publication as an excuse to avoid disclosure. This was merely another delaying tactic by UEA, but the Commissioner thought there was no evidence to support this assertion.
- g. UEA flagrantly disregarded its undertaking to the Commissioner. Instead of publishing the 2006 Chronology as part of the promised article, it only submitted a "short form" article which instead of including the requested 2006 Chronology, merely contained information closely related to but not precisely the same as the requested 2006 chronology. He suspected that the short-form article was rejected because UEA did not submit it until very close to the required date of October 2012 as they refused to disclose the date of submission and rejection.
- h. The 2006 reconstruction would show results inconsistent with the Briffa (2000) and the 2008 Paper results. This accords with the concern expressed by Uri Simonsohn of "*undisclosed flexibility in data collection and analysis*" by

⁴ We note that UEA does not accept this description as an accurate portrayal of the CRU approach, and takes issue with various other assertions made by the Appellant, just as the Appellant does not accept the UEA's position.

researchers who seek combinations of data that work and report only such combinations, without reporting the process.⁵ Simmons et al proposed a set of rules for avoiding the problem including reporting all experimental conditions including failed manipulations. Under these policies directed at preventing both “false positives” and academic fraud, the 2008 Paper would have had to disclose the 2006 Yamal-Urals regional chronology as a “failed manipulation”.

When is something complete?

- iv. In his decision notice FER0256705, the Commissioner considered Regulation 12(4)(d) and stated that “*where an estimated cost is held and used to inform a decision or development of policy, then this information constitutes a completed figure for council purposes at that time*”. Even if documents change, Regulation 12(4)(d) did not apply to figures relied on by council at any stage. On this basis, the Yamal-Urals regional chronology as it existed at the time of the 2008 Paper, a peer reviewed publication, was the relevant Yamal-Urals regional chronology, even if changes were made subsequently.
- v. The Appellant stated in his grounds that:
 - a. In September 2009, when data for the 2008 Paper became available, he had speculated that a Yamal-Urals regional chronology (ie the requested information) had been calculated in the preparation of the article without the authors reporting it. This had led to considerable controversy, with CRU denying that they had considered the inclusion of nearby data sets. Their claim was revealed to be untrue in the Climategate emails.
 - b. The Commissioner failed to consider the issues in the context of the already published 2008 Paper. UEA now says that their calculation of the Yamal-Urals regional chronology was incomplete at the time of publication of the 2008 work and was therefore not presented. Briffa did not include “formal written explanations” of why they disregarded the Yamal-Urals regional chronology and resorted to the local Yamal site chronology.
 - c. UEA admitted that the requested information was profoundly embarrassing to them as Osborn’s witness statement stated that the release of the requested information would create a “*a warped perception of the research we are conducting*”; “*adverse reputational consequences for the individual scientists involved in this work and the University itself*” and that it would even “*warp the debate on climate change, particularly insofar as it relates to the use of climate proxies*”. The Tribunal should therefore accord no more deference to UEA than is due to any supposedly reputable institution faced with potential embarrassment. The best way for UEA (or any other institution) to avoid embarrassment was simply to promptly publish adverse results when they first came to their attention, as UEA should have done long ago in the present case.
- vi. UEA argued, relying heavily on a witness statement from Dr Osborn, that “*the disputed information does not comprise a discrete piece of finished research but instead forms a draft element of an evolving and iterative research project*”. While the disputed information may well have been a “*draft element*” of an “*evolving and iterative research*”

⁵ Simmons, J., L. Nelson and U. Simonsohn, 2011. False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant.

project”, that is not determinative of a 12(4)(d) exemption, particularly now that the UEA has conceded the appropriateness of Simmons et al disclosure policy.

