

1 THE INQUIRY RESUMED AT 10.00 A.M. ON WEDNESDAY,
2 21ST MAY 2025 AS FOLLOWS:

3
4 CHAIRPERSON: Mr. Greaney, good morning.

5 MR. GREANEY: Good morning, sir.

10:01

6
7 The purpose of the hearing over the course of what is
8 currently planned to be the next two days is to address
9 two pressing issues. First of all, His Majesty's
10 Government, HMG, has disclosed relevant documents to

10:01

11 the Inquiry already and will continue to do so.
12 Many of those documents contain the names of junior
13 officials, that is to say junior civil servants, who
14 were not, at the time the relevant document was
15 created, members of the Senior Civil Service. HMG

10:01

16 submits that the names of all junior officials should
17 be redacted from the documents before they are
18 disclosed to Core Participants. So, that is the first
19 issue.
20
21 Second, the Police Service of Northern Ireland, PSNI,
22 has also disclosed relevant documents to the Inquiry
23 and will continue to do so. Some of those documents
24 contain the names of persons suspected of involvement
25 in the Omagh bombing and/or in other terrorist

10:02

26 activity. PSNI maintains that as a matter of
27 principle, the name of any suspects, unless charged,
28 should be protected from disclosure. As we understand
29 it, their position is that the Inquiry should take into

10:02

1 account this principle - if that is what it is - in the
2 decisions that are made as to disclosure on to Core
3 Participants of the documents that name suspects. So,
4 that is the second issue.

5
6 Sir, in our assessment, it's important to emphasise
7 three things at the outset. One, neither HMG nor PSNI
8 is suggesting that the documents should be disclosed in
9 a redacted form to the Inquiry. That is to say, that
10 it is acknowledged that the Inquiry should see those
11 documents unredacted.

12
13 Two, what is, in fact, in issue today is whether those
14 documents should be redacted before they go to Core
15 Participants, all of whom have signed a confidentiality
16 undertaking.

17
18 Three, whether the documents should later be disclosed
19 unredacted during the course of the oral evidence
20 hearings, that is to say in public, is an issue for
21 another day if it remains in relation to any particular
22 name contentious at that stage. So, can we be clear
23 that we are not today dealing with the issue of
24 disclosure on of the names of either junior civil
25 servants or suspects to the public, only where the
26 documents containing such names should go unredacted to
27 Core Participants.

28
29 So, we would invite all Core Participants to focus on

1 what is truly for argument today, not on what may be
2 argument for another day.

3
4 To return to the two broad issues, sir, that is to say
5 the junior officials issue and the suspects issue, 10:04
6 those issues, although separate, both give rise to
7 matters concerning the relationship between several
8 rights preserved or guaranteed by the European
9 Convention on Human Rights in the context of a
10 statutory public inquiry. That is why a single hearing 10:04
11 has been arranged to hear argument in relation to both
12 issues.

13
14 Sir, as I was explaining, that is why a single hearing
15 has been arranged to hear argument in relation to those 10:05
16 two issues. It's also worth noting that it's been
17 necessary to arrange this hearing at relatively short
18 notice, and that's because it will not be possible to
19 disclose to Core Participants a considerable body of
20 material that contains the names of junior officials 10:05
21 and/or suspects until the issues have been resolved.
22 Accordingly, the current position of HMG and PSNI is
23 putting a break on the work of disclosure of the
24 Inquiry.

25
26 Sir, that is why it is so important to resolve those
27 issues today, or at least, sir, for you to hear
28 argument in relation to them.
29

1 we have referred to the relationship between several
2 rights. The rights to which we were referring are
3 these: One, the absolute right guaranteed by Article
4 2, namely the right to life. As everyone we expect
5 will know, this imposes three separate obligations on 10:06
6 the State. First, the negative obligation not to take
7 a person's life save in specific circumstances
8 permitted in law. Second, the positive obligation to
9 protect life. Third, the procedural or investigative
10 obligation to conduct an effective and independent 10:06
11 investigation into a death where the positive or
12 negative duties have arguably been breached.
13 Sir, that is the first right.

14
15 Two, the qualified right in Article 8; the right to 10:06
16 respect for private and family life. Article 8
17 provides that there shall be no interference by public
18 authority - and pausing for one moment, there is no
19 doubt that this inquiry is a public authority - with
20 the exercise of this right, except such as in 10:07
21 accordance with the law and is necessary in a
22 democratic society in the interests, so far as it is
23 relevant, of the protection of the rights and freedoms
24 of others.

25 10:07
26 Three, the qualified right in Article 10; sir, as all
27 will know, the right of freedom of expression. This is
28 qualified in a number of ways. Article 10 is not, it
29 currently seems to the Inquiry legal team, a right that

1 arises for close consideration today, if any
2 consideration, given that we are concerned only with
3 disclosures to Core Participants, and not today to the
4 public at large. We wish to emphasise that Article 10
5 will plainly be of a high degree of relevance when the 10:07
6 question of disclosure to the public arises.

7
8 Although the submissions of the media will be
9 particularly important at that stage, that later stage,
10 we suggest that you would benefit from hearing from 10:08
11 their representatives during this hearing also, to the
12 extent that they wish to develop their written
13 submissions orally, so that you can have the Article 10
14 issues well in mind throughout the course of this
15 Inquiry. 10:08

16
17 Sir, against that background, we are going to turn now
18 to the two issues, the junior officials issue and the
19 suspects issue, and we will develop our submissions in
20 one go, if we can put it that way, and we would invite 10:08
21 others who wish to address you orally to do the same.
22 That is to say, we are not going to break our
23 submissions, nor should anyone else break their
24 submissions down into the separate issues, save to the
25 extent that they submissions on only one of the two 10:08
26 issues.

27
28 In what we next say, we intend to do the following:
29 First, to set out what seem to us to be the applicable

1 principles. Secondly, to set out certain provisional
2 views, and we emphasise that those views will be
3 provisional and dependent upon what we hear over the
4 course of the balance of today and tomorrow. Third,
5 sir, we intend to pose several questions that we
6 believe you would benefit from hearing from Core
7 Participants from, if they have an opinion and view on
8 them.

10:09

10 So, we will begin by addressing the junior officials
11 issue. Before we turn to the substance of HMG's
12 position on the redaction of the names of junior
13 officials, it's necessary for us to set out some of the
14 history of the HMG application.

10:09

15
16 On 6th March of this year, the Inquiry legal team wrote
17 to HMG by e-mail to state that if HMG intended to make
18 an application to you, sir, to redact the names of
19 junior civil servants from the material disclosed to
20 Core Participants, then HMG should do so by no later
21 than 4.00 p.m. on Friday 14th March. The e-mail read,
22 to the extent that is relevant to the issues today:

10:09

23
24 "If GLD, (Government Legal Department), intend to make
25 an application to the chairman on this issue, I would
26 be grateful if it is lodged by no later than 4.00 p.m.
27 on Friday 14th March", that time and date being
28 highlighted.

10:10

10:10

1 The e-mail continued:

2
3 "As it stands, there are 80 documents being withheld
4 from disclosure pending this application".

5
6 We pause to note that even at that early stage in March
7 of this year, as many as 80 documents were having to be
8 withheld from disclosure.

9
10 The e-mail continued:

10:10

11
12 "Please do ensure that any application makes reference
13 to each of these documents as far as relevant, and
14 identifies the issues of concern within each one to
15 assist with the consideration of any application that
16 is made."

10:11

17
18 And there the e-mail ended.

19
20 An application was made by HMG on 31st March, two and a
21 half weeks after the date that had been set in the
22 e-mail. When the Inquiry legal team asked HMG whether
23 there was any reason why that application could not be
24 shared with other Core Participants, HMG formally
25 withdrew the application because.

10:11

26
27 "...it had some sensitivities which ought not to be
28 shared with CPs and the media."

1 Sir, can we make clear that those words that we have
2 just quoted are a direct quote from the final open
3 application.
4

5 On 15th April, so just over a month after the date 10:11
6 originally set, HMG submitted the application that is
7 between pages 2 and 4 of the bundle that has been
8 circulated to all Core Participants. The application
9 sought the redaction of Civil Service names and
10 addresses - and, sir, we understand that to be a 10:12
11 reference to e-mail addresses - from documents before
12 they went to Core Participants, and it gave reasons for
13 the application.
14

15 The application was accompanied by a five-and-a-half 10:12
16 page witness statement of the deputy director of the
17 Legacy Group, Northern Ireland Office. The Inquiry
18 legal team proceeded on the basis that the application
19 and witness statement formed the basis upon which the
20 Inquiry and the Core Participants should consider HMG's 10:12
21 position. In other words, sir, we considered, and we
22 anticipate that Core Participants considered, that this
23 was the argument with which we and they needed to
24 engage.
25

26 Neither the application nor the witness statement
27 suggested any intention to serve any further
28 submissions nor, sir, as we understand it, was that
29 prospect raised in any correspondence with the Inquiry. 10:13

1 It was, therefore, with considerable surprise and some
2 frustration that at 4.00 p.m. on 20th May, so yesterday
3 and therefore the day before the hearing was scheduled
4 to start, and moreover in circumstances in which we
5 suggest it ought to have been anticipated that members 10:13
6 of the Inquiry legal team, and the chairman, and indeed
7 Core Participants and their representatives, would be
8 travelling to Belfast. In those circumstances, a
9 skeleton argument was e-mailed to the Inquiry legal
10 team by the Crown Solicitor's Office. 10:13

11
12 The skeleton argument was stated to be on behalf of the
13 Northern Ireland Office. The Inquiry legal team had
14 not previously received any correspondence from the
15 Crown Solicitor's Office on behalf of the Northern 10:14
16 Ireland Office, all previous communication having come
17 from the Government Legal Department.

18
19 The Inquiry legal team regards the unexpected service
20 of a skeleton argument at such a late stage as highly 10:14
21 unfortunate. One, although the skeleton argument
22 purports in certain respects to respond to the
23 submissions of Core Participants, in large part it
24 develops arguments, including by reference to
25 authorities, that could, we judge, have been developed 10:14
26 five weeks ago, and we suggest should have been
27 developed five weeks ago. There has currently been no
28 formal explanation for why that was not done.
29

1 Two, the service of a skeleton argument at such a late
2 stage deprives both the Inquiry and the Core
3 Participants of the time to which they are entitled in
4 order to prepare their response, and it places an
5 unacceptable burden on all involved in this process. 10:15
6 We suspect that all Core Participants will have shared
7 the Inquiry legal team's surprise and frustration at
8 this turn of events.

9
10 Three, and without wishing to overstate this, it hardly 10:15
11 needs to be said that this Inquiry is about whether the
12 Omagh bombing could have been prevented by UK State
13 authorities. It is also notable that this hearing, the
14 hearing today and tomorrow, concerns issues that could
15 be described as ones involving transparency. So, it 10:15
16 might be thought that HMG would have been scrupulous to
17 avoid the impression that it was behaving in a way that
18 was procedurally unhelpful, and possibly even unfair.

19
20 There seems to the Inquiry legal team a risk that the 10:16
21 approach taken by HMG to this hearing will undermine
22 public confidence in HMG's approach to this Inquiry.

23
24 The Inquiry legal team has an additional concern about
25 the approach taken by HMG to the late service of its 10:16
26 skeleton argument. As we have said, at 4.00 p.m. the
27 skeleton argument was received by the Inquiry legal
28 team. Just over half an hour later, using the e-mail
29 distribution list of the Inquiry legal team, the Crown

1 solicitor's Office, which was not itself on that
2 distribution list, sent that skeleton argument to all
3 Core Participants. This was both unnecessary because
4 the Inquiry legal team had the matter in hand - indeed,
5 the solicitor to the Inquiry had circulated the
6 skeleton argument to Core Participants at 4.13 p.m., 13
7 minutes after it was received - and also likely to
8 cause even further confusion and distress and
9 potentially undermine the Inquiry legal team's
10 relationships with the Core Participants since they
11 will have received an e-mail out of nowhere from
12 someone whose role they may not have understood in our
13 process.

10:16

10:17

14
15 By way of mitigation, can we make clear that it appears
16 that the lawyer in question at the Crown Solicitors
17 Office, had misread an earlier e-mail from the
18 solicitor to the Inquiry and was acting in the belief
19 that the skeleton argument served on the solicitor a
20 very short time before had not been circulated to Core
21 Participants, as we have made plain it had. We, the
22 Inquiry legal team, accept that this mistake was made
23 in good faith, which mistake has been candidly
24 accepted. For this reason, we have not named the
25 individual responsible. We also acknowledge that steps
26 were taken to undo what had been done when the error
27 was pointed out. However, this incident only serves to
28 underline what appears, from the outside, to have been
29 a chaotic rush to provide materials at the very last

10:17

10:17

10:17

1 minute.

2
3 Sir, we suggest that this state of affairs calls for a
4 clear and candid explanation from HMG, following which
5 no doubt we can put this behind us. We will invite 10:18
6 HMG, through counsel, to give that explanation at the
7 commencement of their submissions which will follow on
8 immediately after ours.

9
10 Sir, having unfortunately had to begin this hearing 10:18
11 with those remarks, we'll turn to the substance of
12 HMG's application, that is to say the application to
13 redact the names of junior civil servants from
14 documents before they are disclosed to Core
15 Participants. 10:19

16
17 As we've explained, this application is set out in a
18 letter of 15th April, and is developed in the witness
19 statement of the deputy director of the Legacy Group of
20 the Northern Ireland Office, that statement having the 10:19
21 same date. Now, of course, we have the skeleton
22 argument too.

23
24 In short, HMG submits that the names of junior
25 officials should be redacted from documents for three 10:19
26 reasons. One, the naming of these individuals has no
27 relevance, it is said, to the work of the Inquiry. So
28 the first reason, irrelevance.

1 Two, the naming of these individuals, it's argued,
2 would undermine their expectation of privacy and
3 confidentiality. So reason two, privacy.
4

5 Three, the naming of these individuals, it is
6 contended, will increase the risks to them in the
7 context of the work of the Northern Ireland Office and
8 the Inquiry. Reason three, risk.
9

10:19

10 what we will do, sir, in the hope that it will be
11 helpful both to you and to Core Participants, is to
12 deal with each of those reasons in the order in which
13 they have been identified in the letter and in the
14 skeleton argument.
15

10:20

16 As for the assertion of irrelevance, sir, there are a
17 number of matters upon which we consider you would
18 benefit from the submissions of Core Participants.
19 First, as will be obvious to everyone, the Inquiry is
20 at an early stage in its disclosure process. The
21 current view of counsel to the Inquiry is that it is
22 not possible at this stage, and may be dangerous, to
23 make the decision that the name of any particular
24 junior official is irrelevant such as to justify
25 redaction from documents before they go to Core
26 Participants.
27

10:20

10:20

10:21

28 Connectedly, we do not currently understand how it can
29 be safe to assume that the names of junior officials as

1 a class are irrelevant. It currently seems to us, the
2 Inquiry legal team, that the safe and appropriate
3 course is to assume that where, in any particular
4 document of relevance, a person is named, that name is
5 relevant until a point at which it can be seen that the 10:21
6 name is to the contrary irrelevant. That point,
7 without question, has not yet been reached.

8
9 Accordingly, sir, we consider that you will be assisted
10 by hearing from Core Participants on the question of 10:21
11 whether HMG is approaching this issue from the wrong
12 end. Is it appropriate to presume that the names of
13 junior officials are irrelevant, particularly given the
14 stage that the Inquiry is at?

15 10:22
16 Second, HMG submits that the answer to the problem, or
17 at least a substantial part of the answer to the
18 problem, is that the Inquiry legal team will see the
19 documents unredacted, unlike the court in IAB, a case
20 to which we'll shortly turn. 10:22

21
22 That proposition appears to the Inquiry legal team to
23 assume that the Inquiry legal team has a monopoly of
24 wisdom and that the Core Participants could add nothing
25 to our understanding of relevance. Currently, counsel 10:22
26 to the Inquiry regards that proposition, if it is what
27 HMG's position boils down to, as wrong.
28 At the risk of stating the obvious, within the Bereaved
29 Family and Survivor Core Participant groups are people

1 who have spent decades campaigning and who, as a
2 result, have a detailed knowledge of some of the
3 issues, perhaps many of the issues, that we will be
4 exploring over the course of this Inquiry. We have the
5 Police Ombudsman for Northern Ireland, which has also
6 looked closely at some of these issues, and we have
7 other Core Participants with detailed knowledge as
8 well. It currently seems to us that it is plainly
9 realistic to imagine that a core participant may see
10 something in a name that the Inquiry legal team does
11 not.

10:23

10:23

12
13 Sir, we consider that you will benefit from receiving
14 submissions on that analysis; is it correct, and what
15 difference does it make if it is?

10:23

16
17 Third on the purported reason of irrelevancy. Many of
18 those who have made submissions to you in writing, sir,
19 have pointed out that the High Court and the Court of
20 Appeal of England and Wales consider the redaction of
21 documents by HMG in the IAB case, that is to say the
22 courts in that case considered the redaction from
23 documents of the names of junior officials.

10:24

24
25 HMG is clearly correct to point out that the context
26 for that case was a claim for judicial review. We'll
27 address that difference as we go along. But you, sir,
28 we suggest, will need to consider to what extent the
29 courts in IAB were expressing principles that apply

10:24

1 equally to the situation that you were concerned with;
2 so, to what extent that which was said in IAB read
3 across to the circumstances of a public inquiry.
4

5 Swift J gave detailed consideration to the issue of 10:24
6 relevance at paragraphs 14 to 22 of his first instance
7 decision in IAB, the facts of which do not particularly
8 illuminate the principles to be derived from it.
9

10 His conclusion appears at paragraph 22. For your note 10:25
11 and in case you want to turn it up, that conclusion
12 appears at page 117 of the Inquiry's authorities
13 bundle. So, for those who don't immediately have that
14 authority to hand, we'll read out the relevant part.
15 Swift J said the following, and we quote: 10:25
16

17 "Drawing these points together, the principle which
18 ought to guide the approach in judicial review
19 proceedings is that, absent good reason to the
20 contrary, which might, for example, include that the 10:25
21 information in question was subject to a legal
22 obligation of confidentiality, redaction on grounds of
23 relevance alone ought to be confined to clear
24 situations where the information redacted does not
25 concern the decision under challenge." 10:26
26

27 "The names the Secretaries of State seek to protect are
28 not in this class. Names of civil servants should not
29 routinely be redacted from disclosable documents.

1 Redaction should take place only where it is necessary
2 for good and sufficient reason. This conclusion is
3 consistent with the obligation of candour and with the
4 general principle of cooperation between public
5 authorities and the court that is one foundation for 10:26
6 judicial scrutiny. This approach will also guard
7 against the practical difficulties caused by excessive
8 redaction. "

9
10 It is right, as HMG points out, that this conclusion 10:26
11 was expressed in the context of the duty of candour in
12 judicial review proceedings, and that what was in issue
13 was redaction of materials before they went to the
14 court, although presumably they would have remained
15 redacted when they went on to the claimants. 10:27

16
17 Notwithstanding that that was the context for the
18 decision of Swift J, it is useful to look at some of
19 the reasoning by which he reached that conclusion. So,
20 sir, I'm going to turn to paragraphs 18 and 19 of the 10:27
21 judgment which you will find, I think, at pages 117
22 going on to -- 115, thank you, going on to 116. I do
23 appreciate that for the lawyers in the room, it may be
24 rather tedious for me to read out whole parts of a
25 judgment but we bear in mind that there are others in 10:27
26 this room who are not lawyers and who will not have
27 read these authorities before.

28 CHAIRPERSON: Just bear with me a second, Mr. Greaney.
29 I am going to see if I can just turn up the case

1 reference. In our bundle, what page are we on?

2 MR. GREANEY: If you're looking at electronically, sir,
3 as I think you are, it's pages 115. It's pages 115 to
4 116. Thank you. I was just saying he had it wrong but
5 he had it right.

10:28

6
7 This was Swift J quoting from the judgment of the
8 Master of the Rolls in the well known Huddleston case.
9 We can hand up a hard copy of the bundle with that page
10 turned up, if that's helpful.

10:28

11 CHAIRPERSON: I think I've got them, actually.

12 MR. GREANEY: Within the hard copy bundle, it's divider
13 6. It's the pagination in the top right-hand corner.
14 Page 115 of 458.

10:29

15
16 I'm sorry, sir, you are struggling with the electronic
17 version.

18 CHAIRPERSON: I think there is an issue with the
19 electronic version.

20 MR. GREANEY: Sir, there is an issue. Certainly on my
21 version of the electronic bundle, it was always on page
22 16 even if it was on page 115.

10:29

23 CHAIRPERSON: Are we looking in the first instance
24 case?

25 MR. GREANEY: We are looking at the first instance
26 case, so the judgment of Swift J, wherein it is
27 paragraphs 14 through to 22. We're at paragraph 7 of
28 the judgment of Swift J page 115, where he cites
29 paragraphs 17 and following of the judgment of...

10:30

1 would you bear with me for a moment, sir? what I am
2 going to suggest is if you would rise just for a few
3 moments so I can sort these bundles out, because there
4 seems to be a problem in our bundle as well.

5 CHAIRPERSON: You'd like me to do that, Mr. Greaney? 10:31

6 MR. GREANEY: Yes, I would like you to rise for a few
7 moments. That's the easiest way of dealing with it.

8
9 SHORT ADJOURNMENT

10
11 THE INQUIRY RESUMED AS FOLLOWS:

12
13 MR. GREANEY: Sir, I'm very sorry about that and about
14 the delay. The confusion has arisen because the first
15 instance judgment of Swift J is not within either your 10:36
16 electronic or hard copy bundle. Sir, I take
17 responsibility for that omission, which is unfortunate.

