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The Hon Mr Justice Foskett
Royal Courts of Justice
Strand
London WC2

27 April 2010

Dear Judge

**R oao Sharon Shoemith and (1) Ofsted (2) Secretary of State for Children
Schools and Families (3) London Borough of Haringey**

I have seen your judgment of 23 April in the *Sharon Shoemith* case. In particular, I have noted Appendix 2 to the judgment concerning the duty of candour and disclosure issues and your intention to raise with me personally the matters set out in paragraph 41 of that Appendix. It is, of course, of great concern to me that what happened in this case made it necessary for you to give judgment in these terms. I am instructing Philip Havers QC to undertake a thorough review of the issues that you have raised in your judgment. I have asked for this review to be undertaken as a matter of urgency and it is my intention to write to you enclosing his findings by no later than Monday 10 May.

PAUL JENKINS

Dictated by the Treasury Solicitor
and signed in his absence



JUDICIARY OF
ENGLAND AND WALES

THE HONOURABLE MR JUSTICE FOSKETT

28 April 2010

Paul Jenkins QC
HM Procurator General, Treasury Solicitor
Head of the Government Legal Service

Dear Mr Jenkins

**Re oao Sharon Shoesmith and (1) Ofsted (2) Secretary of State for
Children Schools and Families (3) London Borough of Haringey**

Thank you for your letter of 27 April 2010. I was on the point of writing to you myself as I am sure you will have appreciated. I am grateful to you for having taken the initiative before my letter was sent.

I cannot think of anyone better than Mr Havers to undertake the task that you have set him and I hold him in the highest personal and professional regard. My slight concern is that he is the Head of my former Chambers and he and I would, I think, regard ourselves as old friends. Given the sensitive nature of this particular case and the extensive media interest it has excited, I think it maybe better that you appoint someone with whom I do not share quite such a close relationship on a personal level. Obviously, I know a lot of senior members of the Bar, but choosing someone from my former Chambers may, perhaps, not be a wise course. It is, of course, a matter for you, but I thought I should mention it. It may be that Mr Havers will have mentioned it to you also.

Yours sincerely



Paul Jenkins QC
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The Honourable Mr Justice Foskett
Royal Courts of Justice
Strand
London WC2

30 April 2010

**R oao Sharon Shoemith and (1) Ofsted (2) Secretary of State for Children
Schools and Families (3) London Borough of Haringey**

Thank you very much for your letter of 28 April.

I have reflected carefully, with Philip, on the risks you identify and we are both grateful for the opportunity to think further about his appointment in the context you describe.

There are strong advantages in appointing Philip to investigate these issues on my behalf. He is, as we agree, obviously of the highest professional suitability. I am confident that he will of course undertake this task with complete objectivity. Moreover he already has a degree of familiarity with the case and the issues that will help us move forward much more quickly than if we looked elsewhere.

Philip's role is to advise me but, whilst I will be guided by his findings and by his wisdom, ultimate responsibility for the response will be mine and not Philip's. It will be for me to answer to you for the facts that emerge and for the judgments I make. Philip and I both feel that, in such circumstances, the advantages of his involvement in a process of this sort outweigh any possible risks.

PAUL JENKINS



JUDICIARY OF
ENGLAND AND WALES

THE HONOURABLE MR JUSTICE FOSKETT

4th May 2010

Paul Jenkins QC
HM Procurator General, Treasury Solicitor
Head of the Government Legal Service

Dear Mr Jenkins

**Re oao Sharon Shoesmith and (1) Ofsted (2) Secretary of State for
Children Schools and Families (3) London Borough of Haringey**

Thank you for your letter of 30 April.

As I said in my letter, it is, of a course, a matter for you as to who you appoint to look into the matters raised in the judgment and, as you say, it will ultimately be your judgment on those matters that reflects your response to me in due course.

