IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0152**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0280033

Dated: 23 June 2011

Appellant: Dr Don Keiller

Respondent: Information Commissioner

Additional Party: University of East Anglia

Heard at: Victoria House London

Date of hearing: 13 December 2011

Date of decision: 18 January 2012

Before

Angus Hamilton

Judge

and

Malcolm Clarke

and

Jean Nelson

Subject matter: Regulation 12(4)(a) of the Environmental Information Regulations 2004

Cases considered:

Bromley & others v Information Commissioner (EA/2006/0072)
Harper v Information Commissioner and Royal Mail Group (EA/2005/0001)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 19 January 2011.

SUBSTITUTED DECISION NOTICE

Dated : 18 January 2012

Public authority: The Governing Body of the University of East Anglia

Address of Public authority: Norwich NR4 7TJ

Name of Appellant: Dr Keiller

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 23rd June 2011.

Action Required

1. Within 49 days of the date of this judgement to make enquiries of the police with a view to establishing the following:

    a. Whether the police are prepared to provide UEA with a copy or mirror of the data stored on the CRU's back-up server so that UEA may establish the existence of and recover the email sent by Prof Jones to Georgia Tech on or about 15 January 2009

    b. Whether the police are prepared to interrogate the back-up server themselves with a view to establishing the existence of and recovering the email sent by Prof Jones to Georgia Tech on or about 15 January 2009

    c. Whether the police will allow an independent contractor instructed by UEA to attend their premises and interrogate the CRU's back-up

server (or a copy thereof) with a view to establishing the existence of and recovering the email sent by Prof Jones to Georgia Tech on or about 15 January 2009

2. Within 70 days of the date of this judgement UEA are to report to the Tribunal and the Appellant the outcome of the enquiries listed above and are to take all practical steps to either:

    a. Recover a copy of the back-up server or

    b. Arrange the interrogation of the back-up server or

    c. Arrange for an independent contractor to inspect the back-up server, as the case may be.

3. In the event that UEA are provided with a copy of the back-up server then they are within 28 days of the copy data being made available to arrange for the interrogation of the data by a contractor independent of the UEA with a view to establishing the existence of the email from Prof. Jones to Georgia Tech.

4. Within 20 days of the completion of such interrogation, or receipt of a report from the police on their interrogation or receipt of a report from a contractor examining the server in the custody of the police UEA are to report to the Tribunal and the appellant the result of those enquiries confirming the existence or non-existence of the email and confirming whether it will be disclosed or whether the University intend to rely on any alternative exemption

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Dated this 18th day of January 2012

REASONS FOR DECISION

Introduction

1. The background to this matter has been usefully and fairly set out in the skeleton argument submitted by the Information Commissioner in relation to this appeal and we have adopted that background description.

2. The issue in this appeal is whether the Information Commissioner (IC) was right to conclude in his Decision Notice of 23rd June 2011 (DN) that it was more likely than not that the University of East Anglia (UEA) did not hold any information relating to the second part of the Appellant's information request of 14th August 2009 (see paragraph 8 below).

Legal framework

3. This appeal is brought pursuant to regulation 18 of the Environmental Information Regulations 2004 (EIR). Regulation 18 imports the enforcement provisions of the Freedom of Information Act 2000 (FOIA) into the EIR.

4. It is common ground that the disputed information is 'environmental information' within the meaning of Regulation 2 EIR.

5. Regulation 5 EIR imposes a duty on a public authority to make environmental information available on request. Regulation 5(1) provides:

> (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

6. Regulation 12 provides for exceptions to the regulation 5 duty. Regulation 12(4)(a), which is in issue in this appeal, provides:

> (4) …a public authority may refuse to disclose information to the extent that–
>
> (a) it does not hold that information when an applicant's request is received;

7. In **Bromley & Others v Information Commissioner** (EA/2006/0072), an appeal under regulation 18 EIR, the tribunal set out the proper approach where a public authority relies on regulation 12(4)(a):

> *There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation…whose records are inevitably spread across a number of departments in different locations. The* [public authority] *properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*

