



Case Reference: EJ/2023/0004  
Neutral Citation Number: [2023] UKFTT 01067 (GRC)

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

**Heard by: Determined on the papers  
Decision given on:**

**Before**

**TRIBUNAL JUDGE LYNN GRIFFIN  
TRIBUNAL MEMBER ANNE CHAFER  
TRIBUNAL MEMBER DAVE SIVERS**

**Between**

**GRAHAM GARNER**

**and**

**SHARDLOW & GREAT WILNE PARISH COUNCIL**

Applicant

Respondent

**Representation:**

For the Appellant: in person

For the Respondent: the Respondent Council acted through its clerk

**Decision**

The application to certify an offence of contempt against Shardlow & Great Wilne Parish Council is refused.

## Reasons

### Summary

1. We have concluded that the failure to comply with the Tribunal's Substituted Decision Notice in appeal reference EA/2022/0154 would constitute a contempt of court if these proceedings were proceedings before a court having power to commit for contempt.
2. However, we have decided not to exercise our discretion to certify any offence of contempt to the Upper Tribunal.

### Background

3. The original appeal in this case arose from a request under the Freedom of Information Act 2000 (FOIA) made by Mr Garner (the Applicant) to the Shardlow & Great Wilne Parish Council (herein referred to as the Respondent or the Council). That appeal was given Tribunal reference number EA/2022/0154.
4. The background to the request for information is conveniently set out in the decision of the Tribunal in EA/2022/0154. The requests were made after the laurel hedges owned by Mr Garner on his boundary along a track were pruned on the instruction of the Respondent Council without Mr Garner's consent.

*1. The Appellant made a number of requests for information from Shardlow & Great Wilne Parish Council ('the Council') referring to the Freedom of Information Act 2000 ("FOIA"). The Requests related to pruning work carried out on the Council's instructions in October 2020 to a laurel hedge on the boundary of the Appellant's property. We refer to the requests collectively as "the Requests" and use the numbers FOI 01-FOI 05 to distinguish them, as did the Commissioner.*

*2. On 1 April 2021, the Appellant requested:*

*FOI 01 'Written explanation(s) of the SGWPC reason(s) and the Formal documented evidence by the applicable authority of the Lawful Excuse if it exists, under which the SGWPC membership and/or its employee(s) and/or its' individual member(s):*

- *Wrote to me in the manner of the attached letter on or around May 1st 2020 causing me alarm and prolonged distress'*

*FOI 02 'Please provide, within the time frame required by the legislation:*

- *A written description of how my Yew trees on my boundary with London Road and the vegetation at the foot of it but outside my clearly marked and*

*undisputed boundary were brought to the attention of SGWPC membership, its' employee(s) or its' individual members*

- Written explanation(s) of the reason(s) under which the SGWPC membership, in November 2020, reported to SDDC and/or DCC, that my Yew trees on my boundary with London Road and the vegetation at the foot of it as overgrown'*

*FOI 03 'Please provide, within the time frame required by the legislation:*

- Formal documented evidence of the Lawful Excuse under which the SGWPC membership and/or SGWPC employee(s) and/or [a named contractor ("the contractor"), name redacted], in February 2021, in my absence, without my consent and knowing that you would not be welcome here: Entered my property and deliberately and severely damaged my laurel trees negatively impacting their intended performance and value by indiscriminately pruning them well beyond and significantly inside my clearly marked and undisputed boundary.'*

*3. On 20 April 2021, the Appellant requested:*

*FOI 04*

- 'Records of the decision making process that led SGWPC to engage [the contractor] to deliberately damage my trees. Please include emails, letters, text messages, What's-App messages, records of telephone conversations, records of meetings and any other such records.*
- A list of the names of the people that sanctioned authorising the engagement of [the contractor] to deliberately damage my trees'*