I have noted that you hope to be able to respond to me substantively by no later than Monday, 10 May. That is, of course, entirely acceptable from my point of view, but if you feel you need longer then that is equally acceptable. I would prefer that a full and considered opportunity is taken to review the issues raised rather than one driven by the desire to respond quickly. As you know, I have discouraged the parties from coming back to me on hasty consequential and ancillary applications.

I will look forward to hearing from you in due course.

Yours sincerely

The Honourable Mr Justice Foskett
Royal Courts of Justice
Strand
London WC2

10 May 2010

**R oao Sharon Shoemith and (1) Ofsted (2) Secretary of State for Children
Schools and Families (3) London Borough of Haringey**

Further to our recent correspondence, I enclose a report by Philip Havers QC into the questions identified in Appendix 2 to your Judgment.

I am very grateful to Mr Havers for dealing with this matter urgently. I accept in full the contents of his report. I hope that this report provides an adequate response to the questions that you raised.

The report highlights failings in my Department and that is obviously a matter of concern to me. Since the initial errors were made in this case, we have had the review of disclosure in judicial review proceedings carried out by David Hogg. This review resulted in clear guidance which is, of course, quoted in your Judgment. The guidance has been widely disseminated, both within government and publicly, and training has been provided to litigation staff. I hope that this provides some reassurance that the crucial importance of disclosure is well recognised, as is the necessity for the government to be seen to be fulfilling the highest standards in respect of disclosure.

I am disappointed that an administrative failing led to the letter from the Claimant dated 21 September 2009 going missing. That should not have happened and I would like to re-iterate the apology that has previously been made.

I am not satisfied with what Mr Havers' report reveals about the way in which this case was handled within the litigation group in my Department. It is clear that the handling

of the case did not meet the high standards that are expected of those entrusted with the conduct of litigation on behalf of the government and for this too I apologise. Since this case, changes have been made to the organisation and management of the particular team in which the case was handled. Furthermore, in the light of your Judgment and Mr Havers' report, active consideration is being given as to what follow up action is appropriate.

In your Judgment you mention that you will need to consider the extent to which my reply should be published. You acknowledge that these matters might raise issues of legal professional privilege. Ofsted have agreed to waive legal professional privilege in respect of the contents of Mr Havers' report. However they have asked me to point out that this should not be taken as a waiver by Ofsted of privilege in relation to any other communication between Ofsted and its legal team that is not covered by the report.

Because it seems to me to be important that you have the full facts I have sent you Mr Havers' report in full, including the names of the lawyers involved. They have been given sight of the draft of the report in advance. I am anxious not to prejudice any management steps that may need to be taken and I would, therefore, ask that you give consideration to publishing an anonymised version of the report. Mr Havers has prepared such a version and this is also enclosed for your consideration.

PAUL JENKINS

R (ON THE APPLICATION OF SHARON SHOESMITH) v OFSTED AND OTHERS

Report of Philip Havers QC following review of the issues raised by Mr Justice

Foskett in paragraph 41 of Appendix 2 to his Judgment

1. Introduction: the Legal Team

Before I address each of the specific issues raised by the Judge, it may be helpful if I identify the relevant legal team. It comprised a TSol lawyer based at TSol's offices ("the TSol lawyer"), a TSol lawyer who had been seconded to Ofsted and who had already been working there for some time ("the seconded TSol lawyer") and two junior Counsel (to whom I shall refer, respectively, as "First Junior Counsel" and "Second Junior Counsel").¹ The seconded TSol lawyer left Ofsted on 24 August 2009 and her role was thereafter taken by a temporary lawyer. It seems clear that the TSol lawyer's role was a very limited one.

2. Question 1:

Are you satisfied that proper efforts were made to obtain all documents from Ofsted for the purposes of discharging its duty of candour?

I am satisfied that proper efforts were made to do so. In particular, it seems to me that the seconded TSol lawyer took appropriate steps to explain to her client, namely Ofsted, its duties as to disclosure and candour. Specifically:

¹ These are the only members of the team who I have asked for assistance in carrying out my review.

