Neutral citation number: [2024] UKFTT 00395 (GRC)

Case Reference: EJ/2023/0002 and EJ/2023/0003

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Decided without a hearing
Decision given on: 21 May 2024

Before

JUDGE LYNN GRIFFIN
TRIBUNAL MEMBER PIETER DE WAAL
TRIBUNAL MEMBER PHOEBE MANN

Between

1) FIONA WATMORE
2) HELEN BULLIVANT

Applicants

and

WITHERLEY PARISH COUNCIL

Respondent

Decision: The Application in EJ/2023/0002 is refused
The Application in EJ/2023/0003 is refused

REASONS

Summary

1. We have concluded that there was a failure to comply with the Tribunal's Substituted Decision Notice in the joined appeals, reference EA/2022/0068 (Watmore), and EA/2022/0072 (Bullivant), that would constitute contempt of court if these proceedings were proceedings before a court having power to commit for contempt.

2. However, in all the circumstances, we have decided not to certify the offence of contempt to the Upper Tribunal.

Background

1. The events leading to these applications began when Fiona Watmore and Helen Bullivant (the "Applicants") made requests for information to Witherley Parish Council (the "Council"). The requests stated that they were made under the Freedom of Information Act ("FOIA"). The Council is a public authority for the purposes of FOIA.

2. On 4 February 2021, Ms Watmore sent an email to the Council, requesting information in the following terms (the "Watmore request"):
"A request is made under the Freedom of Information Act for the following;

a) The minutes of the NDP[1] Steering Group 13/11/2019 - Under the Heading of Matters arising mention is made of The Housing and Build Environment Theme Group issuing a statement in which they say that they 'reject any suggestion that they would demonstrate bias in their deliberations and that they will continue to adhere to the Parish Council's Code of Conduct and the Nolan Principles'. This comment appears to relate to the previous meeting of the NDP Steering Group held on the 9th October 2019. Please disclose all documents and transcripts that explain why the Housing and Build Environment Theme Group felt is necessary to issue this statement.

b) The Terms of Reference for the Steering Group have been published on the NDP pages of the Parish Council's Web site. However, on reviewing the minutes it seems input was made to the Terms of Reference by both the representative from RCC as well as by YourLocale. Please therefore disclose copies of all versions of the Terms of Reference plus all the professional advice provided by RCC, YourLocale and any other external consultants, on the content of the Terms of Reference.

c) Please provide a copy of the advice or source information that the Parish Council were provided with which suggested and/or recommended that the minutes and information provided by the Theme Groups might be exempt from enquiries under The Freedom of Information Act, given that the legislation provides for the redaction of any commercially sensitive material or information.

d) The Parish Council Website only displays the NDP Steering group minutes. Please supply copies of all the Steering Group Agenda as well as the Agenda and Minutes for the three Theme Groups.".

3. The Council responded by letter dated 8 March 2021. It stated that no information was held in respect of parts (a) to (c) of the Watmore Request. In respect of part (d) the Council stated that it had printed the information it held and that it had provided that with its reply. Ms Watmore contacted the Council by email on 15 March 2021 requesting an internal review of the Council's response and added to that request in a further email on 11 April 2021 setting out her concerns about (a) the completeness and accuracy of the information which was

[1] NDP stands for Neighbourhood Development Plan

provided in response to the Watmore Request; and (b) documentation which was missing from that response.

4. The Council wrote to Ms Watmore on 14 July 2021, this was after she had made her complaint to the Commissioner. The Council's letter did not specifically refer to the terms of the Watmore Request, nor to the reviews that had been requested by Ms Watmore. However, the letter stated that the Council considered that Ms Watmore's recent requests for documents under FOIA were vexatious and gave some explanations in support of that view.

5. On 11 May 2021, Ms Bullivant sent an email to the Council, requesting information in the following terms (the "Bullivant request"):
"I would like to submit a Freedom of Information request for:-

1. The minutes taken by the Conway's during the meeting with Highways England/ Agency in May 2019.

2. The subsequent report written by the Conway's drawing the findings of the meeting together.

3. Evidence of this report being circulated to all Steering Group members.

4. Evidence this report was discussed and minted at a Steering Group meeting.

5. Details of any contact with any representative of Highways England/ Agency since May 2019 on any Witherley Parish Matter, including date, time duration of contact, who was contacted and details discussed during the contact.".