18 CHAIRPERSON: well, I have it separately downloaded so
19 I have it in front of me anyway.

20 MR. GREANEY: Do you? Right, well then, sir -- 10:36

21 CHAIRPERSON: It's also quoted, of course, in the Court
22 of Appeal decision.

23 MR. GREANEY: It is, sir.

24
25 Let's just take a step back so that this does all make 10:36
26 sense both to you and to everyone else. I had drawn
27 your attention to paragraph 22 of the ruling of Swift J
28 in which he rejected irrelevancy as a basis for
29 redaction of the documents before they went to the

1 court. At the very end of paragraph 22, the learned
2 judge identified that the approach that he was
3 proposing "...will also guard against the practical
4 difficulties caused by excessive redaction."

10:37

5
6 The judge had dealt with the "excessive redaction" at
7 paragraphs 18 and 19 of his ruling. And sir, that was
8 what I was seeking to take you to just before you rose.
9 I was indicating as well so that everyone could follow
10 that I would read out those paragraphs, and that is
11 what I'll do now.

10:37

12
13 Paragraph 18:

14
15 "Redaction leads to significant practical difficulties.
16 The present case is an example of a common situation
17 where e-mail exchanges and other contemporaneous
18 documents are disclosed to explain a decision-making
19 process. Most decisions made within central government
20 now involve significantly sized groups of civil
21 servants. On any occasion, one civil servant within
22 the group might be the sender of the message, might be
23 the recipient of the message, or might, (usually will
24 probably) be copied in. Sometimes, as in this case,
25 the civil servants within the group are spread across
26 different government departments."

10:37

10:38

10:38

27
28 Then the judge said this:
29

1 "At the least, redacting names makes the
2 decision-making process and the significance of each
3 document disclosed more difficult to understand. In
4 some instances it may obscure the significance of a
5 document almost completely. "

10:38

6
7 "When correspondence and other documents are disclosed
8 for the purpose of evidence a decision-making process,
9 it will rarely be the case that it will not assist the
10 court's understanding of that process and the decision
11 itself to know by whom or to whom the documents were
12 sent, forwarded or copied. In most cases, when this
13 information is redacted, any outsider's understanding
14 of the documents, and for this purpose the court is an
15 outsider" - and pausing for a moment, and so will be
16 the Core Participants - "is significantly hampered.
17 Misunderstanding and misinterpretation become
18 commonplace. When documents are disclosed and parties
19 then rely on them by including them in the hearing
20 bundle, the court is under a practical obligation to
21 consider those documents with a view to making sense of
22 how the information in the documents bears upon the
23 legality of the decision under challenge. "

10:39

10:39

10:39

24
25 "All of this is made much more difficult and more time
26 consuming when, for example, successive strings of
27 e-mail correspondence, each pages long, are entirely
28 anonymised. The same point applies to names redacted
29 in the body of correspondence or other documents. All

10:39

1 such redactions only detract from the intelligibility
2 of the document, and impair achievement of the purpose
3 for which the document was disclosed into the
4 litigation. "

10:40

5
6 Paragraph 19 of the judgment read:

7
8 "The Secretary of State's response that any concerns
9 are about no more than making reading documents a
10 little bit easier is glib. First, ensuring that 10:40
11 documents disclosed in litigation to explain a
12 decision-making process are readily intelligible is an
13 objective worth achieving for its own sake. It is
14 notable that the Secretary of State's proposal to deal
15 with problems of intelligibility, both in this case and 10:40
16 generally, was to replace redacted names with a list of
17 ciphers, an approach that would be laborious, prone to
18 error, and even when error free would only add a new
19 layer of complexity to the task of understanding the
20 narrative of the decision-making process from the 10:41
21 documents disclosed. "

22
23 Sir, the reasoning of Swift J was upheld by the Court
24 of Appeal. So, what assistance can be derived by the
25 Inquiry from the ruling in that case? The position is 10:41
26 that whilst the practical difficulties described by the
27 judge in the passage we have just read out will not
28 affect the Inquiry legal team because we will, as I've
29 said, see the documents unredacted, on the face of it

1 those difficulties will affect Core Participants if
2 they receive the documents redacted.

3
4 Sir, we hope that that submission is plain. We will
5 not be affected but the Core Participants will be
6 affected in each of the ways described by Swift J.

10:42

7
8 We therefore consider that you will be helped if the
9 Core Participants address the following issues: One,
10 are we correct that these practical difficulties will
11 affect Core Participants, and what is the significance
12 of this, if any, to the argument on relevance?

10:42

13
14 Two, how does this point interact with the second
15 point, namely the point that the Inquiry legal team
16 currently assesses that Core Participants have an
17 important role to play in identifying whether any
18 particular name is relevant?

10:42

19
20 Three, what is the relevance of the fact that the
21 argument in IAB arose in the context of the duty of
22 candour in judicial review proceedings?

10:42

23
24 Sir, that is all we propose to say about the reason
25 advanced for redaction of irrelevancy.

10:43

26
27 As for the argument based on the asserted expectation
28 of privacy and confidentiality on the part of junior
29 civil servants, again we consider that you will benefit

1 from submissions by Core Participants on a number of
2 issues. In IAB, HMG made an argument that seems to us
3 to be materially identical to the argument, sir, that
4 is advanced to you, and Swift J rejected it. Sir, if
5 you are in the first instance judgment, could I invite 10:43
6 your attention, please, to paragraph 25 of Swift J's
7 ruling, which is the paragraph in which he reached his
8 conclusion about the ground advanced in that case of
9 privacy.

10
11 what the judge said was this, and I quote: 10:44
12

13 "I do not consider any such general expectation...," so
14 a general expectation of privacy, "...even assuming it
15 exists in practice, could be reasonable. No such 10:44
16 expectation would attach to any person as a matter of
17 general employment law. Moreover, when at work, civil
18 servants are not involved in anything that can be
19 described as a private activity. They are exercising
20 public functions as part of the public service of the 10:44
21 country. It is also material that while the Secretary
22 of State's submission refers to the class of junior
23 civil servants, this label was applied only to
24 distinguish them from the civil servants working in
25 grades comprising what the government refers to as the 10:45
26 Senior Civil Service. Therefore, the distinction
27 between junior and senior civil servants is akin to the
28 distinction between junior and leading counsel and is
29 not necessarily any indication of age or experience.

1 The class of junior civil servants includes civil
2 servants with significant responsibilities."

3
4 So, Swift J roundly rejected an argument materially
5 identical, so it seems to us, to that advanced before
6 you, sir. 10:45

7
8 As we've observed, the Court of Appeal of England and
9 Wales upheld the ruling of Swift J, and did so moreover
10 for the reasons that he had given. 10:45

11 CHAIRPERSON: I think it's perhaps fair to say that the
12 issue of privacy wasn't at the forefront of the Court
13 of Appeal decision, but there were one or two passages
14 in which the Court of Appeal looked at that issue.
15 Perhaps at paragraphs 31 and 32 of their decision. 10:46

16 MR. GREANEY: Indeed, sir, yes.

17 CHAIRPERSON: Where there was a discussion on guidance
18 documentation that was provided to civil servants about
19 their duties, particularly in relation to candour and
20 disclosure in judicial review proceedings. The court 10:46
21 pointed out at paragraph 32 that there is no mention in
22 any of that guidance of any practice of redacting
23 names, and concluded that it's difficult to see how any
24 civil servants conscientiously reading the guidance
25 document could have had an expectation that their names 10:46
26 should be withheld as a matter of routine in judicial
27 review proceedings.

28 MR. GREANEY: Sir, we quite agree that that is an
29 important passage in the ruling of the Court of Appeal.

1 CHAIRPERSON: In the final sentence of the Court of
2 Appeal's judgment:

3
4 "The practice is inimical to open government and
5 unsupported by authority. If Parliament takes the view 10:47
6 that members of the Civil Service have a general right
7 to anonymity in judicial review litigation, then it
8 should enact a primary statute to that effect".

9 MR. GREANEY: which it has not done, sir.

10 CHAIRPERSON: Yes. 10:47

11 MR. GREANEY: So, counsel to the Inquiry currently
12 regards the reasoning of Swift J on the issue of
13 expectation of privacy as applying with equal force to
14 the issues confronting the Inquiry. In his ruling,
15 Swift J appears - clearly appears, we would submit - to 10:47
16 be making a point of general application, not one that
17 applies only to judicial review proceedings. The
18 question that we invite Core Participants to address is
19 whether that assessment of counsel to the Inquiry is
20 right or not. 10:48

21
22 In connection with the privacy argument, the skeleton
23 argument of counsel to the Inquiry raised two questions
24 of HMG. The questions were in these terms: First, as
25 has been pointed out to HMG, we said, many of the 10:48
26 junior officials whose names it proposes should be
27 redacted have publicised the identity of their employer
28 via social media. Does that make a difference?
29

1 The point we were making was that far from hiding the
2 identity of their employer, many junior officials whose
3 names had featured in documents that we had seen had
4 publicised that fact on social media.

10:49

6 The second question we posed was in these terms: Some
7 of those who were junior officials at the time of the
8 creation of the relevant documents are now members of
9 the Senior Civil Service; does that make a difference?
10 Does HMG, we ask, submit that it's the position of the
11 individual then or now that is important and, if the
12 former, why so?

10:49

14 Sir, we have noted HMG's response to those questions at
15 paragraph 33 of its skeleton argument. We invite HMG
16 to make clear whether, assuming for a moment that a
17 junior official does have a reasonable expectation of
18 privacy, it does or does not accept that those who have
19 publicised the identity of their employer via social
20 media, and those who are now members of the Senior
21 Civil Service, still have that reasonable expectation.
22 Also, we invite Core Participants to address the
23 significance of these matters generally.

10:49

10:49

25 Finally, sir, on the issue of privacy, we invite HMG to
26 identify the evidential basis, if there is one, for the
27 assertion that junior officials have a reasonable
28 expectation of privacy, particularly bearing in mind
29 the passages from the judgment of the Court of Appeal

10:50

1 to which you, sir, have just drawn attention.

2
3 As for the assertion of risk, in the case of the Crown
4 v L1T FM Holdings UK Ltd and others, citation for which
5 is [2024] EWHC 386 Admin, a class-based argument 10:50
6 similar to that advanced by HMG before you, sir, was
7 rejected by Swift J. Sir, I say with some trepidation
8 that you should find the relevant part of that ruling
9 at page 170 of the electronic version. If you were to
10 be working from the hard copy version -- 10:51

11 CHAIRPERSON: I have it on my own collection.

12 MR. GREANEY: You have it, sir. I am referring to
13 paragraph 26 of the separate ruling of Swift J in this
14 different case. Again, sir, all who are watching
15 online or present in the courtroom can follow the 10:51
16 argument, I will read out in fact two paragraphs that
17 we particularly emphasise, paragraphs 26 and 27.

18
19 At paragraph 26, Swift J said:

20
21 "Further, the Secretary of State relies on evidence in
22 a witness statement made by Jaclyn Ward, the Director
23 of the Investments Security Unit. The latter part of
24 that evidence is under the heading Confidentiality and
25 National Security. Ms. Ward explains that the identity 10:52
26 of civil servants who work on decisions taken in
27 exercise in the Powers of National Security and
28 Investment Act 2021, may be of interest "to those
29 seeking to undermine the UK's national security, such

1 as hostile actors". Her evidence is that this reason
2 applies to all civil servants not working in Senior
3 Civil Service grades, and is a sufficient reason to
4 redact their names from the disclosed documents."

10:52

5
6 Pausing for a moment. As we submitted, a class-based
7 argument relating to risk similar to that advanced
8 before you, sir, was in issue in this case.

9
10 At paragraph 27, the judge said:

10:52

11
12 "I disagree. Ms. Ward's statement does not set out any
13 specific national security reason for the redaction of
14 the names of all civil servants in junior Civil Service
15 grades. Leading counsel for the Secretary of State
16 accepted that there was no national security assessment
17 to the effect that all such names needed to be
18 redacted. The Secretary of State's general application
19 that the names of all civil servants outside the Senior
20 Civil Service should be redacted therefore fails."

10:53

10:53

21
22 The provisional view of counsel to the Inquiry, sir, is
23 that the reasoning of Swift J in that case applies to
24 those referred to in HMG's application. We invite all
25 Core Participants to the extent that they wish to do so
26 to address whether that is correct. So, in other
27 words, sir, what we read from that judgment is that
28 class-based risk arguments, particularly when not
29 evidenced or not adequately evidenced, are not good

10:53

1 enough that there needs to be consideration of
2 individuals on a case by case basis.

3
4 which leads to the next point, which is that, of
5 course, if in the case of any particular junior 10:54
6 official, that person's Article 2 rights are engaged,
7 the Inquiry will respect those rights. And/or if their
8 Article 8 rights are engaged in a way that outweighs
9 other legitimate interests, the Inquiry will respect
10 those rights too. In those circumstances, the 10:54
11 redaction of the name will, or may, be justified.
12 However, our current view, sir, is that any such issue
13 must be addressed on a case by case basis, not on a
14 class basis.

15
16 Accordingly, the provisional view of the Inquiry legal
17 team is that the assertion that the names of junior
18 officials should be redacted from disclosure to Core
19 Participants on a class basis, described by some Core
20 Participants as a blanket basis due to an asserted but 10:55
21 unevidenced generic risk of harm, is one that you
22 should reject.

23
24 Again, however, you will no doubt be assisted by the
25 submissions of Core Participants on this point, both 10:55
26 those you have received in writing already, for which
27 we are grateful, and those that you receive orally
28 today and/or tomorrow. This should, we suggest,
29 include submissions from HMG on what, assuming the risk

1 argument could succeed on a class basis, the evidential
2 basis for the asserted class risk really is.

3
4 There are two final points about which we consider you
5 would be assisted by submissions of the Core
6 Participants in relation to this first issue, the
7 junior officials issue. First, the duty of candour.
8 We know, sir, that we are on safe ground in submitting
9 that you will expect complete candour from all Core
10 Participants, including HMG, throughout your
11 investigation.

10:55

10:56

12
13 In the opening statement protocol, the following was
14 stated:

15
16 "The Chairman expects State Core Participants to
17 understand and exhibit the principles of the
18 Hillsborough Charter and the Hillsborough Law."

19
20 what relevance, if any, do those principles, we ask,
21 along with the seven principles of public life to which
22 reference is made in the submissions of Core
23 Participants have? If HMG has a duty of candour to
24 other Core Participants, what is the impact of that on
25 the proposal to redact documents that are provided to
26 them?

10:56

10:56

27
28 The Inquiry legal team notes what was said by Bean LJ
29 at paragraph 24 of the ruling of the Court of Appeal in

1 IAB, namely, that there is...

2
3 " ... no duty of candour equivalent to that imposed on
4 public bodies defending judicial review claims. "

5
6 we would ask in what practical way does HMG suggest the
7 duty of candour owed to this Inquiry by HMG, in what
8 practical way is it suggested to be different from
9 and/or less than that owed in judicial review
10 proceedings? Moreover, does any such difference, if it 10:57
11 exists, apply to the names of junior civil servants,
12 which, after all, is a matter under consideration? And
13 can HMG give any practical example of something it
14 considers bound to disclose in a judicial review that
15 it would not consider itself bound to disclose to the 10:57
16 Inquiry?

17
18 I said there were two final points and this is the
19 second. In its submissions, certainly in the
20 application itself, HMG makes reference to the 10:58
21 protocols and/or practices applied by other public
22 inquiries. Sir, we do not consider that you are likely
23 to derive any assistance from the approach adopted in
24 other processes. Those protocols and practices that
25 are relied upon were not, so far as the Inquiry legal 10:58
26 team can tell, the product of any hearing at which the
27 issues of relevance, privacy and risk were considered,
28 let alone ruled upon. Moreover, in some cases the
29 protocol or practice referred to was established prior

1 to the decision of the Court of Appeal in IAB, and we
2 have in mind in particular the protocol of the UK
3 Covid-19 Inquiry.

4
5 But in any event, sir, the approach adopted in other 10:59
6 inquiries has no binding effect on you and you must, of
7 course, make your own decision.

8
9 Sir, having dealt with the principles, or at least some
10 of them, having expressed some provisional views, and 10:59
11 having set out some questions that you may benefit from
12 the CPS seeking to answer, we'll turn away from the
13 junior officials issue and to the suspects issue.

14
15 We acknowledge that PSNI has raised an important issue 10:59
16 that requires careful consideration. It is helpful, we
17 acknowledge, that PSNI's position in its written
18 submissions has been expressed in a deliberately
19 non-adversarial way and, moreover, in a clear way.
20 However, we expect, sir, that you will benefit from 11:00
21 hearing from PSNI on whether their position is, on the
22 one hand, that the Inquiry should take into account the
23 principle they identify, if that is what it is, in the
24 decisions that are made as to disclosure on to the Core
25 Participants of documents that name suspects; or, on 11:00
26 the other hand, whether the Police Service of Northern
27 Ireland propose that you should rule that disclosure
28 should not be made of suspect names in any, all, or
29 some sets of circumstance at which stage and in which

1 situation it currently seems to us that there would
2 need to be an application for a restriction order,
3 which there is not at the moment.
4

5 In considering the position on the suspect's issue, the 11:00
6 starting point is Article 8 of the Convention as set
7 out in Schedule 1 to the Human Rights Act of 1998. As
8 everyone knows Article 8 is in these terms:
9

10 "Everyone has a right to respect for his private life, 11:01
11 his home, and his correspondence". That is Article
12 8.1.
13

14 Article 8.2:
15

16 "There shall be no interference by public authority
17 with the exercise of this right, except such as is in
18 accordance with the law and is necessary in a
19 democratic society in the interests of national
20 security, public safety or the economic well-being of 11:01
21 the country, for the prevention of disorder or crime,
22 for the protection of health or morals, or" - and we
23 emphasise this phrase - "for the protection of the
24 rights and freedoms of others."
25

26 As is obvious from its face, and as we have already
27 submitted, Article 8 is not an unqualified right.
28 Interference with an Article 8 right will be lawful
29 where inter alia that interference is in accordance

1 with the law and necessary for the protection and
2 rights and freedoms of others.

3
4 On the facts of this Inquiry, where the Inquiry makes
5 disclosure of the name of someone suspected of 11:02
6 involvement in the Omagh bombing, or in a potentially
7 linked attacked as we have described them, to Core
8 Participants, which, of course, is the stage that is
9 currently under consideration, when in such a
10 situation, we currently consider that the Inquiry will 11:02
11 be acting in accordance with Section 17 of the
12 Inquiries Act of 2005 and therefore will be acting in
13 accordance with the law in making that disclosure.

14
15 In considering next whether such a disclosure to Core 11:02
16 Participants is necessary for the protection of the
17 rights and freedoms of others, we consider that the
18 procedural rights of the bereaved families under
19 Article 2 of the Convention will be of a high degree of
20 relevance, just as they have argued and as PSNI has 11:03
21 acknowledged.

22
23 Sir, pausing for just a moment, may we be clear that we
24 do not ignore the Article 10 rights of the press and
25 the public. Those rights will be of undoubted 11:03
26 importance at a subsequent stage, namely where in any
27 case disclosure is made or proposed to be made beyond
28 the Core Participants to the public at large.
29 So, we hope we have been clear. The Article 10 rights

1 of the press and the public undoubtedly will be engaged
2 and will be an important consideration at that stage.
3 Although, as we have made clear, we consider that you
4 should nonetheless hear from the representatives of the
5 media at this stage if they wish to develop their
6 helpful submissions in writing.

11:04

7
8 In the event that the Article 8.2 criteria are
9 satisfied such as potentially to justify an
10 interference with an expectation of privacy, you, sir,
11 will need to consider whether that interference is
12 proportionate. That approach, that principle or
13 proportionality, arises from, among other cases, the
14 case of *Bank Mellat v HM Treasury* No.2 [2013] 39 at
15 paragraph 74. Sir, we'll make sure we have that
16 citation correctly identified in due course but for the
17 time being, I'll read out what was said.

11:04

11:04

18
19 "The judgment of Dickson CJC in *Oakes* provides the
20 clearest and most influential judicial analysis of
21 proportionality within the common law tradition of
22 legal reasoning. Its attraction as a heuristic tool is
23 that by breaking down an assessment of proportionality
24 into distinct elements, it can clarify different
25 aspects of such an assessment and make value judgments
26 more explicit. The approach adopted in *Oakes* can be
27 summarised by saying that it is necessary to determine,
28 (1), whether the objective of the measure is
29 sufficiently important to justify the limitation of a

11:05

11:05

1 protected right; (2), whether the measure is rationally
2 connected to the objective; (3), whether a less
3 intrusive measure could have been used without
4 unacceptably compromising the achievement of the
5 objective; (4) and whether, balancing the severity of 11:06
6 the measure's effects on the rights of the persons to
7 whom it applies against the importance of the
8 objective, to the extent that the measure will
9 contribute to its achievement, the former outweighs the
10 latter." 11:06

11
12 "The first three of these are the criteria listed by
13 Clyde LJ in de Freitas, and the fourth reflects the
14 additional observation made in Huang. I have
15 formulated the fourth criterion in greater detail than 11:06
16 Sumption LJ, Justice of the Supreme Court, but there is
17 no difference of substance. In essence, the question
18 at step four whether the impact of the rights
19 infringement is disproportionate to the likely benefit
20 of the impugned measure." 11:06

21
22 Sir, that was paragraph 74 at page 246 of the
23 authorities bundle.

24
25 The impact of Article 8 in circumstances in which a 11:07
26 person is investigated on suspicion of a criminal
27 offence but not charged has been considered in several
28 authorities but, sir, it's necessary to note only two
29 because the principles are now settled.

