



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

**Case No. EA/2011/0217**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FER0374328  
Dated: 13 September 2011**

**Appellant: MR M E F B CURTIS**

**Respondent: INFORMATION COMMISSIONER**

**Second Respondent: EAST SUSSEX COUNTY COUNCIL**

**On the papers: 12 January 2012**

**Date of decision: 7 February 2012**

**Before**

**Robin Callender Smith**  
Judge

**Representations in writing:**

For the Appellant: Mr M Curtis  
For the Respondent: Mr Adam Sowerbutts, Solicitor for the Information  
Commissioner  
For the Additional Party: Ms Rebekah Herring, Assistant Director, Legal and  
Democratic Services, East Sussex County Council

**Subject matter:**

**EIR 2004**

- Whether information is held

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

**Case No. EA/2011/0217**

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 13 September 2011 and strikes out the appeal by virtue of Rule 8 (3) (c) of the 2009 Rules on the basis that it has no prospect of success.

**REASONS FOR DECISION**

**Introduction**

1. The Appellant maintained that in 1973 the Second Respondent's planning committee granted permission for a comprehensive development of land in Horam.
2. As a result of the Local Government Act 1972, the responsibility for planning was passed to Wealden District Council.
3. The Appellant was then unable to develop his land because Wealden District Council stated that no permission had ever been granted.
4. The Appellant had approached several agencies including the police and the Serious Fraud Office about the issue but there had been no resolution about the exact circumstances of the planning permission application, the decision or the administration of the changeover of planning responsibility.
5. At the heart of this appeal is the Appellant's firm belief that the requested information is held – or should have been held – by the Second Respondent.

**The request for information**

6. On 6 September 2009 the Appellant made the following request to the Second Respondent:  
  
.... A copy of the Grant of Approval Notice of the comprehensive development upon my land at Dewbrook Farm, Vines Cross Road, Horam which included the application number K/73/1794 as

proposed and deemed acceptable by the County Planning Committee of the East Sussex County Council which was passed to Wealden District Council on 1 April 1974 with all the relevant documents. I also ask that you advise me as to the status of the comprehensive development which included my land at the change over on the 1 April 1974.

7. On 10 September 2009 the Second Respondent acknowledged the request. On 22 September 2009 it stated that it did not hold the requested information because information related to the development had been passed to Wealden District Council for its statutory planning register.
8. Following an internal review the Second Respondent confirmed that it did not hold the requested information.

#### The complaint to the Information Commissioner

9. On 7 February 2011 the Appellant contacted the Information Commissioner (IC) to complain about the non-provision of the requested information. The IC wrote to the Second Respondent on 5 March 2011 and discussed matters further during June 2011.
10. The Second Respondent's maintained its position that it did not hold the information. Following local government reorganisation in 1994 all planning applications were passed the relevant District or Borough councils to manage.
11. In this case, all relevant documents would have been transferred to Wealden District Council because of the location of the proposed development.
12. The Second Respondent had searched its internal Council planning register covering the period from 1970 to 1974 as well as its filing database for archived records. Neither of those searches had returned any documents with the references specified by the Appellant.
13. Even if the Second Respondent had retained copies of the documents referred to, they would have been destroyed after seven years in line with the Council's retention policy.
14. The IC noted in his decision notice (Paragraph 15) that the Appellant had concerns that information in the relevant file may not have been

passed to Wealden District Council. The IC had made enquiries to try to determine whether the information was definitely passed to this other public authority.

15. The Second Respondent explained that it did not know whether there was any policy or procedure for administering the handover of files in 1974. It did not hold such a policy at the present. It emphasised that the events took place nearly 40 years ago.
16. It had considered the possibility that there might be reference to the administrative handover process in committee reports or minutes dating from the 1970s. Searches had been conducted of records held there – and within the Council itself – but no policy could be found.
17. The Second Respondent told the IC that it was confident that the information would have been transferred to the District Council because such bodies took over responsibility for planning matters after that date. The Second Respondent could not however confirm that the records definitely were transferred. It pointed out, however, that it could not now locate any of the requested information within its own records.
18. The Decision Notice notes (Paragraph 16) that the Appellant had provided the IC with submissions and extensive documents concerning the original development and the subsequent debate over it and the documents associated with it.
19. The Appellant believed that the Second Respondent should have created or retained certain information. It was clear that he was dissatisfied at the way that the application for the development was handled. The IC pointed out that his remit was solely to investigate whether the Public Authority acted with the request in accordance with the Environmental Information Regulations 2004.
20. The IC's decision – after extensive enquiries – was that the Second Respondent did not hold any information within the scope of the Appellant's request.

#### The appeal to the Tribunal

21. The Appellant appealed to the Tribunal and submitted further detailed documentation which was eventually released by the Appellant to the

IC. That additional documentation has been considered both by the Tribunal Judge and the IC separately.

#### The question for the Tribunal

22. Whether, on the balance of probabilities, the Second Respondent did hold the information at the time of the original request.

#### Evidence

23. As has been stated above, the Appellant submitted additional material for the consideration of the Tribunal. Having reviewed that material – in the interests of openness and transparency – the Tribunal Judge required that it be served on the IC to his consideration.

#### Conclusion and remedy

24. The Tribunal Judge has considered the submissions and evidence provided by the Appellant as well as the submissions from the IC and the Second Respondent.

25. The material provided by the Appellant – together with the Appellant's grounds of appeal and representations throughout – focused on whether or not the Second Respondent should have retained the information as well as whether the relevant planning permission was in fact granted on or before April 1974.