6. The Council responded to Ms Bullivant by letter dated 23 June 2021 only after she had complained to the Commissioner that she had not received a response and the Commissioner had written to the Council in that regard. The Council stated in its response that it held no information relating to parts 1 to 3 of the Bullivant Request. In respect of part 4 of the Bullivant Request, the Council stated: "An update was given at the Steering Group meeting minuted as 14th May 2019 and available online". In respect of part 5, the Council refused to provide the information requested on the basis that it was considered to be a "fishing expedition" and a vexatious request under section 14(1) of FOIA.

7. Ms Bullivant requested an internal review by email on 28 June 2021. After she had contacted the Commissioner a response was received to that request on 14 July 2021 that stated that the Council considered that her recent requests for documents under FOIA were vexatious and gave an explanation in support of that view.

8. Neither Applicant was satisfied with the way the Council had dealt with their requests and so made complaints to the Information Commissioner who decided in two decision notices, one for each Applicant in this case, that the Council had applied the law correctly to the requests for information.

9. The Watmore Decision Notice held that, although the Council had determined (on review) that the Watmore Request was vexatious for the purposes of section 14(1) of FOIA, the Environmental Information Regulations ("EIR)) applied instead. The Commissioner went on to find that the Watmore Request was manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR. The Watmore Decision Notice concluded that the public interest test favoured maintaining the exception in regulation 12(4)(b) of the EIR and so the Council was entitled to withhold the requested information. The Watmore Decision Notice did not require the Council to take any steps.

10. The Bullivant Decision Notice held that, although the Council had determined (on review) that the Bullivant Request was vexatious for the purposes of section 14(1) of FOIA, the EIR applied instead and that the Bullivant Request was manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR. The Bullivant Decision Notice also concluded that the public interest test favoured maintaining the exception in regulation 12(4)(b) of the EIR and accordingly that the Council was entitled to withhold the requested information. The Bullivant Decision Notice did not require the Council to take any steps.

11. The Applicants were not satisfied with the Commissioner's decisions and so they brought appeals to this Tribunal. Case references EA/2022/0068 (Watmore), and EA/2022/0072 (Bullivant) were determined by the Tribunal in a decision which dealt with both appeals that had previously been joined. That decision has the neutral citation [2023] UKFTT 00205 (GRC), it was republished with corrections on 1 March 2023.

12. In [2023] UKFTT 00205 (GRC) the Tribunal allowed the appeal and, finding that the Commissioner's decision had been in error of law, made a Substituted Decision Notice ("SDN"). The decision was described as a finely balanced one but, in essence, the Tribunal reached the conclusion that neither of the requests for information were manifestly unreasonable, and that regulation 12(4)(b) EIR was not engaged. Thus, it was unnecessary for the Tribunal to address the issue of the Public Interest Test.

13. The Tribunal directed that the Commissioner was to send a copy of the decision to the Council within 28 days of its promulgation or an unsuccessful outcome to any appeal that was made. The SDN read:

"1) Witherley Parish Council shall make a fresh response to each of the Appellants' requests for information (namely, in the case of the First Appellant, the request for information dated 4 February 2021, as referred to in paragraph 10 of this decision and, in the case of the Second Appellant, the request for information dated 11 May 2021, as referred to in paragraph 21 of this decision).

2) Each of the fresh responses must make clear whether information within the scope of any parts of the relevant request is held and, if it is held, must either disclose such information or claim any relevant exemptions to disclosure.

3) The public authority must issue each fresh response within 20 working days (as defined in section 10(6) of the Freedom of Information Act 2000) of the date on which the Information Commissioner sends them notification of this decision in accordance with the Direction below.

4) Each such response will be subject to the rights given under s50 of the Freedom of Information Act 2000 (as applied by regulation 18 of the Environmental Information Regulations 2004) to make a new complaint to the Information Commissioner.

5) Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 (as applied by regulation 18 of the Environmental Information Regulations 2004) and may be dealt with as a contempt of court."

14. The Information Commissioner sent the decision of the Tribunal and SDN to the Council by email on 28 February 2023 addressed to the Parish Clerk. Although an amended decision was thereafter issued on 1 March 2023, the amendments did not affect the substance of the substituted decision. The deadline for compliance as calculated in accordance with section 10 Freedom of Information Act 2000 was 28 March 2023.

15. The Council sent individual letters to the Applicants on 28 March 2023 (by email) purporting to comply with the Tribunal's SDN.

