NCN: [2025] UKUT 420 (AAC)
Appeal No. UA-2025-000261-GIRF

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

Ms Penny Bence

Applicant

- v -

(1) Cornwall Council
(2) The Information Commissioner

Respondents

Before:	**The Hon. Mrs Justice Heather Williams DBE**
Hearing date:	**20 November 2025**
Mode of hearing:	**In person**

Representation:

Applicant:	Mr Andrew Sharland KC, instructed by Wilkin Chapman Rollits
First Respondent:	Mr Mark Beard and Ms Angelica Rokad, instructed by Cornwall Council Legal Service
Second Respondent:	Mr Oliver Jackson, instructed by the Information Commissioner

On certification by:

Tribunal:	First-tier Tribunal (General Regulatory Chamber)
Tribunal Case No:	FT/EJ/2024/0015
Tribunal Venue:	Determined on the papers
Decision Date:	4 March 2025, as amended by the decision of 24 April 2025

SUMMARY OF DECISION

INFORMATION RIGHTS

The First-tier Tribunal transferred this case to the Upper Tribunal pursuant to a contempt certification issued under section 61(4) Freedom of Information Act 2000 ("FOIA"). The certification identified the First Respondent's contempt "offences" as non-compliance with a Substituted Decision Notice ("SDN") promulgated on 14 October 2024 and non-compliance with the First-tier Tribunal's order of 11 February 2025.

The Upper Tribunal inquired into the alleged contempt pursuant to section 61(5) FOIA.

During the hearing before the Upper Tribunal, the First Respondent admitted it had committed a contempt in not complying with the SDN within the prescribed 35 day period and, specifically, not complying with paragraph 2(a) of the SDN until 10 March 2025 and paragraph 2(b) of the SDN until 23 July 2025.

In terms of the allegations that remained in dispute, the Upper Tribunal determines that the First Respondent was in breach of paragraph 2(a) of the SDN until 23 July 2025 and that this amounted to a further contempt. However, it has not been shown that the First Respondent was in breach of the SDN after 23 July 2025 or that it had breached the First-tier Tribunal's 11 February 2025 order.

The Upper Tribunal decides that the appropriate sanction is the publication of this decision, which details the highly unsatisfactory nature of the First Respondent's response to the SDN, along with an award of costs in the Applicant's favour in the agreed sum of £35,000.

The Upper Tribunal also gives guidance as to the respective roles of the First-tier Tribunal and the Upper Tribunal in relation to certifications for contempt under the FOIA provisions and addresses the requisite elements for a finding of civil contempt (breach of an order), procedural safeguards and factors relevant to sanction.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is that:

1. **The First Respondent was in contempt in failing to comply with paragraphs 2(a) and 2(b) of the First-tier Tribunal's Substituted Decision Notice of 14 October 2024 within the stipulated 35 day period or until 23 July 2025.**
2. **It has not been shown that the First Respondent was in breach of the Substituted Decision Notice after 23 July 2025.**
3. **It has not been shown that the First Respondent was in breach of the First-tier Tribunal's order of 11 February 2025.**
4. **The appropriate sanction for the contempt identified in paragraph 1 is the publication of the findings of the First Respondent's contempt as set out in this decision and an order that the First Respondent do pay the Applicant's costs in respect of these proceedings before the Upper Tribunal in the agreed sum of £35,000.**

REASONS FOR DECISION

Introduction

1. On 1 December 2024, Ms Penny Bence, applied to the First-tier Tribunal (General Regulatory Chamber) ("the FTT") to certify a contempt in respect of Cornwall Council's failure to comply with the FTT's Substituted Decision Notice promulgated on 14 October 2024 ("the SDN"). The certification order, dated 4 March 2025, was made by District Judge Moan sitting as a Judge of the FTT, pursuant to the power conferred by section 61(4) of the Freedom of Information Act 2000 ("FOIA"). Pursuant to section 61(5), where an offence is certified under subsection (4), the Upper Tribunal may inquire into the matter and 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. By her further order of 24 April 2025, Judge Moan refused the Council's application to strike-out or set aside the certification, but she amended its scope. The potential contempt identified in this amended certification was:

    a. Not responding to the SDN within 35 days nor complying with that decision notice; and
    b. Not complying with the FTT's order dated 11 February 2025 requiring the Council to file a response.

2. When issuing case management directions on 16 October 2025, I identified the issues for the hearing before me as follows:

    a. Whether any part of the First Respondent's conduct amounted to a contempt;
    b. If so, whether a sanction should be imposed; and
    c. If so, what level of sanction should be imposed.

3. The First Respondent had not appealed against the FTT's certification decision and, in the circumstances, Mr Beard accepted that he was not in a position to challenge this. I indicated at the hearing that I would proceed on the basis that the certification was properly made.

4. The SDN included the following:

    "2. The Council shall take the following steps within 35 days of the date this decision notice is sent to the Council by the tribunal:
        a. Respond to part two of the appellant's revised request sent to the Council on 10 February 2023 by either disclosing the requested information or providing a refusal notice under the EIR.
        b. Disclose to the appellant an amended redacted version of the requested information with the following information unredacted:
            i. The title numbers and screenshots of land registry searches.

ii. The names of the individuals specified in paragraph 1 of the closed annex.
iii. Complaint reference numbers.
iv. The 'other information' specified in paragraph 3 of the closed annex."

5. Although it filed written submissions setting out its (then) position, the First Respondent did not file any witness statements in these proceedings. I confirmed at the outset of the hearing that the First Respondent was not obliged to provide evidence in its defence; that it could give oral evidence if it wished to do so; that if oral evidence was given, there was a right to remain silent and to decline to answer any question which might incriminate the First Respondent, but the Tribunal could draw adverse inferences if this right was exercised. Mr Beard confirmed that his client did not seek to give oral evidence. I also indicated that if the First Respondent admitted the contempt and wished to apologise this could reduce the seriousness with which the Tribunal viewed the matter.

6. Whilst accepting that it had not complied with the SDN within the prescribed 35 day period, up until the 20 November 2025 hearing the Council denied that it had committed a contempt. However, during the hearing, after taking instructions during the lunchtime adjournment, Mr Beard indicated the First Respondent accepted that:

    a. The Council's failure to comply with paragraph 2a of the SDN until 10 March 2025 was a contempt; and
    b. The Council's failure to comply with sub-paragraphs 2b(i) and (iii) until 23 July 2025 was a contempt.

7. The scale of the contempt was not agreed. The following remained in dispute between the Applicant and the First Respondent:

    a. Whether the Council continued to be in breach of paragraph 2a of the SDN after 10 March 2025; and
    b. Whether the Council had failed to comply with the FTT's order of 11 February 2025 and, if so, whether this amounted to a contempt.

8. In terms of sanction, Mr Sharland KC indicated that as she was aware that the Council was a public body with limited resources, his client did not seek the imposition of a period of imprisonment on the First Respondent's officers or confiscation of assets or a fine. He submitted that an appropriate sanction would be this Tribunal's public finding that the Council was in contempt, along with an award of costs against the Council on an indemnity basis.

9. Once the contempt was admitted, Mr Beard accepted that a public finding of contempt was inevitable and he accepted that his client should pay Ms Bence's legal costs. However, he disputed that this should be on an indemnity basis. As the First Respondent had not had much opportunity to prepare a response to the indemnity costs point or to address the contents of the Statement of Costs relied

upon by the Applicant, I gave the parties the opportunity to make post-hearing written submissions on these issues.

10. In the event, the parties agreed that the Council would pay Ms Bence's costs in the sum of £35,000. Accordingly, it is unnecessary for me to decide whether I have the power to award indemnity costs and, if so, whether I should exercise the power to do so in this instance.

11. The Second Respondent adopted a largely neutral position, save for arguing that it was important for a sanction to be imposed in light of the admitted contempt, in order to reflect the seriousness of this matter.

12. The structure of this decision is as follows:-

Factual background and the First-tier Tribunal's decision

The request for information

13. In April 2020 the Council installed a single removable bollard at Chynance, Portreath, Cornwall near to Ms Bence's residential property. In April 2021, the Council replaced this single bollard with four fixed bollards, which had the effect of preventing vehicular access to certain properties including Ms Bence's. The Council's position was that the bollards were installed to prevent illegal vehicular use of the footway.

14. Ms Bence was concerned about this matter and on 5 January 2023, she made a request to the Council for information regarding the installation of the fixed bollards, pursuant to the Environmental Information Regulations 2004 ("EIR"). On 6 February 2023, the Council refused the request on the basis that it was manifestly unreasonable within the meaning of regulation 12(4)(b) EIR, because of the burden of complying with it.

15. On 10 February 2023, Ms Bence refined her request for information. She sought:

> "….all communications, including attachments, between Highways & Legal, relating to the Chynance bollards & rights of way for Chynance properties, odd numbers 23 to 42 between April 2021 & September 2021. These are the last 3 points in my original FOIA request but with significantly reduced date range.
>
> If time limits allow, I would then like to receive the information on the initial complaints & considerations leading to the installation of the fixed bollards in Chynance from approximately April 2020 to April 2021."

16. The Council initially withheld information that fell within the scope of the first part of this request in reliance upon section 42 FOIA (legal professional privilege), but following an internal review it withheld the information pursuant to regulation 12(5)(b) EIR (adverse effect on the course of justice). The Council did not respond to the second part of Ms Bence's request at all at this stage.

17. In a decision notice dated 9 October 2023, the Information Commissioner upheld the Council's refusal to disclose the first limb of the requested information under regulation 12(5)(b) EIR.

Appeal to the FTT and the 31 May 2024 decision

18. Ms Bence appealed the Information Commissioner's decision to the FTT on various grounds. She also drew attention to the outstanding information in respect of the second limb of her request.

19. The appeal was determined on the papers by Tribunal Judge Sophie Buckley, sitting with Members and allowed in part. As regards the first limb of Ms Bence's February 2023 request, the FTT upheld the Council's reliance on regulation 12(5)(b) in relation to some documents, but held that this provision did not apply to pre-existing documents or pre-existing emails attached to or forwarded by the communications between the Council and its legal department. The FTT allowed the First Respondent to further consider the documents it had found were not within regulation 12(5)(b), indicating it would issue a SDN after it had determined the applicability of any other exceptions the Council relied upon.

20. At paragraph 3 of its Reasons, the FTT indicated the basis upon which it had allowed the appeal in part. This included:

> "3.3 The Council was in breach of its obligations under EIR by failing to respond to part two of the appellant's revised request sent to the Council on 10 February 2023."

