

1 THE INQUIRY RESUMED ON WEDNESDAY, 9TH SEPTEMBER 2026 AS
2 FOLLOWS:

3
4 CHAIRMAN: Good morning Mr, Greaney.

5 10:27

6 SUBMISSION BY MR. GREANEY:

7
8 MR. GREANEY: Sir, good morning. As everyone knows,
9 the issue for today's hearing can be summarised in a
10 single question, which is, does the prohibition imposed 10:27
11 by Section 56 of the Investigatory Powers Act 2016
12 (IPA), apply where interception-related material or
13 material from which interception-related conduct may be
14 inferred has already entered the public domain, whether
15 that be through official publication by a public 10:28
16 authority and/or by media reporting or broadcasting.

17
18 Sir, on the 30th of July of this year, you issued what
19 you termed a hearing management decision. In that
20 decision you expressed a provisional view that this 10:28
21 question was, by reason of the broad nature of the
22 prohibition in Section 56, to be answered, "yes." But
23 you were clear to emphasise that this view was
24 provisional and that you would determine the issue only
25 once you had received and considered full written and 10:28
26 oral submissions.

27
28 The Inquiry Legal Team circulated to Core Participants
29 notes that were dated the 30th of July and the 8th of

1 September and in those notes there were set out a total
2 of six questions that you wished to consider in this
3 hearing.

4
5 Before I get to those questions, Sir, it's important, 10:29
6 in our assessment, to emphasise orally today, as we did
7 in our first note, the need for Core Participants to
8 exercise particular care in their oral submissions to
9 ensure that those submissions do not themselves engage
10 the statutory prohibition. Although, Sir, I should add 10:29
11 that to avoid any difficulties there is also a
12 10-minute delay on the YouTube feed for this hearing.

13
14 The first four questions posed by the Inquiry Legal
15 Team in the first note are these: 10:29

16
17 Question 1: Does Section 56 prohibit a statutory
18 Inquiry from adducing evidence, asking questions,
19 making assertions or disclosures, or otherwise doing
20 anything for the purposes of, or in connection with the 10:29
21 Inquiry which discloses in circumstances from which its
22 origin in interception-related conduct may be inferred,
23 any content of intercepted communication or any
24 secondary data obtained from communication, or tends to
25 suggest that any interception-related conduct has or 10:30
26 may have occurred, or may be going to occur where, the
27 relevant interception-related conduct or material from
28 which such conduct may be inferred, has already entered
29 the public domain either through, as I've indicated

1 already, official publication by a public authority
2 and/or by media reporting or broadcasting.
3

4 Question 2 was in these terms, Sir: If the answer to
5 Question 1 is "no," what is the legal basis upon which 10:30
6 Section 56 does not apply in such circumstances? And,
7 in particular, our references during Inquiry
8 proceedings to relevant material that has already
9 entered the public domain through one of the means I
10 have described, capable of falling outside the scope of 10:31
11 Section 56(1)(a) and/or Section 56(1)(b),
12 notwithstanding that such references may tend to
13 suggest that interception-related conduct has occurred,
14 may have occurred or may be going to occur.
15

16 Question 3 read as follows: If the answer to
17 Question 1 is "yes," what is the scope and practical
18 effect of the prohibition contained in Section 56? In
19 particular, to what extent does Section 56, first,
20 prohibit the Inquiry and Core Participants from 10:31
21 referring in open proceedings to material that has
22 already entered the public domain through one of the
23 means that I have described where such reference would
24 either disclose material in circumstances from which it
25 is origin in interception-related conduct could be 10:31
26 inferred, or tend to suggest that interception-related
27 conduct has occurred, may have occurred or may occur in
28 the future. And further we asked, would the
29 application of Section 56 be affected by the fact that

1 any assertion contained in the hypothetical media
2 reporting was speculative in nature and/or factually
3 incorrect?

4
5 And second, Question 3 posed: To what extent does 10:32
6 Section 56 require that the Inquiry refrain from
7 disclosing to Core Participants in open any material
8 including original material and/or statements referring
9 to such material that has already entered the public
10 domain through one of the means we have described, 10:32
11 where such disclosure would disclose one of the
12 relevant facts?

13
14 And further, Sir, we asked in Question 3 this: How
15 should the phrase "tend to suggest" be interpreted for 10:32
16 the purposes of Section 56?

17
18 Question 4, so the final question posed in the first
19 note, was in these terms: Does the application of
20 Section 56 depend solely upon the statutory criteria 10:33
21 enacted by Parliament, or can it be affected by the
22 position adopted by HMG or another public authority?
23 In particular, would it make any difference to the
24 application of section 56 if HMG or another public
25 authority indicated that it had no objection to the 10:33
26 adducing of particular evidence, and so on, which might
27 otherwise fall within the scope of Section 56?

28
29 Sir, those first four questions, as I've indicated,

1 were posed in the first note of the Inquiry Legal Team,
2 so the note back on 30th of July.

3
4 In response, written submissions were received as
5 follows; from HMG, from PSNI, from the Core
6 Participants represented by Fox Law, from the Core
7 Participants represented by Elev8, and from the Core
8 Participants represented by John McBurney Solicitors.

10:34

9
10 Sir, subsequently, yesterday afternoon, a second note
11 of the Inquiry Legal Team was circulated to Core
12 Participants. In it we posed a fifth and sixth
13 question. Question 5 was this: Does Section 56
14 prevent the Chairman of an inquiry from confirming in
15 open that the inquiry is conducting restricted
16 proceedings pursuant to Section 19 of the Inquiries Act
17 and paragraph 23 of Schedule 3 to the IPA? In
18 particular, the note asked, would such confirmation
19 itself amount to a disclosure that tends to suggest
20 that interception-related conduct has or may have
21 occurred on the basis that the necessity for holding
22 proceedings under paragraph 23 arises only in the
23 context of disclosure of issues otherwise falling
24 within the Section 56 prohibition, and following a
25 direction pursuant to paragraph 22 of Schedule 3?