1
2 In the well-known case of Richard v British
3 Broadcasting Corporation and another [2018] EWHC 1836,
4 Mann J ruled - this is page 352 of the authorities
5 bundle - in the following way: At paragraph 248, the 11:07
6 judge ruled:

7
8 ""It seems to me that on the authorities, and as a
9 matter of general principle, a suspect has a reasonable
10 expectation of privacy in relation to a police 11:07
11 investigation and I so rule."

12
13 The judge went on, having cited various other
14 authorities at paragraph 250, to say:

15
16 "These judicial remarks demonstrate at least some of
17 the reasons why an accused should at least prima facie
18 have a reasonable expectation of privacy in respect of
19 an investigation. They are particularly appropriate to
20 the type of case referred to there (of which, of 11:08
21 course, the present case is an instance) but they are
22 generally applicable, to varying extents, to other
23 types of cases."

24
25 Then at paragraph 251, the judge said: 11:08
26

27 "That is not to say, and I do not find, that there is
28 an invariable right to privacy. There may be all sorts
29 of reasons why, in a given case, there is no reasonable

1 expectation of privacy, or why an original expectation
2 is displaced. An example was given by Sir Brian
3 Leveson in the extract quoted above, and others can be
4 readily thought of. But in my view the legitimate
5 expectation is the starting point. I consider that the 11:09
6 reasonable person would objectively consider that to be
7 the case."

8
9 In the second case to which we'll make reference, ZXC v
10 Bloomberg LP [2022] UK FC5, the Supreme Court ruled 11:09
11 consistently with the decision of Mann J in the
12 Richards case, in that the court ruled that as a
13 legitimate starting point, a person under criminal
14 investigation has, prior to being charged, a reasonable
15 expectation of privacy in respect of information 11:09
16 relating to that investigation.

17
18 That was paragraph 146.

19
20 However, that legitimate starting point is, the court 11:09
21 went on to make clear, "no more than that. It is not",
22 the court said, "a legal rule or a legal presumption,
23 let alone an irrebuttable presumption." The
24 determination as to whether there is a legal
25 expectation of privacy in the relevant information is, 11:10
26 the court emphasised, "a fact specific enquiry."

27
28 Accordingly, we accept that the starting point in
29 addressing the suspects issue posed by PSNI is that a

1 person investigated on suspicion of an offence but not
2 charged has a reasonable expectation of privacy in
3 respect of the fact of, and information about, the
4 investigation.

5
6 However, even where that expectation exists, it will be
7 necessary to consider whether naming the suspect in
8 disclosure to Core Participants is nonetheless in
9 accordance with the law and necessary to protect the
10 procedural rights of the bereaved families under
11 Article 2, and is proportionate. 11:10

12
13 Sir, in a moment, having set out all of that by way of,
14 we hope, helpful background, we are going to ask where
15 that leaves us. But looking at the time and bearing in 11:11
16 mind the burden on the shorthand writers, I am going to
17 ask whether it would be an unacceptable burden to
18 continue for a further 10 minutes, or even 15?
19 Thank you very much indeed.

20
21 Sir, where does that leave us? In early
22 correspondence, so I think the 10th April of this year,
23 with PSNI on this issue, the Inquiry legal team set out
24 seven categories of person. Seven categories of
25 suspect. Those categories are rehearsed in PSNI's 11:11
26 submissions for this hearing. We make no criticism of
27 PSNI for that but we should be very clear that what ILT
28 was not doing in setting out those seven categories was
29 expressing any concluded view. We were not saying

1 'here are seven categories and this is our final view
2 in relation to them'. Instead, as is, we would
3 suggest, commonly done, we were inviting PSNI to
4 address what were a number of examples in the hope that
5 their answers would illuminate their reasoning. 11:12

6 The reality, so it seems to us, is that there are a
7 number of ways of breaking down the suspects' cohort,
8 some into a large number of categories, some into a
9 smaller number of categories. Our current view - but
10 we would welcome the views of others - is that that 11:12
11 cohort, that group, can most helpfully be broken down
12 into four subgroups. It's on those subgroups that we
13 invited the submissions of Core Participants in their
14 written responses.

15 11:13
16 Those four subgroups or categories are as follows. In
17 identifying those categories, sir, what we will do is
18 not only state what type of person falls into that
19 particular category, but we will also set out what the
20 Inquiry legal team's provisional views are in respect 11:13
21 of persons within that group or subgroup.

22
23 Category 1, a person suspected of involvement in the
24 Omagh bombing, but not charged, who has been publicly
25 named in the media reporting, or in Parliament as has 11:13
26 happened, as having been investigated. Our provisional
27 view is that those in that category have no reasonable
28 expectation of privacy given that the relevant
29 information is already public knowledge and, moreover,

1 it is our view that even if they do have such a
2 reasonable expectation, it is in accordance with the
3 law and necessary to protect the procedural rights of
4 the bereaved families under Article 2, and
5 proportionate, for their names to appear unredacted in 11:14
6 the disclosure to Core Participants. In other words,
7 where there is a document with the name of such a
8 person, that document should go unredacted with the
9 name unredacted to Core Participants.

10
11 Category 2, a person suspected of involvement in a
12 potentially linked incident, by which we mean an
13 incident potentially linked to the Omagh bombing, but
14 not charged, who has been publicly named in media
15 reporting or in Parliament as having been investigated. 11:14
16 Once again, our provisional view is that those in the
17 second category have no reasonable expectation of
18 privacy, given that the relevant information is already
19 public knowledge; and that even if they do have such a
20 reasonable expectation, it is once again in accordance 11:15
21 with the law, and necessary to protect the procedural
22 rights of the bereaved families under Article 2, and
23 proportionate, for their names to appear unredacted in
24 the disclosure to Core Participants.

25
26 Category 3, a person suspected of involvement in the
27 Omagh bombing, but not charged, who has not been
28 publicly named in media reporting or otherwise as
29 having been investigated. So, not publicly named.

1 Our provisional view is that those in this category, on
2 the basis of high authority, do have a reasonable
3 expectation of privacy but that it is nonetheless in
4 accordance with the law, and necessary to protect the
5 procedural rights of the bereaved families under 11:16
6 Article 2, and proportionate, for their names to appear
7 unredacted in the disclosure to Core Participants. So,
8 again our provisional view, sir, is that the documents
9 should not, when they go to Core Participants, be
10 redacted to remove the names of persons falling into 11:16
11 that third category.

12
13 Category four, a person suspected of involvement in a
14 potentially linked incident, but not charged, who has
15 not been publicly named in media reporting or otherwise 11:16
16 as having been investigated. Again, our provisional
17 view is that those in this category do have a
18 reasonable expectation of privacy but that again it is
19 nonetheless in accordance with the law, and necessary
20 to protect the procedural rights of the bereaved 11:16
21 families under Article 2, and proportionate, for their
22 names to appear unredacted in the disclosure to Core
23 Participants.

24
25 Sir, we recognise that if our provisional view in 11:17
26 relation to each of those categories is correct, that
27 view must nonetheless yield if, in any particular case,
28 a real and significant Article 2 issue is raised in
29 respect of an individual suspect. Again, we emphasise

1 that such arguments would have to be approached on a
2 case by case basis. The Inquiry expects PSNI to be in
3 a position to inform it of any such issue, any such
4 specific Article 2 issue, where, if ever, it arises.

11:17

6 Again, we make clear that what is currently in issue is
7 disclosure to Core Participants, all of whom have
8 signed a confidentiality undertaking. So, disclosure
9 to Core Participants of the names of suspects.

11:18

11 We repeat that the Inquiry will have in place a process
12 that addresses questioning by Core Participants and
13 others in public pursuant to Rule 10 of the Inquiry
14 Rules of 2006. That process will include any Core
15 Participant identifying whether they propose to ask
16 questions about and/or display publicly a document that
17 contains the name of a suspect, and explain precisely
18 why it is proposed to do that.

11:18

20 At that stage, which the media will be invited to
21 contribute to given that Article 10 will be a highly
22 relevant consideration, reflection can be given as to
23 whether the Article 8 balance has altered. It is
24 possible that, at that stage, it will be necessary to
25 inform the individual suspect of what is proposed and
26 seek any representations they wish to make about the
27 issues. But the provisional view of counsel to the
28 Inquiry is that it is not necessary to do that as part
29 of the process of making a decision about disclosure to

11:18

11:18

1 Core Participants, which is what we are dealing with
2 today.

3
4 Can we, nearly finally, mention in this regard the
5 issue of the confidentiality undertaking and connected 11:19
6 matters? In addition to the confidentiality
7 undertaking, in the event that you do not uphold the
8 submissions of either HMG and/or PSNI, consideration
9 could be given to the making of a Restriction Order
10 prohibiting at this stage the public revelation of the 11:19
11 name of any junior official and/or suspect. Any such
12 order would inevitably have to be reviewed at the stage
13 at which there was a proposal to make such information
14 public, but would provide in the meantime a further
15 layer of protection from the concerns expressed by HMG 11:20
16 and PSNI. So, sir, we invite submissions on that
17 proposal in particular from anyone who would disagree
18 with it.

19
20 Sir, everyone will be pleased to hear that that is all 11:20
21 we have to say at this stage on issues 1 and 2,
22 although we will, we predict, want to make further
23 submissions tomorrow once we have heard from the Core
24 Participants.

25
26 In terms of hearing from Core Participants, we will
27 start that process, we expect, after a short break,
28 sir, hearing first from Fiona Fee Kings Counsel on
29 behalf of HMG.

1
2 Before that, sir, may we invite you to rise for perhaps
3 20 minutes?

4 CHAIRPERSON: Could I just explore something before we
5 do, Mr. Greaney? 11:21

6 MR. GREANEY: Of course, sir.

7 CHAIRPERSON: I would just like to tease out a little
8 bit more about the import of the four categories you
9 have identified in relation to suspects.

10 MR. GREANEY: Yes. 11:21

11 CHAIRPERSON: In each of the four categories, which are
12 set out on a class basis, you've identified that on a
13 provisional view, you would consider that those in this
14 category have a reasonable expectation of privacy.

15 That, of course, is the starting point as identified in 11:21
16 the case law that you drew my attention to.

17 MR. GREANEY: Yes.

18 CHAIRPERSON: But am I right in thinking that in each
19 individual case, that legitimate starting point would
20 have to be assessed to see whether it, in fact, applied 11:21
21 to the suspect who was under consideration?

22 MR. GREANEY: Absolutely, sir.

23 CHAIRPERSON: So, albeit these categories are
24 reflecting different classes of suspects, do you
25 anticipate that in each and every case there will be an 11:22
26 individual assessment carried out?

27 MR. GREANEY: We do, sir, yes. We're simply seeking at
28 this stage to establish some broad principles that can
29 guide decision closure so it can go to the Core

1 Participants as soon as possible. But, sir, you are
2 absolutely right, the authorities are clear that the
3 legitimate expectation of privacy is no more than a
4 starting point which can be displaced in the individual
5 circumstances of a particular case. As we have made 11:22
6 plain, we for our own part struggle to identify how a
7 person in respect of whom there has been reporting that
8 they have been investigated on suspicion of involvement
9 in the Omagh bombing could have a legitimate
10 expectation of privacy in respect of the fact of the 11:22
11 investigation.

12 CHAIRPERSON: Yes. I suppose you would say that that
13 might be one of the easier assessments to make?

14 MR. GREANEY: We would.

15 CHAIRPERSON: There may be some that may be a little 11:23
16 more difficult.

17 MR. GREANEY: We quite agree.

18
19 You have, in fact, reminded me by what you asked me of
20 something that perhaps I ought to have said earlier, 11:23
21 which is this: One of the reasons we have sought to
22 deal with the suspect issues in categories is because
23 our judgment is that it is not appropriate -- it is not
24 necessary and not appropriate during the course of this
25 hearing for individual suspects to be named; that we 11:23
26 can deal with them on a category basis.

27 CHAIRPERSON: Yes. Thank you. We'll break at this
28 stage and I'll then hear further submissions from those
29 who wish to offer them.

1
2 My plan is to invite counsel to address me from the
3 desk nearest to the front of the room so that we don't
4 have to engage in an exercise of speaking to each other
5 across the room. We'll hear, first of all, from 11:23
6 Ms. Fee on behalf of the Secretary of State. Thank
7 you.

8
9 A SHORT ADJOURNMENT

10
11 THE INQUIRY RESUMED AS FOLLOWS:

12
13 CHAIRPERSON: Ms. Fee, good afternoon.

14 MS. FEE: Good afternoon.

15 CHAIRPERSON: I would like to make an observation 11:47
16 before we begin, please. This is, of course, the first
17 opportunity for the Inquiry to hear directly from
18 counsel who appear for the Core Participants on
19 substantive matters. That being so, I was disappointed
20 to receive written notes on behalf of the Secretary of 11:47
21 State late yesterday afternoon just as I was boarding a
22 flight to attend these proceedings. I should imagine
23 that you were only instructed to prepare that note very
24 recently. If so, I would like to say that that
25 disappoints me in respect of the level of engagement 11:47
26 with the Inquiry which it implies.

27
28 we are all likely to be spending a significant amount
29 of our professional lives in each other's company, and

1 I would hope that we can do so in a harmonious,
2 constructive, and mutually respective manner. But it
3 does seem to me that those aspirations are unlikely to
4 be easily achieved if Core Participants or their
5 representatives engage with the Inquiry in a manner
6 which appears to demonstrate a lack of prioritisation,
7 or allows an impression to be gained of a disrespectful
8 or disorganised attitude towards the work of the
9 Inquiry.

11:48

10
11 whilst it is obviously helpful to have written notes,
12 if they are going to be submitted, they really have to
13 be provided to the Inquiry at a point which allows
14 their benefit to be achieved. I don't want to say
15 anything more about that other than to make those
16 observations. I hope they will be received with the
17 intention that I have in mind.

11:48

18 MS. FEE: Yes. Thank you very much, Chairman.

19
20 Perhaps if I could speak to that. Firstly, just in
21 introduce myself for the benefit of the rest of the
22 room. My name is Fiona Fee and I appear as senior
23 counsel on behalf of the Secretary of State. My junior
24 counsel, Leona Gillen, sits behind me. My instructing
25 solicitors, Government Legal Department, are also in
26 the room, assisted in this jurisdiction by their sister
27 organisation, the Crown Solicitor's Office.

11:48

11:49

11:49

28
29 If I could say, first of all, I've listened very

1 carefully to what has been said about the service of
2 the skeleton argument yesterday, and particularly,
3 Chairman, I am grateful for the remarks which have been
4 made in respect of that this afternoon. It is helpful
5 in illustrating to us the difficulties that the Inquiry 11:49
6 considers were caused by the service. It's important
7 that I first say at the outset that absolutely no
8 discourtesy to the Inquiry or to other Core
9 Participants was served -- was intended in serving the
10 document. In fact, the intention was exactly the 11:50
11 opposite. The note itself is a note of what I will say
12 today, and it was hoped that it might be of assistance
13 to those following along to have a written record to
14 save the need to take extensive notes.

15
16 To speak very briefly to the chronology of the
17 application, senior counsel to the Inquiry is quite
18 right to say that HMG was originally asked to make the
19 application by 14th March. I understand that a request
20 for an extension was then sent explaining the reasons 11:50
21 why, and that was granted by the Inquiry, extending the
22 deadline to 31st March and the application was then
23 made by that date.

24
25 There were submissions in response to the application 11:50
26 which followed, which were very helpful. Then, a most
27 helpful note from counsel to the Inquiry was e-mailed
28 about five o'clock last Wednesday, 14th May, and that
29 was picked up on the morning of Thursday 15th May.

1 That was very welcome as it indicated to us which parts
2 of the application the Inquiry would be most assisted
3 by more information on.

4
5 Briefly going to that note, which is at tab 10 of the 11:51
6 hearing bundle, the sections which are perhaps most
7 relevant are at paragraphs 11 and paragraph 16A.
8 Paragraph 11 indicates that "... counsel to the Inquiry
9 will also invite HMG in its submissions to deal with
10 the following points." It sets out two points, one in 11:51
11 relation to those junior civil servants who may have
12 published the identity of their employer via social
13 media and, secondly, some of those who were junior
14 civil servants at the time of the creation of the
15 documents but may now be members of the Senior Civil 11:52
16 Service, and questions are posed in relation to both of
17 those relevant matters.

18
19 Then similarly at paragraph 16, it's indicated:

20
21 "Counsel to the Inquiry considers that the described
22 distinction between judicial review proceedings and the
23 Inquiry proceedings that is apparently relied upon will
24 need to be explained in detail and justified by HMG at
25 the hearing." 11:52

26
27 So with that helpful indication, Chairman, HMG was
28 assisted with a guide effectively to what it needed to
29 expand upon. HMG obviously act on behalf of a large

1 client group, but within four working days a document
2 was produced seeking to address those points as fully
3 as we could do. We could have treated that as an
4 internal speaking note and we could have made those
5 submissions today in oral evidence. We felt, and I 11:53
6 accept in light of what's been said that it was
7 misguided, but we felt that it might be helpful to
8 provide a written note of what we intended to say in
9 response to those queries which had been raised in the
10 note dated the previous Wednesday. Certainly, the 11:53
11 intention was to try and provide a written record of
12 what would be said, but we accept, Chairman, that that
13 has not been helpful in the way that we had hoped it
14 would be.

15 CHAIRPERSON: I think one of the concerns is that - 11:53
16 maybe I read this incorrectly - but it does seem to me
17 that some of what's set out in the skeleton argument is
18 different from what was set out in the original
19 application, or at least frames the points differently.

20 MS. FEE: Certainly, Chair, it's intended to -- there 11:54
21 is an overlap of content. It's intended to make the
22 same points but expanding on the areas where we
23 understood that expansion was necessary. It does not,
24 for example, contain a volume of new case law. It
25 refers to the cases referenced in our initial 11:54
26 application and in the submissions of other Core
27 Participants. I want to stress, Chairman, we are
28 genuinely dismayed that the service of the document has
29 caused consternation, and the fact that our attempts to

1 have the opposite effect to that which was intended and
2 hoped for is a matter of real and sincere regret, and
3 is taken extremely seriously.

4 CHAIRPERSON: well, that's kind of you to say. I
5 accept that, of course, entirely.

11:54

6 MS. FEE: Thank you, Chairman.

7
8 If I could perhaps move on to the body of the
9 submissions. The Secretary of State submits that the
10 Chair of the Inquiry should exercise discretion to
11 permit the redaction of the names of junior civil
12 servants in respect of disclosed material from the
13 Northern Ireland Office.

11:55

14
15 If I could summarise three reasons in relation to that.
16 Firstly, the names of the junior civil servants
17 themselves are not relevant to the work of the Inquiry
18 given that they do not fulfil decision-making roles as
19 those in the Senior Civil Service do. While there has
20 been judicial criticism of the practice of redacting
21 the names of junior civil servants, in the IAB case,
22 both the first instance decision and in the Court of
23 Appeal, it is very important to recognise that those
24 observations relate to the very particular duty of
25 candour that the government owes in judicial review
26 proceedings. I'll come on, Chairman, to why we say
27 that matters.

11:55

11:55

11:55

28
29 Secondly, the naming of junior civil servants would

1 disproportionately interfere with their right to
2 respect for private and family life, which is protected
3 under Article 8 of the European Convention on Human
4 Rights. There is an expectation that junior officials
5 are entitled to a greater degree of privacy from
6 personal exposure than would be the case for their
7 Senior Civil Service colleagues, and the disclosure of
8 their names into the Inquiry would undermine this
9 expectation.

11:56

10
11 Obviously it's not being suggested - I know counsel to
12 the Inquiry made this very clear - that the names will
13 be withheld from the Inquiry team, that's not what
14 we're talking about but beyond that.

11:56

15
16 Finally, the naming of junior civil servants could
17 materially increase or create a risk to life which is
18 protected under Article 2 of the ECHR given there are a
19 number of sensitive implications of releasing the names
20 of these junior civil servants. A witness statement
21 has been provided dated 31st March 2025 which should be
22 read in conjunction with these submissions and which
23 makes many of the same points.

11:56

24
25 To deal firstly with the argument that the names are
26 not relevant to the work of the Inquiry. The Secretary
27 of State's position is that the names of junior civil
28 servants aren't relevant to the work of the Inquiry and
29 there is accordingly no basis for their disclosure.

11:57

1 There is a distinction between the naming of junior
2 civil servants and senior civil servants. Senior civil
3 servants are public facing and are likely to be known
4 to the employees of the State. It's recognised that
5 the names of the senior civil servants will be relevant 11:57
6 to the work of the Inquiry as these office holders have
7 a greater degree of constitutional responsibility for
8 decisions implementing government policy such that it
9 has traditionally been accepted that they may be
10 publicly identified, and they can be, for example, 11:57
11 called to answer questions before Parliament.

12
13 But contrast that with the role of junior civil
14 servants, they do not fill decision-making roles, and
15 accountability for any advice or recommendation they 11:58
16 may help with always rests with the Senior Civil
17 Service. Their names, therefore it is said, have no
18 relevance to the work of the Inquiry.

19
20 None of the submissions served by the other Core 11:58
21 Participants clearly articulate why it is asserted that
22 the particular names of junior civil servants appearing
23 in documents disclosed to the Inquiry are relevant to
24 the work of the Inquiry. At its highest, it is
25 suggested in the MCBurney submissions, paragraphs 8 to 11:58
26 12, and the Fox Law submissions, paragraph 17A, that
27 relevance rests upon whether the person was junior or
28 senior.

1 while it is understandable that the decision in IAB has
2 been focused on in the application, and the Secretary
3 of State, in the initial application, did specifically
4 draw attention to that decision, it's important to be
5 clear about what the case decided, and hopefully to 11:58
6 help expand upon the questions that counsel to the
7 Inquiry's note asked us to answer in that regard.