- vii. The Commissioner had recognized the resulting potential for abuse: in stating that *‘this argument should not be used to withhold tree-ring chronologies endlessly, by arguing that they are always a ‘work in progress’.*
- viii. The Oxburgh report stated: *“Chronologies (transposed composites of raw tree data) are always work in progress. They are subject to change when additional trees are added; new ways of data cleaning may arise (e.g. homogeneity adjustments), new measurement methods are used (e.g. of measuring ring density), new statistical methods for treating the data may be developed (e.g. new ways of allowing for biological growth trends)”.* Even though tree ring chronologies are, in a trivial sense, “always a work in progress”, the work is “photographed” from time to time by publication of academic articles. In the case of the Yamal/Urals region, such benchmarks occurred in 1995, 2000, 2002 and 2008.
- ix. Under the Simmons et al policy, such benchmarks trigger broad disclosure obligations on the part of publishing authors and forestall “work in progress” arguments for work up to and including the date of publication. UEA has conceded that they have *“no issue with the approach taken by Simmons et al, which it accepts is reasonable.”* This acceptance eliminates nearly all of the potential controversy in this case and dramatically simplifies the job of the Tribunal to determining factual issues relating to the application of Simmons et al policy to the events surrounding the publication of the 2008 article. The Simmons et al policy, inter alia, requires authors, among other obligations, to disclose “failed manipulations”, such as the 2006 Chronology was, in their eyes, a “failed manipulation”. The “public interest is served by scientists being called upon to explain and defend their finished published research.” The purpose of the present request is to ask UEA to defend the 2008 Paper by disclosing relevant analyses that, even if regarded by UEA as “failed manipulations” are nonetheless required disclosure under agreed Simmons et al policy.
- x. UEA’s argument that Osborn’s calculation of the 2006 Chronology was not even exploratory research relevant to the 2008 Paper and that the article was concerned with a phase of the research entirely separate from the disputed information is highly implausible. This is the most important single issue in the entire case.
- xi. The research reported in the 2008 Paper was intimately related to Osborn’s 2006 research. Both the 2008 article and 2006 email dealt with the development of 2000-year long regional chronologies for three regions in northern Eurasia, with the three regions of the 2008 article either being identical to or overlapping with the three regions of the Osborn research reported in the 2006 email. Further there is documentary continuity between the 2006 research and the 2007 submission of Briffa et al 2008 that unequivocally shows Briffa’s awareness of Osborn’s research and completely contradicting Osborn’s assertion that Briffa was unaware of his results. Far from it being “wholly inapt” for the disputed information to have been included in the 2008 article; its disclosure was mandatory under the Simmons et al policy acceded to by UEA.
- xii. Dr Osborn’s stated that CRU had developed “innovative” and “novel” approaches to the selection and discarding of subpopulations. These “approaches” were not described in Briffa et al 2008 or its references, even though it reported regional chronologies for two of the three regions studied in the article. It is precisely to guard against biases arising from such “innovative” and “novel” techniques that Simmons et al recommend such thorough disclosure obligations, including the disclosure of failed

manipulations. The Oxburgh report into Climategate drew attention to the lack of statistical expertise at the CRU even though their work was inherently statistical: *“The potential for misleading results arising from selection bias is very great in this area... Under such circumstances there must be an obligation on researchers to document the judgemental decisions they have made so that the work can in principle be replicated by others.”*

- xiii. UEA argued that the 2008 article was concerned with a phase of the research that was entirely separate from the 2006 Chronology. Comparing documents on the 2006 research with the 2008 article and the documentary evidence of continuity between Osborn’s calculations in April/May 2006 and the subsequent Briffa et al 2008, the most obvious link between their respective subject matter is that both were concerned with the calculation of 2000-year long chronologies for the same three regions of northern Eurasia: Scandinavia (or Fennoscandia); Taimyr/Avam and Yamal/Urals. The 2006 Chronology was referred to in an email from Osborn to Briffa in 2006, which reported that regional chronologies had been calculated for the same three regions.
- xiv. Further, in September 2006, Osborn and Briffa, co-chairs of EU grant EVK2-CT-2002-00160 (SOAP), submitted their final report on the project, stating that one of its “main deliverables” was to be a reconstruction of “north-western Eurasian regional summer temperatures for the last 2000 years”, which was stated to be forthcoming as “Briffa et al. (in preparation)”. This promised article was unmistakably the subsequent Briffa et al (2008). Then, in March 2007, Dr Osborn, despite his protestations of having “no involvement” in the analysis of Briffa et al 2008, carried out calculations for Briffa for the three regions of Briffa et al 2008, which he placed in a PDF file and emailed to Briffa.
- xv. Osborn’s purported “doubt” that Briffa was “familiar” with Osborn’s regional chronology for Urals/Yamal defied credulity given the close relationship between the two authors, but, in any event, is unequivocally contradicted by available documents. Osborn’s evidence on this point should be firmly rejected by the Tribunal.
- xvi. Under Simmons et al policy conceded by UEA, the 2006 Chronology was, at a minimum, a “failed manipulation” that required disclosure.
- xvii. The Commissioner concluded that the Yamal-Urals regional chronology will “only be complete and finished” when it has been subjected to peer review. This argument would have more weight if CRU had not already published the regional chronologies of the 2008 Paper. The finishing procedures sought by UEA are precisely the form of data torture criticised by Simonsohn.
- xviii. UEA claimed that its 2009 webpage article “was wholly unrelated to the disputed information”. This is completely untrue. It was a direct response to the Appellant’s September 27, 2009 Climate Audit article, in which he surmised that UEA had carried out (but not reported) a calculation along the lines of the 2006 Chronology. It is hard to conceive of a more direct connection. UEA asserted that the research reported in the 2009 webpage article was “finished” while continuing to assert that the research reported in the 2006 email was “unfinished”.
- xix. The regional chronology has not been a “work in progress” for years. Should CRU recalculate the regional chronology in 2011 using the same or different lists of sites, such calculations constitute new research and would not mean that the earlier work was still “in the course of completion”, “unfinished” or “incomplete”. There is hypocrisy in UEA’s claim that publication of articles relying on “incomplete” data might mislead the public, while, at the same time, publishing articles like the 2008 Paper, which, according to