10:34

10:34

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10:35

26
27 And finally, Question 6 was in these terms: If the
28 answer to Question 5 is that the Chairman can confirm
29 in open that the Inquiry is conducting restricted

1 proceedings without infringing Section 56 of the IPA,
2 is there any procedural mechanism by which Core
3 Participants who do not fall within the definition of a
4 relevant party in paragraph 23(4) of Schedule 3 - that
5 is to say open Core Participants - is there any 10:35
6 mechanism by which they may submit proposed lines of
7 questioning for Counsel to the Inquiry to ask in those
8 restricted proceedings without infringing Section 56?
9

10 In particular, we asked, should paragraph 23(1) of 10:36
11 Schedule 3 be interpreted as permitting the open Core
12 Participants to propose lines of questioning to the
13 Inquiry Legal Team which, on their face, refer to
14 matters that may tend to suggest that
15 interception-related conduct has, or may have occurred 10:36
16 and which would therefore fall within the prohibition
17 contained in Section 56? Where those questions are
18 submitted solely for consideration in relation to any
19 restricted proceedings from which proceedings
20 Section 56 is disapplied by paragraph 23(1). And so to 10:36
21 put it another way, could such proposals properly be
22 viewed as forming part of the restricted proceedings
23 themselves?
24

25 Sir, having identified what the six questions are so 10:36
26 that anyone watching the proceedings remotely should
27 understand the purpose of this hearing today, we'll
28 invite submissions from the Core Participants who have
29 submitted their written submissions in the following

1 order: First of all HMG; secondly PSNI; thirdly, the
2 Core Participants represented by Fox Law; fourthly, the
3 Core Participants represented by Elev8; and, fifthly,
4 the Core Participants represented by John McBurney
5 Solicitors. And so we'll ask Ms. Fee first of all to 10:37
6 address you on behalf of His Majesty's Government.

7 CHAIRMAN: Good morning Ms. Fee.

8
9 SUBMISSION BY MS. FEE:

10 10:37
11 MS. FEE: Good morning, Mr. Chairman. Mr. Chairman,
12 you should have written submissions from HMG at page 88
13 of the bundle and what I would propose to do,
14 Mr. Chairman, with your permission is to go through
15 some of the key parts of HMG's answers to the questions 10:38
16 which were posed by the Inquiry, first of all, the four
17 questions in relation to which there are written
18 submissions and then at the end the two questions which
19 were raised yesterday as well.

20 10:38
21 So I should indicate at the outset, Mr. Chairman, that
22 in summary it is HMG's position that the statutory
23 position under Section 56 is subject to specific
24 limited exceptions which are contained within
25 Schedule 3. And Schedule 3 does not make any 10:38
26 exception, for example, because material is already in
27 the public domain. And any issues which arise about
28 intercept can properly be explored in closed session
29 pursuant to paragraphs 22 and 23 of Schedule 3 of the

1 IPA.

2
3 That said, Mr. Chairman, the presumption against
4 absurdity might mean that Section 56 would not be
5 engaged in very exceptional situations such as where 10:39
6 the intercept has been authoritatively and publicly
7 avowed by HMG or with HMG's explicit agreement. We've
8 dealt with that at paragraph 3 of the written
9 submissions on page 88, Mr. Chairman.

10
11 Going into the specifics of Question 1, I won't repeat
12 the question because Mr. Greaney has already outlined
13 it in detail, but HMG's position in relation to that
14 question around the Section 56 prohibition is set out
15 from paragraph 4 of the written submissions. And the 10:39
16 starting point is that the exceptions which are set out
17 in Schedule 3 include certain types of legal
18 proceedings where the prohibition in Section 56 does
19 not apply.

20
21 Question 1 of the Inquiry Legal Team's note queries the
22 position of material which is already in the public
23 domain whether by official publication, media reporting
24 or broadcasting. Section 56 of the IPA governs the
25 exclusion of any material described therein from legal 10:40
26 proceedings. If material has entered the public
27 domain, it does not mean that it is no longer governed
28 by Section 56. In addition, it's important to
29 recognise that any media reporting cannot ever disclose

1 information about intercept or interception. Any media
2 reporting can only make suggestions about such
3 evidence. It is only State bodies which can bring
4 about formal, authorised disclosures of such evidence.

10:40

5
6 Parliament considered the appropriate exceptions to
7 Section 56 and, as I've mentioned, these appear at
8 Schedule 3 of the IPA. The exceptions are tightly and
9 narrowly defined. That is apparent through several of
10 the cases in the bundle, Mr. Chairman, but including
11 the Schofield case.

10:41

12
13 There is no express exception for material which is
14 already in the public domain.

10:41

15
16 At paragraph 9 of our written submissions it's
17 indicated that further clarification is provided in the
18 Attorney General's guidelines for prosecutors.

19
20 HMG agrees with the provisional views on Question 1
21 expressed by the ILT in paragraph 6 to 8 of the ILT
22 note, save in respect of the very exceptional
23 situations where the presumption against absurdity may
24 apply. And I'll come on to that, Mr. Chairman, in more
25 detail.

10:41

10:41

26
27 In the recent judgment on Special Advocates,
28 Mr. Justice McAlinden indicated that Section 56 is a
29 very wide prohibition - that's at paragraph 160 of the

1 judgment - and that it should be applied as such. In
2 particular, HMG agrees that the key issue is not
3 whether the material has already been published or
4 summarised in media reporting, nor whether it would
5 cause any concern to HMG or to any other Core
6 Participant or person. The basic position is clear,
7 that Section 56 is a broad prohibition which must be
8 applied robustly.

10:42

9
10 I'll move on with your permission, Mr. Chairman, to
11 Question 2 and HMG's position on that, which starts at
12 paragraph 12 of HMG's submissions and that's at page 91
13 of the bundle.

10:42

14
15 As I've indicated, HMG's position is that the basic
16 answer to Question 1 is "yes," but that it is subject
17 to very exceptional situations in which the presumption
18 against absurdity might be engaged. And I'll deal with
19 that separately.

10:43

20
21 In relation to Question 3, which is about the scope and
22 the practical effect of the prohibition contained in
23 Section 56, HMG's position is that while there is
24 limited case law on the scope of the prohibition in
25 Section 56 and indeed Section 17 of RIPA before that,
26 the courts have confirmed that disclosure will not be
27 prohibited, even if it in fact derives from intercept
28 if it is communicated in a manner or form which makes
29 it impossible to infer that this was its origin.

10:43

10:43

1 There's a quote in HMG's submissions at paragraph 13 on
2 page 92, from the Gohil case which indicates --

3 CHAIRMAN: Does that mean, Ms. Fee, then that in
4 hypothetical situation where there was intercept
5 evidence, it might be possible to gist the import of
6 that? 10:44

7 MS. FEE: Yes, Mr. Chairman, I think that is what it
8 means. I think if it is impossible to infer what the
9 point of origin of the information is, if it's possible
10 to divorce the content of the information itself from 10:44
11 its point of origin in a way that it's impossible to
12 infer that it came from intercept, in that hypothetical
13 situation, yes, that is how it would work,

14 Mr. Chairman. And I think that is what the quotation
15 at paragraph 13 of our submissions indicates and the 10:44
16 key phrase perhaps is, "in a manner or form that makes
17 it impossible to infer that that was its origin in,
18 those circumstances the prohibition in Section 17, as
19 it was, does not bite and there is no need for any
20 application to be made to the court." Obviously, it 10:45
21 was in a different context but I think it is the same
22 principle, the outworking of the same principle.

