



Neutral citation number: [2023] UKFTT 1051 (GRC)

Case Reference: EJ/2022/0003

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Heard : Determined on the papers
Decision given on: 19 December 2023**

Before

**TRIBUNAL JUDGE LYNN GRIFFIN
TRIBUNAL MEMBER STEPHEN SHAW
TRIBUNAL MEMBER ROSALIND TATAM**

Between

Claire Stretton

Applicant

and

(1) The Royal Borough of Windsor and Maidenhead

And

(2) The Information Commissioner

Respondent(s)

Decision: The application is refused.

REASONS

1. This is an application to certify an offence of contempt against each of the respondents. The determination of the application was made on the papers, the Tribunal agreed that this was an appropriate way to decide the application.

Background and chronology of events

2. On 11 March 2022 a decision was made in case reference EA/2021/0092, the Tribunal panel was composed of Judge Buckley and Tribunal Member Sivers. The parties had consented to the decision being taken by a panel of two.
3. That case involved this Applicant's challenge to a decision of the Information Commissioner ("the Commissioner") in decision notice IC-40928-G9N0 of 9 March 2021 which held that the Royal Borough of Windsor and Maidenhead ("the Council") was entitled to rely on section 41(1) and section 40(2) of the Freedom of Information Act 2000 (FOIA) in refusing the Applicant's request for information. The Commissioner also held that the Council had breached s 10(1) in providing the final response outside of the statutory time limits.
4. The original request was for an unredacted copy of a report into complaints about a named Councillor and Council Officers written by Richard Lingard.
5. The Tribunal in EA/2021/0092 made two decisions, by its interim decision on 14 October 2021 the Tribunal allowed the appeal in part.
6. On 15 October 2021 the Tribunal sent its open interim decision and Case Management Directions to the Appellant and the Commissioner and the closed annex to the Commissioner only.
7. On 28 October 2021 the Commissioner invited the Tribunal to contact the Council and provide them with a copy of the Tribunal's interim decision and closed annex to the decision. On 1 November 2021 the Tribunal emailed the Appellant, the Commissioner and the Council with a copy of an order setting aside the order dated 14 October 2021. The Tribunal emailed the Council (copied to the Commissioner) a copy of its interim decision and closed annex.
8. As the Council had raised section 36(2)(b)(ii) FOIA during the Commissioner's investigation, in accordance with Information Commissioner v (1) Malnick and (2) ACOBA [2018] UKUT 72, the Tribunal considered if section 36(2)(b)(ii) FOIA applied to the information the Tribunal had held not to be exempt from disclosure under section 41(1) and section 40(2) FOIA.
9. In their subsequent decision dated 11 March 2022 the Tribunal allowed the appeal in part, having previously given the parties an opportunity to make submissions on that point. The decision was that the Council was not entitled to rely on s 36(2)(b)(ii) to

withhold the requested information and that the public authority was entitled to withhold only certain specified information under s 40 FOIA or s 41 FOIA. The Tribunal in EA/2021/0092 made a substituted decision notice as follows

Organisation: The Royal Borough of Windsor and Maidenhead ('the Council')

Complainant: Claire Stretton

For the reasons set out below and in the interim decision dated 14 October 2021:

(1) The public authority was not entitled to rely on s 36(2)(b)(ii) to withhold the requested information.

(2) The public authority was entitled to withhold the following information under s 40 (the categories are explained under 'Discussion and Conclusions' in the interim decision):

(a) Richard Lingard's contact details ('category 4')

(b) The names of the complainants at para 2.1 of the report of Richard Lingard dated 10 October 2019 ('the Report') ('category 5')

(c) The names of individuals outside the Council ('category 6')

(d) The names of Council officers other than the Senior Council Officer referred to below ('category 7')

(3) The public authority was not entitled to rely on s 40 or s 41 to withhold the following information:

(a) The name of the senior officer referred to, for example, in para 12.2 of the Report (the 'Senior Council Officer') (category 1)

(b) Substantive information relating to the Senior Council Officer.