21. The FTT addressed this aspect at paragraph 45 of its Reasons, quoting the second limb of Ms Bence's 10 February 2023 request and then saying:

> "...In breach of its obligations under EIR the Council has not provided any response to this part of the request, either by disclosing the information under regulation 5 or by refusing the request under regulation 14. To this extent, the appeal is allowed."

22. At paragraph 47, the FTT indicated it had determined that it was appropriate to issue a SDN either requiring the Council to provide the requested information or to refuse it under regulation 14 EIR.

23. Accordingly, there was a clear finding as far back as May 2024 that the Council had failed to respond to the second limb of Ms Bence's request and that this was a breach of its EIR obligations.

24. The FTT's reasoning on this limb of the request also including the following at paragraph 46:

> "Without deciding the matter, the tribunal observes that it is likely that the Council will hold some recorded information on the initial complaints and considerations that lead to the installation of the bollards. For example the tribunal notes that page A110 of the closed bundle appears to contain information relevant to this part of the request and appears to suggest that further recorded information may be held."

<u>The 14 October 2024 SDN</u>

25. The Council argued it was entitled to withhold information in the documents that the FTT had determined were not covered by regulation 12(5)(b) EIR, on the basis of regulation 5(3) (personal data of which the appellant is the data subject),

regulation 13(2A) (personal data of third parties) and regulation 6(1)(b) (information requested in a particular form or format).

26. In a decision dated 14 October 2024, the FTT concluded that the Council was not entitled to rely on regulation 6(1)(b), but was entitled to rely on regulation 5(3) to withhold Ms Bence's personal data and regulation 13 in relation to some, but not all, of the third party personal data.

27. By paragraph 2 of the SDN, the Council was ordered to take the steps I have set out at paragraph 4 above. Sub-paragraph 2(a) concerned the second limb of Ms Bence's February 2023 request and sub-paragraph 2(b) related to the first limb of her request.

28. The FTT sent the SDN to the parties (Ms Bence and the Information Commissioner) on 14 October 2024. The covering letter indicated that the Council were bcc'd into the FTT's email. The First Respondent accepts that the covering letter and the SDN were received at an email address of one of their employees and that this was an address that the Council had previously provided to the FTT. Accordingly, the date for complying with para 2 of the SDN was 18 November 2024.

29. On the same day, the FTT emailed the "Closed Annex" (referred to in the SDN) to the Information Commissioner and to the Council, using a different email address for the Council to the one to which it had sent the SDN. The covering email stated, "you will receive under separate cover the open decision to this appeal". The Closed Annex did not make reference to paragraph 2 of the SDN. The First Respondent's position is that its case officer examined the Closed Annex but was unaware of the receipt of the SDN, as the inbox the SDN was sent to was not regularly monitored at the time and the situation was compounded by officer absences. The case officer presumed that the FTT had yet to send out the SDN. I accept that this was the belief of those involved at the time, as it is consistent with the internal emails I was shown. It is not suggested that the Council checked the position with the FTT at this stage.

30. On 10 November 2024, Ms Bence emailed the Council referring to the fact that she was still awaiting the information the FTT had directed to be made available to her within 35 days of 14 October 2024. On 13 November 2024, the Council replied saying it was still waiting to hear back from the FTT as to which documents to release. This response also supports the proposition that the First Respondent was not aware of the SDN at this stage.

31. It is common ground that the First Respondent did not comply with either paragraph 2(a) or 2(b) of the SDN by the 18 November 2024 deadline and thus was in breach of the FTT's order from that point.

32. On 19 November 2024, Ms Bence (who did not have legal representation until recently) contacted the FTT asking what procedure she should follow in light of

the Council's non-compliance. She was told that the next course of action would be to make an application for contempt of court.

The contempt application and the 16 December 2024 directions

33. On 1 December 2024, Ms Bence submitted the contempt application to the FTT, using form GRC4. In section 4 of the form, she referred to the two parts of paragraph 2 of the SDN, indicating she had not received any information from the Council thus far.

34. On 16 December 2024, Judge Moan issued directions. She referred to the Applicant's contention that the Council had not responded within 35 days to the SDN. In light of the matters in dispute between the parties, it is necessary to set out parts of these directions in full (emphasis in the original):

> "5. The following issues fall for consideration by the Tribunal and should be the focus of the parties' evidence and submissions:
>
> **a. Is the Respondent guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute a contempt of court?**
>
> The Tribunal is likely to be assisted in the determination of the aforementioned issue by submissions on the following matters:
>
> i. Whether the terms of the [SDN] were sufficiently clear and unambiguous so as to be capable of founding a finding of contempt for breach thereof;
> ii. If so, what were the obligations imposed on the Respondent by the [SDN]?
> iii. Whether the acts of the Respondent were sufficient to comply with the decision of the Tribunal?
> iv. Does the Applicant have a right to complain to the Information Commissioner pursuant to section 50(1) of [FOIA] in relation to her assertion that the response to the [SDN] was not a sufficient response to their information request?
>
> **b. If the Respondent is "guilty of an act or omission in relation to the proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute a contempt of court", should the Tribunal exercise its discretion to certify a contempt?**
>
> The Tribunal is likely to be assisted in the determination of this issue by submissions on whether such a breach was accidental or wilful.
>
> 6. ....."

7. The Applicant is content for their application to be dealt with on paper. Any application for a face-to-face hearing should be made within 28 days of the issue of these directions.

8. The Respondent shall respond substantively both in submissions and, if so advised in written evidence by way of witness statements, to the applicant's allegations **within 28 days** of the date of issue of these case management directions."

35. The time for complying with paragraph 8 of these directions expired on 13 January 2025.

36. The 16 December 2024 directions were received by the Council on the same day. Internal emails from 18 December 2024 indicate that the Council was now aware of its non-compliance with the SDN. On 18 December 2024, Debbie Burton, the Information Governance Manager, emailed the FTT apologising for the failure to respond to the SDN, saying, "unfortunately it was sent during a period of annual leave within the team and subsequently overlooked". She added, "I confirm that Cornwall Council will now take action to comply with the decision". The email also asked that the FTT amend the email address contact details it held for the Council.

37. On 23 December 2024, the Council wrote to Ms Bence purporting to comply with the SDN and attaching 94 pages of documents. It is now accepted that this response did not address paragraph 2(a) of the SDN at all and overlooked sub-paragraphs (i) and (iii) of paragraph 2(b). Other than copying in the FTT to this communication, the Council did not file material in response to the 16 December 2024 directions.

The 11 February 2025 directions

38. Judge Moan made further directions on 11 February 2025. She referred to her earlier order of 16 December 2024 and the First Respondent's response to the FTT of 18 December 2024. She said that no further response had been received. It does not appear she was aware of the 23 December 2024 communication at this stage.

39. She ordered as follows:

> "5.The Respondent has 7 days from the date of receipt of this Order to either –
> (a) Comply with the directions dated 16th December 2025;
> (b) Comply with the [SDN] and copy the Tribunal into the reply.
>
> 6.A failure to comply with paragraph 5 above may lead to an immediate finding of contempt and certification to the Upper Tribunal."

40. The 11 February 2025 directions were received by the Council and the same day Andrew Robinson, Information Compliance Team Leader, replied to the FTT saying:

> "...The Council has already adhered to the direction provided in the email dated 14th October 2024. Please find attached a copy of the email that was sent to all parties on the 23rd December 2024.
>
> We hope this satisfies the case management decision, if it does not, please let us know."

41. The First Respondent did not send any other response to the 11 February 2025 order. On 24 February 2025, Ms Bence contacted the FTT contending that the 11 February 2025 order had not been complied with. On 25 February 2025, she contacted the FTT indicating that the SDN had not been complied with.

The 4 March 2025 certification decision

42. On 4 March 2025, Judge Moan determined Ms Bence's application to certify a contempt. Her decision made reference to the SDN, her directions of 16 December 2024, the Council's email of 18 December 2024 and her order of 11 February 2025. At this stage it appears that she was not aware of the First Respondent's communications of either 23 December 2024 or 11 February 2025.

43. Judge Moan granted the application to certify a contempt. She considered that the First Respondent was in contempt by:

> "(a) Not responding to the [SDN]; AND
> (b) Not complying with the Order dated 16th December 2024 to file a response;
> (c) Not complying with the Order dated 11th February 2025 to file a response."

44. Judge Moan also directed that any application to set aside her order was to be made within five working days on form GRC5, to include a statement as to why the SDN and the two orders had not been complied with and full compliance with the SDN.

45. In her accompanying Reasons, Judge Moan said that the Council had failed to comply with the three orders she had specified and "had not given any reasonable explanation for this". The only reason put forward by the Council as to why the information had not been provided was the indication (in the 18 December 2024 email) that it had not been actioned due to leave. This was "not acceptable" but could have been mitigated by prompt action on the part of the authority thereafter. However, the information required by the SDN had still not been provided and the Council had "ignored their responsibility to the Applicant and to the Tribunal". The Judge said that given these failures, she had no confidence that the Council would comply if she gave them a further opportunity to do so. She concluded that

"the public authority is in contempt by wilfully ignoring the decision notice and the two Orders thereafter" and that it was right for the FTT to take action both to bring about compliance and to act as a deterrent to other public authorities who ignored their responsibilities under FOIA. She concluded that the breaches were "sufficiently grave to justify certification" to the Upper Tribunal.

The Council's 10 March 2025 response

46. On 10 March 2025, David Coulthard, the Council's Strategic Services Delivery Manager, emailed Ms Bence. He said the Council had believed it had fully complied with the SDN, but more recently it had been realised, after conducting an internal review, that limb 2 of her February 2023 request had not been addressed. This was described as "a genuine and unintentional oversight" for which apologies were extended. (It appears from the Council's internal emails that it was on or about 25 February 2025 that this oversight was identified.) The email said the Council recognised the importance of adhering in full to the FTT's directions. The email attached what was described as the Council's response to the second limb of Ms Bence's request.

47. The response was in the form of a letter dated 10 March 2025. It indicated that the Council had undertaken a mail meter search using the search terms: "Compliant & Chynance between the dates of 1st April 2020 and 30th April 2021". I accept that the reference to "Compliant" was a typographical error and that the letter meant to say "Complaint", as the First Respondent subsequently indicated. The letter said that this search had found 757 emails (after duplications had been removed) and that it would take in excess of 37 hours to review each email individually to see whether it was within the scope of Ms Bence's request. Accordingly, the Council refused the request under regulation 12(4)(b) EIR as it was "manifestly unreasonable", given the significant cost and diversion of resources that would be involved in addressing it. The letter indicated the public interest test had been applied and the Council had concluded that this favoured non-disclosure. Although disclosure would adhere to its policy of being open and transparent and would allow the public to gain an understanding of the issues at hand and any related decision-making, this was outweighed by the amount of officer time that would be required to provide a response.

