First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal References: EJ/2021/0003 (previously EA/2018/0086)
EJ/2021/0009 (previously EA/2018/0090)

Heard using the Cloud Video Platform
On: 19 May 2021

Additional written submissions received:
On: 14 May and 28 May 2021

UPON APPLICATIONS FOR CERTIFICATION TO THE UPPER TRIBUNAL FOR CONTEMPT OF COURT

Before:

UPPER TRIBUNAL JUDGE O'CONNOR

Between:

LIAM HARRON

Applicant

and

ROTHERHAM METROPOLITAN BOROUGH COUNCIL

First Respondent

THE INFORMATION COMMISSIONER

Second Respondent

Representation at the hearing
Applicant: In person
First Respondent : Mr J Fitzsimons of Counsel
Second Respondent: Not represented at the hearing

DECISION AND REASONS

Decision

A. The application refenced as EJ/2021/0003 (made in relation to the Tribunal's substituted Decision Notice in EA/2018/0086) is dismissed.

B. In the application referenced as EJ/2021/0009 (made in relation to the Tribunal's substituted Decision Notice in EA/2018/0090) I certify an offence by RMBC to the Upper Tribunal – that offence being the failure to comply with the terms of the Tribunal's substituted Decision Notice in EA/2018/0090.

Preamble

1. These applications were heard remotely, without objection from the parties, using the Cloud Video Platform. Neither the applicant nor the first respondent indicated during the course of the hearing, or thereafter, that the mode of hearing led to an inability to fully participate in the proceedings.

Introduction

2. On 2 May 2019, the First-tier Tribunal ("the Tribunal") made two decisions (EA/2018/0086 and EA/2018/0090) in which it allowed appeals brought by the applicant against decisions of the Information Commissioner which had upheld decisions of Rotherham Metropolitan Borough Council ("RMBC") under the Freedom of Information Act 2000 ("FOIA").

3. By notices of application respectively dated 20 January 2021 (EJ/2021/0003) and 27 January 2021 (EJ/2021/0009), the applicant applies, pursuant to section 61 of FOIA, for "*Certification to the Upper Tribunal for Contempt of Court*" - ostensibly asserting that RMBC failed to comply with the substituted Decision Notices issued by the Tribunal in the appeals respectively referenced as EA/2018/0086 and EA/2018/0090.

4. By way of an order of 2 February 2021, the Tribunal Registrar extended time for the lodging of both applications and thereafter directed that the applications be heard together. RMBC sought consideration afresh by a judge of the registrar's decisions to extend time, in response to which Judge Griffin made the same order by way of a decision dated 9 March 2021.

Role of the First-tier Tribunal

5. In Information Commissioner v Moss and the Royal Borough of Kingston upon Thames [2020] UKUT 174 (AAC), the Upper Tribunal considered the issue of the enforcement of decisions made under FOIA by the Tribunal - focusing in particular on the issues of "*when the First-tier Tribunal on appeal substitutes a decision notice for that of the Information Commissioner, who is responsible for (a)*

deciding whether the public authority has complied with that notice and (b) taking action to enforce it?". The Upper Tribunal concluded that whilst the Information Commissioner does not have power to enforce a decision of the Tribunal, the Tribunal does have such power, as conferred by section 61 of FOIA.

6. The dispute as to the role of the Tribunal in the instant proceedings is not whether the Tribunal has the power to enforce a substituted Decision Notice, but what threshold is to be applied to the Tribunal's considerations.

7. I observe that although this is the first such application to be substantively considered by the Tribunal, the issue as to the appropriate threshold has been flagged during the case management phase of other such applications, which are currently making their way towards substantive hearing.

8. The competing arguments in this case, which are broadly in line with those in other similar matters, can be succinctly put as follows:

   (i) RMBC submits that, "*s61 clearly requires the Tribunal to certify the offence and an offence of contempt cannot be 'certified' unless it has been proved beyond reasonable doubt.*"

   (ii) The Information Commissioner, by way of written submissions dated 6 April 2021, asserts that, "*The breach must be proved [by the applicant] beyond reasonable doubt. The exercise of discretion as to whether to certify is a matter for the Tribunal*".

   (iii) The applicant asserts, "*the bar for determining if the rule 7A Application should be referred to the Upper Tribunal cannot be "beyond reasonable doubt". It also seems to me that if there is any doubt about the First Respondent's Response to a FTT Substitute Decision, there is a case for the Upper Tribunal to "inquire into the matter".*

9. A further possibility, albeit not specifically ventilated by the parties in the instant matter (although it is closer to the applicant's position than the position of the respondents), is that this Tribunal's role in certifying an application for contempt to the Upper Tribunal, is akin to the permission stage in applications for committal made to the civil courts, as identified in CPR 81 (amended from 1 October 2020) - i.e. "*that a prima facie case of sufficient strength is being presented such that, provided the public interest so requires, permission can properly be given"* Ocado Group PLC v Raymond John McKeeve [2021] EWCA Civ 145, at [69].

10. The first port of call in my consideration of the Tribunal's role in determining the instant applications must be an analysis of section 61 of FOIA. Section 61 states:

    "(1) Tribunal Procedure Rules may make provision for regulating the exercise of rights of appeal conferred by sections 57(1) and (2) and 60(1) and (4).