UEA, had been published without “completing” the regional chronology for the Urals/Yamal region.

Ground 3: Public Interest

16. The Appellant’s submissions on Ground 3 included:

- i. Safe space for research: Had Briffa and co-authors never published Briffa (2000) or Briffa et al (2008) or used the Yamal reconstruction in the IPCC (2007) report, their expectation of a “safe space” might have some bearing on the present case. However, by publishing results in academic journals, Briffa and coauthors in effect consented to disclosure of results within Simmons et al 2011, such that a “safe space” argument no longer applies.
- ii. Misinforming the public: Since UEA published Briffa et al 2008 even though there was an “ongoing research project” UEA misinformed the public by failing to disclose relevant adverse results in the Yamal/Urals region.
- iii. UEA observed that any ‘*interested member of the public*’ could use the same tree ring data to challenge conclusions by CRU, yet UEA refused to disclose even the list of sites that they had used in their 2006 Chronology under his request. However, the fact that “interested members of the public” may or may not be able to do such calculations is irrelevant to UEA’s disclosure obligations under EIR.

Respondent’s Submissions

17. The Commissioner’s submissions on Ground 1 included the following:

- i. The Commissioner noted that Dr Osborn had an important role concerning the research involving the 2006 Chronology and there was no reason to doubt his evidence. He relied in part on the same reasoning given in his decision notice, including:
 - a) Process Incomplete: The 2006 Chronology was unfinished and incomplete at the time of the request and the Appellant had not provided sufficient justification or arguments to suggest otherwise.
 - b) Producing a tree ring regional chronology was a process entailing manipulation of the underlying raw data and often input of additional information or reference data. Until the process was complete, the chronology could not be said to be finished or complete.
 - c) UEA’s assertion that the disputed information was incomplete at the time of publication of Briffa et al 2008 and therefore not presented for peer review, was consistent with their evidence to the Muir Russell Inquiry when it stated that it did not include the 2006 Chronology in Briffa et al 2008 because “*it was felt that this work could not be completed in time*”.
 - d) Process yet to be peer-reviewed: The Appellant’s arguments that the 2006 Chronology had not been a ‘work in progress’ for years and any re-calculations made in 2011 would constitute new research, should be rejected. The hiatus did not automatically mean that the work must have been completed, even if the work had not been actively progressed for some time. The determining factor was not one of time, but of process and the stage at which the chronology was at when requested in February 2011. At that time, it

was still in an on-going state of creative flux and would only be complete once all the processes had been concluded and subjected to peer review.

