



Secretary of State for Health and Social Care
Houses of Parliament
London
SW1A 0AA

Minister for the Cabinet Office
Cabinet Office
70 Whitehall
London
SW1A 2AS

Also sent by e-mail: [REDACTED]

Dear Madam/Sir

RE: R (Good Law Project Limited & Others) v Secretary of State for Health and Social Care & Minister for the Cabinet Office

Pre-Action Protocol Letter

Proposed Claimants

- (1) Good Law Project Limited
- (2) Caroline Lucas MP
- (3) Debbie Abrahams MP
- (4) Layla Moran MP

The details of the Claimants' legal advisers dealing with the claim are as follows:

Deighton Pierce Glynn, Unit 10c Whitefriars, Lewin's Mead, Bristol, BS1 2NT

Proposed Defendants

- (1) The Secretary of State for Health and Social Care
- (2) The Minister for the Cabinet Office

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Reference Details

Our reference: UH/3553/011

Please cite the above reference number on all future pre-action correspondence.

Details of the Decision being Challenged

1. The Claimants challenge the repeated failure of the Secretary of State for Health and Social Care to comply with his duty under regulation 50 of the Public Contracts Regulations 2015 (“the Regulations”) to publish contract award notices in respect of contracts for goods and services referable to the COVID-19 pandemic into which he has entered; and the further repeated failure of the Secretary of State for Health and Social Care to comply with the public policy of the Government to publish those contracts entered into under the Regulations, and all contracts with a value of over £10,000, along with the contract award notice.
2. Further, the widespread systemic failure to comply with regulation 50 and with Government policy on the publication of contracts on the part of the Secretary of State for Health and Social Care causes the Claimants to believe that the Secretary of State for Health and Social Care and/or the Minister for the Cabinet Office have adopted an unpublished policy not to comply with regulation 50 and which contradicts the published policy, contrary to the principle of transparency at common law.
3. The Minister for the Cabinet Office is named as the Second Defendant to the proposed claim in circumstances where the Minister is responsible for the Regulations, for the policies published by the Crown Commercial Service, an executive agency of the Cabinet Office, and is responsible for any unpublished policies concerning transparency in procurement.

The Relevant Legal Framework

4. Regulation 50 of the Regulations provides that:

“(1) Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, contracting authorities shall send for publication a contract award notice on the results of the procurement procedure.

“(2) Such notices shall contain the information set out in part D of Annex 5 to the Public Contracts Directive and shall be sent for publication in accordance with regulation 51.

(3) *Where the call for competition for the contract concerned has been made in the form of a prior information notice and the contracting authority has decided that it will not award further contracts during the period covered by the prior information notice, the contract award notice shall contain a specific indication to that effect.*

(4) *In the case of framework agreements, contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on such an agreement.*

(5) *In the case of dynamic purchasing systems, contracting authorities shall either—*

(a) send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system, or

(b) group such notices on a quarterly basis, in which case they shall send the grouped notices within 30 days of the end of each quarter.

(6) *Certain information on the award of the contract or the conclusion of the framework agreement may be withheld from publication where its release—*

(a) would impede law enforcement or would otherwise be contrary to the public interest,

(b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or

(c) might prejudice fair competition between economic operators.”

5. The duty in regulation 50 is a specific instance of the general principle of transparency in EU law, and the general duty imposed in regulation 18(1) that “Contracting authorities...shall act in a transparent and proportionate manner.”
6. Regulations 18 and 50 implement, and are in materially the same terms as, Articles 18 and 50 of Directive 2014/24/EU (“the Public Contracts Directive”).
7. The purpose of the principle of transparency in the procurement context was explained by the CJEU in C-375/17 *Stanley International Betting* (ECLI:EU:C:2018:1026) at §57:

“purpose underlying the principle of transparency, which is a corollary of the principle of equality, is essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority.”