    (2) In relation to appeals under those provisions, Tribunal Procedure Rules may make provision about –

(a) securing the production of material used for the processing of personal data, and
(b) the inspection, examination, operation and testing of equipment or material used in connection with the processing of personal data.

(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.

(5) Where an offence is certified under subsection (4), the Upper Tribunal may-
(a) inquire into the matter, and
(b) deal with the person charged with the offence in any manner in which it could deal with the person if the offence had been committed in relation to the Upper Tribunal.

(6) Before exercising the power under subsection (5)(b), the Upper Tribunal must-
(a) hear any witness who may be produced against or on behalf of the person charged with the offence, and
(b) hear any statement that may be offered in defence.

(7) In this section, "personal data" and "processing" have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act)."

11. By section 61(4) of FOIA, the First-tier Tribunal has a discretion to certify an offence to the Upper Tribunal only where it is satisfied that the requirements of both limbs of section 61(3) have been met i.e. that a person has done something or failed to do something in relation to proceedings before the Tribunal in appeals brought pursuant to sections 57 or 60 of FOIA and, if the proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.

12. It is striking that there is no reference in section 61 to a requirement for an applicant to obtain permission to proceed with an application for certification or an application for contempt, and I can identify no good reason why the word "*certify*", as it is used in section 61(4) FOIA, should be read as introducing a permission stage akin to that identified in CPR 81. Indeed, the statutory language of sections 61(3) and 61(4) of FOIA, when read in context and as a whole, militates against such a conclusion. In particular, by virtue of section 61(3), the discretion in section 61(4) to certify an offence to the Upper Tribunal may only be exercised where the relevant act or omission "*would constitute a contempt of court*" (emphasis added). If Parliament had intended the threshold at the certification stage to be that of "*prima facie case*" or "*strong prima facie case*", it would no doubt would have said so in the clearest of terms.

13. It is further notable that there is no mention in either section 61(3) or section 61(4) of FOIA, or indeed elsewhere in section 61, as to the required standard of proof

by which the allegation of contempt must be judged. In the ordinary course, given the seriousness of contempt proceedings, the standard of proof by which the contempt must be demonstrated is the criminal standard of beyond reasonable doubt: see for example, Arlidge, Eady & Smith on Contempt, 5th Edition, 12-50 onwards and JSC Mezhdunarodniy Promyshellnniy v Pugachev [2016] EWHC 192, at [41].

14. The applicant submits that the ordinary course should not apply to the First-tier Tribunal's consideration of whether to certify an offence to the Upper Tribunal because to do so would conflate and duplicate the roles of the First-tier Tribunal and Upper Tribunal in the process. He observes that section 61(5) of FOIA provides power to the Upper Tribunal to *"inquire into the matter"*, which, he contends, is particularly relevant in circumstances such as those that prevail in the instant case where the public authority has, in response to a substituted Decision Notice, stated that no information is held. I reject this contention.

15. Whilst I accept that when read literally section 61 FOIA could, and indeed in many cases is likely to, lead at least partially to a duplication of the fact finding role as between the First-tier Tribunal and Upper Tribunal, in my view this is not a good reason to read section 61 as either importing a permission stage into the contempt application procedure or as requiring the Tribunal to depart from the well-established authority as to the standard of proof by which an allegation of contempt must be assessed.

16. In conclusion, I concur with RMBC's contention that it is for the applicant to demonstrate beyond reasonable doubt the commission by RMBC of the alleged contempt in relation to proceedings before the First-tier Tribunal. If such an offence is proven to the required standard, the Tribunal must then consider whether, in all the circumstances of the case, discretion should be exercised so as to certify the offence to the Upper Tribunal.

Discussion

EA/2018/0086 (EJ/2021/0003)

17. In EA/2018/0086, the applicant appealed a Decision Notice issued by the Information Commissioner on 28 March 2018, in which she determined that (save for delay in responding to the requests within the prescribed period), RMBC had correctly applied section 14(1) of FOIA on the grounds that the applicant's request was vexatious.

18. The factual matrix, which led to the Tribunal allowing the applicant's appeal and issuing a substituted Decision Notice, is carefully set out in the first 88 paragraphs of its decision of 2 May 2019. It is well known to the parties, and I do not set that background out again herein. I confirm that I have had full regard to it.

19. The Tribunal's substituted Decision Notice reads:

"The public authority is required, within 20 working days of receipt of this substituted Notice, to provide to the Appellant the information requested in his FOIA request of 6 April 2017, ref. No. 21 – 17."

20. It also relevant to observe that at [109] of its decision, the Tribunal said as follows:

> "The Tribunal will accordingly issue a substituted Decision Notice. That may, however, be of academic benefit, as the authority may well still respond to the request in terms as to whether such information is held, with the same results as previously. We consider, however, that the appellant is entitled to a finding that the request in question was not vexatious, and so rule."

21. In his FOIA request of 6 April 2017, ref. No. 21 – 17, the applicant requested information relating to a comment made by a David Williams [of RMBC] contained in an email of 14 September 2015, which had been sent to the applicant in response to an earlier FOIA request. In the 6 April request the applicant, having initially recited the terms of the email from David McWilliams of 14 September 2015, stated:

> "This FOI Request is for a copy of any information relating to the highlighted comment 'I shared this with DLT and it was agreed that we should seek some independent, expert guidance on the content.'
>
> DLT stands for Departmental Leadership Team."