8
9 The context in which the issue arose in those
10 proceedings is important. The High Court and the Court 11:59
11 of Appeal is considering the issue of the redactions of
12 names of junior civil servants in the context of
13 judicial review proceedings. I know that those
14 judgments have been made available in November '23 and
15 February '24. 11:59

16
17 The underlying judicial review concerned, as you know,
18 Chair, the making of regulations intended to facilitate
19 the use by the Home Office of houses in multiple
20 occupation for accommodating asylum seekers. 11:59
21 Fundamentally differently to this Inquiry, the
22 administrative court was provided with redacted
23 material only, and was not aware of, the names that lay
24 beneath the redactions which were then challenged by
25 the claimants. In the High Court, the court in the 11:59
26 High Court upheld the claimants' objections and ruled
27 that the unredacted material should be opened up.

28
29 I know, Chair, you've already heard some quotations

1 from that judgment but there are some important points
2 at paragraphs 12 to 17. If I could flag some of those
3 for the benefit of those who perhaps haven't had an
4 opportunity to read the judgment in full.

5 It is indicated:

12:00

6
7 "Two points of context are material. The first is that
8 it is well established that the duty of candour is an
9 obligation of explanation rather than simply an
10 obligation of disclosure."

12:00

11
12 And it continues further down:

13
14 "The obligation exists to ensure that a defendant
15 explains, whether by witness statements or the
16 provision of documents or a combination of both, the
17 reasoning process underlying the decision under
18 challenge. In the present case, the Secretaries of
19 State have to date chosen to discharge their candour
20 obligation by disclosure of the documents in the four
21 disclosures bundles. No witness statements have been
22 provided."

12:00

12:00

23
24 "The second point of context is the criterion for
25 disclosure of documents in judicial review proceedings.
26 The standard applied by the court when asked to decide
27 whether disclosure of a document is required is whether
28 disclosure is necessary for the fair and just
29 determination of an issue in the case."

12:01

1
2 It cites the case law in respect of that. That perhaps
3 is a helpful paragraph, Chairman, in outlining the duty
4 of candour in judicial review arises in the context of
5 a very different discovery process.

12:01

6
7 The State can, in a judicial review, choose to
8 discharge their candour obligation by disclosing
9 documents, or they may not disclose documents; they may
10 disclose a witness statement or they may disclose both.
11 The core of the obligation of the duty of candour is an
12 obligation of explanation. We say that makes sense in
13 the context of judicial review proceedings but does not
14 apply in the same way to a public inquiry which does
15 not have the same disclosure processes.

12:01

12:02

16
17 At paragraph 13, the judgment continues:

18
19 "It follows that the correct premise is that by making
20 the disclosure they have already made, the Secretaries
21 of State accept the disclosure of those documents is
22 necessary for the fair and just disposal of the issues
23 in this case, or at least, per Bingham LJ at paragraph
24 4 of his speech in Tweed, that the disclosed documents
25 are "significant to its decision". In this case the
26 documents disclosed which evidenced the decision-making
27 process were no doubt disclosed in support of the
28 Secretary of State's response to particular challenges
29 which were raised in that case."

12:02

12:02

1
2 Again, Chairman, we say that that indicates the
3 different nature of the position in judicial review
4 where the documents which are being disclosed, each of
5 those documents is considered to be significant to the 12:03
6 decision. Judicial review doesn't capture the same
7 breadth of documents that a public inquiry will. It is
8 a very focused exercise on those documents which are
9 significant to the decision and which evidence the
10 decision-making process. So, we're not talking about 12:03
11 the same kind of documents in a judicial review as
12 compared to public inquiry.

13
14 Picking up the judgment again, Chairman, at paragraph
15 14, he indicates: 12:03

16
17 "The practice of redacting, of blanking out parts of
18 documents disclosed in litigation, on the ground that
19 the part redacted is irrelevant is long established.
20 One obvious situation is where a part of a disclosable 12:03
21 document does not concern the subject matter of the
22 litigation."

23
24 The judgment goes on to provide a quotation from
25 Hoffmann LJ in the GE Capital Corporate Finance case in 12:04
26 which he said:

27
28 "In my view the test for whether, on discovery, part of
29 a document can be withheld on grounds of irrelevance is

1 simply whether that part is irrelevant. There is no
2 additional requirement that the part must deal with an
3 entirely different subject matter than the rest."

4
5 The last sentence of that quotation is perhaps
6 important:

12:04

7
8 "...provided that the irrelevant part can be covered
9 without destroying the sense of the rest or making it
10 misleading, a party is permitted to do so."

12:04

11
12 The court considered that quotation from Hoffmann LJ.
13 At paragraph 17, the court indicated that the judge did
14 not consider the correct approach to redaction of
15 disclosed documents in judicial review pleadings can be
16 driven only by the purity of Hoffmann LJ's logic.

12:04

17
18 "What is required to discharge the obligation of
19 candour when a public authority chooses to meet that
20 obligation by disclosure of documents must at the least
21 be fully informed by the purpose of the candour
22 obligation. Redaction sentence by sentence or line by
23 line is a matter of course, runs against the grain of
24 an obligation aimed at ensuring public authorities
25 responding to judicial review claims should explain the
26 reasoning underlying the decision under challenge."

12:05

12:05

27
28 Again, Chairman, we say that all of that speaks to what
29 the duty of candour is in judicial review and it is a

1 duty to explain.

2
3 At paragraph 20 of the judgment, the judge made further
4 specific observations about the duty of candour. He
5 noted that:

12:05

6
7 "An approach to compliance with the obligation of
8 candour as a matter of routine hides detail that
9 assists the court's understanding of the public
10 authority defendant's explanation of the decision under 12:06
11 challenge is enthetical to the purpose of the candour
12 obligation."

13
14 Again, it's focused on the explanation of the decision
15 under challenge, because that is what those documents 12:06
16 in the judicial review cases are directed at.

17
18 The judge considered that this was an issue of
19 importance in terms of practice and procedure, and the
20 case went to the Court of Appeal. The Court of Appeal 12:06
21 similarly discussed the nature of the duty of candour.
22 In that Court of Appeal judgment --

23 CHAIRPERSON: of course, in paragraph 17 of the
24 decision that you're discussing with me, the first
25 instance judge expressly accepted that the outcome of 12:06
26 the grounds of challenge don't depend on the identity
27 of decision maker or, of any other person involved in
28 the decision-making process.

29 MS. FEE: Yes, absolutely.

1 CHAIRPERSON: So why then would those names not fall to
2 be redacted?

3 MS. FEE: My interpretation of the decision, Chairman,
4 is that in a judicial review case where the Secretary
5 of State, or anybody else, has chosen and has taken a 12:07
6 view that the best way to discharge their duty of
7 candour to explain the documents is to provide
8 particular documents which are relevant to the making
9 of the decision - those are key documents, important
10 documents, and they go to evidencing the 12:07
11 decision-making process - that all of the judge's
12 comments are to be viewed through that lens. We say
13 that is different from a situation where in a public
14 inquiry, inevitably and rightly so in the performance
15 of its duties, the Inquiry will gather a very large 12:08
16 volume of material, exponentially greater than a
17 judicial review court might expect to gather, and not
18 --

19 CHAIRPERSON: Isn't it at heart undertaking a similar
20 function, namely looking for the explanation? 12:08

21 MS. FEE: If the documents that it is looking at go to
22 an explanation for the decision under challenge, we can
23 expect that that might be submissions to the minister,
24 key emails, those kind of documents, and that is
25 different from in a public inquiry where one might 12:08
26 gather up lots of relatively innocuous emails which
27 don't touch on the Omagh bomb specifically; which don't
28 touch on any matter which is key to the heart of the
29 Inquiry, and it's whether the legal framework and the

1 obligations in one context, the judicial review context
2 and IAB, whether they can readily and straightforwardly
3 be read across into a public inquiry which is doing a
4 different function. It isn't asking the State what
5 documents do you say goes to the decision-making
6 process, please provide them; it is saying here are the
7 Terms of Reference, here is the provisional list of
8 issues, cast a wide net, and that's appropriate.

12:09

9 CHAIRPERSON: Once the material provider has done that,
10 then the Inquiry legal team assess those documents for
11 actual relevance?

12:09

12 MS. FEE: Yes, certainly, Chairman.

13 CHAIRPERSON: It's only those documents that have
14 actual relevance that will then be circulated to Core
15 Participants?

12:09

16 MS. FEE: I think it's conceivable that a document
17 could be actually relevant but not significant in the
18 sense that the documents in IAB were significant to the
19 decision-making process. It will depend how much
20 disclosure the Inquiry legal team ultimately determine
21 to be actually relevant. It would perhaps be
22 understandable if that turned out to be a large volume
23 of material directed at many different parts of the
24 Terms of Reference or list of issues.

12:10

25
26 That, in a nutshell, Chairman, is why we say that the
27 categories of document aren't the same and the analysis
28 can't be exactly the same.

1 In relation to what the Court of Appeal said about the
2 duty of candour, I'm at paragraph 12 of the speaking
3 note, if that assists. The judgment of the court at
4 paragraph 24 of the Court of Appeal decision indicated
5 that the court did not accept that decisions such as GE 12:10
6 Capital, which I referred to earlier:

7
8 "...provide any basis for saying documents in judicial
9 review cases may be routinely redacted to remove names,
10 or indeed taking counsel for the State's arguments to 12:11
11 their logical conclusion, any other detail not directly
12 relevant to the outcome of the dispute. Ordinary civil
13 litigation is very different from proceedings in the
14 administration court. There is no duty of candour
15 equivalent to that imposed on public bodies defending 12:11
16 judicial review claims. Instead, there is a duty to
17 disclose documents."

18
19 It goes on to talk about standard disclosure under the
20 CPR. We, of course, don't have the CPR in Northern 12:11
21 Ireland, we have our own disclosure rules. The point
22 which is made in that paragraph, that there is a duty
23 to disclose documents in certain kinds of cases and
24 then in a special category of case in judicial review,
25 you don't have that duty to disclose documents in the 12:11
26 same way, you have this duty of candour which includes
27 within it an obligation to explain, and the way that
28 you do that will be documents, witness statements or
29 both.

1
2 The Court of Appeal goes on to consider the.
3 Situation --

4 CHAIRPERSON: what the Court of Appeal are saying there
5 really is in judicial review cases, the duty of 12:12
6 disclosure, which is informed by an associated duty of
7 candour, is different from and is wider than that which
8 applies in ordinary civil litigation. Is that right?

9 MS. FEE: I think the language used is very different
10 from proceedings in the administrative court. I think 12:12
11 we respectfully agree with the Court of Appeal in that
12 assessment, that it is quite a different context.

13 CHAIRPERSON: But Inquiry proceedings are very
14 different from anything which happens in the
15 administrative court as well. 12:12

16 MS. FEE: They are, it's a different category of
17 proceeding. When directly applying the reasoning in
18 IAB in that specific context to a public inquiry, I
19 think what we suggest is that the two don't necessarily
20 engage all of the same concerns for the reasons that 12:13
21 I've outlined in relation to the kinds of documents
22 that are caught and the different nature of the
23 obligation. In a judicial review, you are going
24 through the documents and selecting those which are
25 important to discharge the duty of candour, and to make 12:13
26 sure that the explanation of the decision under
27 challenge is full and comprehensive for the court.
28 That's really not the exercise that we are doing in a
29 public inquiry where, as I say casting a wide net,

1 looking at the Terms of Reference, looking at the
2 provisional list of issues, and funneling all of that
3 much broader suite of documentation through to the
4 Inquiry team.

5 CHAIRPERSON: I suppose some people would say that the 12:13
6 reason you cast that net widely in the context of an
7 inquiry proceedings is because of the essential
8 function of the inquiry, which is to establish the
9 facts and to establish the truth of what happened, and
10 to ensure that lessons can be learned. With that 12:14
11 process at its heart, you might be inclined to think
12 that the duty of candour was even more intense in
13 inquiry proceedings than any other form of proceedings.
14 They are inquisitorial, not adversarial; even judicial
15 review is adversarial. 12:14

16 MS. FEE: I think the Chairman is quite right, that
17 that has to be why the net is wider in a public
18 inquiry. Because of its purpose, because of its
19 truth-seeking role, I think all of that has to be
20 correct. The question is what does that mean in terms 12:14
21 of the classical duty of candour as described in
22 judicial review proceedings? So, the discovery process
23 is different so the duty cannot apply in exactly the
24 same way, but that does not mean that the State is not
25 under a duty to be candid in an inquiry. Of course it 12:15
26 is under a duty to be candid, but that does not mean
27 that the legal duty of candour, looking at the
28 documents, working out which ones speak to the decision
29 at hand and deciding whether to do it by way of witness

1 statement, documents and so on, it doesn't mean that
2 all of that methodology follows across. Therefore, we
3 say the reasoning requires perhaps a little more
4 thought. That's what we've tried to do in the written
5 submissions and in these oral submissions.

12:15

6
7 If I could pick up, Chairman, at paragraph 13 of the
8 speaking note which deals with paragraph 29 of the
9 Court of Appeal decision. That's where the court felt
10 that there were situations in which it would be
11 entirely appropriate to redact names.

12:16

12
13 It says, "For example, for reasons of national security
14 or where there is evidence of a real risk to personal
15 safety of the individual concerned."

12:16

16
17 The judicial review proceedings, paragraphs 14 to
18 perhaps 21 of the speaking note, are directed at the
19 kinds of matters we've just been discussing, Chairman.
20 I won't go through all of that in detail. At paragraph
21 15, we note that:

12:16

22
23 "Judicial review proceedings are concerned with the
24 lawfulness of specific decisions made by public bodies
25 and they operate as a facet of upholding the rule of
26 law. In judicial review proceedings, it is for a
27 public body to provide an explanation of the particular
28 decision under challenge so the court can see clearly
29 whether there has been an error of law in that

12:16

1 deci si on-maki ng process. "

2
3 And the administrative guide highlights that
4 self-policing; explains why.

5
6 As the court observed in the IAB cases, the position is
7 different from civil litigation for the reasons we've
8 canvassed. I think it is important to reiterate that
9 this is not a situation in which it's proposed to
10 withhold the names from the Chair or the Inquiry legal
11 team. That is, we say, an important point of
12 distinction compared to IAB. In IAB the court was
13 operating entirely blind in respect of the redactions,
14 and that resulted in practical challenges. We can see
15 that thread running through the Court of Appeal's
16 reasoning. In this Inquiry, in contrast, the Inquiry
17 legal team will be well equipped to assess the
18 relevance and significance of documents as they
19 undertake their review and as the work of the Inquiry
20 progresses.

21
22 So if, in any particular case, they identify that the
23 junior Civil Service name might be relevant, that could
24 be addressed at that stage. But in circumstances where
25 no reasons have been identified why the specific names
26 themselves are relevant to the work of the Inquiry, it
27 is submitted that there is good reason to redact those
28 names both from disclosure to the Core Participants and
29 in due course from the public.

1
2 Paragraph 8 of the Fox Law submissions touches on this
3 point by acknowledging that IAB arose in the context of
4 judicial review, but it goes on to draw an analogy
5 between disclosure in public inquiries and ordinary 12:18
6 civil proceedings, which we take to include judicial
7 review in this context on the Fox Law submissions,
8 relying on a Covid Inquiry decision. Our submission is
9 that paragraph 66 of that decision only offers weak
10 support. That paragraph is set out in full in our 12:19
11 speaking note but it does contain the sentence:

12
13 "It simply means that irrelevant documents may be
14 redacted. It was common ground that the analogy of
15 civil proceedings could only be a loose one because 12:19
16 there were different rules applying for civil
17 proceedings, and civil proceedings pursue a different
18 aim to public inquiries."

19
20 It goes on to say: 12:19

21
22 "But it would be surprising if a valid request in civil
23 proceedings made under the former rules of the Supreme
24 Court might yield irrelevant documents and still be
25 lawful, but such a request by an inquiry acting under a 12:19
26 statutory power permitting a request for documents
27 would be unlawful."

28
29 The citation also in the Fox Law submissions of the

1 Amin case, we say, does not encapsulate the correct
2 principle, which we say is to be found at paragraph
3 20(8) of that decision, where it is said:

4
5 "Public scrutiny of an investigation cannot be regarded 12:20
6 as an automatic requirement; the degree of public
7 scrutiny required may well vary from case to case."

8
9 In summary, the judgments in IAB are relevant to
10 judicial review proceedings where that very special 12:20
11 duty of candour arises with particular disclosure
12 consequences.

13
14 We contrast that with a situation where it can be said
15 that the names of junior civil servants are not, in 12:20
16 general, relevant to the issues investigated by the
17 inquiry. Whether a junior civil servant is named
18 John Smith or Jane Doe, what their e-mail address is or
19 what their contact details is generally can be of no
20 relevance to the matters under consideration by the
21 Inquiry and we say can properly be withheld from
22 disclosure to Core Participants or in due course to the
23 public.

24
25 With your permission, Chair, if I might move to the 12:20
26 question of naming junior civil servants
27 disproportionately interfering with their rights under
28 Article 8 of ECHR. The Inquiry is a public body for
29 the purpose --

1 CHAIRPERSON: Can I just ask you one thing before we
2 move to that? One of the issues which was canvassed,
3 certainly to some extent in the first instance IAB
4 decision and I think also in the Court of Appeal, was
5 the issue of the practical consequence of redaction.

12:21

6 MS. FEE: Yes, Chair.

7 CHAIRPERSON: Paragraph 18 in the first instance
8 decision, "Redaction leads to significant practical
9 difficulties", and it talks about how:

10
11 "...most decisions made within government involve
12 significantly sized groups of civil servants, some are
13 spread across different departments; redacting names
14 makes the decision-making process and significance of
15 each document disclosed more difficult to understand.

12:21

16 When correspondence and other documents are disclosed
17 for the purpose of evidencing a decision-making
18 process, it will rarely be the case that it would not
19 assist the court's understanding of that process and
20 decision itself to know by whom or to whom the
21 documents were sent forwarded or copied. In most cases
22 when this information is redacted, any outsider's
23 understanding of the documents is significantly
24 hampered."

12:22

25
26 So, there is a sort of intelligibility point that is
27 canvassed, at least in the first instance decision in
28 IAB. Does that arise here?

29 MS. FEE: Chairman, I think that is an important point,

1 and it runs through the IAB decisions and also the FM
2 Holdings case as well, to which senior counsel to the
3 Inquiry referred. It's a thread that runs through
4 those decisions that you can render a document
5 meaningless and unintelligible by having large sections 12:22
6 of the documents blacked out. I think that is familiar
7 territory in terms of public interest immunity
8 applications and all kinds of other redaction
9 exercises; the documents have to be intelligible. That
10 remains the case here. 12:23

11
12 where we have for example, an e-mail the provenance of
13 which is clear by the fact that, for example, it goes
14 from one senior civil servant to another and thus those
15 names are not redacted, but you have a copy list which 12:23
16 includes 10 junior civil servants who were copied in,
17 perhaps in some cases for admin reasons, filing reasons
18 and so on, we say doesn't affect the intelligibility of
19 the document in any way whatsoever. In one sense, it
20 might actually make the document easier to understand 12:23
21 because you have removed a large chunk of totally
22 irrelevant information and the reader has the relevant
23 information available to him or her. The check on all
24 of that, Chairman, in this context is that, totally
25 unlike in the IAB situation, the Inquiry has full sight 12:24
26 of the unredacted documentation.

27 CHAIRPERSON: Yes. All right. Thank you.

28 MS. FEE: Chair, if I could move on to the Article 8
29 point that I had referred to previously.

1
2 The Inquiry is a public body for the purposes of the
3 Human Rights Act 1998. Accordingly, it's unlawful to
4 act in a way which is incompatible with Convention
5 rights pursuant to Section 6 of the HRA. Article 8 12:24
6 requires that there shall be no interference by a
7 public authority with the right of an individual with
8 respect to his private and family life, his home and
9 correspondence.

10
11 The Omagh bombing, as I know, Chairman, you are acutely
12 aware was an incident of particular notoriety. The
13 description of it by Horner J in the judicial review
14 proceedings which preceded this Inquiry was of "a
15 terrible atrocity, the worst in the last 60 years of 12:24
16 Northern Ireland's history." It's against that
17 background that the Article 8 ECHR rights and those
18 protected by Article 2 of the civil servants are
19 engaged and require safeguarding through proportionate
20 measures. 12:25

21
22 I won't dwell on this as I know, Chair, you are well
23 aware of the position under Article 8, but where a
24 decision has been taken that interferes with a person's
25 Article 8 rights, it is necessary to carry out an 12:25
26 assessment of proportionality which involves
27 considering is the aim sufficiently important to
28 justify interference with a fundamental right; is there
29 a rational connection between the means chosen and the

1 aim in view; was there a less intrusive measure which
2 could have been used without compromising the
3 achievement of that aim; has a fair balance been struck
4 between the rights of the individual and a general
5 public interest?

12:25

6
7 we set out at paragraph 25 of the speaking note where
8 that four-stage test has evolved from in the case law.

9
10 "Proportionality in this context requires an
11 examination of the relevance and significance of the
12 information in contemplation, which is the names of
13 junior civil servants; open justice as it pertains to
14 that information, and balancing that against the
15 interference with the individual's family and private
16 life."

12:26

17
18 It's respectfully submitted that in circumstances in
19 which firstly the Inquiry will be provided with the
20 unredacted material and so will be able to see the
21 names and, secondly, in general the particular name of
22 a civil servant will add nothing to the substance of
23 the material provided, there is little to balance on
24 the side of open justice. Whether Joe Bloggs was
25 copied into an e-mail doesn't advance anyone's
26 understanding of the issues the Inquiry is
27 investigating, but his identification as an employee of
28 the State could interfere with his private and family
29 life by undermining the confidentiality which is

12:26

12:26

12:26

1 applied to his role and place of employment.