23
24 And similarly, Mr. Chairman, you'll see at paragraph 14
25 of our submissions an extract from a text book National 10:45
26 Security Law, Procedure and Practice, which indicates,
27 for example, it will be consistent with Section 56(1)
28 to disclose the fact that a defendant in criminal
29 proceedings was in a particular location on a

1 particular day, provided it cannot be inferred from the
2 terms of the disclosure that the information is derived
3 from interception rather than, for example, from covert
4 surveillance or the reporting of a covert human
5 intelligent source.

10:46

6
7 Mr. Chairman, the very existence of lawful powers for
8 interception and published guidance on the interception
9 of communications may tend to suggest, at a very high
10 level of generality, that interception-related conduct
11 has or may have occurred or may be going to occur, and
12 the courts have not shied away from considering those
13 powers from at that general level of extraction. And
14 you see that, Mr. Chairman, in the bundle, there have
15 been several cases reaching the highest courts,
16 including the European Court of Human Rights, which
17 have considered law in relation to intercept, and one
18 of the cases in the bundle is the Big Brother Watch
19 case

10:46

10:46

20 CHAIRMAN: I think it might be quite important just to
21 understand this issue, Ms. Fee, because a literal
22 reading of Section 56 might suggest that the court or
23 an inquiry, even in a context of a legal debate,
24 couldn't analyse the import of the section by giving
25 examples, for instance. But if we take a moment just
26 to familiarise ourselves with the general circumstances
27 of the Big Brother Watch case, it's interesting just to
28 note the extent to which reference was made to
29 intercept capabilities and techniques. And it might be

10:46

10:47

1 worth just having a brief look at that.

2 MS. FEE: Yes, certainly, Mr. Chairman.

3 CHAIRMAN: It is in the bundle, isn't it?

4 MS. FEE: It is in the bundle, yes, and there are a
5 number of passages, Mr. Chairman, which engage the -- 10:47

6 CHAIRMAN: It's in your authorities, I think, at
7 page 280.

8 MS. FEE: Thank you, Mr. Chairman.

9 CHAIRMAN: I don't think it's necessary to -- it's a
10 very detailed judgment, it's not necessary to read it 10:48
11 through, but we can get a sense of what the case was
12 about just, for example, from paragraph 17 where the
13 facts are set out.

14 MS. FEE: Yes, Mr. Chairman.

15 CHAIRMAN: And we see there the Court sets out a quote 10:48
16 from a report of the Intelligence and Security
17 Committee of Parliament which explained the two major
18 processing systems which GCHQ was operating for the
19 bulk interception of communications.

20 MS. FEE: Yes, Mr. Chairman, and that is a thread that 10:48
21 runs through the judgment. There is general discussion
22 about bulk interception and how it could operate. So
23 it's not, for example, in that decision it's not the
24 case that there is a reference in one paragraph and
25 then we don't see it again. I know, Mr. Chairman, 10:49
26 you're familiar with the decision --

27 CHAIRMAN: Yes.

28 MS. FEE: -- and throughout that it is very clear, HMG
29 would say, that at a high level of generality one can

1 talk about interception and the principles around
2 interception.

3 CHAIRMAN: Just, for example, at paragraphs 17 and 18
4 there's a fairly detailed description of what are
5 called the two processing systems operated by GCHQ. 10:49

6 MS. FEE: Yes, there are, Mr. Chairman, and there is an
7 indication as to capacity, the capacity to view those
8 communications.

9 CHAIRMAN: Exactly. So there's a discussion of the
10 techniques involved and the capabilities. 10:49

11 MS. FEE: Yes, Mr. Chairman. So you may feel that that
12 is a good example of courts, at a very high level, not
13 shying away from engaging with these concepts and not
14 treating Section 56 as being a bar on even the mention
15 of intercept at that high level. 10:50

16 CHAIRMAN: Yes.

17 MS. FEE: That case and others demonstrate that that
18 isn't how it's been interpreted.

19 CHAIRMAN: And we can see at paragraph 30 it's noted
20 that when the case was before the Investigatory Powers 10:50
21 Tribunal it was agreed that the legal issues would be
22 determined on the basis of assumed facts.

23 MS. FEE: Yes, Mr. Chairman, and I think operating the
24 basis of those assumed facts --

25 CHAIRMAN: Yes. 10:50

26 MS. FEE: -- it was possible to analyse the various
27 legal concepts in play and come up with determinations
28 in relation to those assumed facts.

29 CHAIRMAN: And one of the materials considered is

1 mentioned at paragraph 31 which was what's called
2 GCHQ's unpublished internal arrangements for processing
3 intercept material.

4 MS. FEE: Yes, exactly, Mr. Chairman.

5 CHAIRMAN: So, certainly, the Court in that instance
6 didn't feel itself constrained to apply a literal
7 application of the Section 56 bar.

10:51

8 MS. FEE: No, Mr. Chairman, I think the Court has
9 interpreted that, the high level of generality that we
10 refer to at paragraph 15 of our submissions, at that
11 high level of generality and it is open to the court to
12 deal with --

10:51

13 CHAIRMAN: For the purposes of a legal analysis.

14 MS. FEE: Yes, Mr. Chairman, exactly.

15 CHAIRMAN: And, of course, the case is published and is
16 no doubt referred to in other circumstances where
17 courts or inquiries require to acquire guidance as to
18 the important application of the statutory bar.

10:52

19 MS. FEE: Yes, Mr. Chairman. And HMG's submission
20 there could be no suggestion that Section 56 was
21 engaged merely by the discussion and analysis of those
22 powers and the associated guidance which you find in
23 the Big Brother Watch case which we've just looked at,
24 and also a number of other cases as well.

10:52

25
26 In addition, Mr. Chairman, HMG's position, as set out
27 at paragraph 16 of our submissions is that there may be
28 very exceptional situations in which the presumption
29 against absurdity might be engaged, and this could

10:52

1 include specific instances where the existence of
2 intercept has been authoritatively and publicly avowed
3 by HMG or with HMG's explicit agreement, such that
4 Section 56 might not apply to preclude reference to it
5 in subsequent legal proceedings. And the application 10:53
6 of this principle will, inevitably, always be fact and
7 context specific.