22. It is not in dispute that RMBC, who were not a party to the appeal before the First-tier Tribunal, have received the Tribunal's decision of 2 May 2019. By way of a letter dated 21 May 2019, RMBC wrote to the applicant in the following terms:

> "On 9th May 2019 the Council received formal notification of the Substituted Notice for the appeal with reference EA/2018/0086. The Notice states that, "*within 20 working days of receipt of this substituted Notice, to provide to the Appellant the information requested in his FOIA request of 6 April 2017, ref. No. 21–17.*" However, we are aware that you forwarded this Notice to the Council yourself on 3rd May 2019 and we have therefore accepted this date as the start date, which gave the Council a completion deadline of no later than 4th June 2019.
>
> The referenced request, FOI 21-17, was for, "*…a copy of any information relating to the highlighted comment: [with the highlighted comment being as follows] "I share this with DLT and it was agreed that we should seek some independent, expert guidance on the content.""*
>
> There is no information held by the Council and therefore there is no information to provide. Checks have been made to ascertain whether this information was held – and it was / is not. All the Directorate Leadership Team [DLT] meetings that were minuted are held by the Council; but none of these minutes relate to your request. For assurance, it can also be confirmed that no relevant information relating to this request has at any point been deleted and/or destroyed.
>
> We can offer some general information relating to the DLT process to act as some additional narrative for this response. Not all DLT discussions are carried out in

formal minuted meetings and therefore should a decision be taken at a DLT level then it may not be minuted. Saying this, the comment should be taken in its broadest sense, by which we mean it applies in general terms and is not an exclusive approach to this request.

The Council acknowledges the contents of the Substituted Notice, but as it holds no information we therefore feel this correspondence concludes the requirements of Notice EA/2018/0086."

23. The applicant sought an internal review of this response, to which RMBC responded in the following terms on 8 August 2019:

"Internal Review response
This Review has been carried out by myself, Paul Vessey, Head of Information Management. EA/2018/0086 relates to the request FOI 21-17, with that request stated above.

The Council's response on 21st May 2019 advised that there is no information held by the Council and therefore there is no information to provide.

To fulfil this Review then I have revisited and spoken with relevant officers to ask whether the requested information (i.e. the requested DLT minutes) is held. It has again been determined that the information is not held. All information has been exhaustively checked by multiple officers on many occasions. Therefore I am upholding the response provided to you on 21st May 2019 as correct.

I must also state that the Council has revisited this matter numerous times and cannot continue to divert its limited resources on this subject any longer. The requested information is simply not held and we will therefore no longer be responding to correspondence on this line of enquiry.

Conclusion
The original response is upheld. This concludes the Internal Review for FOI-21-17 (EA/2018/0086)."

24. On 21 January 2021, the applicant lodged a "*Notice of application for Certification to the Upper Tribunal for Contempt of Court*" relying on the following grounds:

"Please see: GRC 01 (20.1.21) Email from David McWilliams dated 15.9.15

Since 16.9.15 I have been trying to get to the truth about the email sent to me by RMBC officer David McWilliams on 15.9.15.

Please note some of the comments from FTT EA-2018-0086 extracts and an Upper Tribunal Hearing on 20.2.20 in:

GRC 02 (20.1.21) FTT EA-2018-0086 extracts and Upper Tribunal (20.2.20) comments

On 6.4.17 I submitted a FOIA Request to RMBC for a copy of any information relating to a comment: "*I shared this with DLT and it was agreed that we should seek some independent, expert guidance on the content*".

Please see: GRC 03 (20.1.21) RMBC FOIA Request 6.4.17

Two related FTT Decisions give a detailed back ground to my attempts to get to the truth:

GRC 04 (20.1.21) FTT EA-2018-0086 2.5.19 GRC 05 (20.1.21) FTT EA-2018-0090 2.5.19

I will be making a separate submission about the RMBC response to FTT EA-2018-0090.

Following by FOIA Request on 6.4.17 and the two FTT Decisions, on 21.5.19 RMBC stated:

"There is no information held by the Council and therefore there is no information to provide."

Please see: GRC 06 (20.1.21) RMBC Response to EA-2018-0086 (FOI-21-7) 21.5.19

I asked for a review. Please see:

GRC 07 (20.1.21) Request to RMBC for Internal Review of FFT EA-2018-0086 Response (13.6.19)

In my view the response by Paul Vessey, Head of information Management on 8.8.19 was seriously inadequate. Please see:

GRC 08 (20.1.21) RMBC Internal Review Response EA-2018-0086 FOI-21-17 8.8.19 I complained about the response. Please see:

GRC 09 (20.1.21) Complaint to RMBC 27.9.19

RMBC refused to look into my complaint. I wrote to the FTT on 21.10.19. Please see:

GRC 10 (20.1.21) Letter to the FTT (EA-2018-0086) 21.10.19

I received a response on 28.10.19. Please see:

GRC 11 (20.1.21) GRC re Letter on 21.10.19 to the FTT (EA-2018-0086) (28.10.19)

Meanwhile the IC has made a decision about a separate FOIA Request to RMBC. I think the findings are very pertinent and strongly evidence the contempt RMBC holds for the FTT and the FTT decisions.