2
3 Identification as an employee of the State has a
4 specific significance in Northern Ireland. Northern
5 Ireland continues to grapple with the legacy of armed 12:27
6 conflict and the dissident threat, and we say there are
7 considerations in play, as I go on to explain, which do
8 not necessarily arise in other jurisdictions and other
9 contexts.

10
11 The specific risk of dissident republicanism,
12 particularly against those employed by the State, has
13 long been recognised by the courts. Bearing in mind
14 that the vast majority of the information relevant to
15 this Inquiry was generated during the Troubles in a 12:27
16 time prior to the current legal landscape of legacy
17 litigation and public inquiries, junior civil servants
18 had and continue to have a reasonable expectation of
19 privacy in respect of their work.

20 CHAIRPERSON: Can we just pause there. I have a sense 12:27
21 that there is becoming an intermingling of risk and
22 Article 8 privacy issues here. It's one thing to say
23 that someone has an Article 8 right to private and
24 family life but it's quite a different thing to say
25 that they are subject to a particular risk that might 12:28
26 engage Article 2 or Article 3. But I'd like just to be
27 clear about what you're saying in relation to Article
28 8.

29 MS. FEE: Yes.

1 CHAIRPERSON: Are you saying that the fact of a
2 person's employment as a junior civil servant is
3 something that falls within the protection of the
4 Article 8 rights to private and family life?

5 MS. FEE: Chair, when we talk about a reasonable 12:28
6 expectation of privacy and does an individual have that
7 reasonable expectation of privacy, we say that it is
8 relevant to consider the context in which they are
9 working. An individual working on sensitive matters in
10 Northern Ireland who does not wish to be identified as 12:29
11 an employee of the State, and who perhaps has never
12 told anybody beyond their very immediate family members
13 that they are an employee of the State, that is
14 relevant to their expectation of privacy, we say.

15 CHAIRPERSON: But where does that come from? Is that 12:29
16 something do with their employment or is it something
17 to do with Article 8?

18 MS. FEE: It's the question which is part of the
19 Article 8 analysis or assessment in terms of whether
20 that person has a reasonable expectation of privacy, we 12:29
21 say it goes to that. It isn't simply an Article 2 or
22 Article 3 point.

23 CHAIRPERSON: well, is there any authority to support
24 the proposition that the fact of someone's employment
25 is something that's protected within the Article 8 12:29
26 right to family and private life?

27 MS. FEE: I think not set out in the speaking note,
28 Chairman. I think the point that is made therein is
29 when you are considering whether an individual has an

1 expectation of privacy, there are various factors which
2 might be considered. One of those factors in a
3 Northern Ireland context should appropriately be the
4 concerns about being identified as an employee of the
5 State.

12:30

6 CHAIRPERSON: What are those concerns? Presumably
7 concerns of some sort of social disapproval, or worse?

8 MS. FEE: Yes, Chair.

9 CHAIRPERSON: So that's not Article 8, that's something
10 different.

12:30

11 MS. FEE: I think, Chairman, our submission is that it
12 is part of the reasonable expectation of privacy and
13 therefore it is part of Article 8.

14 CHAIRPERSON: Article 8 doesn't just state that you
15 have a reasonable expectation of privacy. Article 8
16 relates to private life and family life. Now, that's
17 why the question arises, does the fact of employment
18 fall within Article 8 or does the fact of employment
19 within the Northern Ireland Office arise as a
20 consideration in respect of some other matter?

12:31

21
22 The reason I ask you, of course, is because of what is
23 said in paragraph 25 in the IAB first instance
24 judgment, which says there is no general expectation of
25 privacy or confidentiality in the fact of a civil
26 servant's employment as a matter of general employment
27 law. It says:

12:31

28
29 "Moreover, when at work civil servants are not involved

1 in anything that can be described as a private
2 activity. They are exercising public functions as part
3 of the public service of the country."

4
5 Now that I would read as a statement that is completely 12:31
6 contrary to the proposition that someone's employment
7 as a civil servant would fall as a protected aspect of
8 Article 8. I recognise entirely the question of risk
9 is different and might arise in respect of civil
10 servants but that would have to be looked at 12:32
11 differently.

12 MS. FEE: I think the distinction that we're drawing is
13 that there are considerations in a post-conflict
14 society in Northern Ireland that don't necessarily
15 arise in other situations. But I won't labour the 12:32
16 point; that's the submission that we make I think in
17 both the speaking note and orally today. In
18 particular, at paragraph 29 of that speaking note we
19 highlight that this has been recognised by the courts
20 in Northern Ireland, including the Court of Appeal. 12:32
21 It's been recognised that employees of the State may
22 not have been open in disclosing their employer, even
23 to their family and friends, and the reasons for that
24 reticence about being publicly identified as an
25 employee of the State shouldn't lightly be ignored. 12:33

26 CHAIRPERSON: well, do I have that case?

27 MS. FEE: That should be, Chairman -- there should be
28 two bundles in front of you. This is the Re C case,
29 Chairman. It starts at page 400 of the bundle, which

1 is folder 2. It's one of the cases which arose from
2 the inquest judicial review Jordan matter. We've
3 highlighted in the copy that's on your desk, Chair,
4 we've highlighted some key passages. Those are
5 highlighted in yellow. They appear at pages 425, 428, 12:34
6 429. I believe that's the totality.

7
8 I accept, Chairman, that that overlaps with the
9 question you asked me about Article 2 because this
10 judgment engages in some detail with the issue of risk 12:35
11 and the Article 2 context, and it's largely against
12 that background.

13 CHAIRPERSON: This concerns the shooting of a young man
14 by police officers and the giving of evidence to an
15 inquiry by serving and former police officers? 12:36

16 MS. FEE: Yes, Chairman.

17 CHAIRPERSON: In respect of whom there was an
18 evaluation of risk?

19 MS. FEE: Yes, Chairman.

20 CHAIRPERSON: So where's the Article 8 point? 12:36

21 MS. FEE: I think the reason that that is referred to,
22 Chair, is to indicate that when we say that employees
23 may not have been open in disclosing their employer to
24 family and friends, it is not a new submission, it is a
25 point that's been made before in a variety of species 12:36
26 of litigation throughout Northern Ireland, that there
27 is cadre of individuals who were, at the time of the
28 events relevant to this Inquiry and even today, very
29 reluctant to be identified as employees of the State,

1 and that just may be slightly different from some other
2 jurisdictions.

3 CHAIRPERSON: Okay. What about those who, according to
4 Mr. Greaney, have published their employment
5 information on social media?

12:37

6 MS. FEE: Yes, Chairman. We've tried to deal with that
7 question at paragraph 33 of our speaking notes. What
8 we say about that is that the Secretary of State's
9 position is it makes no difference to the merits of the
10 application that some junior civil servants may have
11 chosen to publicise their identity on the Internet, and
12 that fact cannot have a bearing on the Article 8 ECHR
13 rights and expectation of privacy which applies to
14 other civil servants who haven't taken such steps.

12:37

15
16 Similarly while I am on that point, the fact that some
17 junior civil servants might have later held civil
18 servant roles at a higher level, Senior Civil Service
19 roles, that also doesn't affect the general
20 application. Both scenarios, we say, can be addressed
21 on a case by case basis if and to the extent that the
22 Inquiry team identifies any junior servant names which
23 are relevant or already in the public domain. They
24 could be in the public domain either because of their
25 own actions, such as you have mentioned by social
26 media, or because they later took on a senior role.

12:37

12:38

12:38

27
28 We say that junior civil servants, particularly in the
29 timeframe relevant to the public inquiry, had a

1 reasonable expectation of privacy but were pragmatic
2 about the names of the senior civil servants, who were
3 often more public facing. But in respect of junior
4 civil servants, we say it is relevant that they may not
5 have been open about their employer even to family and 12:38
6 friends, and that when there is no relevance to their
7 identity, the balance should tip in favour of
8 protecting their Article 8 rights.

9
10 Then, Chair, in relation to the point you had asked me 12:38
11 about earlier of Article 2 of the ECHR, what we say
12 about that starts at paragraph 34 of the speaking
13 notes. As is identified in our original application,
14 there may be some junior civil servants, for example
15 those working in defence or security roles, for whom 12:39
16 the risks to their safety may be of a different
17 character. Article 2 ECHR requires that everyone's
18 right to life should be protected by law, and there is
19 an operational duty on the State - or on this case the
20 Inquiry - to safeguard the lives of those within its 12:39
21 jurisdiction.

22
23 We have set out at paragraph 35 some cases which again
24 will be in the bundle before you, Chairman. Lord
25 Carswell conclusions in Re Officer L. 12:39

26 CHAIRPERSON: But this is all about anonymity again.
27 We are not at this stage talking about publishing,
28 we're just talking about disclosure to Core
29 Participants who have signed a confidentiality

1 agreement.

2 MS. FEE: Yes, Chairman. I think what we have tried to
3 do in the submissions is set out, firstly, the general
4 position, and then where there are more specific
5 concerns, to highlight that. I think as a matter of 12:40
6 general principle, whether these names should go out
7 to, you know -- should go beyond the Inquiry
8 effectively is the key issue on the part of the
9 Secretary of State.

10 CHAIRPERSON: That might well be a matter of general 12:40
11 principle but it is not going to be determined by
12 general principles that apply to publication.

13 MS. FEE: I think, Chairman, it may be that if we are,
14 I think as has been flagged earlier today, potentially
15 having -- it may be that there is a further hearing at 12:40
16 a later point which deals with disclosure on to the
17 public depending on the outcome of this hearing, it may
18 be that these cases may be more acutely relevant at
19 that stage.

20 CHAIRPERSON: Yes. 12:40

21 MS. FEE: Certainly, rather than taking you to those
22 cases and into the bundle at this stage, I am simply
23 going to refer to them in general terms and to indicate
24 that they have given consideration to this question
25 about issues around giving evidence without anonymity 12:41
26 and what potential risks that might have. Obviously
27 disclosure beyond the Inquiry; the wider the pool of
28 disclosure, the harder it is to control the flow of
29 information. I know that's a concern often expressed,

1 for example, in commercial court context around
2 confidentiality rings and so on.

3
4 We set out at paragraph 36 some of the context around
5 dissident republican groups and the unfortunate reality 12:41
6 that they are actively planning and carrying out
7 attacks, including on members of the security forces
8 and those employed by the State. Identification of a
9 junior civil servant, however innocuous, could assist
10 with targeting more readily. This not only increases 12:42
11 the actual risk towards junior civil servants but it is
12 also likely to increase their subjective fears. We've
13 set out a quotation in relation to that from the Re
14 Officer L case. As I've said, I don't propose to take
15 you in detail, Chair, to any of those cases unless it 12:42
16 would be of specific assistance.

17
18 In Re C, we saw the court drawing a clear distinction
19 between a retrospective analysis of the sort that would
20 be undertaken in an Osman type situation, and the 12:42
21 perspective risk assessment task undertaken by the
22 court in cases considering the need for operational
23 measures to protect life. The Omagh Bombing Inquiry
24 involves material generated during the Troubles and
25 touching on the atrocities of dissident republican 12:42
26 groups, many of which are unfortunately still in
27 operation. We say this cannot be reasonably be
28 compared to IAB in respect of expectation of privacy
29 and potential engagement of Article 2 ECHR.

1
2 For the reasons which we've already given, the risk is
3 heightened for those working in defence roles. That is
4 also addressed to an extent in one of the cases that
5 senior counsel to the Inquiry mentioned earlier, the FM 12:43
6 Holdings case.

7
8 "The open availability of staff names, e-mail addresses
9 and their roles increases the information available to
10 these hostile groups, and it enables improved 12:43
11 intelligence and targeting information to be obtained
12 by such organisations which would be of considerable
13 value to a hostile actor."

14
15 So in conclusion, Chairman, the application does not 12:43
16 advance some general principle of redaction absent good
17 reason, which was the problem in IAB as the court
18 found. Irrelevance is fundamentally a good reason to
19 redact the material, particularly in circumstances where
20 Convention rights are engaged. Article 2 and Article 8 12:44
21 are good reasons to redact, and frequently cited in
22 Northern Ireland legacy and indeed modern cases to
23 protect those working for security forces and the
24 State.

25
26 The Inquiry, we say, is also entitled to take into
27 account the practical difficulties of the substantial
28 disclosure exercise it's carrying out. Dealing with
29 the redaction of junior civil servant names on a case

1 by case basis will be burdensome and time consuming,
2 and disproportionate to any benefit in terms of open
3 justice which, it is submitted, will be negligible. It
4 will lead to potentially unnecessary increased costs.
5 We say that those sorts of practicalities are matters
6 to which the Inquiry, if it wishes, can give
7 consideration.

12:44

8
9 unless there is anything further, Chairman, that was
10 all that I had intended to say on those matters.

12:44

11 CHAIRPERSON: Thank you, Ms. Fee.

12 MS. FEE: Thank you very much, Chairman.

13 MR. GREANEY: We're next going to hear the submissions
14 of counsel for the Police Service of Northern Ireland.
15 Mr. Henry, Kings Counsel.

12:45

16
17 We have been sitting for 58 minutes. Mr. Henry has
18 told me that he anticipates that he will be no more
19 than 30 minutes. It is desirable that we should hear
20 both applications, if that is what they are, before
21 lunch so that they can be reflected upon by other Core
22 Participants. Could I check first of all with those
23 who are helping with the transcript? Thank you. And
24 then check with you, sir, whether you are content to
25 sit beyond what would be the normal time for breaking
26 for lunch?

12:45

27 CHAIRPERSON: Yes, I certainly am. Is Mr. Henry
28 content to speak at this stage?

29 MR. GREANEY: I ought to check with him as well.

12:45

1 MR. HENRY: Yes.

2 CHAIRPERSON: Good afternoon Mr. Henry.

3 MR. HENRY: Good afternoon, sir.

4

5 As you have heard already, my name is Philip Henry. I 12:46

6 appear on behalf of the PSNI. I am assisted today by

7 Ms. Kelly and Mr. McCartan, junior counsel.

8

9 Hopefully you will have received our written

10 submission. I am not going to read through that this 12:46

11 afternoon. I thought what I'd do is highlight some key

12 issues and if you wish me to develop those any further,

13 I would be happy to do so.

14 CHAIRPERSON: Yes.

15 MR. HENRY: In terms of the points that I was going to 12:46

16 raise with you, sir, I would make some general

17 observations at the beginning and explain briefly what

18 position the PSNI normally take whenever it is the

19 decision maker. I'll deal with the reasonable

20 expectation point which generates the Article 8 right 12:47

21 or is the threshold which applies to determine whether

22 or not it's engaged or not, and then go on to deal with

23 the Article 8.2 qualification point.

24

25 I think it might be useful just at the very outset to 12:47

26 answer the question that was posed to me by Inquiry

27 counsel: Is it the PSNI position that it's applying

28 for redaction of the suspects' names, or is it the

29 PSNI's position that it's flagging up these issues so

1 that the Inquiry can make an informed determination on
2 the redaction issue?

3
4 It is firmly the latter, sir. We haven't lodged an
5 application with you, that was a conscious decision, 12:47
6 but we did want the Inquiry to be as informed as
7 possible so that whenever it was making any decision on
8 redaction of suspect names, it had the legal principles
9 before it.

10 12:48
11 That issue, if you like - and I think it might be
12 helpful for some of the other Core Participants to know
13 this - the issue developed during the course of
14 constructive dialogue, ongoing dialogue between the
15 PSNI legal team and your own legal team. We simply put 12:48
16 on the radar, as it were, that this is something which
17 the PSNI have to consider whenever it's dealing with
18 suspects who were arrested, interviewed, and released
19 without charge.

20 12:48
21 We do, however, at the outset recognise that the
22 Inquiry is in quite a different position and that there
23 are set of proceedings in place which are not in place
24 in the PSNI context.

25 12:49
26 What we've tried to do in our position paper or
27 speaking note is set out the relevant legal principles.
28 We did that in an attempt to be helpful to the Inquiry.
29 We hope that it has been received in that spirit. I

1 wouldn't want there to be a misperception that we were
2 attempting to reduce the amount of information unduly
3 which was being released to the other Core
4 Participants. We were simply trying to provide the
5 Inquiry with as much information as we could in 12:49
6 relation to the legal principles so that its decision
7 is as informed as possible.
8

9 I would also make a general observation that what we're
10 dealing with here - and it's something which Mr. 12:49
11 Greaney touched upon earlier, and indeed formed one of
12 the exchanges between you, sir, and Mr. Greaney - we
13 are really dealing with these issues at the moment
14 almost in the abstract in general terms; necessarily so
15 because we are not going into the detail of individual 12:50
16 cases. That does make it a little bit more difficult
17 for you, sir, in terms of making a determination on a
18 general approach. It is, I respectfully suggest, still
19 quite helpful to have the discussion in general terms
20 because, as we've said, it does identify the principles 12:50
21 that you'll have to apply.
22

23 So, in terms of the Article 8 position --

24 CHAIRPERSON: Mr. Henry, can I just ask you, you're a
25 little taller than Ms. Fee and I maybe need you to 12:50
26 adjust the microphone a little bit.

27 MR. HENRY: Certainly. Is that any better, sir?

28 CHAIRPERSON: It's much better. Thank you.

29 MR. HENRY: If that happens again, by all means draw it

1 to my attention.

2
3 In relation to the Article 8 position, obviously the
4 first question that you have to consider is the
5 suspect's Article 8 right engaged or one of the Article 12:51
6 8 rights engaged? I think we can narrow the discussion
7 down a little bit. If the individual has been charged
8 with a criminal offence, their name goes on to a public
9 court lists, save in very exceptional circumstances.

10 That reasonable expectation of privacy evaporates 12:51
11 effectively at that stage; it no longer exists. So the
12 cohort of individuals that we are dealing with at the
13 moment during this discussion is simply those who were
14 not and have not been charged with any offence.

15 CHAIRPERSON: There has been, of course, some civil 12:51
16 litigation as well.

17 MR. HENRY: It was something I was going to touch upon,
18 and how that impacts on the reasonable expectation of
19 privacy. I'll maybe come to that in just a moment, if
20 I may? But I did want to say, I thought just for the 12:52
21 benefit of those who haven't read through the position
22 that the PSNI submitted - it might be helpful - in very
23 basic terms for the PSNI to set out what it does.

24 So, if there is an individual who is deemed to be a
25 suspect and is arrested and is released without charge, 12:52
26 the PSNI's starting position, in line with the decision
27 of Richards, and ultimately Bloomberg from the Supreme
28 Court, the starting point is that there is a reasonable
29 expectation that their designation as a suspect in a

1 criminal investigation that did not result in a charge,
2 and did not result in criminal proceedings, the
3 starting point is that they have a reasonable
4 expectation of privacy and that information should not
5 be made public. So, their name should not be attached 12:53
6 to that process.

7
8 The PSNI rarely deviates from that starting position
9 because it is fairly well established, but as
10 Mr. Greaney's opening to you is already identified, it 12:53
11 is not a universal rule, it doesn't have hard and fast
12 application, and there can be deviation from it in
13 certain circumstances.

14
15 One of the things you will have to consider is what 12:53
16 effect does the existence of the Inquiry per se and
17 then the duties on the Inquiry have in relation to that
18 reasonable expectation of privacy.

19
20 I would, before I move on to talk about the reasonable 12:53
21 expectation of privacy in a little bit more detail,
22 just draw to your attention one perhaps minor
23 distinction. There is a distinction between the
24 alleged offending on the one hand and an individual's
25 designation as a suspect on the other. I'm not quite 12:54
26 sure if I am going to be able to assist you any further
27 in relation to what the significance of that
28 distinction is but it is something that we respectfully
29 flag up for you to consider because it is something

1 which the PSNI's, in its typical scenario, has to
2 consider.

3
4 I raise that because it has been touched upon in some
5 of the Core Participants' written submissions where
6 there is a focus on the offending. The point that we
7 had raised with the Inquiry was the designation of
8 someone who is a suspect who has not been charged, and
9 so we say there is a degree of distinction between
10 those two.

12:54

12:54

11 CHAIRPERSON: Are you thinking there about what the
12 definition of a suspect is?

13 MR. HENRY: Yes. Well, it may be an immaterial
14 distinction because if there were clear evidence on the
15 one hand of someone's involvement in offending, you are
16 unlikely to arrive at a situation where they are not
17 charged with the offence. It is conceivable but it is
18 difficult to think of an example.

12:55

19
20 As I say, the distinction between the two points might
21 be immaterial but it is something that I wanted to
22 place on the Inquiry's radar so that it could consider
23 whether it had any impact at all.

12:55

24
25 Returning to this issue then of the reasonable
26 expectation of privacy; that's our starting point for
27 the decision that has to be made. If it exists and
28 there is an interference with it, then one moves onto
29 the qualification provision in Article 8(2), but if

12:55

1 there is no reasonable expectation of privacy, you
2 don't need to progress to Stage 2 and consider the
3 lawfulness of any interference and whether that's in
4 keeping with that qualification.

5
6 One of the things that's helpfully been set out in the
7 Inquiry legal team's position paper is what effect
8 someone's involvement or alleged involvement in
9 previous offending being in the public domain has in
10 relation to the expectation or reasonable expectation
11 of privacy. That's a reasonably simple proposition,
12 relatively easy to understand. If it's already in the
13 public domain, then you can't have or you are much less
14 likely to have a reasonable expectation of privacy.