8
9 An example of that, that we've referred to in our
10 written submissions is the Belhaj case, Mr. Chairman. 10:53
11 That is a case in which the Investigatory Powers
12 Tribunal issued an open judgment in relation to two
13 documents containing legal professional privilege. And
14 you'll see from the full text of that case within the
15 bundle, that it was held that the communications were 10:53
16 held by GCHQ in breach of Article 8 ECHR in
17 circumstances where the regime for handling it was in
18 breach.

19
20 In HMG's submission, it would be absurd and impractical 10:54
21 to contend that this positive finding, which occurred
22 in an IPT case, that that was a matter which could not
23 be referred to in any future legal or indeed future
24 inquiry proceedings if it was relevant. The judgment
25 was published. It's in the bundle and HMG's submission 10:54
26 is that it would lead to an absurdity if it couldn't be
27 referred to, Mr. Chairman.

28
29 Similarly, HMG, at paragraph 17, notes that following

1 the 2008 Panorama broadcast, the Government asked the
2 then Intelligence Service Commissioner, Sir Peter
3 Gibson to investigate and produce a report. Sir Peter
4 concluded his report in January 2009 and extracts from
5 it were published by the Government a few days later.

10:55

6
7 I'm conscious. Mr. Chairman, of the management notes
8 for this hearing in relation to summarising material.
9 I think what can be said is that that report contains
10 some high level references which, in HMG's submission,
11 it would be absurd, unworkable and illogical for this
12 Inquiry not to be able to be referred to in open. So
13 that's in the report of Sir Peter Gibson in open.

10:55

14 CHAIRMAN: But on the face of the open report, would
15 you say there are passages which would engage the
16 statutory bar?

10:55

17 MS. FEE: So, I think what we have said, Mr. Chairman,
18 obviously the statutory bar in relation to Section 56
19 relates to legal proceedings.

20 CHAIRMAN: Yes, sorry, maybe I'm not making myself
21 clear. If we were to lead evidence about the open
22 report would there be passages in that which, if we
23 led, would engage the statutory bar?

10:56

24 MS. FEE: So, HMG's position, Mr. Chairman, is that the
25 basis for disapplying Section 56 in the very
26 exceptional circumstances that we're describing here at
27 paragraph 17 and 18 of the written submissions are,
28 effectively -- they may well stem from the presumption
29 against absurdity. I'll go on, if it would be helpful

10:56

1 at this stage, Mr. Chairman, to deal with that
2 specifically and why that is said to be so.

3 CHAIRMAN: Yes.

4 MS. FEE: The presumption against absurdity as you
5 know, Mr. Chairman, is the well-established approach to 10:56
6 the interpretation of statutes. The scope of the
7 presumption was subject to relatively recent
8 explanation in the Competition Appeal Tribunal case by
9 Lord Sales, at paragraph 43 where he stated:

10
11 "The courts will not interpret a statute so as to
12 produce an absurd result, unless clearly constrained do
13 so by the words of Parliament."

14
15 And he then cites from the relevant textbook of 10:57
16 statutory interpretation:

17
18 "The court seeks to avoid a construction that produces
19 an absurd result since this is unlikely to have been
20 intended by the legislature." 10:57

21
22 As the author of that textbook says:

23
24 "The courts give a wide meaning to absurdity in this
25 context using it to include virtually any result which 10:57
26 is impossible, unworkable, impracticable, inconvenient,
27 anomalous or illogical, futile or pointless, artificial
28 or productive of a disproportionate counter mischief."
29

1 And then there's some further consideration of the
2 principle which I won't read out in full, Mr. Chairman.

3
4 Given the wide meaning which is given to the word
5 "absurdity" in this context, and given the 10:58
6 impracticability and illogicality of applying
7 Section 56 to preclude references to the exceptional
8 open statement, HMG's position is that it would have no
9 objection to the open Gibson Report being referred to
10 in open in these Inquiry proceedings. In the specific 10:58
11 instances that I've described it is submitted that the
12 presumption against absurdity could provide a legal
13 route through which it is lawful to refer to those
14 statements, despite the broad and wide terms of
15 Section 56. It's HMG's position that in this Inquiry 10:58
16 it would be unreasonable to preclude such references
17 from being made in open and hence the analysis in the
18 case law which I've just described may apply with some
19 strength. I say that, Mr. Chairman, noting that in any
20 case where the presumption against absurdity might 10:59
21 apply, very careful consideration would need to be
22 given to the particular circumstances of the case and
23 the legal context in which it arose and that nothing
24 which HMG say in these submissions is intended to set a
25 general precedent as any application of the presumption 10:59
26 against absurdity in a Section 56 context would always
27 require detailed and specific consideration on a
28 case-by-case basis.
29

1 And, similarly, I'm conscious that nothing said in
2 these submissions should be taken to give any
3 indication about the position of any other relevant
4 bodies, they're HMG's submissions on the law and it may
5 be that other relevant bodies, including agencies such 11:00
6 as police forces, might have different views on the
7 law.

8
9 And I think it's important, Mr. Chairman, that I accept
10 and make clear that HMG is not the arbiter of whether 11:00
11 Section 56 operates to prohibit reliance on intercept
12 material, it is a matter for the body considering the
13 potential relevance of the presumption against
14 absurdity to make its own decision on the legal risks,
15 but HMG has tried to provide a detailed analysis of 11:00
16 HMG's view but we accept that HMG is not the arbiter.

17
18 And in making those submissions HMG is not expressing a
19 position on what level of specificity is needed to
20 engage Section 56. And HMG's position is that the 11:00
21 Inquiry doesn't need to reach a view on that since the
22 publication and avowal of the open extracts of the
23 Gibson Report is what gives rise to the potential
24 absurdity in this particular instance.

25 11:01
26 And with regards to the open Gibson Report, HMG's
27 position is that the presumption against absurdity
28 could apply only to the matters referred to in open in
29 that report and could not go any further, so the open

1 report might be considered to set the bounds of what
2 might be referred to in the open proceedings.

3
4 So at paragraph 23 of the written submissions onwards,
5 Mr. Chairman, I've tried to address the questions 11:01
6 sequentially. I can briefly summarise that if it would
7 be helpful.