Please see:

GRC 12 (20.1.21) IC Decision Notice - IC-48333-B0H9 dated 21.9.20"

25. RMBC submit that the application for certification falls at the first hurdle and should be dismissed because the alleged act of contempt is not set out with sufficient clarity and particularisation such that it leaves RMBC in the position of not knowing the case it has to meet. I reject this submission.

26. The fundamental question is whether a reasonable person in the position of the alleged contemnor, having regard to the background against which the committal application was launched, would be in any doubt as to the substance of the breaches alleged. As Cockerill J said at [80] of her judgment in Deutsche Bank AG v Sebastian Holdings Inc [2020] EWHC 3536 (Comm), after a thorough review of the authorities:

"…. The Application Notice needs only to set out a succinct summary of the

claimant's case, to be read in the light of the background known to the parties: it is for the evidence to set out the detail…"

27. In my conclusion, in the present case RMBC could have been in no doubt that the case it had to meet was that its response that the information was not held, was untrue. To put it another way, the case against RMBC is that it failed to comply with the terms of the Tribunal's substituted Decision Notice in EA/2018/0086 because, contrary to its statement, it held relevant information and failed to disclose it.

28. Moving on, the applicant's case is reliant upon the drawing of inferences from such circumstantial facts and matters as he is able to prove. In particular, he seeks to make out his case by asking the Tribunal to draw appropriate inferences from the manner in which RMBC has conducted itself in relation to other requests for information, asserting in doing so that "*there is strong evidence of a culture at RMBC that strongly persistently resists providing information. …If there is a rationality in the approach taken by officers at RMBC, evidence strongly suggests that the rationally is designed to provide as little information as possible and, on occasions, to delay providing information as long as possible.*".

29. In this regard, the applicant draws some support from the following paragraphs of the Tribunal's decision in EA/2018/0086:

> "[99] Further, the Tribunal considers that RMBC's response document of 1 March 2018 [0086/89-93] is somewhat mealy – mouthed. In section 4.1, for instance, the concession is made that on some Internal Reviews further information "may have been identified", but then this is excused or explained by the need for clarification of the "complex information requests"
>
> [100] Firstly, there is no "may have" about it. It is clear that further information was provided on Internal Review. In one instance, the review of request 740-16, on 2 February 2017, resulted, 4 months or more after the request was made, in the release of emails passing between the Interim Deputy Strategic Director following amendments made by Commissioner Manzie, and an email header not provided in response to the requests made in September and October 2015, because of "human error". Additionally, in Linton Steele's Internal Review of January 2016 further information was disclosed. The Tribunal notes that despite the Appellant's references to it, and inclusion in various documents he has submitted, a copy of this particular review does not appear in the bundle for this appeal at all.
>
> [101] Further, the Tribunal would like to address the oft – repeated assertion by RMBC that the Appellant's requests were "complex". They were not. They were often no more than a paragraph. Their subject matter encompasses a relatively short timescale, from March 2015 to October 2015, and a single issue, what was the reason that RMBC decided not to distribute the 1500 copies of Voices that it had purchased? The information that the Appellant has been seeking is simply who took that decision and why? Any complexity that has arisen, it seems to the Tribunal has arisen because of the piecemeal and unsatisfactory manner in which information has been elicited from RMBC. This has inevitably led to a train of

further enquiry. RMBC can hardly complain when the Appellant raises a further request because a piece of information that it has disclosed suggests that there may be more information that has not been disclosed."

30. At paragraph 6 of his written submissions of 14 May 2021, the applicant provides a summary of 28 examples said to be 'evidence' of RMBC's *"determined effort to prevent [him] obtaining information."*, and at the hearing the applicant carefully took the Tribunal through documentation relating to what were said to be four occasions when information later came to light which ought to have been, but was not, disclosed by RMBC in response to requests for information.

31. The applicant also sought to call two witnesses in support of his assertion that RMBC had previously failed to disclose information that it held. However, neither the Tribunal nor the respondent had been provided with witness statements from these witnesses and, in all the circumstances, I concluded that it was not fair and just to permit the applicant to call such witnesses. The applicant did not seek an adjournment in order to prepare and serve such statements and, in any event, it is highly unlikely that the witnesses could have materially assisted the Tribunal - it not being said that either witness had any evidence to give directly on the issue of whether the information that is the subject of the instant dispute, is held by RMBC.

32. Mr Fitsimmons did not dispute that RMBC had previously responded inaccurately to information requests, and that information which had not been provided in response to such requests had later come to light. He accepted that RMBC had not performed as it should have done in relation to other information requests, but asserted that the evidence did not disclose dishonesty or a cover-up by RMBC, nor was there any direct evidence to support a contention that RMBC had breached the Tribunal's Substituted Decision notice in EA/2018/0086.

33. Given what is said above, I accept that on numerous occasions in the past RMBC have failed to disclose information that it ought to have disclosed. That such errors came to light has in large part been due to the applicant's diligence and persistence in pursuing information. I do not accept, however, that the applicant has demonstrated to the required standard that RMBC have acted dishonestly in this regard in the past.

34. I reiterate that which I have already said, there is no direct evidence before me that the information sought in request FOI 21-17, which the subject of the Tribunal's substituted Decision Notice in EA/2018/0086, is held by RMBC. I observe once again that the Tribunal in EA/2018/0086 cautioned that such information may not be held (See [109]). However, contempt can be proved by way of the drawing of inferences from circumstantial fact but, as Teper J put it in JSC BTA Bank v Ablyazov [2012] EWHC 237 (Comm), *"where a contempt application is brought on the basis of almost entirely secondary evidence the court should be particularly careful to ensure that any conclusion that a respondent is guilty is based upon cogent and reliable evidence from which a single inference of guilt, and only that inference, can be drawn"*. This reflects the high burden on an applicant in proving

a contempt.

