

# Decision Notice



Decision 176/2011 Mr David Holland and the University of Edinburgh

Unpublished correspondence relating to the Independent Climate Change  
Email Review

Reference No: 201100245  
Decision Date: 24 August 2011

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## Summary

Mr Holland asked the University of Edinburgh (the University) for copies of unpublished correspondence relating to a named professor's work for the Independent Climate Change Email Review. The University advised Mr Holland that it did not hold any information falling within the scope of his request. Following a review, the University located four emails, which it considered to fall outwith the scope of the request. It withheld these emails on the basis of a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA).

Within his requirement for review, Mr Holland made a new information request, asking whether the professor's National Insurance contributions had been paid continuously by the University during 2010. The University initially refused to disclose this information to Mr Holland. Following a review, however, the University released a redacted version of a contract to Mr Holland, which provided an answer to this question, but relied on exemptions in FOISA for withholding the remaining information in the contract.

Mr Holland then submitted an application to the Commissioner for a decision in relation to both of these information requests.

During the investigation, the University disclosed three of the four emails to Mr Holland and advised that it considered that the information redacted from the contract was outwith the scope of his request.

Following an investigation, the Commissioner found that the University did not hold any information falling within the scope of Mr Holland's first request and that it had responded to Mr Holland's second request.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15 (Duty to provide advice and assistance) and 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



## Background

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1. In November 2009, approximately 1,000 emails from the Climatic Research Unit (CRU) of the University of East Anglia were made public without authorisation. In the media, this quickly became known as “Climategate.” Some of the emails which were leaked related to information requests made by Mr Holland under the (UK) Environmental Information Regulations 2004, and led to allegations that the CRU had breached its duties under the 2004 Regulations in responding to requests.
2. This led to a number of inquiries being set up to investigate and report back on what had happened at the CRU, one of which was the Independent Climate Change E-mails Review (ICCER), headed up by Sir Muir Russell. The review team included two professors from the University of Edinburgh. The ICCER published the submissions it had received in April 2010 and, in July 2010, published its findings.
3. Mr Holland made an information request to the University on 8 November 2010. Following correspondence with the University the following day, Mr Holland confirmed that his request was for unpublished communications sent and received by one of the professors in the conduct of the ICCER.
4. The University responded on 29 November 2010, notifying Mr Holland (in terms of section 17 of FOISA) that it did not hold any information falling within the scope of his request. The University noted that the ICCER had centralised the storage of all of its records, including emails and other correspondence.
5. On the same day, Mr Holland wrote to the University requesting a review of its decision, and asking various questions as to how the University reached the conclusion that it did not hold the information he had asked for. Mr Holland asked about emails which he had sent to the professor (which he considered fell within the scope of his request) and about the University's procedures for backing up both incoming and outgoing emails.
6. Within his request for review, Mr Holland also made several new information requests, including whether the University had paid the National Insurance (NI) contributions for the professor continuously during 2010.
7. The University replied on 23 December 2010.
8. The University's review addressed two points – firstly, the emails which Mr Holland had sent to the professor and secondly whether information held on back-up tapes was “held” for the purposes of FOISA.



9. In addressing the first point, the University advised Mr Holland that it believed that the reference to “in the conduct of the ICCER” in his request encompassed the work done under the terms of reference for the ICCER, ending with the publication of the report and other documentation by the ICCER. It noted that the emails Mr Holland had referred to were received by the University after the completion of the review and, therefore, were not within the scope of his request.
10. However, as a matter of goodwill, the University had carried out a search, taking a broader interpretation of the original request and had identified four emails sent or received after the conclusion of the ICCER. Three of these were emails from/to Mr Holland and the University refused to disclose these under section 25 of FOISA, on the basis that the information in these was reasonably accessible to Mr Holland without him having to make an FOI request for them. The University also relied on exemptions in section 38 of FOISA (personal data) for withholding the emails, and on the exemption in section 36(1) of FOISA (legal professional privilege) for withholding the fourth email. The University also notified Mr Holland (in terms of section 17 of FOISA) that it did not hold one particular email he had referred to, as the professor had deleted it shortly after he received it.
11. In addressing the second point, the University advised Mr Holland that it does not regard information on back up tapes as “held by” the University for the purpose of information requests. However, it confirmed that it had searched these, but that, given that it overwrites back up tapes on a six week rotation, and given that the ICCER had consolidated the storage of its records in July 2010, no relevant information had been found.
12. The University also responded to Mr Holland’s new request about NI contributions, refusing to disclose the information on the basis of the exemption in section 38(1)(b) of FOISA. The University advised Mr Holland that this information was the professor’s personal data and that disclosure would breach the data protection principles set out in the Data Protection Act 1998 (the DPA).
13. Mr Holland subsequently wrote to the University on 24 December 2010, asking it to review its refusal to disclose information on the NI contributions.
14. The University notified Mr Holland of the outcome of its review on 25 January 2011. It confirmed that the professor was employed by the University throughout 2010 and that his work as a member of the ICCER was conducted as a member of University staff acting under the University’s standard consultancy terms. The University indicated that it believed that the underlying point Mr Holland may have been trying to establish was whether the work undertaken by the professor was held by the University for the purposes of FOISA or the Environmental Information (Scotland) Regulations 2002 (the EIRs). The University explained to Mr Holland that the most relevant document for this purpose was the contract under which the professor carried out the work. A copy of the contract was provided to Mr Holland, subject to the redaction of certain information for which the University relied on the exemptions in sections 30(c) (effective conduct of public affairs) and 38(1)(b) of FOISA.