15
16 This is a point that I am respectfully asking the
17 Inquiry to consider, and in keeping with all of the
18 observations I am going to make this afternoon, sir,
19 the PSNI is not adopting a position, as it were, we're
20 simply asking or presenting these points for
21 consideration so you have that information, in an
22 attempt to be helpful.

23
24 Is something in the public domain? The examples that
25 Mr. Greaney mentioned earlier, the first is reference
26 in Hansard or Parliament; the second was reference in a
27 newspaper article or some other media publication.
28 Sir, you might consider that whether something exists
29 in the public domain is a question of fact and degree.

1 There will be different subjective views in relation to
2 that. Ultimately, you may feel you have to reach an
3 objective determination in relation to that, is it in
4 fact in the public domain.

5
6 Two extreme examples at opposite ends of the spectrum
7 would be something that we talked about a moment ago,
8 so if someone is a defendant in related civil
9 proceedings, such as the Breslin proceedings, and they
10 had not been charged, there is a significant amount of 12:58
11 public exposure already clearly associating that
12 individual with the Omagh bombing. In that situation,
13 the decision might be relatively straightforward, the
14 public domain decision and therefore the reasonable
15 expectation of privacy decision. 12:58

16
17 At the end of the spectrum, you might have a situation
18 where someone has been named in association with one
19 incident and it may fall into the category of the 31
20 previous incidents that are currently being explored, 12:59
21 and that incident may or may not ultimately be in the
22 opinion of the Inquiry linked to the Omagh bomb in some
23 way.

24
25 With those two extreme examples, I present those to you 12:59
26 just by illustration to respectfully suggest that
27 whether something is in the public domain or not may
28 not be just as straightforward a decision but
29 ultimately it will require an individualised decision,

1 I think, in relation to each of the suspects who fall
2 into this cohort.

3
4 Perhaps less importantly so but still something you may
5 wish to consider, sir, is whatever reference has been 12:59
6 made to that individual in the public domain, what
7 incident is it referring to? Is it referring to Omagh,
8 the Omagh bombing? If so, in the context of this
9 Inquiry about the Omagh bombing, they are much less
10 likely to have a reasonable expectation of privacy. 13:00

11 The further that one moves away from the Omagh bombing
12 incident itself, the greater argument the suspect may
13 have in relation to a reasonable expectation of
14 privacy. And the Inquiry at this stage -- -

15 CHAIRPERSON: I wonder why that would be so? If 13:00
16 someone is identified as a suspect in relation to one
17 of the linked incidents, why would they have any
18 greater expectation of privacy in respect of that
19 matter than somebody would have who is identified as a
20 suspect in relation to the Omagh bombing? 13:01

21 MR. HENRY: well, it's a fair question, sir. You
22 describe it as a linked incident and I have been
23 referring to it as a previous incident, and in due
24 course the Inquiry will have to make a factual
25 determination in relation to how -- first of all 13:01
26 whether there is an association between the two. The
27 point that I am respectfully making is that it may
28 ultimately be that at the end of that process you make
29 a determination that some of those previous incidents

1 do bear a relationship with Omagh and some do not.

2 CHAIRPERSON: I see that, I see that very clearly. I
3 am just wondering about what impact that has at this
4 stage when we are only talking about disclosure to CPS?

5 MR. HENRY: There are a couple of aspects to it. The 13:01
6 first is it's the limited disclosure, as it were,
7 publication only to the CPS. The second point that the
8 Inquiry might wish to consider is if the exploration in
9 relation to the 31 incidents at this stage is a
10 legitimate rational exploration based on sound 13:02
11 judgment, if the individual is associated with that
12 linked incident and you have a bone fide good faith
13 reason for exploring that incident, that may provide
14 the Inquiry with a greater degree of comfort in
15 relation to finding that there is not a reasonable 13:02
16 expectation of privacy with them being named in the
17 Omagh Bomb Inquiry if the only link is to that single
18 previous incident.

19
20 The reason I'm drawing this to your attention is just 13:03
21 so that the greatest degree of thought possible is
22 brought to the process rather than jump straight into
23 cohorts and classifications. How one builds those
24 cohorts of falling into one category or another may be
25 as important a process as the identification of the 13:03
26 cohort itself.

27
28 The final observation I would make in relation to this
29 issue, sir, is that whether the public reference was

1 previous civil proceedings, a reference in Parliament
2 or a reference in the media, you may wish to consider
3 the detail of that reference as well --

4 CHAIRPERSON: what, sorry?

5 MR. HENRY: You may wish to consider the detail of what 13:04
6 is said about the individual in connection with the
7 incident. It's a little difficult to speak about that
8 without a concrete example in front of us, sir, but it
9 may be a fleeting reference based on very little
10 information, or it may be a detailed exploration such 13:04
11 as in the civil proceedings, with reference to evidence
12 potentially linking an individual to offending. Those
13 are two opposite ends of the spectrum, and that may be
14 something that you wish to consider when making a
15 determination as to whether their name is in the public 13:04
16 domain in connection with the Omagh bombing, and
17 thereafter whether they have a reasonable expectation
18 of privacy or not.

19
20 I think - and this is by way of respectful suggestion - 13:04
21 once you make those individual determinations in
22 relation to each suspect, you will have your categories
23 at that stage. But as Mr. Greaney recognised, and as
24 you suggested to him, there would need to be an
25 individualised decision-making process to reach that 13:05
26 point.

27
28 Moving on then to the Article 8(2) qualification issue.
29 I have a lot less to say about that because it doesn't

1 appear to be that there is a huge amount of
2 disagreement between any of the Core Participants in
3 relation to the principles that apply. The first
4 requirement is whether the interference is in
5 accordance with the law. Our position paper flags up 13:05
6 the Inquiries Act and the associated rules, and we
7 suggest that's likely to satisfy that requirement. Our
8 position also flagged up at No. 2 then that any
9 interference is in pursuit of a legitimate aim, and one
10 which must be specified within Article 8(2) itself. 13:06
11 Everyone's written submissions to you have identified
12 the same legitimate aim, and that's the protection of
13 the rights and freedoms of others. In particular then,
14 within that legitimate aim, the Non-State Core
15 Participants Article 2 rights under the Convention, 13:06
16 under the procedural limb, I should say, of Article 2.
17
18 Really, for those suspects who do have and are found by
19 you to have a reasonable expectation of privacy, the
20 key consideration in relation to whether or not any 13:06
21 interference with that by disclosing their information
22 and their names to the Core Participants is likely to
23 be at the proportionality determination at the end of
24 the Article 8(2) process.
25 13:07
26 I was going to take you to the Bank Mellat four
27 questions. In light of the fact that my learned friend
28 Mr. Greaney has already done so this morning, I don't
29 feel the need to do that again.

1
2 I'd simply observe this: Most of the considerations
3 which have been flagged up to you by the respective
4 Core Participants in their written submissions will
5 fall to be considered at the fourth stage of the Bank 13:07
6 Mellat process; that is where one is balancing the
7 rights of the individual with the rights of the general
8 public. Now, that's where things like the importance
9 of the Inquiry will come into play; also I respectfully
10 suggest to you the importance of the principle of open 13:08
11 justice which has been referred to by several of the
12 lawyers involved.

13
14 At that stage, what the decision maker is required to
15 do is set the scales; on the one side, the rights of 13:08
16 the individual, on the other side the competing public
17 interest rights, and ultimately make a valued judgment
18 in relation to that balancing exercise.

19
20 The third thing then I respectfully address you on is 13:08
21 this, the significance of the limited nature of
22 disclosure at this point. As you articulated earlier
23 today, and also Mr. Greaney and your team in their
24 position paper, all we're talking about at this stage
25 is disclosure of the names, potentially, of suspects to 13:09
26 the Core Participants, who are all bound by
27 confidentiality undertakings, not the release of those
28 names into the general public arena at this stage.
29 The significance of that is that the smaller the

1 audience, you may feel the easier it is to justify the
2 interference with the right. That doesn't mean simply
3 because it's a smaller right one can automatically
4 lawfully interfere with it, but it's the size of the
5 audience which is a relevant consideration into the
6 justification.

13:09

7 My learned friend Mr. Greaney also raised the issue of
8 a Restriction Order and asked for the respective
9 contributors today to address our minds to it, and, if
10 they saw fit, address you specifically on the issue.

13:10

11 The Core Participants are subject to the
12 confidentiality undertaking and therefore ought not to
13 release any information given to them wider than beyond
14 the use which is necessary for the purposes of the
15 Inquiry itself. That provides a degree of protection
16 to the Article 8 rights of the suspect. The Non-State
17 Core Participants are not subject to Convention
18 obligations as the Inquiry is, as HMG are and as PSNI
19 are, and it may well be that you feel that the added
20 protection that an explicit Restriction Order would
21 provide would be a useful thing in the event that you
22 ultimately decide the suspects' names should not be
23 redacted in this first round of disclosure to the CPs.

13:10

13:11

24
25 The other topics that I had noted were the issue of
26 notice to the suspects themselves. I'm happy to
27 address you on that and develop that, if you wish. I'm
28 happy also to leave it on the basis of what I put in my
29 position paper in writing.

13:11

1 CHAIRPERSON: Could we just go right back to the very
2 beginning please, Mr. Henry?

3 MR. HENRY: Certainly, sir.

4 CHAIRPERSON: Just to be sure that I have understood
5 you properly. In Mr. Greaney's introductory
6 observations and submissions, he suggested there were
7 two questions which PSNI might address: whether the
8 Inquiry should take into account the principle in the
9 decisions that are made as to disclosure of documents
10 that name suspects, or whether I should rule that
11 disclosure should not be made in any or some sets of
12 circumstances; I suppose drew attention to the fact
13 that there wasn't a Restriction Order in place. You
14 explained to me you had no intentions of intimating a
15 Restriction Order?

16 MR. HENRY: That's a fair observation, sir. It's not a
17 police -- there is no written application before the
18 Inquiry on behalf of the PSNI saying we believe the
19 following suspects' names ought to be redacted from the
20 information which is set before the CPs. The
21 Restriction Order that I mentioned a moment ago is in
22 the event that you -- it's at a later stage in the
23 event that you make a decision that that information
24 should be released to the CPs; you may feel that that
25 provides an added degree of protection to the Article 8
26 rights in question.

27 CHAIRPERSON: Well, I follow that but I just want to be
28 clear about what your position is on the matter of the
29 approach to be taken to the question of whether the

1 names of suspects as disclosed in documentation
2 provided by PSNI should be disclosed to Core
3 Participants. Are you suggesting that that is
4 something that should be left to the Inquiry or are you
5 explaining that PSNI will have a role in that as well? 13:13

6 MR. HENRY: It is the former. You are the decision
7 maker, sir, ultimately in this scenario and we
8 respectfully leave the matter with you. All we've
9 sought to do through, first of all our written
10 submissions and now this oral exchange with you, is to 13:14
11 try and set out as best we can the legal principles
12 which we think you ought to consider, and try and
13 assist you as much as we can in that regard.

14 CHAIRPERSON: well, I'm grateful to you for that.
15 That's very helpful, thank you very much indeed, 13:14
16 Mr. Henry.

17 MR. HENRY: One final matter that I would touch upon
18 sir, we mentioned the issue of -- two matters, I beg
19 your pardon. Completing convention rights, Article 8
20 versus Article 10. We provided some of the general 13:14
21 guidance in our speaking note or skeleton argument in
22 relation to that; we don't intend to advance any
23 further observations about that.

24
25 The second and the true final issue is that of 13:15
26 sensitivity, because we did raise that in our written
27 submissions to you. At this stage, given that we're
28 dealing with issues in general terms, as I referred to
29 earlier, effectively in the abstract without reference

1 to specific documents, specific names and so forth, we
2 are not going to be in a position to assist any further
3 with that. We simply put those two observations about
4 sensitivity in the written note so that the Inquiry
5 would have them on its radar but we don't advance any
6 position beyond that.

13:15

7 Those are my respectful observations, sir. If you have
8 no further queries, I'll draw to a conclusion. I am
9 grateful to the stenographers for sitting on for that
10 as well.

13:16

11 CHAIRPERSON: Thank you.

12 MR. GREANEY: I'm grateful to Mr. Henry for being
13 faithful to his time estimate and in just a moment we
14 will invite you to break for lunch. But it may assist
15 Core Participants if we indicate first the order in
16 which we will invite submissions from them this
17 afternoon.

13:16

18
19 The order is as follows: First, when we return we will
20 invite submissions on behalf of the Police Ombudsman
21 Northern Ireland; then submissions on behalf of those
22 represented by John McBurney Solicitors, followed by
23 submissions on behalf of those represented by Logan and
24 Corry, Campbell and Haughey and Roche McBride. Then,
25 submissions on behalf of the Rush family. Following
26 that, we will turn to invite submissions made on behalf
27 of media organisations, first of all Mr Mullan on
28 behalf of a number of organisations represented by him.
29 Then Jess Glass, who will appear by remote link, as I

13:16

13:16

1 understand it, to make submissions on behalf of the
2 Press Association Media Group. Finally for today, we
3 will invite any submissions that Lara Smyth counsel
4 wishes to make on behalf of Mediahuis UK Ltd.

5
6 It may be, sir, that some of those we have just named
7 wish to do no more than endorse the submissions that
8 you have heard made by counsel to the Inquiry this
9 morning. We anticipate that we will get through all
10 the remaining submissions, with two exceptions which I 13:17
11 will describe in a moment, well before 4.30 today. If
12 we do reach the end of those submissions before 4.30,
13 we will not be able to go further for a good reason of
14 which you are aware.

15
16 Then, tomorrow we will hear submissions on behalf of
17 those represented by Fox Law. As I have said already,
18 we would anticipate making some, I would hope short,
19 closing remarks as the Inquiry legal team.

20 CHAIRPERSON: Thank you. What time would you suggest 13:18
21 we sit again?

22 MR. GREANEY: I was going to suggest, unless it would
23 cause a problem for you or anyone else, that we return
24 at two o'clock.

25 CHAIRPERSON: It may not give people terribly much 13:18
26 time. We do seem to have time in hand.

27 MR. GREANEY: Perhaps I was being mean. Perhaps we
28 could return at 2.15?

29 CHAIRPERSON: Yes.

1
2 THE LUNCHEON ADJOURNMENT

3
4 THE INQUIRY RESUMED AS FOLLOWS

5
6 CHAIRPERSON: Right. Bear with me one moment,
7 Mr. Greaney.

8 MR. GREANEY: Of course, sir. Yes.

9
10 Sir, thank you. As I indicated before lunch what we 14:14
11 would do, the first submissions we'll hear in this
12 session are submissions on behalf of the Police
13 Ombudsman for Northern Ireland, and Simon McKay will be
14 making those submissions.

15 MR. MCKAY: Good afternoon. 14:19

16 CHAIRPERSON: Mr. McKay.

17 MR. MCKAY: I think, height wise, I'm somewhere between
18 Ms. Fee and Mr. Henry. Can you hear me okay with the
19 microphone is where it is?

20 CHAIRPERSON: Yes, I can. Thank you. 14:19

21 MR. MCKAY: As Mr. Greaney has indicated, I am
22 Simon McKay, counsel, instructed by the Police
23 Ombudsman for Northern Ireland via by her solicitors,
24 Mr. Sally and Ms. Coulter. The following short
25 submissions are intended to augment the written 14:19
26 submission dated 7th May 2025 lodged on behalf of the
27 Police Ombudsman, and are intended to address the
28 remaining questions raised in counsel to the Inquiry's
29 note dated 14th May 2025.

1
2 Before addressing those questions, the Police Ombudsman
3 makes the following two brief submissions on the issue
4 of disclosure more generally. First, it may assist to
5 restate, as counsel to the Inquiry has this morning, 14:20
6 the uncontroversial position that there is a
7 distinction to be drawn between the revelation of
8 material to the Inquiry and the dissemination or
9 disclosure of that material to other parties by the
10 Inquiry. 14:20

11
12 Revelation of material is the singular duty of a
13 recipient to a request under Rule 9 of the Inquiry
14 Rules 2006 to comply with. There is no basis upon
15 which any party, subject to a request under Rule 9, can 14:20
16 unilaterally redact or withhold revelation of
17 materially lawfully requested by the Inquiry from the
18 Inquiry, nor is it suggested that this is being
19 proposed in the present proceedings.

20 14:21
21 It was, however, the position in IAB, and is an
22 important factual distinction to be made between that
23 case and the present proceedings. I'll come back to
24 that shortly.

25 14:21
26 The Inquiry may determine what, if any, material it
27 holds is potentially sensitive before disclosing it to
28 another party or releasing it into the public domain.
29 This is an evaluative exercise and does not

1 contemplate, and would be inconsistent with, a
2 class-based approach, in my submission.

3
4 In relation to this material, an application can be
5 made under Section 19 of the Inquiries Act 2005, and 14:21
6 Rule 12 of the 2006 Rules restricting disclosure.
7 The effect of a successful application, as has been
8 intimated, is that a restriction notice or order may be
9 imposed in respect of that material.

10 14:22
11 It is open to the Inquiry under Rule 12, as counsel to
12 the Inquiry has observed in his note dated 14th May, to
13 disclose material to persons that might not otherwise
14 be entitled to see it on the basis it is held in, and
15 subject to, a duty of confidence. This is a decision 14:22
16 for you as chairman, but it is clearly legally
17 significant that you are empowered to do so. Such
18 material disclosed at that stage is held in confidence
19 and is not for wider publication.

20 14:22
21 Second, in approaching whether to impose any
22 restriction, it is submitted on behalf of the Police
23 Ombudsman that the judgments of IAB and FM Holdings Ltd
24 are capable of being distinguished, and do not
25 establish principles of wider general application as 14:22
26 they relate specifically to judicial review
27 proceedings. Any reliance placed on them should, at
28 their highest in my submission, be to provide
29 analogical force to the Inquiry's analysis only and not

1 bind it.

2
3 The duty of candour in judicial review proceedings is a
4 longstanding and established duty that is distinct from
5 those arising in other types of proceedings, 14:23
6 principally because of the constitutional origins of
7 public law. The nature of the challenges before the
8 court in such cases are always inexorably linked to
9 decisions and, importantly for present purposes,
10 decision makers. The identity of decision makers takes 14:23
11 on a particular significance, in my submission, within
12 such proceedings as they may provide the underlying
13 explanation, as it has been referred to earlier today,
14 behind the decision.

15 14:24
16 This is recognised in the long line of authorities
17 beginning with ex parte Huddleston in 1986, a case
18 already referred to by Mr. Greaney KC this morning, in
19 which Donaldson LJ emphasised the existence of the
20 duty, the reasons for it, and its intrinsic 14:24
21 relationship specific to public law proceedings. IAB
22 and TFM are the latest decisions in that line of
23 authority.

24
25 Sir, candour in the context of a statutory inquiry is a 14:24
26 much broader concept. You, sir, in an inquiry and to
27 quote you this morning "cast your net more widely", and
28 "is qualitatively different." Counsel for the Inquiry
29 this morning invited reasons for this to be identified

1 where possible. In my submission, they may include the
2 following: The search for the truth goes beyond the
3 limitations of any one decision. Secondly, it is more
4 analogous to the scope of investigation in a criminal
5 or civil inquiry. Thirdly, includes not only that 14:25
6 which is relevant but that which may put in train a
7 particular line of additional inquiry, or may have some
8 bearing on the issues or surrounding circumstances.

9
10 For those three reasons, we say that the candour in the 14:25
11 context of public inquiry proceedings is wider than
12 that considered in public law proceedings.

13
14 But importantly, sir, the Police Ombudsman submits that
15 it is not necessary for the Inquiry to resolve the 14:25
16 issue of whether a duty of candour applies in the
17 public law sense to a statutory inquiry, or how it may
18 differ between the two types of proceedings. The
19 issues on the application or applications are capable
20 of being resolved without doing so, and by reference to 14:26
21 existing freestanding legal principles.

22
23 The position of the Police Ombudsman on the two
24 outstanding issues is as follows: One, civil servants.
25 First, in respect of the request by HMG to redact 14:26
26 junior civil servants' names, the Police Ombudsman's
27 position is, on relevance, 1, the determination of
28 relevance is a matter for you as chairman in the
29 exercise of your discretion. It is a basic tenet of

1 the law of evidence that only relevant material is or
2 should be admissible. It follows that if the Inquiry
3 determines on the facts of the individual case that a
4 name of any particular civil servant, junior or indeed
5 senior, is not relevant, it does not fall to be
6 disclosed. That determination must be made, as counsel
7 to the Inquiry has submitted this morning, only when
8 the Inquiry is able to make an informed decision on
9 relevance, no doubt with the assistance of Core
10 Participants as is proposed.

14:26

14:27

11
12 It would be inconsistent with the concept of open
13 justice to start with the position where names are
14 redacted, as proposed by the Secretary of State this
15 morning, but later reviewed subsequently. That is to
16 look at the issue, in my respectful submission, from
17 the wrong end of the telescope.

14:27

18
19 On privacy. An assertion that there is an expectation
20 of privacy imposes, firstly, an evidential burden on
21 the party asserting it. However, and in any event, no
22 expectation of privacy arises or is likely to arise
23 where the information is already in the public domain.
24 Public servants may, indeed probably do, have a reduced
25 expectation of privacy. The Police Ombudsman would
26 respectfully agree with Swift J in IAB that there is no
27 general expectation. That is different from where
28 specific expectation arises in particular
29 circumstances.