8
9 The effect of Section 56 is that the Inquiry and Core
10 Participants are prohibited from relying, in open 11:01
11 proceedings, upon material that has already entered the
12 public domain through media reporting or broadcasting
13 where such reference would either disclose material in
14 circumstances from which its origin in
15 interception-related conduct could be inferred, or tend 11:02
16 to suggest that interception-related conduct has
17 occurred, may have occurred or may occur in the future.

18
19 The Inquiry has posed the question regarding any
20 difference of treatment if the material is speculative 11:02
21 or factually incorrect. The suggestion that material
22 might be referred to if it is factually incorrect would
23 require confirmation of what is and isn't correct and
24 that would, in essence, defeat the purpose of the
25 legislation. 11:02
26

27 The correct way in HMG's submission to deal with
28 speculative or incorrect information is in a closed
29 Inquiry hearing where full disclosure of all relevant

1 material will take place should any such information
2 exist. And the Chair can evaluate all the available
3 information in the round.

4
5 In terms of the part of the question related to 11:03
6 disclosing the material to Core Participants, HMG's
7 position is it is not possible within the terms of the
8 statute, and the exceptions of people to whom it can be
9 disclosed are contained within Schedule 3,
10 paragraph 22(1). HMG's position is that the only 11:03
11 situation in which intercept might be relied upon in
12 open Inquiry proceedings is where the presumption
13 against absurdity applies, as we've discussed in detail
14 already. And there is a good case for saying that
15 Parliament cannot have been taken to have precluded 11:03
16 such references in open inquiry proceedings in those
17 circumstances. And HMG has no objection to that course
18 being taken in the specific context of this Inquiry,
19 for example, with respect to the open Gibson Report.

20 11:04
21 Briefly, Mr. Chairman, in relation to the question of
22 Section 3 of the Human Rights Act, at paragraph 25 of
23 HMG's submission on page 97 it's indicated that this
24 Inquiry and the Northern Ireland High Court have
25 already concluded that there is nothing in Article 2 11:04
26 which precludes the adoption of a closed process and
27 requires the families to have access to, or any
28 specific representation at the closed hearings. That
29 must mean there is nothing in Article 2 which means

1 that the families must have access to any relevant
2 intercept, should it exist, in order for the Inquiry to
3 be effective. And hence there's nothing in Article 2
4 which requires Section 56 to be read down or given
5 effect to in a way which differs from the submissions 11:04
6 of HMG.

7
8 We say, Mr. Chairman, that that is a complete answer to
9 the suggestion that Section 3 of the Human Rights Act
10 and Article 2 has any role to play in the 11:05
11 interpretation of Section 56.

12
13 At paragraph 28 of HMG's submissions, Mr. Chairman,
14 there's reference to a case mentioned in the Inquiry
15 Legal Team's note which is National Crime Agency v DP & 11:05
16 Others. If I could summarise. Essentially, HMG note
17 that that is a decision of the Employment Appeal
18 Tribunal and it was considering the consequences which
19 a broad interpretation of Section 56 could have for the
20 Article 6 right to a fair hearing in a very particular 11:05
21 factual scenario. And its findings were in a very
22 specific employment law context.

23
24 We suggest, Mr. Chairman, that the Inquiry should
25 exercise caution in applying that fact-specific 11:06
26 employment law case to the present context. We also
27 note that it considered Section 56(1)(b) but not
28 Section 56(1)(a).

1 I won't take you through the full analysis of that
2 judgment, Mr. Chairman, unless it would be of
3 assistance but I'll move on to Question 4 which starts
4 at paragraph 39 of HMG's submissions. That is the
5 question about whether the application of Section 56 11:06
6 depends solely on the statutory criteria or whether it
7 can be affected by the position adopted by HMG or
8 another public authority.

9
10 Section 56 is governed by the statutory criteria 11:06
11 enacted by Parliament, and Parliament was very clear
12 about what the exception should be. And it has amended
13 the legislation showing that further exceptions have
14 been added where Parliament has felt it was appropriate
15 do so. The basic position is that there is nothing in 11:07
16 Section 56, or those exceptions, which means that the
17 position taken by Core Participants about intercept
18 material could affect the scope of the provision
19 itself. The only circumstances in which the position
20 adopted by HMG might affect the position is in the very 11:07
21 exceptional circumstances which I've described in
22 relation to the principle absurdity.

23
24 If I could take you then, Mr. Chairman, to the two new
25 questions. The first of those questions was in 11:07
26 relation to whether section 56 of the IPA prevents the
27 chairman of an inquiry from confirming in open that the
28 Inquiry is conducting restricted proceedings and
29 whether that confirmation would itself amount to a

1 disclosure falling foul of Section 56.

2
3 HMG's position, Mr. Chairman, is that ordinarily, yes,
4 Section 56 of the IPA would prevent the chairman of an
5 inquiry from confirming in open that the inquiry is 11:08
6 conducting restricted proceedings of this type. And
7 that is because such a confirmation might itself tend
8 to suggest that interception-related conduct has or may
9 have occurred. However, in the context of this
10 specific Inquiry, Mr. Chairman, HMG submits that the 11:08
11 position is different and exceptional.

12
13 You've already heard HMG's submissions that extracts
14 from the report of Sir Peter Gibson were published by
15 the Government in 2009 and that those extracts included 11:09
16 some high level references which HMG has submitted it
17 would be absurd, unworkable and illogical for those
18 open extracts not to be capable of being referred to in
19 open in this Inquiry. HMG considers that these are
20 very exceptional circumstances specific to this Inquiry 11:09
21 and the open extracts of Sir Peter Gibson's report.
22 And as I've suggested and as appears in HMG's written
23 submission, the basis for disapplying Section 56 in
24 these very exceptional circumstances might stem from
25 the presumption against absurdity. 11:09
26

27 If the Inquiry is, as HMG contends, able to refer to
28 the open extracts of Sir Peter Gibson's report during
29 this Inquiry, it logically follows that the Chairman

1 should be able to confirm, as matter of principle, that
2 he is conducting restricted proceedings pursuant to
3 Section 19 of the Inquiries Act, and paragraph 23 of
4 Schedule 3 to the IPA so that he may consider, in
5 closed, the matters to which Sir Peter Gibson refers in 11:10
6 his open report.

7
8 In summary, HMG considers that the Chairman is correct
9 to identify the general problem facing an inquiry which
10 wished to confirm that it intended to hold restricted 11:10
11 proceedings. But in the very specific circumstances
12 that arise here in this Inquiry, HMG considers that it
13 would be open to The chairman to make such a
14 confirmation. But those submissions, Mr. Chairman, are
15 subject to the important qualifier that HMG fully 11:10
16 recognises and accepts that it is not the arbiter of
17 whether Section 56 applies and, if so, in what way.
18 And that's also been expressly recognised in HMG's
19 written submissions, Mr. Chairman.