16. The email to Ms Watmore was signed by the then Parish Clerk[2] and stated

"As instructed by the court judgment case reference EA/2022/0068 we respond to your initial requests (in italics) on 4th February 2021.

A) *All documents and transcripts that explain why the Housing and Build Environment Theme Group felt is necessary to issue this statement (they would adhere to the Nolan Principles and the Parish Council Code of Conduct).*

- On investigation there are no documents or recording transcripts to answer this request.

B) *Please therefore disclose copies of all versions of the terms of reference plus all the professional advice provided by RCC, YourLocale and any other external consultants on the content of the Terms of Reference*. 8th March we responded with "We do not hold this information".

- You returned by email on 15th March stating *the response was in conflict with information you have.* You go on to request *... it is a copy of the advice ... or an explanation of the process which resulted in the content of the final version of the published Terms of Reference.*

[2] We have been informed that the Parish Clerk resigned on 23 February 2024.

• We incorrectly responded on 24th March, and then sent a further response on 7th May with a rectified response from that submitted: The Steering Group members decided and agreed the Terms of Reference, there is no evidence of the discussion which took place or advice given. I understand the Theme Groups were working parties/groups that reported into the Steering Group where plan decisions were made; minutes were not deemed necessary; some groups did minute, some groups did not.

C) *Please provide a copy of the advice or source information that the Parish Council were provided with which suggested and/or recommended that the minutes and information provided by the Theme Groups might be exempt from enquiries under the FOI Act, given that legislation provides for the redaction of any commercially sensitive material or information.*

• The theme groups were not required to keep notes or minutes of the discussions, as they were groups of local people gleaning information and feeding into the NDP Steering Group where decisions were made; and minutes were kept of those decisions. This means that there would be some recorded information from these groups but not necessarily anything. The NDP project at this time was not a Parish Council Committee, but a local residents working party. It was brought into the Parish Council's management in May 2020. It was only when this happened the NDP documents then became subject to the FOI Act.

D) *The Parish Council website only displays the NDP Steering Group minutes. Please supply copies of the all the Steering Group agenda as well as the agenda and minutes of the three Theme Groups.*

• The Council has not ever deemed it necessary to publish the Theme Group meeting minutes on the website, as these meeting (sic) fed into the Steering Group meetings where the Plan's strategy was decided. The Council has supplied you with all of the available documents as per the document Ref 22 which tables all agendas and minutes supplied. The table also states the reason for any not being supplied but expected by you. The document is attached to the email with this letter.

• If you are aware of any documents which are missing from this list and you are expecting the Council to provide I would kindly ask you to advise of the group and date of the meeting so I can investigate further. As far as I am aware you have had copies of all of the available theme groups minutes, Steering Group agendas."

17. The email to Ms Bullivant was also signed by the then Parish Clerk and stated

"As instructed by the court judgment case reference EA/2022/0072 we respond to your initial requests (in italics) on 11th May 2021.

1. *The minutes taken by the Conway's during the meeting with Highways England/Agency in May 2019.*

- The Conways did not take any minutes of the roadside chat. There is no document.

2. *The subsequent report written by the Conway's drawing the findings of the meeting together*.
    - There is no document.
3. *Evidence of this report being circulated to all Steering Group members*.
    - There is no document. I was advised at the time of requesting information from Councillors that the roadside meeting was summarised into a slide presentation to the Steering Group.
4. *Evidence this report was discussed and minuted at a Steering Group meeting.*
    - An update of the roadside meeting was presented to the Steering Group meeting minuted as 14th May 2019 and available online. The presentation no longer exists as it was deleted shortly after the meeting due to minutes being recorded.
5. *Details of any contact with any representative of Highways England/Agency since May 2019 on any Witherley Parish Matter, including date, time, duration of contact, who was contacted and details discussed during the contact*.
    - Our original response to this was that it was considered to be a fishing expedition, a vexatious request under Section 14.1 of the FOI Act. I have asked Councillors to advise of their contact with Highways England and National Highways, all have responded advising they have not had any contact. In the role of Clerk I have had contact via email and I have written the details on a separate excel document which I will attach to the email with this letter."

The history of the application to certify for an offence of contempt

18. The Tribunal received an application from each of these Applicants dated 14 and 19 April 2023 respectively asking the Tribunal to certify an offence of contempt pursuant to Rule 7A of the Tribunal rules.