8. That purpose is just as applicable to the publication of contract awards as to the publication of contract notices and the contract awarding process. It is of particular importance where the public body has not advertised a contract and held a tender process – whether unlawfully or in lawful reliance on an

exception to that usual rule – because without the publication of the award itself the public would have no understanding of what contracts have been entered into, for what goods or services and in what value. It is impossible for the public, interested organisations, Parliamentarians and commercial bodies to hold the Government to account for its expenditure of public funds if it is unknown what contracts have been awarded.

9. Further to its obligations under regulations 18 and 50, the Cabinet Office has produced guidance in relation to compliance with the principle of transparency, available online: <https://www.gov.uk/government/publications/procurement-and-contracting-transparency-requirements-guidance#:~:text=procurement%20and%20contracting-.Transparency%20in%20procurement,commitments%20relating%20to%20public%20procurement>.

That webpage gives a link to ‘Contracts Finder’, a centralised database on which Central Government tenders and awards are to be published and made publicly available. Some contract award notices are, we are aware, also published on the EU Tenders Electronic Daily (“TED”) portal.

10. The guidance is set out, in particular, in a document of the Crown Commercial Service entitled ‘Publication of Central Government Tenders and Contracts: Central Government Transparency Guidance Note’ (November 2017) (“the Transparency Guidance”). §2.1 states that:

“To help achieve greater transparency in how central government spends public funds and to help deliver better value for money the Government introduced both legislative requirements and policy commitments pertaining to the publication of procurement information on Contracts Finder.”

11. At §§2.3-2.4, the Transparency Guidance specifically sets out the policy commitment to publish awarded contracts themselves:

“In addition to the legislative requirements, there are policy commitments to publish the associated tender and contract documents in full on Contracts Finder. This applies to all contracts above £10,000, including call-offs from framework agreements. It is your responsibility to publish any call off contracts that you award above this threshold.

Documents should be attached to the relevant notice:

- a. Tender documents should be attached to the opportunity notice*
- b. Contract documents should be attached to the award notice*
- c. Where an opportunity was not advertised, for example a framework call-off, the tender documents should also be attached to the award notice.”*

12. The publication of the contracts themselves is reiterated at §5.1:

“You are expected to publish contracts in full. For the purpose of this requirement, as a minimum, this must include the following (where relevant):

- Specification*
- Terms and Conditions (Ts&Cs)*
- Associated Schedules (which may include the winning tenderer’s bid)*
- Where contract specifications or associated schedules contain various diagrams (for example, in some construction contracts), you should publish these where practical (taking into account the any necessary exemptions as set out in section 6) and where the diagrams are already in an electronic format that is likely to be accessible to the public (e.g. word or pdf).”*

13. At §9.1 the Transparency Guidance states that:

“Following any permitted redactions as set out in this guidance, it is advised that contracts are published with the award notice within 20 days following the end of the standstill period, where applicable. Where the standstill period applies, contract should not be published before the standstill period expires. Where no standstill period applies, it is advised that departments publish contracts within 20 days from the award of the contract.”

14. The Guidance is supplemented by the Crown Commercial Service’s ‘Procurement Policy Note – Update to Transparency Principles’ (PPN 01/17, February 2017) (“the Transparency PPN”). The Transparency PPN updated ‘The Transparency of Suppliers and Government to the Public’, described by the Government’s webpage as the “Transparency Principles”.

15. At §1 of the Transparency Principles, the rationale for transparency is explained:

“Transparency and accountability of public service delivery data and information builds public trust and confidence in public services. It enables citizens to see how taxpayers’ money is being spent; and allows the performance of public services to be independently scrutinised. It also supports the functioning of competitive, innovative and open markets by providing all businesses with information about public sector purchasing and service providers’ performance.”

16. Alongside detailed guidance on the limited aspects of public contracts which should be redacted from disclosure, §15 reiterates that all Government Departments should “ensure” that contracts over £10,000 are published on Contracts Finder.