20 11:11
21 In relation to the second question which was, if the
22 answer to Question 1 was that the Chairman can confirm
23 in open that the Inquiry is conducting restricted
24 proceedings without infringing Section 56, is there a
25 procedural mechanism by which CPs who do not fall 11:11
26 within the definition of "a relevant party" in
27 paragraph 23(4) of Schedule 3 to the IPA, essentially
28 the open CPs may submit proposed lines of questioning
29 for Counsel to the Inquiry to ask for consideration in

1 those restricted proceedings without infringing
2 Section 56?

3
4 HMG submit that, as I've indicated, the answer to
5 Question 1 is that the Chairman can confirm in open 11:11
6 that the Inquiry is conducting restricted proceedings
7 without infringing the IPA in the exceptional
8 circumstances that have arisen in this Inquiry.

9
10 In terms of a proposed mechanism for open Core 11:12
11 Participants to submit proposed lines of questioning
12 for Counsel to the Inquiry to ask in those restricted
13 proceedings without infringing Section 56, in the
14 specific context of this Inquiry HMG does not, as a
15 matter of principle, see a difficulty with the family 11:12
16 Core Participants suggesting questions or topics that
17 they would wish Counsel to the Inquiry or the Chairman
18 to consider.

19
20 The families have not seen the closed documents and so, 11:12
21 Mr. Chairman, any questions they may ask would be on a
22 hypothetical and speculative basis. And it's perhaps
23 more difficult to see how asking a question on that
24 basis would tend to suggest that interception-related
25 conduct has or may have occurred. HMG suggests that it 11:13
26 would be very different if the Inquiry or a closed Core
27 Participant asks such a question in open as this might
28 be interpreted as a question asked on the basis of
29 specific knowledge, and that could potentially infringe

1 Section 56.

2
3 And, similarly, it would be different if the Inquiry
4 narrowed the process. So if, for example, instead of
5 inviting questioning generally it was indicated that as 11:13
6 a hypothetical example, questions would be invited
7 immediately before one specific module or topic and
8 that might tend to suggest a link which in that
9 hypothetical situation could violate Section 56. HMG
10 does not see a difficulty with family Core Participants 11:14
11 being invited in general terms to propose questions or
12 topics that they would wish the Inquiry to probe. So,
13 a family Core Participant, for example, could
14 articulate if there is intercept we would wish it to be
15 asked whether, and then whatever questions they may 11:14
16 wish to propose. Mr. Chairman, you may consider that
17 it might be helpful if such questions were posed in
18 writing, not least to ensure that they are accurately
19 and comprehensively captured for any consideration in
20 future hearings. It is possible, for example, in a 11:14
21 hypothetical situation that a question raised could be
22 relevant to closed material but not relevant to any
23 intercept material that might exist. And it would be
24 assumed that the family Core Participant raising the
25 question would still want their question considered at 11:15
26 a relevant closed hearing, which might be some time in
27 the future.

28
29 HMG does not discern any specific procedural mechanism

1 in the IPA itself whereby such proposals for
2 questioning would be viewed as forming part of the
3 restricted proceedings. HMG considers that the family
4 Core Participants could pose their hypothetical
5 questions in open for the reasons explained above, 11:15
6 namely, as I've said, Mr. Chairman, any questions that
7 they might ask would inevitably be on a hypothetical
8 and speculative basis. So, it is difficult to see how
9 asking a question, on that basis, would tend to suggest
10 that intercept-related conduct has or may have 11:15
11 occurred.

12
13 HMG considers that this is consistent with submissions
14 made by HMG to the Chair previously in relation to the
15 Special Advocate issue and those submissions are 11:16
16 reflected at paragraph 63, Chair, at your open ruling
17 on the applications for the appointment of special
18 Advocates which reads:

19
20 "When it came to any closed proceedings conducted under 11:16
21 the authority of Section 19, by definition, such
22 hearings would concern material that the family could
23 not give instructions on because they would not be
24 aware of what it was. Any concerns which they had or
25 lines of inquiry which they wanted pursued in relation 11:16
26 to a general understanding of the topic, could all be
27 pursued at their suggestion by Counsel to the Inquiry."

28
29 And we say it's also consistent with paragraph 181 of

1 the same ruling.

2
3 So, in the absence of a specific procedural mechanism,
4 Mr. Chairman, HMG does not see a difficulty with you as
5 chairman fashioning a procedure to allow the posing of 11:17
6 questions, and that might be in keeping with the
7 Section 17 duty to secure fairness, but as previously
8 indicated, the Inquiry may need to be careful not to
9 attach that procedure to any specific module to avoid
10 implying more than is in open. 11:17

11 CHAIRMAN: So if I understand correctly, Ms. Fee, you
12 would see the possibility of questions being suggested
13 by CPs as being framed on a hypothetical or speculative
14 basis and, therefore, that would not be caught by the
15 statutory bar which tends to suggest that 11:18
16 intercept-related conduct may have occurred.

17 MS. FEE: Yes, that's exactly it, Mr. Chairman. So the
18 position would be very different if it was said by a
19 closed CP or if it was said by Counsel to the Inquiry
20 because it might be assumed that those questions or 11:18
21 statements are coming from a position of knowledge.

22 CHAIRMAN: I wonder if it could be looked at slightly
23 differently as well. If the Inquiry was to be
24 considering evidence which would fall within the scope
25 of Section 56 on its face, then it could only do so by 11:18
26 hearing that evidence in the context of restricted
27 proceedings as provided for by paragraph 23 of
28 Schedule 3. I'm right so far?

29 MS. FEE: Yes, yes. Sorry, Mr. Chairman.

1 CHAIRMAN: Section 23(1) provides that the
2 Section 56(1) bar does not apply in relation to any
3 restricted proceedings. So, that obviously opens the
4 gate to hearing evidence about, for example, intercept 11:19
5 in a restricted hearing procedure. But it may go a bit
6 more, a bit further than that, because Section 56(1)
7 does not apply in relation to restricted proceedings.
8 So, if Core Participants, family Core Participants were
9 offered the opportunity of suggesting questions which
10 were to be explored by Counsel to the Inquiry in 11:19
11 restricted proceedings, would those suggestions not be
12 ones that applied in relation to the restricted
13 proceedings and, therefore, not caught within the
14 Section 56(1) bar?