19. The applications asked the Tribunal to certify offences of contempt to the Upper Tribunal under section 61 Freedom of Information Act 2000 (FOIA) and rule 7A of the tribunal rules. The outcome sought by both Ms Watmore and Ms Bullivant was "Enforcement of disclosure or in the absence of disclosure or clear grounds for non disclosure under EIR 2004, Contempt proceedings."

The Allegation(s) of Contempt

20. The Application from Ms Watmore states the offence of contempt relied upon by her is that: *"…the information provided in WPC's letter of the 28th March 2023 (Doc 1) does not satisfy the requirements set out in the Substituted Decision Notice (SDN).*

    The Tribunal judgment and SDN indicate that Witherley Parish Council (WPC) is required to issue a fresh response to my original request for information as outlined in paragraph 10

of the judgment. This requires WPC to confirm whether the requested documents are held by them and if so, either disclose the documents OR outline the exemptions to disclosure upon which WPC seeks to rely. The judgment makes it clear that WPC have breached the requirements of the European Information Regulations 2004 (EIR). It is the exemptions under these Regulations which are relevant.

The letter does not provide the records nor does it unequivocally state that there are no records held by WPC. It also seeks to rely on the Freedom of Information Act 2000 (FOIA), despite the Tribunal's clear decision that the correctly applicable legislation is the Environmental Information Regulations 2004."

21. The Application from Ms Bullivant states the offence of contempt relied upon by her is similar in that she regards the response she received on 28 March 2023 as unsatisfactory.

22. The applications arise from the same decision and the same substituted decision notice. Therefore, these applications were directed to be determined together, and further directions were made as to the issues to be determined and the conduct of the proceedings.

23. The Council responded to the applications to certify on 29 June 2023. The response and associated documents are in a bundle with 147 pages. The Council begins by offering an unreserved apology to the Tribunal and to the Applicants and thereafter provides an explanation. The Council accepts within the response that:

    a. The Substituted Decision Notice in EA/2022/0068 & EA/2022/0072 was clear and unambiguous.

    b. The obligations imposed on the respondent Council were clear but not dealt with properly.

    c. The responses in the letters of 28th March 2023 were insufficient to comply with the decision of the tribunal.

24. The Council made a further response to each Applicant's request for information within the response. The provision of requested information makes up the bulk of that response.

25. The Tribunal was then informed that all of the Councillors had resigned with the exception of Ms Bullivant, one of the Applicants, and that the Council was therefore inquorate and not able to function to make formal decisions. The resignation had happened on 20 July 2023; the communication is set out below.

"Witherley Parish Council (WPC) recognises the seriousness of the Case Management Directions issued by you on 31 May 2023.

Since receiving a copy of the directions on 2 June 2023 the Councillors have acted in good faith and spent hundreds of hours working on the case, despite the role of Parish Councillor being unpaid and none of us having any legal qualifications. WPC's insurers have not provided us with legal support. WPC has limited funds and is not minded to spend public funds on the matter.

This situation has been made all the more difficult since one of the Applicants is a sitting Parish Councillor, who was actively involved in the NDP and hence has copies of the original documents. The said Applicant has a better knowledge of the documents and their availability than the new Parish Council. WPC made an offer to meet with the Applicants to resolve the matter and allow the new Parish Council to move forward- the offer was declined.

WPC has consulted Mr [name redacted], Solicitor and parish resident, at no cost to the Council. Mr [name redacted], advised the Council on a previous legal matter. He has advised WPC that to continue to work on the case ourselves without legal support would be foolhardy and detrimental to our health and well-being.

We have decided to heed Mr [name redacted]'s advice and write to advise you that all the Parish Councillors, with the exception of the joint Applicant Mrs Bullivant, the sitting Parish Councillor referred to above, have resigned with effect from 4pm on Thursday 20th July 2023. In a situation such as this, the Borough Council (Hinckley and Bosworth Borough Council) would be expected to appoint temporary Councillors to oversee the Parish Council until an election takes place.

We acknowledge that we have not responded fully to all of the comments and observations by the Applicants. If we were in a position to avail ourselves fully of legal advice and guidance we would have wished to comment on and challenge some of the observations and assertions made by the Applicants. Simply by way of example the Applicants allege that the Council held an illegal meeting because it was not advertised on WPC's website, whereas it is our understanding that there is no legal requirement for meetings to be advertised in that way. In short, we feel obliged to make clear that we don't agree with everything the Applicants choose to assert.

