

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2010-404-005092

UNDER the Judicature Amendment Act 1972 and
Part 30 of the High Court Rules

BETWEEN **NEW ZEALAND CLIMATE SCIENCE EDUCATION
TRUST**

Plaintiff

AND **NATIONAL INSTITUTE OF WATER AND
ATMOSPHERIC RESEARCH LIMITED**

Defendant

**AFFIDAVIT OF TIM DAVID MAHOOD IN OPPOSITION TO APPLICATION BY
PLAINTIFFS FOR DISCOVERY OF DOCUMENTS**

Dated 1 July 2011

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I, TIM DAVID MAHOOD of Auckland, Solicitor, swear

1. I am the plaintiff's General Counsel.
2. I am authorised on its behalf to swear this affidavit.
3. I make this affidavit in opposition to the plaintiff's application for discovery of documents further to the affidavit made by Mr Morgan, the defendant's Chief Executive, sworn 21 December 2010.
4. As I understand it, the plaintiff now seeks discovery only of items (a), (e), (i), (j), (k), (l), and (m) of the schedule annexed to the initial application for discovery of documents. I annexe hereto as exhibit "TM1" a draft order presenting the discovery orders the defendant would consent to.

I address each of these issues in turn

(a) Documents recording the history, funding, and contracts relating to the National Climate Database and the 7SS.

5. This is a very broad category of documents. The defendant cannot be sure of what is intended to be ordered. A range of documents could be included on one interpretation of this description. On another interpretation, a different selection could be made. I do not see how the defendant could satisfy itself that it had complied with the order without carrying out an exhaustive search of all its facilities and premises and possibly producing documents which are of little value or interest in these proceedings.

(e) Documents recording or tending to show the purposes for which NIWA maintains the 7SS and the uses to which the 7SS is put.

6. The description of documents provided is so broad as to make it difficult for NIWA to determine what documents would fall in or not fall within, as the case may be, this description. Conceivably, every single document directly or indirectly related to the 7SS could be required to be disclosed. As indicated in the "TM1" NIWA, on the other hand, is prepared to provide and has already provided a statement of those purposes in general terms.

(g) All paper and electronic records relating to the 1992 revision of the 7SS, including calculations, source documents, data and metadata, internal memoranda, notes, minutes, computer code or other related documents

7. NIWA is able and willing to produce for inspection all data and material comprising original monthly summaries (301's) and metadata (station files) to the extent that this

data and material remains available to it together with archived records relating to the 1992 revision. Some of this data is comprised in records which are of some antiquity and require careful storage and, accordingly, handling. Access to it needs to be supervised and arrangements would need to be made with the relevant staff at NIWA through me by the person or persons from the plaintiff who wish to inspect this material.

8. I believe that the material I have just referred to answers most of what is sought in (g) but I will not be able to guarantee that absolutely all “memoranda, notes, minutes, computer code or other related documents” would, by the means I have proposed, be made available for inspection. In order to do that a thoroughgoing and exhaustive search throughout all NIWA’s records at its various sites in New Zealand would need to be made. Such an exercise would be extremely time consuming and costly for NIWA to undertake, uncertain of result in terms of whether documents found are within or outside of this categorisation, and uncertain in terms of the amount of material thereby becoming available.

(i) *Scientific and/or academic documents which support the adjustments methodology used for 7SS*

9. NIWA has objected to producing this information. The reason for that objection is that scientific or academic documents are just as available through public sources to whoever is advising the plaintiff as they are to NIWA personnel. NIWA sees no reason why it ought to be required to undertake a review of the research it has carried out with reference to which journals and publications it has had reference to throughout the period of time that the 7SS has been in existence when the body of scientific and academic work available to the plaintiff’s experts as it is to NIWA.

10. Notwithstanding that, and as a matter of co-operation, it is nevertheless prepared to provide such of the documents concerned as it is now able to locate and, failing that, references to the articles or papers concerned.

(k) *Documents relating to the production of the 11SS, including stations election, calculations and computer codes*

11. This, like item (g) above, is intended to be dealt with by means of provision of a statement. I refer to my evidence above in relation to item (g).

(l) *Documents relating to NIWA’s refusal to repudiate the 7SS and/or 11SS*

12. To refer to the defendant’s refusal to repudiate the 7SS and/or 11SS suggests that the defendant was obliged to consider that course. The defendant disputes any such contention. However, the defendant is prepared to disclose the documents concerned which will consist of correspondence between the parties relating to that matter. There is

little if anything to be disclosed, so far as the defendant is aware, that is not already in the possession and control of the plaintiff itself.

(m) The defendant's papers recording its review of the 7SS adjustments and all comments and correspondence with the Australian Bureau of Meteorologists in regard to such review

13. As to item (m) I annex hereto as "TM2" and "TM3" respectively, a letter to the Ombudsmen from the plaintiff dated 1 April 2010 and the Ombudsmens' covering letter and attached opinion dated 10 June 2010.

14. These documents relate to an application made by or on behalf of the plaintiff to the defendant under the Official Information Act 1982 for copies of emails between NIWA and the University of East Anglia Climate Research Unit. This request did not concern the Australian Bureau of Meteorology but, rather, as is evident from the documents, the Climate Research Unit at the University of East Anglia. However, the two exhibits are put in evidence to demonstrate NIWA's approach to such documents.

15. This is that they are documents produced in the course of collaboration with international agencies on atmospheric and climate research. As described in my letter dated 1 June 2010 to the Office of the Ombudsman, NIWA regards it as inimical to the full, free, frank, and robust exchange of views between scientific agents internationally for emails comprising records of these exchanges (which in no sense resemble the final views of the parties concerned) to be released. This is for the reasons set out in my letter to the Office of the Ombudsmen and, I believe, in the opinion of the Office of the Ombudsman. The position is the same, if not more problematic for the defendant, in respect of the materials sought by the plaintiffs in this litigation under item (m) in the schedule attached to the plaintiff's application for discovery. It is very likely to be more problematic in that the material relates to the conduct of a scientific peer review process, which is subject to long standing and widely accepted conventions of confidentiality.

16. I am aware that the plaintiff has sought release of documents directly from the Australian Bureau of Meteorology by means of the Freedom of Information Act 1982 in Australia. Annexed hereto marked "TM4" is what I believe to be a copy of the application. Annexed hereto marked "TM5" is a letter from Brenda Coutinho, the Executive Officer Legal of the Bureau of Meteorology to Ms Gardner at NIWA who is one of the legal counsel employed by the defendant. I understand that the Bureau regarded most if not all of the documents which were sought to be released as exempt for release under one or other of the grounds set out in the Freedom of Information Act 1982. I am not familiar with that Act or its provisions. NIWA objected to the Bureau of Meteorology releasing the documents. I set out those grounds in a letter dated 29 April 2011 to the Bureau. A copy of that letter is annexed hereto marked "TM6"

17. However, I can say that in discussions which followed the initial request between NIWA (where I represented NIWA) and the Bureau of Meteorology the Bureau was concerned about the request as it did not wish to release information which would damage its relationship with us and with other research collaborators. They wished to preserve the confidentiality of the peer review process for reasons similar to those which NIWA itself regard as relevant.

Sworn at Auckland this)
day of before me)

A Solicitor of the High Court of New Zealand