



IN THE FIRST-TIER TRIBUNAL

(INFORMATION RIGHTS)

**IN THE MATTER OF AN APPEAL UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

EA/2011/0257

BETWEEN:-

KEVIN CROSS

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

**DECISION OF THE TRIBUNAL ON AN APPLICATION TO STRIKE OUT THE
GROUNDS OF APPEAL**

1 This appeal arises from a request first made by Mr. Cross to Havant Borough Council in December, 2009 for disclosure of a building control decision notice, plans and inspection records relating to a loft conversion to his home carried out in 1987. He had also successfully requested documents relating to a linked planning application.

2 The requested information is plainly “environmental information” for the purposes of the EIR. Under Regulation 5(1) of the EIR, a public authority that holds environmental information must make it available on request. Regulation 12(4) (a) provides that it may refuse to disclose information to

the extent that it does not hold that information when an applicant's request is received.

3 Havant twice indicated by e mails in January and May, 2010 that it held the requested information but later denied that this was so when Mr. Cross made a second request for it on 20th. October, 2010. Havant was sufficiently concerned by the apparent inaccuracy of those previous indications to undertake in 2011 a six – day search of its microfiche records, though without success. Its stance now is that it received no building regulations application in 1987 but that it must have been dealt with by an independent authorised inspector. If that was so, Havant received only a notification of compliance with building regulations.

4 Mr. Cross inspected documents in January, 2010 at Havant Council offices, which he certainly believed to be those requested. It is therefore not surprising that he was perplexed by Havant's later denial that it held them.

5 Although marked as building inspection documents, the plans and notice are, I was told, quite similar to those submitted for the corresponding planning application. There may be room for confusion as to which documents Mr. Cross, or indeed the relevant council officer, saw, though, it should be noted, he is convinced that he saw those respecting the building regulations application.

6 Nobody suggests that Havant deliberately destroyed these records between January and November, 2010. There is no evidence as to whether they could have been mislaid or accidentally destroyed.

7 The ICO, whilst finding breaches of the EIR arising from a charge made by Havant and its failure to cite regulation 12(4)(a) in its refusal, concluded that it was at least probable that it did not hold the requested information.

8 Mr. Cross appealed. His grounds of appeal referred to a series of criticisms of the ICO which, justified or not, did not form part of the Decision which the Tribunal is empowered to consider. They included a complaint that the ICO had failed to deal with further complaints and that the breaches of the particular EIR regulations which the ICO's ruling had identified were more extensive than detailed in the Decision Notice.

9 They did not initially include his main complaint, that the ICO had wrongly found that Havant did not hold the requested information. However, reference to this point appeared in a later document and it was obvious that this was the fundamental decision which Mr. Cross wished to appeal.

10 In his response dated 24th. November, 2011, the ICO applied to strike out all grounds of appeal -

- (i) those set out in the original notice in accordance with the Tribunal's duty under rule 8(2) (a) of the 2009 Rules and
- (ii) the ground identified in paragraph 9 in the exercise of the Tribunal's power under rule 8(3) (c) to strike out a ground which has no reasonable prospect of success.

11 As to (i), it was plain that these grounds went beyond the ICO's decision. Mr. Cross courteously accepted that they must be struck out, following careful discussion as to the function of the Tribunal.

12 He advanced a firm and clear argument, however, as to Havant's denial that it held the requested information at the date of his second request. He accepted the possibility that it had disappeared since January, 2010 but that alone would not remotely justify striking out this ground. He insisted, entirely sincerely, that he had seen the building regulation documents on his January, 2010 visit. He was confident that the 1987 application was made to Havant directly.

13 I accept without hesitation Mr. Cross's sincerity and truthfulness. He was a moderate, fair – minded reporter of what he was sure he had done and seen.

14 However, whatever be the explanation for his conviction as to the documents that he saw and for Havant's initial response, I am convinced that this appeal is doomed to failure, given the six – day trawl undertaken by Havant, coupled with its obvious willingness to provide this material, if it had it. On a balance of probabilities - indeed, were it appropriate - by a sterner standard of proof, the Tribunal would inevitably decide that Havant did not hold this information in October, 2010.

15 Accordingly, I order that all grounds of appeal be struck out under the provisions of rule 8(2)(a) or 8(3)(c).

David Farrer Q.C.
Tribunal Judge
11th. January, 2012