48. The letter went on to say that the Council may be able to assist if Ms Bence was willing to the narrow the terms of her search and that she had the right to request an internal review within 40 working days.

49. As I indicated in my Introduction, the First Respondent's position is that this communication complied with paragraph 2(a) of the SDN.

50. By her response dated 12 March 2025, Ms Bence contended that the Council had used inappropriately broad search terms, most notably in not narrowing the scope of the search by including "bollard" in the search terms, so that a lot of irrelevant emails had been identified which the Council was then using as a basis for declining to investigate further. She suggested that the Council worked back from the order to install the four bollards, together with the justification for

spending thousands of pounds of taxpayer's money on this work. She also said that there was no point in the Council searching beyond the date when the bollards were installed (7 April 2021) and suggested the use of 1 April 2021 as a cut-off date.

The application to strike out / set aside the certification

51. On 11 March 2025, the Council applied to strike out / set aside the certification of its contempt to the Upper Tribunal. The application was not provided to Ms Bence. The First Respondent indicated that it was content for its application to be determined on the papers.

52. Attached to the application was a letter entitled "Cornwall Council Statement - First-Tier Tribunal" from the Council's Strategic Services Delivery Manager. The letter explained that the Council had inadvertently omitted to address the second limb of Ms Bence's February 2023 request until the 10 March 2025 letter. This was described as a genuine and unintentional oversight for which apologies were extended. At this stage, the Council's position was that the first limb of her request (and paragraph 2(b) of the SDN) had been met by the 23 December 2024 communication. The letter gave the explanation for failing to provide a timely reply to the SDN that I have already summarised. He said the Council took its obligations seriously and strove to comply with all judicial directives. He indicated that in sending the 23 December 2024 communication, the Council believed it had complied with the requirements of the 16 December 2024 directions. In relation to the 11 February 2025 order, he referred to the Council's emailed response of the same day (which he attached). He said that he understood the directions had been complied with.

53. Mr Coulthard concluded by saying that the Council was fully committed to ensuring that oversight did not occur in the future and was committed to co-operating fully with the Tribunal. He accepted that the Council had not complied in full with the FTT's directives.

The FTT's 24 April 2025 decision

54. As I have explained, Ms Bence was unaware of the strike out / set aside application, but on 6 April 2025 she contacted the FTT setting out her concerns about the parameters of the Council's mail meter search and the response to her of 10 March 2025. The First Respondent replied on 10 April 2025, but it appears from Judge Moan's description, that this simply re-attached earlier correspondence and did not address Ms Bence's concerns about the search terms (I have not seen a copy of this letter).

55. In her decision on 24 April 2025, Judge Moan refused the First Respondent's application to strike out or set aside her certification. Her Reasons indicate that she was now aware of the First Respondent's 23 December 2024 communication. She observed that it was unclear whether the documents attached to it fully satisfied paragraph 2(b) of the SDN. She was still under the

impression that the Council had not responded to her order of 11 February 2025. On 3 April 2025, the First Respondent had provided the FTT with a copy of its 10 March 2025 response to Ms Bence and Judge Moan was aware of this.

56. Judge Moan was under the impression that the Council had used the search term "Compliant" rather than "Complaint" and she criticised this. She also agreed with Ms Bence's point about the omission of "bollard" as a search term. She said:

> "17. The Respondent had searched for "Compliant" and "Chynance". At the very least the search should have included "bollard", "Chynance" and "complaint". The date range for the search was sufficiently narrow. The search used would not identify information about the bollards which was key and using compliant instead or [sic] complaint would not reveal the requested information but something else entirely. By not searching appropriately, they have not complied with the substituted decision notice.
>
> 18. The Tribunal had hoped that during the life of this application, the substitute decision notice would have been complied with. The Tribunal cannot be satisfied that Part 2 of the Applicant's request has been compiled with because, quite simply, the searches undertaken were not accurate or focussed to identify information held within scope. Despite this point being made by the Applicant twice since 10th March 2025, this has not been addressed in the Respondent's submissions or indeed by undertaking further searches."

57. Judge Moan indicated that as she was now aware that the Council had responded to her 16 December 2024 directions, her findings of contempt were amended to:

> a. Not responding to the SDN within 35 days nor complying with that decision notice; and
> b. Not complying with the order dated 11 February 2025 to file a response.

58. She said she refused the Council's application as the SDN had still not been fully complied with as incorrect search terms were used "which would not only identify information within scope but might identify a volume of information not within scope". She said this was "particularly disappointing" given the chronology of the proceedings.

<u>The parties' subsequent correspondence</u>

59. On 30 April 2025, the Council sent a letter headed "Internal Review under the Environmental Information Regulations (EIR) 2004" to Ms Bence. This maintained its decision that the second limb of her February 2023 request was manifestly unreasonable. The letter explained that, although the bollards were installed on 7 April of that year, the date range of the search had extended to 30

April 2021 in order to capture follow-up communications or considerations that occurred shortly after their installation. The letter did not address Ms Bence's point about the omission of the word "bollard" from the search terms.

60. Further correspondence ensued. It is unnecessary to refer to each communication. In her email to the Council of 2 May 2025, Ms Bence reiterated her suggestion that the cut-off date for the search should be 1 April 2021, a suggestion she had also made in her email of 14 April 2025. The Council wrote to Ms Bence on 18 July 2025 attaching a number of documents. They comprised the revised disclosure provided to meet paragraph 2(b) of the SDN, following the First Respondent realising that sub-paragraphs (i) and (iii) had not been addressed; and, in respect of paragraph 2(a), some information that the First Respondent had determined to be within the scope of Ms Bence's narrowed request and which it was appropriate to release to her. There were difficulties sending the attachments to Ms Bence and on 23 July 2025, they were re-sent to her in three emails.

61. The First Respondent's position is that the outstanding matters stipulated in para 2(b) of the SDN were complied with at this stage.

62. The 18 July 2025 letter from the Council's Strategic Services Delivery Manager acknowledged there had been "significant delays" in the provision of the information to Ms Bence. He said the Council "sincerely apologised" for this, the delays were not intentional or malicious and the Council took full responsibility for the impact this had had upon Ms Bence's experience. The letter said the Council had "actively reviewed our internal procedures to ensure that similar issues do not arise in the future".

63. The letter also addressed why "bollard" had not been included in the original mail meter search terms in relation to the second limb of Ms Bence's February 2023 request. This word was not included because her request had focused on the information that led to the bollards being installed, for example complaints about parking or safety concerns, and not upon the remedial action of installing the bollards. The Council was required to interpret requests objectively and reasonably and the exclusion of "bollard" was a reasonable decision based on the nature and context of the information sought.

64. The letter continued that notwithstanding it maintained that the earlier search terms were appropriate, the Council had now undertaken a further mail meter search using the terms "bollard" "Chynance" and "complaint" for the period 1 April 2020 to 7 April 2021. It was acknowledged that Ms Bence's emails of 14 April and 2 May 2025 indicated a clear intention to narrow the scope of her request. The letter said that this search had returned 46 emails (Mr Beard accepted this should have said 43 emails). The author indicated that he had personally reviewed each of these emails, their subsequent email trails and attachments and he confirmed that none of them were considered to be within the scope of Ms Bence's February 2023 request. He went on to say that the identification of only 46 emails meant that the threshold for applying regulation 12(4)(b) EIR had not been met and so

the Council had undertaken further searches to identify any additional information falling with the scope of the request. Relevant information located by this means was provided with the letter. Mr Coulthard explained that emails from residents had been withheld in their entirety under regulation 12(5)(f) (where disclosure would adversely affect the interests of the persons who provided the information) and he set out his reasons for concluding that withholding these emails was in the public interest. He also indicated that disclosure of third party names had been withheld pursuant to regulation 13.

65. A document subsequently provided indicates that the narrowed search which provided 43 returns was undertaken by the Council's Digital Investigations Team on 22 May 2025.

Proceedings before the Upper Tribunal

66. On 31 March 2025, Upper Tribunal Judge Wikeley issued an order staying consideration of the contempt certification pending the FTT's determination of the First Respondent's application to strike out or set aside the certification.

67. On 18 June 2025, Judge Wikeley issued further case management directions. He lifted the stay and granted the Information Commissioner's request to be joined as the Second Respondent. He directed the First Respondent to provide a written submission within one month of the date when the directions were sent to the parties. He also directed the provision of subsequent responses from Ms Bence and the Information Commissioner.

68. The First Respondent provided a nine page letter from the Council's Strategic Services Delivery Manager dated 18 July 2025, with various appendices. His letter acknowledged there had been "certain procedural and administrative shortcomings on the Council's part" during the FTT proceedings and he indicated that the Council deeply regretted and "sincerely apologises" for what he described as "genuine mistakes" and "human errors and oversights", which were not the result of any deliberate or wilful disregard of the FTT's authority or desire to obstruct or mislead the Tribunal. Mr Coulthard said that as soon as the issues had come to light the Council "took immediate steps to review and strengthen our internal procedures to ensure that such issues do not arise again". The letter did not identify what those steps were. I return to this topic at paragraph 163 below. The letter set out a narrative of the events, providing the explanations I have already included in my summary of the facts. He included a similar explanation to that contained in his 18 July 2025 letter to Ms Bence, as to why the word "bollard" was not included in the Council's original search terms. He said the request had sought information "leading to the installation", rather than complaints about the bollards post-installation.

69. Ms Bence (still acting in person at this stage) provided her response by email of 10 August 2025. The focus of her submission was the contention that the Council was still in breach of the SDN. In summary, she said: (i) her February 2023 request had sought "information" and had not been limited to emails; (ii) the

Council had been wrong to completely redact communications from other members of the public in the documents it had provided; and (iii) some of the documents supplied were outside of her stated date range. She also criticised the delays in responding to her request and suggested that no substantive justification for installing the bollards had been provided.

70. On 31 July 2025, Judge Wikeley refused the First Respondent's application for the contempt matter to be determined on the papers without a hearing. The First Respondent's application (dated 2 July 2025) was not copied to either Ms Bence or the Information Commissioner.

71. It is unnecessary to detail the subsequent case management directions that I made in relation to the filing of additional documents.

