IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. GIA 1340 2011

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Appellant:	**Mr Tony Wise**
Respondent:	**The Information Commissioner**
Tribunal:	**First-tier Tribunal General Regulatory Chamber**
Tribunal Case No:	**EA/2010/0173**
Hearing Date:	**4 March 2011**

APPLICATION FOR PERMISSION TO APPEAL
DECISION OF THE UPPER TRIBUNAL

I refuse permission to appeal

REASONS

1 This is an application made by an individual relating to information sought from his police authority. The police authority issued a publication to those in its area called "Dialogue". The April 2007 issue of that publication indicated that the following issue (that August) would contain an article on a specific part of police work. It did not. Nor did subsequent issues. A year later, on 31 August 2008, the appellant made an information request to the police authority for all relevant documentation about why the item had never been in the publication. This application continues the attempts by the appellant to obtain that information. I must follow through that history.

2 Before doing so, I record that the tribunal below dealt with this issue, at the request of both parties, on the papers. The Tribunal accordingly considered the appeal to it on the papers, and heard no oral evidence or submissions from any party. Likewise, the appellant has not asked for a hearing before the Upper Tribunal about this application. In accordance with usual practice, and as I see no reason to direct a hearing in this case, I have also dealt with the matter on the papers. I have before me the correspondence between the appellant and the police authority, then between the Information Commissioner, the police authority and the appellant. I then have the decision of the Information Commissioner, the papers put to the First-tier Tribunal and the decision of that tribunal. Finally, I have the grounds of appeal set out in some detail, with accompanying submissions, by the appellant. I have considered all these documents in reaching this determination. These papers seem comprehensive save that there are no copies of the relevant publication included. However, I see no point at this stage, given the limited scope of the issues that are properly considered at this stage, in asking for these to be produced. They are not needed to identify the focus of the application before me.

The complaint to the authority

3 Returning to the history of the case, it appears that the appellant had discussions with officers of the authority on 30 September 2008 about a number of matters, including this complaint. The correspondence suggests that the police authority regarded this as closing the matter. But there was no "closure letter" in the sense that there was no follow-up written confirmation of the outcome of those discussions. It should be recorded however that the

email of 30 August 2008 was specifically said by the appellant to be a request made under the Freedom of Information Act 2000.

4 In the opinion of the appellant, another year then elapsed with nothing happening. Then on 2 October 2009 the appellant asked the police authority for a written response to his complaint of 30 August 2008. In response, the authority indicated that it thought it had dealt with the matter in a letter dated 18 September 2008. But nonetheless it then conducted a review of the request. The authority responded to the appellant to say it had no further information than that already given to the appellant.

The complaint to the Commissioner

5 The appellant complained to the Information Commissioner some weeks later. He indicated that he did not believe the explanation given by the police authority. A significant amount of correspondence followed between those involved. This was concluded when on 22 September 2010 the Commissioner issued a decision notice (FS502780472). This concluded that on the balance of probabilities the information requested was not held by the authority and that therefore the authority had complied with section 1(1)(a) of the Freedom of Information Act 2000. Full reasons were given for this. Although the Commissioner regarded the complaint as met, and required no action to be undertaken, the decision does record that there should have been a timely written response after the meeting of 30 September 2008.

The appeal to the First-tier Tribunal

6 The appellant promptly appealed. The grounds of appeal form a closely argued five page document accompanied by several supporting documents. The statement opens in a particularly robust way, expressing concern about "bias, prejudice and dishonesty in this case with an attendant lack of rigour and resolve to be fair and just" from the Information Commissioner. The appellant indicated that he did not believe for one moment that there was no information. But he produced no specific evidence to support his belief.

7 The proceedings from this point are set out in the decision of the First-tier Tribunal issued on 16 March 2011. I do not repeat them here.

8 The tribunal's decision was that there was no error of law in the decision notice issued by the Information Commissioner, and that the findings of fact of the Commissioner were reasonable and supported the conclusions reached by the Commissioner.

The application to the Upper Tribunal

9 The appellant now seeks permission to appeal against that decision. His grounds of appeal are in another lengthy and closely argued document. This was, in accordance with the required procedure, put to the First-tier Tribunal, where it was considered by the judge who made the original decision (again in accordance with common practice). When it was refused, the application was renewed here.

10 The appellant added to his application here that he did not consider that the decision of the First-tier Tribunal on his application met the legal requirements in relation to adequate reasons and explanation and that the appropriate notification about rights of appeal was not added. Those details are usually in accompanying letters, copies of which are not before me, so I cannot comment on that point save that it did not prevent the appellant making an application on the correct form within the time limit. As to the reasons, those given by the judge below are in my view entirely adequate and I see nothing in them that justifies any complaint about illegality or breach of proper procedure. Nor did the appellant give any specific reason for this general allegation. In any event, I have reconsidered the matter

entirely anew, as again is standard procedure, without putting any weight on the decision of the judge below. So nothing of substance arises from that additional ground of appeal.