35. Despite the evidence produced by the applicant of circumstances in which RMBC have failed to disclose information in the past and the acceptance by Mr Fitzimmons of such occurrences, in my view it is not possible to infer from these occurrences, when taken in conjunction with the evidence before me as a whole, that the instant case discloses another occasion on which RMBC hold the relevant information but have stated that it does not. For these reasons, I conclude that the applicant has not demonstrated beyond reasonable doubt that RMBC have failed to disclose information that was required to be disclosed pursuant to the Tribunal's substituted Decision Notice in EA/2018/0086.

36. For the sake of completeness, and although this is not how the applicant put his case at the hearing, I also conclude that the applicant has not demonstrated beyond reasonable doubt (or even close to it) that either RMBC's statement in its response of 1 May 2019 that *"checks were made to ascertain whether this information was held...For assurance, it can be confirmed that no relevant information relating to this request has at any point been deleted and/or destroyed"*, or the assertion in its internal review that *"All information has been exhaustively checked by multiple officers on numerous occasions"*, is untrue.

37. Consequently, for these reasons I find that it has not been demonstrated that RMBC breached the terms of the substituted Decision Notice in EA/2018/0086 and I do not accede to the applicant's application to certify an offence to the Upper Tribunal in this regard.

EA/2018/0090 (EJ/2021/0090)

38. In EA/2018/0090, the applicant appealed against a Decision Notice issued by the Information Commissioner on 28 March 2018, in which she determined that RMBC had correctly applied section 42(1) of FOIA on the grounds that the information requested was exempt by reason of it being information in respect of which a claim to legal professional privilege could be maintained.

39. The factual matrix, which led to the Tribunal allowing the applicant's appeal and issuing a substituted Decision Notice, is set out in paragraphs 9 to 87 of its decision of 2 May 2019. It is well known to the parties, and I do not set that background out again herein. I confirm that I have had full regard to it.

40. The Tribunal's substituted Decision Notice reads:

> "The public authority is required, within 20 working days of receipt of this substituted Notice, to provide to the Appellant the information requested in his FOIA request of 2 February 2017, ref. No. 1124-16, limited to information falling within the scope of that request, and excluding any emails passing between members of RMBC's Legal Department on 15 September 2016."

41. Request No. 1124-16 relevantly reads:

"Please can I have all of the email exchanges and any other written information arising from my Request for an Internal Review on 29 June 2016 **and** the reinstatement of this request on 26 October 2016.

It is particularly important to have any email exchanges that involved **Sumera Shabir, Eira Owen, Christine Hotson and Ian Thomas.** It is not necessary to include any emails sent to me." (applicant's emphasis)

42. The Tribunal also made the following pertinent observations of the request for information, at [97] – [98] of its decision:

"[97] Not all of the closed material, it should be noted, in our view falls within the scope of the Appellant's request, which relates to "*email exchanges and any other written information arising from my Request for an Internal Review on 29 June 2016* ***and*** *the reinstatement of this request on 26 October 2016"*.

[98] This is very narrow in its scope, and the original request of which a review was sought related only to the request for metadata, made as part of the request submitted on 26 October 2015. Accordingly material which relates, for example, to the Appellant's further FOIA request made on 30 September 2016, and how RMBC were to respond to it, falls out with this request in our view. Only some of the documentation in the closed material before the Tribunal therefore can be said to fall within the scope of the request. In particular, we do not consider that communication passing between Linton Steele and Eira Owen, which relates to the Appellant's next FIOA request of 15 September, a new request, falls within the scope of the Appellant's request."

43. In response to the substituted Decision Notice, RMBC sent, under cover of a letter of 6 June 2019, a redacted copy of the 133 page bundle of email exchanges which had formed the closed bundle before the Tribunal in EA/2018/0090. The covering letter explained the reasons behind each of the redactions.

44. By way of a letter of 14 June 2019, the applicant sought an internal review stating, *inter alia*:

"RMBC officers had more than 28 months, from 2 February 2017 to 6 June 2019, to gather and check the information I was sent on 6 June 2019. I am confident that an independent person looking at the information would very quickly notice omissions. I wrote to Mr Ulyatt on 12 June 2019 giving him an example of an apparent omission from page 58 and offered to meet. On closer inspection it appears there were at least two versions of the chronology referred to on page 58. This is only a single example. Another example is on page 65 where Sumera Shabir writes "I have attached".

Of considerable concern to me is the potential omission of information relating to Ian Thomas and documents prepared ahead of the important meeting on 12 August 2016. The written questions and answers brought to that meeting are not included in the bundle and it may be that information leading to the compilation of these questions and answers is missing."

