IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0006
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notice No: FS50491919, dated 11.12.13

Before

Andrew Bartlett QC (Judge)
Anne Chafer
Andrew Whetnall

Determined on the papers

Date of decision: 2 June 2014

Date of Promulgation: 4 June 2014

Appellant: BERNARD CLUCAS

Respondent: INFORMATION COMMISSIONER

Subject matter:
Freedom of Information Act 2000 – s58 appeals to Tribunal – Tribunal's powers - whether Tribunal may remit a matter to the Information Commissioner

Cases:
APPGER v IC and MOD [2011] UKUT 153 (AAC)
Guardian Newspapers Ltd and Brooke v IC [2011] 1 Info LR 854
Information Commissioner v Gordon Bell [2014] UKUT 106 (AAC)
R(IS)2/08

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal. This decision finally disposes of the appeal except for the question of the appropriate form of order to be made in consequence of (B) below, which remains outstanding.

The Commissioner's Decision Notice FS50491919 was not in accordance with the law in the following respects:
(A) The Commissioner failed to deal with that part of Mr Clucas's complaint in which Mr Clucas complained about the Council's response to the information request made on 16 March 2012 (Ground 2 of the appeal).
(B) The Commissioner was wrong to conclude that the Council had provided to Mr Clucas all the information which it held within the scope of the information request made on 5 July 2012 (Ground 1 of the appeal).

No action is required in relation to (A).

So that the Tribunal may determine what action, if any, to order in respect of (B), the Tribunal orders and directs as follows:
(1) (Joinder) The Goring Parish Council is joined to this appeal with immediate effect upon its receipt of notice of this Order from the Tribunal Office.
(2) (Parish Council Response) No later than the twentieth working day after receipt of notice of this Order the Goring Parish Council shall inform the Information Commissioner to what extent it still holds the information referred to in paragraphs 16c and 20 below, and within that time shall provide such of it as it still holds to the Commissioner, together with any refusal notice which it wishes to rely upon such as would have complied with Freedom of Information Act section 17 if it had been served timeously in response to the information request made by Mr Clucas on 5 July 2012.
(3) The Goring Parish Council shall provide to Mr Clucas within the same time period as under (2) any of the above information which it holds in respect of which it does not rely upon an exemption.
(4) (Commissioner's statement of position) Not later than 21 days after the Parish Council Response the Commissioner shall notify Mr Clucas and the Goring Parish Council of his view on whether Mr Clucas should receive more information in response to the request made on 5 July 2012 than has been provided. This shall include a brief statement of his reasons.
(5) Within 21 days after the Commissioner's statement of position, and after consulting each other, the parties shall submit to the Tribunal their agreed or rival procedural proposals leading to an oral hearing or paper determination by the Tribunal of what action, if any, to order in respect of (B) above.
(6) Any party, including Goring Parish Council, may apply to the Tribunal to vary or revoke any of the above directions upon two days' prior notice to the other parties. If all three parties agree, the parties may adjust any of the time limits without reference to the Tribunal.
(7) The procedural matters in paragraphs (5) and (6) above are to be dealt with by the Tribunal Registrar, unless referred by the Registrar to the full Tribunal.
(8) For the avoidance of doubt, in the alternative to paragraph (5), the parties are at liberty to submit to the Tribunal an agreed draft consent order to conclude the appeal.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with requests to a Parish Council for information about its consideration of how it had handled an earlier information request.

2. It raises a question concerning the extent of the Tribunal's power to remit a matter back to the Information Commissioner where it decides that his Decision Notice was not in accordance with the law. This involves consideration of the decision of the Upper Tribunal in *Information Commissioner v Gordon Bell* [2014] UKUT 106 (AAC). We express our difficulties concerning this decision but conclude that we are bound to follow it.

The requests, the public authority's response and the complaint to the Information Commissioner

3. The background to this appeal is an information request ("the original request") which is not the subject of the present appeal. In January 2012 Mr Clucas made a request to Goring Parish Council for information about allotment sites. This was the first freedom of information request that the Council had ever received. The original request was initially refused. Subsequently the Council sought to charge a fee of £125 for answering it. On reviewing its decision the Council recognised that the fee was not reasonable as required by the Environmental Information Regulations ("EIR"), and provided the information. (In December 2012 in Decision Notice FER0433458 the Information Commissioner found the Council to have been in breach of its obligations under the EIR in relation to the original request.)