Finally, to avoid any misunderstanding or confusion, this statement is not and does not reflect a formal Parish Council decision. It is a personal statement issued by and on behalf of all those named below.

[names redacted]"

26. The Applicants submit that "*the Respondent is seeking to distort the evidence by inferring and maintaining the view that the Council formed in May 2023 has no responsibility for, or connection with, the already admitted 'dysfunctional climate' that existed under the previous administration prior to May 2023"* and that *"By responding to the Tribunal in this way, the Respondent is failing to acknowledge that many of the points relied on have been rebutted by evidence already in the Respondent's possession. It is the Applicants' joint view that this letter, which seems to be a poor, ill-judged attempt to discredit the Applicants, undermines the integrity of the supposed apology offered by the Respondent in their Response to the Applicants and the credibility of the Respondent Council members' statements generally."*

Mode of determination

27. The parties in this case consented to the paper determination of the application. We are satisfied that we can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended) ("the rules").

The evidence

28. Directions were made that the bundle would be provided by the Applicants and would include:

    a. The applications
    b. The submissions of the parties in this application, not in the original case, that included the responses of the Council and any reply
    c. The Tribunal's case management directions in these applications
    d. Any case law or guidance to be relied upon by any party
    e. Any witness statements
    f. The following documents
        i. The decision notice of 6 December 2022 in EA/2022/0068 & EA/2022/0072.
        ii. The letters referred to above dated 28 March 2023.
    g. Further that, if any party wished to include documentation that predates the decision notice relevant in this case, these should be the subject of a specific application to the Tribunal to explain why they are relevant.

29. In the event we were provided with further documentation which the Applicants submitted should be admitted as relevant to the second issue. There was no objection to that course and thus it was directed that the documents sent to the tribunal by the Applicants would be placed before the tribunal panel for us to decide what weight to attach to the documents. Those documents were contained in a 38-page bundle that includes (i) Applicant's Submission from Ms Watmore which Ms Bullivant later adopted and agreed with in her email of 8 September 2023 at 16.55 (ii) Table of Supporting Documents and (iii) Supporting Documents.

30. We have carefully read all of the information placed before us. The Applicants have sent several emails to the Tribunal outlining subsequent events that they believe to be relevant to their application. We have considered the Applicants' communications but in this decision we refer only to those matters that are relevant to the determination of the issues before us. This Tribunal has no power to deal with matters arising beyond the scope of this application under section 61 FOIA.

The legal framework

31. 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 to enforce its decisions and not the Information Commissioner. There is no power to compel a public authority to comply with a substituted decision notice; there is a power to punish a public authority for not doing so, although that power may operate as an incentive to comply.

32. This Tribunal's jurisdiction as regards certification of offences of contempt to the Upper Tribunal is set out in section 61 Freedom of Information Act (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.
...

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

34. 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.

35. Thus there are two stages to any decision to certify an offence of contempt. The first is to decide whether we are satisfied that the alleged contemnor has done something, or failed to do something, in relation to proceedings before the First-tier Tribunal on an appeal under those provisions, which if those proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court. The second is to decide whether to exercise the discretion to certify the offence to the Upper Tribunal pursuant to section 61(4) FOIA.

36. The burden lies on an Applicant to make clear and comprehensible allegations, see JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2016] EWHC 192 (Ch), at paragraph 41. The standard of proof to be applied is the criminal standard of beyond reasonable doubt. In other words we must be satisfied so that we are sure of any fact before finding it proved. Insofar as the respondent raises a positive defence they carry an evidential burden which must be discharged before the burden is returned to the Applicant. This reflects the serious nature and potential consequences of allegations of contempt of court. The making of an application for civil contempt is a significant step which carries potentially very serious consequences for a respondent, including the loss of liberty.

37. Care must be taken when the Tribunal is asked to draw inferences in order to prove contempt. Applying what was said in JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev (supra), circumstantial evidence can be relied on to establish guilt. However, it is important that we examine the evidence with care to see whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the Applicant's case. If, after considering the evidence, we were to conclude first that there is more than one reasonable inference to be drawn and second that at least one of them is inconsistent with a finding of contempt, the application will fail. Where a contempt application is brought on the basis of almost entirely secondary evidence (that is evidence that does not directly demonstrate a fact to be proved but from which we are asked to draw an inference), we should be particularly careful to ensure that any conclusion is based upon cogent and reliable evidence from which a single inference of guilt, and only that inference, can be drawn.