History

8. On 14th August 2009, the Appellant made a request for information to UEA which was in two parts. Only the second part of the request is relevant to this appeal. It was in the following terms :

> *I hereby request:*
>
> *…*
>
> *2. A copy of any instructions or stipulations accompanying the transmission of data to Peter Webster and/or any other person at Georgia Tech between January 1, 2007 and June 25, 2009 limiting its further dissemination or disclosure.*

9. On 11th September 2009 UEA refused the Appellant's request by relying on regulation 12(4)(a). It stated:

> *"…Regulation 12(4)(a) applies as no such instructions or stipulations are held by the University. Any such conditions were verbal and between the parties involved at that time…"*

10. The refusal was upheld by UEA in its internal review on 30th October 2009.

11. The Appellant complained to the Commissioner pursuant to section 50 FOIA on 24th November 2009. The Commissioner's investigation was carried out across the period November 2009 to May 2011. In the course of that investigation UEA provided the Commissioner with the following further information:

    a) Professor Phil Jones, Director of the Climatic Research Unit (CRU), had sent relevant climate data to Georgia Tech University by email within the time period specified by the Appellant;

b) Professor Jones had searched his own email outbox at the time of receiving the request in August 2009 and had not found the covering email accompanying the data transmission;

c) Professor Jones had at some point prior to the request in August 2009 deleted the relevant email as part of his usual practice of managing emails;

d) Emails for the CRU are held on individual staff members' personal computers although they are backed up to a server managed by CRU;

e) That backup server is in the possession of the Norfolk Constabulary as part of their investigation into the so-called 'Climategate' affair and UEA therefore has no access to it;

f) In any event, the covering email did not contain any information relevant to the Appellant's request. No such 'instructions or stipulations' were ever recorded at the time of the data transmission to Georgia Tech.

12. Based on the results of his investigation, the Commissioner issued his DN on 23rd June 2011. Whilst ordering UEA to disclose information relevant to the first part of the Appellant's request (not in issue on this appeal), he found that, on the balance of probabilities, UEA did not hold the information sought in the second part, and had therefore been right to refuse the request in reliance on regulation 12(4)(a) EIR.

The appeal to the Tribunal

13. On 20 July 2011 Dr Keiller submitted an appeal to the Tribunal.

14. The IC in his skeleton characterised the appeal in the following manner. We considered this description to be a fair summary of the appeal.

> *This appeal amounts to an assertion by the Appellant that the Commissioner's decision was wrong, and that it is more likely than not that UEA does hold the requested information. He appears to make three principal arguments:*
>
> *i. The search carried out by UEA was not reasonable or thorough as it was carried out by Professor Jones who deleted the email himself;*
>
> *ii. Even if the email was sent from a personal computer, it will have passed through a university server and been archived. UEA should therefore also have searched the servers;*
>
> *iii. It is 'logically inconsistent' for UEA to state that in any event it does not believe that the deleted email contained any 'instructions or stipulations'.*

The questions for the Tribunal

15. The Tribunal considered that the sole question for them was to consider whether the Commissioner was correct on the balance of probabilities to conclude that UEA did not hold the information sought in the second part of his original request.

16. The Tribunal considered that there was scope in this matter for making a preliminary finding on this issue by dealing with three preliminary questions:

(1) Is it more probable than not that the email sent on or about 15 January 2009 by Professor Jones to Georgia Tech attaching

datasets was backed up onto and retained on the Climate Research Unit's (CRU's) back-up server prior to this server being taken by the police?

(2) Is it more probable than not that the e-mail contained 'any instructions or stipulations accompanying the sending of datasets'?

(3) Is there a valid argument that a back-up of an e-mail retained after the original had been deleted from the computer on which it was composed is not 'held' for the purposes of the EIR?

17. We then proceeded to hear and consider evidence on these issues alone.

Evidence

18. All the parties attended the hearing and the Commissioner and UEA were ably represented by counsel. Dr Keiller also ably represented himself and was assisted by a 'Mackenzie Friend'.

19. We considered, prior to the hearing, all the written representations submitted by the parties and we are grateful for the preparatory work which the parties put into preparing the written submissions.