15. On 31 January 2011, Mr Holland wrote to the Commissioner, stating that he was dissatisfied with the outcome of the University's reviews in relation to both of the requests discussed above and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications. Mr Holland's grounds of dissatisfaction can be summarised as follows:
  - He does not believe that the University does not hold any information in relation to his request of 8 November 2010 due to the ICCER centralising the correspondence.
  - He believes his requests should have been dealt with under the EIRs, rather than under FOISA.
  - The University relied on exemptions for withholding email communications that Mr Holland considered came within the scope of his request of 8 November 2010.
  - The University failed to provide advice and assistance to him in formulating the request he made regarding NI contributions.
  - The University redacted the amount of money it received for the professor's work for the ICCER.
16. The application was validated by establishing that Mr Holland had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.
17. On 23 February 2011, the University provided Mr Holland with copies of three of the emails mentioned in paragraph 10 above. The University continued to withhold the fourth email for which it was relying on section 36(1) of FOISA.
18. All submissions received from the University and Mr Holland, insofar as relevant, are considered in the Commissioner's analysis and findings below.

## Investigation

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19. On 12 April 2011, the University was notified in writing that an application had been received from Mr Holland.
20. The investigating officer subsequently contacted the University on 3 May 2011, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.



21. With regard to Mr Holland's request of 8 November 2011, the University was asked to provide submissions setting out the nature and extent of the searches it had carried out to determine if it held correspondence falling within the scope of the request. The University was also invited to comment on the points raised by Mr Holland in his application regarding his view that the University was obliged to keep copies of the information/correspondence to and from the professor in the conduct of the ICCER.
22. With regard to Mr Holland's request of 29 November 2010, the University was asked to provide a copy of the contract to determine whether it fell within the scope of Mr Holland's second request. The University was also asked to provide submissions on the exemptions it had relied on to withhold certain information from the contract from Mr Holland.
23. The University was also asked, in relation to both of the requests, whether it had given consideration to whether the requests should have been processed under the terms of the EIRs rather than FOISA.
24. A response was provided by the University on 20 May 2011. In relation to Mr Holland's request of 8 November 2010, the University provided a submission setting out the nature of the searches that it had carried out to determine whether relevant information was held. The University also commented on its searches regarding back-up tapes and provided a submission on the comments raised by Mr Holland in his application as to why he considered the information should be held by the University.
25. In relation to Mr Holland's request of 29 November 2010, the University provided a full copy of the contract which had been released to Mr Holland in a redacted form, and advised the Commissioner that it was now of the view that the information redacted from the contract was outwith the scope of Mr Holland's request. The University considered that the information Mr Holland was most interested in receiving from the contract was the fee paid for the professor's work. The University offered to disclose this information to Mr Holland if he would withdraw his application to the Commissioner in relation to the contract, but Mr Holland declined to do so.
26. Further submissions were sought and received from both the University and Mr Holland during the course of the investigation.

## **Commissioner's analysis and findings**

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27. In coming to a decision on this matter, the Commissioner has considered the information which has been the subject of Mr Holland's application and the submissions made to him by both Mr Holland and the University and is satisfied that no matter of relevance has been overlooked.



