1. 2On FT 44 is my email of 12 November 2013, in which I asked the University of Cambridge to supply me a copy of the 'Review Editor's Report, written by its Professor Wadhams, on the Summary Chapter of the Fifth Assessment Report of the IPCC together with various other information on it. A leaked copy of the report is on FT 141 and it is common ground that it is environmental information within the meaning of the Environmental Information Regulations 2004. I firmly believe that if searched for and examined at least one of the items of information on the report that I requested must have been received by the University and will be seen also to be subject to the regulations rather than the FOIA. If for instance the Professor used the password protected IPCC Working Group One server at the University of Bern to avoid his report being subject to the regulations he would still have had to be notified of his login details and only his University details were on the application form that was submitted to his working group.

2. I trust, from the correspondence on UT 150 - 157 that the Respondents do not dispute that Professor Wadhams had used his status as a Professor of the University together with his University telephone number, postal and email addresses. He did not apply as Mr Wadhams using his private addresses and phone number.

3. On FT 46, the University's Information Compliance Officer refused disclosure on the basis that none of the requested information was in its possession, as the Professor's work for the IPCC was not connected with his contractual employment or professional role within the University. On FT 48 in response my request that the University review its refusal the University's Principle Assistant Registry confirmed the refusal citing the Commissioner's advice on FT 61-70. This is that as it was not held to any extent for the purposes of the University it was not held for the purpose of the regulations or the FOIA. At no time prior to my appeal to the FT did the University tell me that it did not physically or effectively hold the requested information. At no time since my original request have I seen any document in which the University state that it had conducted a thorough search of its records and established that none of the requested information was physically or effectively held at the time of my request. Prior to my complaint to the Commissioner, the only basis claimed by the University for stating that the requested information was not held, is on FT 49 where it states that the Compliance Officer made what is referred to as "proper enquiries" of the Professor.

4. I complained to the Commissioner who stated on FT 55 that his office would contact me again should the University amend its position. He did not contact me again and only when

the FT bundle was received did I learn for the first time on FT 59 that the Compliance Officer had amended his position in response to the Commissioner's enquires claiming that the requested information was not created or stored on its facilities. The Compliance Officer could only reasonably believe this if he had made a thorough search of the University's records or if Professor Wadhams has told him. From the documents we have, the Commissioner had not asked what searches had been undertaken and the University's Compliance Officer did not say that any search had been made.

5. However, this appeal is against the Commissioner's Decision Notice upholding the original basis of the University's refusal and in particular his advice to the University that any information that is not held to any extent for the purposes of the University is not held for the purposes of the regulations. It is also against the claim, made evidently without having examined it, that information on the Review Editors' Reports is not subject to the regulations. If the Commissioner really was satisfied the University had searched for all the requested information and established that it had never physically or effectively held any of it he should have found that the University had breached regulations 9 and 10 and stated very clearly that his advice on FT 61-70 was irrelevant to my request.

6. My suspicion is that this may always have been intended as a test case. While in his Decision Notice on FT 5 the Commissioner noted the later statement on FT 55 from the University's Compliance Officer, it upholds at length the advice on FT 61-70, which is that environmental information that is not held for any of the purposes of a public authority is not held for the purposes of the regulations. On FT 4 - 5, to justify this the Commissioner relied upon a brief passage in the Aarhus Implementation Guide, which as I will later explain he completely misinterpreted. There is not the least suggestion, to support the Commissioner's advice, in the Regulation 16 Code of Practice approved by Parliament. Its paragraph 32 begins:

> *Public authorities should bear in mind that "holding" environmental information under the regulations includes holding a copy of a record produced or supplied by another person or body and, unlike FOIA, it extends to holding a record on behalf of another person or body.*

7. Moreover, the Commissioner's advice is clearly in breach of the penultimate paragraph of sub clause 2 of Article 4 of Directive 2003/4/EC, from which the regulations descend. This requires the Commissioner and public authorities to interpret restrictively the phrase, "not held by or for the public authority to which the request is addressed".

8. I am grateful to the Commissioner for alerting me to the *traveaux preparatoires,* which encouraged me to further research the origins of the Directive. In what is referred to as the ECGD case Judge Mitting pointed to the Explanatory Memorandum that accompanied the proposal of the European Commission that led to Directive 2003/4/EC from which the regulations descend.

9. The Commission explained that the first draft of the Aarhus Convention was largely inspired by the earlier Directive 90/313/EEC and the first aim of the proposed new directive was to correct the shortcomings identified in the practical application of the old one.