(c) The comments/version of events of Russell O'Keefe set out in 6.3-6.51.

The Council is required to disclose the following information within 35 days of the date of promulgation of the final decision:

A copy of Richard Lingard's report with only the following information redacted:

(a) Richard Lingard's contact details ('category 4')

(b) The names of the complainants at para 2.1 of the report of Richard Lingard dated 10 October 2019 ('the Report') ('category 5')

(c) The names of individuals outside the Council ('category 6')

(d) The names of Council officers other than the Senior Council Officer ('category 7') (NOTE: The 'Senior Council Officer' is the individual referred to, for example, in para 12.2 of the report).

Failure to comply may result in the First-Tier Tribunal making written certification of this fact to the Upper Tribunal pursuant to 61 of the Freedom of Information Act and may be dealt with as a contempt of court.

10. The Tribunal's decision in EA/2021/0092 was sent to the parties by email dated 21 March 2022 at 15.11. It was not sent by the Tribunal to the public authority.
11. The Commissioner's office sent an email to the Council dated 24 March 2022 that informed them of the Tribunal's decision in EA/2021/0092. The Commissioner pointed out the need for disclosure of certain information and how they could proceed if they wished to challenge the decision. The Commissioner referred the Council to the Tribunal's website for the published decision stating that it should be published in due course. The Commissioner told the Council to contact the Tribunal if they needed further information. The Commissioner's email was in clear and unambiguous terms as follows

"Further to the Tribunal's interim decision in EA/2021/0092 Claire Stretton v Information Commissioner, the Tribunal has promulgated its decision allowing the appeal in part in respect of the council's reliance on section 36 FOIA. Accordingly, the Tribunal has ordered the council to disclose certain information that the Commissioner found exempt from disclosure in the Decision Notice ref. IC – 40928-G9N0.

The Tribunal's decision should be published on the Tribunal's website in due course at: <https://www.gov.uk/guidance/information-rights-appeal-against-the-commissioners-decision>

Should the council wish to appeal the Tribunal's decision, it will need to write to the Tribunal to seek to join as a party to the appeal first. The council may wish to obtain independent legal advice on this matter.

Please contact the Tribunal should you require any further information.

12. The Commissioner received an automatic response saying that the individual to whom the email had been sent no longer worked at the Council and therefore, on the same day, the Commissioner forwarded his email to the generic FOI email address for the Council.
13. On 31 March 2022 the Tribunal emailed the Appellant and the Commissioner enclosing a corrected interim decision (not emailed to the Council) and Rule 40 Order. The Tribunal emailed the Commissioner and the Council employee, who had ceased to work at the Council, the closed annex to its interim decision.

14. On 1 April 2022 the Tribunal sent the closed annex to the Council and copied in the Commissioner.
15. On 24 May 2022 the Commissioner responded to an email from the Appellant dated 20 May 2022 and confirmed that the Commissioner and the Tribunal had informed the Council of the Tribunal's decision. The Commissioner directed the Applicant to the Council regarding disclosure and to the Tribunal as the body responsible for enforcing its decision.
16. Once the time for compliance with the Tribunal's substituted decision had passed the Applicant contacted the Tribunal on 26 May 2022 to request the decision be enforced as a result of which Judge Griffin issued directions dated 13 June 2022 and 30 June 2022 providing a timetable for the resolution of the application.
17. On 4 July 2022 the Council sent the Applicant the material that had been ordered by the Tribunal in the substituted decision notice in EA/2021/0092.
18. On 12 July 2022 Judge Griffin made further directions subsequent to the exchange of emails between the Applicant and the Council at the beginning of that month in which the report of Richard Lingard dated 10 October 2019 had been sent to the Applicant.
19. On 14 July 2022 the Council wrote to the Tribunal asking for copies of the application and associated paperwork. These documents were sent to them again and on 19 July 2022; the Council acknowledged having received them at an earlier date.
20. Ms Stretton has confirmed that she wished to pursue her application for an offence of contempt to be certified notwithstanding the disclosure to her pursuant to the Tribunal's decision in EA/2021/0092.