(i) On 12th March 2009, 3 days after proceedings had been served on Ofsted, she sent an e-mail to Roger Shippam, then the Director of Children's Services at Ofsted and the lead client, in which she explained the substance of the case advanced by the Claimant, the action required by Ofsted, the options open to Ofsted and details of the relevant deadlines and procedure. Under "Action required" she stated as follows:

"2. Gather together all relevant written material – Counsel will need to see everything relating to the lead up to the JAR ("Joint Area Review") and everything relating to the procedures followed and decisions made about how to conduct the JAR. You should be aware that Government Departments have a duty of candour in JR cases which means that they have to be open and honest and disclose everything which is relevant to issues in the case (this doesn't always mean disclosing documents – it might mean setting things out in a witness statement). Litigation solicitors and Counsel will advise on precisely what you need to disclose. Failing to discharge the duty of candour, could lead to costs penalties, severe criticism from the court and in some circumstances might amount to contempt of court."

(ii) On 18th March 2009, 6 days later, she sent an e-mail to Roger Shippam, Philip Pullen (policy lead on JAR's), copied to Heather Brown (lead Inspector), as to the retention and disclosure of documents. The e-mail stated:

“Now that litigation is underway you have to retain any relevant documentation relating to the case as it may be required as evidence in the proceedings. This would include the evidence notebook (which will be a crucial piece of evidence) and also any handwritten notes made by inspectors that have been kept. I know that inspectors are supposed to destroy these² but if that hasn’t yet been done then they should be retained from now on. In addition any internal or external briefing notes submissions and email traffic relating to the JAR should be retained, including emails and telcon notes between DCSF and Ofsted and Haringey.

This is because we do not yet know what will be relevant to issues in the proceedings, and until this is clear nothing should be destroyed. We will need copies of everything for Counsel so he can advise on whether anything should be disclosed as part of witness evidence. So it would be helpful if that process of information gathering could be started, as it may take a little time. It is also possible that the claimant will seek an order for disclosure and I would imagine that she will be asking for things like emails between DCSF and Ofsted.

This does not necessarily mean that everything will need to be disclosed. Counsel will give advice on what needs to be disclosed and whether to resist any application for additional

² This was a reference to Ofsted’s retention policy under which, as she understood it, inspectors destroyed their inspection records after 3 months.

disclosure that might be made by the claimant (and/or other parties) but obviously, if there is a chance that the court would order disclosure we do have to retain them now.

I would be grateful if you could ensure that anyone that might have relevant information, including private office, is warned that they need to retain everything relating to this JAR until the litigation is fully concluded”.

- (iii) Following the grant by the Court of permission to apply for judicial review, the Claimant’s solicitors wrote to the TSol lawyer on 13th May 2009 as follows:

“We would reiterate that we will be expecting as part of [Ofsted’s] detailed grounds and evidence, full disclosure of all communications and records of those communications as between the Defendants to this matter relating to the Claimant and the 2008 JAR during the period 1st November to 1st December 2008, as referred to in paragraph 24 of the Claimant’s Reply dated 16th April 2009. Such disclosure should include the Council’s comments on the draft JAR.”

The TSol lawyer forwarded that letter to the seconded TSol lawyer. She in turn forwarded it to Roger Shippam, Philip Pullen, Heather Brown and Miriam Rosen (Director of Education at Ofsted) attached to an e-mail to them dated 13th May 2009 which included the following:

“I attach a letter which has been received from SS’s solicitors.

You will see that the letter states that they would expect all communications between Ofsted and Haringey and the department between 1/11 and 1/12 to be part of the evidence put forward in the case. Please could you identify this information (if there is any) so that we can send it to Counsel to see whether it should or should not be part of the evidence (it may be for e.g. that some of it is irrelevant to the issues pleaded in the case).