- e) The 2008 Paper not including 2006 Chronology Was Not Relevant to Ground: The Appellant's arguments that the CRU presented the 2008 Paper as being complete despite not relying upon the existing 2006 Chronology, related not to whether the 2006 Chronology was in fact complete at the time of the request (or indeed at the time of the Briffa article), but to whether the article should have been published in the first place before the chronology had been completed. This was not a valid ground of appeal against the Commissioner's conclusion in his decision notice.
- f) The Appellant argued that by applying the policies set out in a paper by Simmons and Simonsohn, the 2008 Paper would have had to disclose the 2006 Chronology as a failed manipulation, so as not to commit academic fraud. This argument (or any others inconsistent with Simmons et al) did not support a view that the disputed information was complete at the time of the request, or indeed at the time of 2008 paper.
- g) The Appellant seemed to argue that the 2006 Chronology, as it existed at the time of the 2008 Paper, a peer-reviewed publication, was the relevant (and therefore complete) chronology, even if changes were made subsequently. However, the CRU decided not to use the 2006 Chronology in the Briffa article or disclose it at the time of the request because it was incomplete at the time.

18. The Commissioner's arguments on Ground 3 included:

- i. The public interest in maintaining the exception outweighed the public interest in disclosure of the requested information.
- ii. There was a considerable public interest in climate science and understanding climate change. Disclosure of significant scientific evidence used in climatic research, which would potentially further such understanding and advance the science was of clear and strong public interest.
- iii. The public interests in maintaining the exception were:
 - a) Undermine its value and cause confusion: On the facts of this case, having accepted that the 2006 Chronology was not finished or complete at the time of the request, disclosure of the chronology in an incomplete state would undermine the information's integrity and scientific worth which would not be in the public interest. Inaccurate conclusions or erroneous extrapolations could be made from the material in its incomplete state potentially prejudicing the scientific rigour of ongoing climate change research as a whole. The public interest would not be served by adding further uncertainty or confusion into an area that had already attracted considerable controversy in recent years and which needed to be as accurate and evidence-based as possible for the public interest benefit to be maximized.
 - b) The need for a safe space in which academics could complete such work without having to prematurely defend or justify the findings/conclusions was an important public interest argument in favour of maintaining the exemption.

- c) The important public interest in generating debate about climate science and the methodologies employed, and putting the associated research to proof, is best served if the information being questioned has been presented in its most robust and clearly explainable form. For the 2006 Chronology, this meant that the information should be disclosed to the public in its completed state at a point when the relevant context would also be explained. Whilst the Appellant had referred to The Independent Climate Change E-mails Review of July 2010, as adding weight to the public interest in disclosure of the requested information, the report stated that:

'We note that much of the challenge to CRU's work has not always followed the conventional scientific method of checking and seeking to falsify conclusions or offering alternative hypotheses for peer review and publication. We believe this is necessary if science is to move on, and we hope that all those involved in all sides of the climate science debate will adopt this approach'. (Para. 31 of the report of the Muir Russell Inquiry.)

- iv. The Appellant argued that the Commissioner, in reaching his decision on the public interest balance, failed to consider the issues in the context of the 2008 Paper. He argued that the public interest favoured disclosure of the 2006 Chronology as the 2008 article did not include formal written explanations of why they disregarded the disputed information and resorted to the local Yamal site chronology. However, the Appellant did not appear to be disputing the general conclusions of the Commissioner in his decision notice that disclosure of research in an incomplete or unfinished form could undermine and jeopardise the full value of the information or that inaccurate conclusions or erroneous extrapolations could be made from the material in its incomplete state which would not only undermine the value of the information itself but could also potentially prejudice the scientific rigour of ongoing climate change research as a whole. The Appellant further did not dispute that incorrect or misapplied conclusions could be drawn from the publication of unfinished data.

Second Respondent's Submissions

19. The Second Respondent maintained that in relation to Ground 1:

- i. Mr McIntyre's entire appeal was built upon an assertion that the disputed information was withheld without intention to publish and should be disclosed under the EIR because it would 'show a long-standing academic fraud by the Climatic Research Unit'. This was misconceived and there was no evidence to substantiate the extremely serious allegation. Instead, the disputed information was withheld to create a safe space for unfinished scientific research and protect intellectual property rights in UEA's unfinished research (regulations 12(4)(d) and 12(5)(c) EIR).
- ii. Mr McIntyre made much of the fact that the disputed information had not yet been published. UEA had every intention to get the disputed information published. The relevant research paper including the disputed information had [by 20 December 2012] been submitted for publication. The reasons for delay in submitting the paper (including the disputed chronology) were entirely proper and explained in the open and confidential witness statements submitted.
- iii. The thrust of Dr Osborn's evidence was that the disputed information did not comprise a discrete piece of finished research but instead forms a draft element of an evolving and iterative research project. Thus, it was information plainly falling within the scope of regulation 12(4)(d) because it relates either to: (a) scientific research material which

is still in the course of completion or (b) unfinished scientific research papers. Notably, there was no credible evidence which undermines this.