45. RMBC responded to this request on 8 August 2019, as follows:

> "As stated above, EA/2018/0090 relates to the request FOI-600-17. The Council's response on 6th June 2019 provided you with a document bundle of 133 pages, some of which were redacted. This was the bundle of emails required to be released by the Substituted Notice for EA/2018/0090.
>
> The letter received from you on 14th June 2019 wished for an Internal Review as you believe the Council is withholding and/or has omitted information. This was namely being three areas of focus:
>
> 1. You believe the chronology referenced has been omitted ("appears there were at least two versions of the chronology")
> 2. You believe there are omitted documents relating to Ian Thomas ("the potential omission of information relating to Ian Thomas")
> 3. Redaction of names ("request that a careful checking of the redactions of names is undertaken and a more detailed explanation give for each of these").
>
> In regard to point 1 above then I have made enquiries and have been advised that you have already been provided a response to the points you raise regarding the chronology. I have seen a copy of a letter sent to you dated 19th June 2019 and this letter states:
>
> *"You also asked "should the "attached chronology" not have been sent to the ICO and then on to the FTT?". The chronology was not provided, nor asked for by the FTT, as it is not relevant to the scope of the request. The Council provided all relevant and held information to the FTT for their assessment in respect of EA/2018/0090. On evaluation of that material the First-tier Tribunal issued their Notice and the Council has complied with that Notice. The Council acknowledges the enquiry has continued for some time to reach an outcome, however the Council has complied with the Notice and provided all information in respect of EA/2018/0090.*
>
> *That said, you do ask to "…have the "attached chronology"…". The Council will not be providing you this document as part of the response for EA/2018/0090 for the reason previously stated, but if you wish for a copy then this can be processed as a Right of Access Request. Please confirm if this is the case and it will be handled via the relevant process."*
>
> As that letter addressed the points raised regarding the chronology then this review only refers you back to that letter and the advice given, as I agree with that advice. I acknowledge that the chronology is mentioned within the bundle of correspondence provided to you as part of FOI-600-17 (EA/2018/0090), however the chronology itself is not relevant to the original request asked and is therefore out of scope (i.e. the chronology did not arise from your Request for an Internal Review on 29 June 2016). For clarity, as not in scope, I have not made further enquiries about the chronology.
>
> In regard to Point 2 then I have to advise that there is no further information to provide. The Council has provided all information within scope of the original request. I have made enquiries and to the best of my knowledge the requested information has been provided. The searches taken were appropriate and the results of those searches have been provided to you in the bundle (subject to

redactions). The bundle provided to you was the same as that which was provided to the Information Commissioner's Officer and the First Tier Tribunal for their assessments prior to the hearings. Therefore to omit documents from the bundle provided to you would have also been to omit documents from them. I have had it confirmed by relevant officers that no information has been omitted, intentionally or unintentionally, from any party.

In terms of Point 3 you raise concerns about the redaction of the information bundle. The letter of RMBC to you dated 19th June 2019, same letter as referenced above, stated why some redaction had occurred (as you had queried this in a letter dated 6th June 2019). This was further to the explanations provided in the original response letter for FOI-600-17 and EA/2018/0090 sent

However, in this case you specifically query the redaction of names. Therefore I have assessed the bundle in terms of redaction, alongside relevant FTT comments. I consider the redaction of names to be appropriate. There does not appear to have been any redaction of names other than where appropriate to redact (i.e. third parties and/or those officers of a non-senior position (other than those forming the scope of your request)).

Conclusion
Whilst I appreciate the possible inconvenience that may have been caused by the delay in replying to this Internal Review, I can only advise that there is no further information to provide. I have considered the three queries you raised that from this Internal Review, however I uphold the original response and support the view that the information bundle provided was fit for purpose."

46. On 21 January 2021, the applicant lodged a *"Notice of application for Certification to the Upper Tribunal for Contempt of Court"* relying upon the following grounds:

"Despite a First-tier Tribunal ruling codes as GRC 04 (27.1.21) (FTT 2018-90) 2.5.19, RMBC have continued to fail to provide "all of email exchanges and any other written information arising from my Request for an Internal Review on 29 June 2016 and the reinstatement of this request on 26 October 2016".

It is very clear, for example that a number of attachments to the email exchanges that involved Sumera Shabir, Eira Owen, Christine Hotson and Ian Thomas have not been provided.

As stated on 14.6.19 in my request for a review of RMBC's response following the FTT ruling:

"Of considerable concern to me is the potential omission of information relating to Ian Thomas and documents prepared ahead of the important meeting on 12 August 2016. The written questions and answers brought to that meeting are not included in the bundle and it may be that information leading to the compilation of these questions and answers is missing".

Please see timeline and summary: GRC 01 (27.1.21) (FTT 2018-90) Case for contempt of court by RMBC"

47. The applicant made a further FOIA request on 4 February 2021, in response to which RMBC provided the attachments to the 133 page bundle of email exchanges that had previously been disclosed to the applicant i.e. the material documents referenced in the applicant's first ground in the instant application. The attachment to page 10 of 133 page bundle comprises of the questions and answers which Ian Thomas took to the meeting on 12 August 2016 i.e. the document referenced in the applicant's request for an internal review of 14 June 2019 and his second ground in the instant application.

48. What then are the issues for consideration in the instant application? The applicant asserts that the attachments to the email exchanges contained within the 133 page bundle (that was served on 6 June 2019 in response to the substituted Decision Notice) ought to have been, but were not, disclosed at the same time. RMBC have never acknowledged that such attachments ought to have been disclosed in accordance with the substituted Decision Notice and they were only disclosed because the applicant had the inclination to make another FOIA request in order to obtain them.