You should identify the information as soon as possible please. This should include emails and records of phone conversations if there are any, also minutes of meetings. If you are not sure if something amounts to a “communication” then err on the side of caution and let us have it – but flag it as something that you are unsure about. We may need to confer with DCSF about some of this information, but I think that we need to gather it together and get some advice from Counsel on it first”.

- (iv) On 1st June 2009 the seconded TSol lawyer also forwarded the letter from the Claimant’s solicitors to Lorraine Langham at Ofsted (she had been asked by HMCI to coordinate the response from private office) as an attachment to an e-mail (which I note she sent at 23:47 hours, an indication of the long hours she was putting in on the case). Having quoted the relevant part of the letter from the Claimant’s solicitors, the seconded TSol lawyer’s e-mail continued as follows:

“The communications they referred to would include meetings and notes of meetings, telephone calls, records of telephone calls, emails and letters. So the legal team needs to know about anything that falls into these categories and have copies of any records (whether electronic or hard copy). Ofsted may not have to disclose all communications if they are not relevant to issues in the case. However, as a public authority, Ofsted has a duty of candour, which means that it has to put all the relevant facts (whether helpful to it or not) before the Court. If there are any questions about whether a specific piece of evidence should be disclosed then Counsel will be able to advise, but he needs to know about everything that you think needs to be included and see any written records.

.....Obviously it would helpful if you could arrange for someone to identify any material that you think is covered by the request as soon as possible.”

- (v) On 24th July 2009 the seconded TSol lawyer sent a further e-mail to Roger Shippam, copied, inter alia, to Philip Pullen and Heather Brown, “to update everyone on where the litigation has reached and what the next steps will be.” In a section entitled “Documents/Disclosure” she stated as follows:

“We are also preparing to disclose the documents requested by the Claimant (ie the emails and other correspondence that evidence communications between Ofsted, DCSF and

Haringey). There are also one or two emails that Counsel has advised need to be disclosed because they might be relevant to the issues and may be helpful to the Claimant's case. As previously explained this is because of the "duty of candour" which requires public authorities to be completely open and honest about what led to a particular decision being taken."

- (vi) Further specific requests for disclosure were made by the Claimant. As I understand it, the advice of Counsel was sought in relation to these requests. I have seen nothing to suggest and have no reason to suppose that they were not properly addressed and handled by TSol, i.e. I have no reason to suppose that TSol, and the seconded TSol lawyer in particular, did not make proper efforts to obtain those documents from Ofsted.
- (vii) I should add that the seconded TSol lawyer has also stated that she asked specifically for advice in relation to emails that were presumed to have been deleted but that she does not remember the issue being addressed in any detail because the focus was on the witness statements although she thinks that in the most general terms it was decided that it was not necessary to attempt to reconstruct deleted emails. I have not pursued this point since it seems to me that there would have been no disclosure duty in respect of deleted emails.

3. Question 2:

To what extent were Mary Ryan's Notes analysed by the legal team?

- (i) According to the seconded TSol lawyer, the existence of these notes first surfaced when she went to Exeter to take a first draft of her witness statement. The seconded TSol lawyer says that she (Mary Ryan) referred to her notebook as she made her statement and made a copy of it which she gave to her to take away. However, although the seconded TSol lawyer states that she was told by Mary Ryan that the notebook contained her personal notes of the whole inspection, she, the seconded TSol lawyer, understood that the only information from the notebook which was relevant to issues in the litigation was her notes of Heather Brown's interviews with the Claimant and two other interviews that Mary Ryan herself had undertaken. In due course Mary Ryan transcribed those parts of her notebook and they were attached as an exhibit to her witness statement.
- (ii) The seconded TSol lawyer says that she looked through the notebook but she could not make a great deal of sense of it because it was handwritten in note form and it was not clear to her to what the notes were referring. In a note which she prepared on 10th November 2009, she stated that as she believed that the relevant parts had been transcribed she left the copy with the Shoemith papers in case it was required to clarify something in the future.
- (iii) I should add that in that note the seconded TSol lawyer stated that when "we had the conference with Counsel to discuss Mary's witness evidence I offered a copy of the notebook to him but he did not take it." In her much more recent note, dated 1st May 2010, she states that

