

INVESTIGATION INTO THE FIRST MINISTER'S ACTIONS AND DECISIONS IN RELATION TO CARL SARGEANT'S DEPARTURE FROM HIS POST AS CABINET SECRETARY FOR COMMUNITIES AND CHILDREN

OPERATIONAL PROTOCOL

The Investigation (paras 1-3)

1. The Permanent Secretary of the Welsh Government has established the Investigation with the following Terms of Reference:-

To conduct an investigation into the First Minister's actions and decisions in relation to Carl Sargeant's departure from his post as Cabinet Secretary for Communities and Children and thereafter.

2. Paul Bowen QC has been appointed to act as an Investigator with a view to conducting the Investigation in accordance with this protocol and with the terms and conditions of appointment (see Annex).

3. The Investigation is a process intended to give effect to the public commitment given by the First Minister on 10 November 2017 in the following terms:-

A spokesman for the First Minister said,

"Further to the First Minister's comments yesterday about the need for independent scrutiny of his actions and decisions in relation to Carl Sargeant, he agrees that there should be an independent inquiry and it would be proper to ask a senior QC to lead that work. To ensure this happens separately from his office, the First Minister has asked the Permanent Secretary to begin preparatory work for this inquiry, and to make contact with the family to discuss terms of reference and the identity of the QC. It is our understanding that such an inquiry should not take place before the outcome of a Coroner's Inquest – but we will take further advice on this matter."

Terms of Reference (para 4)

4. The Terms of Reference have been determined by the Permanent Secretary following submissions by the family of Carl Sargeant and following discussions with the Investigator.

Powers and Funding (paras 5-6)

5. The legal authority for the Investigation is derived from the First Minister's functions set out in sections 48 and 71 of the Government of Wales Act 2006 (GOWA 2006) and the Investigator's role is to undertake the Investigation independently of the Welsh Government subject only to this Operational Protocol and the Terms and Conditions of Appointment.

6. The Investigation is funded directly from the Welsh Government budget and this budget is administered by the Secretariat (as established under paragraph 34). The Welsh Government central finance team is the budget holder for internal Welsh Government financial control purposes.

Expenses and Costs (para 7)

7. The Investigator shall ensure that in undertaking the Investigation the available budget is handled in a way which ensures regularity, propriety and value for money. The Permanent Secretary has confirmed agreement in principle to the reimbursement of a single set of legal costs as may be incurred by the widow of Carl Sargeant (or, alternatively, such member of the family as she may nominate) so far as incurred for the purposes outlined below. The Investigator may also request the Permanent Secretary as Principal Accounting Officer to agree in principle an award of legal costs to other persons where this is considered essential to the effective conduct of the Investigation so far as incurred for the purposes outlined below. Any reimbursement of legal costs shall be confined to the award of reasonable amounts incurred in respect of the cost of seeking legal advice and support (which is not covered by pre-existing insurance or professional representative arrangements or where the person is funded by public funds), provided that they are properly incurred, in relation to the provision of information to the

Investigation. Any award of reasonable costs shall be subject to the qualifications and conditions set out at the Schedule.

Operational Independence and production of Report (paras 8-11)

8. Subject as mentioned below, and to the Terms of Reference, the Investigation will be fully independent. As such it will be undertaken without interference or direction from the Permanent Secretary and/or the Welsh Government. All findings and any recommendations will be wholly a matter for the Investigator.

9. To reinforce the independence of the Investigation and to ensure transparency, the Investigator shall, at the conclusion of the Investigation, produce a report in accordance with the requirements of this Protocol which shall be presented to the Counsel General for tabling in the National Assembly for Wales in accordance with the Standing Orders of the National Assembly for Wales.

10. It is intended that the Investigator shall commence the Investigation as soon as possible and should aim to complete the Investigation, once formally commenced, within a period of six months. In the event that the Investigator forms the view that the report cannot be delivered to this timescale a revised report date will be agreed with the Permanent Secretary. The Investigation shall formally commence once the Terms of Reference, conditions of appointment of the Investigator, Counsel, Solicitor and Secretariat to the Investigator, the Operational Protocol and any relevant practices, policies and procedures necessary for the lawful and effective operation of the Investigation are in place.

11. Subject to the delivery of a report by the agreed date it is intended that the Investigation will be conducted by the Investigator in a manner and to a timetable which, subject to the terms and conditions of appointment and to this Protocol, the Investigator will determine. In particular the Investigator will therefore determine the timing and manner in which individuals or bodies considered able to assist the Investigation may be identified; documentation requested from such individuals or bodies; written statements requested from

such individuals or bodies; and individuals interviewed by the Investigator. If the Investigator is considering including in the report significant criticism of a person, and the Investigator believes that that person should have an opportunity to make a submission or further submission, he or she should send that person a warning letter and give him or her a reasonable opportunity to respond.