72. Counsel was instructed by the time that the First Respondent's Skeleton Argument, dated 13 November 2025, was prepared. The document indicated that a "sincere and unreserved apology" was extended to the Upper Tribunal, the FTT and to all parties concerned for the Council not having secured timely compliance with the SDN. However, the document went on to assert that "at all times the Council took appropriate action and proportionate steps to ensure compliance with its legal obligations". The Council accepted that it did not comply with paragraph 2(a) of the SDN until 10 March 2025 and did not fully comply with paragraph 2(b) until 23 July 2025, but it denied that these failures amounted to a contempt, as the Council had not deliberately or intentionally failed to comply with the terms of the SDN. Non-compliance with the 11 February 2025 order was denied.

73. Mr Beard's Skeleton Argument went on to assert that the Council had sought to fulfil its responsibilities in a "proactive, constructive and conscientious manner" and that it had been "disrupted and confused by regrettable circumstances...which were mostly beyond its control". He also alleged that Judge Moan had been "materially mislead by the Applicant" and that Ms Bence had brought the contempt application for an improper collateral purpose. After taking instructions over the lunchtime adjournment, Mr Beard withdrew these contentions and extended his apologies to Ms Bence. He was right to do so. They should never have been made. There was no foundation for them.

Legal framework

<u>The EIR</u>

74. As I have explained, the Applicant's request for information was made under the EIR. A public authority is under a general duty to make the environmental information that it holds available on request: regulation 5(1) EIR. (Regulation 2 defines "environmental information".) Information shall be made available under paragraph as soon as possible and no later than 20 working days after the date of receipt of the request: regulation 5(2) EIR. Regulation 7 provides that the public authority may extend this period to 40 working days if it reasonably believes that

the complexity and volume of the information requested means that it is impracticable to address the request within the shorter period.

75. Regulation 9(1) imposes a duty on the public authority to provide advice and assistance to applicants and prospective applicants, so far as would be reasonably practicable to expect the authority to do so. Where an authority decides that an applicant has formulated a request in too general a manner it shall ask the applicant as soon as possible, and in any event no later than 20 working days after receiving the request to provide more particulars in relation to the request and to assist the applicant in providing those particulars. The 20 working days period for addressing the request then runs from the date after which the further particulars are received: regulation 9(4).

76. The regulation 5(1) duty is subject to various exceptions. One exception is where the information includes the applicant's personal data (regulation 5(3)). Regulation 12 provides for a number of exceptions which are subject to the public interest in maintaining the exception outweighing the public interest in disclosing the information (regulation 12(1)); and the authority is to apply a presumption in favour of disclosure (regulation 12(2)). These exceptions include: where the information requested includes personal data of which the applicant is not the subject (regulation 12(3) and 13); where the request for information is manifestly unreasonable (regulation 12(4)); and to the extent to which disclosure would adversely affect the interests of the person who provided the information (regulation 12(5)).

77. If a request for environmental information is refused by the public authority under regulation 12 or 13, the refusal must be in writing and specify the reason for this refusal (regulation 14(1) and (3)).

78. The enforcement and appeal provisions of Parts IV and V of FOIA apply for the purposes of the EIR, with the modifications specified in this regulation (regulations 18(1) and (2)). Amongst other modifications, references in FOIA to "this Act", are to be replaced with "these Regulations" and references in FOIA to "Part 1" are to be substituted with references to "Parts 2 and 3 of these Regulations".

<u>The enforcement provisions in FOIA</u>

79. In summary, the enforcement and appeal provisions under FOIA operate as follows:
    a. The requestor may apply to the Information Commissioner if they are dissatisfied with the way that the public authority has dealt with their request (section 50(1) FOIA);
    b. If the Information Commissioner considers that that the public authority has not complied with the legislative requirements he may serve a decision notice or an enforcement notice specifying the steps that must be taken by the public authority in order to achieve compliance (sections 50(4) and 52);

c. Where a notice has been served by the Information Commissioner, the requestor or the public authority may appeal to the FTT against that notice (sections 57(1) and (2)); and
d. If the FTT considers that the Commissioner's notice is "not in accordance with the law" or "to the extent that the notice involved the exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently", the FTT must allow the appeal or substitute such other notice as could have been served by the Commissioner (section 58(1)).

80. In ***Information Commissioner v Moss and the Royal Borough of Kingston upon Thames*** [2020] UKUT 174 (AAC) ("***Moss UT***"), Upper Tribunal Judge Jacobs held that a public authority is bound by the terms of a substituted decision notice issued by the FTT even if it was not a party to the proceedings at that stage, given the terms of the notice (which imposes a duty on the authority) and its status as a decision notice under FOIA (paragraph 25). In the present case the Council accepts that it received the SDN from the FTT and was obliged to comply with the SDN, although it was not a party to the FTT proceedings when it was issued.

The First-tier Tribunal's power to certify a contempt

81. The FTT has no power to compel a public authority to comply with a substituted decision notice and nor does it have the power to commit the authority for contempt if it has failed to comply with an order made by the FTT. However, non-compliance may lead to the exercise of the FTT's certification power contained in section 61 FOIA, which may itself operate as an incentive to comply: ***Moss UT*** at paragraph 1.

82. As material, section 61 provides:

> "(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).
>
> .....
>
> (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."

83. As I have already summarised, sections 57(1) and (2) confer rights of appeal in relation to notices served by the Information Commissioner (paragraph 79 above). (I am not concerned with section 60(1) and (4) which concerns appeals against national security certificates.)

84. Pursuant to section 61(3) and (4), the FTT may certify a contempt of its own initiative or upon an application being made. The procedure for applying for a certification and the making of directions thereafter is addressed in Rule 7A of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 which is entitled "certification". As relevant, it provides:

"(1) This rule applies to certification cases.

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

(3) The application must include—
(a) details of the proceedings giving rise to the application;
(b) details of the act or omission (as the case may be) relied on;
(c) if the act or omission (as the case may be) arises following, and in relation to, a decision of the Tribunal, a copy of any written record of that decision;
(d) .....;
(e) the grounds relied on in contending that if the proceedings in question were proceedings before a court having power to commit for contempt, the act or omission (as the case may be) would constitute contempt of court;
(f) a statement as to whether the applicant would be content for the case to be dealt with without a hearing if the Tribunal considers it appropriate, and
(g) any further information or documents required by a practice direction.

.....

(5) When the Tribunal admits the application, it must send a copy of the application and any accompanying documents to the

respondent and must give directions as to the procedure to be followed in the consideration and disposal of the application.

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

85. The bringing of a committal application is an appropriate and legitimate means, not only of seeking enforcement of an order (or an undertaking), but also (or alternatively) of drawing the court's attention to a serious, rather than a purely technical contempt. A committal application must be proportionate, by reference to the gravity of the conduct alleged and brought for legitimate ends, rather than for improper or collateral purposes: ***Navigator Equities Ltd v Deripaska*** [2021] EWCA Civ 1799, [2022] 1 WLR 3656, paragraph 82(i) and (ii).

The Upper Tribunal's power to address a contempt

86. Section 61(5) FOIA (paragraph 82 above) provides that the Upper Tribunal may deal with a certification reference for contempt from the FTT "in any manner in which it could deal with [it] if the offence had been committed in relation to the Upper Tribunal".

87. The Upper Tribunal's jurisdiction to deal with contempt is established by section 25(1)(a) read with section 25(2)(c) Tribunals, Courts and Enforcement Act 2007: ***YSA v Associated Newspapers Ltd*** [2023] UKUT 75 (IAC) at paragraphs 23 – 24 and ***Moss v Royal Borough of Kingston upon Tames and Information Commissioner*** [2023] EWCA Civ 1438 ("***Moss CA***") at paragraph 36. The Upper Tribunal has the same powers as the High Court to deal with matters of contempt. As relevant, section 25 provides:

"**25 Supplementary powers of Upper Tribunal**
(1) In relation to the matters mentioned in subsection (2), the Upper Tribunal –
(a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court. And
(b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.

(2) The matters are –
.....
(c) all other matters incidental to the Upper Tribunal's functions."

88. Rule 26 of the Tribunal Procedure (Upper Tribunal) Rules provides that where an offence has been certified to the Upper Tribunal, the Upper Tribunal must give directions as to the procedure to be followed in the consideration and disposal of the proceedings (and the preceding rules in Part 3 of the Rules will only apply to the proceedings to the extent provided for by such directions).

The roles of the FTT and the Upper Tribunal

89. Prior to the 2018 amendments to section 61 FIOA, the exercise of the FTT's certification power led to transfer of the case to the High Court (rather than the Upper Tribunal), for the High Court to address the potential contempt under the materially same provisions in paragraph 8, Schedule 6 Data Protection Act 1998 ("DPA 1998"). In ***Moss CA***, the Court of Appeal considered whether, following the FTT's certification, the High Court had jurisdiction to determine whether the conduct in question (in that case an authority's failure to comply with a substituted decision notice) amounted to a contempt of court or whether its jurisdiction was limited to determining the appropriate sanction on the basis that the FTT had already decided that the certified conduct amounted to a contempt.

90. Giving the leading judgment with which the other members of the Court (Peter Jackson and Phillips LJJ) agreed, Lewis LJ concluded that the role of the FTT was to make a certification decision when the person had engaged in conduct (an act or omission) in relation to proceedings before it which it considers could be a contempt if that conduct had occurred in proceedings before a court or tribunal empowered to punish a person for contempt (paragraph 52, emphasis added). Lewis LJ recognised that the wording of paragraph 8(1), Schedule 6 DPA 1998 (now section 61(3)(b) FOIA) "would constitute a contempt of court" could be read as indicating that the FTT must determine whether the act or omission was a contempt (paragraph 39). However, read in context and having regard to the provisions as a whole, the words were not intended to mean that the FTT must make a final and binding determination of whether or not, applying the law of contempt, the conduct is a contempt, rather the statutory phrase means that the act or omission is one which by its nature is capable of constituting a contempt had it occurred in proceedings before a court or tribunal with power to commit for contempt (paragraph 39, emphasis added). The provisions created a mechanism whereby the case is sent to the High Court (now the Upper Tribunal), so that it "may inquire into the matter" (paragraph 8(2), Schedule 6 DPA 1998, now section 61(5)(a) FOIA) and there was no reason to limit this inquiry to the question of sanction (paragraphs 40 and 41).

91. If the FTT is satisfied that the act or omission is one which by its nature is capable of committing a contempt had it occurred in proceedings before a court or tribunal with power to commit for contempt, then it "will decide whether to exercise its discretion to certify...because, for example the act or omission is sufficiently serious to warrant inquiry and possibly sanction" (paragraph 43, emphasis added).

