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The Rt Hon the Baroness Scotland of Asthal QC
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Dear Attorney General,

GUIDANCE ON DUTY OF CANDOUR AND DISCLOSURE IN JUDICIAL REVIEW PROCEEDINGS

I am enclosing the final version of the guidance for Government departments and agencies on discharging the Duty of Candour and Disclosure in Judicial Review Proceedings. The guidance has been produced by a former senior government lawyer, David Hogg CB, in consultation with relevant Government departments, including my own, and First Treasury Counsel.

I commissioned this exercise in April in response to a request from Foreign and Commonwealth Office and Home Office legal advisers, following difficulties which had been encountered with disclosure in the *Binyam Mohamed* litigation. In the light of further difficulties in the *Al Sweady* case in May I asked David Hogg to ensure that the guidance reflected any lessons to be learned from that case.

The purpose of the guidance is to set out the law and standards applicable in discharging the duty of candour and in giving disclosure, where relevant, in judicial review proceedings; to give guidance on the procedures which should be followed in order to meet those standards; and to identify where responsibility for each element of the disclosure process rests in any particular case. I have already stressed to colleagues across Government the paramount importance of complying with our duty of candour and co-operation with the court. The guidance is designed to assist with

this and, as far as practicable, to help avoid a repetition of the problems which arose in *Binyam Mohamed* and *Al Sweady*.

The guidance recognises the challenges faced by Government bodies in cases involving very large volumes of material, particularly where much of it is highly classified for reasons of national security, international relations or other sensitive public interest considerations. Such challenges can arise in judicial review cases (with which the guidance is concerned) as well as in civil damages claims. The resource burdens which such cases place on public bodies can be immense. The numbers of documents can run into tens or even hundreds of thousands. Material relating to a given case, even where involving only a single department, may be held in many different formats, on multiple systems or databases and in numerous locations, sometimes including theatres of conflict or other difficult environments overseas. The complexities are multiplied where (as is often the case) material is held by a number of different departments or agencies. It may be necessary to search the material against many different terms, including (for example) multiple aliases, variants or different spellings of a name. Not all material is in a format which can be readily or electronically searched. When the material under review is sensitive, the need to take into account the differing national security interests of multiple departments requires a significant additional effort on the part of the reviewing department.

Where possible, departments will allocate additional resources to meet these demands. That may include co-opting junior members of the self-employed bar (in some cases considerable numbers) to review documents. However, merely recruiting additional personnel is not necessarily the answer. The individuals concerned will need to be security cleared to the appropriate level. This limits the pool of available personnel and can entail delay. As the number of personnel working on a particular case grows, ensuring consistency between teams becomes increasingly challenging. Moreover, some judgments, for example whether to seek redaction of a document on national security grounds, may require detailed knowledge of the specific subject matter and can be taken only by officers with the appropriate expertise and experience. This work needs to be factored into the other demands on the departments and agencies concerned and on particular personnel within them, including their responsibilities for protecting national security. As you and I have discussed, this last point is of considerable, and growing, concern.

The guidance encourages Government bodies to assess resource requirements early and factor these into any representations made to the court on what might constitute reasonable timescales for disclosure. Where, despite their best efforts, departments face difficulties meeting disclosure deadlines in a given case because of the particular challenges described above, the guidance stresses the need for early and open engagement with the court.

The guidance will be widely disseminated within Government. In addition Treasury Solicitors will be implementing a training programme, designed to promote understanding of our disclosure obligations and of best practice in this area.

Yours sincerely
Paul Jenkins

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