*4. On 22 April 2021, he requested:*

*FOI 05:*

- 1. 'A copy of the order(s) placed with [the contractor] engaging them to deliberately damage my trees*
- 2. A written explanation of the benefit(s) to the local community that came as a result of and justify SGWPC spending public finds to engage [the contractor] to deliberately damage my trees.'*

*5. The Council responded to the Appellant on 29 April 2021 setting out the background to its decision to instruct a contractor to carry out the pruning work. It informed the Appellant that all the requested information was available 'in the public domain, on the Parish Council website'. The Council invoked its Vexatious Complaints policy, saying that it would no longer communicate with the Appellant other than in writing via Royal Mail.*

*6. The Appellant complained to the Commissioner...*

5. On 27 February 2023 the Tribunal promulgated its judgment in EA/2022/0154 allowing the appeal brought by Mr Garner against the Information Commissioner's Decision Notice reference IC-108355-H1R0.
6. That judgment included a substituted decision notice in the following terms  
*“Shardlow & Great Wilne Parish Council holds environmental information requested by the Appellant on 1 and 22 April 2001 in the form of:*  
  
*(1) minutes of Council Meetings in June, July and August 2019 and May 2020, and a news item from September 2019 about its zero tolerance campaign on overgrown boundaries;*  
*and*  
*(2) emails between the Council and a contractor containing the contractor's agreement to complete certain pruning work, a quotation for the work, and photographs of the finished work (contained in the Tribunal's closed bundle).*  
  
*Shardlow & Great Wilne Parish Council is not required to make the information identified in (1) above available to the Appellant because this information is already publicly available and easily accessible to the Appellant pursuant to Regulation 6(1) (b).*  
  
*Shardlow & Great Wilne Parish Council is ordered to make the information in (2) above available to the Appellant as soon as possible and no later than 20 working days after the date of promulgation of this Decision (ref. EA/2022/0154).”*
7. The Tribunal went on to clarify at paragraph 41 of their reasons that  
*“The appeal is allowed and a new Decision Notice is substituted in the terms set out at the top of this Decision. However the Council is only required to disclose to the Appellant its emails with the contractor from the closed bundle; the only other information held by the Council in respect of the Requests is already publicly available and easily accessible to the Appellant in another form or format”.*
8. No order was made requiring the Information Commissioner to take any steps.

### **The Allegation(s) of Contempt**

9. The application made to the Tribunal by Mr Garner is for the Council to be held in contempt of court for what he describes as wilful disobedience of the order made in EA/2022/0154. The Applicant asked for “maximum sanctions” to be imposed on the Council. The Applicant had originally asked for a number of named persons to be sanctioned as well as the Council. Mr Garner speaks in terms of financial sanctions. However, as pointed out in directions 12 May 2023 there is no power to do so, the

Council is a body in its own right and was the legal entity the subject of the Tribunal decision. Furthermore, this Tribunal's powers are limited to deciding whether to certify an offence of contempt to the Upper Tribunal. The Tribunal will not be embarking on a inquiry into the history of the matter or any wider inquiry.

10. Since the time he made his application the Applicant has submitted that there were other instances that should be certified, he describes these as "contempt events". However, the heart of this case is the allegation that the Council did not comply with the decision of the Tribunal in EA/2022/0154. We take the view that if we were to find those "contempt events" proved then those events would be relevant to whether there has been a non-accidental breach of the order and the exercise of our discretion whether to certify an offence of contempt for the act/omission alleged to amount to a contempt in the application.

### **The legal framework**

11. 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.
12. 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.*  
...
13. This section came into force in these terms on 25 May 2018 and therefore applies in this case.
14. 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.*

15. 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 s61(4) FOIA.

16. The burden lies on the Applicant to provide 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.

17. 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.
18. 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.
19. In Rotherham Metropolitan Borough Council v Harron & The Information Commissioner [2023] UKUT 22 (AAC)<sup>1</sup> Mrs Justice Farbey considered this type of application for the first time in the Upper Tribunal. 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.”*

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<sup>1</sup> Heard 18/11/22 and authorised for issue 23/1/23

20. 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.
21. 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).”*

22. 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 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 FTT must consider whether certification served the administration of justice.

