

1 THE INQUIRY RESUMED ON MONDAY, 7TH SEPTEMBER 2026 AS
2 FOLLOWS:

3
4 CHAIRMAN: Good morning, Mr. Greaney.

10:49

5
6 SUBMISSION BY MR. GREANEY:

7
8 MR. GREANEY: Good morning, Sir. Sir, today is the
9 start of the open hearing of the applications for
10 closed material, CMROs. The process for determining
11 those applications, was set out in notes of the Inquiry
12 legal team dated the 14th of January and 6th of
13 February of this year. Since those notes were
14 circulated, the Inquiry has received both open and
15 closed CMRO applications and submissions from the
16 following organisations: His Majesty's Government,
17 (HMG); the Police Service of Northern Ireland (PSNI);
18 and counter-terrorism policing (CTP).

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20 The Inquiry has also received detailed written
21 responses and observations from non-State Core
22 Participants. And, Sir, can I say that we are grateful
23 for all of those documents which have been received.

10:50

24
25 It's important in our estimation that the purpose of
26 this hearing is clear. The hearing is intended to
27 establish, by reference to sample CMRO applications, a
28 principled and practical framework to govern the future
29 determination of other such applications.

10:50

1
2 The Inquiry has already received, and continues to
3 receive, substantial volumes of provisionally closed
4 material. And, Sir, provisionally closed material is
5 material over which material providers have informed 10:51
6 the Inquiry that Restriction Order applications will be
7 made if the Inquiry determines the material to be
8 relevant for disclosure to Core Participants.

9
10 It is anticipated by the Inquiry legal team that a 10:51
11 significant proportion of the provisionally closed
12 material will raise recurring issues concerning the
13 same and/or similar categories of sensitivity. And in
14 those circumstances it is necessary to establish
15 procedures capable of ensuring robust and where 10:51
16 possible resolution of CMRO applications in order to
17 ensure that the process does not result in unacceptable
18 delay to the progress of your Inquiry.

19
20 Sir, your determination of the sample CMRO applications 10:52
21 is intended to assist the Inquiry, assist material
22 providers and assist Core Participants by providing
23 guidance regarding the application of Section 19 of the
24 Inquiries Act 2005, to these recurring categories of
25 sensitive information. 10:52

26
27 There are, in our estimation, four important features
28 of the CMRO determination process. First, your rulings
29 will provide guidance only. They are intended to

1 identify the categories of information which are
2 capable of justifying a Closed Material Restriction
3 Order and to illustrate, through the sample documents
4 the types of information and sensitivities in respect
5 of which you are likely to conclude that a CMRO is 10:52
6 necessary, or not necessary, in the public interest.
7 And your rulings, Sir, as we understand it, are not
8 intended to operate as a substitute for the individual
9 determination of future applications by you but rather
10 to make those future determinations focused and 10:53
11 efficient.

12
13 Second, every future document or part of a document
14 over which a CMRO is sought will be considered by you
15 Sir, we know. The existence of approved categories and 10:53
16 guidance arising from the sample determinations will
17 not remove the requirement for a decision by you, Sir,
18 in respect of the individual material. Rather, the
19 purpose of the CMRO categories and the sample
20 determinations is to provide a principled framework 10:53
21 through which future applications may be considered in
22 a manner that is efficient, consistent and
23 proportionate and, in most cases, without the need for
24 future substantive hearings.

25 10:54
26 Third, it is, it seems to us, likely inevitable, that
27 provisionally closed material will arise which does not
28 fall squarely within an established CMRO category, or
29 which raises issues not considered through the sample

1 determinations. In such circumstances, bespoke CMRO
2 applications will be required supported, for example,
3 by a bespoke damage assessment. Any such applications
4 will be determined by you, Sir, on an individual basis
5 and may require a further CMRO hearing.

10:54

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7 Fourth, it is not anticipated that this hearing will
8 itself result in the release of a substantial volume of
9 provisionally closed material into open. The CMRO
10 sample documents were not selected on the basis that
11 they are the most relevant, significant or
12 representative provisionally closed documents; instead
13 they were chosen because they illustrate the various
14 categories of sensitivity relied upon by the CMRO
15 applicants and, in many cases, provide a basis, an
16 appropriate basis for you to test and determine the
17 boundaries of those categories, Sir.

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18
19 Accordingly, the primary purpose of this exercise is to
20 establish, as we've said, a principled framework. And
21 then once established, those principles can be used by
22 material providers when deciding whether to seek a CMRO
23 and by the Inquiry legal team when considering such
24 applications. However, the determination of whether a
25 CMRO should be granted in any individual case will, of
26 course, remain a matter for you.

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27
28 Sir, in saying all of that, we need to be clear that we
29 know that your objective remains unchanged, namely, to

1 conduct open justice, ensuring that the maximum amount
2 of information is publicly disclosed, consistent with
3 the proper protection of those public interests which
4 Parliament has recognised may justify restriction.

10:56

6 In broad terms, this hearing involves the consideration
7 of six interrelated questions. First, whether the
8 proposed CMRO categories accurately identify classes of
9 information capable of engaging recognised public
10 interests protected by Section 19 of the Act.

10:56

12 Second, whether the evidence advanced by the CMRO
13 applicants establishes that disclosure information
14 falling within those categories creates (or may create)
15 a real and sufficient risk of harm to the relevant
16 public interest such as to justify the making of a
17 Closed Material Restriction Order.

10:56

19 Third, whether the restrictions sought are necessary
20 and proportionate having regard to the nature and
21 extent of the harm relied upon and the Inquiry's
22 obligation to conduct its proceedings as openly and
23 transparently as possible.

10:57

25 Fourth, whether the public interests relied upon by the
26 CMRO applicants can be adequately protected by less
27 restrictive measures.

10:57

29 Fifth, where the balance falls between the public

1 interest in openness, transparency and public scrutiny
2 on the one hand, and the competing public interest
3 relied upon in support of the applications on the
4 other.

5
6 Sixth, how the proposed CMRO categories should be
7 applied in practice to the sample documents.

8
9 So, sir, that is all we propose to say, at least at
10 this stage, in introducing this hearing. We'll next
11 invite submissions and do so in the following order;
12 first the applicants for Closed Material Restriction
13 Orders in the following order, first of all HMG, so
14 submissions from Ms. Fee. Secondly, PSNI represented
15 by Mr. Henry. And, third, CTP, represented by
16 Mr. Goss.

17
18 Sir, once you have heard from those applicants, we
19 anticipate that you will wish to hear responses as
20 follows: First, from Mr. Aiken on behalf of the Police
21 Ombudsman for Northern Ireland; second, from
22 Mr. Southey on behalf of the Core Participants
23 represented by Fox Law; thirdly, from Mr. Mansfield on
24 behalf of the Core Participant represented by Elev8
25 Law; fourth, from Mr. Kane on behalf of those Core
26 Participants represented by John McBurney Solicitors;
27 and, fifth, from Mr. Toal on behalf of the Core
28 Participants represented by PA Duffy, Campbell and
29 Haughey and Roche McBride Solicitors.

1 So, Sir, as we just indicated we will first of all
2 invite submissions from Ms. Fee on behalf of His
3 Majesty's Government

4 CHAIRMAN: Thank you, Ms. Fee.

5
6 SUBMISSION BY MS. FEE:

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8 MS. FEE: Thank you, Sir. Sir, the Inquiry has
9 recognised, from an early stage, and indeed, Chairman,
10 from your first video statement explaining the Terms of 10:59
11 Reference that the nature of the issues which fall for
12 investigation in this Inquiry inevitably require the
13 Inquiry to look at sensitive information. You've made
14 clear on several occasions the importance of open
15 justice but have also recognised that the nature of 10:59
16 some of the material which the Inquiry will need to
17 analyse means that closed hearings may be required.

18
19 The Inquiry legal team have produced a number of notes
20 to explain the process around Closed Material 11:00
21 Restriction Orders or CMROs and we have heard about
22 that from Inquiry Counsel this morning.

23
24 HMG applies, Sir, under Section 19 of the Inquiries Act
25 2005 for Closed Material Restriction Orders. HMG's 11:00
26 written submissions at pages 25 to 42 of the bundle set
27 out the legal principles which HMG consider apply in
28 relation to the application. Inevitably, the detail of
29 the application is contained in separate closed

1 submissions addressing the damage arguments for each
2 individual document on a document-by-document basis.
3 An open damage argument at pages 43 to 47 of the bundle
4 sets out, as far as is possible in open, evidence of
5 the kinds of damage which might accrue and the
6 principled underpinnings of HMG's position.

11:00

7
8 If I could address you, first of all, Mr. Chairman, on
9 the legal principles. The Inquiry may consider that
10 there is a significant measure of agreement between all
11 the Core Participants in relation to the applicable
12 legal principles. On the applicable legal framework
13 there is a significant degree of consensus that public
14 immunity case law, PII, is of assistance in the context
15 of CMRO applications. While I'm very conscious,
16 Mr. Chairman, that each of the Core Participants will
17 address you as to their own position, in case it
18 assists your note some of the references for that
19 consensus are in relation to the State Core
20 Participants, HMG submissions at paragraph 3, page 25;
21 CTP's submissions at paragraph 9, page 50; PSNI
22 submissions at paragraph 10(g) on page 71 of your
23 bundle.

11:01

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24
25 In relation to the families, Mr. Chairman, those
26 families represented by PA Duffy, Campbell and Haughey
27 and Roche McBride Solicitors address this at
28 paragraph 6 on page 157, noting "it is common ground
29 that the jurisprudence on PII assists."

11:02

1 The families represented by John McBurney Solicitors
2 recognise that "the law on this matter is fairly well
3 settled and established," and that is at page 193.

4
5 There is an addendum on behalf of those families 11:02
6 represented by Elev8 Law, and that appears at paragraph
7 8, page 210 referring to both the Supreme Court
8 Thompson case and also PII.

9
10 The families represented by Fox Law suggest "that a 11:02
11 cautious approach should be taken to apply PII case law
12 in an inquest context to this Inquiry," that's at
13 paragraph 19, page 173.

14
15 They cite two reasons which could be described as (a) a 11:03
16 caution that the Omagh bomb has its own specific
17 context and regard must be had to material already in
18 the public domain; and (b) that there are more
19 mitigating measures available to an inquiry than there
20 are in a PII hearing. One of the examples given is 11:03
21 that the Inquiry can use the OSRO procedure.

22
23 Submissions on behalf of the families do recognise, at
24 paragraph 32 on page 178, that national security
25 concerns can provide a powerful justification for 11:03
26 keeping material confidential.

27
28 Concerns about the particular context of the Omagh
29 bomb, the relevance of material already in the public

1 domain, the need to look at each document individually
2 on its own merits, the impact of the passage of time,
3 the relevance of mitigating measures, including the
4 OSRO procedure and others, amongst other points, are
5 matters raised by a number of Core Participants.

11:04

6
7 In HMG's submission, Mr. Chairman, none of those issues
8 which would all fall for consideration as part of the
9 CMRO process undermine the relevance and applicability
10 of PII case law. This reality has been almost
11 universally accepted and HMG welcomes this pragmatic
12 approach.

11:04

13
14 Similarly, Mr. Chairman, all of the submissions on
15 behalf of the families, which include case law make
16 reference to the recent Supreme Court case which arose
17 out of the Thompson Inquest. I know, Mr. Chairman,
18 that you are aware of that decision. The State Core
19 Participants address this from HMG's perspective at
20 paragraph 12, page 29; CTP at paragraph 9, page 50; and
21 PSNI, at paragraph 44, page 84.

11:04

22
23 The families represented by PA Duffy, Campbell and
24 Haughey and Roche McBride Solicitors address it at
25 paragraph 7 page 157. The families represented by Fox
26 Law, at paragraph 31 on page 177. And the Elev8 Law
27 addendum on behalf of the families they represent at
28 paragraph 9, page 210.

11:05

1 So, Mr. Chairman, there appears to be consensus that
2 this decision is relevant to your own determination of
3 the CMRO applications.
4

5 In terms of the categories themselves, there is, again, 11:05
6 at least some measure of agreement. None of the State
7 CPs, Mr. Chairman, take an in principle objection to
8 any of the categories. The families represented by PA
9 Duffy, Campbell and Haughey and Roche McBride
10 Solicitors at paragraph 10(a) page 159 explain that 11:05
11 they do not object to the categories as a descriptive
12 and organisational framework. They make a point made
13 by other family Core Participants "that each document
14 must be considered on its merits."
15

16 The families represented by Fox Law seek amendments to 11:06
17 the categories for reasons including public domain,
18 passage of time and use of the OSRO procedure. The
19 submissions on behalf of the families represented by
20 Fox Law do accept, however, at paragraph 17, page 173, 11:06
21 that all of the matters which they raise can and
22 presumably will be considered as part of the balancing
23 exercise following the application of categories.
24

25 The submissions of the families represented by Elev8 11:06
26 Law suggest that the proposed parameters for the
27 applications are too broad, at paragraph 2, page 166.
28

29 HMG's submission, Mr. Chairman, is the Inquiry's note

1 of August 2026, some of which you've heard about today
2 in oral submissions from Inquiry Counsel, when read in
3 conjunction with the Inquiry's previous notes on the
4 CMRO procedure addresses the concerns raised. The note
5 clearly explains, at paragraphs 3 and 4 page 213 to 11:07
6 214, the purpose of the CMRO framework and sets out key
7 features of the CMRO determination process. I won't
8 rehearse what Inquiry Counsel has said on that topic
9 this morning.

10
11 The Inquiry's note at paragraph 15, page 220, observes 11:07
12 that Core Participants opposing the applications do not
13 generally dispute that the public interests identified
14 by the applicants are capable, in principle, of
15 justifying restrictions under section 19 of the 11:07
16 Inquiries Act 2005. Nor is there substantial
17 disagreement about the legal framework. Against that
18 background, I do not propose to occupy the Inquiry's
19 time by opening authorities and taking you in detail
20 through the legal principles section of HMG's written 11:07
21 submission which starts at paragraph 3 on page 25 and
22 ends at paragraph 32 on page 16.

23
24 I would however, Mr. Chairman, like to briefly draw
25 your attention to some key parts of those submissions. 11:08
26 Paragraph 3 on page 26 includes an extract from a
27 Restriction Order determination made by Lord Hughes in
28 the Dawn Sturgess Inquiry. He makes a point which it
29 is perhaps important not to lose sight of:

1 "In the context of present applications restrictions
2 which are necessary in the public interest will also be
3 conducive to fulfilling my Terms of Reference because
4 they will enable me to make as much material as
5 possible available and public but yet to consider also 11:08
6 confidential material in closed hearings."

7
8 Lord Hughes also set out the provisions of
9 Section 19(4) of 2005 Act which, of course, includes
10 reference to damage to national security. Lord Hughes 11:09
11 made specific comment on the implications of relevance
12 noting:

13
14 "Where the potential relevance is high, the public
15 interest in open justice is similarly high. Where the 11:09
16 potential relevance is marginal, the public interest in
17 open justice, while still present, is correspondingly
18 lower."

19
20 A similar point Mr. Chairman, was made by Mr. Justice 11:09
21 Schofield in the Springhill Inquest and this is
22 referenced at paragraph 16, at page 31 of HMG's
23 submissions. Mr. Justice Schofield remarked that there
24 was some information over which PII was claimed that
25 could have been dealt with by redaction on grounds of 11:09
26 relevance, namely administrative markings on
27 intelligence reports and documents. Such markings do
28 not speak to the substance of the intelligence
29 information. And Mr. Justice Schofield stated:

1 "In other cases, such as this one, they were proposed
2 for PII redaction because it might be argued that they
3 are in some way potentially relevant, showing certain
4 connections or commonalties between documents, but of
5 such limited evidential value or materiality that the 11:10
6 relevant balancing exercise resolves decisively in
7 favour of non-disclosure."

8
9 He said:

10
11 "I have concluded that on either basis in this case it 11:10
12 is appropriate for these proposed redactions to be
13 upheld. They could properly be said to be irrelevant
14 but, alternatively, the public interest in their
15 disclosure for the purposes of these proceedings is 11:10
16 minimal."

17
18 Mr. Chairman, I would not propose to take you through
19 the Binyam Mohamed case or subsequent series of PII
20 case law. It's set out in some detail in HMG's 11:11
21 submissions from page 27 of the bundle, and indeed in
22 the submissions of several other Core Participants. I
23 will, with your permission, Mr. Chairman, take you to
24 HMG's submissions on the Supreme Court decision in
25 Thompson which almost all the Core Participants have 11:11
26 referred to as being relevant to CMRO process. And
27 this starts at paragraph 17 of HMG's submissions at
28 page 32 of the bundle.

1 "The UK Supreme Court considered the lawfulness of the
2 decision of the Coroner in the Thompson Inquest to
3 disclose gists. The Secretary of State for Northern
4 Ireland contended that the gist offended the policy of
5 NCND as they would either confirm or deny the direct 11:11
6 involvement of informers in the events leading to the
7 death of Mr. Thompson."

8
9 The Supreme Court concluded as follows in respect of
10 the chilling effect that a departure of from NCND would 11:12
11 entail (paragraph 33):

12
13 "It is not simply a question of how a CHIS who may have
14 worked or may work for the RUC, PSNI, Army or one of
15 the intelligence agencies in Northern Ireland might 11:12
16 feel about disclosure of information of a certain kind.
17 It is also a question of how a CHIS for the British
18 State in other contexts (say in dangerous circumstances
19 in a foreign country) might feel if they saw that the
20 British State was liable to disclose such information 11:12
21 in such a case and what inference they might then draw
22 about the risks they would be running if they supply
23 secret intelligence to their own handlers."

24
25 And later in the same paragraph, Mr. Chairman, it is 11:12
26 indicated:

27
28 "Neither the Secretary of State nor the Chief Constable
29 has a monopoly in terms of practical experience and

1 expertise in running CHIS in the field and assess their
2 likely reactions to learning the British State may have
3 been unduly careless in risking the exposure of the
4 identities of other informants or agents."

11:13

6 In respect of the question of the weight to be given to
7 the view of the Secretary of State in terms of damage
8 to the national interest, which is informed by the
9 intelligence communities and other relevant state
10 entities, the Supreme Court indicated at paragraph 35
11 that:

11:13

13 "If the relevant public authority contends that the
14 public interest requires that the material should not
15 be disclosed or admitted in evidence, the Court will
16 accept the authority's assessment as to the existence
17 and extent of the risk posed to the aspect of the
18 public interest which is relied upon, such as national
19 security as in this case, unless that assessment is
20 irrational, is unsupported by any evidence or the
21 authority has failed to take relevant matters into
22 account. But it is for the Court to determine whether
23 that aspect of the public interest outweighs the
24 competing aspect of the public interest involved with
25 the due administration of justice."

