



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

**Appeal No: EA/2011/0273**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FER0394174  
Dated: 24 October 2011**

**Appellant: John Kuschnir**

**1st Respondent: The Information Commissioner**

**2nd Respondent: Shropshire Council**

**Heard on the papers**

**Date of Hearing: 19 April 2012**

**Before**

**HH Judge Shanks**

**Judge**

**and**

**David Wilkinson and Andrew Whetnall**

**Tribunal Members**

**Date of Decision: 25 April 2012**

**Subject matter:**

Environmental Information Regulations 2004

Reg. 12(5)(f) exception: *Interests of an individual*

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 24 October 2011.

**SUBSTITUTED DECISION NOTICE**

**Dated:** 25 April 2012

**Public authority:** Shropshire Council

**Name of Complainant:** John Kuschnir

**The Substituted Decision**

For the reasons set out below, the Public Authority should have made the requested information available to the Complainant pursuant to reg. 5 of the Environmental Information Regulations 2004.

**Action Required**

The Public Authority is required to supply the requested information by 25 May 2012.

Dated this 25 April 2012

HH Judge Shanks

## **REASONS FOR DECISION**

### **Factual background**

1. The Appellant, Mr Kuschnir, owns a property in Shrewsbury. Hawk Cycles own an adjacent property. Both are listed buildings. In 2009, Mr Kuschnir's property was suffering from damp penetration which was causing funghi in the kitchen. He believed that the penetration was coming from a leaking flat roof belonging to Hawk Cycles which abuts the gable end of his property.
  
2. Having failed to obtain a satisfactory response from Hawk Cycles, on 19 August 2009 Mr Kuschnir contacted Shropshire Council and spoke to Mr Roberts, a Housing Regeneration Officer who has provided us with a statement in this case. It is clear from his statement and the correspondence that, having inspected the properties, Mr Roberts formed the view that the damp penetration was indeed caused by defects in Hawk Cycles' property and that it represented a statutory nuisance and he started to press Hawk Cycles for a schedule of remedial works to prevent the continuation of the nuisance. In a letter dated 21 October 2009 he formally requested:

**... a detailed schedule and programme of work in the next 7 working days.**

The letter continued:

**I can confirm that failure to take the necessary action and provide documentary evidence will result in the Council serving an Abatement Notice under the Environmental Protection Act 1990.**

3. Hawk Cycles appointed a surveyor who contacted Mr Roberts on 23 October 2009 and told him that he had asked Hawk Cycles to confirm that a copy of his proposed schedule of repairs would be sent to the Council once he had reported to them. Mr Roberts and Mr Rogers, a Council Conservation Officer, continued to monitor the situation and to seek details of the remedial works which Hawk Cycles intended to carry out. There was a site visit attended by Mr Roberts, Mr Rogers and the surveyor on 12 January 2010 at which Mr Rogers asked for a method statement to be provided

so he could check whether listed building consent was required for the proposed works.

4. On 15 January 2010 Hawk Cycles' surveyor sent Mr Roberts a Schedule of Works and a Statement of Intended Works and Methodology (the Tribunal has been provided with copies of these documents in a Disputed Information Bundle). Mr Roberts forwarded a copy of them to Mr Rogers so he could assess whether listed building consent was required. We assume the works were carried out in accordance with the documents sent to Mr Roberts and Mr Rogers.
5. Meanwhile in January 2010 Mr Kuschnir was asking to be provided with a copy of the intended statement of works. Mr Roberts sought the consent of Hawk Cycles to pass it on to him but they would not consent to its release. On 13 January 2011 he made a formal request for the schedule of works. This was refused by the Council on the basis of regulation 12(5)(f) of the Environmental Information Regulations 2004. Mr Kuschnir complained to the Information Commissioner who upheld the position taken by the Council. He now appeals to this Tribunal against the Commissioner's decision notice.

#### The issues on the appeal

6. It was agreed by all parties (including a representative of Hawk Cycles) in the course of a telephone directions hearing on 31 January 2012 that the issues to be resolved on the appeal were whether regulation 12(5)(f) applied to the information requested and, if so, whether the public interest in upholding the relevant exception outweighed the public interest in disclosure. There is thus no dispute that the information requested by Mr Kuschnir was "environmental information" for the purposes of the regulations and no dispute that the Council was obliged to supply it to him unless it was right on both those issues.
7. The Council was therefore obliged to supply the requested information to Mr Kuschnir unless five requirements were satisfied:

- (a) its disclosure would adversely affect the interests of Hawk Cycles;
- (b) Hawk Cycles was not under, and could not have been put under, any legal obligation to supply it to the Council;
- (c) Hawk Cycles did not supply the information to the Council in circumstances where the Council or any other public authority were entitled to disclose it apart from under the Environmental Information Regulations;
- (d) Hawk Cycles had not consented to its disclosure; and
- (e) the public interest in maintaining the exception outweighed that in disclosure, bearing in mind the presumption in favour of disclosure.

There is no question about (c) and (d). We therefore turn to consider (a), (b) and (e). It is fair to record that the Tribunal has been provided with substantially more material (including Mr Roberts' statement) than was before the Commissioner.