10. The Memorandum pointed to the main defect of the earlier Directive as being that exceptions to disclosure were drafted in wide terms and could be engaged if disclosure simply affected one of the protected interests. The proposed new directive would correct these defects and require that disclosure must adversely affect the protected interest. The Memorandum further stated [p10]:

> *"It goes without saying that, in accordance with a well established principle of Community law, exceptions will have to be interpreted in a restrictive way in order not to defeat the principle of the right of access to environmental information."*

11. The lack of any perceived purpose, for which a public authority holds environmental information, is not referred to in any protected interest or part of any permitted exception to disclosure provided for in either the 1990 or the 2003 Directive or in the Convention.

12. The second aim of the proposed new Directive, identified in the European Commission's Memorandum, was to pave the way towards the ratification of the Aarhus Convention by the European Community. One of the specific objectives to be achieved by the new Directive was stated to be promoting measures at international level to deal with regional or worldwide environmental problems, of which I will add climate change must surely be one of, if not the most important.

13. Judge Mitting, ruling in March 2008, stated that the object of Directive 2003/4/EC has direct effect and that the Directive as a whole is a powerful guide to the interpretation of domestic legislation passed into law to give effect to it. While I am no expert on the law and especially not on direct effect, in May 2008, the European Commission went considerably further than Judge Mitting in its Aarhus Convention Implementation Report, which responded to questions put to it by the Aarhus Secretariat. On "Direct Effect" the Commission responded as follows [on p3]:

> *According to Article 300(7) of the Treaty establishing the European Community ("EC Treaty"), international agreements concluded by the European Community are binding on the institutions of the Community and on Member States. In accordance with the European Court of Justice's case law, those agreements prevail over provisions of secondary Community legislation. The primacy of international agreements concluded by the Community over provisions of secondary Community legislation also means that such provisions must, so far as is possible, be interpreted and applied in a manner that is consistent with those agreements.*
>
> *In addition, according also to settled case-law, a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. Such provisions constitute rules of Community law directly applicable in the internal legal order of the Member States, which can be relied on by individuals before national courts against public authorities.*

14. Clearly the Aarhus Convention itself is an agreement of all EU states upon which I believe that can rely in arguing, as I do, for the obvious every day meaning of "held", "received" and "produced". The Aarhus Implementation Guide second edition is, I submit, another such agreement. These documents are all formally agreed to by all EU states at plenary meeting of their parties.

15. What the Commissioner has advised amounts to what the Vienna Convention on the Law of Treaties in Article 31(4) refers to as a special meaning given to a term if it is established that the parties so intended. As I explained in my submission to the First Tier Tribunal bundle pages 13-14 paragraphs 36-39, my FOIA enquiries to the Commissioner revealed that, before issuing his advice, his office had consulted no one and clearly had made no attempt to establish if the parties to the Aarhus Convention, the European Commission, or even the British government agreed with him.

16. The default position is stated in Article 31 of Vienna Convention as being:

> *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

17. In the ECGD case Judge Mitting first looked at Directive Article 1, which he said has direct effect. The first paragraph of it states that the first of the Directives objective is:

> *".. .. to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise;"*

18. We should note here that the general right of access to environmental information guaranteed to the public is not just to information held by public authorities but also that held for public authorities. This is very important, particularly as authorities is in the plural and therefore means that held for public authorities is not limited in this first objective to any particular authority. This is confirmed by paragraph 4 of Directive Article 2 which states:

> *"'Information held for a public authority' shall mean environmental information which is physically held by a natural or legal person on behalf of a public authority."*

19. Public authorities are of course legal persons themselves and accordingly the use in Article 2(4) of the indefinite article in "a public authority" means that any environmental information that is physically held for one authority by another is included in the public right of access to environmental information. Clearly information held by one authority, which is not held for any of its own purposes, may well include some environmental information that is held for the purposes of other authorities.

20. A further point to make here is that the use of the word "physically" in Directive Article 2(4) is as deliberately chosen as are "received" or "produced", upon the Commissioner has concentrated his attention. The word "physically" here in 2(4) limits the meaning of "held", but only in the case of information "held for public authorities" and only to what is reasonable and practical otherwise the directive could create a daisy chain of effectively held information.