38. The fact that a person does not have a lawyer is irrelevant to the proper application of the law of contempt. The same standards of fairness to the putative contemnor apply. This Tribunal must ensure (whether by early case management or otherwise) that the allegations are provided in clear terms to the party accused of breach.

39. In Rotherham Metropolitan Borough Council v Harron & The Information Commissioner [2023] UKUT 22 (AAC) Farbey J confirmed the principles to be applied to these types of application and highlighted the importance of compliance with orders made by courts and tribunals. She said at paragraph 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."

40. In considering whether to exercise the discretion to certify the contempt to the Upper Tribunal the circumstances of any proven act or omission will be relevant. In this regard if the Tribunal is satisfied that the conduct was intentional or reckless this may be a factor tending towards certification while on the other hand accidental, or unintentional non-compliance will not carry the necessary quality of contumacy.
41. In Navigator Equities Limited v Deripaska [2021] EWCA Civ 1799, para 82, the Court of Appeal summarised the principles that must be applied in deciding whether a person alleged to be in breach of a court order should be treated as a contemnor as follows:
"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).”

42. In her decision in the Rotherham case Farbey J indicated that any finding of contempt in relation to a single document among numerous other documents that had been supplied to the Applicant was bound to be disproportionate and so, in that case, no offence should have been certified to the Upper Tribunal. She said that the interests of the administration of justice are not served by disproportionate contempt orders. The First-tier Tribunal must consider whether certification served the administration of justice.

43. In MD v Secretary of State for Work and Pensions (Enforcement Reference)[2010] UKUT 202 (AAC) the Upper Tribunal said at paragraph 19
“Tribunals must make clear in plain English what things must be done. They must also make clear the possible consequences of any failure to do what the tribunal has required. In order to make clear what may happen if the necessary things are not done we think it highly desirable, at the very least, that a statement under rule 16(4)(b) of the SEC Rules of the consequences of a failure to comply with a summons or citation should spell out the penalties that may be imposed for failure to comply. In England and Wales these include imprisonment, a fine, and sequestration of assets.”

The issues

44. The following issues fall for consideration by the Tribunal as foreshadowed in the directions earlier in these proceedings:

a. Is the 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?

Directions indicated that we were likely to be assisted in the determination of the aforementioned issue by submissions on the following matters:

i. Whether the terms of the SDN in EA/2022/0068 & EA/2022/0072 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 SDN?

iii. Whether the acts of the Respondent (for example, the letters dated 28 March 2023 sent to each Applicant) were sufficient to comply with the decision of the Tribunal?

iv. …[3]

b. If the 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?

As indicated in the directions the Tribunal is likely to be assisted in the determination of this issue by submissions on whether such a breach was accidental or wilful.

45. The contentious issues are further limited by the acceptance the Council gave in its response to the applications that the SDN in EA/2022/0068 & EA/2022/0072 was clear and unambiguous, and that the obligations imposed on the Council were clear but not dealt with properly within the responses of 28 March 2023. The focus of our consideration will therefore be on the second issue above, albeit we will consider for ourselves whether the concessions on the first issue are reasonably made.

The parties' submissions

46. The essence of the Applicants' case is that:
    a. The SDN is clear and unambiguous;
    b. The Council has wilfully failed to comply with the SDN, the 28 March emails were not sufficient to comply and the later disclosure was not sufficient;
    c. The Council is wrongly attempting to distance itself from failures that occurred under previous administrations;
    d. The actions of some individuals connected to the Council demonstrates contempt to the Tribunal by wilful non compliance and undermines the apology given by the Council.

47. In its response of 30 June 2023 the respondent Council:

[3] Neither Applicant nor the Respondent contended that there was a right to complain to the Information Commissioner in the circumstances where a breach of the tribunal's substituted decision notice was admitted

a. Accepts that the SDN was clear and unambiguous;
b. Accepts that the obligations imposed on the Council by the SDN were not dealt with properly and that the letters of 28 March 2023 were insufficient to comply with the SDN;
c. "unreservedly apologises" to the Tribunal and apologises to the Applicants for the poor management and delays in responding to their requests for information;
d. Attributes the failures to the poor working practices of the previous Council, including "inadequate supervision of the Parish Clerk" its only paid employee;
e. Submits that the failure to comply with the SDN was not wilful;
f. Submits that, having recognised the inadequacies, the newly elected Council has taken steps, inter alia, to further comply with the SDN and to improve the handling of requests for information within the statutory framework.

