



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0009

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FER0304206
Dated: 21 December 2010**

Appellant: Gerard Conway

Respondent: Information Commissioner

Additional Party: Mid Sussex District Council

Heard at: Field House, London

Date of hearing: 9 May 2011

Date of decision: 6 June 2011

Before

Robin Callender Smith
Judge

and

Anne Chafer
Gareth Jones
Tribunal Members

Attendances:

For the Appellant: Mr Gerald Conway in person
For the Respondent: Mr Mark Thorogood, Solicitor for the Commissioner (in writing)
For the Additional Party: Mr Tom Clark, Solicitor to the Council (in writing)

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

Case No. EA/2011/0009

Subject matter:

Environmental Information Regulations 2004

Exceptions, Regs 12 (4) and (5)

- Internal communications (4) (e)
- Interests of an individual (5) (f)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 21 December 2010.

SUBSTITUTED DECISION NOTICE

Dated 6 June 2011

Public authority: Mid Sussex District Council

Address of Public authority: Oaklands Road
Haywards Heath
West Sussex
RH17 5HZ

Name of Complainant: Mr Gerald Conway

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 21 December 2010.

Action Required

Within 35 days, disclosure of the metadata and other related information not already disclosed which will reveal all the dates on which all the photographs at issue in this information request and subsequent appeal were taken.

Dated this 6th day of June 2011

Robin Callender Smith
Judge

REASONS FOR DECISION

Request for Information

1. On 7 February 2010 the Appellant asked the Additional Party – Mid Sussex District Council – for information in respect of certain planning consents under the Town and Country Planning Act 1990 and the Countryside Rights of Way Act 2000.
2. The requests were as follows:

(1) CD/06/02564/FUL

In relation to that consent, information relating to or in connection with:

- Visit to the land by MSDC officials and their agents at any time;
- Satisfaction or failure to satisfy conditions under the grant of permission notice, dated 17 January 2007;
- Agricultural need for development.

(2) CD/06/01828/FUL

In relation to that consent, information relating to or in connection with:

- Visits to the land by MSDC officials and their agents at any time;
- Agricultural need the development.

(3) CD/00/00054/FUL

In relation to that consent, information relating to or in connection with:

- Visits to the land by MSDC officials and their agents at any time;
- satisfaction or failure to satisfy conditions under the grant of permission notice, dated 9 June 2000;
- Agricultural need for development.

For the purposes of the above, references to Parkgate Farm, Sunrise Farm, land at Cleavers Lane, land to the west of Cleavers Lane, land at the junction of the B2115 and Cleavers Lane or combinations of the above descriptions will be taken to be synonymous with the above application/consent references.

(4) Green Portakabin, currently located on land at junction of B2115 and Cleavers Lane to its west.

All information relating to the above, to the extent not disclosed pursuant to the information already requested elsewhere in this letter.

For the purpose of this request, information shall include, but not be limited to:

- Type of information: includes all media, such as paper, electronic and micro-fiche;
 - Source of information: includes that generated by MSDC or received from or generated by all third parties;
 - Form of information: includes all records such as letters, memos, briefs, file notes (of meetings, telephone conversations or otherwise), e-mails, scanned documents, recommendations, forms (compliance application or like) and photos.
3. On 19 February 2010 MSDC stated that the only information it held in relation to the planning applications in question that it had not already disclosed was held on its enforcement files. The MSDC refused to disclose that information on the ground that it was exempt under sections 40 and 41 FOIA. On 20 February 2010 the Appellant requested an internal review. The MSDC provided some information in a letter dated 1 March 2010 at the Appellant considered that response was incomplete.
 4. There was an internal review and the MSDC informed the Appellant, in a letter dated 16 March 2010, that it had previously disclosed all the information it held relating to the planning applications in question with the exception of information held in its enforcement files. The Appellant complained to the Information Commissioner about that refusal on 29 March 2010.
 5. During the course of the Commissioners investigation MSDC informed him that, given the passage of time, it was no longer seeking to resist the disclosure of the information it had previously withheld from the appellant. MSDC wrote to the appellant on 4 August 2010 disclosing the information that had previously been withheld. That did not include electromagnetic copies of photographs that had been requested. The MSDC qualified the extent of the disclosures on the basis of relevance and the material might be subject to copyright.

The complaint to the Information Commissioner

6. The Appellant did not consider the MSDC had provided him with all the information he had requested and continued with his appeal to the Information Commissioner who issued a decision notice dated 21 December 2010.
7. In that Decision Notice the Commissioner considered whether the MSDC held any further information that had not been disclosed to the Appellant and concluded that, on the balance of probabilities, there was no further relevant information held by MSDC within the scope of the Appellant's request that had not already been disclosed to him.
8. The Appellant appealed against the Decision notice on 19 January 2011

The appeal to the Tribunal

9. By the time the matter came before the Tribunal – following a stay of the appeal to see whether the Appellant and the MSDC could reach agreement on what was disclosable and what had been disclosed – some of the issues set out in the Appellant's grounds of appeal had been resolved.
10. The Appellant had complained that within the documents disclosed to him by MSDC a particular e-mail was partially disclosed. A complete version of that had now been provided to him and was no longer an issue.
11. The Appellant complained that MSDC had not disclosed copies of all the photographs that it held. MSDC's assurance that all "relevant" photographs had been disclosed was a qualified assurance and the Commissioner should have obtained an "unqualified" assurance given the context of the appeal. The Appellant contended that the Commissioner should have invited the MSDC either to confirm that "all related or connected information" had been disclosed or – if not – to have required that all such information be disclosed.
12. The Appellant believed that the Commissioner should have requested the MSDC to disclose any further information that had been withheld because of concerns over copyright infringement or alternatively to have provided non-qualified confirmation that all photographs had been disclosed.

The questions for the Tribunal

13. Whether, on the balance of probabilities, there was metadata in relation to the dates on which particular site photographs had been taken which had not been disclosed to the Appellant.

14. Whether the Commissioner should have used more rigorous language – in terms of relevant documents and data – in requiring MSDC to disclose the information that had been disclosed.

Evidence

15. Mr Conway, in his evidence, concentrated in particular on the metadata in relation to whether photographs could or could not been taken before 17 January 2010.

16. His observations of the site led him to believe that work had not reached the level suggested by a cut-off date of 17 January 2010 – in respect of photographs – and that the work on the site must have happened later.

17. That date is relevant because it is the date the planning consent in relation to the site lapsed. MSDC said that the work had started before 17 January 2010 but he believed that the metadata in respect of the photographic material in question would show work at a later date.

Conclusion and remedy

22. The Tribunal, having considered all the written and oral evidence, concluded that the Commissioner's decision in relation to the language used in respect of "relevant" information was appropriate and proper. It did not agree with the Appellant that more rigorous language should have been used.

23. The Tribunal, having heard the detailed and credible evidence offered by the Appellant in respect of his opinion that metadata and information in relation to the photographic material at issue concluded that it should indeed have been disclosed to him so that the more precise dates could be attributed to the photographs at issue.

24. To that extent the Appellant's appeal succeeds and this information should be disclosed to him as detailed in the Substituted Decision Notice.

The Tribunal's view is that it should already have been disclosed to him and, if it had been, the appeal itself might have been more quickly resolved and decided in the light of the other information that had actually been disclosed by MSDC.

25. There is no order as to costs.

26. Our decision is unanimous.

27. Although this appeal started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5) we are now constituted as a First-tier Tribunal. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date the Tribunal's decision was sent. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Robin Callender Smith

Judge

6 June 2011