49. RMBC submits that it did comply with the substituted Decision Notice. It is said, in particular, that "*the term used in the request and the Tribunal's substituted decision notice was "email exchanges. The Council acted in good faith on the basis that the term did not include attachments.*" Mr Fitzsimmons reminds the Tribunal that for committal proceedings to succeed the Tribunal's order must have been expressed in clear, certain, and unambiguous language. He submits that neither the Commissioner nor the Tribunal, who had each seen the 133 page bundle, suggested to the RMBC that the attachments to the email exchanges therein should be disclosed. RMBC did not view the attachments as falling within the scope of the request.

50. The Information Commissioner states that although she has no reason to doubt RMBC acted in good faith, in her view the reference in the Tribunal's substituted Decision Notice to "*email exchanges*" would include attachments to those emails.

51. The applicable legal principles that can be drawn from the authorities in relation to construction of Court Orders and findings of contempt in relation to breach of an Order, are as follows:

    (i) The terms in which an Order was made are to be restrictively construed (see Federal Bank of the Middle East v Hadkinson [2000] 1 WLR 1695).
    (ii) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (Hadkinson) and the reasons given by the Court for making the Order at the time that it was made (Sans Souci Limited v VRL Services Limited [2013] UKPC 6).

52. In my conclusion, having applied the principles identified above, there is nothing even remotely ambiguous or unclear about the applicant's request, or the substituted Decision Notice.

53. Whilst the applicant's request and the Tribunal's substituted Decision Notice use the term "*email exchanges*" or "*emails*", as identified at [57] of RMBC's written submissions, neither restricts itself to the disclosure of such documents. The substituted Decision Notice required RMBC to provide "***the information requested*** *in [the applicant's] FOIA request of 2 February 2017, ref. No. 1124-16, limited to information falling within the scope of that request…*" (my emphasis). The applicant's FOIA request No. 1124-16 requested, *inter alia*, "*all of the email exchanges and* ***any other written information*** *arising from my Request for an Internal Review on 29 June 2016* and *the reinstatement of this request on 26 October 2016.*" (my emphasis)

54. If either can be said to be ambiguous (and I conclude that it cannot), then that ambiguity manifestly does not extend to the question of whether the request was limited to "*email exchanges*". The natural and ordinary meaning of the language of the FOIA request, and the substituted Decision Notice, clearly leads to the conclusion that something more than a search of the "*email exchanges*" was required. No reasonable person reading the terms of FOIA request No. 1124-16, or the Tribunal's substituted Decision Notice, would understand that it was only the "*email exchanges*" that were being requested by the applicant or that it was only the "*email exchanges*" which the Tribunal directed should be produced.

55. This conclusion is only re-enforced by reading the Tribunal's decision as a whole. In particular, at [49] the Tribunal summarises the applicant's request in the following terms (my emphasis):

> "Thus the information requested by the appellant relates to a period between 29 June 2016 and 2 February 2017, **and relates particularly to information passing between the four named individuals**, and relates to how RMBC proposed to deal with the Appellant's request for an internal review of what had been its decision in relation to his request of 26 October 2015, given reference no. 714 (or sometimes 600) by RMBC." (my emphasis)

56. The conclusion above is not, however, sufficient of itself for the applicant to meet the burden of demonstrating that RMBC did not comply with the Tribunal's order, the applicant must also show beyond reasonable doubt that RMBC failed to provide a document or documents that it ought to have provided in accordance with the terms of the substituted Decision Notice. It cannot be assumed that all, or indeed any, of the attachments to the email exchanges in the 133 page bundle fall within the scope of the request or the Tribunal's substituted Decision Notice, and I observe that, at [58] of RMBC's written response, Mr Fitzimmons submits that a number of the attachments pre-date the request of 29 June 2016 and, consequently, "*did not arise from the request for an internal review on 29 June 2016*"

(my emphasis). I concur with Mr Fitzsimmons on this. I also observe that many of the attachments are either documents originating from the applicant or are letters to the applicant from RMBC.

57. The bundle of attachments, including the embedded attachments, runs to 274 pages, and the applicant has not sought to take the Tribunal through the documents therein in support of the assertion that each is within the scope of the Tribunal's substituted Decision Notice. The applicant's general position is that all of the attachments are in scope, but plainly that is not so. It is not for the Tribunal of its own motion to undertake what would be the extensive exercise of analysing each of the 274 pages and cross referencing this to the 133 pages of email exchanges, particular given the Tribunal's previous observations in EA/2018/0090 that not all of the 133 page bundle required disclosure in order to comply with its substituted Decision Notice. Whilst the Tribunal plainly has an interest in ensuring that its decisions are complied with, it is for the applicant to prove his case and not for the Tribunal to make his case for him.

58. Having said that, one particular attachment has been consistently highlighted by the applicant; for example, in his request for an internal review of 14 June 2019, in his grounds in support of the instant application and in case management submissions made to the Tribunal - that being the attachment to the email exchange at page 10 of the 133 page bundle, *"the questions and answers which Ian Thomas took to the meeting on 12 August 2016"* (found at page 20 of the 274 page bundle). I am satisfied on the information before me that this document is within the scope of the Tribunal's substituted Decision Notice.

