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## RESTRICTION ORDER RULING

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1. This ruling relates to a further stage in the disclosure process of this Inquiry. It should be read together with my OPEN ruling, made on 19 August 2022 in relation to a limited class of potential Restriction Orders concerning names appearing in disclosable documents.
2. Assembling the potentially relevant evidential material and making it available to core participants in this Inquiry is unavoidably complicated by the need to identify and keep secure the substantial element of highly sensitive material which will have to be considered in CLOSED hearings. It was the presence of this material which led the Home Secretary, at the request of the then Coroner, Baroness Hallett, and with the concurrence of all interested persons, to establish this Inquiry in place of the then current Inquest (now adjourned) into the death of Dawn Sturges.
3. Following directions given by me, Restriction Order applications have now been lodged by both His Majesty's Government and by 'Operation Verbasco' (a combined grouping of the Metropolitan and Thames Valley Police Forces). In each case a substantial volume of material has been scheduled, for which Restriction Orders are sought, and in each case the applications and argument in support provide, in particular:
  - (i) the claimed justification for the necessity of a Restriction Order, identifying the nature of the risk of harm or damage which it is said would occur in the absence of such an Order; and
  - (ii) the extent of Restriction Order sought; thus, unless it is claimed that an Order covering an entire document is necessary, the applicants have generally specified the exact redaction sought, and/or any OPEN gist which can be substituted for CLOSED material and/or any other OPEN material which can be made available to participants covering the same information.
4. These applications do not exhaust the material which may have to be the subject of Restriction Orders. If I had waited for an exhaustive list, the disclosure process would have been even longer in the accomplishment than it unavoidably already is. My objective has been throughout, and remains, to effect as much disclosure to core participants as is possible, as soon as it can properly be done. Therefore, in

consultation with the Inquiry Legal Team, each of the applicants has sought to present a representative sample of material, selected with the object of enabling me so far as possible to adjudicate upon the necessity of a Restriction Order in relation to a wide range of types of material and in the expectation that in large measure that will inform the decision on other material sharing the same characteristics. The 'sample' material thus considered by me, over several days, has given rise to several hundred separate adjudications, often involving a number of separate decisions in relation to different parts of a single piece of material.

5. There has been no significant disagreement as to the law in the representations made to me both in OPEN and CLOSED argument.
6. The starting point is that this is a Public Inquiry and so far as possible its proceedings must take place in public (section 18 Inquiries Act 2005). There is a clear public interest in transparency. Restriction Orders and closed material, together with closed hearings, are and must remain exceptions to that principle and must call for clear justification. Section 19(3)(b) of the Act correctly reflects this approach. A Restriction Order must specify only such restrictions as I consider conducive to fulfilling my terms of reference or necessary in the public interest. In the context of the present applications, restrictions which are necessary in the public interest will also be conducive to fulfilling my terms of reference, because they will enable me to make as much material as possible available in public but yet to consider also confidential material in CLOSED hearings. The central question is thus whether the public interest makes a Restriction Order necessary. Necessity is the test, not desirability or convenience.
7. Section 19(4) of the Act goes on to identify particular (non-exhaustive) factors to which regard must be had in determining the necessity of any restriction order:
  - a. the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
  - b. any risk of harm or damage that could be avoided or reduced by any such restriction;
  - c. any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the Inquiry;
  - d. the extent to which not imposing any particular restriction would be likely -
    - i. to cause delay or to impair the efficiency or effectiveness of the inquiry;  
or
    - ii. otherwise to result in additional cost (whether to public funds or to witnesses or others).
8. "Harm or damage" is further elucidated by section 19(5) of the Act. For present purposes, it includes (again non-exhaustively), "death or injury" and "damage to national security or international relations", as well as damage to the economic interests of the UK or part of it, or by disclosure of commercially sensitive information, although those last two kinds of damage are likely to be of marginal if any relevance to the present Inquiry. I have no doubt that by parity of reasoning it includes also damage to the prevention and detection of crime, for example by revealing confidential policing techniques, and likewise damage to the essential confidential process of high level frank assessment of material and formulation of international and national strategies. In the present context this last risk of damage is a further aspect of damage

to national security and/or to international relations, and it is one where disclosure would be of significant assistance to hostile actors.

9. Determining the necessity of a Restriction Order in any instance thus involves balancing the risk of harm against the public interest in transparency and open justice. This is akin to the so-called *Wiley* balance test for public interest immunity (PII) (*R v Chief Constable of West Midlands ex p Wiley* [1995] 1 AC 274). There is the difference that the consequences of upholding a claim for PII are to remove the material entirely from the judicial process, whereas if a Restriction Order is made in relation to an Inquiry, the material can still be considered in CLOSED session. But whilst that is true, it must not dilute the force of the consideration that proceedings must be OPEN unless it is necessary that they, or part of them, should not be.
10. In assessing the strength of the public interest in transparency and open justice I have had regard, in particular, to the several ways in which open proceedings advance the public interest. They include, but are not limited to:
  - (i) public confidence in the outcome, both nationally and internationally;
  - (ii) enabling all parties (and here especially the family of the deceased Dawn Sturgess) to participate effectively;
  - (iii) encouraging frankness and accuracy in witnesses;
  - (iv) the possibility that reliable new information might surface;
  - (v) the reduction of uninformed speculation.