Production of Information and Confidentiality (paras 12-25)

12. The Investigation has not been established pursuant to the Inquiries Act 2005. The Investigator will not, in consequence, have powers to compel attendance of third parties or the production of documents. The Permanent Secretary shall take steps to ensure that the staff of the Welsh Government fully cooperate with the work of the Investigation. The Investigator will notify the Permanent Secretary as soon as possible in the event that these commitments are not being discharged and the Permanent Secretary shall promptly take all remedial action within her powers.

13. The Welsh Government will make available to the Investigator the relevant material in its possession, custody or control to enable the Investigator to progress the Investigation. Relevant material for these purposes shall mean all relevant records and information held by the Welsh Government at the relevant time with the exception only of information which is subject to legal professional privilege. It is anticipated that consideration of the documents and information received (whether from Welsh Government or from any other source) may give rise to the need for the Investigator to see further documents or such further information and additional requests may accordingly be made by the Investigator. All information provided by Welsh Government to the Investigator will be held by the Investigator on behalf of the Welsh Government.

14. Notwithstanding the legal basis on which the information is held, any information provided by the Welsh Government to the Investigator will be the subject of a Transfer Agreement which will list and record the information provided and to be returned to the Welsh Government at the conclusion of the

Investigation and confirm the relevant Welsh Government Information and Records Management policies which will need to be observed. At the commencement of the Investigation the Investigator and the Welsh Government will agree arrangements for the holding of files and electronic data which shall include measures to ensure that data held for the purposes of the Investigation is:

- held securely;
- is under the full control of the Investigator;
- is not accessible by the Welsh Government during the period of the Investigation.

15. It is intended that the Investigator's Report will be made public, subject to any redactions that may be necessary to protect sensitive information (such as, but not limited to, the names, addresses and other identifying details of individuals to whom the Investigator has granted anonymity in accordance with paragraphs 16 to 18) or to ensure that the Welsh Government complies with any subsisting legal obligations affecting the publication of information. Interested persons may make submissions to the Investigator but the final decision on which redactions, if any, are necessary will be for the Investigator subject to obligations imposed by this Protocol in relation to confidentiality or anonymity.

16. The material made available to the Investigator or otherwise produced during the Investigation will include sensitive information, including –

- i. Information which identifies or provides a means of identifying individuals who made complaints concerning the conduct of Carl Sargeant ("the complainants") whether provided directly by the complainants or by other persons;
- ii. Information provided to the Welsh Government, or provided to the Investigator (in his capacity acting pursuant to functions of the First Minister) on a confidential basis;

- iii. Information provided to the Welsh Government, or provided to the Investigator (in his capacity acting pursuant to functions of the First Minister) in relation to which individuals who are identified may have a legal entitlement to anonymity; and
- iv. Information held by the First Minister relating to the Cabinet reshuffle in November 2017.

17. In relation to any information falling within paragraph 16 above, the Investigator must ensure during the conduct of the Investigation and in producing the final report that nothing is done which –

- i. Might identify or provide a means of identifying a complainant unless the complainant has given their prior consent to the disclosure;
- ii. Will breach any confidentiality obligation, unless the person has waived their entitlement to confidentiality;
- iii. Will breach any legal entitlement to anonymity, unless the person has waived their entitlement to anonymity; and
- iv. Discloses any information concerning the Cabinet reshuffle in November 2017 with the exception of information relating to Carl Sargeant.

18. In the case of any other person, the Investigator may, if the Investigator considers it necessary for the efficient and effective conduct of the Investigation, determine that any reference to that person in the Report will be anonymised, and may notify that person (and, to the extent that it is necessary to preserve that anonymity, any other persons and/or the media) accordingly.

19. It is intended that the Investigation will facilitate the opportunity for any person who believes they have evidence of relevance to the Investigation to submit that evidence, to the Investigation, including by way of written and/ or oral evidence given in private, anonymously or on such other terms or conditions as requested by that individual. The Investigator may refuse to accept or may reject any evidence provided upon terms or conditions that he

considers inappropriate or which do not allow him to determine the source or reliability of that evidence.

20. When any document held by the Welsh Government is considered by the Welsh Government to contain information falling within paragraph 16 above the Welsh Government will communicate that fact to the Investigator upon transfer of the information. In such circumstances the Investigator shall be bound to observe the requirements proposed by paragraph 17 above and, in particular, shall not disclose or publish that information without appropriate redactions which ensure the requirements of paragraph 17 are observed or (if such redactions are not practicable) at all. This requirement is without prejudice to the wider requirements on the Investigator under paragraph 17.