92. Lewis LJ suggested that issues in the case before him as to whether the authority had been given sufficient notice of the order and whether the relevant individuals had the requisite state of mind for the conduct to amount to a contempt were factual matters for the High Court (now the Upper Tribunal) to decide following certification, rather than for the FTT to determine when assessing whether to make the certification.

93. As the FTT was not making a final decision on whether the conduct amounted to a contempt and it was the role of the High Court (now the Upper Tribunal), to inquire into whether the conduct would have been a contempt if committed in proceedings before it, the Court of Appeal decided that Farbey J was correct in approaching the case on the basis that it was for her to determine whether the conduct identified in the certification amounted to a contempt (in ***Moss v Royal Borough of Kingston upon Thames and Information Commissioner*** [2023] EWHC 27 (KB) ("***Moss HC***")).

94. There is no doubt that Lewis LJ's careful and detailed analysis (at paragraphs 35 – 52) applies equally to the current power to certify the contempt for transfer to the Upper Tribunal. As I have noted the legislative powers are materially the same and during his discussion of this issue, Lewis LJ made multiple references to the same position applying under the new section 61 FOIA.

95. The parties in the present case agreed that I had the power to consider whether the First Respondent had committed a contempt in either of the respects certified by the FTT (paragraph 3 above). However, I have addressed the respective roles of the FTT and Upper Tribunal in some detail, with a view to providing assistance for future certification applications. There may currently be a degree of confusion. Passages in Judge Moan's 16 December 2024 directions and in her 4 March 2025 certification decision suggest she thought it was for her to determine whether in fact the Council had committed a contempt (and she did not refer to *Moss CA* (which was not cited to her) which explains the respective roles of the FTT and the Upper Tribunal).

96. Accordingly, to summarise the position:

    a. The role of the FTT when deciding whether to exercise the certification power in section 61(4) FOIA is, firstly, to determine whether the relevant person has done something or failed to do something in relation to the appeal before it that by its nature is capable of constituting a contempt had it occurred in proceedings before a court or a tribunal with power to commit for contempt. It is not the FTT's role to decide whether a contempt has been committed;
    b. If the FTT concludes this is the position, then, secondly, it will proceed to consider its discretion to certify. In exercising this discretion it will consider, in particular, whether the conduct in question is sufficiently serious as to warrant a contempt inquiry and possibly sanction;
    c. At the first stage, in assessing whether the act or omission in question is capable of constituting a contempt had it occurred in proceedings before a court or a tribunal with power to commit for contempt, the FTT will bear in mind the ingredients of a civil contempt (which I address at paragraphs 104 – 114 below);
    d. At the second stage, in exercising its discretion and forming a view as to the seriousness of the matter, the FTT will bear in mind the observations of Lewis LJ (paragraph 91 above); that whether the order was

intentionally breached will be relevant to the way the conduct is viewed when it comes to the question of sanction (paragraphs 110 – 114 and 127 below); that applications for contempt should not be disproportionate (paragraph 85 above); the other factors that may impact on the sanction that could be imposed (paragraphs 127 – 128 below); and (where applicable) the role of contempt proceedings where orders are breached by public authorities (paragraphs 98 – 101 below);

e. The potential contempt described in the FTT's certification in effect identifies the "charge" that the Upper Tribunal will then inquire into. Accordingly, it should be formulated with as much clarity as is reasonably possible, albeit not in a way that unduly circumscribes the latter's role of inquiring into the contempt (as the Upper Tribunal has no jurisdiction to inquire into matters that go beyond the terms of the FTT's certification).

Contempt proceedings against public authorities

97. Contempt proceedings may be brought against a public body for a failure to comply with an order of the court or tribunal. As Lewis LJ explained in ***Moss CA***, although the statute refers to an "offence", failure to comply with a tribunal's order may constitute a civil, rather than a criminal, contempt (paragraph 40).

98. Proceedings for contempt of court are intended to uphold the authority of the court and to make certain that its orders are obeyed: ***JS v Cardiff City Council*** [2022] EWHC 707 (Admin) at paragraph 55, where Steyn J also cited the observation of Lord Donaldson in ***M v Home Office*** [1992] QB 270 at 305-306, "Any contempt of court is a matter of the utmost seriousness". Later in her judgment, Steyn J said, "Any breach by anyone of a court order is always a matter of the utmost gravity. The matter is all the more grave when the breach is committed by a public authority" (paragraph 90).

99. Proceedings for contempt are intended to uphold the authority of the court and to make certain that its orders are obeyed. As Farbey J (then Chamber President) observed in ***Harron v Information Commissioner*** [2023] UKUT 22 (AAC):

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

100. I agree with Mr Jackson's submission that, additionally, there is a specific strong public interest in public authorities complying with the provisions of FOIA and the EIR, even where it may seem burdensome or inconvenient.

101. In proceedings in the Administrative Court, it is not the usual practice to include a penal notice on an order against a defendant public body: ***JS v Cardiff City Council*** at paragraph 56. In this passage Steyn J cited the judgment of Collins J in ***R (JM) v Croydon London Borough Council*** [2009] EWHC 2474 (Admin), where he explained, at paragraph 12, that a penal notice is not necessary to enable the court to deal with public bodies by means of proceedings for contempt, as public bodies would seldom find themselves in a position where committal to prison would be contemplated. Collins J observed that an adverse finding of contempt "coupled with what would probably be an order to pay indemnity costs should suffice, since it is to be expected that a public body would not deliberately flout an order of the court".

102. In ***Buzzard-Quashie v Chief Constable of Northamptonshire Police*** [2025] EWCA Civ 1397, Fraser LJ (giving the leading judgment, Asplin LJ and Coulson LJ agreeing) explained that a penal notice is relevant to sanction, not to the court's consideration of whether a finding of contempt should be made (paragraphs 87, 89 – 90 and 95). If the position were otherwise, there would be two levels of court orders, which would be inconsistent with the public interest in court orders being complied with. By contrast, whilst the court has a discretion to commit a person to prison for breaching an order that did not contain a penal notice, this only occurs in rare circumstances (paragraph 87). Earlier in his judgment, Fraser LJ had emphasised that a finding of contempt, absent any sanction, is still a powerful finding, even more so when the object of the finding is a public body (paragraph 58).

103. Mr Beard raised the absence of a penal notice in his Skeleton Argument, but did not pursue this contention in light of these authorities and the indication provided by Mr Sharland that Ms Bence did not seek a committal to prison in this case. For the reasons I have explained, it is clear that there was no requirement for the FTT's SDN or Judge Moan's subsequent orders to contain a penal notice for the certification jurisdiction to apply or for the Upper Tribunal to make findings of contempt in an appropriate case. I note for completeness, that it would be open to the FTT to include a penal notice on an order if it considered it appropriate to do so (for example in a case where that had already been significant non-compliance with earlier orders).

<u>The findings required for a civil contempt</u>

104. Any breach of an order alleged to constitute contempt must be strictly proved. The burden of proof is on the party alleging the contempt who must prove each element beyond reasonable doubt: ***JS v Cardiff City Council*** (paragraph 57).

105. The court (or tribunal) needs to exercise care when it is asked to draw inferences to prove contempt. Circumstantial evidence may be relied upon to establish a contempt, but only where the court concludes that there is only one reasonable inference to be drawn, as opposed to where a reasonable inference can be drawn that is inconsistent with a finding of contempt: ***JSC Mezhdunarodniy Promyshlemniy Bank v Pugachev*** [2016] EWHC 192 (Ch), paragraph 43 (iii).

106. An order will not be enforced by contempt proceedings if its terms are ambiguous: ***JS v Cardiff City Council*** (paragraph 59).

107. It is generally no defence that the order disobeyed should not have been made or accepted; orders are to be complied with even if compliance is burdensome, inconvenient and/or expensive. If there is any obstacle to compliance, the proper course is to apply to have the order set aside or varied: ***Navigator Equities Ltd v Deripaska*** at paragraph 82(v) and (vi).

108. In ***FW Farnsworth Ltd v Lacy*** [2013] EWHC 3487 (Ch) paragraph 20, Proudman J explained the elements that are to prove as follows:

> "A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order."

The contemnor's state of mind

109. In Mr Beard's Skeleton Argument and in Mr Coulthard's July 2025 letter to the Upper Tribunal, it was argued that the Council was not in contempt because the failure to comply with the SDN was the result of oversight, rather than wilful non-compliance and the Council had not deliberately tried to avoid complying with its terms.

110. The Court of Appeal addressed the state of mind required for a finding of contempt where there has been non-compliance with a court order in ***Buzzard-Quashie v Chief Constable of Northamptonshire Police***. Although a very recent decision, Mr Beard fairly accepted that Fraser LJ's judgment contained a restatement of existing legal principles, rather than a change in the law. After hearing Mr Sharland's oral submissions on the morning of the hearing and taking instructions over the lunchtime adjournment, Mr Beard accepted that there was no requirement for the breach of the order to have been wilful (and hence he accepted the Council was in contempt to the extent I indicated in paragraph 6 above).

111. Fraser LJ emphasised (at paragraph 56) that:

> "There is no requirement in any of the authorities that breach of a court order must be 'wilful, deliberate or contumelious' in order for that breach to render the subject of the order liable in contempt. Such an approach [as the judge below had taken in that case] connotes – or at the very

> least suggests – specific intention to commit a contempt or interfere with the administration of justice is required. That is not the law."

112. Having reviewed the relevant authorities, Fraser LJ observed (at paragraph 62):

> "Intention to commit contempt, or intention specifically to disobey an order, is relevant to the sanction for contempt. It is not a pre-condition to a finding of contempt. This has been the common law for a very long time."

113. Fraser LJ identified the requisite intention that must be proved for a finding of contempt as "simply the intention to do the act or omission that constituted the breach of the order, not any intention to interfere with the administration of justice or to commit contempt" (paragraph 64).

114. Fraser LJ also emphasised that it is not necessary to show that the alleged contemnor correctly understood the terms of the order. The starting point is that the order has been breached and the fact that the alleged contemnor may have misunderstood its terms is not relevant to whether a contempt has been shown (paragraphs 69 – 70). Accordingly, the fact that a respondent believed it was complying with an order, which it was in fact breaching, does not afford a defence (paragraph 70). All that needs to be shown is that the alleged contemnor intended to carry out the conduct in question and that such conduct amounted to a breach of the order, objectively construed (paragraph 70). Of course, as I have noted earlier, this will only apply where the terms of the order are clear and unambiguous. I add for completeness that a genuine misunderstanding as to meaning of the order is likely to be relevant to sanction.

