



# Attorney General's Office

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Ms Strickland

By email to: [request-722740-303dc780@whatdotheyknow.com](mailto:request-722740-303dc780@whatdotheyknow.com)

12 March 2021

Dear Ms Strickland

## **Re: Freedom of Information Request (Ref: FOI/027/21)**

On 30 January 2021 you made this request to the Attorney General's Office pursuant to the Freedom of Information Act 2000:

"Please disclose all the materials sent to you in summer 2017 in the case of R v Thacker and others (Stansted 15 case), on which you based your consent to amend the charge to s1(2) (b) of the AMSA 1990."

On 19 February you were sent a response confirming that the AGO holds this material but that it considers it is exempt pursuant to section 42 of FOIA, further, that the public interest tended against disclosure.

On 22 February you wrote further, "Subject: Internal review of Freedom of Information request - Attorney General consent and material sent in 2017 re R v Edward Thacker and others (Stansted 15)", stating:

"Legal privilege does not apply in this context. Please review and disclose the information I have asked for in accordance with the law."

I am therefore conducting an internal review of the AGO decision of 19 February.

As you know, the offence contrary to section 1(2)(b) of the Aviation and Maritime Security Act 1990 provides that proceedings shall not be instituted without the consent of the Attorney General. Section 25(2) of the Prosecution of Offences Act 1985 provides that a suspect can be arrested and charged with an offence requiring consent and a remand decision taken without consent. However, any subsequent proceedings will be rendered a nullity if consent is not obtained. Therefore, the Law Officers become involved when there is a reasonable prospect of criminal proceedings being instituted and play an integral role in the decision as to whether to institute proceedings.

In order to obtain the Attorney General's consent, the Crown Prosecution Service provides an application, which it may supplement with any relevant supporting documentation, which sets out the evidential basis of the prosecution and any matters of public interest that it considers relevant. Those documents are prepared in connection with anticipated criminal proceedings and are used in or for the preparation of those proceedings. It is a constitutional principle that when taking a decision whether to consent to a prosecution, the Law Officers act independently of government, applying well established prosecution principles of evidential sufficiency and public interest.

Legal professional privilege constitutes two distinct but overlapping categories: litigation privilege and legal advice privilege. Litigation privilege is a protection afforded to confidential communications in connection with, in contemplation of, and for the (sole or dominant) purpose of adversarial legal proceedings. Legal advice privilege is a protection afforded to communications between a professional legal adviser, acting as such, and their client. A document or communication that is protected by privilege retains that status unless privilege is waived by the party that benefits from it.

I have reviewed the documents sent by the CPS to the AGO, in which they sought consent to prosecute, and which went before a Law Officer. These comprised the CPS application document itself and supporting documentation.

These documents were confidential communications from the CPS to the AGO, communicating why consent was sought for a prosecution: the CPS assessment and analysis of the evidential and public interest principles which fell to be determined. The documents were created and communicated in contemplation of a prosecution should the Attorney's consent be granted. I have therefore concluded that the documents are covered by litigation privilege.

The documents submitted also constituted and/or comprised advice provided and received in the capacity of legal adviser and client for the purpose of seeking and providing legal advice about the intended prosecution. I therefore further consider that legal advice privilege attaches to it.

I have therefore upheld the application of section 42 to the documents submitted by the CPS. The information held, which you seek, is clearly information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

I must then consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

I acknowledge the public interest in understanding a decision to prosecute and the importance of transparency given the nature and consequences of that decision. I acknowledge that particularly given that the Court of Appeal's conclusion in *R v Thacker, Smoke, Strickland, Burtonshaw, Clayson, Mackeith, Evans, Tamlit, Sigsworth, Hughes, Potts, Ram, McGahan, Clack and Brewer* [2021] EWCA Crim 97 that "the appellants should not have been prosecuted for the extremely serious offence under section 1(2)(b) of the 1990 Act because their conduct did not satisfy the various elements of the offence. There was, in truth, no case to answer."

However, I also note that the Court held as follows, at paragraph 111:

"We have concluded that the use of section 1(2)(b) of the 1990 Act was inapt in the circumstances of what occurred at Stansted Airport on 28 March 2017. It does not follow that the consent of the Attorney General was unlawfully given. From time-to-time prosecutors make errors of law and so too, with utmost respect, do Law Officers. The trial and appeal process provide the appropriate mechanism to deal with such points. We are unpersuaded that there is any arguable basis for impugning the decision of the Attorney General to sanction the prosecution. This case, on a renewed application, is not the place to explore the extent to which an attorney's consent may be challenged, something which has not successfully been achieved hitherto."

In this case, the decision to prosecute and moreover what the evidence was to support the charges was explored in detail in the trial and the appeal. The Court of Appeal has confirmed the legal position and the error(s) which led it to uphold the appeal. In other words, why the prosecution considered the various elements of the offence were met and why that was an error

has been considered in the trial and at appeal and has now been ruled upon and is set out in the judgment. All of that information either took place in public (the trial and appeal hearings) or was published and is therefore in the public domain (the judgment).

Set against that, the public interest which legal professional privilege protects is the full, candid and uninhibited assessment of the legal position where adversarial legal proceedings are contemplated. A full, candid and uninhibited assessment relies upon communications taking place under an expectation of confidentiality. It would be damaging to the relationship between the AGO and the CPS and the process by which consent is sought if those communications were less full, candid or uninhibited because they could not be conducted with an expectation of confidence. It would likely affect what documentation the CPS sought to obtain, whether the CPS would be prepared to share it and the extent to which both the CPS application and any supporting documentation fully, candidly and without inhibition addressed the strengths and weaknesses of the case. The privilege is something which is acknowledged as being fundamental to the administration of justice, that is to say the administration of justice relies upon the expectation that the confidentiality of legal communications will be upheld, and it is therefore an exceptional case indeed where, other than with the consent of both parties, public disclosure is subsequently made.

I have considered, both on the face of your request and more generally, whether this is a case where for some specific reason the public interest would clearly be served by disclosure. I have not identified any such reason, and although I attach some weight to the reasons I have identified tending in favour of disclosure, it is substantially not the same weight as that which I attach to the public interest tending against disclosure. I have therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The importance of ensuring that investigations are conducted, and decisions taken with full and frank disclosure of relevant information, outweighs the marginal public interest in disclosing these documents.

I would also add the following should you remain of the view that the material you seek is not covered by legal professional privilege. In that event, the AGO would draw your attention to (and if necessary, place reliance upon) section 30(1)(a) of FOIA. The material the AGO holds relates to an investigation we have a duty to conduct with a view to it being ascertained whether a person should be charged with an offence i.e. to establish whether consent should be provided. In addressing the public interest in disclosure, or alternatively in further placing reliance upon section 31(1)(c) (prejudice to the administration of justice) my assessment is that the conclusion would also favour non-disclosure for the reasons I have set out above.

In conclusion, I uphold the decision of 19 February.

If you are not content with the outcome of this review process, you have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Yours sincerely

Tom Guest  
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Attorney General's Office