*FOISA v EIRs*

28. As noted above, Mr Holland commented that he felt that the University should have processed both of his requests under the terms of the EIRs rather than FOISA.
29. In responding to this point, the University commented that it was impossible for it to determine whether the information covered by the first of Mr Holland's requests would be environmental information for the purposes of the EIRs, as it does not hold a copy of the information requested.
30. The University advised that it had examined the final report of the ICCER, to understand whether the content clearly fell under one piece of legislation or the other. The University explained that it had concluded that the report itself was made up of information falling within the scope of both pieces of legislation. The University also commented that there was no guarantee that the requested information reflected the content of the final report.
31. Given that the University could not examine the material to determine the applicable legislation, it suggested that Mr Holland's request falls under FOISA. The University commented that all requests for information are freedom of information requests and that, in dealing with requests for environmental information, a public authority can invoke section 39(2) of FOISA to deal with the request under the EIRs. The University advised that it cannot invoke this exemption in this case as it has no way of establishing that the information is environmental.
32. The Commissioner agrees that, where a public authority does not hold relevant information, it can be difficult for it to determine whether any relevant information would be environmental, particularly in a case such as this. He also accepts that requests for environmental information also fall to be considered under FOISA (see, for example, *Decision 218/2007 Professor AD Hawkins and Transport Scotland*). As a consequence, and given that the outcome would be the same regardless of whether the request was considered under FOISA or the EIRs, the Commissioner has not found it necessary to determine whether the information, if it was in fact held, would be environmental information for the purposes of the EIRs. The Commissioner has therefore considered the matter under the terms of FOISA.
33. Having considered the subject matter of Mr Holland's second request regarding the payment of the NI contributions, the Commissioner accepts that the matter of whether the University paid the named Professor's national insurance contributions throughout 2010 was correctly dealt with under FOISA.



**Request 1 – 8 November 2010**

**Section 17(1) – Information not held**

34. As noted above, Mr Holland is not satisfied that the University provided him with all of the information it holds in relation to this request.
35. The University and Mr Holland disagree about the scope of the request (which was for unpublished communications sent and received by one of the professors in the conduct of the ICCER). The Commissioner will address this point first.
36. As noted above, the University consider that “in the conduct of the ICCER” encompassed the work carried out under the terms of reference as set out on the ICCER website, and ended with the publication of the report and other documentation which is available on the ICCER website. The Commissioner concurs with this view. The use of the words “*in the conduct of*” suggests that, once the ICCER had published its report, etc. then the ICCER was no longer being conducted.
37. In his application to the Commissioner, Mr Holland commented that he considered it unlikely to be true that the University did not hold any information falling within the scope of his request. Mr Holland commented that the redacted copy of the contract provided to him on 25 January 2011 was proof that some information was held.
38. The University explained that all of the material created, received or sent by each member of the ICCER team was collected together in July 2010 in order to ensure that the ICCER held a complete record of the conduct of the review. The University advised that, once this information had been provided to the ICCER, individual team members deleted their copies. The University provided the Commissioner with documentary evidence that this was to happen.
39. In response to Mr Holland's concern about the ICCER holding the information on behalf of the University (in which case the information would still be viewed as being held by the University for the purposes of FOISA and, where relevant, the EIRs), the University commented that, under the University's standard consultancy contract, any information created, sent or received by the professor is the property of the ICCER. The University acknowledged that the contract contained a provision for either the University or the professor to elect to keep a copy for recordkeeping purposes or, with the consent of the ICCER, for use in teaching or research.
40. The University states that, if it still held the information, then there may be scope to debate this issue. However, the University submits that this question is irrelevant as the University no longer holds a copy or back-up of this material; neither it nor the professor chose to keep a copy and neither party has access to this material.
41. The University described in detail the searches it had carried out to determine whether it held information falling within the scope of Mr Holland's request (and, indeed, within Mr Holland's definition of the request) and the Commissioner is satisfied that these searches were sufficiently robust to have located any information held by the University.





42. Included in these searches was a search of its back-up tapes, although the University did not regard information on back-up tapes to be held for the purposes of information requests. Again, the University provided the Commissioner with full details of the searches which it had undertaken, and the Commissioner is satisfied that these were sufficiently robust to have located any information held by the University.