### **The issues**

23. The essence of the Applicant's case is that the Council failed to comply with the decision of this Tribunal in EA/2022/0154 by the date they should have done. The order was that they should send to the Applicant the emails between the Council and a contractor containing the contractor's agreement to complete certain pruning work, a quotation for the work, and photographs of the finished work (contained in the Tribunal's closed bundle) within 20 working days of the promulgation of the decision.

24. In directions dated 19 June 2023 Judge Griffin set out the issues to be considered. As relevant to our decision these are as follows

- 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?

The Tribunal is likely to be assisted in the determination of the aforementioned issue by submissions on the following matters:

- i. Whether the terms of the Substituted Decision Notice in EA/2022/0154 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 acts of the Respondent (for example, the letter dated 2 June 2023) were sufficient to comply with the decision of the Tribunal?
  - iv. ...<sup>2</sup>
- 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?

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<sup>2</sup> It is not suggested by either party that there was a right to complain to the ICO in this case.

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

### **The determination of the case**

25. Initially the Applicant consented to a paper determination of his application. Later he changed this election to requesting an oral hearing, however in the run up to the hearing he told the Tribunal that he no longer required an oral hearing and consented to a paper determination. The Respondent confirmed that they also consented to a paper determination.
26. The Tribunal has considered rule 32 and we are satisfied that we can properly determine the issues without a hearing. It is fair and just to decide the case in this way.

### **The evidence**

27. Directions set out that the bundle would contain
  - a. The applications
  - b. The submissions of the parties in this application, not in the original case, that includes the responses of the Council directed above and any reply
  - c. The Tribunal's case management directions in these applications such as this document
  - 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 in EA/2022/0154, but not any documents relating to an appeal to the Upper Tribunal in that regard.
    - ii. The letter from the Respondent dated 2 June 2023 and attachments.
28. In the event we have been provided with an indexed bundle of 16 documents and also the submissions of the parties contained in individual documents and emails.
29. We have also been provided with a copy of the closed bundle in EA/2022/0154 as referred to in the substituted decision notice.

### **The parties' submissions**

30. The Applicant's case may be summarised as follows in relation to that which is relevant to this application:
  - a. The Council did not comply with the substituted decision notice;
  - b. The Council wilfully disobeyed the order of the Tribunal in EA/2022/0154.
31. The Applicant suggests that the wilfulness of the disobedience may be inferred from all the circumstances and their conduct of the wider issues.

32. The Applicant also suggests that the Council has acted contemptuously toward him. On the contrary the Council says that they and their clerk have been disrespected. We have concluded that any difficulties in this regard are not a matter for resolution or comment by this Tribunal and are relevant only in so far as such interactions are relied upon to demonstrate a party's "state of mind" as regards the acts or omissions in issue.
33. The Applicant did not file any final submissions, however he had filed comprehensive grounds of appeal and a reply to the response.
34. The Respondent submits in their response and final submissions that the Tribunal should reject the application because:
- a. The Council was not a party to the appeal EA/2022/0154
  - b. The Council was not aware of any requirement upon them to take action
  - c. All directions have been complied with
  - d. Considerable resources have been consumed in dealing with the request for information and subsequent complaint to the Commissioner and this Tribunal case
  - e. There has been no wilful contempt of court
35. Mr Garner invites the Tribunal to "disallow" the Council's final submissions. He does so because he says they are inaccurate and misleading and amount to disobedience of the Tribunal's directions. Having regard to the overriding objective and the rules we have taken account of not only the Council's submissions but also his reply. We are mindful that neither party is legally represented. We accept the arguments therein only in so far as indicated in our conclusions within the parameters of the issues for us to decide.
36. The Information Commissioner is not a party to the contempt proceedings but is aware of this case. On 19 October 2023 the Commissioner wrote to the Tribunal, that email included the following passage  
*During the appeal EA/2022/0154 the public authority was not joined to the appeal and so the Closed Bundle would not have been provided to the public authority by the Commissioner. It was only provided to the Tribunal.*
37. The Applicant has objected to the Tribunal receiving this email and taking it into account, he submits that it amounts to tipping off of the Respondent Council or other impropriety. However, the email tells the Tribunal only that which is the usual practice and procedure in information rights cases. Closed bundles would not be provided to a non party and indeed would usually, as in this case, be subject to an order under rule 14 preventing any such disclosure.

