

1 THE INQUIRY RESUMED ON TUESDAY, 8TH SEPTEMBER 2026 AS
2 FOLLOWS:

3
4 CHAIRMAN: Good morning, Mr. Southey.

5 MR. SOUTHEY: Good morning, Sir.

10:01

6
7 SUBMISSION BY MR. SOUTHEY:

8
9 MR. SOUTHEY: When we broke I said I was about to move
10 on to sort of some general observations about NCND. 10:01
11 Before I do that, I realise there are probably two
12 things that I should have added to the submissions I
13 made about Mr. Fulton and confidentiality generally.
14 The first is this; obviously we say that in relation to
15 Mr. Fulton, the confidentiality in relation to his 10:01
16 status has been lost because it's been confirmed
17 publicly in the way described.

18
19 We say that once confidentiality is lost that
20 justification effectively for CMRO has gone, there 10:02
21 might be other justifications specific to elements of
22 his evidence but that's it.

23
24 I should say that if for some reason we're wrong about
25 that and in fact confidentiality hasn't been lost, his 10:02
26 case is also, perhaps, a good example of how balancing
27 might work because if confidentiality hasn't been lost
28 there would still, in our submission, be a need to
29 consider essentially how much harm would result from

1 naming him in circumstances where there is such
2 widespread reporting. And against that, would need to
3 be set the real interest in being able, effectively, to
4 talk freely and open about his status. The point I
5 want to make about that is that his evidence is 10:03
6 obviously key and if one looks at or -- not key but is
7 a very central part of the Inquiry's work, potentially.
8 If one looks at what he says in his statement, he for
9 example, addresses the issue of The Sunday People
10 article that you will be aware of, Sir, which was 10:03
11 published, alleged that he had made a call about the
12 bombing three days in advance, and he addresses that.
13 And that's the sort of issue that would be very central
14 and would be very difficult to address in open without
15 revealing his status because, clearly, if that is to be 10:03
16 remain confidential it would be very difficult to
17 determine whether or not he's likely to have made the
18 call that he's alleged to have made to The Sunday
19 People, and what the credibility of that call is.

20 10:04
21 And so if you look at balancing, in our submission,
22 assuming for the moment, as I say, confidentiality
23 isn't completely lost, there is a large amount of
24 reporting already, that is clear, and it's clear that
25 there is a large amount of reporting in the context of 10:04
26 a situation where he's not just a tangential sort of
27 matter in this Inquiry's work, there are central issues
28 and that would all weigh very heavily, in our
29 submission, in favour of openness.

1 The second thing that I've just realised I should touch
2 upon was something that Mr. Henry touched upon which is
3 how, within the sort of structure of Binyam Mohammed
4 and Thompson should the Inquiry approach situations
5 where confidentiality or loss of confidentiality is
6 disputed.

10:05

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8 In our submission, when looking at that issue of
9 whether confidentiality has been lost, essentially,
10 there is no reason why the Inquiry can't determine that 10:05
11 for itself. That is a question of fact that State
12 bodies have no particular expertise in relation to,
13 that is a question of fact for you, Sir, we would
14 submit.

10:05

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16 Now, obviously, the State bodies have an important role
17 in ensuring that you are fully informed about whether
18 confidentiality has been lost but that doesn't mean
19 they bring particular expertise.

10:05

20
21 If you find that confidentiality then has been lost,
22 how does that fit in? well, there are two ways in
23 which the State bodies may have approached the issue,
24 they may be saying if you find confidentiality is lost
25 that in fact confidentiality hadn't been lost. If 10:06
26 that's the case, in our submission, they haven't taken
27 account of a relevant factor. Their assessment has,
28 essentially, been based on a factual inaccuracy.

1 In addition, if you find that confidentiality has been
2 lost that is highly relevant, we would submit, to
3 balance which is obviously a question for you, because
4 if confidentiality has been lost the question that will
5 then be asked is what is achieved, essentially, by a 10:06
6 CMRO in those circumstances. As I've indicated, there
7 may be specific circumstances that mean something can
8 be achieved if, for example, some of the particular
9 details about training, for example, need to be
10 protected, that may be something that needs a CMRO. 10:07
11 But if all that is being sought to be protected is
12 something which is in fact no longer confidential, then
13 there's no benefit, essentially, from the CMRO and it's
14 pretty clear how the balance needs to be determined in
15 those circumstances. 10:07

16
17 So that's hopefully of assistance. That's what we say
18 in response to Mr. Henry's position as to how do you
19 approach the issue of confidentiality.

20 10:07
21 Turning then to NCND, our submissions in relation to
22 NCND are obviously linked to what I've already been
23 saying about confidentiality. In terms of NCND, I
24 think you've already been referred to it - I can take
25 you to it if need be but I think it's already been 10:08
26 referred to in other submissions. In the DIL case,
27 Mr. Justice Bean (as he then was) made clear obviously
28 that balance was for the Court and recognised - and we
29 don't dispute this - that when looking at

1 self-disclosure, self-disclosure isn't necessarily a
2 sort of trump card, it doesn't necessarily mean that
3 NCND falls away. But Mr. Justice Bean's judgment
4 certainly implies, and we would submit that's
5 consistent with common sense, that it's a relevant
6 factor.

10:08

7
8 If one goes back to what we say fundamentally and this
9 is why I submit it's linked to what we've already said
10 about State agents, if a key question is whether
11 confidentiality is lost, self-disclosure, depending on
12 the circumstances may mean, but it doesn't necessarily
13 mean, that confidentiality has been lost. It depends
14 on the circumstances.

10:09

15
16 If, for example, which in some senses is exactly the
17 Rupert case, evidence is given by an agent in court
18 proceedings, criminal proceedings - and I'm using an
19 extreme example to some extent - if evidence is given
20 in criminal proceedings by a State agent that they are
21 a State agent in circumstances where there would be
22 disclosure obligations on the State which would be,
23 presumably, required in those circumstances,
24 particularly if the State agent was a prosecution
25 witness, to make clear that he was not or she was not a
26 State agent because of those disclosure obligations,
27 if, in those circumstances, the witness was giving
28 evidence that they were a State agent that obviously
29 would carry a lot of weight. If the disclosure was to

10:09

10:09

10:10

1 a media organisation in circumstances where the State
2 was making clear that they were not willing to confirm
3 or deny whether those allegations were correct, that's
4 a separate situation and that's a situation where it
5 might be very difficult to argue that confidentiality
6 had been lost. 10:10

7
8 So, self-disclosure is a relevant factor because it
9 goes into that confidentiality ring. It's relevant for
10 a second reason which is part of the reasons for NCND 10:10
11 is to protect the individual who is a State agent and
12 if the State agent feels they don't need
13 confidentiality then that may be a relevant factor and
14 it may go to the weight in the balancing exercise. But
15 fundamentally, we accept self-disclosure isn't, as I 10:11
16 say, a trump card. It doesn't automatically mean that
17 confidentiality is lost, it ultimately is a factor that
18 needs to be taken account of and a lot depends on the
19 circumstances.

20 10:11
21 That's I think all I can say at this stage as an open
22 advocate in relation to State agents and what we said
23 in relation to Category A.

24
25 In relation to Category B, which is operations, 10:11
26 capabilities and methodology, we had a couple of
27 observations in relation to that. Firstly, we do
28 submit that is an area where passage of time is most
29 obviously relevant. The Chief Constable in his

1 statement fairly, in our submission, expresses a
2 concern at para 17, which is page 150 of the bundle,
3 about disclosure of methods of operation and
4 capabilities of the police and he does that in the
5 present tense. And that's not surprising. I mean if 10:12
6 one thinks, there's a good example on the facts of this
7 case about how passage of time can change. Some of the
8 material, for example, recognises that when cell site
9 analysis was first used, it was relatively confidential
10 because it was a new technology and criminals weren't 10:12
11 necessarily aware of it. It has now become very
12 common. There is also a document, I think, that
13 doesn't need to be referred to particularly but it's an
14 example of this, there was a document, there's a police
15 document somewhere in the papers which refers cell site 10:13
16 analysis appearing on EastEnders I think. So it
17 demonstrates how technology has either become public or
18 they become obsolete.