“when the conference was over I held the notebook up and told First Junior Counsel it was Mary’s notebook of the inspection. He waved it away and indicated that he did not want to look at it.” In fact, prior to her earlier note and following the discovery of the full extent of Mary Ryan’s notes following the hearing, First Junior Counsel suggested to the TSol lawyer that he contact the seconded TSol lawyer to warn her what was going on since he did not want her to read about it in the newspaper without prior warning. According to his attendance note of his conversation with the TSol lawyer, (although the attendance note itself does not bear a date the computer file which holds the attendance note is dated 6th November 2009) the TSol lawyer told him that he had spoken to the seconded TSol lawyer the day before, that she was aware of Mary Ryan’s notebook, that she said that she had brought it along to a meeting she had held with First Junior Counsel when they were working with Heather Brown on her statement, that there was a lot going on, that she had pulled the notebook out and that he had said “not now”. First Junior Counsel believes that it is possible that this conversation took place but both Counsel are absolutely clear that neither the seconded TSol lawyer nor anyone else ever alerted them to the true nature or extent of Mary Ryan’s notes (let alone that she had a notebook containing her personal notes of the whole inspection) and that if this had been explained to them they would have been anxious to know what they said.

- (iv) It seems to me that ultimately it matters not whether the seconded TSol lawyer did or did not make some reference to Mary Ryan’s notebook at a conference with Counsel because I am wholly satisfied that Counsel

were never, in fact, alerted, either at this conference or otherwise, to the fact that Mary Ryan's notes contained her personal notes of the whole inspection because I am wholly satisfied that if they had been, they would, as they have said, have been anxious to know what was in them. Indeed, the seconded TSol lawyer accepts that she should have pursued the matter with First Junior Counsel or another member of the team "but because of the huge pressure of work at the time, the issue slipped my mind."

- (v) The TSol lawyer did not see the notebook at all before the trial but this is unsurprising given his limited role in the case.

- (vi) It follows that, for the reasons set out above, Mary Ryan's notes were not analysed by the legal team save for those parts which were subsequently transcribed and exhibited to her witness statement. Indeed, I am satisfied that none of the other members of the legal team, namely Counsel or the TSol lawyer, were aware of the rest of her notes until after they came to light following the hearing.³

4. Question 3:

Why was the letter of 8th September phrased in the way it was given that it was thought that there were no drafts?

- (i) It is clear from paragraph 33ff of Appendix 2 to the Judgment that the Judge is referring here to the response set out in the letter from TSol

³ The seconded TSol lawyer has said that it did not occur to her that none of the other members of the legal team knew about the notebook because she had shown it to First Junior Counsel and because she thought that Mary Ryan would have discussed it when working on her witness statement with Counsel.

dated 8th September 2009 to Request 13 of a number of requests for specific disclosure made on behalf of the Claimant against Ofsted on 21st August 2009. Request 13 stated:

“Please provide copies of all drafts of the JAR report and copies of all comments received on those drafts from within and outside Ofsted.”

Request 14 is also relevant, for reasons which appear below:

“Please provide a list of the changes made to the draft report arising as a result of comments made by Counsel.”

- (ii) As the Judge records in paragraph 33 of Appendix 2, the response to Request 13 was as follows:

“We do not consider that such materials are relevant to the issues that arise for determination in this case and/or reasonably necessary and proportionate to enable the Claimant to prepare her case.”

- (iii) It is common ground amongst the legal team that this answer, and the answer to question 14 (see below), were drafted by Counsel . Their reasoning has been explained by them as follows:

- (a) The Request gave no reasons at all for any of the individual requests it contained. The Claimant’s challenge was to the

procedure adopted by Ofsted in the JAR. In essence her case was that “no copy of the report was ever provided to the Claimant for comment nor were any opportunities to discuss its content offered”: Claimant’s Skeleton, paragraph 149. The JAR was drafted during the week following the completion of fieldwork. We could not see how any such drafts were of relevance to her case. No reason had ever been given.