21. I submit that the use of "physically" in Directive Article 2(4) clearly infers that elsewhere within the Directive such as in Article 2(3) the word "held" implies environmental information that is both physically held as well as that which is held effectively. Preambular clause 5 of the Directive requires UK law to be consistent with the Aarhus Convention, which in its 17th preambular clause reinforces the ordinary and wide meaning of "held" within the Convention, which I say is regardless of the purpose for which it is held. The Aarhus parties agreed that they were:

"Acknowledging that public authorities hold environmental information in the public interest,"

22. This, I submit, is a purpose that all public authorities have for holding environmental information. On the importance of this preambular clause to the meaning of "held", the Aarhus Implementation Guide second edition states:

> *The seventeenth preambular paragraph, along with the ninth, the tenth and the twenty-first, places the Convention in the context of democratic principles. While the legislature establishes public policies and the government executes them, the system of rights and responsibilities in society acts as a further check on abuses of power. In a democracy, the government holds the public trust and discharges its duties on behalf of the public welfare. Openness in the sphere of public authority guarantees that the public can check the ways in which public authorities discharge their duties. A basic underlying principle that ensures openness is the notion that the information held by public authorities is held on behalf of the public. This includes information held by private persons and enterprises to the extent that they come within the definition of "public authority" under the Convention (see the commentary to the definition of "public authority" in article 2, paragraph 2 (b) and (c)). In such contexts it is improper to talk of ownership of such information. Moreover, this principle includes the notion that public authorities must serve the needs of the public, including individual members of the public, so long as this does not interfere with the rights of others.*

23. The Aarhus Implementation Guide goes further in its guidance on refusing information that is not held. On its page 83 it states

> *A request for environmental information may be refused if the public authority to which the request is addressed does not hold the environmental information requested;*
>
> *A public authority is required to give access only to the information that it "holds". This means that if a Party decides to provide for this exception, it will need to have defined what is meant by "holding" information."*

24. Indeed the Directive Article 2(3) states clearly, and regulations regulation 3(2) in effect also states:

> *"'Information held by a public authority' shall mean environmental information in its possession which has been produced or received by that authority."*

25. The guide goes further on its page 83 and mentions the relevance of information to the functions of the authority, upon which point alone, the Commissioner initially, at least, based his advice. However, the context in which the Guide mentions relevance does not in any sense limit the scope of what it means by holding environmental information. In fact *"relevance to authorities functions"* is referred to in order to make it clear that holding environmental information includes information that is available to public authorities and is relevant to their functions, but which is not physically held by them. The Guide's purpose in mentioning the *relevance to authorities functions* is the exact opposite of what the Commissioner claims. The Guide actually states, as it continues on page 83:

> *However, information that is held is certainly not limited to information that was generated by or falls within the competency of the public authority. The Convention provides some guidance in article 5, paragraph 1 (a), which requires Parties to ensure that public authorities possess and maintain environmental information relevant to their functions. In practice, for their own convenience, public authorities do not always keep physical possession of information that they are entitled to have under their national law. For example, records that the authority has the right to hold may be left on the premises of a regulated facility. This information can be said to be "effectively" held by the public authority. Domestic law may already define conditions for physical and/ or effective possession of information by public authorities. Nothing in the Convention precludes public authorities from considering that they hold such information, as well as the information actually within their physical possession. If the public authority does not hold the information requested, it is under no obligation to secure it under this provision, although that would be a good practice in conformity with the preamble and articles 1 and 3. However, failure to possess environmental information relevant to a public authority's responsibilities might be a violation of article 5, paragraph 1 (a). Moreover, where another public authority may hold the information, the public authority does have a duty under article 4, paragraph 5, to inform the applicant which public authority may have the information. Alternatively, it can transfer the request directly to the correct public authority and notify the applicant that it has done so. In either case, the public authority must take these measures as promptly as possible.*

26. I submit that the phrase "*information that is held is certainly not limited to information that was generated by or falls within the competency of the public authority"* together with the phrase "*as well as the information actually within their physical possession"* leaves little room for any doubt but that all environmental information that is physically or effectively held by

public authorities is within the application of Convention, Directive and Regulations, as the Code of Practice states so clearly. This includes, as I will discuss later, bank statements and emails from spouses or partners.