4. There was further correspondence between Mr Clucas and the Council, and the Council conducted a retrospective review of how it had handled the original request with a view to learning how to deal better with such requests in future. The Council wrote to Mr Clucas on 7 March 2012 providing additional information and a copy report prepared by two Councillors "Review of GPC Freedom of Information Procedures", which also formed an appendix to the minutes of, and was discussed at, the Council's meeting of 5 March 2012.

5. Mr Clucas replied on 16 March 2012. His letter was headed "Freedom of Information Act – Failure of Service – Internal Review". He stated that the Council needed to tell him the outcome of the retrospective review,

requested (by implication) the relevant minutes of the 5 March meeting (which would contain the outcome of the review), and expressed criticisms of the copy report. We refer to this as "the March request". He repeated the March request by letter of 5 April 2012, in which he stated:

> The Council still needs to tell me the outcome of its review of the handling of my freedom of information request. ... The clerk could simply tell me exactly what was decided. Or draft minutes of the meeting on 5 March could be published on the Council's website.

6. The Council responded on 24 April 2012, to the effect that it had already provided to him the information requested and the outcome of the Council's review. This was not correct, because, while the letter of 7 March had enclosed the copy report, it had not contained an account of the relevant part of the 5 March meeting and the letter was not entirely clear concerning what had been resolved at the meeting.

7. At some point the minutes of the 5 March meeting (but not any confidential minute)[1] were published on the Council's website.

8. On 5 July 2012 Mr Clucas wrote again, under the heading "Freedom of Information Act - Failure of Service". He asked for "copies of the confidential minutes for each occasion the matter was considered in confidential session, with any other associated material considered at the time." We refer to this as "the July request". The Council responded the same day, stating that confidential minutes were the subject of an exemption (which was not specified) and would not be provided.

9. In October 2012 Mr Clucas asked for internal review of the response to the July request. On 13 November 2012 the Council wrote to him (in two separate letters) enclosing the confidential minutes of the meeting on 5 March but stating that it was unclear what 'review' he was seeking. (It appears the Council was unfamiliar with the concept of 'internal review', which is a procedure by which a public authority responds to a requester's concern that an information request has not been dealt with correctly, and thereby has opportunity to amend its response.)

10. In January 2013 Mr Clucas complained to the Information Commissioner. The first basis of his complaint, as further explained and amplified in March 2013, was that the Council wrongly claimed in April 2012 that it had supplied to him all the information it held answering to his March request. It had not supplied the relevant minutes of the March meeting or the

[1] The papers before us contain assertions about whether there can be any such thing as a confidential minute of a Parish Council. It is not necessary for us to enter into this debate or to refer to the provisions of s228 or Schedules 12 or 12A of the Local Government Act 1972. We use the expression 'confidential minute' to refer to a separate minute, not published, which the Council or its clerk thought at the time should be treated as confidential.

confidential minute. He wrote: "Note: the response to this request is the basis of the current complaint to the ICO." (All emphases are original.) He added: "This complaint is about withholding information about the outcome of the review and misleading the applicant about what information was available." He also stated in regard to the March request: "this request was satisfied on 13 November by supply of the "not for publication" minutes. So the complaint for this information request is that the request was not handled properly – an eight month delay and a lot of trouble for me in insisting that a proper response be given."

11. Mr Clucas's complaint was also about the July request. The matters of complaint were, in summary, the following five matters-

    a. that the council was slow in providing the 5 March minutes,

    b. that it did not provide the 13 February "not for publication" minutes,

    c. that it did not say whether any associated material existed,

    d. that it did not say whether any other confidential sessions had been held, and

    e. that it professed not to know what an internal review was.

12. The Commissioner's Decision Notice FS50491919 did not address the complaints about the Council's response to the March request. It dealt only with the July request. As to the latter, the Commissioner noted (under the heading "Other matters" at the end of the Decision Notice) that the initial refusal of the confidential minutes of the 5 March meeting did not comply with FOIA s17, because it did not specify the exemption relied upon, albeit this error was superseded by the subsequent supply of the information. The Commissioner upheld the complaint that the information was not supplied at the time when it should have been, contrary to FOIA s10. As regards the 2nd, 3rd and 4th matters of complaint concerning the July request, the Commissioner decided that on the balance of probabilities the Council did not hold any further information within the scope of the July request. The Commissioner did not deal with the 5th matter of complaint.