- iv. The Appellant's arguments in support of his case that the disputed information did not fall within the scope of regulation 12(4)(d) were not sustainable:
 - a) He complained that the disputed information was not reported as part of the 2008 Paper. However, Dr Osborn explained that the 2008 article was concerned with a phase of the research that was entirely separate from the phase of research to which the disputed information relates; these phases having different objectives and requirements.
 - b) Mr McIntyre also seeks to draw an analogy between the disputed information and research information which UEA published in 2009. However, for the reasons explained by Dr Osborn, the 2009 article was wholly unrelated to the disputed information. Its publication did not entail the publication of unfinished research.
 - c) Mr McIntyre acknowledged that the disputed information amounted to an unfinished chronology in his letter to UEA dated 26 May 2011, in which he stated that the "CRU went ahead with the publication of Briffa et. al. 2008 without completing the 2006 Polar Urals/Yamal regional chronology as originally intended."

20. The Second Respondent maintained that in relation to Ground 3:

- i. UEA contended that the public interest balance weighed very firmly in favour of non-disclosure and that this was so irrespective of whether relevant public interests were aggregated (in relation to regulation 12(4) and 12(5)) as per the approach in *Office of Communications v Information Commissioner (Case C-71/10) [2011] 2 Info LR 2*.
- ii. Safe Space for Unfinished Research: there was an extremely strong public interest in preserving a safe space within which scientists in higher education could enjoy a confidential 'safe space' within which to develop their research free from the public gaze or fear that, whilst their research was still evolving, it would be exposed to public scrutiny. This had particular force in the context of heavily contested, highly charged areas of scientific research, including climate change. It was not in the public interest for scientists to have to defend and explain incomplete research concepts and tools which were by their very nature evolving. The public interest was served by scientists being called upon to explain and defend their finished published research.
- iii. In this case, the effect of disclosure would have been to place in the public domain an unfinished strand of on-going scientific research on climate change. There was every reason to suppose that, once disclosed, this research would end up being misinterpreted and mischaracterised so as to create a warped impression of the research being conducted within CRU. Thus, for example it would be presented, entirely unfairly, as a 'completed' chronology when in fact it was a draft chronology forming part of a wider and on-going research project. Indeed, Mr McIntyre's own arguments in this appeal suggested that this outcome was inevitable. As explained by Dr Osborn, Mr McIntyre had been dissatisfied with the way that CRU had conducted its research and previously made his dissatisfaction clear to various inquiries that investigated CRU following the so-called 'Climategate' controversy.
- iv. These arguments might conceivably be weakened in a case where the researchers were intending to keep their finished research 'under wraps'. However, the scientists

responsible for the project to which the disputed information relates had and still have every intention of publishing the research in question, as confirmed by Dr Osborn.

- v. The request was made at a point in time when the research project was still 'live' and evolving. It is well established that arguments as to the need to preserve a safe space for evolving ideas carry particular weight if the ideas relate to a process which is still unfolding and 'live' at the time of the request.
- vi. If interested members of the public were sceptical about the science being developed within CRU, there was nothing to stop them developing their own research based on the same tree-ring data that CRU used, which was publicly available, and using that research to challenge conclusions.
- vii. The Appellant had asserted that the disputed information should have been included because of the recommendations made by Simmons et al in an article they published in 2011 about the approach to be taken when publishing scientific research. However, the disputed information was not and could not properly have been treated as part of the research, which led to the 2008 Paper and was not considered for use in that paper. A piecemeal disclosure of individual draft chronologies would have been at odds with the comprehensive reporting recommended by Simmons et al. Thus, Mr McIntyre's arguments actually supported UEA's case on non-disclosure.