11:13

11:14

11:14

26
27 It continues at paragraph 38:

28
29 "In assessing national security, it is the Secretary of

1 State who has the democratic authority and
2 institutional competence to make the relevant
3 assessment and the degree of respect due to be given to
4 his assessment by a court has to take account of this."

11:14

6 In closing paragraphs, paragraph 163 of the judgment,
7 the Supreme Court continued:

9 "However, the national security interest in attempting
10 to meet the threat of terrorism in Northern Ireland
11 should not be underestimated. The Supreme Court
12 identified a number of failings in the Coroner's
13 decision and the subsequent Northern Ireland High Court
14 and Court of Appeal majority decisions. It was not
15 correct for the Coroner to have proper regard to the
16 assertions of risk of damage contained in the
17 Minister's certificate, rather, the assessment should
18 have been accepted unless there was no evidence to
19 support that assessment or it was Wednesbury
20 irrational."

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11:15

22 That's paragraph 138 of the judgment.

24 The Coroner incorrectly concluded that there was no
25 need to carry out a balancing exercise. The primary
26 reason given by the Coroner to disclose gists was that
27 they mitigated against the real risk of serious harm to
28 the public interest. Absent any finding that there was
29 no evidence to support the Minister's assessment or

11:15

1 that the assessment was Wednesbury irrational, it was
2 not open to the Coroner to conclude that the gist
3 mitigated or prevented any real risk or serious of harm
4 to the public interest."

11:16

6 That, Mr. Chairman, is at paragraph 140 of the
7 judgment.

9 The incorrect attribution by the judge and the majority
10 of the Court of Appeal of a wider margin of discretion
11 to the Coroner in respect of her determination of the
12 Wylie principles, the UK Supreme Court stated at
13 paragraph 158:

11:16

15 "The Coroner had to determine whether there was
16 evidence to support the Secretary of State's assessment
17 regarding the nature and extent of risk of damage to
18 national security. The question there is whether there
19 is or is not evidence, no discretion is exercised. She
20 had to consider whether the Secretary of State's
21 assessment is Wednesbury irrational, that requires an
22 evaluation not the exercise of any discretion.

11:16

11:16

24 In relation to the Wylie balancing exercise, the
25 Coroner had to determine whether the overall public
26 interest was in favour of or against disclosure.
27 Again, that is not an exercise of discretion. Rather,
28 it requires an evaluation. On judicial review the
29 issue is whether deference should be shown for her

11:17

1 evaluation or whether the reviewing court decides for
2 itself whether her decision was right or wrong. As we
3 have explained, it is the latter."

4
5 Mr. Chairman, one of the reasons why I've taken you 11:17
6 through the Thompson decision in some detail is that it
7 foreshadows some of the damage arguments which you will
8 see the HMG open damage arguments document at page 43
9 of the bundle. And I can deal with those,
10 Mr. Chairman, fairly briefly. 11:18

11
12 HMG has made very detailed submissions in closed on
13 these matters, including addressing the damage on a
14 document-by-document basis, and addressing the
15 different types of damage where they appear within the 11:18
16 same document. The open damage arguments explain that
17 HMG applies for a Restriction Order covering these
18 representatives sample documents because it is
19 necessary in the public interest, having regard, in
20 particular, to any risk of harm or damage that can be 11:18
21 avoided or reduced and damage to national security or
22 international relations that could be avoided or
23 reduced by such restriction.

24
25 Although this open application unavoidably considers 11:18
26 these sample documents as a whole, the Chair is invited
27 to assess each sensitivity across each of the
28 representative sample documents individually with the
29 assistance of the damage arguments supplied for each

1 individual document, all of which are held in closed.

2
3 The UK intelligence community has a critical role to
4 play in keeping the UK and its people safe from a wide
5 range of threats. Intelligence-gathering work by its 11:19
6 nature is inherently sensitive and must be conducted in
7 secret in order to remain effective. Maintaining the
8 secrecy of sensitive capabilities, the operations that
9 employ them, and underlying methodologies is,
10 therefore, essential to safeguarding the UK's national 11:19
11 security. Consequently, the techniques used to deliver
12 these activities cannot be publicly disclosed. Any
13 revelation of information concerning the UK
14 intelligence community's operations, capabilities or
15 methodology could compromise their work and endanger 11:19
16 those involved in such activity.

17
18 With the passage of time, Mr. Chairman, the terrorist
19 threat in Northern Ireland has evolved significantly
20 from the period under consideration by this Inquiry. 11:20
21 However, as you are aware, Mr. Chairman, Dissident
22 Republican groups remain the drivers of terrorist
23 threat in Northern Ireland. Unfortunately,
24 Mr. Chairman, paragraph 7 of HMG's submissions at
25 page 45 requires to be updated in that there has been 11:20
26 further Dissident Republican-related activity since
27 those submissions were drafted.

28
29 In July of this year there was a seizure of a bomb on

1 the M2 near Carrickmacross in the Republic of Ireland.
2 The AGS have indicated publicly that this was an
3 extremely significant seizure of an explosive device
4 and that it was Dissident Republican activity.
5 Paragraph 7 and 8 at page 45 of HMG's submissions
6 detail the earlier serious attacks on Dunmurry PSNI
7 Station and on Lurgan PSNI Station.

11:21

8
9 I won't, Mr. Chairman, take you through those in
10 detail.

11:21

11
12 The threat level is referred to at paragraph 10 of
13 HMG's submissions on page 46. To update that,
14 Mr. Chairman, the current position is that the national
15 threat level, which is the threat to the UK (England,
16 Wales, Scotland and Northern Ireland) from terrorism is
17 severe. This means an attack is highly likely. The
18 threat to Northern Ireland from Northern
19 Ireland-related terrorism is substantial, and this
20 means an attack is likely. Set against this threat
21 context, it is imperative that HMG retains the ability
22 to protect sources who have provided information or
23 assistance in confidence to HMG. The disclosure of any
24 material that might confirm the status or identity of
25 such an individual or the nature of the information
26 provided risks putting that individual in real
27 jeopardy. It is submitted that a Restriction Order
28 would avoid or significantly reduce this serious risk
29 of harm.

11:21

11:21

11:22

1 The material in the representative set of sample
2 documents would provide hostile actors with a wealth of
3 valuable information about capabilities, operations,
4 trade craft and methodology that could be utilised in
5 order to help them evade detection. And in spite of 11:22
6 the passage of time, Mr. Chairman, this detail remains
7 sensitive from a national security perspective and
8 could still be successfully exploited by Dissident
9 Republican actors.

10
11 In addition to the threat posed by Dissident
12 Republicans, the national security damage implications
13 of disclosure of sample documents into open must also
14 take into account the threat from the wider set of
15 adversaries who seek to harm the UK intelligence 11:23
16 community and their operations, wider HMG and the UK
17 and its people more broadly. And such adversaries
18 include terrorist actors from across the full spectrum,
19 hostile states, criminals and other adversaries.

20
21 In short, Mr. Chairman, the damage, potentially,
22 arising from disclosure of this material would not be
23 restricted to the Northern Ireland arena but could
24 seriously jeopardise HMG's ability to keep the UK safe
25 from any and all national security threats. A 11:23
26 Restriction Order would significantly reduce the
27 serious risk of damage.

28
29 Mr. Chairman, HMG has given very careful consideration

1 to whether there are practical alternatives to
2 Restriction Order that could avoid or reduce the risks
3 of disclosure. HMG has not been able to identify any
4 suitable viable options. And the reasons for that are
5 set out at paragraph 14 of HMG's submissions at 11:24
6 page 47. Given the national security damage
7 implications relating to the full spectrum of threat
8 actors, providing a smaller subset of individuals with
9 unredacted documents would leave those Core
10 Participants vulnerable and exposed to those hostile 11:24
11 actors without the knowledge or understanding of how to
12 appropriately protect that sensitive information. And
13 I wish to stress, Mr. Chairman, that that is in no
14 way a criticism of any Core Participant but simply a
15 reflection of the fact that a detailed understanding of 11:25
16 the full measures needed to appropriately protect that
17 kind of information is, itself, highly sensitive
18 information and not something that could be shared
19 outside of a closed environment.

20 11:25
21 Unless there is anything further with which I can
22 assist you, Mr. Chairman, those are HMG's submissions
23 and I recognise that the more substantial exercise will
24 be in closed when you will require me to address you on
25 a document-by-document basis and in some detail about 11:25
26 the specific arguments.

27 CHAIRMAN: Ms. Fee, I don't think anyone would quarrel
28 with the suggestion that the work which the Security
29 Services conduct on our behalf in order to keep society

1 safe is important work, and nor would anyone quarrel
2 with the suggestion that in general that work has to be
3 kept secret for all of the various reasons which you've
4 identified. But yet, it's clear that there is room for
5 a process in order that applications can be considered 11:26
6 and that legitimate interests in disclosure of
7 documents can have effect.

8 MS. FEE: Yes, absolutely, Mr. Chair.

9 CHAIRMAN: And the way that I think that you would ask
10 me to approach that is to take account of the guidance 11:26
11 given by the Supreme Court in Thompson. And as I would
12 understand it, what that really comes to for my
13 purposes, is that subject to the receipt of adequate
14 evidence on the point, I am required to accept a
15 statement by relevant public authority that disclosure 11:27
16 would constitute a risk to national security. And I'm
17 also required to accept that body's assessment of the
18 extent of the risk to national security which is
19 involved. And these considerations would apply unless
20 either assessment is irrational, unsupported by 11:27
21 evidence or there has been a failure to take relevant
22 matters into account.

23 MS. FEE: Yes, absolutely, Mr. Chair.

24 CHAIRMAN: However, moving on from that, it then falls
25 to me to balance the risk to the national security 11:27
26 which is identified, against the public interest in
27 disclosure in relation to the particular evidence under
28 consideration in each document. And what I would be
29 entitled to conclude, I think, is that the public

1 interest in disclosure of that evidence was so strong
2 and that it should be disclosed despite the risk to
3 national security which would ensue. Is that, in
4 effect, the import of Thompson?

5 MS. FEE: Yes, Mr. Chairman, I think Thompson provides 11:28
6 some guidance on the severity of the risk to national
7 security that it was considered might apply in the
8 context of Northern Ireland terrorism. But I think as
9 a matter of principle everything that you've said,
10 Mr. Chairman, is absolutely right; that the balancing 11:28
11 exercise is for the Court and the Court alone and it is
12 for the Court to weigh up the two different aspects of
13 the single public interest that you are required to
14 balance, and the judgment in relation to that must be
15 yours alone. And I appreciate that you will want to 11:28
16 look carefully at the individual documents and also
17 have in mind the remarks of Lord Hughes in relation to
18 the higher the relevance the more important the public
19 interest, or something which is perhaps of very minimal
20 relevance will attract. 11:29

21 CHAIRMAN: When I go about that process of applying the
22 judgment in Thompson, I think you would recognise as
23 others do, that there would be value in applying the
24 four consecutive questions that are identified in the
25 Mohammed case. 11:29

26 MS. FEE: Yes, Mr. Chairman.

27 CHAIRMAN: You set those out at paragraph 7 of your own
28 submissions, but I just have a tiny point. I think
29 there's a typographical error in the fourth question at

1 paragraph 7(d), if the alternatives are -- it should be
2 insufficient, not sufficient?

3 MS. FEE: Yes, that's absolutely right, Mr. Chairman,
4 it has to be insufficient in order for that sentence to
5 make sense. 11:30

6 CHAIRMAN: And perhaps the -- well, maybe it's unfair
7 to separate one question as being any more important
8 than another, but the second question concerns serious
9 harm. And what I would have to consider is whether
10 disclosure would bring about a real risk of serious 11:30
11 harm to an important aspect of the public interest and
12 that would be national security insofar as your
13 submissions are concerned. But when I ask myself that
14 question, I have to accept your assessment of it unless
15 your assessment is irrational, unsupported by any 11:31
16 evidence or fails to take other material which is
17 relevant into account.

18 MS. FEE: Yes, Mr. Chairman, that's the effect of
19 Thompson.

20 CHAIRMAN: And in the general concept of Security 11:31
21 Service information, perhaps the process is relatively
22 straightforward but there are some aspects which arise
23 in connection with this particular Inquiry which are
24 less straightforward and I would welcome your
25 assistance on that. 11:31

26
27 So, for example, there's the passage of time. Now,
28 what weight do I give to the passage of time in the
29 context of this Inquiry or what assessment do I give to

1 the passage of time?

2 MS. FEE: So, Mr. Chairman, that is inevitably a highly
3 fact-specific question. So you have in the open damage
4 argument served on behalf of HMG at page 46,
5 paragraph 11, you have an indication at the last

11:32

6 sentence of paragraph 11 that in spite of the passage
7 of time, some of the detail described in that paragraph
8 around trade craft, capabilities, operations and so on,
9 remain sensitive from a national security perspective
10 and could still successfully be exploited by Dissident

11:32

11 Republicans. And you may well, Mr. Chairman, in
12 closed, wish to enquire into why that is said to be so
13 in respect of for example, specific methodologies or
14 specific pieces of information, why is it that it is
15 capable still of being exploited by Dissident
16 Republicans notwithstanding the passage of time.

11:33

17 CHAIRMAN: And if I do that, does that mean that I'm
18 applying that test to the second question, the question
19 of whether there is in fact a real risk of serious harm
20 to an important public interest in that context?

11:33

21 MS. FEE: Yes. And I think HMG fully accept,
22 Mr. Chairman, that you are engaged in a full, frank and
23 fearless examination of this evidence and that you are
24 entitled to press, in closed.

25 CHAIRMAN: Is it to that question though, or does the
26 passage of time feature somewhere else?

11:33

27 MS. FEE: I think it does go to that question,
28 Mr. Chairman, but you might consider it -- you could
29 also consider it for example, in the Lord Hughes

1 approach when he's thinking about, you know, where's
2 the relevance of it, where does it sit on the spectrum?
3 You might also consider passage of time in that
4 context. I think it's perhaps a thread that -- as you
5 say it is one of the aspects of this Inquiry which 11:34
6 requires a bit more thought but it's a thread that
7 potentially runs through a number of different areas.
8 It might speak to relevance, it might speak to the
9 serious nature of the harm, whether or not there is
10 sufficient evidence of a real risk of a serious harm to 11:34
11 an important public interest. It could speak to all of
12 those things, in my submission, Mr. Chairman.

13 CHAIRMAN: And, similarly, there's the question of what
14 is the effect of material being in the public domain?
15 Where do I factor that question in? 11:34

16 MS. FEE: Again, Mr. Chairman, I think it's capable of
17 being factored in, in more than one way. But you
18 might, for example, when you are considering well am I
19 satisfied that there is sufficient evidence of a risk
20 of serious harm, you might look at what is already in 11:35
21 the public domain and weigh that against the --

22 CHAIRMAN: But is it a question of sufficient evidence?
23 I thought it would be a question of no evidence and a
24 question of whether if there was evidence it was being
25 viewed irrationally? 11:35

26 MS. FEE: I think that's right, Mr. Chairman. It's
27 unsupported by evidence I think might be one of the
28 phrases used. So I think you would look at, is that
29 unsupported by evidence? And one of the aspects of

1 that might be what is already in the public domain.
2 And, similarly, when you are looking at it on the
3 spectrum of relevance through a Lord Hughes lens, you
4 might say, well, how relevant is that information in
5 circumstances where there is an awareness already in 11:35
6 the public of this specific piece of information and am
7 I adding anything by looking at it in this way in
8 closed?

9 CHAIRMAN: If I'm being asked to impose a Restriction
10 Order in relation to some material about which there is 11:36
11 already a significant level of public information, then
12 I must be doing so on the basis that your submission
13 will be that nevertheless any further disclosure of
14 that material, some of which is already in the public
15 domain, will lead to a real risk of serious harm. 11:36

16 MS. FEE: Yes, Mr. Chairman, and there's different ways
17 that that could come about. For example, it could be
18 the way in which the material is in the public domain.

19 CHAIRMAN: I know there are different ways in which it
20 can come about, I'm not really looking at the 11:36
21 individual, I'm trying to just get my -- I'm trying to
22 just understand the principle that would be involved.
23 So there will be evidence in a document about a matter
24 which one can easily recognise also features in the
25 public domain. And if the Government are asking for a 11:37
26 Restriction Order then it must be on the basis that
27 their assessment is that any further disclosure will
28 nevertheless still constitute a real risk of serious
29 harm to national security.

1 MS. FEE: Yes, Mr. Chairman, or it might be the nature
2 of the disclosure. For example, there could be an
3 assertion in a newspaper article that a certain set of
4 facts was correct and there could be either a rebuttal
5 of that position in a closed document or a confirmation 11:37
6 of that position in a closed document and that, itself,
7 might be sensitive. So while it is open to, for
8 example, a journalist to, in the interests of the free
9 press write what they feel is appropriate, that is very
10 different from an official confirmation or an official 11:38
11 denial which you might find in a closed document. Yes,
12 Mr. Chairman, I agree with the premise that you've
13 established but to add also that qualifier as well as
14 it being that that the position might be that there
15 would be more disclosure, it might also be that the 11:38
16 disclosure could be qualitatively different in nature
17 from the closed materials, as opposed to the open.
18 CHAIRMAN: But it sounds as though the issue falls to
19 be viewed through the lens of the second Mohammed
20 question rather than, for example, in a final balancing 11:38
21 act, because in a final balancing act it would be
22 difficult for me to say that I don't think disclosure
23 of this information would cause as much damage as the
24 Government say because by that stage I will already
25 have accepted your level of assessment. 11:39
26 MS. FEE: Yes, I think to an extent, Mr. Chairman, you
27 may consider that to an extent that partly reflects
28 what happened in Thompson because what happened in
29 Thompson was the Coroner felt that the proposed gists

1 did sufficiently mitigate the risk to national
2 security. That was the Coroner's assessment, that the
3 gists that she wished to put out were suitable and
4 effectively were safe. And the Supreme Court said that
5 is not the exercise. So I think there is support,
6 Mr. Chairman, for the way that you've suggested
7 approaching it within the Thompson decision itself.

11:39

8 CHAIRMAN: And another issue, of course, which arises
9 in the context of this Inquiry concerns individuals who
10 have self-avowed as being agents or informants. Now,
11 as I would understand the position, generally speaking,
12 the Government would apply the policy of neither
13 confirm nor deny in those circumstances and there's no
14 doubt that that policy has been recognised as both
15 legitimate and effective in many different cases, for
16 all of the reasons that are set out. However, there
17 seems to be an acceptance in the submissions, although
18 perhaps less clearly in your own, that that policy,
19 even if insisted upon, can be overruled by me in the
20 context of a Closed Material Restriction Order. Now,
21 what's your position on that? If the Government state
22 that they apply the policy, is that something that I
23 can, in some sense, overrule or fail to give effect to,
24 decline to give effect to?