13. Our summary above is incomplete in one respect, which is that the documentation is peppered with allegations by Mr Clucas that the Council deliberately set out to mislead him and to withhold information from him wrongly. We have found nothing whatever that supports these allegations, which appear to us to be entirely without foundation, and we say no more about them.

The appeal to the Tribunal

14. Mr Clucas appeals against the Decision Notice on four grounds. We summarise our understanding of them as follows:

    a. In relation to the July request, the Commissioner was wrong to find that the Council held no further information (Ground 1).

    b. The Commissioner failed to deal with the complaint about the response to the March request (Ground 2).

    c. In relation to the July request, it was not sufficient for the Commissioner to note the section 17 breach under "Other matters"; the Commissioner should have found explicitly that FOIA sections 1 and 17 were breached by the Council's initial refusal of the 5 March confidential minutes (Ground 3).

    d. The Commissioner's Notice should have been in blunter terms, and sanctions should be applied to the Council as a "repeat offender" (Ground 4).

15. Mr Clucas requested that the appeal be determined on the papers, to which the Commissioner agreed.

Ground 1 – whether the Council held further information within the scope of the July request

16. Mr Clucas's points under this heading are-

    a. The confidential minute of 13 February 2012 was not disclosed.

    b. Not having seen that minute, Mr Clucas was unable to say whether that minute mentioned associated documents that should have been disclosed.

    c. The confidential minute of 5 March 2012 mentioned "Council documents, files and letters" that were examined, and an interview with the clerk to the Council, for which there should be a note. It was not credible that the Council was unable to find these items.

17. We remind ourselves that the July request was for "copies of the confidential minutes for each occasion the matter was considered in confidential session, with any other associated material considered at the

time". In context, "the matter" means the Council's investigation or consideration of its failure to deal correctly with the original request. It seems to follow that the February confidential minutes and the associated documents mentioned in the confidential minute of 5 March fell within the scope of the request and should have been provided.

18. When the Commissioner prepared the bundle for this appeal he obtained the confidential minute of 13 February 2012, provided it to Mr Clucas, and added it to the appeal bundle. It does not refer to any additional documents except Mr Clucas's own letters, so the second of Mr Clucas's three points falls away.

19. The Commissioner contends that the confidential minute of 13 February 2012 does not fall within the scope of the July request, stressing that this minute does not address the outcome of the investigation. We do not agree with the Commissioner's analysis. The July request was not limited to the outcome. In our view the February confidential minute falls squarely within the words "copies of the confidential minutes for each occasion the matter was considered in confidential session". We therefore accept Mr Clucas's first point.

20. The Commissioner's Response and written submissions are silent concerning Mr Clucas's contention that the Council should produce the associated documents and a note of the interview mentioned in the confidential minute of 5 March 2012. We do not find before us any material sufficient to contradict this contention. We find no support for the Commissioner's finding in the Decision Notice that the Council had provided all the relevant material which it held at the time of the request.

21. Ground 1 is therefore upheld, on the basis of the first and third points relied on by Mr Clucas, subject to our further comments below concerning what is the appropriate remedy.

<u>Ground 2 – the Commissioner's failure to deal with the complaint about the response to the March request</u>

22. The Commissioner resists this ground by contending that the letter of 16 March 2012 contained no information request.

23. In our view this contention is without merit. On a fair reading of the letter of 16 March 2012 Mr Clucas was requesting information from the Council. This was confirmed by the repetition in Mr Clucas's letter of 5 April 2012.

24. We note that the Commissioner did not say in the Decision Notice that the letter of 16 March 2012 contained no request for information. It appears to

us that the Commissioner simply overlooked this aspect of the complaint and failed to deal with it.

25. Ground 2 is therefore upheld.

Ground 3 – whether the Commissioner should have made findings of breach of ss1 and 17

26. Ground 3 relates to the refusal on 5 July 2012 and is a complaint that the Commissioner should have included explicit findings that FOIA sections 1 and 17 were breached by the Council's initial refusal of the 5 March confidential minutes.

27. As regards section 1, the Commissioner's argument is that there was no complaint by Mr Clucas of a breach of this section. We do not understand this argument. Mr Clucas was contending in his complaint that the Council, instead of initially refusing to provide the 5 March confidential minutes, ought to have provided them. He was therefore alleging a breach of section 1.