48. The Applicants provided a joint reply to the Council's response on 14 July 2023. In that reply it was submitted in summary that:
    a. The concessions made by the Council are evidence of contempt;
    b. The failings are not the sole fault of the previous administration;
    c. The acts or omissions were wilful and not negligent/accidental;
    d. There is no rationale included for its position;
    e. The response was not made in good faith.
    f. The following documents have still not been supplied arising from the Watmore request albeit they have been accessed via a link provided:
        i. Housing Theme Group - Agenda 26-03-2019; Agenda and Minutes 04-02-2020 (3 documents)
        ii. Community Sustainability Group - Agendas for 25-03-2019; 29-04-2019; 10-06-2019; Agendas and Minutes for 23-08-2019; 24-10-2019; 01-11-2019 (6 documents).
    g. As regards the Bullivant request the complete "correspondence between WPC and Highways England (HE) from May 2019 to May 2021" has not been supplied. The complete material has been obtained from Highways England.
    h. There is some continuity of membership between the previous Council and the newly elected council. The Parish Clerk was in post throughout (since 2015) and dealt with the requests for information. They were qualified to act as a clerk including training in how to deal with requests for information.
    i. The Council is in breach of its obligations to publish information under the EIR. On 28 March 2023 the Council were using active digital storage facilities within which the documents were available and accessible. These storage facilities were not disclosed until after the SDN.
    j. Information within the scope of the information requests may have been deleted and minutes/agendas or notices altered which demonstrates a contemptuous attitude.
    k. The Council continues to act in a way similar to what it describes as dysfunctional in its own response.

49. As already noted all the Parish Councillors, with the exception of Mrs Bullivant, a sitting Parish Councillor, resigned with effect from 4pm on Thursday 20th July 2023. Elections were due to take place in mid-October 2023.

50. Further submissions by the Applicants draw attention to posts on social media by former members of the parish council which, it is suggested, demonstrate a contempt to the tribunal. In January 2024 the Applicant Mrs Bullivant drew the tribunal's attention to repeated requests she had received in person, in public forum and via email to withdraw these proceedings. The tribunal was sent further emails in February and March by the Applicants detailing exchanges about the SDN and these proceedings and also from a parish councillor informing the tribunal that the parish clerk had resigned. The last of these communications was sent to the panel on 22 March 2024.

51. In making this decision we have had regard to all the submissions made by the parties and the documents they have submitted. As indicated above, we have read and considered all of the submissions from the parties even if not directly referred to in this decision. It is clear from the documents submitted that there continue to be sharp divisions within and concerning the operation of the Council. These matters are not for us to decide but it is regrettable that these proceedings have served to perpetuate those divisions. We are concerned only with taking a decision on compliance with the decision in EA/2022/0068 & EA/2022/0072. The contempt in issue, if any, is that shown by the party to whom the SDN was addressed towards the administration of justice and not any alleged contemptuous attitude between the parties.

Analysis and conclusions

52. The SDN did not require the Council to publish any documents but to issue a fresh response to the requests for information. The Tribunal in EA/2022/0068 & EA/2022/0072 made observations about the duties regarding publication but these were not elements of the SDN. Whether or not the Council is in breach of any obligation to publish information is outside the scope of the requests for information and thus is not a matter for this tribunal. Furthermore it is not our function to supervise the way the Council conducts its business, nor the way individual councillors or other persons choose to conduct themselves towards others.

53. The first stage is to consider whether the Respondent, is guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having the power to commit for contempt, would constitute a contempt of court.

54. We note that the Respondent has made concessions, however as previously indicated we have considered the matters for ourselves taking into account those admissions where relevant.

55. We agree with the parties that the terms of the SDN in EA/2022/0068 & EA/2022/0072 were sufficiently clear and unambiguous so as to be capable of founding a finding of contempt for breach thereof. It seems to us that the SDN set out clearly what was to be done, by whom and within what timescale. The language used is clear and straightforward.

56. The obligation imposed on the Council by the SDN was to make a fresh response to the information requests made by each Applicant within 20 days of the sending of the SDN to the Council. The fresh responses were to set out whether the requested information was held and if so to either disclose that information or claim any relevant exemptions. These were simple and straightforward matters.