11:40

11:40

11:40

25 MS. FEE: Mr. Chairman, as you know NCND is a policy
26 but the information protected by NCND would fall to be
27 considered by you in the same way as other information
28 which HMG is proposing for protection. So you would
29 need to go through the same exercise in respect of

11:41

1 material which may attract the NCND policy, as you
2 would in respect of material which would be national
3 security sensitive for another reason. And so the
4 process is the same. I think what would be said on
5 behalf of HMG is that there are very specific reasons, 11:41
6 I won't take you through them, Mr. Chairman, I know
7 you're aware of them, there are specific reasons why
8 the NCND policy operates in the way that it does.

9 CHAIRMAN: Nobody doubts that.

10 MS. FEE: Yes. 11:42

11 CHAIRMAN: But I just want to cross the hurdle of
12 understanding whether or not it's something that I need
13 to consider. And I think you, in common with the other
14 participants, accept that it may be an issue in the
15 question of applying Closed Material Restriction 11:42
16 Orders.

17 MS. FEE: Yes, Mr. Chairman. We say that you consider
18 material which is national security sensitive for
19 reasons of NCND in the same way that you consider
20 material which is national security sensitive for other 11:42
21 reasons. It may be that there is particular
22 considerations behind the NCND policy which apply on a
23 wider basis but that would be a matter for you,
24 Mr. Chairman, to hear about and consider in closed.

25 CHAIRMAN: And if I try to understand just what 11:42
26 principles should be applied in relation to whether or
27 not to give effect to NCND, I wonder just where I get
28 some guidance. In all of the submissions I think it's
29 recognised that self-avowal has a part to play,

1 although is by far from being determinative. So, it
2 must be something that I take into account and give
3 some effect to. And it probably grows in value if it
4 can be associated with some other form of avowal.

5 MS. FEE: I think, Mr. Chairman, in relation to 11:43
6 self-avowal there is some helpful case law in relation
7 to that, I think some of which is in the bundle before
8 your Lordship. But the core principle is perhaps that
9 set out at paragraph 30 of the Thompson decision which
10 itself quotes from the decision which I know you're 11:44
11 aware of Mr. Chairman of Lord Chief Justice Carswell
12 (as he then was) in the Scappaticci judicial review,
13 and it effectively gives a rationale for the NCND
14 approach which survives regardless of whether or not
15 there is self-avowal, the rationale remains equally 11:44
16 sound whether that has occurred or not.

17 CHAIRMAN: So avowal is not irrelevant then?

18 MS. FEE: No, we don't suggest it's irrelevant. I
19 think HMG would accept that it's something,
20 Mr. Chairman, that you may wish to have cognisance of 11:45
21 but if the question is does self-avowal speak to the
22 underpinnings of the NCND procedure, does it shake
23 those foundations, the HMG's submission would be no, it
24 does not.

25 CHAIRMAN: Yes, I understand that. So if I'm trying to 11:45
26 identify what sort of test to apply in those
27 circumstances, I wonder if there's some guidance in the
28 Attorney General v BBC case, I think that's in one of
29 the bundles.

1 MS. FEE: Yes, it is, Mr. Chairman.

2 CHAIRMAN: Can I just have a look at it please? Do you
3 have it Ms. Fee?

4 MS. FEE: I am just opening it Mr. Chairman.

5 CHAIRMAN: I'm interested in paragraph 6 for example. 11:46
6 So there we see that the court confirm that man X was a
7 CHIS, and an MI5 officer had been authorised to tell
8 the journalist that X was a CHIS. So there's a clear
9 form at least of avowal there. And the effect of that
10 is touched on by the Court at paragraph 12, 11:46
11 sub-paragraph (a), where they say:
12

13 "...the key question was whether MI5 had departed from
14 NCND..."

15 11:47

16 And at paragraph 12(b), any justification for
17 maintaining NCND had disappeared.
18

19 Now, does that set out a test for determining whether a
20 claim for NCND should be given effect to or denied? 11:47

21 MS. FEE: Well, Mr. Chairman, in circumstances where
22 there is an official avowal by a specific institution
23 of a specific individual and their role, where there
24 has been such an official avowal that will, of course,
25 be relevant to your decision, Mr. Chairman. And you 11:47
26 may feel that that sits at a very different end of the
27 spectrum from a self-avowal or speculation in the
28 press, or something of that nature. And I think you
29 would be entitled, Mr. Chairman, to consider that an

1 official avowal is a different species of confirmation
2 for you to consider as compared to the ones that we
3 were talking about earlier.

4 CHAIRMAN: I think that's self-evident, but what's the
5 effect of it, is the more important question perhaps. 11:48
6 So, if there is an official avowal of the sort we've
7 just been looking at in the BBC case, does that mean
8 that it isn't possible to rely on NCND?

9 MS. FEE: I think, again, it's fact-specific
10 Mr. Chairman, because if there is, say, an official 11:48
11 avowal by a specific institution of a specific
12 individual and their role, it will be extremely
13 difficult to seek to row that back in other
14 proceedings. However, if there was a situation where,
15 for example - and this is entirely hypothetical - I'm 11:49
16 thinking of a situation where a mistake was made in the
17 course of some proceedings or a press conference or
18 something of that nature, and there was a slip which,
19 you know, might can interpreted in a particular way it
20 might be said that well, that comes from an 11:49
21 authoritative source but it may be - and I'm dealing in
22 hypotheticals, Mr. Chairman - but it may be that that
23 needs to be treated differently than the kind of
24 considered specific official avowal of which I was
25 speaking earlier. 11:49

26 CHAIRMAN: I think there's a similar sort of suggestion
27 in The Attorney General v Guardian Newspapers case, and
28 particularly I think in the speech of Lord Gough at
29 page 291. Just give me a moment to bring that up.

1 [Short pause]. Do you have that, Ms. Fee?

2 MS. FEE: I think the technology is slightly letting us
3 down, Mr. Chairman. Oh, I have it now, I'm grateful to
4 my junior. Yes, Mr. Chairman, I have that.

5 CHAIRMAN: So, at letter D, his Lordship says:

11:51

6
7 "In our civil law there is, so far as I am aware, no
8 ground for restraining publication of information
9 relating to national security other than breach of
10 confidence. Information relating to national security
11 is, of its very nature, prima facie confidential. If a
12 person into whose possession it comes publishes it, and
13 is (as he usually will be) aware of its confidential
14 nature, he will prima facie be guilty of a breach of
15 confidence; any such publication, if threatened, can
16 therefore be restrained by injunction as a threatened
17 breach of confidence, subject of course to the usual
18 limitations upon the duty of confidence. One of these
19 limitations is that information is no longer
20 confidential once it has entered the public domain;
21 once information relating to national security has
22 entered the public domain, I find it difficult to see
23 upon what basis further disclosure of such information
24 can be restrained."

11:52

25
26 Now, there's a question, of course, as to what is meant
27 by "entering the public domain," but as a matter of
28 principle that seems to be entirely consistent with the
29 passage in the BBC case that we looked at a moment ago.

1 MS. FEE: I think it is, Mr. Chairman, I would just in
2 terms of, and I know, Mr. Chairman, you'll cognisant of
3 this, but the timing of that, I think that is maybe
4 1990, that sort of era of case which is effectively pre
5 the Internet and you may consider, Mr. Chairman, that 11:53
6 your task is more difficult than the task that a
7 predecessor working on a similar exercise in the 1980s
8 might have had because what is in the public domain in
9 terms of, for example, technically available on the
10 Internet will be very different now. 11:53

11 CHAIRMAN: I entirely accept that. The question of
12 what's in the public domain can be a difficult one and
13 it's not necessarily straightforward. But if we are
14 just looking at principle at the moment, there we see
15 from a few different cases some significant time apart, 11:53
16 a pretty similar thread as to the sort of test that
17 should be applied.

18 MS. FEE: Yes, I think that's fair, Mr. Chairman.

19 CHAIRMAN: And if we then turn to try and think about
20 how that arises in the present case, the two most 11:53
21 significantly well known individuals in connection with
22 this Inquiry are possibly those known as David Rupert
23 and Kevin Fulton, and so what I need to know is, what
24 is the Government's position in relation to the policy
25 of either confirm nor deny, first of all, in relation 11:54
26 to Mr. Rupert? Does the Government wish to apply that
27 policy or not?

28 MS. FEE: In general terms, Mr. Chairman, the position
29 is that NCND is relied upon by HMG in relation to

1 Mr. Rupert. Mr. Rupert gave evidence in the Republic
2 of Ireland at the criminal trial in relation to
3 Mr. McKeivitt and HMG does not seek to protect
4 information which Mr. Rupert, for example, gave in
5 evidence in the course of those proceedings. So, in 11:55
6 terms of how that interacts with the doctrine of NCND,
7 HMG continues to rely in general terms in relation to
8 both Mr. Rupert and Mr. Fulton on the doctrine of NCND.
9 I can address you in further detail in relation to the
10 specifics of that in closed, but there is a recognition 11:55
11 that Mr. Rupert did give evidence in the Republic of
12 Ireland and also Mr. Rupert was the subject of Ground 3
13 of the preventability judicial review, and at
14 paragraphs 245 onwards, I believe, of Mr. Justice
15 Horner's judgment, there is a narrative in relation to 11:56
16 Mr. Rupert, again which HMG does not and will not take
17 any issue in relation to.
18 CHAIRMAN: Yes, well I'm not just sure what that means.
19 You don't seek to protect the evidence which he gave in
20 the Republic of Ireland, but you still want to apply 11:56
21 the policy of neither confirm nor deny to some aspects
22 concerning Mr. Rupert?
23 MS. FEE: To some aspects confirming Mr. Rupert, I
24 think that's a fair summary.
25 CHAIRMAN: Are you going to apply the policy to the 11:57
26 question of whether or not he was an agent for the
27 Security Service?
28 MS. FEE: I think, Mr. Chairman I've gone far as I can
29 in open. I think the --

1 CHAIRMAN: why can you not just -- you don't need to
2 give me justification for it but why can you not just
3 say whether or not the Government's position is that
4 they're going to acknowledge Mr. Rupert as an agent or
5 apply the policy?

11:57

6 MS. FEE: well, as you're aware, Mr. Chairman, the
7 policy of NCND operates on the basis of neither
8 confirming nor denying. I certainly, on my feet, would
9 be extremely reluctant to depart from that.

10
11 In relation to the specifics of Mr. Rupert's situation,
12 I've referred to the criminal trial in the South, I've
13 referred to what's in the open judgment of Mr. Justice
14 Horner and that is as far as I feel I can certainly at
15 the moment, go in an open forum.

11:57

16 CHAIRMAN: well, of course, there's also information
17 about Mr. Rupert in the Breslin judgment?

18 MS. FEE: Yes, there is, Mr. Chairman.

19 CHAIRMAN: It's worth just having a look at what's said
20 there and then thinking about what effect has to be
21 given to that.

11:58

22 MS. FEE: I can say, Mr. Chairman, that in the same way
23 that HMG takes no issue with the content of judicial
24 proceedings in the South of Ireland, HMG takes no issue
25 with the content of the judicial proceedings in Breslin
26 in the North of Ireland.

11:58

27 CHAIRMAN: If we just have a look at what the Breslin
28 judgment contains, at paragraph 88.

29 MS. FEE: Can I check, Mr. Chairman, which Breslin

1 decision.

2 CHAIRMAN: It's the first decision. Lord Chief Justice
3 Morgan's decision. He wasn't the Lord Chief Justice at
4 the time of course.

5 CHAIRMAN: So, there is a heading at the bottom of page 12:00
6 38 of the decision, "the statements of David Rupert"
7 and then at paragraph 88 it talks about him giving
8 evidence in the trial in the Republic of Ireland. In
9 the second or third sentence it says in preparation for
10 that trial the prosecuting authorities sought 12:01
11 disclosure from the FBI and British Security Service
12 for both of whom Rupert had been employed as an agent.
13

14 And it says, the disclosure consisted of approximately
15 2,300 pieces of e-mail traffic and four ring binders of 12:01
16 documents. And then he goes on to talk about content
17 of these matters. And if we go to paragraph 105, in
18 the third sentence it says:

19
20 "There are statements from Paul and Peter of the 12:01
21 Security Services who state how they were in contact
22 with Rupert over a period from May 1998 until November
23 2000 during which they say Rupert sent them detailed
24 emails in relation to his activities in Ireland."
25

26 And then moving on to paragraph 126, under the heading: 12:02
27

28 "The Woolwich evidence and the conviction of the Third
29 Named Defendant."

1
2 We can see that the judgment reads:

3
4 "Witness E is employed by the Security Service and in
5 2000 had responsibility for the day-to-day conduct of 12:02
6 agent operations against Irish terrorist targets
7 outside Northern Ireland. In late 2000, he received
8 intelligence from Rupert that the leadership of the
9 Real IRA were seeking State sponsorship for their
10 activities and were looking to establish contact with 12:03
11 foreign governments likely to be sympathetic to their
12 cause. The disruption and prevention of this was given
13 the highest priority by the Security Service."
14

15 At paragraph 145, Lord Chief Justice Morgan sets, out 12:03
16 by way of bringing this passage to something of a
17 conclusion, at the bottom of page 62:

18
19 "Rupert received approximately £190,000 in salary and
20 expenses between 1997 and 2002 from the British 12:03
21 Security Services and approximately 1.25 million in
22 salary and expenses from 1994 until 2002 from the FBI."
23

24 Now, these are pronouncements in a judicial decision
25 based upon the evidence and disclosures that were made 12:04
26 and it would really seem quite difficult to conclude,
27 thinking about the BBC text, that the Security Services
28 had not departed from NCND in relation to the question
29 of whether Rupert was an agent.

1 MS. FEE: well, as I've indicated Mr. Chairman, there
2 will not be any attempt to protect information which is
3 in the public domain in that context in the course of
4 judicial determinations. And it may well be,
5 Mr. Chairman, that when you consider that information
6 and you consider the information in closed, you come to
7 a decision in relation to that aspect of Mr. Rupert,
8 but as I've indicated --

12:05

9 CHAIRMAN: But I'll only be coming to a decision if I
10 have something to adjudicate on. If the Government
11 accept that NCND has been departed from in the question
12 of whether Rupert was an agent, then I'll not be asked
13 to determine anything. I'll only be giving
14 consideration to this sort of material if I'm faced
15 with the rather odd set of circumstances that you tell
16 me I can look to what was said in the Breslin judgment
17 and you don't quarrel with any of that but you're still
18 wanting to apply NCND in relation to the question of
19 whether Mr. Rupert was an agent.

12:05

20 MS. FEE: I think, Mr. Chairman, the question of NCND
21 can bite on a number of aspects and you've taken us
22 through, in some detail, what is said about
23 Mr. Rupert's employment and the specifics that are
24 given in those judgments. That does not mean that all
25 aspects in relation to Mr. Rupert should be treated the
26 same way and that is something you will need to
27 determine in closed.

12:05

12:06

12:06

28 CHAIRMAN: well, I can see that there might be some
29 things that he has said that you draw my attention to

1 that would warrant a Restriction Order but don't the
2 other Core Participants need to know today, before we
3 get to the closed hearings, what the Government's
4 position is going to be on that simple question of
5 whether or not Rupert is avowed as an agent?

12:07

6 MS. FEE: well, I don't think I, Mr. Chairman, as I say
7 on my feet, can do more than point you to the specific
8 sentences that have already been read out and say that
9 HMG takes no issue with them. If, Mr. Chairman, it
10 would be helpful to have something more authoritative
11 by way of instructions I can certainly do that. I can
12 say that the -- I don't know if you wish me to deal
13 with the position in terms of Mr. Fulton as well at
14 this stage or simply focus on Mr. Rupert?

12:07

15 CHAIRMAN: We've been talking about Rupert for the
16 moment because perhaps the question of whether the
17 Government should seek to apply the policy is more
18 pertinent in his case than it is for Fulton, but you
19 probably have some things to say about Fulton as well.

12:07

20 MS. FEE: Yes, Mr. Chairman, and essentially it is that
21 HMG does rely on the policy of NCND in relation to
22 Mr. Fulton. It is aware of the various disclosures and
23 purported disclosures which might go towards the
24 question of the extent of information already in the
25 public domain. HMG considers that that does not
26 undermine the policy of NCND and it does not intend to
27 depart from it in relation to Mr. Fulton. And, again,
28 the reasons for that specific reasons, can only be
29 given in closed. I don't know that I can take that

12:08

12:08

1 much further, Mr. Chairman.

2 CHAIRMAN: You're aware of the disclosures that go
3 towards the question of whether Fulton was an
4 informant, but you intend, nevertheless, to apply the
5 policy of neither confirm nor deny. 12:09

6 MS. FEE: So I'm aware for example, of the newspaper
7 article, Mr. Chairman, which is ventilated at some
8 length in the open judgment of Mr. Justice Horner, I
9 believe it's The Sunday People, I'm aware of that
10 newspaper article. 12:09

11 CHAIRMAN: I'm not entirely sure which one you're
12 referring to but for example, there's an article which
13 is in the disclosed bundle on relativity at INQ001592
14 and it appears to be an interview between the then
15 Chief Constable and a journalist, I think from The 12:10
16 Irish Times; are you aware of that one?

17 MS. FEE: Yes, Mr. Chairman. Just for completeness,
18 because The Sunday People article which I was referring
19 to is the one referred to at paragraph 237 of the open
20 judgment and it is the one which makes the claim, I 12:10
21 think the initial claim that Mr. Fulton was a police
22 agent.

23 CHAIRMAN: That's a different category I think, Ms.
24 Fee, because that's something that a journalist was
25 putting out in his own article, he may or may not have 12:10
26 claimed to have sources but they weren't identified.
27 The article that I'm asking you to think about is one
28 in which the then Chief Constable said certain things
29 to the journalist which were then published. In

1 paragraph 4.2 of the article he said:

2
3 "Fulton passed on information on supposed Dissident
4 Republican terrorist activity to his CID handler on
5 five occasions between June and August 1998."

12:11

6
7 Paragraph 4.5:

8
9 "Fulton was an informant for Special Branch in
10 partnership with another agency from 1992 to 1994."

12:11

11
12 And then at paragraph 4.7 there's detail set out of the
13 June, July and August information which Fulton was said
14 to have passed.

12:11

15
16 So, that's a public statement by the Chief Constable
17 which acknowledges that Fulton was an informant both
18 for the CID and Special Branch. Now, how can neither
19 confirm nor deny be applied in that situation?

20 MS. FEE: I think, Mr. Chairman, what can be said is
21 that it would not be for HMG, in those circumstances,
22 to assert NCND in respect of what the Chief Constable
23 is saying, from what you've read out to me, I don't
24 have it in front of me from what you've read out to me
25 that sounds like a question that needs to be directed
26 to the Chief Constable. In terms of HMG, I don't see
27 anything in that, Mr. Chairman, which would undermine a
28 basis on which HMG would rely on NCND in relation to
29 Mr. Fulton generally. So I think I have -- there's a

12:12

12:12

1 limited amount that I can assist you with in relation
2 to that PSNI document.

