



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

RULING on an APPLICATION for PERMISSION to APPEAL

**By
JULIAN SHEPHARD**

1. This is a ruling concerning an application for permission to appeal against a decision of the First Tier Tribunal (Information Rights) dated 14 May 2010. That decision was that the Tribunal would not consider Mr Shephard's Notice of Appeal dated 12 May 2010 because it was out of time.

Background

2. The background to this matter is that on 17 October 2007 Mr Shephard made a request under the Freedom of Information Act 2000, in respect of certain information about traffic restriction orders and road signs in his local area. The public authority to whom the request was directed was West Sussex County Council ("the public authority"). It initially informed Mr Shephard that it was unlikely that it held the information he had requested and that as a search for it would be likely to exceed the relevant costs limit he could undertake his own search on condition that he paid for the time that officers would spend escorting him while he did so.
3. In subsequent correspondence with the Information Commissioner, the public authority accepted that the request should in fact have been treated as one falling under the Environment Information Regulations 2004. The public authority then issued a refusal notice under the Environmental Information Regulations 2004 regulation 12(4)(b), on the basis that the request was manifestly unreasonable. This was said to be because of the time and cost involved in searching for the requested information. The Information Commissioner subsequently issued a Decision Notice number FS50200310 dated 15 February 2010, requiring the public authority to search manually through its files to ascertain whether any of the information requested was held by it and, if so, requiring the public authority to disclose that information to Mr Shephard or to provide him with a refusal notice citing a valid exception to the disclosure obligation.
4. Mr Shephard was then informed by the public authority on 12 April 2010 that it had undertaken a manual search of its records as required by the Information Commissioner, but had found that it did not hold the requested information. Mr Shephard did not accept that this was the case, and wrote to the Information Commissioner requesting him to take enforcement action against the public authority. The Information Commissioner's Office explained by letter dated 7 May 2010 that it had no power to do so as the public authority had in fact complied with the Decision Notice. Mr Shephard then made an application to the First-tier Tribunal (Information Rights) dated 12 May 2010, in which he asked for an appeal to be allowed to proceed, notwithstanding the fact that it had been lodged out of time. He gave a number of reasons for his late application to the Tribunal, including the facts (i) that the decision notice had been in his favour but had not been complied with and (ii) that he had awaited the public authority's response to the Information Commissioner's decision before deciding whether to appeal.

The Decision of the First-tier Tribunal (Information Rights)

5. On 14 May 2010 Peter Martin from the Tribunal administration wrote to Mr Shephard on the instructions of the Principal Judge, informing him that *“the Notice of Appeal is well out of time and the Tribunal is not prepared to allow the appeal to proceed. In any case the grounds of appeal do not appear to raise matters which the Tribunal has powers to deal with and should be pursued elsewhere”*.
6. On 19 May 2010 Mr Shephard wrote back to the Tribunal administration, asking for *“a review of your decision not to proceed with an appeal”*. On 24 May 2010, Roger Towers from the Tribunal administration wrote back to Mr Shephard, confirming that the Notice of Appeal dated 12 May 2010 had not been accepted by the Tribunal because it was out of time and further, that as Mr Shephard had in fact been successful in his appeal to the Information Commissioner, his complaint that the public authority had not complied with the Information Commissioner’s Notice was not one that the Tribunal has power to deal with.

The Tribunal’s Power to Review its Decisions

7. Mr Shephard originally asked for a review of the 14 May decision in his letter of 19 May 2010. Under rule 44 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended) (“the Rules”), the Tribunal may only undertake a review of a decision if (a) it has received an application for permission to appeal or (b) it is satisfied there is an error of law in the original decision. As Mr Shephard’s original request for a review did not suggest there had been an error of law, it was not passed to a Tribunal Judge for consideration at that stage, and the letter of 24 May was therefore an administrative confirmation of the Tribunal’s earlier decision. Having now considered the papers myself, I have not identified any error of law in the original decision which suggests that this was an inappropriate response.

The Application for Permission to Appeal

8. On 1 June 2010, Mr Shephard applied to the First-tier Tribunal (Information Rights) for permission to appeal to the Upper Tribunal in respect of the decision of 14 May 2010. I set out my ruling on this application at paragraph 13 below. Rule 43 of the Rules states that, before considering an application for permission to appeal, the Tribunal must first consider whether to review the earlier decision in accordance with rule 44.

Ruling on Review

9. I have reviewed the decision of 14 May 2010. I have noted Mr Shephard’s reasons for the delay in lodging his Notice of Appeal (see paragraph 4 above). I have considered whether it would have been appropriate to have exercised discretion to allow the appeal to proceed out of time in circumstances where the Tribunal in fact had no power to grant Mr Shephard the relief he sought, namely the enforcement of the Information Commissioner’s Decision Notice.
10. I have considered all the papers in this matter, including Mr Shephard’s grounds for seeking permission to appeal. I have reviewed the Tribunal’s decision of 14 May 2010 and concluded that the Tribunal should take no action on the review. Whilst I understand that Mr Shephard is frustrated that circumstances beyond his control caused his Notice of Application to be lodged out of time, I cannot escape the conclusion that his application is itself without merit for the reasons set out at paragraph 9 above. The decision of 14 May 2010 must therefore stand.

11. A decision to review an earlier decision but to take no action following the review is an “excluded decision” for the purposes of section 11(5)(d)(ii) of the Tribunals Courts and Enforcement Act 2007 and so is not itself subject to a right of appeal.

Ruling on Application for Permission to Appeal

12. Rule 43(2) of the Rules provides that, having reviewed the decision and decided to take no action on it, the Tribunal must go on to consider whether to give permission to appeal. I have also therefore considered whether Mr Shephard should be given permission to appeal against the decision of 14 May 2010. I have taken into account the fact that the Information Commissioner’s Decision Notice was in Mr Shephard’s favour and that it has as a matter of law been complied with by the public authority concerned, albeit that Mr Shephard remains unhappy with the outcome. It is of course a well established legal principle that a successful party should not be permitted to bring an appeal.
13. Having considered the grounds of appeal carefully, I have come to the conclusion that they do not identify an error of law in the decision of 14 May 2010, as required by rule 42(5)(g) of the Rules. In all the circumstances, permission to appeal is refused.
14. Mr Shephard has a right to renew his application for permission to appeal to the Upper Tribunal. Under rule 21(3) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, he has one month from the date this ruling was sent to him to lodge an appeal with the Upper Tribunal (Administrative Appeals Chamber), 5th Floor, Chichester Rents, 81 Chancery Lane, London, WD2A 1DD. Further information is available on the Upper Tribunal’s website at <http://www.osscsc.gov.uk/index.htm>

Alison McKenna
Tribunal Judge
First-tier Tribunal (Information Rights)
16 June 2010