19
20 And so in circumstances where things have moved on 28 10:13
21 years, well 28 years rather from the time in question,
22 and in circumstances in which the situation in the
23 North has improved, there is a need to consider whether
24 things that were sensitive in the past remain
25 sensitive. 10:13

26
27 Now, in the State party's submissions, during the
28 course of their submissions there was a certain amount
29 of discussion about how that feeds in. In our

1 submission it feeds in in three ways; firstly, when
2 you're looking at the State's reasoning it's important
3 to know that the State has taken that into account. If
4 the State says essentially this piece of technology was
5 important 28 years ago, it's important it explains why 10:14
6 it's still relevant and why it still needs to be
7 protected. So, the first question is has the State
8 taken that into account.

9
10 Secondly, but it's essentially in one sense almost the 10:14
11 same point, there needs to be evidence, effectively, to
12 support the State. So it's not enough that there's a
13 submission essentially saying well technology remains
14 important; there needs to be someone saying well this
15 is why this technology remains important. 10:14

16
17 But, thirdly, we do submit that it potentially is
18 relevant to balance. Now, the reason we say that is
19 this, if - and I don't know whether this is the case -
20 the State were to say this is a piece of technology 10:15
21 that we don't currently use but there is a possibility
22 that it might come into use in the future, that might
23 go to weight when conducting balance, essentially. It
24 might be that that is a less powerful justification,
25 effectively, than the State saying, this remains a key 10:15
26 part of our technology, nobody in the public is aware
27 of this, this would be extremely damaging for this
28 current key technology to become available. And so it
29 may be relevant to balance. It all depends on the

1 facts and in the abstract it's a bit difficult in one
2 sense to take this submission any further. But it is
3 important, in our submission, not to rule out that
4 possibility that it may be relevant to balance.

10:16

6 I should also say in relation to passage of time
7 something about the submission of CTP that
8 re-disclosure, essentially, may be an issue. I think
9 re-disclosure was their language if I've noted it down
10 correctly.

10:16

12 In principle, and there is case law perhaps in a
13 different context that supports this, it is possible to
14 conceive of circumstances where something that was
15 public in the past has been forgotten about. Some of
16 the case law and the different context I'm thinking
17 about, some of the case law to do with criminal
18 convictions and criminal records recognises that the
19 fact someone was convicted in public 20 years ago
20 doesn't mean that anyone will remember it. And so it
21 will be potentially forgotten, that's why there's
22 confidentiality about it.

10:17

10:17

24 However, we do submit that if that is going to be
25 relied upon in any circumstance, it needs to be
26 approached with great care because the reality is we
27 live in a world where it is very difficult, in one
28 sense, for something that becomes public to be covered
29 up again, if I can put it that way. Once

10:17

1 confidentiality is lost, modern technology means it's
2 generally lost forever, in our submission. And if that
3 point is going to be relied on in practice there is a
4 need for a high degree of candour, there's always a
5 need for high degree of candour but it's extremely 10:18
6 important that there are, in our submission, demanding
7 searches done to see what is available. And once you
8 remember in that context the sorts of risk one is
9 talking about here, in our submission, is not generally
10 some individual who's sitting at home and suddenly is 10:18
11 inspired by something they just happen to chance upon,
12 we're talking about fears that are being expressed are
13 the fears of motivated individuals, people who are;
14 looking to potentially research how they carry out an
15 action. The fact that something isn't perhaps at the 10:18
16 front of public debate doesn't mean it's not available
17 to the person who is going to investigate how to carry
18 out an attack.

19
20 And so, as I say, a lot of my submissions in this 10:19
21 Inquiry generally have been about the sort of arguing
22 never say never and so I'm reluctant to say in this
23 context never say never about re-disclosure, but one
24 needs to approach it, in our submission, with a degree
25 of care. 10:19
26

27 The second point I was going to make about Category B
28 is intelligence is said to fall within that category.
29 Now, we have a concern about that because there already

1 has been, for good reason and without any suggestion of
2 harm, a significant amount of disclosure of
3 intelligence. I'll give you a reference number, Sir, I
4 don't think we need to go to it, of an example of this.
5 INQ 038234 is PSNI's response to the request for 10:19
6 information about suspects. I think we, for some
7 reason our written submissions may use the wrong INQ
8 number but I'll double-check, that is the right one.
9

10 Now, in that there are people identified as suspects 10:20
11 purely on the basis of intelligence. So the contents
12 of intelligence are revealed. Now there's no surprise,
13 in our submission, about that because the naming of
14 someone says nothing about the techniques used to
15 gain/gather that intelligence. They don't, for 10:20
16 example, reveal whether a particular person was an
17 agent. It's very difficult to see what harm is caused
18 in those circumstances.
19

20 INQ 038234 is an example, essentially, of alternative 10:20
21 measures being used. Now, we obviously don't know
22 whether there could be more disclosure in that document
23 but it's effectively a quite good example of how one
24 can gist intelligence. The product of the intelligence
25 is made clear without anything being said about how 10:21
26 that intelligence was gathered.
27

28 Now, the sample documents on the face of them appear to
29 include - and I'll come back to this - documents where

1 it's reasonable to believe that suspects are being
2 named. Now, the redactions that have been made to
3 those PSNI sample documents means that we don't know
4 who is being named as a suspect in them and, to some
5 extent, it's even a guess whether or not suspects are 10:22
6 being named, but if INQ 038234 can name suspects, in
7 our submission, it's unclear why gists of other
8 documents can't be prepared naming suspects. And, as I
9 say, the key point we make about that is we understand
10 why there is a sensitivity about techniques, we 10:22
11 understand why there's a sensitivity about naming
12 particular people as sources. The product of
13 intelligence in one sense is the more important thing
14 here and that isn't always, in our submission,
15 sensitive, and that needs to be considered with care 10:22
16 and at the moment, Category B doesn't necessarily do
17 that.

18 CHAIRMAN: well, I suppose, it depends how prescriptive
19 the categories need to be.

20 MR. SOUTHEY: Yeah. 10:22

21 CHAIRMAN: If they are just a general headline or list
22 of categories which would be capable of accommodating a
23 CMRO then it's a quite a high general level.

24 MR. SOUTHEY: Yeah.

25 CHAIRMAN: It depends whether they need to be more 10:23
26 specific than that to be helpful.

27 MR. SOUTHEY: well, we made the submission yesterday,
28 and obviously, it doesn't necessarily need to be
29 accepted, but the submission we made yesterday was to

1 maximise their value and also to sort of give a clear
2 indication to, particularly State Core Participants as
3 to what needs to be withheld, they should, as closely
4 as possible, and obviously perfection is completely
5 impossible in this context, I'm not arguing for that, 10:23
6 but they should, as closely as possible, effectively
7 mirror what in fact will be disclosed. The one way
8 that we have suggested this might be addressed is not
9 to necessarily remove intelligence from Category B,
10 it's to put a qualification at the end of it making it 10:24
11 clear that you need to consider, firstly, whether
12 something's become historic and secondly whether or not
13 in fact there is a current need for confidentiality in
14 relation to particular aspects of the document, for
15 example, and that's the way in which we would suggest 10:24
16 potentially addressing that problem.
17 CHAIRMAN: I just wonder if that isn't a statement of
18 what I would have to be doing anyway.
19 MR. SOUTHEY: But if this is a public statement of
20 that, we wonder -- if it is a public statement then 10:24
21 it's helpful in one sense to just include that as a
22 reminder because we have, as I say we have concerns,
23 and I'll come back to some of the sample documents in a
24 moment. But we have concerns that, for example, there
25 does appear to be an inconsistency of approach, so that 10:25
26 suspects are named in one document but apparently not
27 in others. Obviously, I don't know what the redactions
28 reveal, it may be there's some good reason for that but
29 we do submit it's important in one sense to remind

1 State CPs in particular because it mainly applies to
2 them, about the fact that the mere fact that something
3 is within the categories doesn't necessarily mean
4 there's good reason for withholding it.

10:25

6 The final area that we take issue with or that we raise
7 in relation to the categories is Category C.

8 Category C is information useful to hostile actors and
9 the examples include information about manufacturer of

10 improvised explosives. Now, that, in our submission,

10:26

11 should be compared with the ruling on OSR material,

12 and, in particular, paragraph 21 which sets out the

13 material covered by the OSR Restriction Order. And in

14 our submission there is a close relationship between

15 the two categories, not least because the OSR material

10:26

16 talks about including tactics and capabilities used by

17 UK State authorities. It talks about that covering

18 methods used in the commission of suspected terrorist

19 or other criminal activities.