3 CHAIRMAN: well, I find that difficult to follow.
4 There's what looks like a public avowal by the then
5 Chief Constable of the fact that Fulton was an agent 12:13
6 for both CID and Special Branch. So, if that prevents
7 PSNI from relying on the policy are you saying that
8 nevertheless HMG still could?

9 MS. FEE: No, Mr. Chairman, I'm saying that I don't
10 know if HMG can rely on the policy there or not because 12:13
11 I don't know the circumstances in which the Chief
12 Constable made those remarks or any of the background
13 to it and so it's very difficult for me to comment upon
14 it. It is possible in closed when we have specific
15 documents in front of us to look at them and unpick 12:14
16 where does that come from, does that represent a
17 departure. It is extremely difficult to do it,
18 firstly, on hypothetical basis but, secondly, in
19 circumstances such as this where simply in the dark
20 about the circumstances behind it. And I don't wish, 12:14
21 Mr. Chairman, to speculate or to go beyond the things
22 that I can meaningfully assist you with. I don't think
23 that would be in the best interests of the Inquiry
24 either.

25 CHAIRMAN: So, I'm not sure where we're left then. Is 12:14
26 HMG's position that neither confirm nor deny as a
27 policy is being applied to the question of whether
28 Kevin Fulton was an informant?

29 MS. FEE: I think I can say it applies in HMG's

1 submission relatively straightforwardly on the question
2 of whether Mr. Fulton was an informant. The position
3 is more nuanced in respect of Mr. Rupert because HMG is
4 accepting that there are statements in the Breslin
5 judgment, there is evidence that has been given to the 12:16
6 Court in the Republic of Ireland, and there is also
7 content in the open judgment of Mr. Justice Horner in
8 the judicial review, all of which HMG does not propose
9 and will not propose to protect and those statements
10 say what they say, Mr. Chairman. And so the position 12:16
11 in respect of Mr. Fulton and Mr. Rupert is not the
12 same.

13 CHAIRMAN: Okay. So at the end of the day, I may have
14 to seek to apply the sort of legal principles that we
15 discussed a moment or two ago to the question of 12:16
16 whether I should permit that policy to be maintained in
17 relation to either or both of Rupert and Fulton?

18 MS. FEE: Yes, or the extent, what exactly it covers
19 within that matrix, yes, Mr. Chairman.

20 CHAIRMAN: All right, thank you very much. 12:17

21 MR. GREANEY: Your Honour I wonder before we call on
22 Mr. Henry on behalf of the PSNI if we can have a break
23 for 15 minutes?

24 CHAIRMAN: Yes.

25
26 THE INQUIRY ADJOURNED BRIEFLY AND RESUMED AS FOLLOWS:
27

28 CHAIRMAN: Mr. Greaney.

29 MR. GREANEY: Sir, as we indicated, we'll next invite

1 Mr. Henry to make his submissions on behalf of the
2 PSNI.

3 CHAIRMAN: Good afternoon, Mr. Henry.
4

5 SUBMISSION BY MR. HENRY:

12:49

6
7 MR. HENRY: Good afternoon, my Lord. May can I just
8 double-check that you can hear my submissions okay.
9

10 My Lord, we have provided very detailed and
11 comprehensive written submission in open on the
12 relevant legal principles which we respectfully say
13 apply to the CMRO process. I'm glad to see from the
14 written submissions which followed from the other CPs
15 that there's a large measure of agreement in relation
16 to the principles which should apply. I think where
17 any areas of potential disagreement might arise is in
18 relation to the application of those principles to the
19 individual documents.
20

12:49

12:49

21 So, I wouldn't propose this afternoon my Lord, to deal
22 with those general legal principles in significant
23 detail, but if I might just touch upon a few matters
24 and then my intention would be, if your Lordship would
25 wish to deal with some of the points you raised with
26 Ms. Fee KC and then also deal with any additional
27 questions that you have at the end.
28

12:49

12:50

29 So, in relation to the PSNI's position on the CMRO

1 applications generally, we recognise, as we've done in
2 our written submissions and in the Chief Constable's
3 open statement, the importance of openness and
4 transparency. And we have recognised that a successful
5 application for CMRO is a departure from that starting 12:50
6 point and should be done so in exceptional
7 circumstances.

8
9 we also recognise that if there is any departure from
10 the starting point of open justice then it should be 12:51
11 the minimum necessary.

12
13 Now, in relation to the test which is applied, we have
14 addressed this in our written submission in quite some
15 detail about the interaction between the public 12:51
16 interest immunity or PII principles, established
17 through the common law and also the statutory
18 provisions which apply to CMROs in an inquiry context.
19 So, really the interaction between PII on the one hand
20 and Section 19 on the other. And if one were distill 12:51
21 our position in relation to that interaction down to
22 its most basic, it's this; we respectfully promote the
23 use of the four questions from the Mohammed judgment
24 applied within the Section 19 framework. And those
25 four questions, we appreciate that there is some 12:52
26 difference between PII on the one hand and a CMRO on
27 the other hand. But if those four questions are
28 applied they allow for all of the public interest and
29 other principal considerations which the CPs urge on

1 the Inquiry, that process will allow for those to be
2 taken into account.

3
4 I'll come in due course, my Lord, in a little bit more
5 detail to which of the four questions some of those
6 considerations will bite at because I know that's
7 something that the Inquiry is interested in.

12:52

8
9 In relation to the process generally of considering
10 materials for potential CMRO application, if the police
11 are satisfied that such an application is properly to
12 be considered, I do wish to provide both the Inquiry
13 and the other CPs present that alternatives are always
14 considered as a matter of course in any case where the
15 PSNI are satisfied that the first two questions from
16 Mohammed judgment are met. So it's a test for
17 disclosure or discovery met and is there a real risk of
18 serious harm to a public interest. Those alternatives
19 can manifest in a number of different ways, examples
20 include partial redaction, gisting, and also in some
21 circumstances it may be possible to engage in
22 ciphering. Obviously, my Lord, all of those general
23 considerations have to be considered on a case-by-case,
24 document-by-document basis.

12:53

12:53

25
26 what I would also like to say, respectfully, is this,
27 that every single sensitive or potentially sensitive
28 document that is considered within the context of this
29 Inquiry is given serious consideration by the PSNI

12:54

1 before any CMRO application is made, has been made or
2 will be made. They do involve difficult predictive and
3 evaluative decisions. They do require a degree of
4 expertise on the part of the police officers who are
5 conducting those exercises and reviewing the documents. 12:54
6 And I would also say respectfully, my Lord, that whilst
7 the PSNI has arrived at a view in relation to each
8 document it has asked for a CMRO over thus far, the
9 PSNI has also demonstrated that it is approaching that,
10 those issues or those assessments not with a closed 12:55
11 mind, it is willing to listen to others. That's
12 demonstrated through some of the materials which have
13 been released after sensitivity review already. It is
14 also demonstrated through some of the sample documents
15 which make up the CMRO sample document hearing. We 12:55
16 provided our closed submissions in relation to those
17 sample documents. The ILT have responded to those and
18 those responses from ILT are actively under
19 consideration and can be addressed in more detail in
20 the closed hearing before your Lordship next week. 12:55

21
22 So the point I'm respectfully making is, whilst a
23 careful and informed decision is made, the PSNI is
24 willing to listen to others making their
25 representations. 12:56
26

27 I would also acknowledge, at this stage, my Lord, as we
28 have in our written submission, we can appreciate some
29 of the frustration which will come out from review of

1 redacted materials by the non-State CPs and that
2 sometimes it could be difficult to understand the
3 approach which is taken by one or other or all of the
4 State parties. What we've tried to do in this instance
5 and for the purpose of this hearing, was to provide all 12:56
6 of the sample documents which are under consideration
7 in this hearing in a redacted form so that they could
8 be supplied to the non-State CPs for the purposes of
9 this hearing so that an indication was given as to the
10 approach that the PSNI is taking to this exercise. And 12:57
11 what review of those documents demonstrates is this,
12 there is a mixed approach in respect of some documents
13 there are no proposed redactions requested by the PSNI,
14 in respect of some there are partial redactions, in
15 respect of others the PSNI is seeking redaction of the 12:57
16 entire document. And in many instances, whether it's a
17 completely redacted document or partially redacted
18 document, the PSNI has proposed a gist of the
19 underlying information or redacted information.

20
21 So, we are demonstrating, we respectfully say, the
22 correct approach on a principled basis on those
23 materials. Ultimately we do accept, though, that it's
24 a matter for you as the Chair to make the ultimate
25 decision. 12:58

26
27 I would also respectfully observe, my Lord, that there
28 are two different perspectives in approaching these
29 materials. If you are an individual CP approaching a

1 redacted document or a sensitive document within the
2 context of this Inquiry, you might understandably say
3 to yourself, 'well, that information is over 25 years
4 old why does it have to be redacted?' Or you might say
5 to yourself, 'well, that information is already known 12:58
6 through another outlet.' One could readily appreciate
7 the frustration which might be felt by those who can't
8 understand why a State CP is seeking non-disclosure of
9 information such as that.

10 12:58
11 The reason for that, my Lord, is very simple we say, on
12 a principled basis. The police have a national
13 security and policing responsibility which involves a
14 number of different duties, principally around the
15 protection of the public. The PSNI is not viewing the 12:59
16 sensitive materials solely through the lens of looking
17 at this Inquiry, it has responsibility for previous
18 incidents and it has responsibility for future
19 incidents which have yet to occur, and it's those
20 broader and often forward-looking considerations which 12:59
21 necessarily must inform the PSNI's approach to the CMRO
22 process. But again, my Lord, we readily understand why
23 there can be a difference of opinion because of those
24 two different perspectives.

25 12:59
26 So, my Lord, that's all that I wish to say by way of
27 brief introduction to the issue of CMRO applications.
28 If it's convenient, my Lord, what I would do next is go
29 through the queries that you raised with Ms. Fee and

1 deal with them in turn and it may well be that your
2 Lordship has additional questions to ask during that
3 processor at the end as well.

4
5 The first point that you raised with Ms. Fee was the 13:00
6 Thompson judgment, relatively recent from the Supreme
7 Court. And you propose an interpretation of the test
8 set out therein. And we respectfully agree with the
9 summary of the test that you have described.

10 13:00
11 The second issue that you raised with my learned
12 Friend, Ms. Fee, was the effect potentially of the
13 passage of time within the context of the CMRO process.
14 And I think the overriding question was whereabouts in
15 the sequence of four questions ought you to take the 13:01
16 passage of time into consideration? I will address
17 that in just a moment. But I'll make some brief
18 observations about the passage of time before doing so.

19
20 Firstly, we accept - we being the PSNI - that it is a 13:01
21 relevant consideration for the Inquiry to take into
22 account. It does require, in applying the passage of
23 time as a relevant consideration, a case-by-case or a
24 document-by-document consideration. It is simply not
25 going to be possible for a one-size-fits-all approach 13:02
26 but we do accept that that it is a relevant
27 consideration.

28
29 Now, in relation to where --

1 CHAIRMAN: But the relevant consideration to what,
2 Mr. Henry?

3 MR. HENRY: Where we respectfully say that it bites,
4 certainly primarily, my Lord, is on the second question
5 of real risk. 13:02

6 CHAIRMAN: But, again, what I find difficult is that if
7 I'm giving any consideration to passage of time in the
8 context of application for a Restriction Order, it's
9 going to be in circumstances where you tell me that the
10 PSNI has already taken account of the passage of time 13:03
11 in relation to that particular issue and has come to
12 the view that nevertheless there remains a real risk of
13 serious harm in disclosure of the information and you
14 would then explain why that's so. Now, it seems to me
15 that my scope for interfering with that is fairly 13:03
16 limited.

17 MR. HENRY: I accept that proposition, my Lord, and
18 your scope is limited through the Wednesbury lens,
19 because unless there is no evidence in support of the
20 real risk or there's been a failure to take into 13:03
21 account a material consideration, it's only if the
22 decision is one which no reasonable decision-maker
23 could arrive at based on the same information, i.e.,
24 the Wednesbury test, that you could interfere with the
25 or properly disagree with the assessment of real risk. 13:04

26 CHAIRMAN: And does the same sort of approach apply in
27 relation to public domain issues?

28 MR. HENRY: That's correct, my Lord. May I just make
29 one brief observation about the question number query.

1 I'm not closing my mind entirely to the possibility
2 that a passage of time might have some application at
3 the fourth stage, where it is much more likely to bite
4 is the second stage. I'm not going to propose to a
5 hypothetical situation in respect of the fourth
6 question where it might apply, I'm struggling to think
7 of one at the moment, but I just don't want to cut off
8 the possibility that that may be an appropriate place
9 for it to be taken into account, albeit it's much more
10 likely to be taken into account at question No.2.

13:05

13:05

11 CHAIRMAN: How does it come to be taken into account in
12 the balancing exercise?

13 MR. HENRY: As I say, my Lord, I would struggle to
14 think of a hypothetical or empirical example to give
15 you. I was wondering during the course of your
16 exchanges with Ms. Fee whether it might have some
17 purchase along with the relevancy question about
18 assessing to what extent there's an interference with
19 the administration of justice by non-disclosure of the
20 information. But I must confess, my Lord, that's not a
21 fully developed consideration at the moment, hence why,
22 I don't wish to close the possibility of it being a
23 relevant consideration at Stage 4 but it's much more
24 likely to bite at Question 2.

13:05

13:06

25
26 Your Lordship is correct, in that it's the same answer
27 for the public domain query.

13:06

28 CHAIRMAN: Although, it's perhaps a little bit more
29 complicated in relation to the public domain question

1 because again, I would be faced with a situation where
2 you would be telling me that you had taken account of
3 what was in the public domain but nevertheless insisted
4 that there was a real risk of serious harm attached to
5 disclosure. Now, I could only consider interfering 13:07
6 with that assessment if it seemed to me to be
7 irrational or if it seemed that there had been a
8 failure to take relevant material into account. would
9 that then mean that I would have to know what you had
10 identified as being in the public domain and had taken 13:07
11 into account before I could give proper effect to your
12 assessment?

13 MR. HENRY: I think so, my Lord. There are matters of
14 fact and degree in all of these issues. So if we take
15 the two extremes to make the point. If there is a 13:07
16 quiet, limited previous disclosure in a marginal space
17 which isn't very well known about, that's one end of
18 the spectrum. If there is something which is, for want
19 of a better expression, commonly known in a public
20 domain that's the other end of the spectrum. 13:08

21 CHAIRMAN: But I, of course, won't know, just in the
22 course of general consideration of the application,
23 what information apparently in the public domain you've
24 taken account of. And isn't that where the duty of
25 candour bites? Isn't that the whole basis of the duty 13:08
26 of candour, that you have to set out and explain to me
27 the understanding that you have of what's in the public
28 domain and despite that the reasons for taking the view
29 that you do?

1 MR. HENRY: Yes, I agree my Lord that the public
2 authority who is seeking non-disclosure in respect of
3 information which to some extent is already in the
4 public domain should address you on their knowledge of
5 the extent to which it is in the public domain; 13:09
6 i.e. how they know that it's in the public domain
7 already. And how that has factored into their
8 assessment, their decision-making process which has led
9 to an application for CMRO.

10 CHAIRMAN: well, that may have some particular impact 13:09
11 when we consider the question of the policy neither
12 confirm nor deny.

13 MR. HENRY: That's correct.

14 CHAIRMAN: It's already 1:10, Mr. Henry, might it be
15 convenient to turn to that after lunch? 13:09

16 MR. HENRY: well, I'd be happy to try and deal with
17 that before lunch if your Lordship would prefer.

18 CHAIRMAN: I think it might take a little time.

19 MR. HENRY: Certainly, my Lord. well then we will
20 retire until after lunch. 13:10

21 CHAIRMAN: Mr. Greaney, it is 1:10, what time do you
22 suggest we reconvene?

23 MR. GREANEY: well, if, sir, we can come back at 2:10.

24

25 THE INQUIRY ADJOURNED FOR LUNCH AND RESUMED AS FOLLOWS: 13:10
26

27 CHAIRMAN: Mr. Henry.

28 MR. HENRY: Thank you, my Lord. My Lord, where we HAD
29 finished before lunch, I had been running through in

1 the same order the points that you had raised earlier
2 today with Ms. Fee. I'm happy to adopted that same
3 structure if that meets with your approval, or if you
4 prefer to proceed another way, again I'm happy with
5 that.

14:16

6
7 So I think the next point that had been raised with
8 Ms. Fee, it flowed on from your request about the
9 Wednesbury -- subject to an irrationality finding that
10 the assessment at stage No.2 from the expert State body
11 should be accepted. You went on to query whether a
12 court or tribunal or inquiry could effectively overrule
13 NCND and --

14:17

14 CHAIRMAN: Maybe the better way of putting it is to ask
15 whether the Court, or in this case the Inquiry would
16 permit the Government or the PSNI to rely on the
17 policy; is that a the better way of putting it?

14:17

18 MR. HENRY: I think that's a better way to put it, my
19 Lord. And the short answer is, yes, you would be
20 entitled to decide if they were not entitled to rely
21 upon it, but how that manifests is in the decision at
22 the end of -- assuming one reaches the fourth question
23 in Mohammed, the disagreement, as it were, with
24 whichever State CP is asserting NCND or if there's more
25 than one, the disagreement bites at the end of question
26 No.4. Again, that flows from the decision in Thompson
27 and I've already accepted that your assessment of the
28 law in that respect is accurate. I think it accords
29 with that which I've seen in the written submissions of

14:17

14:18

1 the other CPs as well.

2
3 So, my Lord, the next point or query that was raised
4 was about self-avowment and you queried was there any
5 guidance in relation to that and also what is the 14:18
6 effect of it? In relation to guidance, my Lord, the
7 decision which deals directly with the point as it
8 were, that we were able to locate, is DIL v the
9 Commissioner for the Metropolitan Police, it's a 2014
10 decision. It's a High Court decision and if you're 14:19
11 looking for the specific reference you'll find it in
12 the trial bundle for today, page 138. The paragraph
13 number within the decision itself, not the paragraph
14 number within the skeleton, is 39. And 39 sets out
15 three propositions and it's the third of those 14:19
16 prepositions. It begins by stating -- this is I
17 believe it was Mr. Justice Bean said:

18
19 "I derive the following guidance from the authorities."

20 14:19
21 They are reviewed earlier in the judgment. There's
22 point No.1 and then point No.2 and at No.3 he states:

23
24 "Even where an individual informant or undercover
25 officer has self-disclosed, the police or the Secretary 14:20
26 of State may nevertheless be permitted to rely on NCND
27 in respect of allegations in the case if the
28 allegations in the case were to admit or deny them
29 might endanger other people, hamper police

1 investigations, assist criminals or reveal police
2 operational methods."