The legal framework

21. The Upper Tribunal ruled in the case of Information Commissioner v Moss and the Royal Borough of Kingston upon Thames [2020] UKUT 174 (AAC) that it was a matter for the First-tier Tribunal (FTT) to enforce its decisions and not the Information Commissioner.
22. There is no power to compel a public authority to comply with a substituted decision notice but the power to certify an offence of contempt may operate as an incentive to comply.

23. The FTT's jurisdiction as regards certification of offences of contempt to the Upper Tribunal is set out in section 61 FOIA. This section reads, as relevant

S.61

...

(3) Subsection (4) applies where –

(a) a person does something, or fails to do something, in relation to proceedings before the First-tier Tribunal on an appeal under those provisions, and

(b) if those proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.

(4) The First-tier Tribunal may certify the offence to the Upper Tribunal.

...

24. This section came into force on 25 May 2018 and therefore applies in this case.

25. Section 61 FOIA is supplemented by rule 7A of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the Tribunal rules) as follows

Certification

7A. – (1) This rule applies to certification cases.

(2) An application for the Tribunal to certify an offence to the Upper Tribunal must be made in writing and must be sent or delivered to the Tribunal so that it is received no later than 28 days after the relevant act or omission (as the case may be) first occurs.

(3) The application must include –

(a) details of the proceedings giving rise to the application;

(b) details of the act or omission (as the case may be) relied on;

(c) if the act or omission (as the case may be) arises following, and in relation to, a decision of the Tribunal, a copy of any written record of that decision;

(d) if the act or omission (as the case may be) arises following, and in relation to, an order of the Tribunal under section 166(2) of the Data Protection Act 2018 (orders to progress complaints), a copy of the order;

(e) the grounds relied on in contending that if the proceedings in question were proceedings before a court having power to commit for contempt, the act or omission (as the case may be) would constitute contempt of court;

(f) a statement as to whether the Applicant would be content for the case to be dealt with without a hearing if the Tribunal considers it appropriate, and

(g) any further information or documents required by a practice direction.

(4) If an application is provided to the Tribunal later than the time required by paragraph (2) or by any extension of time under rule 5(3)(a) (power to extend time) –

(a) the application must include a request for an extension of time and the reason why the application was not provided in time, and

(b) unless the Tribunal extends time for the application, the Tribunal must not admit the application.

(5) When the Tribunal admits the application, it must send a copy of the application and any accompanying documents to the respondent and must give directions as to the procedure to be followed in the consideration and disposal of the application.

(6) A decision disposing of the application will be treated by the Tribunal as a decision which finally disposes of all issues in the proceedings comprising the certification case and rule 38 (decisions) will apply.

26. No order will be enforced by committal unless it is expressed in clear, certain and unambiguous language: Harris v Harris [2001] 2 FLR 895 per Munby J at paragraph 288. So far as is possible, the person affected should know with complete precision what it is that they are required to do or abstain from doing.

27. The application notice should be sufficiently particularised to ensure that the person alleged to be in contempt knows exactly what they are said to have done or have omitted to do, so as to properly defend themselves: Kea Investments Ltd v Eric John Watson & Ors [2020] EWHC 2599 (Ch) per Lord Justice Nugee at paragraph 23.

28. The burden of proof lies on the Applicant and the standard of proof is the criminal standard: JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2016] EWHC 192 (Ch).