10:27

21 Now, all of that suggests that at least some of the

22 material potentially caught by Category C, is material

23 that initially at least should potentially be subject

24 to the OSR Restriction Order rather than the Closed

25 Material Procedure.

10:27

27 Now, it would be possible, in our submission, to

28 include something saying starting point is potentially

29 OSR and is the OSR Restriction Order and then

1 justification needs to be provided if the material is
2 to be treated more sensitively. Now, that is a matter
3 that was touched on particularly I think by CTP in
4 their oral submissions and they drew attention to your
5 judgment, Sir, from June on anonymity, and what you
6 said there about disclosure, why disclosure to the CPs
7 alone wasn't necessarily an adequate response. There
8 is a distinction, in our submission, and it's a
9 distinction that is inherent in the approach that
10 you've adopted to OSR material

10:28

10:28

11
12 The June ruling, in our submission, was based heavily
13 on the obligations that are owed to individuals giving
14 evidence by reason of Article 2. It was based heavily
15 on the need to protect people whose lives may be at
16 risk from giving evidence.

10:28

17
18 The OSR material Restriction Order is based on the fact
19 that we're talking about a category of sensitive
20 material which is sensitive but isn't, perhaps, of the
21 most sensitive nature and which as a result is material
22 which can in a proportionate manner be disclosed with
23 CPs with their undertakings but not to the public at
24 large. And in our submission it's important to
25 recognise, as the OSR Restriction Order does, that
26 there is that category of material and that the
27 starting point, not least because it's an alternative
28 to withholding from everyone, the starting point should
29 be that consideration needs to be given to why material

10:29

10:29

1 that falls within this category can't be managed
2 through the OSR process.

3
4 So as I've already indicated how do we submit these
5 issues should be addressed? well, firstly, we submit, 10:30
6 obviously Kevin Fulton and David Rupert should be
7 removed from the categories. More generally though, we
8 submit that it is important in one sense to remind
9 anyone applying for a Restriction Order that these
10 categories are categories of material that could be 10:30
11 coloured by Closed Material Procedures, or Closed
12 Material Restriction Orders but that they won't
13 automatically be covered and categories where they
14 wouldn't be covered are ones, firstly, where
15 confidentiality has been lost; secondly, where passage 10:31
16 of time means there is no current justification for
17 maintaining confidentiality; and, thirdly, where
18 effectively there's some other reason why there's no
19 justification for confidentiality. And all of that
20 does, in our submission, it reminds parties applying 10:31
21 that they need to consider those matters and need to
22 address them in evidence.

23
24 It's important to remember obviously in relation to
25 this, that even if somethings moved out of the list of 10:31
26 categories, nobody's suggesting that it's not possible
27 in particular circumstances to make an application for
28 closed material, all of this is, is an indication, in
29 our submission, it's intended to be an indication of

1 the circumstances where a Closed Material Order may be
2 likely, and in those circumstances it's important to
3 identify circumstances where it won't be likely.
4

5 we also submit the problems I've highlighted indicate 10:32
6 the importance of safeguards. I don't think there's
7 any real dispute about the importance of candour.
8 Candour needs to be a continuing process. The Inquiry
9 obviously can't monitor everything that's going on in
10 the public domain, in the media. Public authorities 10:32
11 have an obligation, in our submission, not merely to
12 indicate what reporting is relevant at the time they
13 make their application, they need to make it clear if
14 there's subsequent reporting. In our submission, there
15 needs to be evidence in support so there is someone who 10:32
16 is responsible for confirming the information that's
17 being provided. And all of that is an issue on the
18 facts.
19

20 we have, in terms of the open material, and obviously I 10:33
21 don't know what is in closed but in terms of the open
22 material we have HMG Government's risk assessment.
23 That, on the face of it, firstly, doesn't say anything
24 about historic public statements. It's difficult to
25 see why that shouldn't address public disclosure about 10:33
26 things like David Rupert. What's in the public domain
27 is in the public domain, it's difficult to see why
28 there shouldn't be open material saying we are aware
29 that there's been reporting on David Rupert but, for

1 these reasons whatever, they are, we submit the NCND
2 still applies, if that's what their position was going
3 to be, or we accept that David Rupert can't be subject
4 to NCND any longer. That is not in the open position
5 of the Secretary of State, it was dealt with or HMG 10:34
6 rather, it was dealt with orally yesterday and that, in
7 our submission, is a significant failing and shouldn't
8 happen in future.

9
10 There is also a general statement about the historic 10:34
11 nature of material in the open material and in our
12 submission that's also inadequate. If you go to
13 page 46 of the bundle, para 13 HMG says:

14
15 "Even though this Inquiry is focused on activity in 10:34
16 Northern Ireland in the late 1990s, the material
17 reviewed in the course of this Inquiry (including
18 documents comprising this representative set of sample
19 documents) would be of just as much interest and value
20 to this wider set of adversaries." 10:35

21
22 Now common sense says as a rigid statement or as an
23 all-embracing statement as that appears to be cannot be
24 correct. It cannot be correct, effectively, that
25 everything that relates from the late 1990s is of as 10:35
26 much interest. I've already given the example of cell
27 site analysis, that is now much more widely known to be
28 a technique available to law enforcement. And, in our
29 submission, it is important that there is a more

1 granular consideration of the impact of passage of
2 time.

3
4 Now, it may be that's in closed, but we don't know.

5
6 what's also striking is, unlike PSNI for example,
7 there's no apparent gisting, for example, or no
8 apparent attempt to sort of redact so that one gets
9 partial bits of documents. On the face of it, whatever
10 the HMG's sample documents are as far as we're aware, 10:36
11 complete confidentiality is being maintained. So it's
12 difficult to see that consideration is being given to
13 alternative steps.

14
15 Finally, we submit it's important that these sorts of 10:36
16 statements are in the form of evidence, so an
17 individual has taken responsibility for them.

18
19 The statement of Deputy Assistant Commissioner Evans
20 obviously is a statement but it's in very generalised 10:36
21 terms and, again, we submit doesn't deal with previous
22 publicity or previous disclosures and doesn't deal with
23 passage of time. PSNI's position is, in one sense,
24 well in a real sense more helpful in the sense that the
25 Chief Constable signs a statement making it clear he's 10:37
26 considered the individual documents and he relies on
27 his spreadsheet. And we've obviously have had an
28 opportunity to consider that spreadsheet.

1 The spreadsheet is in fairly general terms and I should
2 say there are concerns that we have about some of the
3 reasoning. I will give you the two key examples just
4 in passing really. Page 235, Item 3, which is the
5 closed session of the Northern Ireland Affairs 10:38
6 Committee transcript. What is said is -- the objection
7 to disclosure is -- the expectation of anyone asked to
8 give evidence was that it would remain closed. That's
9 an example of the situation where passage of time may
10 be important. I don't know whether there is any 10:38
11 consideration of why Northern Ireland Affairs Committee
12 authorised evidence to be given in closed, but one
13 obvious reason why it may have done is because at that
14 stage there was a real prospect of a prosecution. And
15 in fact there was an attempt at a prosecution 10:38
16 subsequent to that and so there was, potentially, a
17 real concern that the investigating officer giving
18 evidence in public about certain matters might
19 undermine the prospects of a prosecution.

20 10:39
21 Realistically, I don't think anyone suggests, and
22 that's effectively been accepted, that a prosecution is
23 now a realistic prospect. Not just likely. There's no
24 suggestion it's a realistic prospect. That means the
25 justification may have fallen away. I don't know, 10:39
26 because I don't know what the justification of the
27 Northern Ireland Affairs Committee was. But it's
28 important to consider that. That's the sort of area
29 where passage of time may change matters.