28. However, since the minutes were subsequently provided, the complaint of breach of section 1 became academic. While it seems that the Council did not have a good understanding of the relevant processes under FOIA, this was effectively a provision of the information upon internal review. Internal review is an important process, which is contemplated in the Act. While there is no absolute rule, access to the statutory process of complaint to the Commissioner is typically conditional upon exhaustion of the internal review procedure: see *APPGER v IC and MOD* [2011] UKUT 153 (AAC), [39]-[40].[2]

29. Mr Clucas is evidently unhappy that the Commissioner did not provide a ruling on the section 1 issue. We are not persuaded that, where an issue becomes academic because the public authority revises its position on internal review, the Commissioner must necessarily still rule upon it. The Commissioner has to act within budget constraints and make the most constructive use of his resources. Accordingly in this case we consider that he was entitled not to provide a ruling on the section 1 issue, and that the omission to do so does not render the Decision Notice contrary to law.

30. There was a breach of section 17 because, at initial refusal, the Council did not specify the exemption which was relied upon. This became academic because the refusal was not maintained. The Commissioner drew attention in his Decision Notice to the requirements of section 17 and the Council's

[2] The rule is not absolute because, while FOIA envisages that public authorities will have a complaints procedure which enables internal review, the Act does not makes this a firm mandatory requirement – see s45(2)(e) and s50(2)(a).

non-adherence to them. In our view, given that the point was academic, he was not under a legal obligation to present this as a formal finding in the Decision Notice, and it was sufficient for him to note it under "Other matters".

31. We therefore reject Ground 3.

Ground 4 – whether Decision Notice insufficiently blunt and should have imposed sanctions

32. In so far as this ground expresses dissatisfaction with the wording of the Decision Notice, as opposed to its substance, it is invalid. In an earlier appeal concerning a request made by Mr Clucas, where the Council was the appellant, the Tribunal[3] stated: "The appeal process is not designed to enable those affected by a Decision Notice to participate in re-drafting its terms in order to make it more reflective of their particular concerns." We agree.

33. In so far as this ground raises the question of wider sanctions against the Council, the Commissioner submits that the Tribunal has no powers to consider whether the Commissioner ought or ought not to take regulatory action. We do not find it necessary to rule on that submission as a general proposition. It is sufficient for us to consider the circumstances of this particular case. Sanctions are in the first instance a matter for the discretion of the Commissioner in the pursuance of his statutory enforcement functions. We cannot see that in the present case there would be any ground for impugning the absence of sanctions taken by the Commissioner in relation to a small Council which was evidently at an early stage of its learning in regard to the workings and obligations of FOIA.

34. For the above reasons we reject Ground 4.

What next?

35. The question that arises is how we should dispose of this appeal, having regard to our upholding of Grounds 1 and 2:

    a. Under Ground 1 we have decided that the Council held more information within the scope of the July request. The February confidential minute has now been provided, but the associated documents and a note of the interview mentioned in the confidential minute of 5 March 2012 have not. The remedy sought by Mr Clucas in regard to Ground 1 is: "The decision notice should be struck

[3] Differently constituted, save for one member.

down, the investigation should be completed and a new decision notice should be issued."

b. Under Ground 2 we have decided that the Commissioner failed to deal with Mr Clucas's complaint about the Council's response to the March request. The remedy requested by Mr Clucas is: "Either the report [meaning the decision notice] should be re-written to include the 16 March 2012 information request or, if it is easier, the Commissioner should investigate and decide the 16 March 2012 request as a separate complaint."

36. The obvious course would be for us to allow the appeal on the basis that Grounds 1 and 2 are upheld, and remit the matter to the Commissioner so that he can (1) seek the additional documentation held by the Council and consider whether the information in it should be disclosed to Mr Clucas pursuant to the July request, and (2) investigate and rule upon Mr Clucas's complaint about the Council's response to the March request.

37. It does not at first sight seem appropriate for the Tribunal to do either of those two things itself in this particular case. As to (1), the Tribunal has not seen the additional documentation in the course of the appeal and has no knowledge of what, if any, exemptions, the Council might wish to rely upon in relation to it. As to (2), the Tribunal's role is to review the decision made by the Commissioner, but in this case he has failed to make any decision at all about the part of the complaint related to the March request.

38. However, the Upper Tribunal held in *Information Commissioner v Gordon Bell* [2014] UKUT 106 (AAC) that the First-tier Tribunal had no power in the circumstances of that case to dispose of an appeal by remitting the matter to the Information Commissioner. We therefore need to examine that case closely in order to discover what courses are open to us in the present case. We record that despite the nature of the relief sought by Mr Clucas, neither party chose to make any submissions to us concerning the extent of the Tribunal's powers to grant what he sought.

