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Refs: IR2022/19190
FOI2022/16174

Dear Amanda Hayman,

Freedom of Information Act 2000 Internal Review

Thank you for your email dated 3 October, requesting an internal review of our response dated 21 September to your information request made under the Freedom of Information Act 2000 (the FOI Act), under our reference: FOI2022/16174.

The department has now completed its internal review process and has carried out a thorough review of the case overseen by a senior official who was not involved with the original request.

Background

On 26 August, you made the following request under the FOI Act:

"1. Confirm whether your organisation applied to be part of the Stonewall Workplace Equality Index in A) 2018 (for 2019), B) 2019 (for 2020) or C) 2021 (for 2022) (NB the index was suspended in 2020/21 because of Covid)

2. Give details of the total amount of money you paid to Stonewall in 2021 whether or not as payment for goods or services.

3. State whether you intend to continue your membership of any Stonewall scheme in the future, and if so which.

If the answer to any part of 1 is yes please supply:

4. Any application you made in 2021 to be included on Stonewall's Workplace Equality Index, including any attachments or appendices to those applications. Please redact personal details if necessary.

5. Any feedback you received in 2018/19 or 2019/20 or 2021/22 from Stonewall in relation to either application or programme. This must include the priorities or

objectives written by your organisation's representative at the end of the feedback form (under the heading 'Priorities for the year ahead' in 2019; 'Your priorities' in 2020)."

On 21 September we provided our response. We responded factually to your first, second, third and fourth questions, including confirming that Treasury is no longer a Stonewall member or participating in the Stonewall Workplace Equality Index.

In response to your fifth question in which you asked for *"any feedback you received in 2018/19 or 2019/20 or 2021/22 from Stonewall in relation to either application or programme"*, we advised that we are interpreting this as referring to the 2018/19 and 2019/20 feedback reports the Treasury received from Stonewall. We informed you that the information we hold in response to your fifth question engages the exemptions at section 41(1)– information provided in confidence – and section 43(2) – prejudice to commercial interests – of the FOI Act. Section 43(2) is a qualified exemption and we concluded that the public interest in withholding the information outweighs the public interest in disclosing it.

On 3 October, you requested an internal review as follows:

"I am writing to request an internal review of HM Treasury's handling of my FOI request 'Information about Stonewall Workplace Equality Index (WEI)'.

I reject your view that you can apply sections 41(1) and 43(2) of the FOI Act in these circumstances. The issues of 'confidentiality' and 'commercial interests' have been considered in detail in recent decisions of the Commissioner. These were referred to in my original request and, for the sake of convenience, I attach links to those decisions below. In addition, I have included a link to an explanatory note relating to those decisions which may be of assistance.

With reference to section 41(1), I do not agree that disclosing the information sought would constitute an actionable breach of confidence. In this context, 'actionable' means 'likely to succeed' and, as the Commissioner has noted in the decisions referred to, there is a valid 'public interest' defence upon which you could rely were any claim to be brought by Stonewall. I draw your attention, in particular, to paragraphs 29 to 48 of the University of Huddersfield decision, which deal with this aspect in considerable detail. In light of the comprehensive review of the legal position undertaken by the Commissioner it is not open to you to rely upon section 41(1).

Turning to section 43(2), I do not accept that you have undertaken the balancing exercise required of you in an appropriate manner, or at all. You have noted that you 'recognise' that there is a public interest in transparency before just moving on to assert that disclosure would be likely to prejudice the commercial interests of Stonewall. That does not amount to undertaking a balancing exercise at all, not least because it does not contain any reference to the weight you have attached to each element. Indeed, it seems clear that (reading between the lines) your reference to 'transparency' is nothing more than a sop. The suggestion that information in the public domain might satisfy the need for transparency is ridiculous. The whole purpose of the request is to seek disclosure of detailed and specific information related to the Treasury and not information that is generally available online.

Furthermore, you have made no distinction between the various types of material you may hold with respect to this element of the disclosure request., as is clearly necessary following the approach taken by the Commissioner. It is obvious that you have decided to protect Stonewall's commercial interests at all costs and believe that giving the illusion that you have considered the need for transparency will suffice. It will not.

The Commissioner's views on these issues take into account a variety of factors that impinge upon the relevant tests you have to undertake, including the very marked change in the public's perception of Stonewall and the withdrawal of many public authorities from various Stonewall programmes. Consequently, and in order to avoid the need for a referral to the Commissioner, I urge you to review my application for disclosure in light of the points I make above and the specific contents of the Commissioner's decisions."

In your request for an internal review, you also provided links to various decision notices issued by the Information Commissioner's Office.

The Review

I have considered the response we provided to your fifth question, which asked for "any feedback you received in 2018/19 or 2019/20 or 2021/22 from Stonewall in relation to either application or programme", and whether our handling was compliant with our obligations under the FOI Act.

First, to clarify, HM Treasury holds feedback reports from Stonewall in relation to Stonewall's 2019 Workplace Equality Index and Stonewall's 2020 Workplace Equality Index.