38. In making this decision we have had regard to all the submissions made by the parties and the documents they have submitted. We have read and considered all of the submissions from the parties even if not directly referred to in this decision.

### **The facts**

39. We have applied the criminal standard of proof in finding the following facts about which we are sure:

a. The Tribunal's decision in EA/2022/0154 was promulgated on 27 February 2023.

b. 20 working days from 27 February 2023 was 27 March 2023.

c. On 7 March 2023 the Tribunal wrote to the Council as follows

*Dear Clerk at Shardlow & Great Wilne Parish Council,*

*EA/2022/0154 - Graham Garner vs Information Commissioner*

*The First-Tier Tribunal General Regulatory Chamber (GRC) draws Shardlow & Great Wilne Parish Council to the Tribunal decision for the above appeal.*

*Please click on the link below to see the Tribunal Decision for EA/2022/0154 – Graham Garner vs Information Commissioner*

*Information Tribunal > Search (Tribunals.gov.uk)*

*Bcc. Graham Garner and The Information Commissioner*

*Yours sincerely,*

...

*Admin Officer*

*General Regulatory Chamber (GRC)*

d. Mr Garner did not receive the information that the Tribunal had decided should be sent to him within 20 days of the date of promulgation. The Council does not suggest that they sent Mr Garner the material.

e. He therefore contacted the Tribunal and directions were issued by Judge Griffin on 12 May 2023 in response to which Mr Garner confirmed that he was making an application under rule 7A.

f. The directions of 12 May 2023 stated, inter alia,

*4. The essence of the case is that the Council failed to comply with the decision of this Tribunal in EA/2022/0154 by the date they should have done. The order was that they should send to the Applicant the emails between the Council and a contractor containing the contractor's agreement to complete certain pruning work, a quotation for the work, and photographs of the finished work (contained in the Tribunal's closed bundle) within 20 working days of the promulgation of the decision.*

5. *I am not clear from the application whether Mr Garner submits he has received any of the material ordered or whether the Council would say they have complied with the order. Therefore I direct as follows*

6. *The clerk will send the grounds of application and associated documents to the Respondent Council if they have not already been sent. Thereafter*

a. *Within 7 days of the issue of these directions Mr Garner will write to the Tribunal copied to the Council setting out exactly what he says he has received, if anything, as a result of the order of this Tribunal*

b. *Within 14 days of the issue of these directions the Council will write to the Tribunal copied to Mr Garner setting out what steps they have taken to comply with the Tribunal's decision in EA/2022/0154 and providing any documentation in support, ie a copy of the correspondence.*