Part 81 of the Civil Procedure Rules and procedural safeguards

115. Part 81 of the Civil Procedure Rules ("CPR"), applicable in the civil courts, concerns "Applications and Proceedings in Relation to Contempt of Court". Amongst other provisions, Part 81.3 addresses "How to make a contempt application" and Part 81.4 "Requirements of a contempt application".

116. In ***YSA v Associated Newspapers Ltd*** Lane J (then President of the Upper Tribunal (Immigration and Asylum Chamber)) and Mr Ockelton (Vice President) held that in the absence of a specific procedure laid down by the Tribunal Procedure Rules, the Tribunal would require applications to commit for contempt to adopt, so far as possible, the same practices and safeguards as are found in CPR Part 81, so as to ensure fairness to the respondent and economy of resources (paragraphs 25, 33 and 40).

117. In his Skeleton Argument, Mr Beard argued that the requirements of Part 81 applied by analogy to the present contempt proceedings. Mr Sharland and Mr Jackson disputed this proposition. During the hearing I summarised my provisional view on this topic and in the circumstances (where it made no material difference to his client's position) Mr Beard chose not to develop this submission

orally. However, I will make a number of observations on this topic, with a view to providing some assistance for future cases.

118. ***YSA*** was concerned with an application to commit the respondent media organisation for breaches of anonymity orders made in the applicant's favour by the FTT and the Upper Tribunal (Immigration and Asylum Chamber). There was no specific procedure in the Tribunal Rules that covered the making of such an application (although it was accepted that the Upper Tribunal had jurisdiction to deal with the matter pursuant to the powers conferred by section 25 Tribunals, Courts and Enforcement Act 2007 (see paragraph 87 above)). In those circumstances, the Upper Tribunal held that a procedure analogous to CPR 81.3 applied, including, in that case, a requirement to obtain the Upper Tribunal's permission to bring the contempt application (paragraph 32).

119. The present situation is quite distinct from the position in ***YSA***. As I have described, section 61 FOIA sets out a specific mechanism applicable to FOIA appeals for bringing an allegation of non-compliance before the FTT and, if an offence is certified, before the Upper Tribunal (paragraphs 84 and 88 above). Accordingly, there is no need or benefit in trying to apply by analogy the different provisions of CPR Part 81.3 concerning how a contempt application should be made. The Panel in ***YSA*** said that it had reached its conclusion "in the absence of Tribunal Procedure Rules covering this area of procedure" (paragraph 40; emphasis added).

120. I turn to the requirements of CPR 81.4. Rule 81.4(1) addresses the supporting written evidence that is required and rule 81.4(2) the matters that must be included in contempt applications. However, as I have set out at paragraph 84 above, Rule 7A of the FTT Rules specifically addresses what an application for certification must contain. In addition, Rule 7A(5) of the FTT Rules and Rule 26A of the Upper Tribunal Rules confer broad powers on the FTT and the Upper Tribunal, respectively, to make directions as to the procedure to be followed (paragraphs 84 and 88 above). If it had been intended that the requirements of CPR 81.4 were to apply to this jurisdiction, this could have been spelt out in the rules, but that is not what happened. Accordingly, I do not consider it appropriate to simply read across the requirements of CPR 81.4 and find that they apply to this jurisdiction.

121. Furthermore, some of the CPR 81.4 provisions plainly envisage a procedure that is different to the FOIA certification process. By way of example: CPR 81.4(1), provides that (unless the court directs otherwise), every application must be supported by written evidence given by affidavit or affirmation; and CPR 81.4(2)(d) reflects the requirement in CPR 81.5(1) relating to personal service, for which there is no equivalent in Rule 7A of the FTT Rules. On the other hand, the gist of some of the requirements in CPR 81.4(2) are already reflected in Rule 7A(3) of the FTT Rules, albeit phrased differently, in particular those aimed at ensuring that the alleged contempt is clearly articulated. I also note that at paragraph 88 in ***Buzzard-Quashie v Chief Constable of Northamptonshire Police*** Fraser LJ concluded that CPR 81.4 relates to committals for contempt,

rather than to findings for contempt; as I have already noted, it is unlikely that a committal will be sought in FOIA proceedings against public authorities (paragraph 101 above).

122. Nonetheless, as CPR 81.4(2) is directed to achieving fairness to the respondent and in some respects, such as the right to remain silent, reflects well-established pre-existing common law principles, there are elements of CPR 81.4(2), particularly 81.4(2)(l)-(s), that it would be valuable to spell out to a respondent when the Upper Tribunal makes directions after a certification case has been transferred. This is particularly so where the facts appear to be substantially in dispute and all the more so if it appears that a committal is or may be sought. Adopting this approach would entail the respondent being made aware that: (i) they will have a reasonable time to prepare for the hearing; (ii) they are not obliged to give written and oral evidence in their defence, but they may do so; (iii) they have a right to remain silent and to decline to answer any question which may incriminate them, but the tribunal may draw adverse inferences if this right is exercised; (iv) the tribunal may proceed in their absence in the event of non-attendance, but will only find them in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt; (v) if the tribunal is satisfied they have committed the contempt it may impose a fine, imprisonment or confiscation of assets; (vi) if they admit the contempt and wish to apologise to the tribunal, that is likely to reduce the seriousness of any punishment; (vii) the tribunal's findings will be provided in writing as soon as practicable after the hearing; and (viii) the tribunal will sit in public (save to the extent that it orders otherwise) and its findings will be made public.

123. As regards the latter of these points, I agree with Judge Wikeley's refusal to determine the matter on the papers (paragraph 70 above). Contempt proceedings should, wherever possible, be the subject of public hearings.

124. As I indicated earlier, I went though the matters I have referred to at paragraph 122 above, at the start of the hearing, insofar as they remained of potential relevance. It is not suggested that there was any unfairness to the First Respondent in this case.

Witness statements from public authorities

125. Mr Jackson proposed I should indicate that a public authority facing a certification application should generally provide a witness statement in response. He said this was because in FOIA cases the public authority has access to all the relevant information, whereas the applicant does not and is in a uniquely difficult position in terms of establishing non-compliance to the criminal standard. He suggested that a witness statement from the authority would also assist the Upper Tribunal in the conduct of its inquiry. Whilst I see the force of these points, I am reluctant to be prescriptive in circumstances where it is well established at common law that a person accused of contempt has to the right to remain silent: ***Comet Products UK Ltd v Hawkex Plastics Ltd*** [1971] 2 QB 67 CA.

Sanction

126. Where a court or tribunal concludes that a party is in contempt, the power to impose a sanction is discretionary. Pursuant to sections 14(1) and 14(2) Contempt of Court Act 1981, sanctions available to the Upper Tribunal include an unlimited fine or imprisonment for a period of up to two years. Counsel also accepted that, like the High Court, there is a power to confiscate assets. However, as none of those potential sanctions are sought in this case, I will not lengthen this decision by addressing them in any greater detail.

127. Matters such as later compliance (as opposed to ongoing non-compliance), an apology, an explanation for the default and a lack of intention to flout the order fall to be considered whether deciding whether to impose a sanction and, if so, at what level: ***Moss HC*** at paragraph 85 and ***JS v Cardiff City Council*** at paragraph 53.

128. I do not seek to provide an exhaustive list of matters that will be relevant to sanction. However, I note that in addition to those identified in the preceding paragraph, the following are likely to be relevant: the length of time the contempt lasted; the seriousness of the contempt, including the number of acts or omissions involved; the resources and support available to the contemnor to assist with avoiding the commission of the contempt; and the extent to which the respondent has taken steps to rectify matters and avoid future repetition.

Analysis

The admitted contempt

129. I will make a number of observations about the nature and scale of the contempt that the First Respondent has belatedly admitted, before turning to the matters that remained in dispute. The Council accepts it did not respond to the SDN within the 35 day period stipulated by the FTT (which expired on 18 November 2024) and that it failed to fully comply with its terms until 23 July 2025.

130. I emphasise the following in particular:

    a. Ms Bence's request for information was made as long ago as 10 February 2023. Even on the Council's own case, it only managed to comply with the first part of her request on 23 July 2025 and the second part of her request on 10 March 2025. This delay is all the more striking when set against the timescales for compliance prescribed by the EIR (paragraphs 74 - 75 above). On any view, there was very protracted delay in this case;
    b. The FTT's 31 May 2024 decision made it quite clear that the Council had overlooked the second part of Ms Bence's request and that a SDN would be issued in due course requiring the Council to address this, either by providing the requested information or refusing to do so under regulation 14 EIR. Accordingly, the Council were put on notice that they had entirely

overlooked this part of the request nearly six months before the SDN was issued;

c. The terms of the SDN were clear and unambiguous and upon reading it the Council should have been in no doubt about what they were required to do in relation to both paragraph 2(a) and paragraph 2(b);
d. Whilst I accept that the SDN was initially overlooked, rather than deliberately ignored (paragraph 29 above), the Council's failure to appreciate that it had received the SDN at an email address which it had provided for service, but which was not monitored regularly, was indicative of a poor attitude towards compliance;
e. In the circumstances, it would be reasonable to expect that when the Council's oversight did come to its attention by 18 December 2024, already a month after the time for compliance had expired, every effort would have been made to put things right by now responding to the SDN in a timely and accurate way. As Judge Moan observed in her 4 March 2025 certification decision, the earlier oversight could have been mitigated by prompt action by the Council at this stage. However, that was not to be;
f. Instead and quite remarkably, the Council somehow managed to overlook two of the four requirements in paragraph 2(b) of the SDN and paragraph 2(a) of the SDN in its entirety (and in circumstances where it had been put on notice of the latter as early as the 31 May 2024 decision). No sensible explanation for this has been provided at any stage by the First Respondent. At the least, it indicates that the Council was cavalier, irresponsible and unreasonable in the way it addressed the SDN in its 23 December 2024 communication;
g. As I have indicated, it was not until on or about 25 February 2025, over three months after the deadline for completion, that the Council realised it had not addressed paragraph 2(a) of the SDN (paragraph 46 above);
h. It was then not until several months later from 18 July 2025 that the Council addressed the outstanding aspects of paragraph 2(b) of the SDN. The date when this oversight first came to its attention is unclear. Again, the failure to appreciate the terms of the SDN at an earlier juncture has not been adequately explained;
i. The Council wrongly informed the FTT when applying to strike-out / set aside the certification that it had now fully complied with the SDN (paragraph 52 above).

131. I address the question of sanction and the matters relied upon in mitigation from paragraph 162 below. On any view, this is a dismal litany of failings.