29. In Navigator Equities Ltd & another v Deripaska [2021] EWCA Civ 1799 (hereinafter “Navigator”) the Court of Appeal set out the principles to be applied and the relevant considerations see para 70 et seq. At paragraph 82 the Court of Appeal stated

The following relevant general propositions of law in relation to civil contempts are well-established:

i) The bringing of a committal application is an appropriate and legitimate means, not only of seeking enforcement of an order or undertaking, but also (or alternatively) of drawing to the court’s attention a serious (rather than purely technical) contempt. Thus a committal application can properly be brought in respect of past (and irremediable) breaches;

ii) A committal application must be proportionate (by reference to the gravity of the conduct alleged) and brought for legitimate ends. It must not be pursued for improper collateral purpose;

iii) Breach of an undertaking given to the court will be a contempt: an undertaking to the court represents a solemn commitment to the court and may be enforced by an order for committal. Breach of a court undertaking is always serious, because it undermines the administration of justice;

- iv) The meaning and effect of an undertaking are to be construed strictly, as with an injunction. It is appropriate to have regard to the background available to both parties at the time of the undertaking when construing its terms. There is a need to pay regard to the mischief sought to be prevented by the order or undertaking;*
- v) It is generally no defence that the order disobeyed (or the undertaking breached) should not have been made or accepted;*
- vi) Orders and undertakings must be complied with even if compliance is burdensome, inconvenient and expensive. If there is any obstacle to compliance, the proper course is to apply to have the order or undertaking set aside or varied;*
- vii) In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. Rather it must be shown that the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant;*
- viii) Contempt proceedings are not intended as a means of securing civil compensation;*
- ix) For a breach of order or undertaking to be established, it must be shown that the terms of the order or undertaking are clear and unambiguous; that the respondent had proper notice; and that the breach is clear (by reference to the terms of the order or undertaking).*

30. If a contempt is proven to the required standard, the Tribunal must then consider whether, in all the circumstances of the case, the discretion in section 61(4) FOIA should be exercised to certify the contempt to the Upper Tribunal.
31. In this case the Council relies on two pieces of case law. First, Dallas v United Kingdom 2016 WL 01253952, application 38395/12. That was a case arising from a criminal trial, the facts of which are not relevant. The Council relies upon the to establish the principle that a contempt of court is an act or omission which creates a real prejudice to the administration of justice, done with the intent of creating such a risk. A similar principle is outlined in the second case relied upon by the Council; Attorney General v Sport Newspapers Ltd & others [1991] 1 WLR 1194. These cases concern contemptuous acts in the context of criminal proceedings. These are not criminal proceedings and so the principles to be applied are those in Navigator.
32. In Rotherham Metropolitan Borough Council v Harron & The Information Commissioner's Office and Harron v Rotherham Metropolitan Borough Council & The Information Commissioner's Office [2023] UKUT 22 (AAC) Farbey J pointed out that

54. The principle that proceedings for contempt of court are intended to uphold the authority of the court and to make certain that its orders are obeyed is longstanding (for a recent restatement, see JS (by her litigation friend KS) v Cardiff City Council [2022] EWHC 707 (Admin), para 55). A person who breaches a court order, whether interim or final, in civil

proceedings may be found to have committed a civil contempt. Given the nature and importance of the rights which Parliament has entrusted twenty-first century tribunals to determine, the public interest which the law of contempt seeks to uphold – adherence to orders made by judges – is as important to the administration of justice in tribunals as it is in the courts. There is no sound reason of principle or policy to consider that any different approach to the law of contempt should apply in tribunals whose decisions fall equally to be respected and complied with.

33. Farbey J went on to emphasise that where an order has not been complied with the FTT should consider all the circumstances in deciding whether certification is a proportionate step. She said that *“The interests of the administration of justice are not served by disproportionate contempt orders”*, see paragraph 82 of the Harron decision (supra).
34. The Applicant relies on Derek Moss Royal Borough Of Kingston-Upon-Thames (Allowed) [2022] UKFTT 2018_0007 (GRC). This is a decision of the First Tier Tribunal and has no binding authority upon us, albeit we acknowledge that it was a Tribunal panel composed in part of the Chamber President and one of the Tribunal members on this panel. If we take a similar course that is because we have decided that is the appropriate decision in this case on its facts, not because we are bound to follow the previous decision.