1 Turning over the page to Item 4. Item 4 deals with the
2 affidavits, the closed affidavits that were relied upon
3 in the judicial review. This looks to be a
4 spreadsheet, to be fair to PSNI the full text may not
5 be there but if you look at the box giving 10:40
6 justification, point 4 appears to recognise that
7 certain parts of the documents could be broken out into
8 open, in other words they could be disclosed, which
9 suggests that the redaction process hasn't been
10 completed. And that's obviously a matter of concern. 10:40

11
12 That's an example, as I say, of how it's really
13 important, in our submission, that during this process
14 consideration is given to alternative measures,
15 protective measures. One that we've already drawn 10:40
16 attention to is gisting. One that we haven't drawn
17 attention to orally but is in our written submission is
18 ciphers. Ciphers, in our submission, are, potentially,
19 very important. They allow cross-referencing of
20 documents. And that's been recognised, we cite the 10:41
21 Springhill Inquest judgment of Mr. Justice Schofield as
22 an example of that and they're commonly used in this
23 jurisdiction in inquests, in our submission, and they
24 allow cross-referencing.

25 10:41
26 If, for example, someone can't be identified as a
27 suspect or if someone can't be identified as an agent,
28 using a cipher allows one to understand whether the
29 same person is being referenced in multiple documents.

1 And that's why they've become so important in this
2 jurisdiction. At the moment it doesn't appear that any
3 consideration has been given to that. Obviously, the
4 approach adopted in operationally-sensitive material
5 cases is a further protective measure.

10:42

6
7 One of the reasons why we submit it's important to make
8 clear what the safeguard measures are and how
9 alternative measures can potentially be used, in this
10 context, is we do worry, effectively, that at the
11 moment confidentiality is being over-claimed. There is
12 over-claiming of the need to keep material within
13 closed procedures.

10:42

14
15 A few examples of that; firstly the approach to Rupert
16 and Fulton, what happened yesterday, in our submission,
17 was disappointing, State bodies were seeking still,
18 certainly initially to defend the indefensible in our
19 submission. It is also, in our submission, as I say,
20 the point I made earlier a moment ago which is that
21 it's disappointing, for example, that on the face of,
22 certainly as far as we are aware, because we understand
23 the sample documents to come from PSNI, HMG, for
24 example, doesn't appear to have identified any
25 documents where redactions could be made or gisting
26 could be provided. Now, there may be a reason for that
27 but we do have concerns about that.

10:42

10:43

10:43

28
29 Can I then take you to a few documents within the

1 samples that we also have particular concerns about?
2 INQ 43896, we did provide a short clip of documents and
3 if you have that, it's at page 21 that I'm referring to
4 but it obviously is also available through -- it can be
5 identified as 43896. INQ 43896, is, potentially, a 10:44
6 particularly important document. It's a statement of a
7 police officer who describes, based on his role in
8 Special Branch, the intelligence response or he talks
9 about the intelligence response after both the
10 Banbridge bomb and the Omagh bomb. 10:45

11
12 Now, I don't know, obviously, what's been redacted, but
13 our concern is that what appears to have been redacted
14 may be intelligence. Now, obviously, one of the key
15 issues that is raised by the Terms of Reference is 10:45
16 whether intelligence was deployed promptly or whether
17 there was a failure to deploy it promptly. We have a
18 real concern that there is a need for a gist of what
19 intelligence, assuming this document includes that and
20 obviously I don't know that, but there is a real need 10:46
21 for disclosure of what intelligence was available both
22 after the Banbridge bomb and immediately after the
23 Omagh bomb and this document may withhold that. And we
24 struggle to see, providing that techniques are
25 protected and providing that names of informants are 10:46
26 protected and things along those lines, why there can't
27 be a gist, for example, of whether named individuals,
28 individuals who have known to have been identified by
29 reason of intelligence, were being identified at this

1 stage, if that's what is in issue.

2
3 Another example that we've identified, potentially, of
4 over-claiming is a document at INQ 43914. That, and if
5 you've got that, as I say in our bundle it's at 10:47
6 page 23, that is a Police Ombudsman's interview of an
7 individual. Now, putting that in context, knowing what
8 the Ombudsman was investigating at that stage, knowing
9 what is said in that interview, it would appear
10 extremely likely that that is Kevin Fulton. And if it 10:47
11 is Kevin Fulton, given what's known about the
12 Ombudsman's investigation of his allegations, it seems
13 to us impossible to justify the failure to disclose the
14 name there.

15 10:48
16 There is another Ombudsman's document at INQ 43886,
17 which is a record of a meeting apparently between
18 police and the Ombudsman's representative.

19 CHAIRMAN: Have I got this one in your sample?

20 MR. SOUTHEY: Sorry, you have, it's page 7 of the 10:49
21 sample.

22 CHAIRMAN: Yes.

23 MR. SOUTHEY: Where everything is deleted but it
24 includes -- what one does know from the redactions on
25 page 7, sorry, at page 9 of your bundle, the sort of 10:49
26 final page of the document, third page of the document
27 is that there is discussion as to whether a named
28 individual was an informant. Now, I don't know what
29 this document, obviously I'm speculating to some extent

1 but, again, knowing what the Ombudsman was
2 investigating in 2001, it's not unreasonable to infer
3 that it may have been a discussion about Kevin Fulton.
4 And if that's the case, in our submission, it's very
5 difficult to know why discussion about whether 10:49
6 Kevin Fulton is an informant, whether it is about
7 Kevin Fulton even, should be confidential, even if you
8 can't have a discussion -- even if it can't be
9 disclosed what was being said about whether he was an
10 informant, it's very difficult to see why it can't be 10:50
11 revealed that there were discussions about Kevin Fulton
12 because clearly Kevin Fulton was being investigated by
13 the Ombudsman at that stage.

14
15 Even if that isn't the case, suppose, for example, it 10:50
16 isn't Kevin Fulton that's being named, this is the sort
17 of situation where, potentially, a cipher is important
18 because it allows -- one could have a document which
19 says Individual A was the subject of discussion as to
20 whether they were an informant, it was confirmed by 10:50
21 police that in fact he was an informant or he wasn't an
22 informant, and that could then be used to link up with
23 other documents. And that's exactly the situation
24 where a cipher is potentially an issue.

25 10:51
26 More generally, as I say -- I focus on those documents
27 as examples. Actually, can I just take you to one more
28 from within our slot. Page 11 is INQ 43893. This is,
29 effectively, an entirely redacted document other than

1 the page at the start which tells you what it
2 contained. And one sees from that it's an intelligence
3 summary and there's an annex with personalities named
4 and an annex with chronological summary. Now, one
5 doesn't know the date of this, which may be important 10:52
6 because it may be important in terms of fitting in the
7 chronology and it's difficult to see why there
8 shouldn't be a date. But, more importantly, it's not
9 unreasonable to assume that if intelligence is being
10 provided the intelligence is, essentially, identifying 10:52
11 people who may be suspected of being involved. Now,
12 given what I've already drawn attention to, which is
13 that there are clear statements in open as to who is
14 suspected of being involved in the bombing and some of
15 those people are identified simply on the basis of 10:52
16 intelligence, if this is a document that says persons
17 A, B and C were suspected, it's very difficult to see
18 why we shouldn't know when that suspicion was, who
19 those people were, particularly if they've already been
20 identified as suspects on the basis of intelligence in 10:53
21 other documents, at the very least, because again that
22 helps with the chronology of knowing when information
23 came to light about particular individuals.

24
25 It may be also that it may be relevant, for example, 10:53
26 whether that intelligence came from Special Branch,
27 that doesn't reveal the intelligence source in one
28 sense, it doesn't reveal whether a particular informant
29 was being used but it may be relevant along those

1 lines. And, again, it's important that that's an
2 example of how it is possible, potentially, for
3 meaningful gisting to be put in place.
4

5 More generally, we are concerned about the approach of 10:53
6 the State. Can I give you one example, it's not in our
7 bundle, the INQ number is 015715 which is the Army
8 corporate statement, the statement of Colonel McMullan.
9 He references there GOC Directives. Given that
10 obviously there isn't an Army presence in Northern 10:54
11 Ireland in the way that there was in 1998, it's very
12 difficult to see, because of passage of time, why that
13 sort of document can't be made available and it's
14 obviously very important in terms of how protection was
15 being provided. And all of that needs to be considered 10:54
16 in the light of the points made by the current Chief
17 Constable in the Interim Report of Operation Kenova and
18 you'll be well aware of that, it's paragraph 48.7 of
19 Operation Kenova. There is a concern that NCND has
20 been over-claimed historically in Northern Ireland. 10:54
21 And that concern, as I say, is not being expressed by
22 some activist group or some NGO, it's being expressed
23 by the Chief Constable.
24

25 And all of that I draw attention because it 10:55
26 demonstrates why the point I made about safeguards is
27 so important, why it's important that there's clear
28 evidence addressing these issues.