21. This paragraph is subject to paragraph 22 below. It is intended that documents, witness statements, transcripts of evidence and any other material provided to the Investigator will not be published, save to the extent that the Investigator considers it necessary (subject to paragraphs 17 and 20, and to any other legal restrictions on publication):

- (i) to refer to such material in the Report;
- (ii) to provide material supplied by one person or body to another person or body, whether for the purposes of obtaining the recipient's comments upon that material, in order to assist the recipient's recollection or for any other reason.

22. If the Investigator at any stage considers that it may be necessary, in order for him to comply with his common law duty of open justice and/or the right of access to information under Article 10 ECHR, to disclose to the public or any section of the public any of the material described in paragraph 21:

- (i) the Investigator shall first invite representations from the First Minister, Welsh Ministers and any members of Carl Sargeant's family who are participating in the Investigation, on the issue of whether there should be any such disclosure;

- (ii) the Investigator, if he decides following receipt of such representations to make any form of disclosure, shall give those named in sub-paragraph (i) above two clear working days' notice before he makes that disclosure and shall, when giving that notice, provide details of the disclosure that he intends to make and of the persons to whom he intends to make it.

The Investigator recognises that:

- (a) no disclosure may be made which may breach any duty of confidence of which the Investigator is aware;
- (b) he must ensure that no disclosure is made that may in any way prejudice the inquest into the death of Carl Sargeant, and that factor shall be of paramount importance when the Investigator decides whether to make any disclosure; and
- (c) no disclosure may be made which may be contrary to the requirements in paragraphs 17 and 20.

23. Subject to paragraphs 17 and 20, when the Investigator provides material to a person or body under paragraph 21 above, the Investigator shall provide it under an express condition of confidentiality and upon the recipient undertaking to use the material for the purposes of the Investigation only, not to disclose it to any other person and to comply with such other conditions as the Investigator may stipulate.

24. Where information is disclosed by the Investigator pursuant to paragraphs 21 or 22, the Welsh Government will, to the extent of that disclosure, waive any entitlement to confidentiality that may otherwise vest in Welsh Ministers or the Welsh Government.

25. In accordance with paragraph 19 above the Investigator is entitled to receive information from any other source in confidence if the Investigator considers it in the best interests of the Investigation to do so. However, the Investigator is expected to use his best endeavours to obtain the agreement

of all those providing confidential information to permit publication of that information, to the extent that the Investigator considers it necessary, in the Report.

Inquisitorial nature of the Investigation (paras 26-33)

26. Any person may submit written evidence to the Investigation in accordance with arrangements to be specified by the Investigator.

27. It is intended that the Investigation will be inquisitorial and not adversarial in nature.

28. The Investigator may invite any person to provide a witness statement for the purposes of the Investigation.

29. The Investigator may invite any person to give evidence orally, whether or not that person has provided a witness statement.

30. It is intended that any oral evidence will be heard in private. Those present when oral evidence is taken shall be confined to the Investigator, Counsel and Solicitor to the Investigation, the Secretariat, the witness and their legal representative(s), and any other person(s) who the Investigator determines (a) has a sufficient interest in the subject matter of the evidence; and (b) it is necessary in the interests of justice should attend. Where the Investigator permits such a person to attend to hear a witness give evidence he may do so on such conditions as he considers appropriate. The Investigator may refuse, or revoke, such permission if attendance will cause a witness to withdraw their consent to give evidence. The Investigator shall refuse or revoke such permission for all or part of any evidence where this is necessary to ensure that the requirements of paragraph 17 are complied with. Any witness giving evidence to the Investigator may decline to answer any question in the presence of such persons in circumstances where the witness considers that the answer to the question may lead to the requirements of paragraph 17 not being complied with.

31. Any person who is permitted to attend the taking of oral evidence shall first be required to sign a confidentiality undertaking in respect of the conduct and content of the session at which the evidence is taken.

32. Any person may provide the Investigator in advance, in writing, with questions that that person wishes the Investigator to put to any witness during the taking of oral evidence. It will be for the Investigator and Counsel to the Investigation to determine whether or not, and the conditions upon which, any such questions will be asked. Where any person has been permitted to attend during the taking of oral evidence in accordance with paragraph 31 the Investigator may permit such further questions to be asked, through the Investigator or Counsel to the Investigation, as he thinks fit. No person will be permitted to ask questions of any witness in any other manner, whether directly or through their own or another legal representative.

33. The Investigator may invite and receive written or oral submissions on any issue from any person or body as he see fit.