17. In the light of the COVID-19 public health pandemic, the Cabinet Office published ‘Procurement Policy Note 01/20 – Responding to COVID-19’ (March 2020), which reminded Government bodies that they may be permitted to use

regulation 32(2)(c) of the Regulations in cases of extreme urgency, under which a contract may be awarded without prior publication or the ordinary competitive procedure. Nothing in PPN 01/20 purported to alter the duty in the Transparency Guidelines and Principles to publish contract award notices (indeed, it expressly reiterated the regulation 50 duty) and the contracts themselves: these are (unsurprisingly) not the subject of any exemption in the Regulations.

18. Accordingly, the Defendants have a legal obligation to publish contract awards within 30 days and an established and unambiguous policy to publish the contract itself with that award.

The Evidence of Breach

19. Notwithstanding that it is inherent in a failure to comply with the Regulations and with the Transparency Guidelines and Transparency Principles that any interested person will be unable fully to identify instances in which those breaches have occurred, it is apparent to the Claimants that contracts awarded in relation to COVID-19 matters have routinely not been the subject of contract award publication under regulation 50 and have not been the subject of contract publication under the Transparency Guidelines and Principles.
20. The Secretary of State for Health and Social Care has, in a number of high-profile cases already the subject of substantive challenge, breached regulation 50 and the duty to publish the contract itself. In addition, the Claimants are aware of various other clear cases of breach. In particular:
 - (1) The award of a contract to Ayanda Capital Limited for the supply of personal protective equipment with a contract value of £252 million on or around 29 April 2020, with the contract award notice only being published on TED on 2 July 2020 and on Contracts Finder on 27 July 2020. The contract itself has not been published.
 - (2) The award of two contract to Clandeboye Agencies Limited for the supply of personal protective equipment with a total contract value of £108 million on or around 28 April 2020 and again on 18 May 2020, with the contract award notices and contracts only being published on Contracts Finder and TED on 23 and 24 June 2020.
 - (3) The award of a contract to Crisp Websites Limited (t/a Pestfix) for the supply of personal protective equipment with a contract value (as apparently amended) of £32 million on or around 13 April 2020, with the contract award notice only being published on TED on 18 May 2020. The contract itself has not been published.
 - (4) In answer to a Parliamentary question, the Parliamentary Under-Secretary of State for Health revealed on 10 August 2020 that ten other contracts for the supply of PPE have been awarded to Pestfix, it would appear in April

and May 2020, but no contract award notices have yet been published in respect of those contracts and the contracts have not been published.

- (5) The award of a contract to Faculty Science Limited for the supply of data science and artificial intelligence assistance to NHSX, including in relation addressing the impact of COVID-19, with a contract value of £930,000 on or around 3 February 2020. Neither the award nor the contract appear to have been published on Contracts Finder or TED. The Claimants are aware of the terms of the contract only because it has been obtained and published by Open Democracy.¹
- (6) On 20 July 2020, the Chancellor of the Duchy of Lancaster issued a press release naming three firms with which the Government had contracted for the production of personal protective equipment: British Rototherm Group, Cookson & Clegg, and Transcal. A contract award notice has been published on TED only in respect of British Rototherm. Neither an award notice nor the contracts themselves have been published on Contracts Finder.
- (7) A report in the Guardian newspaper on 20 August 2020² revealed that £56 million worth of contracts with consultancy firms for work relating to COVID-19 had been procured, but those contract awards had not been notified and the contracts not published. The Guardian was only able to report on these awards because contractual documentation was leaked to it.
- (8) Both the Cabinet Office and the Department for Health and Social Care have awarded contracts to Public First Limited for public opinion research work. The contract with the Cabinet Office has a value of £840,000, was awarded on 3 March 2020 but only notified on Contracts Finder on 12 June 2020, and no contract has been published. The contract with the Department for Health and Social Care has a reported value of £116,000, and confirmation of its award was obtained in a report in the Daily Mirror on 19 August 2020.³ The contract has been published, but with heavy redactions which are inconsistent with the Transparency Guidelines.