15 MS. FEE: I think, Mr. Chairman, HMG's position is that 11:20
16 because Section 23(2) indicates that:

17
18 "Proceedings held under the Act are restricted
19 proceedings for the purposes of this paragraph, where
20 restrictions have been imposed prohibiting attendance 11:20
21 at proceedings by any person who is not..."

22
23 And then it gives a list which wouldn't include the
24 open CPs, that HMG's interpretation was that the
25 provisions relating to restricted proceedings weren't 11:20
26 of assistance in terms of the questions that the family
27 might wish to ask, but that effectively we didn't reach
28 that problem because the families could ask their
29 questions in open in any event because of HMG's

1 interpretation that the families are asking
2 hypothetical and speculative questions not coming from
3 a position where they have seen closed documents or
4 from a position of knowledge and that it was difficult
5 to see how that would infringe the wording of the 11:21
6 statute.

7
8 So I think, hopefully, Mr. Chairman, I've given HMG's
9 position in relation to all of the questions and parts
10 of the questions that have been posed but if there's 11:21
11 anything else with which I can assist you, I would be
12 glad to try and do so.

13 CHAIRMAN: If your suggestion about family Core
14 Participants being able to provide proposed questions
15 to Counsel to the Inquiry for exploration at restricted 11:22
16 hearings is correct, it's on the basis that the
17 proposed questions would be speculative and not based
18 on knowledge held by the Core Participant.

19 MS. FEE: Yes, Mr. Chairman.

20 CHAIRMAN: And, therefore, in that fashion Section 56 11:23
21 would not be engaged.

22 MS. FEE: Yes, Mr. Chairman.

23 CHAIRMAN: Why then could those questions not simply be
24 asked in open proceedings?

25 MS. FEE: I think they could be asked openly, 11:23
26 Mr. Chairman, the difficulty is the answer. If, as we
27 understand it, the family Core Participants want
28 Counsel to the Inquiry to try and procure an answer to
29 specific questions or concerns that they might have, it

1 may be considered inevitable that answers could only be
2 given in closed. The asking of the questions, as I've
3 indicated is a different matter. The asking of the
4 questions are not based on any protected material.
5 I've indicated that HMG is not seeking to protect the 11:23
6 open extracts of Gibson, for example, the Gibson
7 Report.

8 CHAIRMAN: But Section 56 prohibits the asking of
9 questions in open proceedings which tend to suggest
10 that intercept-related conduct has taken place. 11:24

11 MS. FEE: Yes, Mr. Chairman.

12 CHAIRMAN: So, are you saying that that only applies to
13 questioners who are deemed to actually have knowledge
14 about the aspects that they are questioning on?

15 MS. FEE: In the circumstances of this Inquiry, 11:24
16 Mr. Chairman, the submission that I've made on behalf
17 of HMG is that any questions that the families would
18 ask, the kinds of topics that we understand they wish
19 to have answers on, those questions will inevitably be
20 hypothetical and speculative and that they would not 11:24
21 tend to suggest, within the meaning of the statutory
22 language. And I've drawn a distinction between a
23 situation where a closed State participant was to ask a
24 question or make a statement to the same effect and
25 that a reasonable viewer or listener might well think 11:25
26 that that is coming from a position of knowledge and
27 that it does tend to suggest that such activity did or
28 didn't occur, but we say that can't really apply to the
29 families who don't have access to that material in the

1 event that it exists. But, as I say, Mr. Chairman,
2 I've been careful to make clear HMG does not hold
3 itself out as the arbiter on Section 56, this is HMG's
4 position and HMG's interpretation but we accept the
5 limitations to that.

11:26

6 CHAIRMAN: Prohibition tends to suggest, not tends to
7 confirm or tends to establish.

8 MS. FEE: Yes, that's right, Mr. Chairman.

9 CHAIRMAN: It's described everywhere that it's
10 considered as the broadest prohibition designed to
11 prevent any sort of inquiry into that issue. It's
12 rather hard to think that it can be designed only to
13 apply to people who actually know whether there was
14 intercept or not.

11:26

15 MS. FEE: I think, Mr. Chairman, the submissions that
16 have been made on behalf of HMG in respect of this,
17 have to be viewed in the round. So, I've said at the
18 outset that I consider these to be very exceptional
19 circumstances that have arisen in this Inquiry and have
20 indicated that in HMG's submission that excerpts from
21 the open report of Sir Peter Gibson can be relied upon.
22 That sets the context to what comes next. And against
23 that background it is HMG's submission that the
24 families could ask general, hypothetical and
25 speculative questions on the topics that they wish to
26 have addressed. They could indicate to Counsel to the
27 Inquiry that these are topics that they would be keen
28 to have pursued if intercept exists, for example, and
29 then those could be picked up in closed as appropriate,

11:26

11:27

11:27

1 if relevant.

2 CHAIRMAN: I'm just noticing that we're getting close
3 to an hour or so after commencement, Ms. Fee, does that
4 bring us close to the end of your submissions?

5 MS. FEE: I have said everything that I wish to say, 11:28
6 Mr. Chairman, it's only if there's anything with which
7 I can assist you, but I'm finished from my perspective.

8 CHAIRMAN: Thank you.

9 MS. FEE: Thank you.

10 CHAIRMAN: we'll take a break at that stage, perhaps, 11:28
11 Mr. Greaney.

12 MR. GREANEY: Sir, if we could have a break until
13 quarter to midday.

14
15 THE INQUIRY ADJOURNED BRIEFLY AND RESUMED AS FOLLOWS: 11:44
16

17 CHAIRMAN: Mr. Greaney.

18 MR. GREANEY: Sir, thank you, next we're going to hear
19 from Mr. Henry on behalf of the Police Service of
20 Northern Ireland. 11:46

21 CHAIRMAN: Mr. Henry.

22
23 SUBMISSION BY MR. HENRY:
24

25 MR. HENRY: Good morning, my Lord. My Lord, during the 11:46
26 course of the exchanges between yourself and Ms. Fee
27 earlier this morning, there was a short exchange about
28 the ability to engage in high level legal analysis or
29 debate about these issues, and I'd like to make it

1 clear from the outset that I agree with what was said
2 and what was agreed between your Lordship and Ms. Fee.

3
4 Now, in terms of dealing with the queries which have
5 arisen, I think they could probably be categorised as 11:47
6 the public domain material query and then the
7 restricted proceedings query and the questions query.
8 So I'll deal with them in that order, if I may. Each
9 of them, essentially, distills down to an exercise of
10 statutory interpretation. And the starting point for 11:47
11 every statutory interpretation exercise is the language
12 chosen by the legislator within the provisions in
13 question. I know that the Inquiry is very familiar
14 with these provisions already. I would just
15 respectfully draw your attention, though, to page No.2 11:48
16 of the trial bundle or hearing bundle which sets out
17 Section 56.

