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4 January 2021

Dear J E Garner,

Freedom of Information Act (FOIA) Outcome of Internal Review – 201202008

Thank you for your Internal Review request, received on 2 December 2020, regarding FOI request 200915010, in which you asked for the following information from the Ministry of Justice (MoJ):

“With reference to the findings of Judge Ord in the [REDACTED] v Secretary of State for Justice Employment Tribunal case, involving withholding of evidence, tampering, corrupting of documents etc. Please provide details of:

1. The report into the conduct of the respondents (MOJ) carried out by the woman in the Government's Legal Department as referred to in Paragraph 50.

2. Please explain why, the woman in the Government's Legal Department is allowed to prepare the "Report into the conduct," when she herself was involved in the ET remedy hearing, is this not a conflict of interest?

3. Please provide details of anybody involved in the above ET case, guilty of the "forgery of documents" having been disciplined/dismissed as a result of the MOJ's Legal Department's "Internal Review"

4. Please provide details of those responsible for the "corruption of and misleading after-the-event creation of documents" as referred to in Paras 59 and 61 of the ET judgment, being referred to the Police/CPS for consideration of a prosecution for the criminal offence of forgery”.

The purpose of an Internal Review is to assess how your FOI request was handled in the first instance and to determine whether the original decision given to you was correct. This is an independent review: I was not involved in the original decision.

Firstly, as noted in our original response, I should explain that I have redacted the name of a third-party individual in your request as this information is exempt from wider dissemination under section 40(2) of the FOIA, because it is personal data. Personal data should only be processed more widely if to do so would not contravene any of the data protection principles set out in Article 5(1) of the General Data Protection Regulation and section 34(1) of the

Data Protection Act (DPA) 2018. Releasing the redacted information within the terms of your request into the public domain via FOIA would therefore be unlawful.

Turning to the response to your original questions, we confirmed that some of the information requested, in respect to items 1,2 and 4, is held by the MoJ but exempted from disclosure.

Item 1 was exempted from disclosure under section 42(1) of the FOIA, because it constitutes confidential information between lawyers and clients. We withheld information for item 2 of your request under no specific exemption, but with an explanation of how the Government Legal Department (GLD) review was carried out. Information in relation to item 4 was withheld under section 14(2) of the FOIA, as the MoJ is not obliged to comply with a request which is identical, or substantially similar, to an earlier request from you, unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

In relation to item 3, we confirmed that the MoJ does not hold the information requested.

After careful consideration I have concluded that this response was **compliant** with the requirements of the FOIA.

Statutory deadline

The statutory deadline for your request was 29 September 2020. On 13 October 2020 and 10 November 2020, we wrote to you explaining that we needed more time to carry out the public interest test, as the information engaged s38(1)(a) and s42(1) of the FOIA. Whilst we note the importance of prompt and timely replies to FOIA requests we do, on occasion, exercise the discretion allowed in the legislation to take additional time to consider complex public interest matters fully.

We provided the final letter in response to your request on 1 December 2020. All three replies were, therefore, compliant with the timeliness requirements of the FOIA.

Outcome

I will address the four items in your letter in turn.

Item 1

In our original response we explained that we were applying section 42(1), because the GLD review constitutes confidential information between lawyers and clients. Having considered the applicability of this exemption, I am satisfied that the information does fall within the scope of section 42(1). As it is a qualified exemption, the decision to disclose the requested material is subject to the public interest test. When assessing whether it was in the public interest to disclose the information to you, our response then set out the arguments favouring disclosure and those favouring withholding the information.

In relation to the arguments favouring disclosure, we noted there was a public interest in public authorities being accountable for their decision making, and we acknowledged that part of this duty was to ensure that those decisions reflected good-quality legal advice. The response also highlighted how transparency and access to the information upon which decisions have been made can enhance accountability, and that knowing whether or not legal advice has been followed in some cases is in the public interest. We ended by noting that transparency arguments gain weight when public funds are spent on providing legal advice.

Turning to the arguments we set out favouring withholding the information, we outlined that GLD prepared this report to provide a review and advice on its conduct of that litigation on behalf of Her Majesty's Prison and Probation Service (HMPPS)/Ministry of Justice (MOJ). The principles of Legal Professional Privilege (LPP) were also pointed out here and the response acknowledged that a client should be guaranteed the greatest level of openness, leading to full and frank legal advice in confidence, including the review of litigation.

In these arguments favouring withholding the information we stressed the importance of public authorities being allowed to conduct what was termed 'a free exchange of views as to their legal rights and obligations with those advising them, without the fear of intrusion'. We added that both HMPPS/MoJ as the client, and its legal adviser need to be able to discuss litigation matters freely so that issues were considered fully, consistent with the fundamental principle of English law.