The decision in *IC v Bell*: Is there a power to remit?

39. In the case of *Gordon Bell* the public authority had relied upon a particular exemption in refusing to confirm or deny that it held the requested information. The Commissioner upheld the public authority's stance. On the appeal by the requester, to which the public authority was not a party, the First-tier Tribunal issued a final decision[4] in which it held that, because of a mistake of fact, the exemption relied upon was not applicable. The consequence was that neither the public authority nor the Commissioner

[4] Dated 26 February 2013

had properly considered what information, if any, was held by the authority and ought to be disclosed or what, if any, other exemptions might apply.

40. The First-tier Tribunal held:

> In light of this finding The Tribunal will allow the public authority to consider their position and present the Respondent [ie, the Commissioner] with arguments on any other exemption that may apply to the disputed information being released on or before the 19th March 2013. The Information Commissioner will then consider the position as between the parties and if necessary provide a further Decision Notice on or before the 9th April 2013. In any event the Tribunal will expect this matter to be concluded with a further and final decision by the Respondent on or before the 9th April 2013 and the [sic] either party will have the usual right to appeal from that decision if he chooses to do so.

41. The Commissioner appealed to the Upper Tribunal. He argued that the Act did not give the First-tier Tribunal power to remit a case to the Commissioner for further consideration and decision, as the Commissioner had exhausted his powers under s50 once he had issued his decision notice. In further support of this argument he placed reliance on the existence of the power of the First-tier Tribunal under s58 to substitute a different decision notice, as explained in *Guardian Newspapers Ltd and Brooke v IC* [2011] 1 Info LR 854, [16]-[23]. No submissions on the question of the power to remit were made by the Respondent, Mr Bell.

42. In regard to the first part of the Commissioner's argument, we observe that whether the Commissioner had exhausted his powers under s50 might depend upon what he had done. If, for example, he had mistaken the nature of the exercise that he should have carried out under s50, the proper exercise might still remain for him to perform. And, even if (in the absence of an appeal) the Commissioner had exhausted his powers, it would not necessarily follow that a Tribunal, upon finding that he had exercised them not in accordance with law, did not have power to order him to exercise them again in accordance with the law. If the Tribunal were to set aside the Commissioner's decision on the ground that it was not in accordance with the law, we do not see what arguable obstacle there would be to the re-exercise of the Commissioner's powers under s50.

43. The Upper Tribunal rejected the first part of the Commissioner's argument in its unqualified form, reasoning that there were some circumstances in which the Commissioner's powers under s50 might not be exhausted: see *Information Commissioner v Gordon Bell* [2014] UKUT 106 (AAC), [23], [27]. We will return to this topic below.

44. In regard to the second part of the Commissioner's argument, we observe that the existence of a power in the Tribunal to issue a substituted notice does not provide a compelling argument in support of the Commissioner's position. In a case where the Tribunal has the necessary evidence before it, it will be in a position to say what the decision notice ought to have said; but where the Tribunal does not have the necessary evidence before it, it cannot do this, and in such a case a power to remit would be useful.

45. The Upper Tribunal rejected the analysis of s58 in the *Guardian* case, on which the Commissioner relied. We confess that we have not found the Upper Tribunal's reasoning on this aspect entirely easy to follow. In particular-

a. At [20] the Upper Tribunal rejected the analysis without addressing head-on the central point, namely, that the infelicity of the statutory words for situations where the requester was the appellant appeared to derive from the adoption of phraseology from the Data Protection Act, which was written for situations where only the party holding the information could be the appellant. Under the latter Act, the data controller would appeal, seeking revocation of the enforcement notice, information notice or special information notice and its requirements. If the Tribunal decided the notice should not have been served, the Tribunal would allow the appeal; if it decided that the notice was in accordance with the law and the Commissioner had exercised his discretion correctly, it would dismiss the appeal; or the Tribunal could take the middle course of substituting a notice with less stringent requirements. This threefold set of options was apt under the DPA but is less than apt to cover the different situation under FOIA where a requester appeals against a negative decision notice which places no requirements on the public authority, asking that the notice be made more stringent so as to require disclosure of information.[5]

b. At [26] the Upper Tribunal held that the statutory phrase "or substitute such other notice as could have been served by the Commissioner" referred only to the substitution of a different kind of notice, "say an information notice instead of a decision notice". The Upper Tribunal gave no example of how this would arise in practice. We are not aware of there ever having been an appeal under FOIA in which a substitution of this kind has been granted, or even sought.

c. At [18], [23] and [25] the Upper Tribunal said that to read the word "or" in a conjunctive sense was not appropriate to various kinds of cases which would arise. This was recognised in the analysis in

[5] We would add that, on further reflection, it seems to us that the problem in s58 arises not only because of the feature that appeals under FOIA may be by a dissatisfied requester but also because of the potentially wide range of findings that a decision notice may contain.