3
4 So, in simple terms, my Lord, what we understand that
5 decision to be saying is, it is a relevant factor, as 14:20
6 we've accepted in our written submissions,
7 self-declaration but it is not of itself determinative
8 of the outcome.

9
10 I'm not sure that you'll reach any, it's certainly a 14:20
11 material factor but I don't think you'll reach any
12 disagreement within this room in relation to that as a
13 general proposition.

14
15 The next point that I've noted, my Lord, that you 14:21
16 raised with Ms. Fee was the BBC case, and a query as
17 to, I think it was paragraph 12(b) therein and whether
18 it raised a statement of principle. I'll say this in
19 relation to that case, my Lord, I don't think there's
20 anything within it, as a matter of principle, which 14:21
21 disagrees with the submissions that we've made in
22 writing and echoed to you orally today.

23
24 It is a case made in relation to the facts which arose
25 in those circumstances in which there had been a 14:21
26 decision which wasn't honoured to depart from NCND or
27 wasn't subsequently honoured. I'm not sure that beyond
28 the general principles that paragraph 12(b) adds
29 anything of particular significance, it certainly

1 doesn't issue a determinative principle or test.

2 CHAIRMAN: You mention at paragraph 188 of your own
3 submissions that if there has been a previous
4 disclosure by a State official then you accept that
5 this is a valid consideration for the Chairman to take 14:22
6 into account.

7 MR. HENRY: Yes.

8 CHAIRMAN: Now, what does that mean "take into
9 account"? Is it not determinative?

10 MR. HENRY: It depends, my Lord. I would respectfully 14:22
11 suggest that there's again going to be a matter of fact
12 and degree. It depends who has made it, when, in what
13 circumstances.

14 CHAIRMAN: well, who has made it? A State official is
15 the way you put it. So, if a State official has made a 14:23
16 previous disclosure, then assuming for a moment that
17 that's not some sort of act of misconduct why would
18 that not be determinative?

19 MR. HENRY: well, dealing with it in stages, my Lord.
20 First of all, it may not be a State official associated 14:23
21 with the State authority which is making the request
22 for non-disclosure. If it is, obviously it's more
23 significant, it's a more significant factor for the
24 decision-maker to take into account when deciding
25 whether or not there should or should not be a 14:23
26 disclosure. But one does need to drill down into the
27 detail of it when such a disclosure was made before
28 making any decision. It doesn't automatically follow,
29 it may well follow in due course that a disclosure by

1 an associated state official tips the balance, informs
2 a decision in a very significant way, but it is not of
3 itself as a freestanding principle determinative.

4
5 And I should, just to place that submission into 14:24
6 context, my Lord, indicate that the assessments by the
7 PSNI in relation to NCND are present assessments made
8 at the current time.

9 CHAIRMAN: well, that's a wee bit oblique, Mr. Henry,
10 can we perhaps just explore it a little? I'd quite 14:24
11 like to do, if we can, in light of what was said in the
12 case of The Attorney General v BBC, that's one of the
13 cases that's in the various bundles. And I'm
14 interested in paragraph 27, in which the Court said:

15
16 "It is important that a party seeking to adopt an NCND 14:25
17 stance in relation to a fact relevant to legal
18 proceedings, ensures that the court is candidly
19 informed, if necessary in closed, about:

20
21 (a) the existence in terms of any relevant policy or 14:25
22 practice relating to the use of NCND and the
23 circumstances in which it may be departed from, and
24

25 (b) the circumstances of any departure from NCND in the 14:25
26 particular case, or other related cases, and the
27 precise terms of the departure."
28

29 Now, I'd like to just think about that in the context

1 of Mr. Fulton because it seems to me that the open
2 material demonstrates a number of circumstances in
3 which it might be said that there has been a departure
4 from NCND in his case. And perhaps the first place to
5 start is the Smithwick Report. Mr. Fulton, of course,
6 self-avowed in the course of his evidence there but if
7 we put that to one side, the Smithwick Report explains
8 that evidence was given by two CID officers from what
9 would then have been the RUC I imagine, and at
10 paragraph 15 point 6.4, it states:

14:26

14:27

11
12 "The Tribunal heard evidence from two CID officers
13 including Mr. Fulton's direct CID handler. They
14 confirmed in evidence that he did give good information
15 which resulted in successful operations, and I deal
16 with this in further detail below."

14:27

17
18 And then at paragraph 15.7.1:

19
20 "I heard evidence from Kevin Fulton's CID handler
21 during the period 1994 to 1996 (Witness 71). I also
22 heard evidence from Witness 71's superior officer
23 (Witness 70)."

14:27

24
25 At paragraph 15.7.4 there's an explanation of the
26 information which Mr. Fulton gave to witness 71 and
27 which witness 71 then gave to the Smithwick Tribunal.

14:27

28
29 At paragraph 15.7.9:

1
2 "I also heard from Witness 64 (a retired RUC Special
3 Branch officer) and he says that he was in charge of a
4 particular team which handled Mr. Fulton."

5 14:28

6 At paragraph 15.7.10, the same witness is recorded as
7 explaining in his evidence that at the time the Special
8 Branch had a relationship with Mr. Fulton he was also
9 being handled by the Security Service.

10 14:28

11 So, that would seem to demonstrate that a number of
12 officers from the RUC gave evidence in the Smithwick
13 Tribunal about the fact that Fulton was a CHIS and
14 about the information that he gave to them. Does that
15 not constitute a departure from the policy?

14:29

16 MR. HENRY: Yes, by those officers during the course of
17 their evidence to the Smithwick Inquiry, I accept that,
18 my Lord.

19 CHAIRMAN: And were they not authorised do so?

20 MR. HENRY: That is not something that I have
21 instructions on as I stand here today, it's something
22 that we'll take instructions on after today.

14:29

23 CHAIRMAN: well, on the face of it?

24 MR. HENRY: I should say that we were aware of
25 Kevin Fulton being named in the Smithwick Report and
26 how he was described within the report.

14:29

27
28 SHORT PAUSE IN THE PROCEEDINGS DUE TO TECHNICAL
29 DIFFICULTIES

1 CHAIRMAN: So, Mr. Henry, I was really just exploring
2 with you the question of whether the giving of evidence
3 by officers from the RUC to the Smithwick Tribunal, in
4 the manner described, constitutes or constituted a
5 departure from the policy. And you, first of all, 14:32
6 answered it would appear to be a departure by them, but
7 they're not just acting as private citizens, were they?

8 MR. HENRY: My understanding is that they were all
9 retired but I'm subject to correction in relation to
10 that, my Lord. 14:32

11 CHAIRMAN: They were all?

12 MR. HENRY: Retired, but I am subject to correction.

13
14 I should also say, my Lord, that the if we're looking
15 at the various sources of information in which 14:32
16 Mr. Fulton has been named publicly, there are others,
17 there's the information from PONI, there's also
18 information -- there was also a disclosure by the
19 former Chief Constable as well.

20 CHAIRMAN: well, that's what I'm trying to look at 14:33
21 really, just --

22 MR. HENRY: I didn't wish to cut across your Lordship,
23 I didn't mean any discourtesy, but just whenever we're
24 talking about whether those officers had authority to
25 speak in the way that they did as such, that's somewhat 14:33
26 over shadowed by the disclosure by Sir Ronnie Flanagan.

27 CHAIRMAN: well, it's been some time since the
28 Smithwick evidence was taken and published. If it was
29 to be contended that for some reason the evidence given

1 by those officers shouldn't constitute a departure then
2 I would have rather thought you'd be in a position to
3 tell me that. But putting them to one side just for
4 the moment, there's other material which might be
5 viewed as an apparent departure from the policy in the 14:34
6 PONI public statement made in December 2001 where, in
7 the statement at paragraph 6.3, it was said that PONI
8 is satisfied that Fulton did pass information to the
9 CID regarding dissident terrorist activities, to his
10 CID handler on five occasions between June and August 14:34
11 1998. And then entirely separately there's a document
12 on the PONI website still which is described as a press
13 statement, dated the same date as the statutory public
14 statement, but it goes into significantly more detail
15 about Mr. Fulton and his relationship with the RUC. 14:35
16 And so, for example, at paragraph 6 it says that three
17 days before the bombing of Omagh the RUC received
18 information from a reliable informant known as
19 Kevin Fulton; it then sets out the details of when he
20 met his handler and the information which was passed. 14:35
21 At paragraph 9 it sets out how the information given by
22 Fulton it was processed by CID, Force Intelligence
23 Bureau and the Special Branch. And at paragraph 11 on
24 page 7, Kevin Fulton was an informant of RUC Special
25 Branch between 1992 and 1994. A Special Branch officer 14:36
26 confirmed that Fulton had supplied intelligence that
27 had resulted in one or two successful operations but
28 say that he became a maverick, et cetera. It talks
29 about him receiving substantial financial rewards as

1 well.

2
3 Now, that's information put into the public domain by
4 PONI, but information given to them by the RUC; does
5 that not constitute a departure? 14:36

6 MR. HENRY: It is a departure by PONI, I accept that my
7 Lord.

8 CHAIRMAN: No, I'm asking if it doesn't constitute a
9 departure by the RUC in the giving of that information
10 to PONI. 14:36

11 MR. HENRY: It only would be if there was express
12 agreement in advance, or an understanding in advance
13 that that information would be revealed publicly by
14 PONI.

15 CHAIRMAN: And was there any attempt made to suggest to 14:36
16 PONI that that shouldn't be published?

17 MR. HENRY: That I can't speak to at the moment, my
18 Lord.

19 CHAIRMAN: well, that chain progresses through the
20 Chief Constable's statement, published on 24th January. 14:37
21 Now, when I mentioned that to Ms. Fee earlier I was
22 actually remembering IT slightly incorrectly and it is
23 available on the Relativity Database. It's document
24 number 001592. And although it's published by The
25 Irish Times on 24th January 2002, it's not actually an 14:37
26 interview, as I had remembered it to be, it's the
27 publishing of a public statement by the Chief
28 Constable, that's its heading:

29 "Statement by Sir Ronnie Flanagan, Chief Constable of

1 the PSNI."

2
3 And it begins:

4
5 "We, in the Police Service of Northern Ireland..." 14:38

6
7 Now, this is a public departure surely?

8 MR. HENRY: My Lord, our understanding of that document
9 is that it was the PSNI response to the PONI Report in
10 2001. It has made its way through to the Inquiry team, 14:38
11 it may or may not have already made its way into the
12 public domain.

13 CHAIRMAN: It's published in The Irish Times, it would
14 seem?

15 MR. HENRY: We don't understand it to have been 14:38
16 provided to The Irish Times by us, my Lord. If your
17 Lordship is looking at the first page and reading that
18 as a public statement made The Irish Times, one could
19 readily understand why that's the interpretation
20 because of how it's framed at the beginning but it's 14:39
21 responding, we understand is the PSNI response which
22 followed in January 2002 to the December 2001 report.

23 CHAIRMAN: Was this not published then, was it not made
24 public?

25 MR. HENRY: It wasn't the intention, as we understand 14:39
26 it, to make this statement public, it was a response to
27 PONI.

28 CHAIRMAN: This was designed to be a private response
29 to PONI? Are you sure?

1 MR. HENRY: That is our understanding, my Lord. It
2 contains sensitive information.

3 CHAIRMAN: This response was also used in other court
4 proceedings, was it not?

5 MR. HENRY: There was certainly reference to a response 14:40
6 and there was some controversy in and around the
7 response itself, my Lord. I'm not sure that it was
8 quoted as such in other proceedings, but it would
9 certainly take into account any references that are
10 brought to our attention. 14:40

11 CHAIRMAN: well, these rather oblique references might
12 not sound to everyone as though they were entirely
13 consistent with the duty of candour, you must know the
14 extent to which this statement by the Chief Constable
15 was used in other proceedings and was made public? Can 14:41
16 we not just know that straightforwardly?

17 MR. HENRY: My Lord, it had not been our understanding
18 when until we saw The Irish Times article that the
19 response was -- or the information framed with The
20 Irish Times around it that this material had in fact 14:41
21 made its way into the public domain.

22
23 what I can say, not to take your Lordship off topic or
24 off point, but if your Lordship refers to the written
25 submissions that we've provided, we have said that 14:41
26 we've endeavoured to find out what is in the public
27 domain and what's not. If there's anything new which
28 is brought to our attention that we were previously not
29 aware of, we would take that into consideration.

1 CHAIRMAN: well, what does it matter in a sense? This
2 is the Chief Constable's position. If it was intended
3 that it should be given privately to PONI, then that
4 doesn't seem to have come to pass, it has made its way
5 into the public domain plainly through being published 14:42
6 in The Irish Times. It may also have made its way into
7 the public domain in other ways, I'll have to check my
8 notes about that, I don't have them quite in front of
9 me at the moment. But the Chief Constable's position
10 on the question of whether Fulton was a CHIS could not 14:42
11 be more straightforward.

12 MR. HENRY: But within the body of that response, yes,
13 my Lord.

14 CHAIRMAN: And what is the effect of the fact that
15 that's now been published? Should it be ignored? 14:43

16 MR. HENRY: My Lord, we've previously accepted that any
17 previous disclosure is a relevant material
18 consideration whenever taking into account any claim
19 for a CMRO. The disclosures which your Lordship has
20 referred to are matters that can be taken into account 14:43
21 when arriving at your decision.

22 CHAIRMAN: But I don't know what this taking into
23 account really means. How am I to take it into
24 account? Am I to say to myself well, in the balancing
25 exercise I can look to the fact that all of this 14:43
26 information about Mr. Fulton is there so, therefore, to
27 require the Chief Constable to disclose one way or the
28 other whether he was a CHIS won't do any further harm?
29 Or am I to look at the matter before that and say, is

1 it acceptable to allow the Chief Constable to apply the
2 doctrine in circumstances where there is so much in the
3 public domain about Mr. Fulton?

4 MR. HENRY: I think it's probably the latter, my Lord,
5 but if I might try and answer your Lordship's question 14:44
6 in the following way. Your Lordship receives the view
7 of the State CPs in relation to whether or not there's
8 a real risk of serious damage to an important public
9 interest. It's within your gift then to assess that.
10 If it is rational, accept it and apply it to question 14:44
11 No.4, Stage 4. If you find that it's irrational then
12 it's within your gift not to accept it when
13 considering, if needs be, moving on to the decision at
14 stage No.4. What I can also say is this, and this is
15 echoing something that I mentioned earlier, this is a 14:45
16 current assessment, NCND is something, as your Lordship
17 knows, has significant consequences. It derives its
18 value from being maintained, it loses value from
19 exceptions and it speaks to the willingness of one or
20 more State CPs to disclose information about those who 14:45
21 have previously provided information to the security
22 forces.

23
24 The more willing such disclosures are to be made the
25 less confidence anyone will have in the confidentiality 14:46
26 of information moving forward.

27 CHAIRMAN: I fully understand the rationale behind the
28 policy and the importance of it, but once the status of
29 the individual has been declared, the policy is

1 departed from. It can't be reimposed. That fact is
2 out into the open. Now, it might be that that
3 individual has given information to the authorities or
4 discusses in documentation other matters that are
5 confidential, such as methods, operations, things of 14:46
6 that sort and they might quite easily fall within the
7 bounds of a Restriction Order. But that's not because
8 of NCND, that's just for different reasons. Its
9 status, once departed, from can't be reimposed, surely?

10 MR. HENRY: I think, my Lord, respectfully, there is 14:47
11 interest there is a significance which attaches to a
12 present day confirmation one way or the other in
13 relation to an particular individual's status. I'm not
14 sure that I'm going to be able to go any further than
15 that in open in order to assist you. You may find that 14:47
16 dissatisfactory, my Lord, but I think that that is as
17 far as I can go with it.

18 CHAIRMAN: Another area where we might see evidence of
19 a departure is in Mr. Justice Horner's decision where
20 at paragraphs 239 to 243 he talks about Fulton and the 14:48
21 intelligence apparently provided by him. And at 241 he
22 says:

23
24 "The intelligence by Fulton cannot be dismissed
25 summarily." 14:48
26

27 At 243 he talks about the assessments that have been
28 made of him, and he sets out what he thinks may or may
29 not be capable of being made of the intelligence

1 supplied by Fulton. So it's pretty clear that in the
2 hearing before Mr. Justice Horner, there was evidence
3 about the fact that Fulton was a CHIS. But there's
4 another passage I just wanted to look at as well.

14:48

5
6 At paragraph 107, Mr. Justice Horner is talking about
7 the PONI Report, the criticisms contained in it. And
8 at 108 he says:

9
10 "This report provoked a statement in response from the
11 Chief Constable which joined issue with PONI on many
12 issues and, in particular, made it clear that Fulton's
13 information would not have prevented the Omagh bomb..."
14 et cetera.

14:49

15
16 Now, that's the response that you and I were talking
17 about a minute ago, isn't it?

18 MR. HENRY: That's correct, my Lord.

19 CHAIRMAN: So, it was obviously sufficiently public to
20 have been aired and considered during the course of
21 those proceedings.

14:49

22 MR. HENRY: It was provided to Mr. Justice Horner
23 during the course of those proceedings.

24 CHAIRMAN: And given that Mr. Justice Horner also made
25 the comments that I mentioned in paragraphs 239 to 243
26 about Fulton being a CHIS, and bearing in mind that
27 there were closed hearings proceedings in that judicial
28 review, does that mean that the policy was not insisted
29 upon in the course of those proceedings?

14:50

1 MR. HENRY: There was certainly no interference with
2 that judgment being published in open, my Lord, in
3 those terms.

4 CHAIRMAN: So, does that mean that my impression was
5 right, the policy was not insisted upon? 14:50

6 MR. HENRY: If the direct question did the PSNI insist
7 or attempt to insist on the reference being removed
8 from the open judgment, the answer to that is no.

9 CHAIRMAN: Or even in the evidence that was heard prior
10 to the decision being published? 14:51

11 MR. HENRY: Well, I'm not sure that the answer to that
12 is quite as clean-cut as the answer to the last query
13 my Lord.

14 CHAIRMAN: All right. So, have we reached this stage
15 where, although you haven't said so perhaps in terms 14:51
16 yet, Mr. Henry, that the PSNI's position is that it
17 should be permitted to apply the policy of neither
18 confirm nor deny in these proceedings to the question
19 of whether Kevin Fulton was a CHIS?

20 MR. HENRY: That's correct, my Lord. 14:52

21 CHAIRMAN: And I'll have to assess then in due course
22 whether that's a rational position to be in or not?

23 MR. HENRY: Yes, my Lord.

24 CHAIRMAN: All right, thank you.

25 MR. HENRY: Unless I may be of any further assistance. 14:52

26 CHAIRMAN: Thank you, Mr. Henry.

27 MR. GREANEY: Sir, Mr. Henry has undertaken to obtain
28 instructions in relation to a number of matters
29 relating to Kevin Fulton. Could we suggest two other

1 matters that he might wish to take instructions about,
2 they are as follows: As we understand it, on the 13th
3 of December 2001, so the day after the PONI Report was
4 published, Sir Ronnie was interviewed on Newsnight by
5 the journalist Kirsty Warke and a transcript of that
6 interview, which was broadcast reveals that she asked
7 the following question:

14:52

8
9 "You also had a contact with a police informant called
10 Kevin Fulton who said three days before the bomb that
11 something was going to move north. Again, this wasn't
12 acted on. This was an informant who you paid
13 substantial financial rewards to who you trusted and
14 yet his information was not passed on."

