THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/1930/2011

APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

Tribunals, Courts and Enforcement Act 2007, section 11
Tribunal Procedure (Upper Tribunal) Rules 2008

Appellant:	Nick Innes
Respondent:	Information Commissioner
First-tier Tribunal no:	EA/2010/0164
Date of decision:	12 May 2011

DECISION

Permission to appeal is refused.

REASONS FOR DECISION

A. BACKGROUND

1. Mr Inness submitted a number of questions to Buckinghamshire County Council with respect to selection for secondary education. The Council's response to each question was: 'this is not a request for information, but rather a question the answer to which is an opinion or judgement that is not already recorded.' The Information Commissioner treated that as a denial that the information sought was held and decided that the Council was correct that it did not hold any information requested. The Commissioner decided that the Council's response to the requests had been made late, but required no action to be taken in respect of that failure.

2. Mr Innes appealed against that decision to the First-tier Tribunal. At first, that tribunal struck out his appeal, but it was reinstated and, after an oral hearing, dismissed. The tribunal refused Mr Innes permission to appeal, but he renewed that application to the Upper Tribunal. His application was referred to me. I directed an oral hearing, which was held at Field House on 19 December 2011. Mr Innes attended, accompanied by his wife. I am grateful to him for the clear, economical and methodical way that he set out his arguments. The Commissioner was not represented.

B. THE TEST FOR PERMISSION TO APPEAL

3. An appeal to the Upper Tribunal lies on 'any point of law arising from a decision' (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). I have a discretion to give permission to appeal if there is a realistic prospect that the decision was erroneous in law or if

there is some other good reason to do so (Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538).

4. Issues of fact are outside the scope of an error of law, provided only that they were made rationally. The Upper Tribunal has no power on an application for permission to appeal to make its own assessment of the evidence or to substitute its view of the facts for the findings made by the First-tier Tribunal. The Upper Tribunal has to respect the fact-finding role of that tribunal.

5. Judge McKenna gave detailed reasons for refusing permission to appeal. I am not reviewing those reasons: *CIS 4772/00* at [2]-[11]. Nor may they be used to show that a point of law arises from the decision: *Albion Water Ltd v Dŵr Cymru Cyf* [2009] 2 All ER 279 at [67].

C. ANALYSIS

6. I have refused permission to appeal, because there is no realistic prospect that the decision involved the making of an error on a point of law and there is no other reason for giving permission. This is why.

The first ground of appeal

7. This refers to Mr Innes' first request for information: 'Have you corrected the false statements made to schools on this issue? Please provide evidence of this.' The tribunal accepted that the Council did not hold information relevant to this request and that it was not required to go through the motions of conducting a search. This ground does not disclose any error of law, because the question was argumentative. On this approach, Mr Innes' arguments are beside the point. I come back to this point under the fourth ground. The question contains an assumption that the Council was not likely to accept as accurate, namely that it had made false statements. In those circumstances, the only answer that it could give to the question was that it did not have any such information.

The second ground

8. This refers to Mr Innes' second and third requests for information: 'Have you independently verified, with the vast amount of data that you have at your disposal or by any other means that coaching is not a factor in achievement and that an unfair advantage is not gained through coaching? Please provide any information related to this.' And: 'What have you done, intend to do, to take into account factors related to coaching highlighted above (particularly the Bunting & Mooney research)? Please provide any information relating to this.' Again, the tribunal accepted that the Council did not hold information relevant to this request and that it was not required to go through the motions of conducting a search. Mr Innes referred me to the report written in February 2009 by the Council's Chartered Educational Psychologist. The report begins with a review of current research and follows with some indications for possible future research. This ground does not disclose any error of law, because the existence of this report does not show that the Council may have had information within the terms of the request. The report does not contain or indicate any verification, nor does it indicate any action, taken or planned. It sets out the contents of the research literature and puts forward some options.

The third ground

9. This refers to the Council's refusal to conduct specific researches in response to the requests. Its position was that it had already conducted searches in the past and its evidence satisfied the Commissioner as to their 'scope, quality, thoroughness and results', to quote from the Commissioner's decision. The tribunal agreed. Mr Innes argued that the Council's position could not be accepted as a matter of probability given the information he had already discovered of his own initiative and the attitude of the Council as demonstrated in its *Sent In Confidence* letter to the Information Commissioner of 7 January 2009. This ground does not disclose any error of law for these reasons. As regards information already discovered, that is a factor that has to be taken into account, but it is not determinative of the issue, even on the balance of probabilities. It is also relevant that the Council's response was to the requests as formulated and it is always possible that a differently worded request might have produced a different response, including the evidence that Mr Innes discovered. As regards the letter, that related to an earlier case not this one, and the Council admitted that it would assist the Commissioner, albeit reluctantly.

The fourth ground of appeal

10. This refers to what the tribunal said in paragraph 33 of its reasons about the way that requests for information should be worded. This ground does not disclose any error of law, because it did not form any part of the reasoning that led the tribunal to dismiss the appeal. What the tribunal was doing in essence was to give Mr Innes advice about how to formulate questions under the Freedom of Information Act 2000. As the tribunal pointed out, questions that contain assumptions limit their scope. This underlies parts of the Information Commissioner's decision and the attitude of the Council. I will make up an example to make my point. Suppose a person makes a request to a local authority in these terms: what policy do you have to remedy your incompetent performance in meeting your recycling targets? That question assumes that the authority's performance has been incompetent. If the authority does not accept that it was incompetent (as it probably won't), it can only answer the question by saying that it holds no information.

Signed on original
on 21 December 2011

Edward Jacobs
Upper Tribunal Judge