Guardian and was part of the problem which the analysis was addressing.

d. We have difficulty in seeing how the construal of the phrase "or substitute such other notice" as referring only to the substitution of a different kind of notice actually solves the problem inherent in the wording of FOIA s58(1). Even on this narrow construction, the problem seems to remain that appropriate disposal of a case may involve both allowing the appeal and substituting a different notice. The word 'or' remains puzzling to us.

46. While we have expressed our difficulties, we are of course bound by decisions of the Upper Tribunal. We are unsure whether the Upper Tribunal's analysis of s58 is strictly part of the *ratio decidendi*, but we think it probable that it is[6]; in the circumstances, we think the right course for us to take is to accept for present purposes that on an appeal against a decision notice a First-tier Tribunal has no power in a formal sense to issue a substituted decision notice. Instead, if the First-tier Tribunal considers that a decision notice is wrong, it should "allow the appeal and, in doing so, ... identify the mistake in the notice"; this amounts to exercising a "power to vary the notice", which "arises from the nature of the appeal": see *Bell* at [25]. We note that, on the basis of the Upper Tribunal's reasoning, this power is not found expressly stated in s58; it must therefore be an implied power.

47. Notwithstanding the Upper Tribunal's rejection of both limbs of the Commissioner's argument, in the circumstances of the case it upheld his position that his powers were exhausted and that there was accordingly no power in the Tribunal to remit the matter to him for further investigation and decision. We therefore need to examine the Upper Tribunal's reasoning in order to determine the principle which divides those cases where the Commissioner has exhausted his powers under s50 from those cases where he has not, so that we can then go on to determine what courses are open to us in the circumstances of the present case.

48. Paragraph [27] of the decision of the Upper Tribunal commences: "It follows that I accept Mr Hopkins' argument that the Commissioner did not have power *in this case* to serve a further notice under section 50" [emphasis original]. This suggests that the reasons for the acceptance of the Commissioner's contention are to be found in paragraphs [21]-[26]. Leaving aside the special case (not relevant here) where the Tribunal substitutes an information notice for a decision notice, the material reason seems to be based on the distinction made in paragraphs [23]-[25] between a decision notice that is valid, whether legally correct or incorrect,

[6] See the statement in paragraph [8] of the Upper Tribunal decision: "If the tribunal intended to undertake a two stage process by first allowing the appeal and then substituting a different decision notice, it had no power to do so." We incline towards the view that the Upper Tribunal's objection here is to the substitution of a different decision notice rather than to dealing with the appeal in two stages.

and a purported decision notice that is not in law such a notice at all. Examples given of the latter are (1) where the Commissioner issued the decision notice without any jurisdiction to do so, because there had been no complaint, and (2) where the notice was so completely incoherent or unconnected to his legal powers that it was not in law a notice at all. In the first example, the Tribunal would "allow the appeal on the ground that the Commissioner had no jurisdiction to serve the notice"; in the second example, the Tribunal "could allow the appeal on the ground that the purported notice was of no force or effect, leaving the Commissioner free to issue another notice": see [23]. Although not expressly stated in [23]-[25], we infer that the implicit reasoning must be that the Commissioner's decision notice in the *Bell* case, although erroneous, was nevertheless a valid notice, which could not be remade by the Commissioner after it was found by the Tribunal to be not in accordance with the law.

49. The Upper Tribunal's reasoning seems also to involve, by necessary implication, a repudiation of any power in the Tribunal to set aside a decision notice on the ground that it is not in accordance with the law in some respect which falls short of rendering it not a notice at all. If the Tribunal had power to set aside on this ground, the Commissioner's ability to re-exercise his powers under s50 would not depend upon the distinction between that which is in law a notice and that which in law is not a notice at all. Instead, it would depend simply on whether the notice was in accordance with the law.