11 The main grounds of appeal are, in the view of the appellant, various points of law disregarded by the First-tier Tribunal and the Commissioner. The grounds are supported by reference to a number of relevant authorities.

12 The first issue identified is that of the test being applied by the tribunal. The appellant refers, as did the tribunal, to the case of *Bromley and others v Information Commissioner and Environmental Agency,* a report of which is held as [2007] UKIT EA 2006 0072. That report, at [10], concisely states the relevant issue for the tribunal below:

> [10] The powers of the tribunal on an Appeal are set out in section 58 of the Freedom of Information Act 2000. It applies to environmental information Appeals as a result of EIR regulation 18. Section 58 provides:
>
> *"(1) if on an Appeal under section 57 the Tribunal considers-*
> *(a) that the notice against which the Appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently the tribunal shall allow the Appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the tribunal shall dismiss the Appeal.*
> *(2) on such an Appeal, the tribunal may review any finding of fact on which the notice in question was based."*
>
> We must therefore consider whether the Information Commissioner's decision that the Environment Agency did not hold any information covered by the original request, beyond that already provided, was correct. In the process we may review any finding of fact on which his decision was based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities."

The appellant cites also from [12] in that decision. I set out the cited passage in its context in that paragraph, in order to explain the passage more fully:

> "...It has been difficult at times to contain the debate within the only issue which the tribunal is authorised to investigate, namely the Environment Agency's disclosure obligations in respect of information falling within the scope of the original request. In particular, we have resisted the Appellant's suggestion that we should base our decision on matters such as the seniority of the individuals who conducted relevant searches, the adequacy of the freedom of information training they had received or the archiving and document destruction procedures adopted by the Environment Agency in the past. We may only consider, in light of the evidence placed before us, whether the scope, quality, thoroughness and results of those searches entitles us to conclude that the Environment Agency does not hold further information falling within the scope of the original request."

13 The appellant contends that the Commissioner ignored this test, and that there was a failure to undertake "adequate, focussed and stringent" searches for the information requested. In his view the Commissioner had no evidence or information available "of any value <u>at all</u>" on the question.

14 The appellant then submits a short review of authorities to identify duties on the Commissioner, including a duty of enquiry, a duty to ask the right question, a duty to consider all relevant material, and a duty to consider relevant evidence. They appear to me to be a fair summary of the current understanding of the duties on any public authority conducting an

exercise of decision making. He then sets out a citation about the duty on a tribunal not to be biased and accuses the Commissioner of bias, applying this also to the First-tier Tribunal:

> "The First Tier has dismissed in its entirety the proven facts that the case was determined in favour of the ICO twice with absolutely no information available in relation to searches ..."

adding later in the submission that:

> "at the very least it adds to the appearance of bias that runs throughout this case in my view."

15 In the appellant's view this is also evidence of predetermination by the Commissioner. After close argument the appellant concludes that "there was absolutely no explanation provided" by the First-tier Tribunal to account for the decision reached on this point. He supports this by arguing that "every item of evidence as provided by the authority was an unsupported bare assertion" save for one specified document.

16 The appellant went on to criticise as "unfair, unjust and unreasonable" the First-tier Tribunal ruling that complaints about the internal review by the authority was outside its jurisdiction.

17 Inevitably, this is a short summary of the full grounds of appeal. But I set out what I consider the focuses of the grounds of appeal in so far as they are relevant to the application to the Upper Tribunal. I am not concerned with reconsidering the evidence. My concern is only with the question whether the grounds of appeal arguably identify errors of law in the decision of the First-tier Tribunal of a kind that could materially affect the outcome of the hearing. I am therefore not concerned with any further consideration of the evidence or of making any new findings of fact on that evidence save in so far as that is necessary to test the grounds of appeal.

The decision of the First-tier Tribunal

18 I therefore now turn to the decision of the tribunal below, reading it in the context that it was made following a consideration of the matters on the papers (and therefore with no further oral representations or evidence by any person).Those papers show that the tribunal followed the proper procedure in seeking the views of, and evidence from, both parties. The decision correctly identifies the jurisdiction of the tribunal as set out in section 58 of the Freedom of Information Act 2000 (cited above in the quotation from *Bromley*). It follows this with a summary of the cases put by the appellant and the Commissioner. It identifies from these that the central question is whether the Commissioner properly decided that the authority did hold any relevant information at the time.

19 The tribunal's analysis of this includes a correct discussion about the burden of proof. It is for an appellant to show on the balance of probabilities ("more likely than not") that the authority and Commissioner in their views of the facts.