59. Insofar as the applicant made a discrete submission to the effect that there is other information i.e. information not included within the 133 page bundle or the attachments thereto, that falls within the scope of the Tribunal's substituted Decision Notice but which has not been provided to him, I reject that submission. The evidence before me does not even begin to make a case in this regard, and certainly does not reach the high threshold required in an application of this sort.

60. Drawing the above strands together, I have found that the terms of the substituted Decision Notice were clear and unambiguous. It is not in dispute that RMBC were aware of the terms of the Notice or that RMBC, despite not being a party to EA/2018/0090, were bound by it. I have also found that the terms of the substituted Decision Notice did not restrict disclosure to "*email exchanges*" arising from the Request for an Internal Review on 29 June 2016 and the reinstatement of this request on 26 October 2016, but also included *"any other written information"* arising from the Request for an Internal Review on 29 June 2016 and the reinstatement of this request on 26 October 2016. The "*questions and answers which Ian Thomas took to the meeting on 12 August 2016"* were held by RMBC, including as the attachment to an email exchange at page 10 of the 133 page bundle, and fall within the scope of *"written information arising from my Request for an Internal Review on 29 June 2016 and the reinstatement of this request on 26 October 2016"*. This

document should, therefore, have been provided to the applicant in compliance with the Tribunal's substituted Decision Notice. This document was not produced in compliance with the substituted Decision Notice and, despite the applicant drawing this specific fact to the attention of RMBC in his internal review request of 14 June 2019, it was still not produced in response thereto or at any time in response to the substituted Decision Notice. The document was only produced in response to a further FOIA request made by the applicant in 2021.

61. Given the above findings, I conclude that RMBC breached the terms of the substituted Decision Notice by failing to provide the applicant with a copy of the document referred to above within 20 working days of receipt of the Notice.

62. Civil contempt does not require an intention to interfere with the administration of justice, it is enough that the alleged contemnor was aware of the order, that the terms of the order bound the contemnor and that the contemnor disobeyed those terms. Where the Tribunal concludes that the party in contempt has acted on the basis of an interpretation of the Order which was not reasonably arguable, and I accept that this is the position in the instant case rather than the wilful disregard by RMBC that the applicant contends for, it is not necessary for an applicant to also show that the breach of the Order was committed with actual knowledge. Christopher Clarke J put this point clearly in Masri v Consolidated Contractors [2011] EWHC 1024 at [155]:

> "In my judgment the power of the court to ensure obedience to its orders for the benefit of those in whose favour they are made would be inappropriately curtailed if, in addition to having to show that a defendant had breached the order, it was also necessary to establish, and to the criminal standard, that he had done so in the belief that what he did was a breach of the order – particularly when a belief that it was not a breach may have rested on the slenderest of foundations or on convenient advice which was plainly wrong."

63. There is an important public interest in protecting the administration of justice, and this includes the need for compliance with the orders of the Tribunal. The Tribunal has an interest, on behalf of the community at large, in ensuring that its orders are not disobeyed. In my conclusion, for the reasons given above, if these proceedings were proceedings before a court having power to commit for contempt, the failure by RMBC to comply with the Tribunal's substituted Decision Notice issued in EA/2018/0090 would constitute contempt of court.

64. The next issue I must consider is whether, given the finding in the preceding paragraph, I should exercise my discretion to certify the offence to the Upper Tribunal. In reaching my conclusion on this issue I have taken account of the circumstances of the case as a whole. This includes, but is not limited to, the fact that my finding as to breach relates only to one document and that this document has now been produced to the applicant. In such circumstances, the coercive effect of contempt proceedings on RMBC is not a matter that need concern me.

65. It is also relevant, however, that the applicant specifically raised issue with the failure to provide a copy of the document incorporating the "*questions and answers which Ian Thomas took to the meeting on 12 August 2016*" in his request for an internal review over 2 years ago, and that it was not until March 2021 that the document was eventually provided, and even then not as a consequence of the Tribunal's order but rather in response to a subsequent FOIA request.

66. I have concluded above that I am prepared to accept that RMBC did not act wilfully in breaching the Tribunal's Notice, this being despite the striking absence of witness evidence from RMBC. In my view, the fact that the relevant document (and all other attachments to the 133 page bundle) were provided this year in response to a further FOIA request, as opposed to a response to the Tribunal's substituted Decision Notice, supports Mr Fitzsimmons' submission that RMBC acted in good faith in responding to the Tribunal's Decision Notice. Of course, there is little room between this finding and my finding that the terms of the Tribunal's Notice were clear and unambiguous but, nevertheless, it is this space in which I conclude RMBC resides in the instant proceedings.

67. As already alluded to above, the Tribunal has an interest in ensuring that there is compliance with its orders. Punishment of those who do not comply with its orders clearly furthers that interest. Were the Upper Tribunal also to conclude that RMBC had acted in contempt, the nature of any punishment would be entirely a matter for that Tribunal. However, even a public finding that RMBC breached the Tribunal's order, and imposition of no further punishment, would further the public interest in the administration of justice and is likely to cause others to more diligent in their response to Decisions of this Tribunal.

68. In all the circumstances, given the clear and prolonged nature of the breach, and despite such breach not being wilful and having accepted that the relevant document has now been provided, I conclude that it is appropriate in furtherance of the public interest described above to exercise my discretion to certify a contempt to the Upper Tribunal.

Signed

M O'Connor
Upper Tribunal Judge O'Connor

Dated: 22 June 2021

Promulgated: 29 June 2021