<u>The disputed allegations of contempt</u>

Paragraph 2(a) of the SDN: 10 March – 23 July 2025

132. The First Respondent contends that it complied with paragraph 2(a) of the SDN when it issued the refusal notice to Ms Bence on 10 March 2025. The question for me is whether this was a lawful refusal notice. Mr Beard rightly accepted that

complying with the second option stipulated in paragraph 2(a) of the SDN ("providing a refusal notice under the EIR") required the notice in question to be a valid refusal notice. The Council's case is that it did this. Ms Bence's case is that the refusal notice failed to meet the Council's EIR obligations in a number of respects. Mr Sharland points out that her request sought the "information" she identified and was not confined to emails, whereas the Council only searched the emails that it held. Furthermore, as I have already described, Ms Bence asserted (as I have already described) that the Council had wrongly arrived at the conclusion that her request was "manifestly unreasonable", because it had used inappropriately broad search terms in respect of the emails.

133. Mr Beard explained that his client's position was that the best way to identify documents in the Council's position was to interrogate the emails that it held, as this would give an indication as to whether a wider search would be manifestly unreasonable. He contended that the search parameters used by the Council at this stage were reasonable and that the narrower search it subsequently carried out using the term "bollard" was undertaken on a voluntary basis, rather than because it was obliged to do so. He submitted that including the term "bollard" in the original email search would have narrowed its scope unduly.

134. I accept, as Mr Coulthard indicated in his July 2025 submissions, that in accordance with the guidance provided by the Information Commissioner's Office, public authorities are required to interpret requests objectively and reasonably, based on the wording and context of the request.

135. Although it was a matter that Ms Bence pursued in her correspondence, I do not consider that there is force in her complaint that the Council's search parameters were too wide because it used a date range of 1 April 2020 – 30 April 2021, rather than adopting a cut-off point of 1 or 7 April 2021 (the latter being the date when the new bollards were installed). Communications relating to the considerations for installing the new bollards could well have occurred in the period shortly after they were put in place; in any event, this was a very modest extension to the period in question; and I note that the period referred to in Ms Bence's February 2023 request was "approximately April 2020 to April 2021".

136. However, undertaking the only email search that was conducted at this stage by reference to "Complaint" and "Chynance", self-evidently, would be likely to return a substantial number of documents that concerned matters about Chynance that were entirely unrelated to the concerns and considerations that had led to the installation of the bollards. Furthermore, the explanation that the Council has since given for not including "bollard" in its search terms is illogical and irrational. I have summarised this explanation at paragraphs 63 and 68 above. Emails that included reference to the complaints and/or the considerations that led to the installation of the fixed bollards, may well have included reference to "bollards", not least in the context of identifying the benefits, or indeed the disadvantages, of taking the course of installing fixed bollards, including (but not limited to), internal emails relating to the Council's own decision-making process. It is simply a non-sequitur to suggest that emails that mentioned "bollards" would not be likely

to contain information about the initial complaints and considerations that led to their installation. In addition, as there was previously a (removable) "bollard" at the location, emails may well have identified and/or discussed the proposed reasons for replacing this type of bollard with the fixed bollards that were subsequently installed. Moreover, the omission of "bollard" from the search terms was in a context where, as I have already emphasised, there was no alternative word employed that would be likely to have limited the mail meter search to the topic Ms Bence had sought information on in the second limb of her request.

137. The outcome of this one mail meter search, undertaken using inadequate, unduly wide search parameters was the only basis upon which the Council determined that the second limb of Ms Bence's February 2023 request was "manifestly unreasonable" such that it was entitled to issue a refusal notice. In the circumstances, the refusal notice issued on 10 March 2025 was not in compliance with the Council's EIR duties and thus, in turn, did not amount to compliance with paragraph 2(a) of the SDN. Failing to provide any information in response to this limb of Ms Bence's request in reliance upon the outcome of a single evidently over-broad email search was a thoroughly inadequate response in the circumstances.

138. In arriving at this conclusion, I have not lost sight of the fact that when the narrowed search was eventually undertaken on 22 May 2025 it did not return any emails that Mr Coulthard considered fell within the terms of the second limb of Ms Bence's request (paragraph 64 above). However, that subsequent outcome does not alter the fact that there was no proper basis for the refusal notice issued on 10 March 2025, which was not EIR compliant for the reasons I have identified.

139. Furthermore, undertaking this single, unduly wide search of the emails before precipitately issuing the flawed refusal notice also had the effect that the Council wrongly failed to search for the "information" requested by Ms Bence other than in the emails it held.

140. For these reasons I am satisfied so that I am sure that the Council's response to Ms Bence of 10 March 2025 failed to comply with paragraph 2(a) of the SDN and that the Council remained in breach of this part of the order until, at least, 23 July 2025. I am also sure that limiting the Council's inquiries to the sole mail meter search that was undertaken at this stage and issuing the 10 March 2025 refusal notice were deliberate acts which the Council intended to undertake and that at the time it had knowledge of all the facts that meant this conduct did not constitute compliance with the SDN. Accordingly, I conclude that the Council remained in contempt in respect of paragraph 2(a) of the SDN at least until the provision of additional information on 23 July 2025.

Paragraph 2(a) of the SDN: after 23 July 2025

141. As I indicated earlier, Ms Bence contends that the Council remains in breach of the SDN. The Council denies this is the case. Mr Beard pointed to the information provided on 23 July 2025, although he mainly relied on the contention that the 10

March 2025 refusal notice amounted to compliance with paragraph 2(a) of the SDN (the proposition I have just rejected).

142. Ms Bence made a number of points in her 10 August 2025 email (paragraph 69 above). I can dismiss two of them quite briefly before I turn to the other contentions in a little more detail. The fact that the Council chose to provide some documents that were outside the date range of her request (as well as documents that were within it), is not an indication of non-compliance with the SDN. Further, the SDN required the Council to take the stipulated steps regarding the provision of information; whether Ms Bence considers that the information that was provided affords a good or a poor justification for the installation of the new bollards is not relevant to the question of compliance with the SDN.

143. I also consider that the Council is entitled to withhold the emails from residents under regulation 12(5)(f) (paragraph 64 above), essentially for the reasons it set out in its letter of 18 July 2025, which I summarise below. Notably, Mr Sharland did not take issue with this reasoning in either his written or oral submissions.

144. In summary, the Council referred to the terms of regulation 12(5)(f), indicating it was entitled to withhold information where disclosure would adversely affect the interests of the persons who provided the information and this person was not under, and could not have been put under, any legal obligation to supply it to the Council or to any other public authority; did not supply it in circumstances such that the Council or any other public authority is entitled apart from the EIR to disclose it; and has not consented to its disclosure. As the Council's letter said, the residents were not under any obligation to provide the information in their emails; it was not supplied in circumstances where the Council or any other public authority was otherwise entitled to disclose it; and, following third party consultation, they had not given consent for this information to be disclosed.

145. The Council concluded that the unrestricted disclosure of the residents' emails, provided in a personal capacity and with a reasonable expectation that their identities would remain confidential would adversely affect their interests. The emails related to a sensitive local issue, within a small community where residents would know each others' views and patterns of expression. Even with the removal of direct identifiers such as name and address, the residents were likely to be identified. This could expose residents to personal distress, lead to community tensions and discourage members of the public from raising concerns with the Council. The Council acknowledged the presumption in favour of disclosure and that disclosure would increase transparency and accountability in relation to its decision-making. However, information was already in the public domain as to why the bollards were installed and there was a significant and overriding public interest in protecting the confidentiality of the residents and in enabling the Council to carry out its functions effectively. Protecting the voluntary flow of information was not only about safeguarding individual privacy, but was fundamental to maintaining public trust and to the Council's ability to gather honest, timely and accurate information from the public. Accordingly, the public

interest in disclosure did not outweigh the public interest in maintaining the exception to disclosure under regulation 12(5)(f).

146. As I have already indicated, the Council also determined that it would withhold third party names pursuant to regulation 13. Again, it set out its reasoning in some detail in the 18 July 2025 letter and Mr Sharland did not take issue with it. I consider that the Council is entitled to withhold this information. Such an approach is consistent with the FTT's 14 October 2024 decision, which Ms Bence has not challenged.

147. Mr Sharland's central contention was that the Council remained in breach of the order because it had not addressed the document highlighted by the FTT at paragraph 46 of its May 2024 decision as appearing to contain information relevant to this part of the request (paragraph 24 above). I have seen the closed bundle and can understand why the FTT made this observation. The Council did not address this document in terms in its responses to Ms Bence. It would have been better if it had done so. In his oral submissions Mr Beard said that this document was not within the terms of Ms Bence's narrowed search. This is correct inasmuch as the date of the document does not fall within the period 1 April 2020 – 7 April 2021 (although it was sent before the end of April 2021).

148. I have explained that I do not consider the Council can be criticised for having initially adopted search parameters that extended to 30 April 2021 (paragraph 135 above). Nonetheless, it was open to Ms Bence to narrow the terms of the information that she sought and/or to clarify the parameters of February 2023 request as she did, and for the Council to then limit the date range of the information it provided accordingly. Ms Bence was quite clear in her March, April and August 2025 correspondence that she sought information within a date range that ended with 1 April (or 7 April) 2021 (paragraphs 50 and 60 above). In the circumstances, compliance with paragraph 2(a) of the SDN, which directed the provision of the information requested on 10 February 2023, must be assessed in light of the narrowed /clarified search terms once Ms Bence had given that indication to the Council. Further or alternatively, in the circumstances I cannot be sure that after this Ms Bence had given this indication, the SDN clearly required the Council to provide information falling within paragraph 2(a) if the material post-dated 7 April 2021 and/or that a failure to do so constituted a breach of the FTT's order such as would amount to a contempt. At the very least there was ambiguity in this regard.

Paragraph 2(b) of the SDN: after 23 July 2025

149. Having reviewed the documents, it appears to me that the Council lifted the redactions that were directed by paragraph 2(b)(i) and (iii) of the SDN in the information it provided on 23 July 2025. Further, whilst I appreciate that the nature of a redaction is not always apparent to the receiving party, Mr Sharland did not suggest, for example, that there were any evident failings such as documents still containing the redacted title numbers of land registry searches.

150. In the circumstances it has not been proved so that I am sure that the Council has remained in breach of paragraph 2(b) of the SDN after 23 July 2025.

Compliance with the 11 February 2025 order

151. The 11 February 2025 order required the Council, within 7 days, to comply with the 16 December 2024 directions or to comply with the SDN (paragraph 39 above). As Mr Beard emphasised, these were expressed as alternatives. The Council accepts that it had not complied with the SDN by 18 February 2025, but it contends that it had already complied with paragraph 8 of the 16 December 2025 directions by providing the 23 December 2024 response to Ms Bence (paragraph 37 above).