29 CHAIRMAN: Is that observation by the Chief Constable

1 in the Kenova Report something that I should bear in
2 mind in assessing PSNI's approach to Kevin Fulton and
3 NCND?

4 MR. SOUTHEY: Potentially, all of it, we would say,
5 because I started, in one sense, with their approach, 10:55
6 one should look at what PSNI are saying in relation to
7 Kevin Fulton and their difficulties, we submit,
8 yesterday justifying the position, one should look at
9 the sort of examples I've just drawn attention to and
10 that general statement, and it all is something at this 10:55
11 stage at least, which would feed into the need, in
12 particular, for safeguards. And we submit,
13 particularly from the CPs' point of view and it was the
14 final point I was going to make about the general
15 approach, you'll be aware, Sir, and we highlight it in 10:56
16 our written submissions, that there is a history in
17 this jurisdiction in Northern Ireland of material
18 potentially being withheld from investigations. The
19 statement of Dame O'Loan provided to this Inquiry talks
20 about, for example, material being concealed from her. 10:56
21 And that's in our clip of documents. It's at page 5 of
22 that clip of documents and it's para 61 and 91 of her
23 statement where she talks about material being
24 concealed. And we, in our written submissions at
25 para 38 and 41 detail examples of this. 10:57

26
27 That is also part of the context and that's why, in
28 particular, from the CP point of view, the points I've
29 made about safeguards are particularly important.

1 There is a problem with confidence here, public
2 confidence and CP confidence and so it's important
3 there are safeguards to make sure that it's
4 demonstrated, effectively, proper account has been
5 taken of openness.

10:57

6
7 Can I deal with one discrete point and it's really in
8 one sense to put down a marker? Although we in our
9 written submissions have focused on the McVicar Report
10 it may be relevant to other issues. The reality is
11 that, and in fact it sort of reared its head yesterday
12 in a slightly indirect way. The reality is that there
13 are members of legal teams who have had access over the
14 past to confidential documents. The point we make in
15 our written submissions is that three members of my
16 team, including me, have seen the unredacted McVicar
17 Report. We still, potentially, have access to it in
18 ongoing civil proceedings although it is possible they
19 will be concluded. We have access subject to
20 undertakings. Clearly, in our submission, it is
21 possible that confidentiality in relation to a document
22 may be lost in relation to particular people and those
23 people may have a role to play in relation to the
24 Inquiry. Any Restriction Orders, in our submission,
25 have to, potentially, take account of it. It would be,
26 in one sense, it would be, in our submission,
27 impossible to justify the members of the Fox Law legal
28 team who I've identified, well I haven't identified
29 them but I've made clear exist, it would be impossible

10:57

10:58

10:58

10:59

1 to prevent us having -- it wouldn't make sense, in our
2 submission, for us to be excluded from discussions
3 about McVicar.

4 CHAIRMAN: I was interested in that submission in your
5 written documents, I wasn't sure how you would envisage 10:59
6 it operating, but it seems to be that what you're
7 suggesting is that there might be a Restriction Order
8 which applied only to some members of the Core
9 Participants and only to some members of the legal
10 representatives. Is that right? 10:59

11 MR. SOUTHEY: Yes, yes, my Lord. I recognise why
12 that's in one sense unattractive but, in my submission,
13 one has -- one has to recognise the reality of the
14 situation. If certain people have had access to
15 certain documents -- I mean can I give a different 11:00
16 example in one sense and I'm not going to name the
17 document because of its sensitivity. There were
18 discussions yesterday about a document which PSNI were
19 concerned was available on Relativity and which my
20 legal team had clearly seen because we were seeking to 11:00
21 reference it. It cannot be right, in our submission,
22 for a Restriction Order -- PSNI may apply for a
23 Restriction Order in relation to that document and they
24 may have reasons -- they would argue they have reasons
25 why that shouldn't be made public. That document, 11:00
26 clearly, has been given a certain amount of
27 consideration by at least my legal team because we were
28 about to address it, which is why --

29 CHAIRMAN: It might be that confidentiality has been

1 lost in respect of that if it has been disclosed to all
2 Core Participants. But that's not the same as a
3 situation where you're seeking some form of advantage
4 over other Core Participants and over other
5 representatives.

11:01

6 MR. SOUTHEY: well, my Lord, I wouldn't put it as
7 seeking an advantage. The reality is -- what I'm
8 saying is that in circumstances where, for whatever
9 reason, we have had access to that material --

10 CHAIRMAN: The reason might matter.

11:01

11 MR. SOUTHEY: well, I'm not sure -- the reality is, in
12 our submission, if we've had access to that material we
13 can't undo that, we can't be expected not to address
14 that if there's a point that --

15 CHAIRMAN: well, I've no idea how you came by it.

11:01

16 MR. SOUTHEY: Yes.

17 CHAIRMAN: But, for example, and I don't suggest that
18 this is the case, but in other written submissions it's
19 been acknowledged that information which has been
20 acquired unlawfully shouldn't be the subject of
21 disclosure. So with reference to the break-in at some
22 PSNI premises where material was stolen. And if that
23 comes into the public domain, it's accepted, at least
24 by other Core Participants, that that doesn't permit
25 open disclosure and a Closed Material Restriction Order
26 might still be imposed over that sort of material. So,
27 the circumstances in which information becomes
28 available can matter. Now I don't need to pry for the
29 moment into how you have that information but I'm not

11:02

11:02

1 so sure I accept just the bland statement that it can
2 never matter.

3 MR. SOUTHEY: well, if I can deal with it in one sense
4 because it may be an important starting point to what
5 I've said about McVicar. To use the example of a 11:03
6 situation where, for example, there's been a break-in.
7 If there is a break-in and material is then handed -
8 and I'm not aware of this having happened but I'm using
9 this as a hypothetical example - material is then
10 handed to the media and is published and, for example, 11:03
11 PSNI say this is material, it should never have been --
12 this is material that was stolen it should never have
13 been published, but it is material that was stolen,
14 confidentiality is lost there, in our submission.
15 You're in{ the Spycatcher} situation, you're in The 11:03
16 Guardian and Sunday Times situation because the reality
17 is that although there was illegality that you can't
18 put the cat back in the bag, effectively, and there may
19 be other steps that need to be taken in relation to
20 that but confidentiality has been lost, in our 11:04
21 submission.

22
23 Now, obviously, that's not always going to be the case,
24 it depends on what happens to that material. It may be
25 there is a break-in, there's a limited disclosure to a 11:04
26 limited group of people, it doesn't get widely
27 circulated, there's no confirmation by PSNI, for
28 example, that the material is genuine. You're in a
29 very different situation there. But our basic point is

1 that if material has been made available through
2 whatever -- has become available perhaps is a better
3 way of putting it, to individuals, it becomes
4 difficult, in our submission, for that not to then
5 be -- it becomes difficult to justify not allowing
6 those individuals to continue to effectively address
7 that material.

11:05

8 CHAIRMAN: well, it does depend, it's not unknown in
9 circumstances of litigation for information to become
10 inadvertently disclosed to one party or to one
11 representative which it ought not to have been. It
12 doesn't always follow, in that situation, that that
13 information is then available for use in the
14 proceedings. Sometimes, for example, there's a
15 requirement that the information, the document be
16 returned and that there be no reference to it.
17 Sometimes it means that those who have come into
18 possession of it have to withdraw from acting. It's
19 not always just as straightforward as you seem to be
20 suggesting.

11:05

11:06

11:06

21 MR. SOUTHEY: well, except that the reason why I would
22 submit that that's not necessarily an analogy that can
23 be drawn is that obviously in conventional civil
24 proceedings there is the Rules of Evidence,
25 effectively, that are intended to ensure one party
26 doesn't get an advantage over another party, an unfair
27 advantage over another party. Here, one's looking at
28 Section 19 because Section 19 requires restrictions to
29 be justified. And our point is that if a party has

11:06

1 knowledge of something it becomes very difficult, in
2 our submission, compatibly with Section 19, to justify
3 a restriction that prevents that person being party to
4 the part of the Inquiry where that material is being
5 considered.