The Issues

35. As foreshadowed in the directions 30 June 2022, the following issues fall for consideration by the Tribunal
- a. Is the First Respondent, guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute a contempt of court?

In the determination of issue (a) above the following matters are relevant:

- i. Whether the terms of the Substituted Decision Notice in EA/2021/0092 were sufficiently clear and unambiguous so as to be capable of founding a finding of contempt for breach thereof;
- ii. If so, what were the obligations imposed on the Respondents by the Substituted Decision Notice?

- iii. Whether the actions of the Council have been sufficient to comply with the decision of the Tribunal?
 - iv. Does the Applicant have a right to complain to the Information Commissioner pursuant to section 50(1) of the Freedom of Information Act 2000 (“FOIA”) in relation to her assertion that the response to the Substituted Decision Notice was not in accordance with Part I of FOIA?
- b. If the First Respondent is “guilty of an act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute a contempt of court”, should the Tribunal exercise its discretion to certify a contempt?

In the determination of issue (b) above the Tribunal will consider whether such a breach was accidental or wilful.

The submissions

- 36. The nature of the application against the Council is that they did not comply with a decision of this Tribunal because they omitted to provide Ms Stretton with the documents that had been ordered to be disclosed by the deadline set out in the Tribunal’s substituted decision notice in EA/2021/0092.
- 37. The Information Commissioner has not provided a response to the application, he was not required to provide a response.
- 38. The Council lodged a “defence” dated 22 July 2022 which appended a witness statement from their information governance officer (IGO). In that witness statement the IGO explains the reasons why the disclosure to the Applicant was not made until after the expiry of the deadline set in the Tribunal’s substituted decision notice in EA/2021/0092.
- 39. In the witness statement the IGO explains the reasons relied upon by the Council, no further evidence was adduced by the Council. The explanation given can be summarised as follows:
 - a. Busy workload combined with staff shortage and illness;
 - b. Limited resources, including not being in receipt of central government funding this area of their work;
 - c. The Tribunal decision was received late ;

- d. The IGO thought the material had already been sent, and that the Tribunal notification was a “formality”; a conclusion she formed on account of the “lengthy and long-winded process”;
- e. The IGO is not a legal professional and has no political affiliation, she has no interest or bias in not following the direction of the Tribunal;
- f. The IGO suggests that “any reasonable” person would get in touch if they had not received the material and states further that there was no intention not to provide document to the Applicant, if she had emailed they would have done so;
- g. On 27 June the IGO double checked with the Commissioner and was in the process of completing the material when the Tribunal made contact;
- h. Once the Council received request they acted quickly.

40. The heart of the Council’s case is that the Council accepts it has served the material late but that no prejudice to the administration of justice has been caused.

41. The Council submits that there has been no contempt, and nothing which is capable of amounting to an act which has caused “a real risk” to the administration of justice.

42. In a letter dated 27 January 2023 the Council submitted that they had not been provided with a copy of the decision dated 11 March 2022 that included the substituted decision notice and that furthermore the final decision had not been published on the Tribunal website which carried only the interim decision. The Council stated that the first time they had received the final decision of 11 March 2022 was when it was provided as part of these enforcement proceedings on 1 July 2022.