57. The Council accepts that the emails it sent to each of these Applicants dated 28 March 2023 were not sufficient to comply with the decision of the Tribunal. We accept that concession. We have decided that the emails of 28 March 2023 failed to comply with the SDN because:

    a. The emails did not make clear whether information was held, as opposed to documents;
    b. Information that was held was not disclosed;
    c. No exemptions were claimed in support of that non-disclosure, whether under FOIA or EIR.

58. We are satisfied so that we are sure (beyond reasonable doubt) that the Council's response to that SDN failed to comply with the obligations imposed upon it within the timescale set to do so. The responsibility is the Council's and not their clerk. It is the responsibility of a Council to train and supervise its employee(s). We understand that the clerk who dealt with these requests for information had undergone training but it is then incumbent on the public authority to ensure that such training was adequate and did not need refreshing. It does not matter who has been elected to serve on the Council, the responsibilities do not change, as the Council as a public authority remains constant.

59. We have concluded that this omission would constitute a contempt of court if these proceedings were proceedings before a court having power to commit for contempt.

60. We have not considered whether there was a right to complain to the Information Commissioner about the response to the SDN. This is because neither of the Applicants nor the Respondent contended that there was a right to complain to the Information Commissioner in the circumstances where a failure to comply with the Tribunal's substituted decision notice was admitted.

61. We have concluded that the 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.

62. We have gone on to consider whether the Tribunal should exercise the discretion to certify the offence to the Upper Tribunal.

63. We have considered whether the failure to comply with the SDN was accidental or wilful. In our view the Council's communications of 28 March 2023 to the Applicants demonstrate a casual disregard for the duties of a public authority under the information rights legislation and the Tribunal's process, and moreover a failure to take seriously the obligations imposed upon the Council by the Tribunal. As emphasised by Farbey J, the obligations imposed by decisions of this Tribunal are to be regarded as seriously as those of any court. It undermines the administration of justice if those to whom the Tribunal's decisions are directed adopt a casual approach to compliance. Regrettably that is what happened in this case.

64. In our judgement the failure to comply with the SDN was not intentional but was a product of the Council not having appreciated the duties on all public authorities that arise under FOIA and the EIR. It is likely from all we have read that the way the requests were originally handled was adversely affected by the relationship between the Council and the Applicants. Such considerations are not appropriate when considering requests for information which must be dealt with without regard to the identity of the requestor or their motive for requesting the information.

65. The subsequent steps taken by the Council demonstrate a more systematic approach to the requests for information made by the Applicants. The requisite amount of attention was paid to the issues arising, enquiries were made and a thorough and comprehensive response made. Had the Council previously approached its duty under the legislation in this way, it is likely that the case would not have been appealed to the Tribunal in the first instance, still less would the Council have found themselves facing allegations of contempt. The actions of the Council since 28 March 2023 amounted to a fresh response in accordance with the SDN. Thus the SDN has now been complied with, albeit outside the deadline given.

66. We accept that the apology tendered to the Tribunal by the Council is sincere. It is clear to us from the documents submitted by the Applicants that the way the requests for information were handled by the Council perpetuated the divisions that already existed between the members of the Council. However, as already stated, we are concerned only with the allegations of contempt towards the tribunal and in our judgement the inferences that may be drawn from the actions and statements of individuals are limited. Those matters demonstrate that the persons concerned may not have appreciated the significance of the Council's failure to comply or the nature of these types of proceedings being those that are not generally suitable for compromise between the parties. However, regrettably, the actions and statements of individuals are not attributable to the Council.

67. The Council remains responsible for previous failures regardless of whether the composition of the Council remained the same. It is a public authority and its legal character does not change depending on who is elected. The Council does not seek to avoid that responsibility but draws our attention to previous events by way of explanation.

68. The Council have now complied with the SDN. It is a matter of regret that it took an application to certify a contempt of court to achieve what should have been a matter of straightforward compliance but there is no continuing non-compliance. The culpability of the Council is mitigated by its compliance and its apology. This decision will be publicly promulgated and sets out the strength of Tribunal's conclusions about the non-compliance in this case on public record. In those circumstances we have decided that it would be disproportionate to exercise our discretion to certify the contempt to the Upper Tribunal. The interests of the administration of justice would not be served by doing so.

69. For the reasons set out above we refuse both applications.

Signed	Date:
Judge Griffin	20 May 2024