- (b) Our initial advice was, therefore, that this request should be refused. We considered that if the Claimant provided reasons for the request, the answer could of course be reconsidered.

- (c) This approach was driven by a strategic concern. The Claimant had made a first request for disclosure dated 13th May 2009. That request had sought “full disclosure of all communications and records of those communications as between the Defendants to this matter relating to the Claimant and the 2008 JAR during the period 1st November to 1st December 2008”. We had advised that Ofsted should comply with that request, and it had done so on a voluntary basis, disclosing a considerable volume of material.

- (d) We were concerned that the further request dated 21st August 2009 appeared to be largely a fishing expedition. We included an observation to that effect at the beginning of Ofsted’s Response. Request 13 in particular appeared to open up a new

line of enquiry as to Ofsted's internal deliberations following the end of fieldwork. The Claimant had given no reason as to why those deliberations might be relevant to the pleaded case. We wanted to offer some resistance, rather than simply acquiescing to such an expansion of the scope of enquiry, a matter of weeks before trial.

- (e) In recommending this approach, we were mindful of the fact that if the Claimant was dissatisfied with that answer, she would be entitled to press further and ultimately make an application to the Court. If she did so, and justified the request, Ofsted's approach could be reconsidered.

- (iv) I should add that Counsel's draft was endorsed by the in-house lawyer at Ofsted who had taken over the seconded TSol lawyer's role at the end of August 2009.

- (v) I can well understand why Counsel drafted a response to Request 13 in these terms and I may well have done so myself in their position. True it is that they could have added that, in any event, there were no drafts of the report other than the one taken to the meeting with the Council on 1st December 2009 but I can well understand that, as I infer from their reasoning, they considered that the appropriate response was to reject the relevance of the documents requested, particularly where the Claimant had provided no reasons as to why the documents might be

relevant. A robust response along the lines drafted by Counsel was, in my view, entirely legitimate in the circumstances.

- (vi) I should add that they have pointed out that they advised that a reply should be given to Request 14 which, as set out above, asked for “a list of the changes made to the draft report arising as a result of comments made by the Council”. They have explained that:-

“We considered that this was potentially relevant, as the Claimant might have wanted to argue (and indeed did argue) that the Council was unable to put forward all the considerations that she herself might have put forward, had she seen the draft. Thus the content of this document was in fact disclosed to the Claimant in any event.”⁴

- (vii) I should also add that they have explained that: “[w]hen, on 12 October 2009, the last day of the hearing, the Claimant renewed her request for the drafts, we advised [that] the draft that had been located should be disclosed, on the basis that it would narrow the area of dispute, and the substance of it had been disclosed in any event (in the table of 2 October 2009)”.

5. Question 4:

How did the letter from the Claimant of 21 September go missing?

The TSol lawyer cannot explain this. (I have not sought an explanation from anyone else). He has always assumed that it went missing in TSol, probably

⁴ In fact, a holding response was initially provided in the letter of 8 September and a table of the changes was then disclosed on 2 October 2009.

in Goods Inwards or somewhere in the building before the files enclosed with
it reached him.

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PHILIP HAVERS QC

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6 May 2010



JUDICIARY OF
ENGLAND AND WALES

THE HONOURABLE MR JUSTICE FOSKETT

17th May 2010

Paul Jenkins QC
HM Procurator General, Treasury Solicitor
Head of the Government Legal Service

Dear Mr Jenkins

Re oao Sharon Shoesmith and (1) Ofsted (2) Secretary of State for Children Schools and Families (3) London Borough of Haringey

Thank you for your letter of 10 May enclosing the report of Mr Havers. I have now had an opportunity to consider both the letter and the report.