14:27

14:28

1
2 Sir, as the submissions have evolved during the day,
3 you have asked what authority might exist to establish
4 private rights may extend to the work place. The
5 following submission is simply to assist the Inquiry. 14:28
6 If it doesn't, you'll ignore it, but you may consider
7 the appropriate authority is the well-known decision in
8 Niemi etz v Germany. It's not in the bundle because it
9 has only arisen during your interactions with counsel
10 this morning but it is a well-known authority and can 14:28
11 be provided to the Inquiry if it assists. In that
12 case, the European Court of Human Rights increased the
13 scope of the notion of home to include business
14 premises and relationships. At paragraph 29, the court
15 held: 14:29

16
17 "It would be too restrictive to limit the notion of an
18 inner circle in which the individual may live his own
19 personal life as he chooses and to exclude therefrom
20 entirely the outside world not encompassed within that 14:29
21 circle. Respect for private life must also comprise to
22 a certain degree the right to establish and develop
23 relationships with other human beings. There appears
24 furthermore to be no reason in principle why this
25 understanding of the notion of private life should be 14:29
26 taken to exclude activities of a professional or
27 business nature since it is, after all, in the course
28 of their working lives that the majority of people have
29 a significant, if not the greatest, opportunity of

1 devel oping rel ati onshi ps wi th the outsi de worl d. "

2
3 That case is not a case that was referred to in IAB
4 either at first instance, or the Court of Appeal as far
5 as I can tell with the limited time available to
6 research the issue.

14:30

7
8 There may be, sir, a distinction between junior and
9 civil servants in the context of expectation of
10 privacy. That is a question of fact as Swift J noted
11 in IAB.

14:30

12 CHAIRPERSON: Can you just pause for a moment? Let's
13 flesh out a little bit more about the European Court of
14 Human Rights case. What do you say the effect of it
15 is?

14:30

16 MR. MCKAY: The effect of it is to extend in principle
17 the expectation of privacy into the work place. It's
18 no more than that.

19 CHAIRPERSON: To what effect?

20 MR. MCKAY: There may be, in certain circumstances, an
21 individual expectation of privacy that could arise
22 because of someone's employment.

14:30

23 CHAIRPERSON: Because of what, sorry?

24 MR. MCKAY: Somebody's employment. I don't think it
25 changes the practical effect of the approach that the
26 Inquiry will take, but what I think is important is
27 that Article 8 is a broad notion, it is a broad
28 concept, and the starting point would not be to exclude
29 certain activities from the concept of private life but

14:31

1 rather to take a broader and more liberal approach to
2 it. Whether in an individual case an expectation
3 arises is a matter for the Inquiry. Let me make it
4 clear, the Police Ombudsman agrees with Swift J in IAB
5 that there is no general expectation; it would have to
6 be fact-specific, arise on the particular facts of the
7 particular case.

14:31

8
9 CHAIRPERSON: Part and parcel of that consideration
10 would no doubt be what he also said about civil
11 servants, namely that they perform a public function in
12 the public service?

14:31

13 MR. MCKAY: Yes, sir. As you are aware, in the written
14 submissions the Ombudsman has filed, she has referred
15 to the Information Commissioner's Office guidance on
16 the revelation of names subject to a Freedom of
17 Information Act request. We say that there is some
18 helpful methodology in there to understand what the
19 principles are at work. What the Information
20 Commissioner's Office is doing is recognising different
21 levels of expectation first of all. First of all, what
22 the Information Commissioner's Office recognises is
23 that the right extends to the work place. First and
24 foremost, that seems to me what the ICO is saying.

14:32

25
26 Second of all, that there may be a distinction, may be
27 a distinction between the seniority of the individuals
28 concerned, but specifically is saying that in
29 determining whether there is a specific expectation of

14:32

1 privacy arising in the particular circumstances, it
2 will all depend on the evidence that's available to the
3 decision maker.

4
5 That's one of the things that's not before you there. 14:33

6 There is a complete dearth of evidence before you as to
7 whether any of these civil servants who have been
8 referred to, in fact, wish to make an assertion that
9 their privacy is being interfered with. It seems to me
10 that one of the things that emerges clearly from the 14:33
11 principles is that there is an evidential burden on the
12 person making the assertion to prove it, and you don't
13 have that evidence. But it would be wrong, in my
14 respectful submission, to approach the issue on the
15 basis that there is no expectation. One must approach 14:33
16 it in a broader sense.

17 CHAIRPERSON: Yes.

18 MR. MCKAY: In fact, I was about to go on to say that
19 that is a question of fact, as Swift J noted in IAB,
20 and the Inquiry would need to resolve if evidence - and 14:34
21 as I say there is no evidence before it presently - if
22 evidence is placed before it in support of an
23 assertion, that an expectation arises in an individual
24 case. No such evidence or sufficient evidence is
25 presently before you to enable you to make that 14:34
26 decision.

27
28 On the question of risk, an application that redaction
29 should take place on the basis of risk also imposes an

1 evidential burden, but the threshold is significantly
2 higher and not significantly crossed. That is the
3 effect of the decision in Re Officer L, a case that
4 appears in my submission but I'm not quite clear that
5 it has made it to your bundle. It is a
6 well-established and uncontroversial principle. Again,
7 there is no evidence currently before the Inquiry to
8 enable it to make that determination.

14:34

10 Second, there is no basis in law for a class exemption
11 in respect of either relevancy, privacy or risk, and
12 certainly not one upon the grounds of expediency.
13 Indeed, it is antithetical to the correct approach to
14 the determination of such issues, which requires a
15 careful balancing of important but often competing
16 rights by the Inquiry that is the exercise of
17 proportionality in action. An application needs to be
18 made specific to each case, supported by evidence, and
19 a determination made by you, the chairman.

14:35

14:35

20
21 Equally, there is no basis in law for a conclusion that
22 membership of a particular class in the present case -
23 the civil servants - of itself automatically excludes
24 the possibility of an expectation of privacy arising in
25 an individual case.

14:35

14:36

26
27 Sir, is there anything arising about the submissions
28 made so far on the issue of civil servants?

29 CHAIRPERSON: No. No, thank you.

1 MR. MCKAY: I'll just turn to suspects, if I may. The
2 Police Ombudsman agrees with the Inquiry counsel's
3 analysis that the names of suspects in any of the four
4 categories identified should not be redacted at this
5 stage, in addition to the reasons set out in her
6 written submissions.

14:36

7
8 To adopt the language of the Supreme Court in
9 Sutherland v HM Advocate, none of the conduct - and
10 picking up on Mr Henry's submission this morning,
11 that's what's relevant here, the nature of the
12 conduct - none of the conduct engaged in is capable of
13 respect within the scheme of values which the
14 Convention exists to protect and promote.

14:36

15
16 Although neutral on the issue, the Police Ombudsman
17 submits that naming the suspects a decision plainly
18 open to the Inquiry and supported by the existing
19 jurisprudence. That will need to be, as you have
20 previsioned in fact today, considered on a case by case
21 basis in due course.

14:37

22
23 Further, and in addition in developing this point, a
24 couple of practical or procedural issues may arise
25 based on the submissions you have heard this morning.
26 First, the Inquiry must have before it a relevant
27 application under Rule 12 in order to consider
28 derogation from full disclosure, and it's become
29 apparent that that's not before the Inquiry as things

14:37

1 stand.

2
3 Second, it's not clear to the Police Ombudsman that
4 anyone other than the suspect can make the assertion of
5 nondisclosure on the grounds of privacy, although it 14:38
6 may be possible for a public authority to advance
7 alternative grounds for the withholding of material on
8 behalf of a third party such as, for example, prejudice
9 to an investigation or an ongoing trial. That is not
10 the case in respect of privacy. This is an important 14:38
11 issue of standing, we say, and may give rise to a
12 procedural requirement to take reasonable steps to
13 either invite the suspects who may be named to make
14 such an assertion, if they wish to do so, and/or put
15 them on notice of the intention to release their names 14:38
16 to the public domain and invite them to provide any
17 objections to such a cause.

18
19 Sir, unless the Police Ombudsman can assist you
20 further, those are additional submissions she wishes to 14:38
21 make in addition to those she has already filed in
22 writing.

23 CHAIRPERSON: I am interested in exploring something
24 which you have just said, Mr. McKay, which I think ties
25 in with some of your observations in your written 14:39
26 submissions, and it is do with the nature of the
27 conduct engaged in.

28 MR. MCKAY: Yes.

29 CHAIRPERSON: As I understand what you have said this

1 morning, you would say that none of the conduct engaged
2 in is capable in respect of the sphere for which the
3 Convention exists, and accordingly the names of the
4 suspects should not be redacted at this stage?

5 MR. MCKAY: Correct, sir. The underlying analysis for 14:39
6 that focuses on the word "respect" in Article 8, which
7 hasn't been emphasised particularly well significantly
8 so far when reference has been made to it. But the
9 rationale in Sutherland was the right to respect for
10 private and family life. The Supreme Court justices in 14:40
11 that case took that through to its logical conclusion,
12 that where an individual is engaging in activity that
13 is not deserving of respect, no expectation of privacy
14 can in those circumstances arise.

15 CHAIRPERSON: well, I'm just wondering how that falls 14:40
16 to be determined. You've explained in your written
17 submissions, for example at paragraph 24, that:

18
19 "...is that the nature of the conduct or offending,
20 where and how it occurred, would be significant in 14:40
21 determining whether an objective expectation of privacy
22 arises."

23
24 So that's slightly different from just saying that
25 because someone is a suspect, their name should not be 14:40
26 redacted. I think what that would convey to me is that
27 if someone is a suspect then a little bit more
28 consideration should be given to whether or not their
29 name should be redacted.

1 MR. MCKAY: It is essentially comes back to the
2 application of Stage 1 --

3 CHAIRPERSON: Yes.

4 MR. MCKAY: -- that I deal with at paragraph 14 of the
5 written submissions, and that is the adoption in
6 Bloomberg by the Supreme Court of the Court of Appeal's
7 analysis in Murray, where it identifies, I think,
8 non-exhaustive factors to determining whether the
9 expectation arises. Certainly, these are the

10 principles that the Supreme Court in JR 38 found
11 particularly persuasive. JR 38, sir, you might recall
12 the case, was a young rioter, I think in Derry,
13 Londonderry/Derry, who was caught on camera by a
14 reporter and it was proposed that his -- in fact, his
15 photograph did appear in the local and regional press,
16 and a challenge was brought against it.

17 CHAIRPERSON: Yes, I know the case but in that case the
18 question was whether the publication of his photograph
19 was a breach of his Article 8 rights. One of the
20 factors, despite his youth which contributed to the
21 court concluding that there was no breach, was the
22 nature of the activity that he was engaged in.

23 MR. MCKAY: Sir, yes.

24 CHAIRPERSON: He was pictured rioting. But that's not
25 what we're talking about, we're talking about the
26 question of disclosing the names of individuals who
27 were investigated by the police, and that investigation
28 will no doubt have been triggered by all sorts of
29 different pieces of information. But it is highly

1 unlikely, I'm assuming, that any of that will
2 constitute photographs of them actually engaged in
3 terrorist activity.

4 MR. MCKAY: The issue isn't whether it was
5 photographed, the issue is whether it is in the public 14:43
6 domain. The taking of the photograph was incidental in
7 JR 38, the question was the publication of him engaging
8 in the conduct. The question that would then fall to
9 be asked, in my submission, would be - in relation to
10 the suspects - to what extent is the nature of the 14:43
11 conduct that they have engaged in already in the public
12 domain? Has there been, for example, a trial? We know
13 there has been at least one criminal trial, for
14 example. So, in relation to that individual, it seems
15 to me unsustainable that one could sensibly make the 14:43
16 case for the redaction of the name that everyone will
17 know we're talking about.

18 CHAIRPERSON: I don't think anybody would quarrel with
19 that. The more difficult question surely is what's to
20 be done with someone who is investigated as a suspect 14:43
21 and who, in accordance with the law in Bloomberg, is
22 entitled, at least as a starting point, to protection
23 of that fact from publication.

24
25 Now, the investigation is into whether or not he 14:44
26 committed a terrorist act. Let's assume he's a suspect
27 for that. You're not saying surely that just because
28 he's a suspect, he doesn't deserve protection of the
29 fact of the investigation?

1 MR. MCKAY: No, I'm not saying that. We're just
2 saying -- in fact we are saying the opposite. The
3 starting point is he is entitled to the expectation of
4 privacy. What we're saying is that one must then
5 follow a methodology to reach the outcome. One of the 14:44
6 considerations that you will have regard to is whether
7 the nature of the conduct that was engaged in in a
8 public place. Or, for example, if it went to
9 membership of a proscribed organisation, that is not
10 something that would be deserving of protection because 14:44
11 of its nature. So, one comes back to what might be
12 called the Murray factors and works through them.

13
14 But let me make it clear, the Ombudsman isn't being
15 declarative about what any of the outcomes should be 14:45
16 but rather what the principles are.

17 CHAIRPERSON: The nature of the activity, as you would
18 see it in the Murray interest, is a question of the
19 extent to which it's public knowledge?

20 MR. MCKAY: Or takes place in the public domain. I 14:45
21 think Kinlough is a better example, sir. You are
22 talking in Kinlough about an observation of a suspect
23 on the streets of Glasgow by police officers without
24 the necessary authorisation in place. What the Supreme
25 Court said in Kinlough is the activity taking place in 14:46
26 a public place wasn't something that was deserving of
27 respect for his rights under Article 8 of the
28 Convention. That would be the same broad analysis that
29 would take place in relation to that aspect of whether

1 you decide to redact or not redact suspects' names.

2 CHAIRPERSON: So how am I going to follow that up? Am I
3 going to have to conduct some sort of inquiry of PSNI
4 as to the basis of their suspicion for each individual
5 suspect?

14:46

6 MR. MCKAY: No, no. The real question will be to what
7 extent their involvement in the conduct that you are
8 concerned with is already in the public domain for the
9 purposes of that principle.

10 CHAIRPERSON: But won't that require me to ask PSNI why 14:47
11 they suspect this person?

12 MR. MCKAY: It may do. It may already be obvious for
13 the reasons we have described; there has already been a
14 public trial and publicly available judgment about
15 that.

14:47

16 CHAIRPERSON: I think that's unlikely because in that
17 situation, we will not be taking up terribly much time
18 to consider it, that would be a perfectly obvious
19 decision. But there will be many, I assume, where the
20 decision is far more difficult and a far more nuanced 14:47
21 consideration will need to be taken into account. If
22 the nature of the conduct that the person is engaged in
23 is something I have to take account of, then I need to
24 know how I'm going to go about that.

25 MR. MCKAY: well, sir, forgive me, first of all I am 14:47
26 only trying to help the Inquiry. Second of all, the
27 nature of the conduct is the conduct you're concerned
28 with, so it's conduct that you will already be aware of
29 and may be germane to the Inquiry's Terms of Reference.

1 There ought not to be anything surprising about the
2 nature of the conduct in issue, unless we're talking at
3 cross purposes. We are referring to suspects.

4 CHAIRPERSON: Yes.

5 MR. MCKAY: So there must be information available that 14:48
6 points to them as being suspects. What we wouldn't
7 anticipate is there being some prolonged inquiry as to
8 what the nature of that evidence is. I mean, certainly
9 part of that inquiry would be whether the nature of
10 that evidence supports the fact that it was taking 14:48
11 place in a public place.

12
13 Taking a hypothetical example, a conspiracy taking
14 place in a safe house is not taking place in a public
15 place, but other conduct that might have been and may 14:48
16 be the subject of - again hypothetically, I'm not
17 suggesting this has arisen in this case - took place in
18 a directed surveillance operation on the streets of
19 Belfast or Omagh or some other location within the
20 United Kingdom. Well, if that is part of the evidence 14:49
21 that forms the basis upon identifying that individual
22 as a suspect, that is conduct that took place in a
23 public place and is not deserving of the rights
24 afforded to that individual under Article 8 of the
25 Convention. 14:49

26
27 Sir, you are absolutely right, of course. This is a
28 very nuanced decision for you to make and a difficult
29 one. On behalf of the Ombudsman, we're attempting to

1 identify in a sense a route to the decision.

2 CHAIRPERSON: would that conduct have to constitute
3 criminal conduct?

4 MR. MCKAY: It would have to constitute conduct not
5 deserving of the rights afforded under the Convention. 14:50
6 It may be criminal but it may fall short of criminal.
7 For example, in many of the well-known privacy cases,
8 it's involved engaging in recreational drug use or
9 other related activity where the courts have held that
10 the nature of that activity isn't something that would 14:50
11 be deserving of respect under the Convention. But it
12 is an evaluative exercise.

13 CHAIRPERSON: Yes, all right. Thank you. Did that
14 conclude your submissions?

15 MR. MCKAY: It did. 14:50

16 CHAIRPERSON: Thank you very much.

17 MR. GREANEY: Sir, thank you. We are now going to hear
18 from Michael Smyth on behalf of the Bereaved Families
19 and Survivors, represented by John McBurney Solicitors.

20 CHAIRPERSON: Good afternoon, Mr. Smyth. 14:51

21 MR. SMYTH: Good afternoon, Chairman.

22
23 By way of introduction, I appear for the John McBurney
24 Core Participants, and I am assisted in that by my
25 learned friend Ms. McMullan who is here today, and also 14:51
26 by Kings Counsel Alan Kane, who I understand is
27 participating via the online link.

28
29 Can I say, sir, that at the outset we rely primarily on

1 the written submissions that were provided to the
2 Inquiry by us on 30th April and on 7th May. Those are
3 set out at pages 45 to 57 of the submissions bundle.
4

5 I'd like to take this opportunity to make some brief 14:52
6 points on behalf of the John McBurney Core Participants
7 regarding the two issues which are under consideration
8 in today's proceedings. Prior to doing so, I would
9 first like to endorse the provisional view set forth on
10 both of those issues as presented by counsel to the 14:52
11 Inquiry in his note dated 14th May. All of the
12 comments that I will make are made conscious of the
13 fact that the degree of redaction being considered at
14 this stage is redaction or otherwise to the Core
15 Participants as opposed to the issue that will be dealt 14:52
16 with at a later time, namely redaction from the general
17 public.

18
19 If I could deal firstly with the issue of the redaction
20 of names of junior civil servants. On behalf of the 14:52
21 John McBurney Core Participants, I would express their
22 dissatisfaction at the apparent diluted candour which
23 they perceive in the approach which has been taken by
24 both HMG and the Secretary of State. I would further
25 take this opportunity, Chairman, to reiterate their 14:53
26 full confidence in the Inquiry to strongly discourage
27 such an approach in order to fully maintain the
28 openness and transparency of these proceedings.
29

1 In respect to the submission by HMG that there should
2 be a redaction of junior civil servants' names on a
3 class basis, it is important, we feel, to re-emphasise
4 the question as was framed by Fordham J, which we have
5 quoted in our written submissions at page 47 of the
6 bundle, which is namely this:

14:53

7
8 "Judges should not write a judgment asking is there a
9 necessity for giving this name, the question has to be
10 whether there is a necessity for protecting someone's
11 identity."

14:54

12
13 The HMG submission to the Inquiry on redaction by class
14 is in direct contradiction, we feel, to the legal
15 authorities, all of which have been properly considered
16 by counsel to the Inquiry. It is the hope of the John
17 McBurney Core Participants that the Inquiry will
18 strongly resist any impracticalities which might be
19 suggested insofar as they might enable those legal
20 authorities to be circumvented.

14:54

14:54

21
22 The final point that I will make on this issue of
23 redaction of the names of junior civil servants, sir,
24 is to say that regrettably this Inquiry is taking place
25 almost 27 years after the Omagh bombing. That passage
26 of time has significance in terms of the career
27 progression, and in some cases retirement, of the
28 junior civil servants who are now being discussed.
29 That is a real world consideration for the Inquiry to

14:54

1 take into account as it moves forward.

2
3 On the second issue under consideration today, the
4 redaction or the proposed redaction of names of
5 individuals suspected of involvement in the Omagh 14:55
6 bombing or in other related terrorist incidents, may I
7 say this: On behalf of the John McBurney Core
8 Participants, the provisional view on the redaction of
9 suspects' names as expressed this morning by counsel to
10 the Inquiry has been warmly received, as it has clearly 14:55
11 taken into account their early concerns.

12
13 In particular, the John McBurney Core Participants'
14 strongly shared objection was that the Inquiry, when
15 looking at all the related terrorist incidents that 14:56
16 occurred in 1997 and 1998, should not hesitate to bring
17 into the light for their consideration the identity of
18 each and every suspect connected to any of those
19 incidents, regardless of whether they were dissident or
20 otherwise. 14:56

21
22 Counsel to the Inquiry has invited comment from Core
23 Participants on the four categories which were
24 identified at paragraph 25 of his note to the Inquiry.
25 Can I say, Chairman, that we have no contrary view to 14:56
26 either the categorisations used or to the proposed
27 degree of redaction set out.

28
29 Thank you, Chairman, for the opportunity to make these

1 oral submissions and have them added to our written
2 submissions. Is there anything that you would wish me
3 to comment further upon, sir?

4 CHAIRPERSON: There is just one thing I would like to
5 be clear about. I think from what you've just
6 explained, you're content with the general approach
7 suggested by counsel to the Inquiry in relation both to
8 identifying the four categories and to identifying the
9 approach that should be taken in each category?

14:57

10 MR. SMYTH: That's correct, sir.

14:57

11 CHAIRPERSON: But there was one thing in your written
12 submissions that seemed perhaps to me to go a bit
13 further than that, and I would maybe just like to be
14 clear about it. At paragraph 13 in the submissions in
15 relation to this matter, you set out that all suspects
16 should be named unless there is clear and reliable
17 exonerating intelligence or evidence which confirms
18 that they were wrongly identified as suspects in the
19 first place. That seems to be quite a far-reaching
20 proposition.

14:57

14:57

21 MR. SMYTH: At the point that that paragraph was
22 drafted, we hadn't yet had sight of counsel to the
23 Inquiry's note. That paragraph perhaps looks further
24 down the line towards the issue of redaction from the
25 general public and under what circumstances that might
26 be permissible. At this stage dealing with redaction,
27 only two are against the Core Participants. I'm not
28 sure that that's a point which needs to be dealt with
29 today, but it can be expanded upon at the relevant

14:58

1 stage.