Our findings

Ground 1

21. Whether work is complete at the time at which a request is made is a matter to be determined on the facts of the case. We consider that at the time of the request, the 2006 Chronology related to material 'still in the course of completion, to unfinished documents or to incomplete data', because:
 - i. We accept the Commissioner's arguments set out in paragraph 17 above and the further evidence within paragraphs 12(xxxiii) and 13(iv).
 - ii. We accept UEA's evidence to the extent that the disputed information was a draft element of an evolving and iterative research project where many chronologies were developed, and that this was still in the course of completion or was otherwise unfinished, such that it fell within the ambit of regulation 12(4)(d).
 - iii. We accept as evidence of this Dr Osborn's statement that, as the project progressed, the amount of raw tree ring-data being considered had expanded and a number of further uncertainties considered. The project had been shaped and directed by the evolution of the various forms of chronologies constituted over time, including the 2006 Chronology. The methods for processing the raw tree-ring data had been improved and refined. Comparing the draft chronologies and how they had developed and improved over time lay at the heart of drawing conclusions from the research project. The 2006 Chronology was an integral and non-extractable part of the unfinished process.
22. The Appellant sought to undermine this, by asserting that the 2006 Chronology was connected to the 2008 Paper that had already been published. He asserted that it was implausible that the 2006 Chronology was not even exploratory research relevant to the 2008 Paper and that the article was concerned with a phase of the research entirely separate from the disputed information. He considered that the research reported in the 2008 Paper was '*intimately related to Osborn's 2006 research*'. He argued that the

disputed information should have been included in the 2008 Paper as its disclosure was '*mandatory under the Simmons et al policy*'.

23. He nevertheless also stated that in the 2008 Paper, Professor Briffa did not use the 2006 Chronology and further did not disclose either that they had calculated a regional chronology for that area, nor why they had elected not to use it. Mr McIntyre thus acknowledges that the 2006 Chronology was not used in the 2008 Paper, although he considers it was relevant to that work and should have been included.
24. Accordingly, this does not help his argument that his request did not relate to material that was '*still in the course of completion, to unfinished documents or to incomplete data*', such that the exception in regulation 12(4)(d) would not apply. Nor does it detract from the finding that the 2006 Chronology was a draft element of an evolving piece of research intended for publication but not yet completed at the time of his request. Had the 2006 Chronology had been used in the 2008 Paper that might have indicated that it was complete at that time, but it was not so used.
25. The Appellant argued that whilst the Commissioner had concluded that the Yamal-Urals regional chronology would '*only be complete and finished*' when it has been subjected to peer review, this argument would have had more weight if CRU had not already published the regional chronologies of the 2008 Paper. He asserted that by electing to publish certain regional chronologies, UEA had taken the position that a phase of their research had been completed. However, as the 2006 Chronology was not used in that paper, we do not find this reasoning compelling.
26. The Appellant also referred to the articles published on the CRU website in 2009, stating: "*the website articles need to be closely examined in light of UEA reliance in their refusals on the premise that they would be 'adversely affected' by disclosure of the 2006 Chronology on the internet. UEA willingly published the 2009 chronology on the internet, together with supporting information and data far more extensive than that requested in the present EIR appeal*". However, again, the 2006 Chronology was not used in the 2009 publication, so we do not see how this is evidence that it was complete.
27. The Appellant argued that while the disputed information may well have been a '*draft element*' of an '*evolving and iterative research project*', as stated by Dr Osborn, this was not determinative of a 12(4)(d) exemption, particularly if UEA conceded the appropriateness of Simmons et al disclosure policy. The Tribunal cannot accept this argument. The rules governing disclosure of environmental information by a public authority are those set out in the EIR, not quotes from an academic article by Simmons and Simonsohn.
28. Mr McIntyre questioned whether UEA had any intention to publish the 2006 Chronology, or rather, was asserting disingenuously that it was incomplete as a delaying tactic. He suspected that data would reveal '*academic fraud*' and failed manipulations within the meaning of the term explained by Simons and Simonsohn. The argument we can see of relevance here would be if he were asserting that the 2006 Chronology was as complete as it would ever be and did not relate to unfinished documents, because no report relating to it was to be published. However, we accept UEA's reasons for the delay in the publication, including the absence of one of the researchers, referred to in Dr Osborn's evidence and explained more fully in the closed evidence made available to us. We also note that UEA have made very clear that they intend to publish the 2006 Chronology shortly and Dr Osborn's statement that the various iterations of chronologies have been retained by UEA to demonstrate the soundness of its research techniques and results, and that analysis of them would form part of the intended publication of the research. We doubt that they would run the

risk of reputational and other damage by making such a statement to a Tribunal if it were not true, particularly given the veracity or lack of it would be clear in the fullness of time.