Given the way in which the issue of the duty of candour/disclosure arose in this case, and I because I see our exchange of correspondence on the issue as, in effect, a continuation of part of the hearing, I do think it will be appropriate for your letter and the anonymised version of the report to be published. Both may, of course, be of relevance to other parties in the proceedings on matters that remain to be resolved.

Before I make arrangements for that to occur (and, subject to the terms of your response to this letter), I would propose that this letter and your response to it should also be made public and available to the other parties.

I have, of course, noted the acknowledgement in your letter of failings within your Department and that is plainly an acknowledgment that had to be made in the light of Mr Havers' report. It is, of course, reassuring to know that the issues raised are being, and indeed already have been to some extent, addressed

I am sensitive to the fact that it is not for me to conduct a post-trial inquiry through correspondence with one party about the way a case was prepared and conducted. I am, as you know, alive also to issues of legal professional privilege. That is why I am endeavouring to be guarded in my response to your letter and to Mr Havers' report. Whilst there are a number of issues that I might have raised, I propose to confine myself to two matters upon which I would welcome a further response from you.

The first relates to the issue of deleted e-mails. You will, I am sure, know that this issue arose in a high profile way when the full extent of Ms Ryan's notes became

appreciated and then made available for the other parties to see. As I said in the judgment, not surprisingly, this issue had caused me considerable concern. At the end of the day, I was of the view that the picture derived from the e-mail traffic with which I was presented was sufficiently full for the Claimant not to have been prejudiced by any deletion of e-mails at or about the time of Mr Pullen's instruction: see paragraph 22 of Annex 2 to the judgment.

It does, however, emerge from paragraph 6(vii) of Mr Havers' report that the question of deleted e-mails had been raised by the seconded TSol solicitor, presumably before she left her post on 24 August 2009. It is, however, unclear as to the circumstances in which this issue arose. Furthermore, Mr Havers says that he has not pursued this matter because "there would have been no disclosure duty in respect of deleted e-mails." I am not sure, with respect, that that is a full answer to this issue. Your new guidance (issued in January and, of course, after the events with which this case is concerned) does contain in paragraph 8, which deals with disclosure of electronic documents, a recognition that "deleted files" count as documents. That, as it seems to me, has been well-recognised for some time and, of course, is reflected in Part 31 of the CPR (and its Practice Direction) which, whilst not directly applicable to judicial review, is at least a touchstone by which issues of disclosure are judged.

I should, if I may, like to receive your views to whether the issue of deleted e-mails (however and whenever it arose) was pursued appropriately in the circumstances of this case.

The second matter relates to the letter from TSol to the Claimant's solicitors of 8 September and the missing letter of 21 September. I have now seen how the letter of 8 September came to be drafted in the way that it was and I have noted (and respect) Mr Havers' view as to the appropriateness of it being drafted as it was given the absence at that stage of a justification from the Claimant's advisers for making the request they did. I should, however, like to know whether the justification given in the letter of 21 September (set out in paragraph 34 of Annex to the judgment) would, if the letter had been received, have been regarded as sufficient to warrant disclosure of the drafts of the JAR had they been thought at that time to exist.

As I have indicated, I will defer making any arrangements for publication of our exchange of correspondence until I have seen your reply.

Yours sincerely



Paul Jenkins QC
HM Procurator General, Treasury Solicitor
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Treasury Solicitor

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The Honourable Mr Justice Foskett
Royal Courts of Justice
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28 May 2010

**R oao Sharon Shoemith and (1) Ofsted (2) Secretary of State for Children
Schools and Families (3) London Borough of Haringey**

Thank you very much for your letter of 17 May.

I note, and of course accept, your comments with regard to the proposed publication of my letter of 10 May and the anonymised version of the Report; so too your intention to publish your letter of 17 May together with this response.

Your letter raised two further questions. The first concerned the issue of deleted e-mails and the second matter relates to the letter from my Department dated 8 September and the missing letter of 21 September. In view of these questions I considered it appropriate to ask Mr Havers to prepare an Addendum to his Report. This he has kindly done and I enclose it for your attention. I should add that I agree with the conclusions that Mr Havers has reached on both questions.