50. If the above understanding of these paragraphs is correct, the powers of the Tribunal on appeal would seem to depend on a technical distinction between different types of illegality. Distinctions dependent upon this degree of technicality have been found in other branches of the law to be unstable.[7] We do not see this distinction made in FOIA s58, which refers to a notice that is "not in accordance with the law", and which does not distinguish between different ways in which the notice may fail to be in such accordance.

51. Moreover, if it is correct to apply this kind of technical analysis to the decision notice, so that in some circumstances the purported decision notice must be held not to be a decision notice at all, it would seem to follow that in such a case the Tribunal would have no jurisdiction to deal with the appeal. By s57(1), the right of appeal depends on the service of a decision notice; but if the appropriate analysis for the purposes of the Act is that no such notice has been served, it is unclear from where the Upper Tribunal is saying that the Tribunal's jurisdiction is derived. The logic of the Upper Tribunal's analysis suggests that the appropriate remedy would have to be judicial review, rather than appeal to the Tribunal.

[7] such as the distinction between acts or orders that are void and those that are voidable, or the distinction between substantive invalidity and procedural invalidity: see, for example, the discussion in *Boddington v Transport Police* [1999] 2 AC 413.

52. We would respectfully have thought that the more natural and convenient interpretation of ss57-58 would be that the right of appeal arises whenever the Commissioner has served a notice, or what purports to be a notice, irrespective of whether it is in law valid or invalid.

53. In paragraph [23] there is reliance upon the decision in *R(IB) 2/04*. While we venture with trepidation into the area of cases decided by Social Security Commissioners, we would draw attention to the decision of a panel of three Commissioners in *R(IS) 2/08*, in which *R(IB) 2/04* was referred to. Under the relevant legislation (as here) there was no express prohibition on the Tribunal remitting a case to the authority which originally decided it (in that case, the Secretary of State). The panel decided at [48]:

> When an appeal against an outcome decision raises one issue on which the appeal is allowed but it is necessary to deal with a further issue before another outcome decision is substituted, a tribunal may set aside the original outcome decision without substituting another outcome decision, provided it deals with the original issue raised by the appeal and substitutes a decision on that issue. The Secretary of State must then consider the new issue and decide what outcome decision to give.

54. The panel in *R(IS) 2/08* regarded this approach as preferable to, and less cumbersome than, the alternative of retaining jurisdiction and giving directions which would lead to the matter coming back before the panel: see the reasoning in [41]-[49] and the practical guidance at [55]. In the present case the Upper Tribunal has not pointed to any difference in the applicable statutory language which would prevent the adoption of a similarly preferable and less cumbersome approach for appeals under FOIA.

55. The above misgivings drive us to consider whether we may have misunderstood the course of reasoning in paragraphs [23]-[25] of *Bell*. The Upper Tribunal's reasons for accepting the Commissioner's submission that he did not have power to serve a further notice under s50 are also subsequently identified in paragraph [27] in four points:

a. "First, as he argued, the Commissioner had exhausted his powers to act under section 50, once he had served his decision notice on Mr Bell."

b. "Second, there is no power in the legislative structure for the Commissioner to revisit a notice."

c. "Third, it is not possible to have two notices on the same complaint but in different terms, for obvious reasons."

d. “Fourth, it was inconsistent with the nature of an appeal to the First-tier Tribunal for that tribunal to remit the case to the Commissioner for reconsideration (as the tribunal’s decision appeared to do) or to refer the case to the Commissioner as part of an interlocutory stage in the tribunal’s decision-making (as the refusal of permission envisaged). Leaving aside the constitutional issue of the separation of powers, once an appeal is made, the legal responsibility for decision-making was the tribunal’s. It had no power to abdicate that duty or to seek to share it in the way that the tribunal may have envisaged.”

56. As we understand it, the first of these points is not an independent reason, but a re-statement of the conclusion.

57. As to the second point, the question whether there is power in the legislative structure for the Commissioner to revisit a notice, in consequence of a successful appeal against the notice, is the very point at issue. We remain unsure why the lack of an express statutory power to do so should be regarded as decisive, when the Upper Tribunal has decided that the lack of an express power for the Tribunal to vary a notice does not prevent its doing so.

58. The reasons for the third point are said to be obvious, but are not spelled out, and we are therefore not able to consider them. In the absence of this statement by the Upper Tribunal, we would have thought that, if the Tribunal holds that a decision notice was wrong in law, either the Tribunal or, in a suitable case, the Commissioner should be able to correct it, depending upon the circumstances. To the extent that the correction constitutes an alteration, the correction would supersede the first notice, whether made by the Commissioner or by the Tribunal. Even if that is wrong, we do not see any reason why the Tribunal, upon finding that the decision notice was not in accordance with the law, should not be able to set it aside, thus leaving the field free for the making of a new decision notice.