11:07

6 CHAIRMAN: And if otherwise but for that act of not
7 disclosure, but for the act of coming to know of the
8 material, if otherwise there would have been a
9 Restriction Order imposed what's the consequence then
10 of that?

11:07

11 MR. SOUTHEY: But the point then is that if otherwise
12 the Restriction Order would have been imposed, it would
13 have been, effectively, because there was some
14 justification for preventing the party having
15 knowledge, having access to that material. Now, if
16 they have access to it, that justification has fallen
17 away. Whatever harm might result is no longer a
18 relevant factor because if that harm has occurred, if
19 there is that harm it's occurred.

11:08

20 CHAIRMAN: well, it's occurred to some extent. Would
21 it mean then that you would be entitled to explore, in
22 the course of open proceedings, anything about the
23 content of the document of which you're aware, but the
24 other representatives wouldn't?

11:08

25 MR. SOUTHEY: well, what you would need to consider in
26 those circumstances, firstly, is in circumstances where
27 you would presumably have evidence of the fact because
28 this would need to be provided not least by the public
29 authority as part of its duty of candour, you would

11:08

1 have evidence of the fact that we have had access to
2 it, you would have evidence of whether any harm had
3 resulted from it. You would need to consider whether
4 in light of what had actually happened other CPs, there
5 was justification for preventing other CPs also having 11:09
6 access to it. But assuming you concluded and I would
7 have to accept that it wouldn't necessarily follow that
8 every other CP should have access to it, assuming you
9 concluded there was a good reason for denying other CPs
10 access to that material, then -- 11:09

11 CHAIRMAN: well, your suggestion seems to be a form of
12 Restriction Order which denies disclosure to the others
13 but allows you to be exempt from that?

14 MR. SOUTHEY: Yes, I accept that because I accept that
15 may be the consequence of that. But I am making it 11:10
16 clear that there would need to be a prior stage which
17 would be looking at what had actually happened and
18 whether the -- but, yes, I accept that that may be the
19 consequence of that process but that's, in our
20 submission, the result of -- it's the result of two 11:10
21 things; one the expressed terms of Section 19 and the
22 fact they require justification for each restriction.
23 And, secondly, the fact that partly because of the
24 passage of time different people have access to
25 different material. And I make that submission 11:10
26 knowing, if I remember rightly, I think it's the case
27 that Mr. Mansfield, for example, he also says that he's
28 had access to certain material, not the same material
29 as us. So if my submissions are correct, it may be

1 that I'm excluded from something that Mr. Mansfield is
2 able to address, if my memory of his submissions are
3 correct. This isn't a situation where I'm making a
4 submission necessarily assuming we're always going to
5 have the advantage and nobody else will in other
6 circumstances.

11:11

7
8 It links, in some senses, to what we accept is probably
9 the reality of the situation in relation to Sir Ronnie
10 Flanagan because Sir Ronnie Flanagan has had access to
11 documents that may be confidential. And, again, we've
12 always made clear we find it very difficult to see what
13 justification there can be for excluding him from
14 proceedings where documents are considered that he will
15 be aware of. And that's a disadvantage to us, we
16 accept that, but all of that flows, in our submission,
17 from Section 19.

11:11

18 CHAIRMAN: Perhaps that's a convenient point to break
19 for the stenographer.

20 MR. SOUTHEY: Yes, thank you. That basically concludes
21 my submissions so that may assist other people.

11:12

22 CHAIRMAN: Thank you very much, Mr. Southey, that's
23 very helpful.

24 MR. GREANEY: Sir, could we return at 11.30 please.

11:12

25
26 THE INQUIRY ADJOURNED BRIEFLY AND RESUMED AS FOLLOWS:

27
28 CHAIRMAN: Mr, Greaney.

1 SUBMISSION BY MR. GREANEY:

2
3 MR. GREANEY: Sir, just before I invite Mr. Mansfield
4 to address you on behalf of the Rush family, I just
5 wanted to make one short point. In due course, Sir, we 11:29
6 anticipate that you may identify the types of document
7 that can be gisted and it seemed to us, therefore, that
8 there may have been some unfairness, albeit inadvertent
9 unfairness in the suggestion that was made by
10 Mr. Southey that HMG has not engaged in the process of 11:29
11 gisting, it seems to us that that process will come
12 later following your guidance.

13
14 So, Sir, having made that point could I now invite
15 Mr. Mansfield to make his submission. 11:29

16 CHAIRMAN: Good morning, Mr. Mansfield.

17 MR. MANSFIELD: Good morning, can you hear?

18 CHAIRMAN: I can hear well, thank you.

19
20 SUBMISSION BY MR. MANSFIELD: 11:29

21
22 MR. MANSFIELD: I want to approach, if I may, these
23 matters unusually, in the sense that you have our
24 written submissions, they appear at 166 and 209, I do
25 not intend to read them out, for obvious reasons, you 11:30
26 will have read them, but I do ask that you turn up
27 page 166, which is the first page of the short
28 submission we made on the closed material issues.

1 The unusual approach I want to adopt here is really
2 highlighted by the exchange that's just taken place in
3 relation to a certain document which I'll return to in
4 a moment.

5
6 One has to occasionally just take stock of the stage
7 we're at and you will be acutely aware, I've no doubt
8 at all, that the stage we are at is in fact one of a
9 serious and substantial watershed. The reason I say
10 that is that your decisions on these matters, that is 11:30
11 on the closed material and on the follow-up submission
12 which I'm referring to now, because I see what I have
13 to say as a kind of bridge into the submissions which,
14 as I understand it, may be tomorrow rather than today,
15 on Section 56 of the Investigatory Powers Act. 11:31

16 However, the taking stock - and this is why I would
17 want the family, the Rush family would want you to bear
18 in mind, I'm sure, these matters as you're dealing with
19 the question of balance, and that is that, this has
20 been engaged as a public inquiry and what the family, 11:31
21 and I'm sure you yourself, want to avoid is it becoming
22 a private inquiry, that's just a colloquial term,
23 rather than a secret inquiry, perhaps, is another term.
24 This is the point we're making in our short submissions
25 that are written. But at the moment there is a risk 11:32
26 that the decisions that are taken may result in the
27 public and the families never getting to know what the
28 causes, what the explanations, what the reasons are for
29 core issues, because they are being kept behind, as it

1 were, closed doors.

2
3 This is particularly important in this case, and we
4 would ask as a factor you might like to consider in
5 relation to the balancing exercise, these are matters 11:32
6 that occurred originally over a quarter of a century
7 ago and despite various forms of litigation, inquests,
8 civil procedures, criminal procedures and so forth,
9 right the way through to inquiries of another kind and
10 a judicial review, so it's been the subject of public 11:33
11 interest, and I haven't even touched on all those
12 public, they've been mentioned today, Sunday Times,
13 Telegraph, Guardian and else where and, of course the
14 BBC, that this matter has been canvassed. The matter
15 is not just the Omagh bombing itself, which was bad 11:33
16 enough, but the issue - and I'm going to be very
17 careful, I appreciate the difficulty that we're all in
18 - that one of the core issues that threads it's way
19 through these 25, well it's far more than a quarter of
20 a century now, since the actual occurrence, is the Term 11:33
21 of Reference that you have, namely, was it preventable?
22 And we've described in our submissions on Section 56 -
23 and I don't want to pre-empt it too much at this stage,
24 but it runs the risk, the Inquiry, of becoming the
25 theatre of the absurd if the obvious, the elephant in 11:34
26 the room is so large but no one talks about it, no one
27 says anything about it in public. And the difficulty
28 becomes, if I may just stretch you back to the Sturgess
29 Inquiry in which I was involved and referenced

1 yesterday, was that most of it, the most you can do and
2 even this won't be possible, on behalf of the families,
3 unless the structure of the closed material favours
4 disclosure, is the most we'll be able to do is the most
5 I was able to do in the Sturgess Inquiry, which, at the 11:34
6 end of the day, was unsatisfactory, although there were
7 different factors. And I'll give you an example,
8 namely, Lord Justice Hughes allowed me to canvass the
9 issues, in other words -- I'm not going to spell them
10 out they are fairly obvious, well they might be in the 11:35
11 Sturgess case, not dissimilar to some of the ones here.
12 Because this argument arose there, was permission to
13 ask the questions of the witness but he couldn't answer
14 them in public. So the family -- and they never were
15 asked in public and they were never answered in public. 11:35
16 And the unsatisfactory nature of that, we say, may be
17 for other reasons connected with contemporary events
18 rather than historic events. We say that this is a
19 situation we would hope to avoid in this case. In
20 other words, that your counsel is able to formulate 11:35
21 evidence, summaries and outlines for us to respond to
22 and that we are able to respond to those in terms which
23 can be heard publicly.