2 CHAIRPERSON: Yes. That's helpful, thank you. I just
3 wondered really where the concept of the presumption of
4 innocence would sit within that. But that's something
5 you can help me with at a later stage, if necessary. 14:58

6 MR. SMYTH: We will do. Thank you, sir.

7 CHAIRPERSON: Thank you.

8 MR. GREANEY: Thank you, Mr. Smyth. Mr. McGuckin
9 appears on behalf of the families represented by Logan
10 and Corry, Campbell and Haughey and Roche McBride. I 14:58
11 have had the opportunity to speak to him on a number of
12 occasions over the course of the day, including at
13 lunchtime. He would simply wish me to indicate on
14 behalf of the families that he represents that they are
15 entirely supportive of the position expressed by 14:59
16 counsel to the Inquiry this morning.

17 CHAIRPERSON: Well, that's helpful. Thank you.

18 MR. GREANEY: I've also had an opportunity to speak to
19 Ms Rountree, who appears on behalf of the Rush family,
20 represented by Elev8 Law. She similarly has explained 14:59
21 to me that she wishes me to indicate on her behalf and
22 on behalf of the Rush family that they are entirely
23 supportive of the submissions made this morning by
24 counsel to the Inquiry.

25 CHAIRPERSON: And neither wish to present any further
26 submissions? 14:59

27 MR. GREANEY: As I understand it, neither wishes to
28 present any further oral argument to you. So, we are
29 grateful to them.

1
2 Next then, sir, we turn to receive submissions on
3 behalf of the media organisations. I'm going to ask
4 Mr. Sean Mullan, who is immediately to my right, to go
5 to the lecture and to make the submissions that he 15:00
6 wishes to make orally by way of supplementing or
7 developing his written submissions on behalf of UTV,
8 The National Union of Journalists, BBC Northern
9 Ireland, and RTÉ.

10 CHAIRPERSON: Mr. Mullan. 15:00

11 MR. MULLAN: Good afternoon, sir. Hopefully you can
12 hear me.

13
14 Sir, I am here today representing the media
15 organisations, BBC Northern Ireland, UTV, RTÉ, and the 15:00
16 National Union of Journalist. I am instructed by
17 Ms. Olivia O'Kane from DWF. I should say at the
18 outset, sir, I do intend to be very brief in respect of
19 my submissions here today.

20
21 You have had the benefit of our written submissions
22 filed on 12th May. At that stage we had not had sight
23 of the very helpful note of counsel to the Inquiry. We
24 have now had sight of that note from the counsel to the
25 Inquiry, and we respectfully agree with the content of 15:01
26 that note, and we would adopt the submissions made
27 therein in respect of the approach to be taken, and the
28 approach in regard to the naming of suspects.

1 I should say just for clarification in terms of the
2 naming of junior civil servants, we take no issue in
3 respect of that. We leave that as a matter for the
4 Inquiry, sir.

5
6 In terms of the written submissions which we have
7 advanced, we have set out the public function of the
8 press, sir, the watchdog nature, the interests of open
9 justice, and we would rely upon those in terms of any
10 assessment or exercise that's carried out by the
11 Inquiry.

12
13 We respectfully agree, as I say, sir, in terms of the
14 Article 8 exercise that must be carried out in respect
15 of the suspects. We again agree in respect of Article
16 8(2) in the test in accordance with the law, and the
17 necessity of the protection of rights and freedoms of
18 others. What we say clearly in terms of that
19 assessment is that the Article 2 procedural rights for
20 the bereaved families and the victims are very
21 powerful, and that is obviously a weighty matter for
22 consideration for the Inquiry.

23
24 At this stage - and we are grateful, sir, for the focus
25 that was brought by senior counsel to the Inquiry in
26 terms of moving matters along - given that this is at
27 the limited stage in terms of disclosure at this stage
28 to the Core Participants, we say that the Article 10
29 rights of the media or somewhat limited in respect of

1 that. We say that there is a potential factor for
2 consideration because names going forward at this stage
3 could stimulate further input from the families, the
4 bereaved families and Core Participants. So, we say
5 that that is a factor for consideration, but accept at 15:03
6 this stage, sir, it is perhaps more limited than it
7 would be available at the more later stage in terms of
8 public disclosure.

9
10 As I say, sir, we agree with the categorisation of the 15:03
11 suspects set forth at page 105 in the note to the
12 Inquiry set out at paragraph 25 therein; the four
13 categories of the suspects in terms of the reasonable
14 expectation of privacy. Also, where there is a
15 reasonable expectation of privacy, the Article 2 15:03
16 presumption for the bereaved families would
17 counterbalance that.

18
19 Those four categories we agree with, and in terms of
20 disclosure to the Core Participants. We say that any 15:03
21 exercise in terms of that assessment, we'll leave that
22 to the Inquiry at this stage because it is on the
23 limited basis for disclosure at this stage, sir.

24
25 Unless I could be of any further assistance, sir, at 15:04
26 this stage, I tend to rely upon the written
27 submissions. As I say, we intended to keep it as
28 focused as possible.

29 CHAIRPERSON: There is just one thing I would like to

1 canvass, and it is really just of a very general
2 nature. In your original written submissions, much
3 emphasis was understandably laid upon the function of
4 the press, and the value and scope of Article 10, and
5 much was said about the principle of open justice. But 15:04
6 I think you would recognise that all of those
7 principles and statements probably form the context in
8 which Sections 18 and 19 of the Inquiries Act came to
9 be legislated for by Parliament. So in Section 18 of
10 the 2005 Act, there is the obligation to hold inquiry 15:04
11 proceedings in public. Of course, it's not an
12 unfettered obligation. Something was said about
13 reading across between open justice principles as they
14 apply in court to open justice principles as they apply
15 to an inquiry. But I'd just like to be sure there is 15:05
16 no disagreement amongst us about this issue.

17
18 If we look, for example, to Kennedy v Charity
19 Commission at paragraph 124, we see the statement:

20
21 "The considerations which underlie the open justice
22 principle in relation to judicial proceedings apply
23 also to those charged by Parliament with responsibility
24 for conducting quasi judicial inquiries and hearings."

25
26 So that's what we are doing.

27
28 But then in the very next paragraph, the court goes on
29 to say:

1
2 "The application of the open justice principle may vary
3 considerably according to the nature and subject matter
4 of the inquiry. A statutory inquiry may not
5 necessarily involve a hearing, it may be conducted in 15:06
6 other ways." And it says, "The subject matter may be
7 of much greater public interest or importance in some
8 cases than in others."

9
10 Two or three other comments of that sort are made and 15:06
11 drawn together in paragraph 128, which reads:

12
13 "Such enactments", those that create inquiries, "may go
14 into greater or less detail about how an inquiry is to
15 be conducted. The Inquiries Act of 2005 contains 15:06
16 detailed provisions about the conduct of an inquiry
17 under that Act. Other acts which provide for inquiries
18 may be less detailed. To the extent that an enactment
19 contains provisions about the disclosure of documents
20 or information, such provisions have the force of law, 15:07
21 but to the extent that Parliament has not done so, it
22 must be for the statutory body to decide questions of
23 disclosure subject to the supervision of the court. I
24 don't see the absence of a prior statement by the
25 courts that in general the principle of openness should 15:07
26 apply, subject to any statutory provisions and subject
27 to any countervailing reasons as a convincing reason
28 for not saying so now."

1 what I would understand the court to be saying - and
2 I'd be grateful for your comment on - is that open
3 justice principles apply in relation to inquiries, but
4 only subject to the statutory provisions set out under
5 which the inquiry is governed?

15:07

6 MR. MULLAN: Yes, sir, I think that is correct.

7 Obviously from the media's perspective, we want as much
8 to be aired as public as possible, subject to any
9 decision of the Inquiry to the contrary. Of course,
10 any decision made therein would only be made in certain

15:08

11 limited circumstances and for very good reasons. I
12 suppose the media approach this, very much so within
13 Northern Ireland, from the victims' perspective, a
14 victim-centric approach, in terms of trying to get

15 further information out there may lead to further

15:08

16 inquiries in due course, further information coming
17 forward. All of those matters are very important parts
18 within media function here, sir. That is what the
19 media are trying to do, they are trying to assist the
20 public in general because it is such an important topic
21 within Northern Ireland and for the bereaved families.

15:08

22 CHAIRPERSON: of course.

23 MR. MULLAN: Of course that's where we are trying to
24 focus on, and we are trying to come from the angle we
25 approach on. I accept that there is a case by case
26 basis; in due course individual assessments will have
27 to be carried out in terms of suspects. That's perhaps
28 for further down the line, so to speak, sir.

15:08

1 In terms of the aspect today, we do accept and we adopt
2 the position by counsel to the Inquiry. Our position
3 would be that the names of the suspects should go
4 forward to the Core Participants at this stage, sir.

5 CHAIRPERSON: I suppose the important point, in my mind 15:09
6 at least, is that unlike, for example, a criminal
7 trial, a statutory inquiry conducted under the 2005 Act
8 has the opportunity in appropriate circumstances to
9 hear evidence in private which cannot be published.

10 MR. MULLAN: Yes. 15:09

11 CHAIRPERSON: And that's recognised.

12 MR. MULLAN: Yes, absolutely sir. That's entirely
13 correct.

14 CHAIRPERSON: All right. Thank you very much indeed.

15 MR. MULLAN: Thank you very much, sir. 15:09

16 MR. GREANEY: Thank you, Mr. Mullan.

17
18 Sir, the next submissions you will hear are from
19 Ms. Jess Glass on behalf of the Press Association Media
20 Group, PA Media Group. She will be appearing by a 15:10
21 remote link, a video-link. We will need five minutes
22 in order to set up that link, so could I invite you to
23 rise for five minutes or until we are ready, whichever
24 is the longer?

25 CHAIRPERSON: All right. Thank you. 15:10

26
27 A SHORT ADJOURNMENT
28
29

THE INQUIRY RESUMED AS FOLLOWS

CHAI RPERSON: Mr. Greaney.

MR. GREANEY: I'm told the link is now established.

Assuming that that is so, I'm going to ask

15:16

Ms. Jess Glass to make her submissions on behalf of PA Media Group.

MS. GLASS: Good afternoon, Chairman. Can I first check that you can see and hear me?

CHAI RPERSON: We can, thank you very much.

15:17

MS. GLASS: I'm grateful to the Inquiry for facilitating my remote attendance and I do apologise for not being with you there in person.

As indicated, my name is Jess Glass. I am the law editor of PA Media, also known as the Press

15·17

Association. I do not intend to repeat the submissions made by the other parties and I do plan to be very short, but there are a few key points I would like to raise on top of my written submissions.

15·17

We respectfully submit that it is difficult to overstate the substantial public interest and the importance in transparency in these Inquiry proceedings, given the background in which it sits. We do respectfully also endorse the submissions made by counsel to the Inquiry. Although PA has limited our written submissions to the suspect name issue, we would wish to briefly touch on the issue of the junior civil

15:17

1 servants.

2
3 The traditional criticism of the practice of redacting
4 the names of junior civil servants, particularly in the
5 LAB case, is a factor that we submit should be given 15:18
6 considerable weight by this Inquiry. The underlying
7 principle that we do say the judges were reflecting
8 apply to these proceedings. In fact, we would submit
9 it would be actually artificial to only appreciate the
10 comments in the context of judicial review. 15:18

11
12 With respect, we also respectfully submit that the HMG
13 submission that the names of junior civil servants
14 should be anonymised is an overly broad approach and
15 unsupported by authority. It is our submission that 15:18
16 HMG have approached the legal test in the incorrect
17 way. It is not the case that a person should be
18 unnamed until relevance or other reasons proved under
19 the open justice principle, bearing in mind the
20 Chairman's recent comments. Instead, it is the 15:18
21 starting point is that a person should be named unless
22 there is a cogent reason to do so otherwise. That
23 cogent reason must be supported by evidence on a case
24 by case basis, we submit. We also submit that a
25 purported lack of relevance as determined by HMG does 15:19
26 not meet this test.

27
28 The Inquiry has been given the witness statement of
29 Sharon Carter made on behalf of the LIO where she says

1 that junior officials may conduct advisory and
2 management functions as opposed to decision-making
3 roles. PA would say that even advisory and management
4 functions are not insignificant.

5
6 The so-called suspect point is addressed in our written
7 submissions and I don't intend to expand further, aside
8 from the fact that our overarching submission is that
9 given the substantial public interest, all suspects
10 should be named subject to a very high bar to justify 15:19
11 anonymity, again on a case by case basis.

12
13 Unless I can assist any further, those are my
14 submissions.

15 CHAIRPERSON: She's gone. 15:19

16 MR. GREANEY: If you are still there, Ms. Glass, thank
17 you very much indeed.

18
19 Sir, finally today I'm going to invite Ms. Lara Smyth
20 to make her submissions on behalf of Mediahuis UK Ltd, 15:20
21 Mediahuis UK Ltd being the publisher of the Belfast
22 Telegraph and Sunday Life.

23 CHAIRPERSON: Ms. Smyth.

24 MS. SMYTH: Good afternoon, sir. As indicated by the
25 other parties, at this stage I don't intend to 15:20
26 duplicate either the written submissions I have
27 provided or indeed the submissions made by other
28 parties today.

1 At the outset, sir, it has been correctly emphasised by
2 your counsel and numerous parties today that the issue
3 in consideration today is one about the disclosure of
4 material to the Core Participants rather than to the
5 public at large. I think, and I paraphrase your 15:20
6 counsel in his opening remarks, that it may be, he
7 said, that Article 10 does not arise for close
8 consideration today given that we are concerned with
9 that issue, but that it will be important at a
10 subsequent stage, and I quote "where it is made or 15:21
11 proposed to be made beyond the Core Participants to the
12 public at large."

13
14 while, sir, it is certainly acknowledged, as Mr Mullan
15 did on behalf of his clients, that the issue of 15:21
16 dissemination and deployment of that material will
17 certainly engage to a very significant extent the issue
18 of Article 10, in my submission it would be wrong to
19 dismiss the relevance of Article 10 at this stage.
20 That is because, of course, those stages, Stage 1 and 15:21
21 Stage 2 as they have been framed today, are
22 inextricably linked.

23
24 As we have discussed, the second stage may be one where
25 there is dissemination beyond the Core Participants to 15:21
26 the public at large, but as a matter of fact, if the
27 material is not disclosed to the Core Participants,
28 there is no realistic prospect of that ever being
29 disclosed to the public at large. So, the approach

1 taken now by the Inquiry to this issue will directly
2 impact the ability of the public to have access to
3 information that will, as a matter of course, have been
4 deemed relevant to the Inquiry's Terms of Reference.
5 That is the important starting point, we say, that will 15:22
6 impact the ability of the public to be informed about
7 matters, and for the press to perform what you have
8 already recognised is the very important role as the
9 public's watchdog.

10
11 Turning briefly to the specific issues before the
12 Inquiry today. On the issue of redaction of the names
13 of suspects, we endorse and adopt the submissions
14 already made by your own counsel, save to emphasise the
15 fact that the procedural safeguards that will need to 15:22
16 be put in place in respect of the individualised
17 assessments, that will need to be carried out by the
18 Inquiry in due course. We would emphasise that at that
19 point, the press will need to be given the opportunity
20 to be heard. At that point in particular, 15:22
21 consideration will need to be given to the disclosure
22 of the important subject information, in particular the
23 names, to those representing the media for the purposes
24 of permitting those representations to be both informed
25 and meaningful. 15:23

26
27 Dealing with the issue of the civil servants, on behalf
28 of Mediahuis UK Ltd, we strongly contest the approach
29 advocated by the Secretary of State. It has been noted

1 on a number of occasions today that the Inquiry is at
2 an early stage, and the Inquiry will no doubt be faced
3 with many more issues of redaction and restriction
4 orders over the next number of years. But this is an
5 important point of time that will therefore set the 15:23
6 tone for this Inquiry and how the Inquiry will approach
7 matters of this nature.

8
9 The context in which this application arises, as has
10 been noted, is one in which the information sought to 15:23
11 be redacted is already protected by the significant
12 undertaking provided by the Core Participants. In
13 addition, it is in a context in which the Inquiry team
14 itself will only be disclosing the documents that are
15 truly relevant to the Inquiry's Terms of Reference. It 15:23
16 is in a context where, even today, it has been
17 emphasised on numerous occasions that the Inquiry will
18 only permit the deployment of this material once that
19 has been examined and assessed and its justification
20 has been considered. It is in that context today that 15:24
21 the Secretary of State requests that the Inquiry redact
22 information on a wholesale basis, on the basis of a
23 specific job title alone, based on entirely speculative
24 rather than specific concerns as required by the
25 authorities that have been opened to the Inquiry today. 15:24
26

27 At one stage in the Secretary of State's submissions,
28 it was said that a civil servant's identification as an
29 employee of the State could interfere with his private

1 and family life. That, in my submission, discloses the
2 fundamental issue with the application being made.
3 There is no place for hypothetical speculative concerns
4 in the balancing exercise that has to be undertaken by
5 the Inquiry.

15:24

6
7 Importantly, as will not have escaped you, sir, no
8 party, as I understand it, is making the contention
9 that the redaction of any particular junior civil
10 servant's name could never be justified on the grounds
11 of Article 8 or Article 2. What is merely being
12 restated today is the uncontroversial principle that
13 each application has to be considered on its own facts.
14 That approach is obviously consistent with the
15 well-established authorities that I don't think I need
16 to open to the court. The one being advocated today by
17 the Secretary of State is one that is not consistent
18 with those authorities and is contrary to the need for
19 cogent evidential bases before a departure from open
20 justice can lawfully occur.

15:25

15:25

15:25

21
22 Because this is at an early stage and at the opening of
23 the Inquiry, it is important that the Inquiry respond
24 robustly and firmly to this request, and affirm the
25 confidence, both for the families and for the public at
26 large, that in this Inquiry any application for a
27 derogation from open justice will be closely
28 scrutinised and only granted where it is grounded in
29 true, firm, legal and cogent evidential basis. In this

15:25

1 case, for the reasons outlined by a number of parties
2 today, there is neither, and we submit this should be
3 refused.

4
5 The only other matter, I think, Chair, for me to 15:26
6 address is the issue of the Restriction Order that has
7 been mooted as a compromise, if I can put it like that.
8 We would make two observations about that. In the
9 first instance, it isn't clear to us if such an order
10 was to be made in the alternative to granting the 15:26
11 application made by the Secretary of State what the
12 legal basis for doing so would be. That hasn't been
13 articulated today, save for an indication that of
14 course it may provide some added surety. In our
15 submission, the Chair and the Inquiry would need to be 15:26
16 very clear on the basis on which such an order would be
17 being imposed.

18
19 The second observation, Chair, that I would make about
20 that would be the risk that such an approach would take 15:26
21 would be to reverse the burden somewhat, such that it
22 would be for the media or the Core Participants, or
23 indeed a member of the public, to apply to set aside
24 that order in due course rather than for the burden to
25 be placed on the party seeking to restrict the 15:27
26 information.

27
28 unless I can address the Chair on anything in
29 particular, those would be our submissions.

1 CHAIRPERSON: I would just like to think about your
2 final submission for a moment. I think what was
3 suggested was the possibility of imposing a Restriction
4 Order if the submissions of say, for example, the
5 Secretary of State were not upheld. So, that would be 15:27
6 in circumstances where I declined to redact the names
7 of junior civil servants.

8 MR. SMYTH: Yes.

9 CHAIRPERSON: The consequence of that would be the
10 documents including those names would then be disclosed 15:28
11 to Core Participants?

12 MR. SMYTH: Yes.

13 CHAIRPERSON: I think what was suggested was that in
14 that situation, I might make a Restriction Order
15 prohibiting the disclosure of any of the information as 15:28
16 so disclosed to Core Participants to any other party or
17 person. I think would that fall within the terms of
18 Section 19 of the Act?

19 MR. SMYTH: It would, save for the fact that the Chair
20 would have to be satisfied that it was necessary to do 15:28
21 so. It wasn't clear to me, given the terms of the
22 undertaking, how the Chair could be satisfied.

23 CHAIRPERSON: You say the undertaking would be enough?

24 MR. SMYTH: I think there is an undertaking in place
25 and that is already there. I think the suggestion is 15:29
26 simply that that would copper fasten somewhat that
27 undertaking, but I'm not sure what lawful exercise
28 there could be to simply impose a further Restriction
29 Order. It may be that it would lead to nothing but,

1 from my client's perspectives, the concern is it would
2 reverse the burden that we would have to seek to set
3 aside that Restriction Order in due course, rather than
4 if the matter -- if the evidence was in due course
5 deployed, it would be as a matter of fact reportable. 15:29

6 CHAIRPERSON: Yes. Well, that's helpful. I'll think
7 about that. Thank you very much.

8 MR. GREANEY: Ms. Smyth, thank you very much.
9

10 Sir, as I explained earlier, that is, for good reason, 15:29
11 as far as we can go today. Could we finish now and
12 then we start at 10 o'clock tomorrow morning when we
13 will hear the submissions of Mr Raymond Foster on
14 behalf of the families represented by Fox Law, and then
15 finally some closing remarks by counsel to the Inquiry. 15:30
16 I don't anticipate that it will be necessary to sit
17 much beyond 11.00 a.m. tomorrow.

18 CHAIRPERSON: Yes, all right. Thank you, Mr. Greaney.
19

20 THE INQUIRY ADJOURNED TO 10.00 A.M. ON THURSDAY, 22ND 15:30
21 MAY 2025
22
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