27. To extinguish even the most ingenious of arguments that some environmental information that is physically possessed and produced or received by public authorities may not be within the application of the Directive and the Regulations, we should consider whether such a position is consistent with object of the Directive which Judge Mitting stated as having direct effect. As previously stated, the first paragraph of Article 1 of the Directive granted a general right to citizens – not a privilege – of access to *environmental* information. The second paragraph of the Directive's Article 1 states that its second objective is

> *"to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted.*

28. Two phrases in the second paragraph of the objectives are very important. *"as a matter of course"* unambiguously sets the default position to disclosure of all environmental information held by or for public authorities, regardless of who actually owns the environmental information or for what purpose it is held. The Commissioner and First Tier Tribunal have provided an arbitrary escape clause allowing refusal *"as a matter of course"* without even examining the information on what the First Tier Tribunal freely and at some length stated to be routine environmental work undertaken at public expense by many employees of public authorities, but which is not specifically required by their terms of employment. This is entirely contrary to the object of "*achieving the widest possible systematic availability and dissemination to the public of environmental information".*

29. Additionally the penultimate paragraph of Directive Article 4(2) begins by stating:

> *"The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way,"*

30. Expanding, for any reason, the meaning of the words "not held" to include environmental information that is actually physically or effectively held by or for public authorities is, I submit, a clear and obvious breach of the Convention, Directive, Regulations and, of course, the Regulation 16 Code of Practice.

31. I would like to return briefly to the issues of bank statements [UT 81 para 51] and emails from a spouse/partner [UT82 para 53]. The Commissioner, and for that matter the University, seem unable accept that the regulations, which Judge Mitting explained descends from an EU directive, guarantees to citizens a general right of access to all environmental information and a presumption in favour of disclosure. I submit that this is regardless of whether such environmental information is in someone's bank statement or an email from a spouse/partner, if it is physically or effectively held by or for a public authority. The right of access, which under the regulations is only for environmental information, is limited by exceptions that that protect personal information and the interest of the provider, but the test of the public interest is still biased in favour of disclosure.

32. However, in this case a bank statement could reveal, if we did not already know it, that the British government paid for a Professor's trip to Marrakech for a meeting discussing climate change. An email from a spouse could conceivably reveal that a colleague had called by and left important environmental information for a Professor who subsequently denied having received it. No doubt the respondents will have some better examples for us to consider. However, if its environmental information physically or effectively held by or for a public authority, I submit that it is subject to the regulations.

33. I must point out that the inbuilt bias in Aarhus Convention in favour of disclosure is at its highest for the disputed information in this case as it relates to the emissions of carbon dioxide from burning fossil fuels. The *raison d'être* of the IPCC is to assess the effect of among other things of human emissions from burning fossil fuels. On page 90 of Aarhus Implementation Guide it states:

> *"The balancing test that authorities must go through to weigh the public interest served by disclosure against an interest protected under one of the exceptions in subparagraphs (a) to (h) was noted by the Compliance Committee in its findings on communication ACCC/C/2007/21 (European Community). In that case the Committee rejected the position of the Party concerned that the identification of any harm to one of the protected interests would be sufficient to keep the information from being disclosed. As the Committee stated, "in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure."*

"In a second safeguard, the Convention requires public authorities to take into account whether the information requested relates to emissions into the environment. As is evident in the exception concerning commercial confidentiality (article 4, para. 4 (d)), the Convention places a high priority on releasing information on emissions."

34. Clearly the arbitrary extension of the meaning of "not held" to include some environmental information on emissions into the environment, that is physically or effectively held but of no interest to an authority, is to drive a coach and horses through the Convention, Directive and Regulations.

35. As a final point I submit that whether or not Professor Wadhams applied to DECC as its employee, the University has a purpose in law for holding for all the environmental information that it physically or effectively holds and has received or produced. This arises from the Article 1 objectives of the Directive and preambular clause 17 of the Convention. This means that it must endeavour to find and examine any environmental information that is requested and disclose, or refuse to do so, strictly in accordance with the regulations.

36. A public authority cannot in law respond to a request without looking at the information by saying it is not held for any of its purposes even if it does hold it. It cannot decide to classify information as not subject to the regulations without seeing it. The Commissioner cannot uphold a complaint against the classification of information, which is physically or effectively held, and believed by a complainant to be environmental, without examining it.

37. If the University has indeed never physically held any of the requested information, it has grossly failed to give me the advice and assistance to which, in law, I was entitled. As a result of it not advising me in is final refusal that it was not held, physically or effectively, if indeed that is the case, it has prevented me from pursuing a complaints against Professor Wadhams and the DECC both of whom must have held some or all of the information but had refused to disclose it to me. Professor Wadhams as well as many other public authority employees were nominated and paid expenses directly by the British government via DECC to participated in one of the most important global environmental decision making processes relating to emissions into the environment. The requested information was obviously relevant his functions as a public authority as well as to DECC which effectively held at least some of it by virtue of its password access to the IPCC Working Group One server, which is a fact that DECC has acknowledged in its published, but illegal, refusal to disclose it.