24
25 Now, of course, there are lots of ways of doing, I've 11:36
26 heard of gist being mentioned a minute ago, a gist of a
27 document and I'm sure you're fully aware of all the
28 ways in which it can be done. A partial disclosure can
29 be done. And a term, a term that we've used and I

1 noticed that your counsel have used the same term in
2 written documents, and you'll understand entirely the
3 scope of this word, you could use the word
4 "monitoring."

11:36

6 Now, you will see on page 167 that I have put there, we
7 have put there what we see is one of the crucial
8 issues, unredacted. It's paragraph 7 and it's the
9 first sub-paragraph, because preventability Term of
10 Reference is fed by another stream which is one of the
11 central themes of the past quarter century and we've
12 set it out there and I'm going to read this but I'm not
13 going to read other things on the page in order to
14 prevent any risk of violation of any rules or protocols
15 or whatever.

11:37

11:37

16
17 So 7.1, the example we give that is central to the
18 preventability issue relates to, and I start on that
19 paragraph:

11:37

20
21 "...to an obvious and widely canvassed issue squarely
22 in the public domain already, namely, whether the bomb
23 car and the bombers had been monitored..."

24
25 Now that's the word. We've put another one in there,
26 "tracked" in case it's more precise.

11:38

27
28 "...from the moment the car was stolen until the
29 explosion itself."

1 Anyone reading that will see straight away how
2 significant that issue is.

3
4 And therefore, to answer that particular issue, we say,
5 cannot be left behind closed doors. There may be ways 11:38
6 of doing it but it has to be, we say, made public in
7 order to retain public confidence in a public inquiry.
8 And the problem that you face, which we recognise and
9 it's a knotty one, if I can put it that way, comes
10 later on the same page, even on the submission it's 11:38
11 already been redacted. I'm not going to read it out
12 again, I don't want to compromise anybody. But there
13 it is redacted. And the problem here already, at this
14 stage, which is why this is a watershed of importance
15 and it will determine the nature of this Inquiry in the 11:39
16 future, nature being is it going public or is it
17 primarily going to be secret, is that that particular
18 redaction is due to the submissions that follow on
19 Section 56.

20 11:39
21 Sir, we have a proposal on Section 56. I mention it
22 now because it has to be read in tandem with the regime
23 that is being put before you for closed material. We
24 are going to ask that you seek a change in the
25 legislation. 11:39

26
27 Now, no change in legislation will be contemplated
28 unless government of the day recognises that alongside
29 any change there is a closed material regime in place

1 in order to provide a CIV, should it be necessary. But
2 the object of suggesting this in a separate submission
3 is to empower you with the facility to, as it were,
4 deal with - and I'm going to go straight to the point,
5 because that's the one we've given, the intelligence 11:40
6 issue of this relating to the bombers themselves and
7 the car - that that should be an exception to the
8 Investigatory Powers Act. And we realise if there's a
9 possibility of it being made in urgent legislation and
10 exception, so that you can, you can deal with it and 11:40
11 you can deal with these matters and, of course, using
12 the balance - and we say a balance in favour of
13 disclosure because of what has happened historically,
14 what is called the passage of time, however you define
15 it, and that is why we say at this stage what is 11:41
16 important is to ensure that there is a regime which
17 allows publicity without risking the protection of the
18 public. And, of course, there may be things, as
19 mentioned yesterday, that any continued disclosure may
20 provide a risk. I understand that. However, that's a 11:41
21 matter, as everybody has agreed, that's a matter and a
22 decision in the balancing exercise for you at the end
23 of the day, and only you. But we would like to ensure
24 that you are provided with the materials here and then
25 able to ensure that the public, and I say the public, 11:41
26 but the families of course are at the forefront of the
27 public. They're not the first to know, but they are to
28 know, to know exactly what has happened here without
29 risking their own protection. They're not sitting here

1 today wanting to, as it were place any risks in front
2 of anybody, so that would never be the objective.

3
4 And, of course, can I deal with a matter that has
5 arisen this morning with my learned Friend, 11:42
6 Mr. Southey, and that is a document, a particular
7 document, the McVicar Report. Now, I can't go into
8 redactions so I'm not going to go into redactions, I'm
9 going to stick to unredacted documents, but let's deal
10 with that for a start, because it's very a interesting, 11:42
11 and we say complicated, situation which means we say
12 exceptions should be made in the Investigatory Powers
13 Act, I'll justify that when we get to that submission.
14 However, the McVicar Report: what has happened here,
15 and please understand and I hope Mr. Greaney will not 11:43
16 take umbrage as I mention it, I'm not suggesting for a
17 moment there's been any violation of anything, however,
18 this is done in best of faith. We received a document,
19 I can disclose it because it's unredacted, at least I
20 can disclose the fact that an unredacted version was 11:43
21 made available on the 15th of May this year. Now, this
22 is a document entitled, and it's therefore, after the
23 document of the 8th of May in which Mr. Greaney
24 indicates various categories for your consideration,
25 one of them being 3(b), the intelligence issue. 11:43

26
27 Now this document is headed:

28
29 "Inquiry Legal Team Chapter 3 summary, paragraph 7,

1 processes subsequent to the Omagh bombing."

2
3 Now, this is a substantial document of 45 pages of
4 considerable detail. I'm going to save the main thrust
5 of my argument for Section 56 but if Section 56 has any 11:44
6 bearing most of this document should be redacted. And,
7 as I understand it, it has been, already a lot
8 redacted. But the problem that's been posed this
9 morning, although done indirectly in relation to only
10 one of the documents, I've read the whole of this 11:44
11 document, 45, which summarises, if I may say so very
12 helpfully, summarises for anybody a great deal of
13 intelligence material. Now, is that going to be a case
14 in which, having seen the unredacted - I've got it in
15 front of me - the unredacted version that I'm not 11:45
16 allowed to use that to inform questions I might want
17 Mr. Greaney to ask so the Restriction Order, in other
18 words, becomes wider, and we're complaining about the
19 breadth of category that is being chosen here. And one
20 of the practical difficulties is that an extremely 11:45
21 helpful document is now in the same category possibly
22 as the McVicar Report itself. And we would say, and I
23 would say that, I'm saying I've seen it and I've still
24 got it, it hasn't been returned, nobody's asked for it
25 to be returned. In fact I had to ask yesterday, has it 11:45
26 been redacted and I hadn't actually seen the redacted
27 form. I had made a date of when we got it. A redacted
28 form was on the 27th of August, so it's only a week or
29 so ago, that might explain why I hadn't noticed the

1 redacted form.

2 CHAIRMAN: Is the unredacted document you're speaking
3 of, Mr. Mansfield, one that sets out quotes from the
4 Gibson Report?

5 MR. MANSFIELD: Yes, quite a lot. I can give an 11:46
6 Inquiry number for the record. The number of the lead
7 sheet is INQ 042374.