152. Mr Sharland, on the other hand, submitted that the Council's 23 December 2024 communication did not amount to compliance with the 16 December 2024 order, which, he said, required the First Respondent to substantively address the matters Judge Moan had listed at paragraph 5 of her directions. In this regard he emphasised the opening words of paragraph 5: "The following issues fall for consideration by the Tribunal and should be the focus of the parties' evidence and submissions.." (emphasis added).

153. However, the key paragraph for present purposes is paragraph 8 of the 16 December 2024 directions. This required the Council to "respond substantively both in submissions and, if so advised in written evidence by way of witness statements, to the applicant's allegations" (emphasis added) within the stipulated timescale of 28 days. No part of the order required the Council to address the matters that Judge Moan had listed at her paragraph 5. The Applicant's allegation at this time, as set out in the GRC4 and recorded at paragraph 4 of the directions, was that she had received no response to the SDN. The 23 December 2024 communication was a substantive response to that allegation, even though it did not address all elements of the SDN. Furthermore, paragraph 5 of the 16 December 2024 order did not in terms direct compliance with the SDN.

154. Accordingly, whilst it might well be thought discourteous of the Council not to have even attempted to provide Judge Moan with the assistance she was seeking at paragraph 5 of the directions, I conclude that, as at 11 February 2025, the Council was not in breach of the 16 December 2024 directions.

155. Further, or alternatively, there was at least some ambiguity as to what paragraphs 5 and 8 of the 16 December 2024 order obliged the Council to do. If Judge Moan wanted to require the Council to substantively respond to the matters she had listed in paragraph 5 of the directions, this should have been stated in terms. There is, at least, insufficient clarity, in terms of what was required, to lead to a finding of contempt based on the proposition that as at 11 February 2025 the Council had not complied with this earlier order.

156. The terms of the 16 December 2024 directions have to be construed objectively, as I have done. Nonetheless, it is of some note, that when she was later made

aware of the 23 December 2024 communication, Judge Moan no longer considered the Council to be in breach of her 16 December 2024 directions (paragraph 57 above). This underscores the proposition that there was, at least, some ambiguity in terms of what her earlier order had required of the First Respondent. Judge Moan explained in terms that she was removing this aspect of her earlier certification because she was now aware that the Council had responded to her 16 December 2024 directions; in light of this explanation, I do not accept Mr Sharland's suggestion that she did this simply because she was "tidying up" the terms of the certification.

157. As I have found that the Council did comply with the 16 December 2024 directions on 23 December 2024 or, at least, it has not been proved to the criminal standard that it failed to do so in light of the lack of clarity over what was required, it follows that the Council was not in breach of the 11 February 2025 order or, at least, it has not been proved to the criminal standard that it was.

158. I mention for completeness that it is not entirely clear to me why Judge Moan certified the contempt in relation to her 11 February 2025 order (even allowing for the fact she was not aware at that stage of the Council's 11 February 2025 email to the FTT), given she had removed non-compliance with her 16 December 2024 directions from her certification. However, in circumstances where the validity of the certification is not challenged, I have proceeded to inquire into the certified offence and to determine it on its merits.

Summary of my findings on the disputed allegations of contempt

159. For the reasons set out above I have found that the Council remained in contempt in relation to paragraph 2(a) of the SDN until 23 July 2025. As I have highlighted earlier, the Council finally realised its oversight in respect of this part of the SDN on or by 25 February 2025 (paragraph 46 above). In the circumstances, and in light of the previous protracted default, it would be expected that the Council would then regard it as a priority to provide Ms Bence with a timely and conscientious response. However, the Council failed to do so. The 10 March 2025 response was obstructive and unreasonable for the reasons I have detailed (paragraphs 136 - 140 above). It has been proved so that I am sure that the Council remained in breach of the SDN from 10 March 2025 for nearly a further four and a half months.

160. However, for the reasons that I have also explained, it has not been proved so that I am sure that the Council remained in contempt by continued breach of either paragraph 2(a) or paragraph 2(b) of the SDN after 23 July 2025 or that it failed to comply with Judge Moan's 11 February 2025 order.

161. For the avoidance of doubt, the Upper Tribunal's jurisdiction in this matter is limited to the subject of the contempt certification. In circumstances where I have not found that there is any ongoing contempt by the Council, I do not consider the Upper Tribunal has jurisdiction to deal with outstanding matters (if there are said to be any outstanding matters) in relation to the case before the FTT.

Sanction

162. I have set out the nature and extent of the Council's contempt at paragraphs 130 and 159 above. Although I have not found all of the allegations proven, those that have been established are substantial and they reflect poorly on the Council. The Council is a large and relatively well-resourced authority with an in-house legal department. These failings were avoidable and should not have happened. The Council has been too ready to try and place the blame on others, in particular in making the unfounded allegations against Ms Bence that were included, on instructions, in Mr Beard's Skeleton Argument (paragraph 73 above). Despite the protestations to the contrary, I am left with the impression that the Council did not treat its obligations under the EIR or to the FTT with sufficient seriousness. It is nothing short of remarkable that it could be suggested in Mr Beard's Skeleton Argument (on instructions) that "at all times, the Council took appropriate and proportionate steps to ensure compliance with its legal obligations".

163. Although the Council's 18 July 2025 submissions to the Upper Tribunal said it had taken immediate steps to review and strengthen its procedures as soon as the issues had come to light (paragraphs 68 above), I received a concerning and unsatisfactory answer during the hearing when I asked for further details of the steps that had been taken in this regard. After taking instructions, Mr Beard told me that where a contempt was alleged, cases would now be referred to a more senior officer within the Council. When I pointed out that I was more concerned to hear about the steps that had been taken to avoid questions of potential contempt from arising in the first place, I was told by Mr Beard (after taking further instructions) that he was not in a position to indicate the steps that had been implemented, although he did refer in general terms to some additional training that staff would be receiving on FOIA and EIR obligations. Whilst this was a disappointing response, I am more encouraged by the contents of the post-hearing letter of apology to Ms Bence. In summary, this letter identifies the following: that the Council's Data Protection Officer will be assigned to undertake tribunal-related cases personally (with the assistance of external legal support, where required); compliance case handlers are receiving further training on FOIA and EIR obligations, in which, amongst other aspects, best practice and accountability will be reinforced; and team leaders and managers will sample closed cases to verify adherence to appropriate standards.

164. I make clear that I also expect the Council to carefully review the multiple failings highlighted in my decision and to take clear and focused steps aimed at ensuring there is no repetition.

165. Insofar as the Council relies upon the various apologies that it provided, the earlier apologies ring rather hollow in light of the Council's continued denial that it was in contempt until half way through the hearing itself; the fact it continued to deny it was in breach of the SDN after 10 March 2025; and the contents of Mr Beard's Skeleton Argument. However, I accept and record that a more fulsome apology was given during the hearing, when Mr Beard accepted that there had

been repeated and serious breaches (albeit limited to events up to 10 March 2025). Post-hearing the Council has provided a letter to Ms Bence dated 3 December 2025 which is a significant improvement on previous apologies, although it should have come at a much earlier stage, as the letter acknowledges. The letter is from Simon Mansell, the Head of Governance, Elections & Democratic Services. He proffers unreserved apologies for "the oversights and systematic errors which occurred during the handling of your EIR request" and for the Council's "handling of the subsequent First-tier Tribunal and Upper Tribunal proceedings". The letter recognises that in consequence of the Council's failings, Ms Bence has been occasioned significant inconvenience, frustration and distress. It also acknowledges that aspects of the Council's conduct of the litigation has been procedurally unfair in not copying Ms Bence into certain applications and other communications with the FTT and Upper Tribunal.

166. I accept that the Council did not wilfully breach either limb of paragraph 2 of the SDN (and that Judge Moan's characterisation of the Council's conduct as wilful was based on an incomplete picture of the circumstances at that stage). However, I do not consider that there was any reasonable basis for the Council to misunderstand the terms of the SDN or what it required of the Council. I also consider that the Council was, at least, cavalier in its failure to respond properly to paragraph 2(a) of the SDN for months after it had come to its attention. I repeat that I have not found that the Council continues to be in breach of the SDN.

167. As I have already noted, a breach of a Tribunal order by a public authority is a matter of considerable seriousness (paragraphs 98 – 100 above). This is all the more so where the breach is as protracted as it was in this case.

168. I regard the publication of the detailed findings of contempt on the part of the Council contained in this decision as an appropriate sanction in all the circumstances, coupled with the order for costs, which, as I explained earlier, has been agreed in the sum of £35,000.

Conclusion

169. I have inquired into the offences certified by the FTT. As I have explained, the Council accepted during the hearing that it was in breach of the SDN and in contempt for the period after the 35 days for compliance had expired until 10 March 2025 in respect of paragraph 2(a) and until 23 July 2025 in relation to paragraph 2(b) of the SDN. This concession was properly made and I am satisfied that these aspects of the contempt is established.

170. I have made findings in relation to the disputed aspects of the alleged contempt. For the reasons explained at paragraphs 136 – 140 above, I am satisfied so that I am sure that the Council remained in breach of paragraph 2(a) of the SDN and in contempt until 23 July 2025. For the reasons explained at paragraphs 141 –

150 above, I am not satisfied so that I am sure that the Council has been in breach of either paragraph 2(a) or 2(b) of the SDN after 23 July 2025. I am also not satisfied so that I am sure that the Council breached the terms of the FTT's order of 11 February 2025, as it appears that it complied with the earlier 16 December 2024 directions (paragraphs 151 – 158 above).

171. I have highlighted the protracted nature of the Council's contempt and the unsatisfactory aspects of it conduct at paragraphs 130 and 159 above. I have taken into account the mitigation and I have accepted that the Council did not wilfully disobey the SDN, albeit there are good reasons to characterise its response in highly critical terms, as I have done in those passages and in paragraphs 162 - 167 above.

172. I consider that the appropriate sanction in this case is the publication of this decision, along with the Council paying Ms Bence's costs in the agreed sum of £35,000.

173. This is the first case, so far as I am aware, where the Upper Tribunal has found a contempt proved in relation to a section 61 FOIA certification. I have therefore taken this opportunity to provide some guidance as to the respective roles of the FTT and the Upper Tribunal in relation to this process (paragraphs 89 – 96 above). I have also addressed the requisite elements of a civil contempt (breach of a court or tribunal's order), procedural safeguards and factors relevant to sanction (paragraphs 104 – 128 above).

Mrs Justice Heather Williams DBE
Chamber President of the Upper Tribunal (Administrative Appeal Chamber)

Authorised by the Judge for issue on 17 December 2025