Following our review, detailed further below, please find the information you have requested attached. Please note that some information is still being withheld in reliance on section 43(2) - commercial interests – and is explained further below. Please also note that HM Treasury leadership has changed since the reports provided by Stonewall so references to specific individuals, such as the Permanent Secretary, may no longer be relevant

Section 41

We have considered our application of section 41(1). Section 41(1) provides that information is exempt if disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

Guidance from the Information Commissioner's Office states that, for this exemption to apply, four criteria must be met:

- the authority must have obtained the information from another person
- its disclosure must constitute a breach of confidence
- a legal person must be able to bring an action for the breach of confidence to court
- that court action must be likely to succeed

HM Treasury received feedback from Stonewall, so the information has been received from another person. That "person" (Stonewall) is a legal person, capable of bringing an action for a breach of confidence. Consequently, the first and third criteria are met.

We also consider that the second criteria is met. The Information Commissioner's Office has recognised that Stonewall's Terms and Conditions for membership indicate that information of this type was likely to have been provided with an expectation of confidence and therefore the information was imparted in circumstances importing an obligation of confidence and disclosure could breach said confidence.

To clarify, section 41(1) is an absolute exemption and is therefore not subject to a public interest test. However, to determine whether an action would be likely to succeed, and therefore that the fourth criteria is satisfied, we must assess whether HM Treasury might be able to put forward a public interest defence. Decision notices issued by the Information Commissioner's Office have found that a public defence argument can be used against any court action, and upon reviewing we now consider that the fourth criteria is not satisfied.

Due to this, we no longer consider that section 41(1) is engaged for the information you have requested.

Section 43(2)

We have also considered our application of section 43(2). Section 43(2) exempts information whose disclosure would, or would be likely to, prejudice the commercial interests of any legal person (an individual, a company, the public authority itself or any other legal entity).

In decision notices on FOI requests for public authority's submissions to the Stonewall Workplace Equality Index, the Information Commissioner's Office has recognised there will be some commercial detriment arising from disclosure. Disclosure of the information requested would allow organisations providing similar services to use the information to their advantage, and to Stonewall's detriment. It would also allow other organisations to benefit from Stonewall's expertise without participating in Stonewall's programmes themselves. This deprives Stonewall of the income from such organisations. We therefore continue to consider that section 43(2) is engaged.

We assure you that we fully considered the public interest test when considering your initial request. However, we recognise that our initial response did not detail this.

In favour of releasing the information, we recognise the general inherent public interest in transparency and in the accountability of public authorities.

In this specific case, we recognise that there is a strong public interest in ensuring that public authorities are committed to inclusivity given the role that we play in people's lives. Taking equality considerations into account in our work as a government department is an important and integral part of our approach as both an employer and a policymaker.

Further information on this can be found on GOV.UK at:

<https://www.gov.uk/government/organisations/hm-treasury/about/equality-and-diversity>.

We also recognise in this case that there is a public interest in ensuring that taxpayer's money is spent responsibly. HM Treasury have provided funding to Stonewall as part of an annual membership subscription fee. Details of this spend can be found in response to a

Parliamentary question at: <https://questions-statements.parliament.uk/written-questions/detail/2021-11-09/72343>.

We have also noted the arguments made in decision notices issued by the Information Commissioner's Office, most notably concerns about lobbying given advertisements are included in the Stonewall's Workplace Equality Index feedback reports.

In favour of withholding the information, we recognise that Stonewall should not be put at a commercial disadvantage because it delivers some of its services to bodies subject to the FOI Act. There is a public interest in Stonewall being able to carry out its charitable objectives without being undermined commercially.

In addition, as an economics and finance ministry HM Treasury relies on information provided by a range of stakeholders to help develop policy and wider understanding. There is a strong public interest argument that HM Treasury, as well as wider Government, maintain good working relationships with valuable stakeholders to better understand all considerations when developing policy. As stated above, taking equality considerations into account in our work as a government department is an important and integral part of our approach as a policymaker.

As stated in our previous response, the transparency of information is met to some extent by Stonewall publishing their rankings of organisations. Whilst we appreciate that this does not provide you with the same level of detail as the information you have requested, we do consider that this satisfies some of the public interest arguments in releasing the information you have requested. In particular, this information satisfies the public interest in understanding, broadly, HM Treasury's dedication to inclusivity.

We also consider that the information we are now releasing, given that we no longer consider section 41(1) is engaged, satisfies the remaining public interest arguments. In particular, we are releasing the advertisements that are included in our Workplace Equality Index feedback reports from Stonewall to satisfy the public interest concerns around lobbying.

We consider that the information which has been withheld, bespoke feedback from Stonewall, would hinder their commercial interests and ultimately impact on their charitable aims. We do not consider that this is in the public interest and have therefore withheld the information under section 43(2) - commercial interests.

Conclusion

I hope that by setting out the basis of the review, its findings and conclusions above, you will be assured that the Treasury has, on your behalf, carried out a thorough and considered review of the request you made and the responses that the Treasury gave under the FOI Act.

If you are not content with the outcome of this internal review you have the right to apply directly to the Information Commissioner for a decision. The Commissioner can be contacted at: The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow SK9 5AF.

Yours sincerely

Head of Information Rights Unit