8 CHAIRMAN: So what becomes of that will probably depend
9 upon the submissions that we have in mind for tomorrow
10 in relation to Section 56. 11:46

11 MR. MANSFIELD: Yes. Except it trickles, there's a
12 trickle-down and that's why I use it as a bridge
13 because -- in a way what's happened here is that
14 Section 56, I'm sorry to bring it in a bit, is
15 providing an overshadowing straitjacket to what you're 11:46
16 having to consider in this section, in other words
17 closed material, because the overriding one, which is
18 strict, which has no -- well, it has a few exceptions
19 and, obviously, I'm suggesting a further exception
20 would have to be made, but it's far stricter than the 11:47
21 kind of situation you have where it can be gisted. It
22 can't be gisted. I don't want to go through Section 56
23 at this stage, but the wording of Section 56, I submit,
24 gives no holes, as it were, there's no room for
25 manoeuvre at all. And that's why 56 is worded so 11:47
26 broadly. So, the real difficulty is if section 56
27 applies, never mind closed material restrictions, it
28 can't even be mentioned. That's, we say, how bad it
29 is, how draconian it is and why there's a need

1 obviously, for that to be addressed quite separately.
2 But, in a sense, it can't be addressed separately
3 unless at the same time one is recognising at the end
4 of the day that you have this ability and power under
5 the closed material regime to ensure, and we say in 11:48
6 this case that the balance is struck, where necessary,
7 in favour of publicity, because in this particular
8 Inquiry, unlike the Sturgess one which was dealing with
9 contemporary matters, this is historic and there's a
10 fair amount of material, some we have to guess at and 11:48
11 we've put it in the submission, must be outdated.
12 CHAIRMAN: It's helpful to begin to flag up the sorts
13 of issues that we'll canvass tomorrow no doubt, but one
14 question that would be in my mind about Section 56, is
15 whether it requires a Restriction Order to be imposed 11:48
16 or whether, on the contrary, it simply identifies
17 what's competent and what's not competent in terms of
18 leading evidence before the Inquiry.
19 MR. MANSFIELD: Yes.
20 CHAIRMAN: So it may be that Section 56 just identifies 11:49
21 that certain evidence just simply cannot competently be
22 led, and you don't need to think about a Restriction
23 Order.
24 MR. MANSFIELD: In fact it isn't, the section isn't
25 restricted, 56, to leading evidence. It's anything -- 11:49
26 CHAIRMAN: No.
27 MR. MANSFIELD: Anything you do, so even if you breathe
28 over the page that's going to be revealed. Can I deal
29 with a particular McVicar document because Mr. Southey

1 perhaps has glided over something, I haven't seen it.
2 May I just indicate the position? I knew from my
3 instructing solicitor who has now disappeared, I wonder
4 why, oh, he's over there, I knew at an early stage
5 there was what I was informed was a secret document, 11:49
6 which he had. As it turns out, and I only discovered
7 this, and my junior is in the same position as myself,
8 we only discovered this days ago that the secret
9 document - it was named that just informally - was in
10 fact the McVicar Report because, of course, things have 11:50
11 been served within the last week or two. So may I say
12 clearly, Mr. Doherty didn't share the report he had,
13 which appears to be - I haven't compared them because I
14 can't - but appears to be close to if not a replica of
15 the unredacted McVicar Report. He has not shared it 11:50
16 with anyone, including the person we represent.
17 However, he has -- so one sees -- I adopt Mr. Southey's
18 arguments obviously on this, not the fact of a review
19 in terms of our participation in this, it becomes a
20 situation which again is absurd if he can't -- if 11:51
21 there's a restriction put on Mr. Doherty because he's
22 read the whole thing, but not on us because we haven't
23 read it at all, didn't even know what the document was,
24 and I know some of these arguments fall into section
25 56, but they impact, as they do physically on the pages 11:51
26 that you're looking at. And I think, if I can be
27 allowed to say this, that the sensitivity on those
28 pages, can I put it that way, the sensitivity are
29 actually words spoken by your counsel. So this is the

1 absurdity of the situation that Section 56 undoubtedly
2 impacts and, therefore, there's a risk, we can see the
3 risk now, blossoming into a situation in which the only
4 way round this we say, and obviously it's the change
5 I've already suggested, but when it comes to 11:52
6 Restriction Orders and the regime behind that, that if
7 there's an error to be made, it's to be made in favour
8 of disclosure given the importance of it and the extent
9 to which the public are watching to go see what the
10 result is going to be in relation to that 11:52
11 particularity.

12
13 There are a lots of other issues, but we've chosen the
14 intelligence one because we suggest intelligence is
15 right at the heart of one of the key threads that 11:52
16 traces back to the Terms of Reference which you have to
17 face. We, that is the families, don't want you in a
18 situation, which is impossible. There are things you
19 know but you can't say them. And we have given an
20 illustration. Using the word "there was" or "there 11:52
21 wasn't monitoring," for example, is not going to be
22 satisfactory, because it won't actually identify what
23 you're talking about, other than as a generic topic.
24 So that's why we say generic gists, or whatever they
25 may happen to be at the end of the day, are not going 11:53
26 to be satisfactory in this case. So I won't develop it
27 any further, most of my remarks are really for
28 Section 56 but I felt the bridge should be made known.
29 CHAIRMAN: Thank you, Mr. Mansfield.

1 MR. GREANEY: Sir, the document to which Mr. Mansfield
2 referred, INQ 042374 is what we have been describing as
3 the Part 7 summary. Mr. Mansfield is right to say that
4 in recent days redactions have been applied to that
5 document for reasons, Sir, that you yourself have
6 identified. But can I be clear that those redactions
7 have been applied on a provisional basis ahead of the
8 consideration of the Section 56 issues for tomorrow.

11:53

9 CHAIRMAN: Yes. As I've said to Mr. Mansfield, what
10 becomes of those will be determined by tomorrow's
11 hearing.

11:54

12 MR. GREANEY: They have simply been applied on a
13 precautionary basis.

14
15 Could I next, Sir, invite Mr. Kane to make his
16 submissions on behalf of the Core Participants
17 represented by John McBurney Solicitors.

11:54

18
19 SUBMISSION BY MR. KANE:

20
21 MR. KANE: Could I say, Sir, that having heard the very
22 powerful submissions which we've all heard from
23 Mr. Mansfield just more latterly and also from
24 Mr. Southey that there's really nothing of any
25 additional assistance which I can provide to you, Sir,
26 other than the general principles that the families are
27 very much in your hands to consider all those issues,
28 and insofar as the balance and the balancing exercise
29 which has to be undertaken, that it should fall clearly

11:54

11:54

1 towards full and open disclosure and transparency
2 insofar as is possible within your discretion and
3 within the law obviously.
4

5 And just dealing with the very discrete issue of what 11:55
6 other parties may have seen or may not have seen, or
7 whether one lawyer has seen it and the other may not
8 have seen it within the same party, can I just say that
9 it's a party that really doesn't know what they're
10 talking about as such other than what has now been 11:55
11 revealed in the course of this morning, all we would
12 say is the principle of fairness to the families we
13 represent should be applied, that there should be an
14 equality across the board.

15 CHAIRMAN: Yes. Thank you, Mr. Kane. 11:55

16 MR. GREANEY: Sir, that leaves one group of bereaved
17 family Core Participants. The written submissions on
18 behalf of the Core Participants represented by PA Duffy
19 and Co. Solicitors, Campbell and Haughey Solicitors and
20 Roche McBride Solicitors are at page 156 of the bundle. 11:56
21

22 Sir, I discussed with Mr. Toal yesterday his preferred
23 approach to his submissions, and he explained to me
24 that he and Mr. McGuicken stand by their written
25 submissions and they see little value in repeating them 11:56
26 today and, accordingly, he does not propose to make any
27 oral submissions, as I understand it. Sir, subject to
28 your better view that seems to us to be entirely in
29 order.

1 CHAIRMAN: Yes, well thank you for your helpful written
2 submissions, Mr. Toal, I have received those and I'm
3 grateful for them.

4 MR. TOAL: Thank you.

5 MR. GREANEY: Sir, that being so, that concludes the
6 open hearing of the Closed Material Restriction Order
7 applications.

11:56

8
9 As everyone knows there will be a closed hearing next
10 week at which the State Core Participants will be
11 required to justify their applications. But before
12 that, as has been mentioned very recently, tomorrow at
13 10:00 a.m. we will consider a discrete issue on a
14 hypothetical basis relating to Section 56 of the
15 Investigatory Powers Act of 2016. So, unless there is
16 any other issue that you wish to canvass today that
17 concludes the proceedings until tomorrow.

11:56

18 CHAIRMAN: Thank you, Mr. Greaney.

19
20 THE INQUIRY ADJOURNED UNTIL WEDNESDAY, 9TH SEPTEMBER
21 2026 AT 10:00 A.M.

11:57

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