21. Preliminary analysis carried out on behalf of the Claimants of Contracts Finder and TED indicates that in the period since March 2020, the Government (and predominantly the Secretary of State for Health and Social Care and executive agencies for which he is responsible) have published contract award notices in relation to COVID-19 contracts on average after some 47 days, whereas for non-COVID contracts the average is (lawfully) 29 days. Publication of the contracts themselves appears not to be happening in relation to COVID-19 contracts on a routine basis.

22. The reasonable inference to draw that is that there is either a policy stance taken by the Secretary of State for Health and Social Care, and/or of the

¹ https://cdn-prod.opendemocracy.net/media/documents/Faculty_Agreement.pdf

² <https://www.theguardian.com/world/2020/aug/20/government-spends-56m-on-consultants-to-help-with-coronavirus>

³ <https://www.mirror.co.uk/news/politics/dominic-cummings-allys-firm-given-22536284>

Government more generally, not to comply with regulation 50 and not to publish COVID-19 related contracts (at least until challenged).

The Grounds of Claim

23. Without compliance with the statutory or common law principles of transparency, it is impossible to hold Government contracting – and the very significant expenditure of scarce public resources this entails – to account. Non-governmental organisations such as the Good Law Project cannot scrutinise the Government. Members of Parliament are unable to hold Ministers effectively to account for their actions and use of public funds, despite the established proposition that the accountability of the Government to Parliament “*lies at the heart of Westminster democracy*”: *R (Miller) v Prime Minister* [2020] AC 373 at §46. Other commercial operators who might have wished to tender for a particular contract will be denied knowledge that a contract has been awarded and so will be unable to investigate bringing a challenge promptly, and before the contract has been performed, a situation of particular concern where, on grounds of purported urgency, no advertisement for a tender process was published either.
24. As Lord Mance explained at §1 of *Kennedy v Charity Commission* [2015] AC 455:
- “Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise the press, NGOs and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection.”*
25. It is in this context that the Defendants have acted unlawfully.
26. First, it is apparent in the examples identified above (at least) that the Secretary of State for Health and Social Care has failed to comply with the mandatory duty placed upon him by regulation 50 of the Regulations. There is no available legal justification for that failure, and he has accordingly acted unlawfully.
27. Second, it is similarly apparent in the examples identified above (at least) that the Secretary of State for Health and Social Care has failed to comply with the duty placed upon him by the Transparency Guidelines and Transparency Principles to publish the contracts awarded. It is a trite proposition of law that a public authority is obliged to act consistently with a policy it has published. There is no available legal justification for that failure, and he has accordingly acted unlawfully.

28. Third, it is a basic proposition of public law that a public authority should act consistently with a relevant published policy, and not by reference to an inconsistent, unpublished, policy: *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245. In *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 363 at §68 Laws LJ held that it was a “*requirement of good administration*” (to which the courts would give effect) that “*public bodies ought to deal straightforwardly and consistently with the public*”. In *R (Justice for Health) v Secretary of State for Health* [2016] EWHC 2338 (Admin), Green J explained at §141 that the principle of transparency at common law was “*well established*” (see too *Kennedy*, above) and applied, at §148, to contracting arrangements of the Secretary of State in connection with the NHS.
29. In circumstances of widespread breach – in particular on the part of the Secretary of State for Health and Social Care – of the Transparency Guidance and Transparency Principles by the failure to publish COVID-19 related contracts, it appears to the Claimants that the Defendants have adopted a practice or an unpublished policy which is directly contrary to the Transparency Guidance and Principles. Any such practice or unpublished policy is contrary to the common law duty of transparency and is unlawful.
30. The Claimants reserve the right to advance further grounds by reference to any information disclosed under the duty of candour, or otherwise made available.
31. For the avoidance of doubt, there cannot in the circumstances of the grounds advanced be any suggestion that the Claimants lack standing to complain of breaches of the Regulations – which are a public law wrong open to challenge by non-economic operators by way of judicial review: *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] PTSR 749 and *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin) – and of the common law obligations to comply with published policies and not to operate unpublished policies in contradiction to published policies. There is very considerable public interest in the Defendants’ approach to contracting and transparency.⁴