Finally, we noted that previous case decisions by the Court have established what we describe as a 'strong presumption in favour of maintaining LPP in the absence of compelling reasons to the contrary'. We ended this section of argument by confirming that there are no compelling reasons to waive that privilege in this case.

In summary we concluded that the public interest favours withholding the information at this time.

Having weighed these arguments again I am satisfied that the decision to withhold the GLD review under s42(1) was correct. The lawyer/client relationship can only be exercised in the public interest if there is a free exchange of legal advice and views without the fear of intrusion, whether it is in matters of litigation such as this, or on broader government decision making. The Government's duty to be transparent and accountable to the taxpayer in its decision making, whilst clearly compelling, should not outweigh these principles here, and I believe we struck the right balance in our response of 1 December.

I have noted your additional comment that the report could not 'wholly contain LPP' and that the application of section 42(1) was 'flawed'. Whilst it is true that, in applying exemptions under the FOIA to documents we hold, we must be mindful to apply this only to the sections of text that engage such an exemption, I am satisfied that the exemption in this case can be applied to the whole document. Having viewed in full the GLD report I can confirm that, with the exception of a half-page introductory pre-amble, it contains wholly legally privileged content.

Finally, on item 1 our original response confirmed we had considered whether the information is exempt from disclosure under section 38(1)(a) – endangerment to the physical or mental health of any individual – and/or section 40(2) – personal information. We concluded that some of the information contained within the report would fall within each of those exemptions but would not be applied, as section 42(1) exempts the whole of the report. I agree with this additional assessment of other potential exemptions and have no reason to change the approach in my review of the case.

Item 2

In the original response we confirmed that the report is a review conducted by the GLD of the conduct of the litigation to which the Secretary of State for Justice was a party. We made it clear that whilst there may be an inference from the Remedy Judgment referenced in your request, the person who conducted the review was not otherwise involved in the case. It may also help you to know that our Counsel made oral submissions to the Tribunal at the time confirming that the person conducting the review was not involved in the conduct of the litigation. I note you have a difference of opinion on this matter, but I am satisfied that our original reply does not require any amendment or reconsideration.

On a further note, in relation to this item, I note our previous reply outlined that this was not an information request within the meaning of the FOIA, and our answer here was explanatory in nature. I agree with this approach and can confirm that Section 84 of the FOIA states that, in order for a request for information to be handled as a FOI request, it must be for recorded information. For example, a FOI request would be for a copy of a policy, rather than an explanation as to why we have that policy in place. The advice you received in the previous reply about this was, therefore, correct.

Item 3

On this point, in our original reply, we confirmed that the terms of reference of the GLD review were to provide advice to the MoJ about the conduct of the litigation only, and we did not, therefore, hold any information about staff involved in the Employment Tribunal being dismissed or disciplined because of the review.

I have considered this point again and am satisfied that the advice we gave to you in our reply was clear and unambiguous, and came to the correct conclusion.

Item 4

I note that you do not comment specifically on this item in your request for Internal Review. I will, however, provide a review of this element of the case as well for clarity.

In our original reply we stated that the information requested is exempt from disclosure under section 14(2) of the FOIA. We noted the MoJ's previous responses of 1 October 2020 (FOI 200915040), and your subsequent request for an Internal Review of that response, which was provided to you on 28 October (IR 201001051), upholding the original reply. We noted our understanding that you have since asked the Information Commissioner's Office to review the Department's handling of your request.

We then explained our view that, whilst the wording of your request on this occasion was different, you sought substantially the same information as requested in FOI 200915040 and we were applying section 14(2) of the FOIA here as the MoJ is 'not obliged to comply with a request which is identical, or substantially similar, to an earlier request from you, unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request'.

I have reviewed the content of the previous cases referred to above and can see no reason to change the approach to the use of section 14(2). In the first case you ask if any staff (responsible for the forgery of documents) have been '*referred to the Police/CPS for a consideration of a prosecution for the criminal offence of forgery?*' In this current case, whilst you have expanded the paragraph with a short preamble, you go on to use this identical phrasing at the end of your sentence. Section 14(2) is, therefore, correctly applied.

In conclusion I am satisfied that the response you received on 1 December 2020, to all items of your request, was correct.

Appeal Rights

If you are not satisfied with this response you have the right to apply to the Information Commissioner's Office (ICO). The Commissioner is an independent regulator who has the power to direct us to respond to your request differently, if she considers that we have handled it incorrectly.

You can contact the ICO at the following address:

Information Commissioner's Office

<https://ico.org.uk/Global/contact-us>

Yours sincerely,

W J Coonerty, HM Prison & Probation Service