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Ministry of JUSTICE

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FOI case: ITG 58068
08 May 2009

Dear Mr Gunn,

Re: Request under the 2000 Freedom of Information Act

I am writing to respond to your request you made on 6th February 2009 for an internal review of the Ministry's response to your Freedom of Information Act request in which you asked:

When did the Lord Chancellor last review the discount rate under Section 1 of the Damages Act 1996, and what evidence was placed before him?

The Ministry of Justice on the 30th January 2009 neither confirmed nor denied that it held any information falling within the description specified in your request and found that the duty in Section 1(1)(a) of the Act did not apply by virtue of Section 35(3) of the Freedom of Information Act (formulation of government policy). You then requested an internal review of this response.

I am sorry for the time it has taken to respond to your request that we review our original decision. This delay in responding should not be taken as an indication that the information you requested is or is not held by the Department.

By way of explanation, the delay in dealing with both your original request and internal review has been caused by an unusually high volume of requests for information and some legacy issues. We have made a number of administrative changes that I hope will improve our service. In addition, replies to outstanding requests are now being progressed by a larger team.

The Information Commissioner is aware of the difficulties the unit has faced and is monitoring the changes we are implementing to improve the position.

I have thoroughly reviewed and reconsidered the Ministry's original refusal to confirm or deny whether or not it holds any of the information you requested. I am satisfied that the

original decision was correct.

We believe that to confirm or deny whether or not information is held could lead financial analysts within the insurance industry and elsewhere to speculate, possibly incorrectly, as to the level of exposure insurance firms will face, as changes in the discount rate will affect the level of lump sum awards calculated on the basis of the discount rate.

To confirm or deny holding any of the information requested therefore could have two effects:

1. An effect on the market.
2. A direct effect on parties in damages cases.

Any order by the Secretary of State to amend the discount rate would be a statement of certainty to financial markets, insurers, and other interested parties. Any amendment would be clear in terms of its direction and magnitude, and would provide a solid basis on which to update expectations - that is, the change in the discount rate would be clear. However, to confirm or deny whether an amendment was merely considered would only provide an unclear signal to the market that a policy change (of some description or another) may be more or less likely to occur, even though a settled decision may not in fact be taken.

Under this exemption in the Act, we must take into account the balance of the public interest in confirming or denying whether or not information is held by us. Where the balance of the public interest falls in favour of confirming or denying whether we hold information, then we will do so. In this instance, I am satisfied that the public interest at the time of your request fell in favour of not doing so.

We acknowledge the general public interest in openness in the conduct of public affairs, and recognise that there is a public interest in knowing what policies are being considered by the Government at any given time.

However, were an announcement on the discount rate to be expected (correctly, or incorrectly) of the basis of a confirmation or denial, it could directly change the behaviour of those involved in damages claims.

This would significantly affect settlements, as cases would then either be stayed or expedited as a result of expectations as to whether the discount rate was likely to go up or down. I am satisfied that it is not in the public interest to disrupt financial markets and the equitable settlement of claims through speculation caused by a Government department confirming or denying whether it holds specified information.

While some degree of speculation regarding the discount rate is inevitable, any indication relating to any possible future change in the rate or the timing of any such change would be much more harmful in its effects on settlements. We believe that these reasons outweigh the public interest argument of transparency in government operations.

The basis of your request for a review was that once a decision has been reached all statistical information that lead to that decision is no longer protected under the formulation of policy exemption. It may be helpful if I explain that while the confirmation or denial you have requested would relate to information that is (or would be) statistical in nature, such information is not (or would not be) 'informed background' to a decision, but an integral

part of the decision itself. Therefore, by virtue of section 35(3), the duty to confirm or deny does not arise.

I am sorry that on this occasion I have not been able to be of more assistance.

If you are dissatisfied with the findings of this review, you have the right to apply to the Information Commissioner. The address for the Information Commissioner is:

Information Commissioner's Office,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire
SK9 5AF.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Michael Evans', enclosed within a circular scribble.

Michael Evans