- g. That same day, 12 May 2023, the Council wrote to the Tribunal having received the case management directions. In that email the Council stated that Mr Garner had received everything that they had to provide in relation to the original complaint.
- h. Further information was provided to Mr Garner on 2 June 2023 by way of an email directed to the Tribunal into which he was copied. The Council's email was as follows  
*"Please find attached the required information as per the case management direction EJ/2023/0004 which states:  
"SGWPC.... should send to the Applicant the emails between the Council and a contractor containing the contractor's agreement to complete certain pruning work, a quotation for the work, and photographs of the finished work within 20 working days of the promulgation of the decision.""*
- i. There were three attachments to the email of 2 June 2023. These attachments were called
- i. Completed works photos
  - ii. Scanned docs request
  - iii. [The contractor's] Invoice Laurel hedge work.
- j. The attachments provided to Mr Garner on 2 June 2023 satisfied the terms of the SDN in that this was the information that was required to be provided by the Tribunal in EA/2022/0154. Not only was the agreement to complete the works provided, a quotation was provided and 2 photographs of the work but also the invoice for the work which was in addition to that which had been required.
- k. The material provided to Mr Garner on 2 June 2023 contains the substance of that which was placed before the Tribunal in EA/2022/0154.

## **Analysis**

40. We have applied the legal framework set out above to the facts as we have found them.
41. We have first considered 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 power to commit for contempt, would constitute a contempt of court.
42. The terms of the Substituted Decision Notice (SDN) in EA/2022/0154 were clear and unambiguous. The SDN set out what must be provided and a timescale within which it should be provided. Neither party suggests that it is otherwise. We have concluded that the terms of the SDN were sufficiently clear and unambiguous so as to be capable of founding a finding of contempt for breach thereof.
43. The first obligation imposed on the Respondents by the SDN was to provide emails between the Council and a contractor containing the contractor's agreement to complete certain pruning work, a quotation for the work, and photographs of the finished work (contained in the Tribunal's closed bundle). The Respondent was obliged to do so within 20 working days of the promulgation of the decision in EA/2022/0154.
44. The Respondent did not provide the information to the Applicant as required within 20 working days.
45. The Respondent did provide the material as directed in the SDN with the letter dated 2 June 2023.
46. The late provision of the material was not sufficient to comply with the decision of the Tribunal in EA/2022/0154 which was clear and unambiguous as to the timescale within which the information should have been provided.
47. The omission was in relation to proceedings before the Tribunal under FOIA reference EA/2022/0154.
48. The Council submits that the Tribunal's email to them of 7 March 2023 was insufficient to inform the Council of its obligations. It is further suggested that a member of the Tribunal's staff informed the Council that they were not required to take any action in relation to the decision. If that was communicated this was clearly an error and contrary to the plain words of the decision. However, it is not necessary for us to embark on an inquiry in that regard because it was incumbent on the Council as a public authority and the organisation which had received the FOIA request in issue in the decision, to read the Tribunal's decision to which their attention had been drawn and to draw their own conclusions about what action (if any) they needed to

take. It is not for a member of HMCTS to advise them, should the Council have required advice it was for them to obtain it independently.

49. If the Council could not access the link steps should have been taken by the Council to obtain a copy from the parties in EA/2022/0154 or from the Tribunal instead of a link.
50. We have concluded that the Council had proper notice of the decision of the Tribunal.
51. The Council maintained at first, in the email to the Tribunal dated 12 May 2023, that there was nothing further to be sent to the Applicant. We have concluded that this demonstrates that the Council had not read the SDN by this date. Had they done so it would have been apparent that there was more to be provided.
52. Mr Garner suggests that the documents provided to him on 2 June 2023 are not as ordered but we have considered the closed bundle and concluded that he has been provided with the substance of what was before the Tribunal in EA/2022/0154. It may not be presented in entirely the same way but the information within scope of his request and the Tribunal SDN has been disclosed to him along with the invoice which was an additional piece of information.
53. It seems to us that the Council did not fully appreciate the role of the Tribunal nor that the Tribunal had the power under section 58 FOIA to make a decision binding upon them whether or not they were parties to the proceedings. The Tribunal stands in the shoes of the Information Commissioner and may issue any notice that he could have made, such a notice may require a public authority to take steps. It would be contrary to the interests of justice if a public authority were to be able to avoid compliance with such a notice because they were not a party to the appeal proceedings which gave rise to it.
54. We acknowledge that the only constant in appeal proceedings under sections 57 & 58 FOIA is that the Respondent will be the Information Commissioner whose decision notice is subject of that appeal. The interests of the person who made the request for information and the public authority from whom they requested it are engaged by the Information Commissioner's decision. Either may appeal to the Tribunal but the other will not automatically become a party. This is why the Tribunal will draw the decision to the attention not only of the formal parties to the case but also to the other interested person/organisation affected by the decision.
55. We further acknowledge that small public authorities such as Parish Councils have limited resources, however such public authorities have statutory responsibilities under FOIA as well as the Environmental Information Regulations and the Data Protection Act 2018. These responsibilities must be complied with and there are consequences for any failure to do so. Tribunal proceedings are an important part of