#### Adverse affect on Hawk Cycles

8. Although Judge Shanks raised the point at the directions hearing (in which, as we have said, a representative of Hawk Cycles participated) and it is expressly alluded to in para 4 of the directions given on 1 February 2012, no specific evidence was submitted to the Tribunal as to any prejudice to Hawk Cycles that would result from the disclosure of the information. It is clear from the correspondence between Hawk Cycles and the Council from January and February 2010 and from March 2011 (when the Council was seeking their consent to disclosure to Mr Kuschnir) that they found Mr Kuschnir aggressive and difficult to deal with and therefore did not wish to share any information with him or indeed deal with him in any way, although in an email dated 15 February 2010 there was a suggestion that they would do so if he engaged a professional to represent him.
9. The Commissioner at para 11 of his decision notes that there was a potential litigation context in this case; there was, however, no evidence that the disclosure of the information would have made litigation against Hawk Cycles more likely and, if any

claim was started by Mr Kuschnir, it is abundantly clear that he would have been entitled to disclosure of the information in the context of the litigation. In our view the potential litigation context therefore adds little to the debate.

10. The most that can be really be said is that Hawk Cycles did not want their information shared with Mr Kuschnir because they did not trust him to use it in a way that would suit them. Given that the *extent* of the adverse affect on Hawk Cycles of disclosure is a matter that is inevitably considered at the public interest balance stage, we are satisfied that, although we do not regard such adverse affect as very substantial, it is sufficient to satisfy the requirement that the interests of Hawk Cycles must be adversely affected by disclosure.

Legal obligation on Hawk Cycles to supply information to Council

11. It is not suggested that Hawk Cycles were under a legal obligation to supply the schedule of works to the Council on 15 January 2010. However, the question remains whether they could have been put under a legal obligation to do so.
12. Mr Roberts states in his witness statement that he knows of no statutory powers under which the Council could have obtained the information from Hawk Cycles in the circumstances of this case and the Council informed the Commissioner in the course of his enquiry that this was the position. However, section 80(1) of the Environmental Protection Act 1990 provides as follows:

**...where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the local authority, the local authority shall serve a notice (“an abatement notice”) imposing all or any of the following requirements:**

- (a) requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;**
- (b) requiring the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes ...**

and section 80(4) provides that failure to comply with such a notice without reasonable excuse is an offence. Although the Council argue to the contrary we can

see no reason, as a matter of statutory construction, why a local authority is not empowered by the general words “the taking of such other steps” to require the disclosure (and indeed the preparation, although that point does not arise here) of a schedule of works by a person who they judge to be causing a statutory nuisance.

13. We have already found that Mr Roberts had formed the view that a statutory nuisance existed and that Hawk Cycles were responsible for it. In those circumstances we are satisfied that if they had failed to supply the schedule of works to the Council on 15 January 2010 Mr Roberts could have required them to do so by means of a suitable notice under section 80 of the 1990 Act. Requirement (b) as set out in para 7 above was therefore not satisfied in our view and regulation 12(5)(f) did not apply so that the Council were obliged to supply the information requested to Mr Kuschnir. Strictly speaking it is not necessary for us to consider the public interest in those circumstances but, in case we are wrong on the point of statutory construction, we will do so.

#### Public interest balance

14. *Public interest in disclosure:* The Commissioner at para 28 of his decision notice expressed the view that the dispute between Mr Kuschnir and Hawk Cycles was essentially a private, civil matter and that the Council had no real purpose in obtaining the information and no regulatory role. It is clear from all the material we now have that that is not correct, overlooking, as it does, the possible existence of a “statutory nuisance” and the Council’s powers and duties under the 1990 Act. It is also relevant we think that Mr Kuschnir’s property was a listed building and one that the Council itself features on guided walks of Shrewsbury. In our view there was therefore some public interest in the publication of information about works that would affect the building which were being required by the Council in carrying out its public health duties under the 1990 Act. Although the public interest in disclosure to Mr Kuschnir would not have been great we consider that it would have been substantially weightier than the Commissioner did.

15. *Public interest in maintaining exception in reg. 12(5)(f)*: Assuming, as we must for these purposes, that the Council had no power to require the disclosure to it of the schedule of works, it is nevertheless clear as a matter of fact that Hawk Cycles did not supply it to the Council in any way voluntarily: they were clearly under threat of an abatement notice requiring them to execute works to prevent a recurrence of the nuisance if they did not co-operate with the Council. This finding of fact undermines substantially the Commissioner's consideration that disclosure in this case would tend to discourage the informal sharing of information in confidence with public authorities like the Council. We have already recorded at para 10 above our view that the adverse affect for Hawk Cycles of disclosure to Mr Kuschnir would not have been substantial.

16. Although we do not consider the public interest to be great either way we are of the clear view, taking account of these considerations, that the public interest in disclosure is weightier. In those circumstances the exception at reg 12(5)(f) would not have entitled the Council to refuse Mr Kuschnir's request and, even if we are wrong on the statutory interpretation point, the information should have been supplied and the appeal must now be allowed.

#### Conclusion and remedy

17. The appeal is allowed and the substituted notice set out above is issued.

18. Our decision is unanimous

HH Judge Shanks

Date: 25 April 2012