20 The tribunal found that the allegations of bias, dishonesty and predetermination were entirely unfounded. It therefore set that aspect of the appeal aside. It then considered the application of the test of balance of probabilities to the issue of the absence of evidence about the decision in question. This, it notes, was one of editorial content of a publication. It found that there "is no statutory, policy or practical reason" for records of the kind sought by the appellant. It found in that context, and in the context of the timing of the various stages in

the complaint, that it was satisfied on the balance of probabilities that there was no information of the kind sought. "Indeed, there is no evidence to the contrary ([21])."

Determination of this application

21 I can see no arguable error of law identified in these grounds of appeal, despite their length and close argument.

22 I must deal first with the repeated allegations of bias, dishonesty and predetermination. Had I considered that there was any arguable specific element in these grounds that warranted consideration I would have directed that the accusations be put to the judge and members of the First-tier Tribunal for comment before considering them. That would be required to ensure fairness to both sides of that issue had I considered that there was substance to it warranting any further investigation. I see nothing warranting that step. The First-tier Tribunal followed the full procedure required of it. The appellant did not ask for a hearing, so the tribunal was able – and required – only to act on the matters in the papers before it. I see nothing in those papers that causes me to disagree in any way with the comments of the First-tier Tribunal about, in particular, bias and dishonesty. Nor can I see anything to suggest that the tribunal itself was in any way biased or dishonest. The appellant repeatedly comments in his grounds of appeal about the absence of evidence. That is precisely why I see nothing of substance in this aspect of his grounds of appeal. He has pointed to no reason why the Commissioner or tribunal should be less than entirely fair, and he has produced no evidence to support his allegations that this is so.

23 I also reject the accusation (noted at [16] above) that the tribunal was unfair in failing to explore the appellant's criticisms of the procedure adopted by the authority in dealing with his complaint. The tribunal correctly set out its jurisdiction in respect of this appeal and correctly declined to look at matters outside its jurisdiction. It would have acted unfairly only had it looked at matters that it had no power in law to examine.

24 Did the tribunal below properly carry out the task it correctly identified as its task in its decision? I see no error of law in the way it dealt with this aspect of the decision. The tribunal rightly considered the nature of the information sought, as well as the process employed to seek that information both by the authority and by the Commissioner. It did so against a background of assertion that there "must be" such information but no evidence that there was such information. The tribunal rightly noted the difficulty of any appellant seeking to show that there was specific evidence of documents of the kind sought in the original application in a situation such as occurred here. But it also rightly noted the nature of the information sought. In my view it was right to consider the appeal in the context of a search for information where there was no duty in law to keep the information and no strong policy or commercial reason suggesting why it might be kept.

25 The appellant put great weight on what he considered the absence of any evidence about unproduced documents. Indeed, he repeatedly asserted that there was no evidence and that what was in the papers was assertion and not evidence. Even if he was correct in law in making that point, it does not assist him. If there is genuinely no evidence about something, then a court or tribunal must conclude that the person making the assertion to which the evidence, if any, would relate, has failed to satisfy the burden of proof. So if the appellant is correct that there was "absolutely no evidence" about the points he made, then his appeal must fail on that ground.

26 In this case, despite the labelling by the appellant of evidence as assertion, and of assertion as "proved evidence", there was evidence about the search and absence of

documents, What the appellant criticises as "bare assertion" is evidence before the tribunal. The fact that that evidence was not supported by documents does not detract from this. It is of the very nature of the question being posed in this appeal that such evidence was not supported by documents. What the Commissioner and tribunal had before them was evidence of a search conducted by identified individuals. The appellant did not seek to challenge that evidence specifically, for example by asking for a hearing and the attendance of witnesses, but contented himself with generalised criticism. That does not change that evidence into assertion. Rather, it leaves it as unchallenged evidence. The tribunal is fully entitled to rely on such evidence.

27 It is important, at this stage as below, to have in mind precisely what was being sought in this case. This appeal has resulted in a considerable amount of time being spent on investigating whether records existed to show why the editor of a publication issued by the police authority changed his or her mind in 2007 about the content of an edition of that publication after indicating in advance what that content would be. Having reviewed the correspondence and decision of that authority, of the Information Commissioner, and of the First-tier Tribunal about that question, I can see nothing of any substance at all in any of the grounds of appeal to the Upper Tribunal warranting a further look at the question.

28 It may be, with hindsight, that it would have been wise for the editor to explain at the time that there was a new focus to the authority's publication in 2007. And it would have been proper practice of the authority, a failure in which was criticised by the Information Commissioner, to write to the appellant about his complaint on this point following the discussions at the end of September 2008. But I see no failure on any part since then that can be regarded as an error of law directly or indirectly in the decision of the First-tier Tribunal. In particular, I do not consider that the First-tier Tribunal dealt with the appeal in any way unfairly, or that it considered any evidence that it should not have considered or that it ignored any evidence that was properly to be considered by it. Nor did it reach any decision for which it had no evidence or against the evidence. And it adequately explained its decision.

29 The application is therefore refused.

David Williams
Judge of the Upper Tribunal
12 07 2011

[Signed on the original on the date stated]