the administration of justice, Tribunal orders and directions must be complied with just as those that are made by a Court.

56. It is plain to us from the correspondence that the Council did not appreciate the seriousness of their obligations to the Tribunal nor the potential consequences of non-compliance. In our view this is reflected in the way the Council has responded to this application for certification.
57. Mr Garner draws attention to the quality of the formal response in particular and submits that the nature of that document and other correspondence demonstrates that the Council holds this Tribunal and its proceedings in contempt. We bear in mind that neither party is represented. Mr Garner has taken a detailed approach to each step in the process and contrasts his approach to that of the Council. Both parties have levelled accusations at each other. It seems to us that the Council has missed the point that what was in issue was the provision of information pursuant to the order of a Tribunal rather than being part of the ongoing lengthy correspondence about the non-consensual pruning of a hedge.
58. However, we do not accept that the Council has been dishonest in its dealing with the Tribunal, to draw such an inference from the correspondence would be to imbue it with a meaning that is not sustainable. Bearing in mind the standard of proof we are not satisfied that the only inference that can be drawn from the Council's actions and omissions is that they were acting dishonestly. The circumstances support the equal if not more persuasive, inference that the Council were struggling to cope with limited resources and limited understanding of the situation. The latter inference is not consistent with a finding of dishonesty.
59. We have concluded that the Council did not ignore the decision as suggested by the Applicant but failed to comply with it because they took insufficient steps to acquaint themselves with its contents. By reason of the email to them of 7 March 2023, the Council were aware there was a decision of the Tribunal and that it had been drawn to their attention. Had any officer of the Council read the decision with its clear SDN they would have known that action was required.
60. Thus, the failure to comply with the SDN was not accidental but resulted from a choice made not to pursue the matter and properly acquaint themselves with the obligations placed upon the Council.
61. We have concluded that the failure to comply with the Tribunal's SDN would constitute a contempt of court if these proceedings were proceedings before a court having power to commit for contempt.
62. The second stage is to consider whether we should exercise our discretion to certify a contempt to the Upper Tribunal

63. We have determined that the breach of the SDN was not accidental but neither was it wilful in the sense of being a manifestation of a contemptuous attitude towards the Tribunal or the administration of justice.
64. We take into account that the material has been provided as ordered, albeit later than required. This process will have informed the Council as to their obligations and the necessity to act swiftly to obtain details of any Tribunal decision that is brought to their attention.
65. Furthermore, in our judgment the culpability of the conduct is mitigated by the significant time and resources that the Council has devoted to the various requests and complaints made to them by Mr Garner; the volume of which resulted in them putting in place a single point of contact process. Against that background the mistaken perception of the Council about the importance of the Tribunal decision is understandable albeit does not entirely excuse the failure to comply.
66. That failure to comply was rectified and in all the circumstances it would be disproportionate for any contempt order to be made.
67. There are no wider grounds that would justify certification. The administration of justice would not be advanced by so doing in circumstances where any contempt order would be disproportionate.
68. Therefore we have decided not to exercise our discretion to certify any offence of contempt to the Upper Tribunal.

### **Conclusion**

69. For the reasons set out above we refuse the application.

**Signed** *Judge Griffin*

**Date:** 14 December 2023