PAUL JENKINS

**R (ON THE APPLICATION OF SHARON SHOESMITH) v
OFSTED AND OTHERS**

ADDENDUM TO MY EARLIER REPORT

1. Introduction

This addendum to my earlier report addresses the two issues raised by the Judge in his letter dated 17 May 2010.

2. First issue: deleted emails

It may be helpful if I make two preliminary observations arising from the Judge's letter. First, Part 31 of the CPR does not, of course, apply to claims for judicial review unless the Court orders otherwise (as is acknowledged in paragraph 1.4 of TSol's Guidance on discharging the duty of Candour issued in January 2010). As I understand it, the Court did not order otherwise in this case.

3. Secondly, I read Paragraph 8 of that Guidance, to which the Judge also refers, as applying in cases where the Court has ordered otherwise. I do so, first, because it follows Paragraph 7 which is expressly addressed to cases where an Order for disclosure has been made and, secondly, because it is headed "Disclosure of Electronic Documents".

4. Be that as it may, as the Guidance points out in Paragraph 3, even absent an Order for disclosure, there must still be a sufficient search for relevant

documents as part of the preparation of the case and so as to enable the public authority in question to comply with its duty of candour. However, as Paragraph 3.2 points out, the “limiting factors are relevance and proportionality”. A search of Ofsted’s deleted mail system would have been difficult (because it would have been difficult for the IT staff to know precisely what to look for amongst what would have been a huge amount of otherwise wholly unconnected correspondence between Ofsted and the Department during the relevant period) and expensive and there was nothing specific which they would or should have been looking for or which would have been expected to emerge from such a search. Moreover, Ofsted’s IT team advised that it would not be technically feasible to recover this material.¹ In those circumstances, I consider that the decision not to carry out such a search was a reasonable one.

5. Second Issue: the letter of 21 September

The Judge has asked “whether the justification given in the letter of 21 September (set out in paragraph 34 of Annex 2 to the Judgment) would, if the letter had been received, have been regarded as sufficient to warrant disclosure of the drafts of the JAR had they been thought at that time to exist”. It seems to me that, on analysis, this question in fact breaks down into two parts:-

- (a) Would the justification given in the letter, if the letter had been received, have been regarded as sufficient to warrant disclosure of the one draft of the JAR which was understood to exist?

¹ I note that in the letter from TSol to the Claimant’s solicitors dated 8 December 2009, it was stated that: “Ofsted’s I.T. Department has ... confirmed that deleted data is only preserved for 19 days (in the case of emails) and 30 days (in the case of documents)”.

(b) Would it have been regarded as sufficient to warrant disclosure of all the drafts of the JAR had they been thought to exist?

6. Given that Counsel drafted the letter of 8 September, it is, in my view, highly likely that they would have been asked to advise as to these questions and that their advice would have been accepted. In those circumstances, not least since these questions are, necessarily, hypothetical, I have asked Counsel alone for a response. I can do no better than to set out that response here:

“We do think we would have advised that the draft (or drafts) should be disclosed if we had received the letter of 21 September 2009, essentially on pragmatic grounds. That letter does not provide a clearly articulated justification for the request. Nevertheless, having made the point that we did on 8 September, we think that we would not have wished to further escalate the issue. It would have been unhelpful to begin the hearing with a dispute over disclosure. We think that we would have regarded that consideration as more important than seeking to engage in a debate about the quality of justification.

On 12 October 2009, the Claimant made a further request for drafts. We settled a reply to that letter which stated that although the Claimant had provided no justification for the request, we would disclose the draft ‘in an effort to bring the correspondence on this subject to a close’.

We think it likely we would have taken the same pragmatic approach on 21 September 2009, had we been aware that the Claimant had pressed her request.”

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24 May 2010