14:53

15
16 And the response of Sir Ronnie is recorded as being as
17 follows: "That", so plainly a reference to
18 Kevin Fulton:

14:53

19
20 "That was an informant at that time in respect of whom
21 monies had been paid for criminal intelligence. He was
22 giving at that stage some subversive intelligence. The
23 truth is the report says if that intelligence had been
24 acted upon, a number of things might have been
25 possible. It names a number of people in respect of
26 whom surveillance might have been conducted, in fact
27 surveillance was ongoing in respect of those people
28 named. So what Fulton gave would not have added one
29 iota to already existing high levels of covert and

14:53

14:53

1 overt policing activity in that area which was already
2 subject to a whole range of high level threats."

3
4 So, Sir, if that is accurate, it would appear that
5 Sir Ronnie departed from the principle of NCND in
6 relation to Kevin Fulton on national television.

14:54

7
8 The second issue that Mr. Henry might wish to obtain
9 instructions on, and which we invite him do so, is that
10 our understanding is that either on the same day, so
11 13th December, or the following day, Sir Ronnie gave a
12 newspaper interview, we think to The Belfast Telegraph
13 but we'll need to check that, and the contemporary
14 reports of what he said include the following:

14:54

15
16 "The Chief Constable then rebutted evidence from an
17 informant known as Kevin Fulton about a possible bomb
18 attack on Northern Ireland in and around Omagh. 'There
19 was a whole range of sets of information given by him
20 (Fulton), which we and other organisations mounted very
21 costly, very prolonged and very extensive operations to
22 then find there was no other original basis for that'."

14:55

23
24 And it goes on but the point, perhaps, is made by the
25 passage that we've just read out. Again, on the face
26 of it, assuming that is an accurate report of what
27 Sir Ronnie said, he would appear to have departed from
28 the principle of NCND in relation to Kevin Fulton in a
29 newspaper interview.

14:55

1
2 Sir, having made those observations and before we call
3 upon Mr. Goss to make his submissions on behalf of
4 counter-terrorism policing, Sir, I can see something I
5 have said has puzzled you.

14:56

6 CHAIRMAN: I had an understanding that you might be
7 going to invite Ms. Fee to say something.

8 MR. GREANEY: Indeed, Sir. What I was about to say is
9 before we hear from Mr. Goss on behalf of
10 counter-terrorism policing that I knew Ms. Fee on
11 behalf of His Majesty's Government wishes to add
12 something to the submissions that she made earlier
13 today.

14:56

14 CHAIRMAN: Ms. Fee.

14:56

15
16 FURTHER SUBMISSION BY MS. FEE:

17
18 MS. FEE: Thank you, Mr. Chairman, I'm grateful to you
19 for hearing from me again on this short discrete
20 matter. I have taken specific instructions on one of
21 the questions which you asked me earlier, as I
22 indicated I would do, in relation to Mr. Rupert.

14:56

23
24 There was a historical departure from NCND in respect
25 of Mr. Rupert in the course of the McKeivitt prosecution
26 to the extent that HMG do not seek to protect that he
27 was an agent for MI5. There's no new departure today
28 but those historical facts are in open through, for
29 example, the sections of the Breslin judgment which,

14:56

1 Chairman, you referred to specifically earlier. There
2 will, however, be a range of other matters relating to
3 Mr. Rupert and his work which HMG will continue to seek
4 to protect.

5
6 So I hope, Mr. Chairman, that those additional
7 instructions are of assistance.

8 CHAIRMAN: Thank you.

9 MR. GREANEY: Thank you very much. Sir, we can now
10 hear from Mr. Goss on behalf of counter-terrorism
11 policing.

12 CHAIRMAN: Good afternoon Mr. Goss.

13
14 SUBMISSION BY MR. GOSS:

15
16 MR. GOSS: Good afternoon, Sir. First of all, can I
17 say my learned leader, Ms. Whitehall King's Counsel,
18 sends apologies for her absence due to other
19 professional commitments today, and she has been
20 closely involved in the preparation of CTP's
21 application and CTP is committed to assisting the
22 Inquiry's work so far as it is able to do so.

23 CHAIRMAN: Thank you.

24 MR. GOSS: As this is the first time that CTP have
25 appeared at an Inquiry hearing, I hope it is both in
26 order and helpful for me briefly to introduce it as an
27 organisation before turning specifically to the CMRO
28 application.

1 CTP is not a legal entity, it is a network. It's a
2 collaboration of UK police forces which delivers the
3 law enforcement elements of the UK Government's
4 counter-terrorism strategy known as CONTEST.

14:58

6 The CTP Network has three distinct missions;
7 preventing, disrupting and investigating dangerous
8 extremists, including terrorists, tackling state
9 sponsored criminal activity in the UK. And it is also
10 the UK law enforcement lead for the investigation of
11 war crimes.

14:58

13 In terms of its structure, it's broken into nine
14 regions across England and Wales. Each region has a
15 counter-terrorism unit or counter-terrorism
16 intelligence unit which generally involves a number of
17 police forces, under the leadership of a single chief
18 officer of police. And beyond England and Wales, CTP
19 works in partnership with both the Police Service of
20 Northern Ireland and Police Scotland.

14:59

14:59

22 The CTP Network is headed by the Assistant Commissioner
23 of Specialist Operations within the Metropolitan Police
24 Service and at the centre of the network is
25 Counter-Terrorism Police Headquarters, CTPHQ, hosted by
26 the Metropolitan Police Service under a national
27 collaboration agreement. The lead officer for CTPHQ
28 underneath Commissioner, underneath the Assistant
29 Commissioner of Specialist Operations is the Senior

14:59

1 National Coordinator for Prevent and Pursue, Deputy
2 Assistant Commissioner, Victoria Evans from whom you
3 have an open witness statement as part of CTP's
4 application.

15:00

6 The role of CTPHQ is to coordinate and deploy resources
7 across the national network and to provide guidance and
8 policy to the regional units. And the SNC can also, on
9 significant or high profile incidents or investigations
10 exercise direct control of CTP officers and resources.

15:00

12 Alongside hosting CTPHQ, the Metropolitan Police
13 Service also host CTP London which is a collaboration
14 between the Metropolitan Police and City of London
15 Police, it's the counter-terrorism unit for London as
16 one of those nine regions. And that incorporates the
17 unit that until recently was known as SO15 or the
18 counter-terrorism command.

15:00

20 And so the Metropolitan Police Service, therefore,
21 hosts both an operational counter-terrorism unit, CTP
22 London, and the headquarters for the network as a
23 whole, CTPHQ. Ms. Whitelaw KC and I represent both CTP
24 London and CTPHQ in this Inquiry.

15:00

26 Importantly, Sir, the CTP Network did not exist at the
27 time of the Omagh bombing, it began to be developed in
28 approximately 2006 onwards. Instead, individual forces
29 had their own Special Branches. We've heard a little

15:01

1 bit about the RUC Special Branch already today. That
2 included Metropolitan Police Special Branch, sometimes
3 known as MPSB or MPSSB, sometimes also known as SO12.
4 And there was also the Metropolitan Police
5 Anti-Terrorist Branch also known as ATB or SO13. And
6 it was in 2006 that SO13 and SO12 merged to form SO15.
7 And if I can be forgiven for the acronyms.

15:01

8
9 Prior to 2006, MPSB and ATB did have some national
10 responsibilities but they were never responsible for
11 countering terrorism in Northern Ireland, that was the
12 royal of the RUC and later PSNI in conjunction with the
13 Security Service.

15:02

14
15 In Great Britain, from 1992 onwards the Security
16 Service was the lead agency for countering Northern
17 Ireland-related Republican terrorism, although MPSB
18 retained its own particular responsibility for London
19 and continued to contribute to the wider national
20 effort.

15:02

15:02

21
22 Inevitably, there was crossover between intelligence
23 and information from Northern Ireland about the
24 activities of Republican terrorists there and the
25 threat of Republican terrorism in London and throughout
26 great Britain.

15:02

27
28 ATB also supported some of the forensic work following
29 the Omagh bombing itself and it was also responsible

1 for the National Bomb Data Centre which existed at the
2 time of the Omagh bombing, and still does today. As
3 I've said, Sir, those two organisations merged in 2006
4 to form SO15 and that has in turn recently become part
5 of CTP London.

15:03

6
7 The role now carried out by CTPHQ prior to the
8 formation of the CTP Network was, to some extent,
9 carried out by an organisation known as the Association
10 of Chief Police Officers Terrorism and Allied Matters
11 Committee (ACPO TAM). But it's right to say that under
12 that model there was less coordination or unity of
13 approach between the various Special Branches than
14 there is now across the CTP Network.

15:03

15
16 The reason I've set that out in a little, although
17 quite brief detail I hope, is that the significance of
18 that link between CTP and its predecessor organisations
19 is that as a result of that history both CTPHQ and CTP
20 London hold relatively substantial material from the
21 relevant time period relating to Northern Ireland and
22 to the threat of terrorism there. That's the case even
23 though their predecessor organisations did not have a
24 role in policing or countering terrorism in Northern
25 Ireland. And your Inquiry, Sir, is rightly interested
26 in the material that CTP holds. But I hope that that
27 background explains why CTP has engaged with the
28 Inquiry as a material provider rather than seeking Core
29 Participant status.

15:03

15:03

15:04

1
2 In doing so, CTP has nonetheless appointed a senior
3 investigation officer and a small team of experienced
4 counter-terrorism detectives to respond to the Inquiry.
5 It's drawn on CTP electronic and historical paper 15:04
6 records and located a number of retired officers to
7 ensure that the Inquiry has the information that it
8 needs.

9
10 And from the earliest stages of the Inquiry, CTP has 15:04
11 engaged extensively with your legal team providing
12 disclosure and responding to Rule 9 requests. And may
13 I take this opportunity, Sir, to express CTP's thanks
14 for the constructive and helpful approach that your
15 team has adopted throughout. 15:05

16 CHAIRMAN: Thank you.

17 MR. GOSS: Save for a small amount of legally
18 privileged material in the usual way, CTP hasn't sought
19 to hold anything back from your legal team, though, of
20 course, as with other organisations, given the passage 15:05
21 of time, perhaps unsurprisingly, not all of its records
22 are still available. And CTP, Sir, will continue to
23 support the Inquiry's important work. Delivering
24 justice for the victims of terrorism is at the heart of
25 what CTP does and that's no less important in an 15:05
26 inquiry contest as opposed to a criminal trial. And so
27 I hope I may take this opportunity through you, Sir, to
28 express CTP's condolences to those bereaved by the
29 horrific atrocity that was the Omagh bombing and

1 sympathy to those who were injured, physically and
2 psychologically.

3
4 Sir, inevitably in the light of what I've said and in
5 the light of CTP's role, some of the work that it does 15:06
6 has to take place behind closed doors both to protect
7 national security and the effective prevention,
8 detection, investigation and prosecution of crime.
9 And, in particular, of course, for CTP that involves
10 terrorism and crimes arising from hostile state 15:06
11 activity. That's why we're present today as applicants
12 for CMRO although CTP does seek to limit the material
13 over which it has sought CMROs to the minimum possible
14 to protect those relevant public interests.

15 15:06
16 Unless I can assist any further on the background to
17 CTP, Sir, that might be a convenient point for me to
18 turn to the CMRO submissions themselves.

19 CHAIRMAN: Yes.

20 MR. GOSS: As Mr. Greaney KC set out this morning, CTP 15:06
21 has applied for CMROs over a sample of the documents
22 that it has disclosed so far to the Inquiry. That
23 sample was selected by your team, supplemented with
24 suggestions from CTP to provide an indicative range of
25 the national security and counter-terrorism policing 15:07
26 interests which CTP seeks to protect. In our open
27 submissions, at the time they were filed it was a list
28 of 35 documents, following liaison with your team that
29 has expanded slightly so it is now 36 sample documents.

1
2 In terms of CTP's open material, Sir, you will have
3 seen our open written submissions which start at
4 page 48 of the open bundle for today, and the witness
5 statement of DAC Evans, the senior national coordinator 15:07
6 which starts at page 58. Sir, may I simply take those
7 as read because the written submissions of all of the
8 CPs have indicated that they have seen those and we're
9 grateful for the thoughtful engagement with them from
10 everybody. 15:08

11
12 In terms of the legal framework, Sir, as others have
13 said, there's relatively little dispute and you are now
14 very familiar with it. May I say, Sir, that from CTP's
15 perspective the comprehensive analysis of the law in 15:08
16 CTI's note dated 6th February 2026 is one with which we
17 agree. There are, though, three points that we would
18 wish to emphasise.

19
20 The first, Sir, is to endorse, as I'm sure others will 15:08
21 as well, the importance of open justice and
22 transparency in the context of public inquiries.
23 That's something that DAC Evans makes plain has been at
24 the forefront of her mind in her statement. And we
25 recognise the significant weight that you are bound, 15:08
26 rightly, to place on those matters in this Inquiry in
27 particular given the gravity of what happened, the
28 passage of time, the history of previous investigations
29 and inquiries and the importance of preserving both

1 public and Core Participant confidence in the Inquiry's
2 work and in its final conclusions.

3
4 DAC Evans says in her witness statement at paragraph 20
5 on page 61 she would not support an application that 15:09
6 sought infringements on that open justice principle
7 without being satisfied there was a relevant,
8 significant and real risk of harm to an important
9 public interest. And CTP has approached this
10 application for CMROs with those principles very firmly 15:09
11 in mind.

12
13 Belatedly, Sir, it's also had in mind the need to be
14 candid and transparent with the Inquiry, that's not yet
15 a statutory obligation but nonetheless it's one that 15:09
16 CTP has sought to adhere to. I've set out say, as I
17 say, save for a very small amount of privileged
18 material, that we've not sought to hold anything back
19 from your team.

20 15:10
21 The second point Sir, is that while, for obvious
22 reasons, much of the focus when considering CMROs both
23 in this Inquiry and indeed generally in the case law,
24 has been on the public interest in protecting national
25 security, there is also a significant public interest 15:10
26 in the prevention, detection, investigation and
27 prosecution of crime. That is, I think unlikely to be
28 controversial proposition. And where the crime in
29 question is terrorism, or where it is the work of

1 hostile states counter to UK interests, that,
2 obviously, can overlap with national security but it
3 is, in my submission, a public interest in its own
4 right.

5
6 And so when considering Section 19(3)(b) of the
7 Inquiries Act and what is necessary in the public
8 interest, in our submission, the risk of harm or damage
9 to that public interest in effective policing if I can
10 put it that way as a shorthand, is a relevant
11 consideration, even though it is not listed in
12 Section 19(4) and (5). That is, in my submission,
13 consistent with the case law on public interest
14 immunity which your counsel have referred you to in
15 their written submissions. Respectfully, Sir, we
16 agree, it makes no difference whether you consider PII
17 as a rule of law under 19(3)(a) or whether you consider
18 it through the lens of what is necessary in the public
19 interest with the particular factors that you must have
20 regard to under 19(3)(b).

21
22 There has been some suggestion in some of the written
23 submissions, Sir, based on Al Rawi, that because of the
24 effect of CMROs would be to place material into closed
25 rather than to exclude it, that represents a more
26 significant departure from the open justice principle
27 that requires a correspondingly more compelling
28 justification. The logic being that because it means
29 that some parties, Core Participants are having to deal

1 with the Inquiry without a full picture, that requires
2 more justification than where the closed material, as
3 in PII, is simply taken off the table altogether.
4

5 That proposition has been the subject of some debate in 15:12
6 the authorities since Al Rawi, Sir. We've addressed
7 them at paragraph 18 of our open submissions on page 54
8 of the bundle. And, Sir, without asking you to look it
9 up, could I endorse the discussion of this issue in the
10 case of R (on the application of AIG) v HM Courts and 15:12
11 Tribunal Service by Mr. Justice Swift.
12

13 He sets out the competing views on that issue of
14 Mr. Justice Marcus Smith In The Competition and Markets
15 Authority v Concordia case, and Mr. Justice Chamberlain 15:12
16 and R (on the application of Jordan) v The Chief
17 Constable of Merseyside case, and he endorses the
18 proposition the fact that material which a body seeks
19 to withhold from open proceedings will be considered in
20 closed, does not alter the cogency of the evidence 15:13
21 required to justify withholding the material. And,
22 Sir, we would say that there is now a considerable body
23 of case law, we've summarised in that and Mr. Justice
24 Swift reviews in AIG which supports that proposition
25 that things have moved on somewhat since Al Rawi. 15:13
26

27 The third point, Sir, on the legal framework, again a
28 short one, you've been referred to the principle of
29 relative institutional competence between the Inquiry

1 and the Secretary of State, in particular, in making
2 judgments about national security. In CTP's
3 submission, Sir, and again I hope this is not a
4 controversial position to take, the same logic applies
5 to senior police officers where the public interest in 15:14
6 question falls within their area of expertise,
7 responsibility and accountability.

8
9 You have, at some point, been referred to authorities
10 from the PII context that suggest that this might flow 15:14
11 with particular levels of rank. In my submission, Sir,
12 the better approach is to look to expertise and
13 responsibility as well as formal rank. DAC Evans, in
14 particular, is a very senior police officer. The rank
15 of DAC in Metropolitan Police Service is equivalent to 15:14
16 Deputy Chief Constable in other forces, and she clearly
17 has those significant expertise and responsibility in
18 this field.

19
20 But I emphasise, Sir, as others have, that reliance on 15:14
21 relative institutional competence does not detract from
22 the fact that the balancing exercise and Question 4 of
23 the Binyam Mohammed questions is ultimately for you.

24
25 In terms of the categories, Sir, I hope that I can, in 15:15
26 the light of the submissions that have been made
27 already and the considerable degree of agreement across
28 the written submissions, I hope I can simply make two
29 observations first on NCND and second on the impact of

1 passage of time and information being in the public
2 domain.

3
4 In terms of NCND, Sir, CTP's open position is that it
5 neither confirms nor denies whether anyone is or has 15:15
6 been a sort of agent for it or any of its predecessor
7 organisations. That includes the two individuals,
8 David Rupert and Kevin Fulton, identified in
9 Category A. We do maintain an NCND position as regards
10 them and CTP. 15:15

11
12 But regardless of the position as regards any
13 individuals, CTP does, obviously, have a significant
14 institutional interest in the effective operation of
15 the NCND principle for the reasons the Supreme Court 15:16
16 articulated in Thompson at paragraph 33, to which
17 Ms. Fee KC took you this morning. We recognise that
18 NCND is, of course, not absolute but we would submit
19 that where a justification for it exists, there is
20 ordinarily a very high bar before a court or tribunal 15:16
21 should decline to permit an organisation to rely on it.