59. The fourth point is that it is inconsistent with the nature of an appeal to the First-tier Tribunal for that tribunal to remit the case to the Commissioner for reconsideration. It is not clear to us why that is necessarily so. In a particular case the allowing of an appeal on the ground that the notice is not in accordance with the law may mean, for example, that the public authority and the Commissioner have never considered material questions which need to be considered in order for the provisions of the Act to be properly applied to the information request. While in many cases, because of the nature of the evidence and arguments on the appeal, the Tribunal is able to resolve those questions itself, in other cases the Tribunal will not be in a position to do so. Uninstructed by the decision in *Bell*, we would have thought, with respect, that a power to remit would in such a case be exercisable because of the nature of the appeal.

60. However, what matters for present purposes is that we find nothing in the four points which disturbs our initial interpretation of paragraphs [23]-[25]. Moreover, our initial interpretation is confirmed by paragraph [28], which identifies two circumstances in which, as it is put, "the Commissioner's power might revive by virtue of the retrospective effect of a tribunal's decision". The first is the special case where the tribunal substitutes an information notice for a decision notice, which would then require the Commissioner to give another decision notice once the information had been provided to him. The second is where the appeal is allowed on the basis that the first notice "was not a notice". As we read [28], these are envisaged to be the only circumstances in which the Commissioner may serve a second decision notice on a complaint.

61. We are driven to the conclusion that the Upper Tribunal has held in *Bell* that, save in the two circumstances identified at paragraph [28] of its reasons, the Commissioner has no power to revisit a decision notice issued on a complaint under s50, and accordingly on appeal the First-tier Tribunal has no power, outside those two circumstances, to set a decision notice aside and remit a matter to the Commissioner for reconsideration. While we regret the introduction of technicalities of this kind into this jurisdiction, which is intended to be flexible and avoid excessive formality, we acknowledge that we are bound by this holding and it is our duty loyally to apply it.

Disposal of the appeal in the light of *Bell*

62. Applying as best we can the technical distinction between a valid notice and an invalid notice introduced into the Act by the decision in *Bell*, the Commissioner's decision notice in the present case, while not in accordance with the law, appears to us to be a legally valid notice. It seems to follow that we are unable to take the course of allowing the appeal and remitting the matter to the Commissioner for re-investigation and reconsideration on the basis that we have decided to uphold Grounds 1 and 2.

63. As regards Ground 2, namely, the Commissioner's failure to deal with the complaint about the response to the March request, it seems we do not have the power to require him to deal with it and to make a finding upon it. However, on the available evidence it appears to us that there is no additional information which should have been provided in answer to this request beyond that which Mr Clucas has ultimately received. We therefore refuse the relief sought by Mr Clucas under Ground 2 and merely declare that, contrary to law, the Commissioner failed in his decision notice to deal with Mr Clucas's complaint about the March request.

64. As regards the further information which the Council held, within the scope of the July request, we do not know precisely what this consisted of, whether it is still held, or whether having regard to any applicable

exemptions it should have been disclosed. We are therefore unable to determine at this stage what is the appropriate order to make pursuant to our decision on Ground 1 of the appeal. We must therefore give directions leading to a further hearing or paper determination in order to decide what is the appropriate remedy, if any, arising from our decision on Ground 1. We have strong concerns about the proportionality of this approach, but see no alternative, and we express our regret that we are unable to take the more convenient and cost-effective course of remitting this aspect of the matter to the Commissioner.

65. The directions are set out at the head of this decision.[8]

66. We express the hope that in a future case the Upper Tribunal will reconsider the extent of the First-tier Tribunal's power to remit, with the benefit of legal submissions on both sides of the question.

Signed on original:

/s/ Andrew Bartlett QC, Tribunal Judge

[8] For completeness, we note that in *Markinson v IC* EA/2005/0014, 28 March 2006, at [39], Mr Pitt-Payne for the Commissioner is recorded as submitting that, although the Tribunal did not have an express power to remit a matter to the Commissioner to reconsider his decision, the same practical effect could be achieved by providing appropriate guidance and then adjourning the hearing of the appeal to allow the Commissioner to reconsider the matter and make further representations at a later date. This is not far distant from the course which we are adopting.