20. As we were considering a preliminary set of issues as outlined in paragraph 17 we heard evidence only from Jonathan Colam-French the Director of Information Services at UEA.

21. We also heard submissions from all the parties.

Conclusion and remedy

22. In relation to the first question outlined at 16(1) above - we concluded that it was more probable than not that the email sent on or about 15 January

2009 by Professor Jones to Georgia Tech attaching datasets was backed up onto and retained on the Climate Research Unit's (CRU's) back-up server prior to this server being taken by the police.

23. The Tribunal were rather disconcerted by the evidence adduced by the UEA on this issue. Jonathan Colam-French had almost no knowledge of the CRU's back-up system and was simply unable to answer several pertinent questions.

24. We were left in no doubt however that the e-mail in question would have been backed-up onto the CRU's back-up server (indeed there was no dispute between the parties on this point). We also considered that there was no persuasive evidence before us that gave any indication that the email in question had been deleted from the CRU's back-up server prior to its being retained by the police. In particular we noted the complete lack of evidence about anything resembling a coherent deletion/retention policy for emails. On this basis we reached the conclusion stated in paragraph 22.

25. In relation to the second question at 16(2) above – we concluded that it was more probable than not that the e-mail contained 'instructions or stipulations accompanying the sending of datasets'.

26. Our starting point was that a covering e-mail was a rather obvious place to set out such matters in relation to the attached datasets. We also took into account that we heard no evidence as to what the relevant email did contain beyond the reported assertion by Prof Jones (who did not himself provide any evidence) that it didn't contain any such matter. Although we took into account the reported related assertion from Prof. Jones that such matters were discussed verbally only we considered ultimately that it was more probable than not that the covering email did contain ''instructions or stipulations' relating to the attached datasets.

27. In relation to the third question at 16(3) above we ultimately concluded that it was a matter of common-sense that information backed-up onto a back-up server in the control of UEA, but deleted from the computer on which the original email was composed, was still 'held' by UEA. We considered the counter-arguments to be over-technical.

28. On this issue UEA argued in particular that the fact that the email had been intentionally deleted by Prof Jones put it in a different position to material which the University intended to keep and was backed up in case of disaster. Whilst we can see some logic to this position, we noted that the purpose of back-up is precisely to ensure that a document is not lost; the lack of any coherent policy on retention and deletion of documents, and that had there been timeframes in such a policy, we would have expected these to be reflected in the back-up programs operated on the server. In these circumstances, it seemed more logical to us to take the view that if the email existed, it was still 'held' by UEA.

29. On this point we also noted the decision of the First Tier Tribunal in **Harper v IC (EA/2005/0001**). This was drawn to our attention by the Commissioner. This decision is not binding on us as it is the decision of a Tribunal at the same level. We did however find the analysis set out in the decision to be helpful. There are two particular points we note from that judgement's analysis:

30. First the judgement suggests, rightly in our view, that it '*will be a matter of fact and degree, depending on the circumstances of the individual case whether* ***potentially*** *(our emphasis) recoverable information is still held for the purposes of the Act'.*

31. Secondly, although as we say it is not binding on us we also noted the conclusion by the Harper Tribunal that *'Simple restoration from a… back-up tape, should normally be attempted, as the Tribunal considers that such information continues to be held'* **(paragraph 27).**

32. This conclusion was reached by the Harper Tribunal after very careful consideration of the implications of deleting an email from the computer that was originally used to compose it.

33. Consequently we concluded that the particular email described at 16(1) above was probably stored on the CRU's back-up server and probably contained information of the nature sought by Dr Keiller. We also concluded that the email being stored in such circumstances was 'held' by the UEA for the purposes of the relevant legislation.

34. Our decision on allowing this appeal is unanimous.

35. Having reached our conclusion we then sought submissions from the parties as to the appropriate remedial steps to be taken by UEA bearing in mind that the back-up server in question is now in the custody of Cambridgeshire Police. The remedial steps that we consider to be appropriate reflect those submissions and take into account the practicalities of the current situation. The remedial steps are set out in the substituted Decision Notice attached.

Signed:

Angus Hamilton DJ(MC)
Tribunal Judge

Date: 18 January 2012