I have not, however, allowed myself to be swayed by volume of material potentially subject to Restriction Orders, either because it is large or because it is small. To do so would be to abandon the item by item balancing exercise which is required.

11. The present applications identify a series of categories of possible harm. In all cases, the type of harm described is, I am satisfied, *capable* of justifying a Restriction Order. But that is only the first stage of the exercise which I have undertaken. It is then necessary to conduct the balancing exercise described above, item by item in each case. Further it has been necessary to examine, item by item, whether some lesser form of restriction will meet the potential for harm, for example by limiting the proposed redaction or by requiring an open gist of redacted material, or by requiring the placing of similar information before me in OPEN form. Neither applicant has, correctly, sought to suggest that the presence of a stated category of potential harm is by itself enough to call for a Restriction Order.
12. The balancing exercise described has involved recalling the scope of my terms of reference; for example, they extend to the policy or strategies adopted by public authorities insofar as they bear on the death of Dawn Sturgess but not otherwise (unlike some Inquiries which are essentially reviews of policy making generally). It is then necessary to make an assessment of the potential relevance of the material to those terms of reference. Where the potential relevance is high, the public interest in open justice is similarly high. Where the potential relevance is marginal, the public interest in open justice, whilst still present, is correspondingly lower. In some, but very few, cases I have determined on close examination of the material, that it has no potential relevance (in anyone's hands) to my terms of reference, with the consequence that it has not been necessary to attempt to balance the potential for

harm against the public interest in open justice. Such a decision has been made only in a plain case.

13. In assessing the potential harm advanced as a justification for a Restriction Order, I have also had regard to any extent to which the material in question is already in the public domain. To the extent that it is readily known, the scope for further harm to be done by disclosure will be reduced, and may be eliminated. It does not, however, follow, that because an *assertion* has been made in public, harm may not ensue from disclosure of confirmation or denial of the fact asserted, or of evidence supporting or undermining it. The balance must be assessed in each case.
14. Where the contention is that disclosure of material would harm national security, it is appropriate to pay heed to the particular expertise of the Secretaries of State: *Secretary of State for Foreign and Commonwealth Affairs (SFCCA) v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (*Litvinenko*) at [54], [57], *R (Binyam Mohammed) v SSFCA* [2010] EWCA Civ 65 at [131] and *R (Begum) v SSHD* [2021] UKSC 7; [2021] AC 765. Where the contention is that harm would be done to effective policing, the police also have an expertise beyond that automatically available to me. In the former case part of the reason for the approach is the democratic responsibility of the Secretary of State, which is not mirrored in the public status of the police, although the SSHD's responsibility extends to the police. But in both cases the decision is for me, and not for those propounding the case for a Restriction Order.
15. A particular example of a risk of harm to national security relates to the principle that the State will neither confirm nor deny whether any individual was or is an agent of the intelligence agencies. I am wholly satisfied that this principle ("NCND") is justified. It is maintained not primarily for the benefit of any single person, nor for that matter for any single case. It is maintained in order to safeguard those who either have served, or may serve, the country as agents. The principle only holds good if it is generally maintained, and known to be maintained. Once the principle is departed from, it inevitably follows that a decision in another case not to depart from it will be understood to amount either to confirmation or denial, and the essential safeguarding is lost. I was referred to three exceptions in which the principle was not followed, however, none of these involved an assertion that an individual was an agent (as opposed to an officer or employee of HMG). None of those instances comes close to justifying me overruling the Secretary of State's contention that to depart from the principle of NCND in this case would occasion considerable unnecessary damage to national security. On the contrary, I share that view. That conclusion is moreover firmly supported by, *inter alia*, *Re Scappaticci* [2003] NIQB 56 and *Litvinenko supra*.
16. Some of the material in respect of which application was made was initially provided to me with some blacked out or asterisked sections indicating additional prior redactions which had been applied. Accordingly, I called for the unredacted versions, so that I could assess the validity of the prior redactions. In several cases that call was immediately answered and the assessment made. Where it was not immediately answered, that exercise has now largely been completed save only for a few residual queries. Some of the redacted material has proved to be either (a) irrelevant to the Inquiry or (b) patently justifying a Restriction Order.
17. I have recorded my decisions in relation to each document, or part of document, on schedules which must, for obvious reasons, themselves remain CLOSED. Where I have approved the contention that the public interest requires material to be CLOSED,

it will be listed in a schedule to the Restriction Order. Where I have not approved such a contention, the material will be disclosed as an OPEN document.

18. There remains a small number of the sample documents where further information is required before my decision can be made. In such cases, which are very few, I have called for the necessary additional information and will make final decisions as soon as I practicably can.

**3 November 2023**

**THE RIGHT HONOURABLE LORD HUGHES OF OMBERSLEY**