43. The Applicant responded to the “defence”, we are grateful for her submissions which were comprehensive and well expressed. In summary the submissions were that:

- a. The substituted decision was clear and unambiguous;
- b. Proper notice was given to the Council in the form of notice of the promulgation;
- c. The material was not disclosed until after the deadline;
- d. It is wrong to expect her to have taken further action to obtain the information that the Tribunal had decided should be disclosed to her. The duty to take action was on the Council;
- e. The omission might have been accidental in the light of the workload described by the IGO if this is accepted by the Tribunal however, as the IGO spotted the email and escalated it at an earlier date demonstrates this was not

the case and the omission was caused by misunderstandings about what needed to be done;

- f. The workload/lack of resources are no answer as the law demands compliances no matter how burdensome, see the Navigator case, supra;
- g. The Council's responsibilities under the Freedom of Information Act 2000 are no less important than its other key duties of which this area is one;
- h. The IGO was in error, as were her colleagues, in regarding the Tribunal's decision as a formality or believing it had already been complied with;
- i. As in Derek Moss Royal Borough Of Kingston-Upon-Thames (Allowed) [2022] UKFTT 2018_0007 (GRC) there can be a contempt notwithstanding that there has been compliance in substance where that compliance is not in accordance with the deadline provided;
- j. The information was not provided to her until after the institution of these proceedings which would not have been needed had the Council provided the information in a timely manner.

44. The Applicant responded to the letter dated 27 January 2023 as follows on relevant matters:

- a. The chronology it outlined is contrary to that contained in the witness statements served on behalf of the Council;
- b. The Council were aware of the decision of 11 March 2022 and that it required them to take action; the Council was wrong to take no steps to obtain a copy of the decision if it was not attached/otherwise accessible to them.

45. In her response the Applicant invited the Tribunal to express an opinion on matters beyond the scope of these proceedings. However, we have no power to do so as these proceedings are not about compliance with FOIA in general but only about the enforcement of the substituted decision notice, and thus we decline her invitation.

Analysis and conclusions

46. There is no allegation of any act or omission by the Commissioner that would amount to a contempt of court. He was joined to the proceedings and has provided a helpful chronology of events and replies in correspondence where appropriate but we make it plain there is no suggestion of any contemptuous behaviour on the part of the Commissioner. In so far as it is necessary to do so we formally refuse to certify an offence of contempt against him.

47. The Council does not dispute that there was delay in compliance with the Tribunal order but it is suggested that there were a number of reasons for that non-compliance.
48. Having considered the reasons for the delay in compliance put forward by the Council we have concluded that they do not bear scrutiny. Limited resources and a busy workload combined with staff shortage and illness are circumstances that face many public authorities. As stated in Navigator orders must be complied with even if compliance is burdensome, inconvenient and expensive. If there is any obstacle to compliance, the proper course is to apply to have the order or undertaking set aside or varied. In our view it is incumbent on all public authorities, not any individual officer, to ensure that sufficient resources are available to properly deal with requests made under FOIA and any complaints to the Information Commissioner as well appeals from his decisions.
49. It is suggested by the Council the Tribunal decision was received late but we have concluded that it was sent to the Council on 24 March 2022. Furthermore, the Council was aware that it was coming since the previous October.
50. We find the suggestion that delay in compliance was due to the IGO forming the opinion that the FTT decision was a formality and that material must already have been sent due to the length of time taken by the process as irrelevant and regrettable. It seems to us to be illogical for the Council to draw any such conclusion from the passage of time. We acknowledge that the IGO is not a legally qualified professional but it was incumbent on the Council to familiarise itself with what was required to comply with the Tribunal's decision or to seek legal advice on what was required of the Council. Tribunal proceedings are an important part of the administration of justice and Tribunal decisions should not be viewed as formalities. As acknowledged by Farbey J. Tribunal decisions should be accorded equal respect with the decisions of the Courts.
51. As to an absence of political affiliation, this is irrelevant to the Council's compliance with the decision of this Tribunal and to the performance of its duties under FOIA which must be exercised regardless of the identity of the requestor or any motivation, whether real or perceived. We strongly disagree with the implication behind the suggestion that "any reasonable" person would have contacted the Council if they had not received the material to be disclosed. In our view this demonstrates a contemptuous attitude towards the requestor which is inconsistent with the scheme of the legislation. The Applicant was entitled to expect the public authority to comply with the Tribunal's decision.

