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Dear Ermine,

## Review of handling of request for information on dealings with Stonewall (IR772)

Further to my email of 29 July 2021, I am writing with my conclusions on the handling of your request for information on dealings with Stonewall. Thank you for your patience.

### **Q1 of your request**

The s43(2) exemption—I consider that the public interest is finely balanced but falls in favour of disclosure. Subject to the application of other exemptions, I have concluded that the applications from 2019 and 2020 should be disclosed, and these are attached.

It may helpful if I set out my consideration of the public interest underlying this decision.

I consider the key points in favour of disclosure are:

- (a) Accountability—informing the public about the use of public money;
- (b) Openness and transparency—informing the public about wider issues of the day, including how outside bodies and other persons influence public bodies;

- (c) Providing additional information to bodies that may be beneficial for promoting equality and diversity, particularly better performance of the public sector equality duty.

I consider the key points in favour of maintaining the exemption (against disclosure) are:

- (d) Disclosure will tend to reduce participation in Stonewall's programmes, leading to harm to Stonewall's commercial interests by loss of income;
- (e) Disclosure will tend to make WAO and other public bodies less frank in applications to the Stonewall programmes and other equality-related improvement programmes, leading to less effective programmes, which may in turn diminish progress in equality matters (and which may further make public bodies less willing to participate exacerbating the point above)—I note, however, that elements of the Stonewall programmes are matters of debate.

The section 40(2) exemption— I have concluded that the application of the s40(2) was, and remains, appropriate. The applications contain, though do not entirely consist of, personal information, which if disclosed would be contrary to data protection principles. I recognise that you may have intended your phrase "*Please redact personal details if necessary*" to put personal data out of the scope of the request. However, given the scope for confusion, I consider it appropriate that we made clear that personal data in the application that falls within s40(2) is withheld, as stated in our response of 6 April 2021.

The s41(1)(b) exemption—I consider that as some information in the applications was obtained by WAO from or about individuals on the understanding that it was provided voluntarily in confidence, disclosing such information would be an invasion of personal privacy and detrimental to the individuals concerned. I consider that given Article 8 of the European Convention on Human Rights, the public interest in maintaining confidence outweighs the public interest in disclosure (as outlined above under s43(2)). I therefore conclude that the s41(1)(b) exemption was correctly applied and should be maintained for such information.

## **Q2 of your request**

The s43(2) exemption—I have concluded that this exemption should not be maintained on the feedback material. This for the same reasons as outlined above under Q1 in respect of the s43(2) exemption.

The s41(1)(b) exemption—I have concluded that this exemption should be maintained, as follows.

The feedback has the necessary quality of confidence: it is not trivial in nature, and it is also not accessible (apart from proforma elements—see below). It was provided on the understanding that it would be kept confidential. Also, the confider would be subject to detriment: it is likely that disclosure will make public bodies less likely to participate in Stonewall's activities, leading to loss of income (as set out above at (d) under Q1). Disclosure would therefore appear to be an actionable breach of confidence. However, we must also consider whether disclosure would be covered by a public interest defence.

In favour of such a defence are the public interest in:

- Accountability—informing the public about the use of public money;
- Informing the public about wider issues of the day, including how outside bodies influence public bodies;
- Providing additional information to bodies as to what may be beneficial for promoting equality and diversity, particularly better performance of the public sector equality duty.

Against such a defence are:

- Disclosure would undermine the principle of confidentiality in general and undermine confidence in public bodies—that they cannot be trusted to keep information provided in confidence confidential, so people and organisations will be less likely to engage with them constructively;
- Disclosure in this case would be likely lead to Stonewall being less frank in its feedback, leading to a less effective service, which may in turn diminish progress in equality matters and also make public bodies less willing to participate (which may further diminish equality progress and reduce income)—again, I note that elements of the Stonewall programmes are matters of debate.

My view is that the arguments on both sides are weighty. However, I consider that the claim to confidentiality is reasonable in that it supports frank feedback and the benefits that provides. It is not clear that the public interest in favour of a defence (for disclosure) outweighs the public interest in maintaining confidentiality. I therefore do not consider that a public interest defence would be likely to be successful. Accordingly, I conclude that the section 41(1)(b) exemption should be maintained.

As to the proforma elements of the feedback material, these would seem to be in the public domain and therefore exempt under section 21 (information accessible by other means), which is an absolute exemption (not subject to the public interest test).

### **Q3 of your request**

I have concluded that the personal information within the application falls within s40(2) as stated in our original response and that this exemption should be maintained for such information. I have also concluded that there is a small amount of information within the communications that was provided to us in confidence and that the s41(1)(b) exemption applies, as explained under Q2.

However, I have concluded that the parts of the correspondence which do not fall within the scope of sections 40(2) and 41(1)(b) should have been disclosed, and this redacted correspondence is now attached.

### **The three areas you requested consideration of in review**

You will see from the above that I have included consideration of the three areas that you set out in your request for review: openness and transparency, accountability for spending public money and the public sector equality duty. It may, however, be helpful to set out some further detail in respect consideration of the particular points you raise:

#### **1) The strong case for openness and transparency in your dealings with Stonewall, given the Equality Minister's call for all public sector organisations to leave Stonewall.**

The UK Equality Minister's views do not seem to me to be particularly relevant or persuasive, as the Wales Audit Office is not subject to the Minister's direction or guidance.

#### **2) The accountability for spending public money on advice from an organisation that the Reindorf Review found has an erroneous understanding of the law, basing advice, directions on policy and requirements for the Workplace Equality Index on the law as Stonewall would prefer it to be, rather than the law as it is.**

Our 6 April 2021 response disclosed the amount of expenditure on Stonewall's services. With this context, the benefit of further public knowledge of the nature of Stonewall's advice through disclosure of its particular feedback (advice) provided in confidence would not seem to justify the breach of that confidence.

**3) Your Public Sector Equality Duty - withholding this information obstructs your execution of your Public Sector Equality Duty including the duty to advance equality of opportunity between people who share a protected characteristic and those who do not and the duty to foster good relations between people who share a protected characteristic and those who do not.**

I recognise that it is significantly in the public interest to disclose information that may be beneficial for promoting equality and diversity, particularly for better performance of the public sector equality duty. However, the public interest in such disclosure must be weighed against the need to maintain trust in public bodies' proper treatment of information provided in confidence. The benefits of such disclosure would not seem to justify the breach of that confidence.

I see that our Information Officer has already referred you to section 50 of the Freedom of Information Act under which you may apply to the Information Commissioner for a decision on whether your request has been dealt with in accordance with the Act. The Information Commissioner's contact details are:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF  
Tel: 0303 123 1113

As our Information Officer noted in her response to you, the Information Commissioner would normally expect you to have exhausted our internal complaints procedures before dealing with such an application. It may therefore be helpful if I confirm that I consider that you have exhausted our procedures. Further guidance may be found on the Information Commissioner's website: <https://ico.org.uk/>.

Yours sincerely,

Martin Peters

Pennaeth y Gyfraith a Moeseg || Head of Law & Ethics

Ysgrifennwch ataf yn Gymraeg neu'n Saesneg || Please write to me in Welsh or English