22
23 There are four features which can be or which are often
24 relied on to support an argument that there should be a
25 departure or refusal to permit reliance on NCND. The 15:16
26 first, Sir, is self-disclosure and that is obviously
27 relevant in this case. We've cited in our written
28 submissions at paragraph 13 Lord Justice Burnett (as he
29 then was) in the Al Fawwaz case to the same effect as

1 DIL that Mr. Henry referred to earlier, self-reporting
2 does not without more undermine the application of
3 NCND, the reasons for NCND do not fall away in
4 self-reporting cases. And that must be right, Sir,
5 because NCND does not exist solely for the protection 15:17
6 of each individual in question but also to protect
7 others and to protect the effectiveness of law
8 enforcement and intelligence use of sources generally.
9 And that relies on the consistent application of NCND
10 principle which adopting a confirm or deny approach 15:17
11 where there has been self-reporting would undermine.
12 Such an approach would also allow manipulation of the
13 NCND principle. Individuals under suspicion by hostile
14 actors could, for example, be compelled to make a
15 self-disclosure, true or not, and then seek official 15:17
16 confirmation or denial. And it would also, of course,
17 operate only in one direction. Someone denying they
18 were a source would be unlikely ever to be able to
19 point to an official statement.

20 15:18
21 The second and similar argument, Sir, is everyone knows
22 that someone was a source. In my submission, that
23 suffers from the same difficulties of principle as
24 self-disclosure does. Official confirmation of
25 information that everyone knows is very different to 15:18
26 speculation and rumour. And again, as Lord Justice
27 Burnett observed in Al Fawwaz, extensive discussion in
28 journalistic material of an individual's links to MI5
29 did not undermine the NCND position in that case.

1
2 You've been referred already this morning, Sir, to the
3 decision on Restriction Orders of Lord Hughes in the
4 Dawn Sturgess Inquiry. As one practical illustration
5 of those points in that ruling at paragraph 15 Lord 15:19
6 Hughes declined to sanction a departure from the NCND
7 principle in respect of an alleged agent of the
8 intelligence agencies. That was despite the fact that
9 CTI in that case had noted that there were widely
10 reported assertions that the individual in question was 15:19
11 an agent for MI6, including in a book with which he was
12 said to have cooperated. That was a point vigorously
13 made by my learned Friend, Mr. Mansfield KC, in
14 submissions. He described it as you have an actor on
15 this stage who has actually indicated that that is 15:19
16 precisely what he was doing. Nonetheless, despite
17 Mr. Mansfield's vigour, the NCND principle was
18 maintained in that case.

19
20 One could also point, Sir, to the Scappaticci case 15:19
21 which I know you'll be familiar with.

22
23 The third argument that is often relied on for
24 declining to permit an agency to rely on NCND is one
25 that has already been the subject of considerable 15:20
26 discussion today which is official avowal. In other
27 words, there has been a previous official departure
28 from NCND. And, of course, this does, from time to
29 time, occur. In my submission, it will be a question

1 of fact in any particular case whether that is the case
2 or not. And if it has been then it is important that
3 there is candour for the reasons set out in
4 paragraph 27 of the AG v BBC case. What I would note,
5 Sir, is that paragraph 27 does not suggest that where 15:20
6 there has been a previous departure that that is
7 automatically a bar to NCND being relied on in future.
8 It will plainly be a relevant factor and that is why it
9 must be drawn to the tribunal's attention. But what is
10 not said in AG v BBC is that wherever there has been an 15:21
11 official avowal in the past, NCND cannot be applied in
12 the future. That will turn on the facts, in my
13 submission

14 CHAIRMAN: What do you make, then, of what was said at
15 paragraph 12(b), the passage that I raised earlier, I 15:21
16 think with Ms. Fee, in which the Court said -- sorry,
17 it's 12(a):

18
19 "The key question is whether MI5 had departed from NCND
20 in relation to X's status" 15:21

21
22 MR. GOSS: It was undoubtedly a key question, Sir. It
23 was a key question, perhaps, particularly in the
24 context of that case, because, as I'm going to come to,
25 one of the factors that's often very relevant is 15:22
26 whether there is a risk of a court or tribunal being
27 misled. And in that case, of course, that was exactly
28 what had occurred. There had been a departure as was
29 subsequently accepted, but then it was being stated

1 there had not been a departure and there was,
2 therefore, a risk of the tribunal being misled. And
3 that is why we say it was a key question. But in any
4 event, it's easy to see that it may well be a key
5 question but it does not mean it is a determinative 15:22
6 question, Sir. That may be slightly dancing on the
7 head of a pin, but there is nothing in my submission on
8 the face of the AG v BBC judgment that says where there
9 has been some form of official avowal in the past that
10 automatically means that it cannot be applied in the 15:22
11 future. It will all have to turn on the individual
12 facts of each individual case, Sir.

13 CHAIRMAN: The key unusually unlocks the door into the
14 secret.

15 MR. GOSS: I can see that in very many cases it will be 15:23
16 an extremely important consideration to take into
17 account. What we would not want to do is to say that
18 it will always be the answer. Doors may have more than
19 one lock, Sir.

20 CHAIRMAN: All right. 15:23

21 MR. GOSS: Where there has been official confirmation
22 or denial, of course, it is important to have full
23 regard to exactly what has or has not been officially
24 confirmed or denied. The fact that some information
25 has been confirmed or denied does not mean that 15:23
26 everything related to that information is then fair
27 game. Again, speaking, hypothetically, if it was
28 confirmed that an individual had previously been an
29 agent for a law enforcement agency that doesn't mean

1 the question of exactly which information they
2 provided, when they provided it, how long they had been
3 doing so, the arrangements by which they were contacted
4 or handled or recruited or managed would necessarily
5 fall to be disclosed. The exact scope and meaning of 15:24
6 any official avowal would, inevitably, be a question of
7 fact for the tribunal to determine. But, again, at the
8 level of principle in my submission, any avowal should
9 be construed with the purpose of NCND firmly in mind.
10 An overbroad interpretation of any avowal risks the 15:24
11 disclosure of information that would harm important
12 public interests.

13
14 Then, Sir, the last argument in favour of departing
15 from NCND is typically that on the facts of the case 15:24
16 the public interest in disclosure outweighs the
17 maintenance of NCND, that's effectively the Stage 4
18 question in Binyam Mohammed in this particular context.
19 And again not disputed that there are cases where such
20 a finding has been made. Typically, that is where 15:25
21 there is a risk that a criminal trial could not be
22 fairly determined without disclosure of an individual
23 status, or there are examples from civil jury trials
24 where, again, a jury might be misled leading to a risk
25 of a serious miscarriage of justice. And that's the 15:25
26 point, Sir, that I was just making and the significance
27 of tribunals being misled, that we also see in AG v
28 BBC.

1 It's important, of course, in this context, because
2 this is an inquiry not a trial, that the position will
3 be capable of full exploration in closed. And unlike
4 in a criminal or indeed in most civil trials, the risk
5 of the tribunal being misled is not present in the same 15:25
6 way.

7
8 Sir, those are the principal submissions we make as to
9 NCND. We will inevitably return to that point in
10 closed. 15:26

11
12 Can I assist any further on NCND from the perspective
13 of CTP?

14 CHAIRMAN: Sorry, just bear with me a second.

15 Mr. Greaney, was there something you wanted to raise? 15:26

16 MR. GREANEY: I was simply going to say, Sir, if
17 Mr. Goss is about to move on to another aspect of the
18 submissions this would be a convenient moment to have a
19 break.

20 CHAIRMAN: Yes. Mr. Goss, you understand we have to 15:26
21 take account of the stenographer and it's necessary to
22 have breaks from time to time. I hope this is not
23 going to be inconvenient.

24 MR. GOSS: Not at all. I think I have a very short
25 amount of time left, but if a break is convenient now 15:26
26 then so be it.

27 CHAIRMAN: We will just break at this stage.

28 MR. GREANEY: Can we take 15 minutes?
29

1 THE INQUIRY ADJOURNED BRIEFLY AND RESUMED AS FOLLOWS:

2
3 CHAIRMAN: Mr. Goss.

4 MR. GOSS: Thank you, Sir. Having said that those are
5 my submissions on NCND can I make two further short 15:44
6 points. The first is just to situate those four
7 grounds for refusing to permit reliance on NCND, within
8 the ambit of the four questions from Binyam Mohammed,
9 that the last one outweighed by the public interest in
10 disclosure is, obviously, analogous to the fourth 15:45
11 question. The first three, we would say, go to the
12 second question and, perhaps, also to the third and
13 whether the public authority's assessment of risk of
14 harm is one that you can properly accept. And I should
15 say at this juncture, Sir, that we accept your 15:45
16 formulation as put to Ms. Fee KC, of the test in
17 Thompson about when you should accept and when you are
18 entitled to depart from that assessment.

19
20 The other point, briefly, to make, Sir, is just an 15:45
21 observation on the AG v BBC case, which is that even in
22 that case the identity of Agent X was not disclosed.
23 And, therefore, the public interest factors and the
24 risks may be quite different when dealing with named
25 individuals rather than when dealing with confirmation 15:45
26 where, certainly to the public at large, it is on a
27 limited basis.

28
29 Sir, could I turn then to the other points I said I

1 would pick up which is the relevance of passage of time
2 and material being in the public domain. DAC Evans set
3 out in her witness statement that the position as
4 regards harm arising from disclosure has to be assessed
5 now, not as at 1998. What was sensitive then is not 15:46
6 necessarily sensitive now. Units have changed,
7 structures have changed, I've already touched on some
8 of the developments with a very wide lens. Technology
9 has, of course, changed.

10
11 We've given some examples of matters that probably, had
12 these proceedings been taking place in 1998, we would
13 have sought to protect but that now we do not in
14 paragraph 23 of our open submissions, one relating to
15 unit structures and one relating to cell site evidence. 15:46
16

17 Likewise, consistently with what I've said about
18 candour and transparency, CTP has also done all it can
19 to take full account of the material that is already in
20 the public domain. We've described an example of that, 15:47
21 again, at 23(c) of those submissions in relation to the
22 prosecution of the attempted firebombing campaign in
23 July 1998.

24
25 It's fair to say, Sir, that some things that would have 15:47
26 been put into the public domain, for example, in
27 criminal trial in 1998 probably wouldn't be today. The
28 kind of threats which the UK faces in the
29 counter-terrorism and hostile state, counter-state

1 threat field are very different from the late 1990s and
2 that, I suspect, goes really without saying. So too
3 are the technological capabilities of the kind of
4 hostile actors, both criminal and State with whom CTP
5 is contending.

15:48

6
7 It's not always easy to ascertain what it can properly
8 be said to have been put into the public domain in the
9 1990s or early 2000s. And, in some cases, where
10 material has been or appears to have been put in the
11 public domain, CTP's assessment is that re-disclosure
12 now in a context that would likely involve its
13 ventilation in an open hearing, involve placing it on
14 the Inquiry's website quite likely, dissemination
15 perhaps via the Internet in various ways, that that
16 re-disclosure would cause harm. We fully anticipate
17 that you will want to scrutinise examples of those
18 where they arise in closed and we accept that
19 particularly careful scrutiny must be given to those
20 sorts of cases. But there will be cases where, on the
21 particular facts, something that perhaps was
22 tangentially put into the public domain a long time ago
23 but in reality it is very difficult for anybody now to
24 put their finger on and say, yes, this is where that
25 information comes from or came from or this is now
26 widely known or widely available where re-disclosure
27 through this forum and may still cause harm.

15:48

15:48

15:49

15:49

28
29 In terms of the relevance of passage of time, I've

1 touched there on the changes since 1998 and how we have
2 to look at the position now. To an extent --

3 CHAIRMAN: It's quite easy, I suppose, Mr. Goss, to see
4 that there will be a number of examples of techniques
5 or operations that were available in 1990 which through 15:49
6 the passage of time have fallen into disuse and
7 therefore, as you say, no longer really need to be
8 protected. If it's the other way round it's a bit
9 harder to see, isn't it, that some things that were put
10 into the public domain in the '90s, and, of course, 15:50
11 with the Petronel trials, for example, would now, if
12 re-disclosed satisfy the second Mohammed question. But
13 that's something that you'll give me more details on in
14 closed, is it?

15 MR. GOSS: Yes, Sir. My learned Friend, Mr. Henry, 15:50
16 referred to the passage of time as being primarily
17 relevant to the second Mohammed question, and we'd
18 endorse that. He very carefully didn't close the door
19 on its potential relevance to the fourth question
20 though without wanting to put forward any sort of 15:50
21 hypothetical examples, can I try at the level of
22 principle to suggest one scenario where there might be
23 a hypothetical or there might be an example of it being
24 relevant to the fourth question stage and the balancing
25 exercise. Where the passage of time is relevant to 15:51
26 risk of harm, that clearly falls into the second
27 question, but the passage of time might, again on
28 particular facts, be relevant to the public interest in
29 disclosure. It may be that there is a common

1 assumption that has stood for many years which closed
2 material or provisionally closed material upturns or
3 confirms. And the length of time that that assumption
4 has been in place might be relevant to how important it
5 is that that disclosed so that there is an open 15:51
6 position, an accurate open position. Again, I don't
7 want to be pinned down to any particular facts, that is
8 speaking at the level of principle, but where the
9 passage of time is relevant to the public interest in
10 disclosure would be a case where, in my submission, it 15:52
11 could be taken into account at the fourth stage.
12 Because that, of course, is a matter for you and a
13 matter which is within yours and the Inquiry's
14 expertise and, ultimately, the balance is, of course, a
15 matter for you. 15:52

16
17 otherwise, Sir, on the balancing exercise, you have
18 CTP's closed damage assessment, I'm not going to go
19 through that now, obviously, and you have the view of
20 DAC Evans which has been expressed in open. That view, 15:52
21 in my submission, when taking account of all of the
22 material, is an informed, credible and rational one.
23 She has taken into account the relevant factors and
24 particular expert advice. She's formed a view based on
25 her own considerable experienced and responsibility. 15:52
26 It's the sort of view as to the likely harm to
27 important public interests from which, in my
28 submission, there should not be a departure.
29

1 She sets out in the statement her own view of the other
2 side of it but recognising that that is one for you.

3
4 She has also set out some consideration of the lesser
5 possible alternatives and so all I will say on that, 15:53
6 because it speaks for itself, is that you may think
7 that the consideration of official sensitive
8 Restriction Orders, OSROs, and the suggestion that
9 there's no suggestion that CPs wouldn't take the
10 protection of information within that seriously, the 15:53
11 practical reality is that disclosure of material into
12 that space would increase the risk of harm. And as you
13 held in June this year, Sir, on anonymity for certain
14 PSNI officers, it's not a question of whether Core
15 Participants can be trusted, it's a question of what 15:53
16 proportionate measures should be taken to provide
17 effective protection. And although that ruling turned
18 on questions relating to Article 2, you may think the
19 public interest in national security and in the
20 prevention, detection and investigation of crime have a 15:54
21 similar weight in this context.

22
23 Sir, the remainder of our submissions, I think, will
24 have to be addressed in due course in closed by way of
25 reference to individual documents and specific 15:54
26 sensitivities. Unless I can assist any further those
27 are CTP's open submissions

28 CHAIRMAN: Thank you, Mr. Goss, I'm very grateful to
29 you.

1 MR. GREANEY: Can we next call upon Mr. Aiken as he has
2 made some short submissions on behalf of the Police
3 Ombudsman for Northern Ireland.

4 CHAIRMAN: Mr. Aiken.

5
6 SUBMISSION BY MR. AIKEN:

7
8 MR. AIKEN: Good afternoon, Sir. Sir, I now appear on
9 behalf of the Police Ombudsman for Northern Ireland.

10 The Ombudsman doesn't intend to make any formal
11 submissions to you in respect of the CMRO process that
12 you have designed and is to be implemented, unless
13 there's something specific that I can assist you with.
14 You already have lots of submissions from both State
15 parties and those representing the families so I don't
16 intend to make any further submission in that regard.

17
18 If there is something I can assist with I'm happy to
19 do that, but if not I'm happy to take my seat.

20 CHAIRMAN: No, I don't think there's anything I wanted
21 to raise, Mr. Aiken, thank you very much.

22 MR. AIKEN: Thank you Sir.

23 MR. GREANEY: Sir, we are going to turn next then to
24 the submissions made on behalf of the bereaved families
25 and survivors, and I will ask Mr. Southey, please, to
26 make a start of his submissions recognising that he
27 will not finish them today.

28 CHAIRMAN: Are you happy to introduce your submissions
29 at least this afternoon.

1 MR. SOUTHEY: Absolutely, I'm very happy to start and
2 see how far I get.

3
4 SUBMISSION BY MR. SOUTHEY:

5
6 MR. SOUTHEY: Can I start by saying, firstly, we
7 obviously made submissions in writing, relatively
8 extensive ones going into some detail, for example, in
9 relation to the sample documents. I'm not going to go
10 through all of those submissions, you'll be pleased to 15:56
11 know, repeating them verbatim. What I hope to do is focus
12 on what I think are some of the key issues based on
13 oral submissions we've heard today and also the
14 submissions in writing from other parties.

15
16 Our starting point is to agree with something that is
17 said in the Inquiry legal team's note of the 24th of
18 August, which is at 218 of the bundle, which is that
19 there is agreement - and there certainly seems to be
20 agreement between all the parties - that it's important 15:57
21 that the Inquiry should be as open and transparent as
22 possible. That agreement is, obviously, welcomed.
23 What seems to us to be really the focus of the various
24 submissions about CMRO is it that the real area of
25 dispute is as to what is possible, effectively, what 15:57
26 can be made public and what can't be made public.

27
28 Now, in that context we also accept that there is
29 apparently large agreement on the legal principles.

1 There's one issue I'd wish to highlight, I'm not sure
2 it's actually in dispute but there is one area where I
3 would like to address one specific submission that's
4 been made where there may be an area of dispute.

5
6 The first thing I wanted to highlight, recognising this
7 may not be in dispute, is that certainly in written
8 submissions and I think in oral submissions the
9 parties' position may have become clearer, but
10 certainly in written submissions it wasn't necessarily
11 made clear by the State parties that they accepted that
12 the balancing exercise is ultimately one for you. I
13 say things have moved on, certainly HMG in their oral
14 submissions today accept that. But it is important to
15 recognise that ultimate test in our submission is one
16 for you.

17
18 There's several reasons for that, firstly, as has been
19 recognised in the evidence, you are in the best
20 position to assess the public interest. And, secondly,
21 obviously you will be in the best position to assess
22 the importance of the documents, both of which are
23 factors relevant to the balance.