52. It is suggested that the Council had no intention not to provide the information to the Applicant, and that if she had emailed they would have done so, but it was not the Applicant's role in this case to ask yet again for information that should already have been released by reason of the Tribunal decision.
53. The Council submits that on 27 June 2022 the IGO double checked with the Commissioner and was in the process of completing the material when the Tribunal made contact and that then they acted quickly. The Applicant disputes that this occurred but even if it did this was too little and too late. The submission ignores the fact that there were earlier opportunities for the Council to comply with the decision or to clarify what was required; there was an email from the Information Commissioner dated 24 March 2022 which should, at minimum, have put the Council on notice of the Tribunal's decision requiring action By the Council and which should have been followed up.
54. We turn to consider whether the first question Council is guilty of any act or omission in relation to these proceedings which would constitute a contempt of court (were we to be a court having power to commit). We have concluded that the applicant has satisfied us beyond a reasonable doubt (so that we are sure), that the Council is guilty of failing to comply with the substituted decision notice in EA/2021/0092 before the expiry of the deadline set by the Tribunal in that case.
- a. The material required to be disclosed was not sent to the Applicant until 4 July 2022, after she had made the instant application and two sets of directions had been issued by this Tribunal. There was delay in compliance with the substituted decision notice the length of which is to be calculated from the date of the decision and with reference to the time scales set out therein. There is no suggestion that the terms of that substituted decision were anything other than clear and unambiguous.
 - b. The obligation on the Council (not any individual employee or officer) was to comply within 35 days and even if this is calculated from 24 March 2022 compliance was over two months late. It is the responsibility of the Council as a public authority and not any individual employee or team to comply with their duties under FOIA; how this responsibility is delegated is a matter for them.
 - c. We acknowledge that there were issues with the Council accessing a copy of the promulgated decision, however this does not remove the obligation to take steps to follow up on the communications received rather than assume that all was in order and any communication would be a formality.

d. It is not necessary in this case to consider whether there was a right to complain to the Information Commissioner given that no fresh response was ordered. It is clear from the authorities that it is for the Tribunal to enforce its decision in the circumstances of this case.

55. We then considered whether in all the circumstances of this case we should exercise our discretion to certify that offence to the Upper Tribunal. After careful consideration we have decided not to do so, but the decision was a finely balanced one.

a. The Council's handling of the situation was inadequate in that the Council omitted to take the steps they should have done by reason of a failure to appreciate the importance of compliance with the substituted decision notice. This was compounded by an attitude in these proceedings that could be described as dismissive and disdainful of the Council's obligations under FOIA and to the Tribunal.

b. However, the failure to comply was not wilful in the sense of being a positive decision to do nothing in the knowledge of the obligations upon the Council. Neither is the omission to comply accidental. We have concluded that the offence of contempt was committed negligently by which we mean that the Council should have been aware (on receipt of the communication from the Information Commissioner on 24 March 2022 at the latest) that there was a decision of the Tribunal that concerned the Council and yet took insufficient steps to find out what that decision was or to comply within the timescale set therein.

c. Such negligence cannot be excused by a lack of resources or by focussing responsibility on the action of one employee or even one team. However, that lack of resources may go towards explaining why no employee or Council Officer appreciated the seriousness of what was happening, or the potential consequences of a failure to comply, because no one had the time to properly reflect on the correspondence received or the appropriate steps to take.

d. The substituted decision notice was complied with in the end, albeit late. In the circumstances of this case, as explained in this decision, certification would be disproportionate.

56. Therefore we refuse the application to certify the contempt because we decline to exercise our discretion under section 61(4) FOIA.

57. The Council applies for permission to place a costs schedule before the Tribunal. This Tribunal has a limited jurisdiction on costs which do not follow the event as they do in the civil courts. Cost may only be awarded in circumstances where rule 10 applies and any application must be made in accordance with that rule.

Signed *Judge Griffin*

Date: 18 December 2023