#### *Commissioner's findings*

43. Having considered the scope of Mr Holland's request (which, as noted in paragraph 36 above, the Commissioner agrees was properly interpreted by the University), together with the submissions from Mr Holland and the University, the Commissioner is satisfied that the University does not hold any information falling within the scope of the request. Very detailed searches have been carried out by the University (including, in the case of the back-up tapes, of information which the Commissioner does not consider to be held by the University for the purposes of FOISA – or, where relevant, for the purposes of the EIRs) and the Commissioner is satisfied that the searches did not locate any relevant material. While Mr Holland believes that the existence of the contract shows that information was held, the Commissioner is satisfied that the contract does not fall within the scope of this request and that it can have no bearing on the request. (Similarly, the Commissioner does not consider that the emails presented to him by the University as evidence of its deletion and of the ICCER's centralisation of records in July 2010 fall within the scope of Mr Holland's request.)
44. The Commissioner is satisfied that the email communications identified by the University on review fall outwith the scope of Mr Holland's request, the communications having taken place after the conclusion of, and not in the conduct of, the ICCER. As a consequence, the Commissioner is not required to consider the application of the exemption in section 36(1) of FOISA to the one email which has not been disclosed to Mr Holland.
45. The Commissioner has therefore concluded that the University was correct to notify Mr Holland in line with section 17(1) of FOISA that it did not hold any information falling within the scope of his request.

#### **Request 2 – 29 November 2010**

##### **The scope of the request**

46. In his request of 29 November 2010, Mr Holland asked whether the University paid NI contributions for the professor continuously during 2010.
47. As mentioned previously, the University refused to disclose this information to Mr Holland under section 38(1)(b) of FOISA.



48. In responding to his request for review, the University provided Mr Holland with a redacted copy of the contract which the University and the professor had entered into in relation to his work on the ICCER. The University relied on the exemptions in sections 30(c) and 38(1)(b) of FOISA for withholding information as to the fee paid to the professor for his work, the bank account details for the University and the signatures of the signatories to the contract. However, during the course of the investigation, while it offered to disclose the amount of the fee to Mr Holland, the University submitted that the redacted information did not fall within the scope of Mr Holland's request.
49. The Commissioner is satisfied, having viewed the contract in question, that it provided Mr Holland with information to allow him to determine whether it had in fact paid the professor's NI contributions, although he notes that it would have been simpler to respond by saying "yes" or "no".
50. The Commissioner is also satisfied that the information redacted from the contract under the exemptions in sections 30(c) and 38(1)(b) was in fact outwith the scope of Mr Holland's request. As such, there was no need for the University to apply exemptions to the information and the Commissioner will not consider them here.

#### Other matters of dissatisfaction

51. In his application to the Commissioner, Mr Holland expressed dissatisfaction that the University had initially withheld information about the NI contributions, and failed to advise him that he could have simply asked if the professor was continuously employed by the University, which would, in Mr Holland's view, have answered the obvious purpose of the question.
52. The University refuted Mr Holland's assertion that it did not provide him with adequate advice and assistance. It did not accept that there was an obvious purpose to Mr Holland's original question, and commented that, if Mr Holland had wished to know if the professor was continuously employed by the University in 2010, this is what he should have asked.
53. When Mr Holland had explained that what he wanted to know was the extent to which the work done for the ICCER by the professor used University facilities, etc., the University was, it submitted, able to provide the information Mr Holland wanted. However, this clarification, the University submitted, suggested that the obvious purpose of the request was not to determine the professor's employment status, but to establish whether the work carried out by the professor was "held" by the University for the purposes of FOISA and the EIRs. The University states that it was for this reason that it provided additional information about the terms under which the professor participated in the ICCER.
54. Under section 15(1) of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Section 15(2) also states that a Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by section 15(1).

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55. Having considered the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (the section 60/62 code), the Commissioner considers that the request made by Mr Holland was clear and that the University was under no obligation to clarify with Mr Holland the information he was seeking.
56. The Commissioner also notes that Mr Holland did not, at any point, advise the University that he felt that the information disclosed to him, by way of the redacted contract information, was irrelevant to this request.
57. For these reasons the Commissioner does not accept that the University failed to comply with its duty to provide advice and assistance to Mr Holland in respect of his request of 29 November 2011.

## DECISION

The Commissioner finds that the University of Edinburgh (the University) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), in advising Mr Holland that it did not hold information in relation to his request of 8 November 2010. He also finds that the University complied with Part 1 of FOISA in responding to Mr Holland's request of 29 November 2010.

## Appeal

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Should either Mr Holland or the University of Edinburgh wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**24 August 2011**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

##### 17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),
- if it held the information to which the request relates; but
- (b) the authority does not hold that information,



it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.