24
25 Now, that, in one sense, explains something that we
26 would wish to emphasise that arises from Thompson and
27 has been touched upon today. I won't take you to it
28 but paragraph 134 of Thompson emphasises the importance
29 of the Court, as obviously it was being considered in

1 Thompson being fully and accurately informed. And
2 certainly that, in our submission, is important, partly
3 because of the need for the Inquiry to conduct its own
4 balancing exercise. That, obviously, is also reflected
5 in the BBC case.

15:59

6
7 Sir, I think during the submissions that you've already
8 heard you've drawn attention to paragraph 27 and the
9 need for disclosure there. And we would highlight
10 also, paragraph 19, which makes clear that the weight
11 that is normally given should be given to public
12 authorities who were asserting national security
13 concerns is dependent, essentially, on those bodies
14 demonstrating, essentially, compliance with their
15 obligations to the Court.

16:00

16 CHAIRMAN: What does that mean then in the context of
17 this Inquiry, Mr. Southey?

18 MR. SOUTHEY: Well, it means that, for example, going
19 forward that what the Inquiry has to be confident
20 about, and this is one of the reasons why we've
21 highlighted in our written submissions the need for
22 safeguards and the need for open statements about
23 things like candour, the Inquiry gives weight to claims
24 based on national security, it allows them,
25 effectively, to be -- or it accepts them, unless it can
26 be demonstrated they are Wednesbury unreasonable, et
27 cetera, but it only does that if it's satisfied that
28 the public authorities are, for example, complying with
29 their obligations of candour.

16:00

16:00

16:01

1 Public authorities are entitled to great respect when
2 they claim national security concerns, but that is
3 conditional on them complying with their obligations.
4 And that's one of the key lessons in one sense from the
5 BBC case.

16:01

6 CHAIRMAN: How am I going to achieve that though?

7 MR. SOUTHEY: well, one of the things we've suggested
8 in writing, and we echo orally, is that, on the
9 material we've seen - and I recognise, obviously, we
10 only see part of the picture so it may be that this is
11 addressed else where, but it does seem to us that if a
12 claim is being made, for example, that something should
13 remain confidential it is important that there is a
14 witness statement essentially saying we've complied
15 with our obligation of candour, as far as we're
16 concerned, this is what is in the public domain or
17 there is nothing in the public domain about this
18 matter. And those sorts of safeguards are important to
19 ensure that the Court has confidence, essentially, in
20 the process. The language, I have it on my screen at
21 paragraph 19 is:

16:01

16:02

16:02

22
23 "The courts need to have confidence without reservation
24 in the process."

16:02

25
26 And I'm not saying necessarily that this should be a
27 sort of determinative going forward but some of the
28 answers that have been given today in relation to
29 Mr. Fulton and Mr. Rupert give rise to concern,

1 essentially. The uncertainty, in particular, in
2 relation to what PSNI has said in the past about
3 Mr. Fulton is a matter of concern. It seems to us
4 that, or certainly we would submit that it is important
5 that, as was made clear in the BBC case, there is put 16:03
6 before the Inquiry comprehensive information,
7 essentially, about what has been said in the past about
8 Mr. Fulton.

9
10 Now, none of that means necessarily that we've reached 16:03
11 the stage where the Thompson approach should be
12 departed from, except that would be quite a bold
13 submission but it does mean that safeguards need to be
14 put in place so that going forward you can have
15 confidence, Sir, that, as I say, confidence without 16:04
16 reservation using the language of the judgment, that
17 there has been proper and full information put before
18 you about matters that are relevant. As I say, we say
19 that links back to para 134 of Thompson and para 134 of
20 Thompson is where it is said by the Supreme Court that 16:04
21 that a court and coroner have to take great care that
22 they have informed themselves fully and accurately
23 about the competing aspects of the public interest
24 before reaching a about the balancing exercise. Now,
25 that places the burden on the Court. But how does the 16:05
26 Court make sure it's fully informed? It does that, in
27 our submission, by making sure, there are safeguards in
28 place that make sure that the duty of candour has been
29 complied with.

1 The second thing that I just wanted to touch upon, and
2 to be frank given the submissions that were made by
3 Mr. Henry orally on behalf of PSNI, this may be a
4 relatively minor matter, but it is, certainly from my
5 client's point of view, an issue that they have a 16:06
6 degree of concern about, and that's this: We drew
7 attention to a certain focus in the PSNI's submissions
8 on case law regarding inquests and PII. Now, in
9 principle nothing that is said in those judgments in
10 terms of the law is necessarily out of line with 16:06
11 judgments like Mohammed. And I don't see that material
12 being relied upon by PSNI to suggest that the approach
13 in Mohammed shouldn't be departed from. Where we've
14 taken issue with it, and I hope it's helpful for me to
15 clarify this, is that in terms of PSNI submissions 16:06
16 effectively that the practice of inquests might be
17 followed, that's where we would take issue. And the
18 reason we take issue with it is this; in our
19 submission, the balancing exercise in a case where PII
20 is being ordered can be different. And the reason for 16:07
21 that is because ultimately, in terms of fairness, the
22 issues are potentially different. This is something
23 that was identified in Al Rawi. I recognise that Al
24 Rawi may not be completely up to date in some respects
25 but this particular point in Al Rawi, as far as I'm 16:07
26 aware, has never been questioned. And the big
27 difference is between PII and a closed procedure is
28 that when there is a PII application it means,
29 obviously, no consideration is being given to the

1 material. No party has access to it. The
2 decision-making body won't rule on it. It is,
3 effectively, not part of the considerations. Now that
4 means in one sense there's no particular issue
5 generally with fairness in terms of how the procedure 16:08
6 is adopted. The point made by Lord Dyson at para 41 of
7 Al Rawi is that closed procedures are different
8 because, of course, they mean that some parties
9 involved in the decision-making won't have access to
10 that material. And all we're saying is that when you 16:08
11 conduct the balancing exercise that is factor
12 potentially to take into account. So, we're not saying
13 that in any way the basic principle of a balancing
14 exercise that one derives from the PII case law and
15 which is applied in the inquest cases is wrong in this 16:08
16 context; what we're saying is, inevitably, everything
17 is fact sensitive and so the fact a particular result
18 was reached in the inquest context doesn't necessarily
19 mean it should be reached in this case. And that's
20 where we took issue with the approach of PSNI. 16:08
21 CHAIRMAN: What it comes to there is that your point of
22 fairness is that in PII, fairness is satisfied because
23 nobody gets to see the material.
24 MR. SOUTHEY: Absolutely.
25 CHAIRMAN: You say the difference which should feature 16:09
26 in the balance is that in closed material hearings,
27 material is available but some people don't get to hear
28 it.
29 MR. SOUTHEY: And, indeed, it may be that there is

1 reasoning, obviously, that the public doesn't get to
2 see, for example.

3 CHAIRMAN: All of that discussion that you've taken me
4 through is in the context, again, of adversarial
5 proceedings and my query is the extent to which there's 16:09
6 any validity in that in inquisitorial proceedings.
7 Now, this is a theme that you and I discuss from time
8 to time and I can see that through the lens of
9 adversarial proceedings there's an obvious opportunity
10 for unfairness if material is relied on that one party 16:10
11 doesn't get to see. But we're not in that territory
12 here.

13 MR. SOUTHEY: Can I put it in a slightly different way
14 which may make it more relevant? Obviously, all the
15 parties accept, rightly, that the openness is an 16:10
16 important consideration in this context, in part
17 because of the need for public confidence.

18
19 If the Inquiry, and it will need to and I'm not saying
20 this isn't legitimate providing it's justified, but if 16:10
21 the Inquiry reviews closed material, makes findings of
22 importance in relation to that closed material, it may
23 be for good reason, that, potentially, has an impact on
24 that openness. And the point I'm making is, that
25 means -- which is different to the inquest situation, 16:11
26 the inquest situation, which is what the case law is
27 about, whatever the findings are will have been made on
28 entirely open evidence because there isn't power to
29 hold a closed. So that public confidence, that public

1 interest, if you like, in openness is not the same.
2 That's a different way of putting the same thing
3 perhaps. But, in one sense, that's still the concern
4 that's being expressed in Al Rawi, we would submit,
5 because it talks about the difference being in a PII 16:11
6 case nobody considering the material, whereas in a
7 closed procedure there is consideration given to that
8 material. So, I use the language of fairness, that's
9 the language that appears in Al Rawi but I probably was
10 wrong in one sense to focus on fairness, because it's 16:11
11 not just about fairness, it's about openness.

12
13 As I say, none of that's to suggest, which would be,
14 again, a very bold submission that in some sense the
15 closed procedure is prohibited or anything like that, 16:12
16 it's just that when you come to that balancing exercise
17 and that balancing exercise we submit is important
18 ultimately, and it is ultimately for you, it is
19 important to recognise that the public interest in
20 openness is potentially significantly different in 16:12
21 circumstances where something is being considered but
22 considered in closed, as opposed to the situation where
23 something is not even being considered.

24
25 Turning then to the categories of document that have 16:13
26 been identified as being in one sense a starting point
27 essentially for the CMRO process. We submit that its
28 important, as far as possible, and obviously it would
29 be impossible for this to be perfect, but we submit

1 it's important, as far as possible, that those
2 categories mirror, essentially, the categories of
3 document that in fact will be made closed. Because if
4 they're over-broad or if they're over-narrow they're
5 likely to increase everyone's workload because people 16:13
6 will be either over-claiming or needing to make
7 applications to vary the categories and so as far as
8 possible we submit they should reflect what is actually
9 going to be subject to closed material.

10
11 There's a second reason why we make that submission and
12 it's one I'm going to come to probably tomorrow, which
13 is that the Core Participants I represent are concerned
14 that public authorities are seeking to over-claim,
15 effectively, that material should be closed. And so 16:14
16 it's important the Inquiry, to some extent, corrects
17 that understanding or that approach and it corrects it,
18 we submit, by making it clear where the line is likely
19 to be drawn.

20
21 Now, in terms of the particular categories that are in
22 issue, we take specific issue with, I think, three or
23 four points, effectively. The first of those is the
24 information relating to David Rupert and Kevin Fulton.
25 Now, the position, as I understand it, in relation to 16:15
26 David Rupert following the helpful sort of additional
27 submission made by Ms. Fee, is that HMG is not seeking
28 to protect the confidentiality, that's the wrong way of
29 putting it because it clearly isn't confidential, but

1 it's not seeking to rely on NCND in relation to the
2 material that was disclosed as part of the McKeivitt
3 prosecution, but it seems it's still seeking to rely on
4 some matters as being confidential.

5
6 Now, we submit that in relation to that, it's important
7 to distinguish, potentially, between reliance on NCND
8 and objections to disclosure based on other matters.
9 To give an example, in Kevin Fulton's evidence to the
10 Inquiry he, for example, takes issue with -- he argues 16:16
11 that what his training was should not be made public
12 because there's a national security issue. Now, that
13 would be a basis for claiming confidentiality based on
14 the threat to national security of revealing
15 techniques. 16:17

16 CHAIRMAN: It has nothing to do with NCND.

17 MR. SOUTHEY: Nothing to do with NCND. NCND, we
18 submit, is concerned with a very discrete but important
19 issue, which is the identity of agents. And it exists,
20 as we see it, fundamentally, because if you name agents 16:17
21 you put them at risk and if you name agents you
22 potentially discourage other people from becoming
23 agents because they will believe that they are,
24 potentially, going to be named and put at risk in that
25 way. 16:17

26
27 Now, if it is known that an individual is an agent,
28 details of what they did, for example, may be justified
29 and may still need to be confidential for other

1 reasons, I completely accept that, but it's not based
2 on NCND. The key point is, for NCND, whether that
3 individual is an agent or not and that has been lost.
4 And the problem we had with the categories, for
5 example, in relation to David Rupert is, it started 16:18
6 from the presumption, effectively, that because
7 David Rupert was in issue it should be confidential.
8 Presumption is the wrong word but that was the starting
9 point. And that seemed to be an attempt to maintain
10 NCND in relation to that. And in our submission NCND 16:18
11 is lost because it is clear it is no longer
12 confidential that David Rupert was an agent. That was,
13 essentially, accepted in the McEveitt prosecution. And
14 that's accepted by HMG. As I say, that doesn't mean
15 that there might not be aspects of the evidence in 16:18
16 relation to David Rupert that are properly confidential
17 for other reasons because, for example, they go into
18 techniques. But that basic fact as to whether or not
19 he was an agent, it seems to us is -- and what that has
20 implications for is, if, for example, there's a dispute 16:19
21 about how long he was an agent, it's difficult to see
22 how that is confidential because it doesn't say
23 anything about techniques, it doesn't say anything
24 about other things that might be sensitive.

25
26 Now, the position in relation to Kevin Fulton appears
27 to be more murky. We had initially proposed that we
28 would draw attention to documents that we say
29 demonstrate, effectively, State acceptance of his

1 status. There is some sensitivity about that so I'm
2 not going to do that. What we would say, at this
3 stage, is that clearly, as you've identified, he has in
4 the past effectively self-identified as an agent.

5 There has been evidence given to confirm that he is an 16:20
6 agent, that was given in particular in Smithwick. The
7 High Court judgment, in the Gallagher judicial review,
8 the judgment of Mr. Justice Horner appears to confirm
9 those statements. It's also worth noting that
10 Mr. Justice Horner at para 238 made note effectively of 16:20
11 the historic credibility findings that have been made
12 in relation to Mr. Fulton. You then have the
13 statements of Sir Ronnie Flanagan.

14
15 Now, I should say in relation to that, I think I can 16:20
16 say this and I alerted my learned Friend, Mr. Henry,
17 about this, that I was going to say this, without
18 identifying the documents, we understand that there was
19 both a private response to the Ombudsman and a public
20 statement to the Ombudsman about the Ombudsman's 16:21
21 report. The Irish Times website document we understand
22 is the public statement and consistent with that,
23 you'll see at the start of that document there is a
24 reference to a desire not to cause hurt effectively.

25 CHAIRMAN: Yes. 16:21

26 MR. SOUTHEY: which suggests it was a public statement
27 as well. Obviously, it's important the PSNI come back
28 with a considered response to that, but, yeah, that is
29 obviously important.

1 Now, in the course of making that statement - and I may
2 come back to this tomorrow - or in the course of
3 discussing that statement there was some discussion and
4 a certain amount of submissions made about sort of what
5 degree of formality is required before the State has 16:22
6 lost essentially or has, essentially, revealed the fact
7 that someone is an agent. In our submission, the key
8 point is, and it goes to both the approach of
9 Lord Gough in The Guardian Newspaper case but also the
10 subsequent consideration in that case in the European 16:22
11 Court of Human Rights in Sunday Times v the United
12 Kingdom. I think there's also a judgment in the same
13 terms called The Guardian v the United Kingdom but we
14 happened to take you to The Sunday Times v the United
15 Kingdom. The key point about both those judgments is 16:22
16 there comes a point at which confidentiality is lost.
17 In our submission, there's no magic in terms of having
18 to go through a formal process, the magic is in terms
19 of confidentiality being lost. Now, if one thinks
20 about something like an unauthorised statement, of 16:23
21 course, if a public body, if someone makes an
22 unauthorised statement and if, for example, it is
23 alleged, and I'm not sure it is going to be alleged,
24 but if it is alleged that Sir Ronnie Flanagan wasn't
25 authorised to make that statement, there is a way which 16:23
26 public authorities can respond to that, they can say,
27 without breaching NCND, 'This is unauthorised
28 statement, because of our policy of NCND we are
29 unwilling to confirm or deny what was said.' Now, that

1 may or may not have a degree of credibility, it may or
2 may not make sense but it is still a way of maintaining
3 NCND. It doesn't, perhaps, make sense in the context
4 of Sir Ronnie Flanagan. It might if a police
5 Constable, for example, said, 'I've decided to leak the 16:24
6 fact that Kevin Fulton was an agent.' You can see, in
7 those circumstances, how the ability of the State...
8 and that would mean that perhaps there wasn't the
9 degree of clarity as to whether he was an agent or not.
10 If the State responded in that way, by saying, 'This 16:24
11 police constable didn't have authority, we're not going
12 to confirm or deny what they allege,' it's an attempt
13 at least to maintain NCND. And what we would accept in
14 those circumstances is, ultimately, the question
15 essentially for any court or for this Inquiry would be 16:24
16 actually whether as a matter of fact confidentiality
17 has been maintained. But there comes a point, and
18 there's no magic, we submit, in a particular mechanism
19 of disclosure, there comes a point where it's clear
20 that effectively confidentiality has been lost. 16:24
21 CHAIRMAN: I suppose you could say if there was some
22 issue about whether the retired officers in Smithwick
23 were authorised to give the evidence that they did, one
24 might have expected to see that as time has gone on and
25 there's been no such reaction. And then you add into 16:25
26 that all the other layers of information that seems to
27 have been conveyed about Fulton from the PSNI to PONI
28 and in the other hearings that we've been discussing.
29 MR. SOUTHEY: Yes. And that's important also when

1 looking at some of the things that have been said,
2 effectively, about newspaper reporting. I accept, I
3 would accept that a single newspaper report on its own
4 alleging someone's an informant, for example, probably
5 doesn't go very far in terms of opening things up but 16:25
6 it's a question of degree. And my learned Friend
7 representing counter-terrorism police referenced the
8 Scappaticci case. You, I suspect, are well aware of
9 the Chief Constable saying, "even the dogs in the
10 street know his identity," the very famous quote, and 16:26
11 it demonstrates how there is a degree and there comes a
12 point where, as a matter of fact, confidentiality has
13 been lost because of the package of information that is
14 in the public domain. That's ultimately a question of
15 fact but it should be relatively easy to apply. I'm 16:26
16 not necessarily suggesting dogs in the street is a
17 legal test, but I am suggesting, ultimately, the
18 question is one of fact as to whether confidentiality
19 has been lost. And, certainly, we would say in the
20 Fulton and Rupert cases because of the material that's 16:26
21 already been identified it's clear it has been. And
22 the fact the State has been involved in the disclosure
23 of that material supports that argument.

24
25 That argument, I should make clear, I've already 16:27
26 touched upon it, we submit is supported by the judgment
27 of the European Court of Human Rights in The Sunday
28 Times v United Kingdom and supported by The Guardian
29 Newspaper judgment.

1 CHAIRMAN: If you're moving away from there,
2 Mr. Southey, is that a sensible point at which to
3 break?

4 MR. SOUTHEY: I was just going to suggest, what I was
5 going to move on to is that's the context of some wider 16:27
6 submissions about NCND, that would be a sensible place
7 to break. Thank you.

8 MR. GREANEY: Sir, we'll start again at 10 o'clock
9 tomorrow morning.

10
11 THE INQUIRY ADJOURNED UNTIL ON TUESDAY, 8TH SEPTEMBER
12 2026 AT 10:00 A.M.
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