29. In short, whilst the Appellant questions the credibility of UEA and Dr Osborn in particular (see *paragraph 15(ii)*), he has not convinced us of any specific reasons why the 2006 Chronology could be said to be complete at the time of the request. We have considered whether there is an objective point at which this sort of data might be said to be complete, bearing in mind that there is otherwise a risk that it may be argued, endlessly, that research is always work in progress, provided it has not been published.
30. UEA accepts that research or data might be considered complete when ready for publication after it has been peer reviewed or when it has been abandoned. We accept Dr Osborn's evidence that the requested material had not been abandoned as not being worth pursuing at the time of the request. Funding had been sought to continue the work after a period of hiatus.

Ground 3: Public Interest

31. We consider the public interest in maintaining the exception in regulation 12(4)(d) outweighs that in disclosure. This is because:
 - i. We accept the Commissioner's arguments in relation to this ground as set out in paragraph 17. Having established that the information requested was not finished and related to a paper that had not been completed at the time of the request, we do not see any public interests in disclosure of significant weight. We consider there to be a public interest in understanding the work of a publicly funded body carrying out research over a substantial period of time, (and accordingly do not accept UEA's point in paragraph 20(vi) above), but not before it was effectively published or abandoned.
 - ii. In particular, whilst there was and is considerable public interest in climate science, and the requested information could serve to further understanding in this field and advance the science, the public interest would only be satisfied once the information reflected what its authors considered to be completed research, rather than work that was live and unfolding, and for the chronology to then be disclosed together with the accompanying article and explanations as explained by Dr Osborn.
 - iii. Any contribution to public debate would clearly be better served by waiting rather than prematurely publishing data by virtue of an EIR request that would much more likely result in further confusion and fuel controversy, in an area that seems to us to be already both complex and controversial.
 - iv. Mr McIntyre's assertion that the requested data would reveal an 'academic fraud' and 'failed manipulations' does not indicate a public interest in the data being published before it is completed. We accept that the potential for misleading results arising, for example, from selection bias is very great in this area of research, but we accept also that premature disclosure of incomplete material could equally contribute to the public being misled.
 - v. We found Mr McIntyre's argument that the authors had in some way jeopardised any right to a safe space for research by virtue of having published other articles un-compelling. Likewise, his argument that the authors of the 2008 Paper had misinformed the public by failing to disclose relevant adverse results in the requested chronology did not carry force if it was accepted that the chronology and related paper was not complete.

- vi. To the extent that the Appellant argued that the Simmons et al recommendations revealed a public interest in ensuring scientific research be more robust and transparent, we consider that in fact reinforced the interest in not disclosing unfinished work that had yet to be peer reviewed.
- vii. To conclude, we consider that the public interests in maintaining the exception (as listed in paragraph 17), included the need to allow the scientists a safe space to develop their research free from concern of the need to justify their work before it was complete; the need for the work not to be undermined or cause further confusion in the area as a result of incomplete work being published; and related to that the importance of the work being presented in its most robust, scrutinised and tested form having been properly informed by peer review.
- viii. We did not find any public interests in favour of disclosing the information at the time of the request. There was a strong public interest for scientific research to be the subject of scrutiny, but not prematurely whilst incomplete. The 2006 Chronology could not meaningfully be viewed in isolation given that it was a draft chronology inextricably bound up in the on-going and evolving research. Therefore disclosing the 2006 Chronology, at the time of the request when not completed or contextualised would not have advanced any public interest.
- ix. In view of the above, it is not necessary for us to set out our findings in relation to regulation 12(5)(c) related to any intellectual property rights belonging to UEA.

Other Matters

- 32. We note the general point made by the Commissioner in paragraph 58 of his Decision Notice, that: *“given the written assurances which have been received from the University as to the publication date, he considers that any delay beyond October 2012 will need to be reasonably explained by the University if the withheld information is to remain exempt from disclosure by virtue of regulation 12(4)(d), if a further request was made”*. There has been some slippage from that date, for reasons we have accepted above. However, the general point remains valid.

- 34. Our decision is unanimous.

Judge Taylor

17 May 2013