Secretariat and Legal Support (paras 34-37)

34. A Secretariat will be established, led by an individual who is wholly independent of, and not a member or former member of, the staff of the Welsh Government, to provide administrative support to the Investigator. The Welsh Government central finance team is the budget holder for internal Welsh Government financial control purposes. The Investigator shall be entitled to appoint legal support to assist the Investigator. Such legal support may take the form of independent Counsel to the Investigation and independent Solicitor to the Investigation.

35. The Investigator must ensure that the budget is spent for services and purposes of the Investigation in a way that ensures regularity, propriety and value for money, in accordance with the accounting officer requirements within Welsh Government.

36. It is not intended that the Investigator should enter into contracts in a personal capacity and any contractual liabilities with third parties will be

entered into in the name of the Welsh Government and subject to agreement with the Secretariat, including where the Investigator makes a recommendation under paragraph 43 below.

37. The Secretariat will have such temporary accommodation as the Investigator considers necessary during the course of the Investigation.

Copyright (para 38)

38. The Report shall be subject to Crown Copyright.

Records and Information (paras 39-41)

Public Records Status

39. Subject to any alternative arrangement which may be agreed between the Investigator and the Welsh Government, at the conclusion of the Investigation, the Investigator will return documents to the Welsh Government in accordance with the terms of the Transfer Agreement entered into pursuant to paragraph 14 and, in relation to other documents generated by the Investigation, will determine which documents produced in undertaking the Investigation are appropriate for public retention and pass those documents to the Welsh Government. In undertaking the selection the Investigator shall have regard to National Archive Guidance produced in 2017 entitled: Information Management: Public Inquiries, Independent Investigations etc. Documents passed to the Welsh Government as public records for permanent preservation will be held securely and solely for the purpose of cataloguing the documents and sending them to The National Archives.

Data Protection

40. It is highly likely that the Investigator will process personal data during the lifetime of the Investigation.

41. The Secretariat will discuss with the Information Commissioner's Office whether the Investigator or the Welsh Government should be considered to be a data controller or data processor for the purposes of the Data Protection

Act 1998 and the General Data Protection Regulation and Data Protection Act 2018, and put in place arrangements for protecting data accordingly.

Contracting with Third Parties (paras 42-43)

42. Where the Investigator has made a recommendation to contract for the provision of goods or services from a third party, the Welsh Government will enter into such contracts for the purpose of the Investigation provided that:-

- the Investigator's proposal is regular, proper and provides value for money and
- the proposal is otherwise consistent with and complies with those of Welsh Government's corporate policies which the Investigator has adopted.

43. As the contract will be entered into by the Welsh Government on behalf of the Investigator, the Welsh Government procurement policies will be followed.

SCHEDULE

Qualifications and Conditions applying to the award of legal costs pursuant to paragraph 7

The qualifications and conditions are as follows:-

1. The Investigator shall only recommend an award of a person's costs of legal representation in relation to the investigation where he considers it necessary, fair, reasonable and proportionate that an award is made.
2. The award of legal costs shall be subject to the condition that payment will only be made for work that is properly evidenced and can be identified as having been done in an efficient and effective manner, avoiding unnecessary duplication and making the best use of public funds.
3. The award of legal costs shall be only in respect of legal work undertaken by a person's legal representative whom the Investigator considers to be that person's recognised legal representative in relation to the investigation.
4. The Investigator may also recommend the size and composition of any legal team to be engaged by a person's recognised legal representative including counsel.
5. In determining whether to recommend an award the Investigator shall specify the broad areas of work that are to be covered by the award and the hourly rates applicable to all members of the applicant's approved legal team subject to the maximum hourly rates specified at paragraph 6 below.
6. Any person applying to the Investigator to make a recommendation for an award of their costs shall set out written submissions in support as to why the criteria in paragraph 1 are satisfied; the size and composition of the team proposed, the work it is anticipated each team member will do along with a Costs Schedule setting out the hourly rate and anticipated hours to be spent at each stage by each team member.
7. Where an award has been agreed in principle, the person's legal representatives shall submit monthly worksheets and invoices of work done for approval to the independent auditor or costs draftsman appointed by the Welsh Government, who shall pay any such invoice promptly once approved.
8. The maximum hourly rates for legal work by the members of an applicant's legal team shall be:

Leading Counsel

Whether a member of the Bar or a Solicitor acting in the role of advocate -
£220.00

Junior Counsel

Whether a member of the Bar or a Solicitor acting in the role of advocate -
£120.00

Solicitors

Solicitors with over eight years post qualification experience - £175.00

Solicitors and legal executives with more than four years" experience -
£150.00

Other solicitors legal executives and fee earners of equivalent experience -
£125.00

Trainee solicitors, paralegals and other fee-earners - £100.00

9. The maximum hourly rates for travel and waiting time by the members of an applicant's legal team shall be half of the applicable maximum hourly rate relating to legal work specified at paragraph 6 above.