26. The Tribunal Judge can find nothing to indicate that the IC's decision – that the Second Respondent did not as a matter of fact hold the requested information at the date of the information request – was then or is now anything other than completely reasonable and in accordance with the evidential standard of the balance of probabilities.

27. The Information Rights Tribunal is dealing with a matter, here, under the Environmental Information Regulations 2004. The Tribunal's jurisdiction is limited by such Regulations and by statutes like the Freedom of Information Act 2000 and the Data Protection Act 1998.

28. It is not part of the Tribunal's function to deal with matters that may be part of valid litigation elsewhere and, necessarily, outside its jurisdiction.

29. The Tribunal Judge is satisfied to the required standard – the balance of probabilities – that the IC's decision is correct and that the Second Respondent did not hold the requested information at the time of the information request. He has found nothing on the papers or in the submissions that convince him otherwise.
  
30. Where an appeal has no prospect of success there is a procedure to strike it out in its entirety under Rule 8 (3) (c) of the 2009 Rules. The Appellant has made his representations in accordance with Rule 8 (4) of the 2009 Rules setting out why he believes the appeal should not be struck out.
  
31. The Tribunal Judge has considered carefully all of this material and those submissions and has decided that the appeal has no reasonable prospect of success for the reasons given above. As a result this appeal is struck out in its entirety.

Robin Callender Smith

Tribunal Judge

13 February 2012



**IN THE FIRST TIER TRIBUNAL  
(INFORMATION RIGHTS)**

**RULING on an APPLICATION for PERMISSION to APPEAL**

**By**

**Mr Michael Curtis**

1. This is an application dated 20 February 2012 by Mr M Curtis for permission to appeal the decision of the First Tier Tribunal (Information Rights) (“FTT”) dated 7 February 2012. That decision struck out the appeal of Mr Curtis and upheld the Information Commissioner’s (IC) Decision Notice dated 13 September 2011.
2. The right to appeal against a decision of the FTT is restricted to those cases which raise a point of law. The FTT accepts that this is a valid application for permission to appeal under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended (“the Rules”).
3. The FTT has considered whether to review its decision under rule 43(1) of the Rules, taking into account the overriding objective in rule 2, and has decided - save for one correction at Paragraph 11 of the Decision which changes the incorrect date of “1994” to “1974” - not to review its decision because the grounds of the application do not raise an error of law for the reasons stated below.
4. The Grounds of Appeal re-iterate the firm belief of the Appellant that the Public Authority has tampered with records and removed evidence.
5. I have found as a matter of fact – on the balance of probabilities – that the Information Commissioner was correct to conclude that this was not the case and that the Public Authority did not hold the requested information.
6. The Permission to Appeal is based on the misconception that I and the Information Commissioner were not (or should not have been) entitled to come to that view. The Permission to Appeal does not disclose any point of law on which the appeal could succeed.
7. It follows that the appeal has no prospect of success and that permission to appeal is refused.

8. Under rule 21(3) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended Mr M Curtis has one month from the date this Ruling was sent to it to lodge the appeal with:

Upper Tribunal (Administrative Appeals Chamber)  
5th Floor, Rolls Building,  
7 Rolls Buildings, Fetter Lane,  
London, EC4A 1NL

Tel: 020 7071 5662

Fax: 020 7071 5663

Email: [adminappeals@hmcts.gsi.gov.uk](mailto:adminappeals@hmcts.gsi.gov.uk)

Web site: <http://www.justice.gov.uk/tribunals/aa>

Robin Callender Smith

Judge

First-tier Tribunal (Information Rights)

7 March 2012





**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**  
**FREEDOM OF INFORMATION ACT 2000**  
**Tribunal Procedure (Upper Tribunal) Rules 2008 SI No 2698**  
**Environmental Information Regulations 2004 SI No 3391**

**APPLICATION FOR PERMISSION TO APPEAL FROM DECISION OF FIRST-TIER TRIBUNAL**

<i>Applicant:</i>	Michael E F B Curtis
<i>Respondents below:</i>	(1) Information Commissioner (2) East Sussex County Council
<i>First-tier Tribunal:</i>	Information Rights
<i>First-tier case ref:</i>	EA/2011/0217
<i>Decision dated:</i>	7 February 2012

**NOTICE OF DETERMINATION OF APPLICATION**

**I decline the applicant's request for an oral hearing of this application and I refuse permission to appeal.**

**REASONS**

No arguable error of law in the first-tier decision is identified, such as to warrant either an oral hearing of this application or a grant of permission to pursue any further appeal. An appeal to the Upper Tribunal can only be brought on some question of law: section 11 Tribunals, Courts and Enforcement Act 2007. The application in this case fails to identify any point of law but makes it plain that what the applicant wants to use the appeal process for is to pursue his contentions on the facts about a planning application made in the early 1970's, including an allegation that corruption had taken place. The first-tier tribunal has expressly found as a fact that the second respondent did not hold the requested information at the time of the request. On the basis of that finding of fact, which is not open to challenge in these proceedings, there could be no valid ground under the 2000 Act or the 2004 Regulations for disputing the decision of the Information Commissioner, and no arguable error in law in the first-tier judge's decision to strike the appeal out as it was bound to fail. As the judge correctly directed himself, that legislation is concerned with rights of access to information actually held at the time of a request. Contentions that an authority should have obtained or retained information which it did not in fact so hold, and any broader allegations about the past, are outside its scope.

*(Signed)*

**P L Howell**  
**Judge of the Upper Tribunal**  
**1 May 2012**

*Under rule 22(3)-(5) of the Upper Tribunal Procedure Rules the applicant may apply for this decision to be reconsidered at an oral hearing but any such application must be made in writing and received by the Upper Tribunal within 14 days after the date on which this notice is sent to the applicant.*