Action Requested

32. The Claimants seek, along with the documents and information requested below under the duty of candour, the following action from the Defendants:

⁴ https://www.huffingtonpost.co.uk/entry/who-profits-coronavirus-government-spending-boom-uk_5f0890c0c5b63a72c3413817?n8w&guccounter=1&guce_referrer=aHR0cHM6Ly9tYWlsLjExa2J3LmNvbS9vd2Ev&guce_referrer_sig=AQAAAAoSg30KjiF49pWtWoMN3QTHBVgqWN9hA-8Fo-35oxANoVh-B-9rPXq00RGLjis3CQGe0MfXYLrsoJW3SUlwjcKilj_ghN7mTZVjisTDXuwa4R3yCzCg1L1QQaVWoxtlFLzWmBPPMRjky4kPYp9BA4BUciS7tBQeoJfAKU1FL- N

- (1) Confirmation of all cases in which the Secretary of State for Health and Social Care has, in relation to contracts connected to COVID-19, failed to comply with regulation 50 of the Regulations.
- (2) Confirmation of all cases in which the Secretary of State for Health and Social Care has, in relation to contracts connected to COVID-19, failed to publish the contract in accordance with the Transparency Guidelines and the Transparency Principles.
- (3) An undertaking on the part of the Secretary of State for Health and Social Care to comply with both obligations within 14 days of the date of his letter in response.
- (4) The withdrawal by the Minister for the Cabinet Office of any policy or practice which departs from the Transparency Guidelines and Transparency Principles (whether in relation to COVID-19 or otherwise).

33. In any claim brought, the Claimants will seek declaratory and mandatory relief in relation to the established breaches of the Regulations and Guidelines, and a quashing order in relation to any unpublished policy or practice.

Details of Other Interested Parties

34. As set out above, we presently consider that the two named proposed Defendants are relevantly legally responsible and that as a result there are no other interested parties. However, please let us know if you consider that there are interested parties, or if you consider that either proposed Defendant is more appropriately an Interested Party and the reasons for that.

Alternative Dispute Resolution

35. We do not consider that alternative dispute resolution is practical or applicable in the circumstances.

Requests for Information and Documents

36. In accordance with the duty of candour, and with particular regard to the context of the proposed being concerned with the Defendants' failures to comply with duties of transparency and its inevitable adverse impact on the ability of the Claimants (and others) to fully understand the scope of the legal breaches, the following documents and/or information is requested to be provided with your response to this pre-action letter:

- (1) All policies and procedures adopted by the Defendants for the publication of contract award notices and of contracts themselves, whether published or unpublished;
- (2) The number of contracts awarded by the Department for Health and Social Care (and all bodies or agencies for which the Secretary of State is

responsible) relating to COVID-19 (including the Government's response to it) since 20 March 2020;

- (3) The number of the contracts in (2) for which the contract award notification was published in TED and/or Contracts Finder in breach of regulation 50 of the Regulations; and
- (4) The number of the contracts in (2) for which the contract has not been published by the Department in TED and/or Contracts Finder.

37. We expect your letter in response specifically to address each of the contracts listed or addressed in paragraph 20 above, confirming in each case:

- (1) Whether the contract was procured following an open and competitive tender;
- (2) When the contract was awarded;
- (3) When the contract award notice was published on Contracts Finder and/or TED and whether this was compliant with regulation 50;
- (4) Where there was non-compliance with regulation 50, the reason for the breach;
- (5) Why the contract itself has not been published, in breach of the Transparency Guidelines and Transparency Principles.

Address for Further Correspondence and Service of Court Documents

38. The address for reply and service of documents is the address of the Claimants' legal advisers.

39. We request that all documents and correspondence are sent to us by email at

[REDACTED]

Proposed Reply Date

40. In accordance with the pre-action protocol we request a reply to this letter within 14 days of the date of this letter.

Yours faithfully

[REDACTED]

DEIGHTON PIERCE GLYNN