18
19 So the type of things which are prohibited by
20 Section 56(1) are: 11:48

21
22 "Evidence to be adduced, question asked, assertion or
23 disclosure made..."

24
25 or the catchall term which follows: 11:49

26
27 "...or other thing done in, for the purposes of or in
28 connection with Inquiry Act proceedings which (in any
29 manner)..."

1 So just pausing there for a moment, my Lord. There is
2 a very clear statutory intent to impose what is a
3 draconian prohibition encompassing a wide range of
4 potential actions in connection with Inquiry
5 proceedings. I'm not going to focus on 11:49
6 Section 56(1)(a) but I would move to (b) which contains
7 the "tends to suggest" language.

8
9 First brief observation I'd make about that is that it
10 refers to past and future conduct. But I'd also 11:50
11 respectfully highlight the language used at the
12 beginning and the end of that first line of the text it
13 being "tends to suggest," "may have occurred". And if
14 one just pauses again and considers those, that
15 statutory language carefully. It's not unique, it has 11:50
16 appeared in the previous statutory provisions which
17 foreshadowed the 2016 Act and "tends to" has been used
18 in other statutes as well, albeit it is a relatively
19 unusual term. But what the statute is essentially
20 getting to is a prohibition on hinting that something 11:50
21 may have happened. And in due course it will be
22 important for the Inquiry to consider whether questions
23 asked, even the act of asking the question on a
24 speculative basis, whether that hints or tends to
25 suggest that something may have happened. I'll come 11:51
26 back to your Lordship in relation to the issue of
27 knowledge and asking that question from a position of
28 knowledge or from a purely speculative position in a
29 moment.

1 CHAIRMAN: what I find difficult just at the moment is
2 to understand how asking a question, even on a
3 speculative basis, couldn't be for the purpose of
4 suggesting that something may have occurred?

5 MR. HENRY: That's a valid concern, we respectfully 11:52
6 suggest, my Lord. That's why I deliberately took you
7 to the outer perimeters of the statutory language
8 within 56(1)(b) at the outset. If you're asking the
9 question you are tending to hint or suggest that
10 something may have happened, otherwise why is the -- 11:52

11 CHAIRMAN: what is the purpose of a question otherwise?

12 MR. HENRY: It does tend to be the reasonable and
13 rational interpretation of that provision, I would
14 respectfully say.

15 11:52
16 Now, if that is the blunt force - and just before I go
17 any further, my Lord, what we know is obvious from the
18 provision is that Section 51 sets out in clear terms
19 what's not allowed. It also then sets out that the
20 exceptions to that are in Schedule 3. And we also know 11:53
21 that it's abundantly clear that there is no specific
22 exception for material for referring to or asking
23 questions about or making assertions in relation to
24 material which is already in the public domain. So
25 there's no specific exception or exemption. 11:53

26
27 Again, I do somewhat reluctantly come back to the
28 starting point that when one is interpreting statutes
29 you're trying to identify what Parliament's intention

1 was, including how it would apply to a specific factual
2 scenario. The starting point for identifying that
3 intention is to look at the language used. The
4 language used here is fairly blunt and hard-hitting,
5 unforgiving one might say.

11:54

6
7 Then if we look at the types of scenario where one
8 might be able to interpret the legislation in a nuanced
9 way, in our written submissions we set out three
10 potential general scenarios, one was with the language
11 itself is ambiguous. I think we could rule that out
12 fairly quickly, my Lord, because there is no ambiguity
13 within the language, we respectfully say.

11:54

14
15 So that doesn't provide a pathway into a different
16 interpretation other than the literal interpretation of
17 the language used.

11:54

18
19 Another possibility in terms of statutory
20 interpretation is Section 3 of the Human Rights Act.
21 It sits apart from all of the other statutory
22 interpretation exercises because one's not slavishly
23 trying to identify what Parliament's intention was, one
24 is looking at trying to interpret what Parliament said
25 in a convention-compliant manner. So we anticipated
26 that some of the Core Participants might suggest that
27 Article 2 was an issue and that in order to interpret
28 Section 56 in an Article 2 compliant manner there may
29 be a need to read in or read out certain words or give

11:55

11:55

1 it a different meaning, which doesn't appear on the
2 face of the statute book.

3
4 We set out in our submissions the reasons why we say we
5 don't think that is possible and indeed much of that 11:55
6 Article 2 case law was dealt with in the Special
7 Advocate hearing before your Lordship and then in the
8 subsequent judicial review before Mr. Justice McAlinden
9 and I don't think your Lordship would require me to
10 repeat it here. So, we respectfully say that isn't a 11:56
11 pathway to a different interpretation within the
12 confines of this Inquiry.

13 CHAIRMAN: It would only be something that would be
14 considered if otherwise an interpretation of the
15 statute would lead to a breach of one of the articles 11:56
16 of the Convention and Article 2 is the one we would be
17 thinking about. And you're right, we did discuss that
18 in previous hearings, but some of the contributors and
19 I think you're one, have drawn attention to the case of
20 Schofield and the decision in the case of Schofield was 11:56
21 issued by Lord Justice Singh at a time he was already
22 the President of the Investigatory Powers Tribunal and,
23 therefore, someone who would be recognised as having a
24 deep insight and expertise in this field. And the
25 issue in the Schofield case was whether or not 11:57
26 Section 56(1) was compatible with Article 2 of the
27 Convention. And he analyses all of that out and I
28 don't need to take you through it, but he comes to the
29 conclusion at paragraph 98 in which he says:

1 "I have reached the clear conclusion that the position
2 of the UK, as reflected in primary legislation, is not
3 incompatible with the procedural obligation in
4 Article 2."

5
6 So if that's right, the case examining the relationship
7 between the statutory bar in Section 56 and Article 2,
8 results in a view that there's no incompatibility, then
9 that might be quite a powerful guide.

10 MR. HENRY: We respectfully suggest so. And whilst
11 that was about a challenge to the compatibility of the
12 legislation within the Schofield case, it was in
13 circumstances where the result that was being
14 complained of was, on any objective viewing, extremely
15 draconian. There was an individual who had lost their
16 life that the State was alleged to have been
17 responsible for and the criminal prosecution in
18 relation to that was stopped as a result of Section 56.
19 So that's the factual context in which that debate was
20 taking place. So I do respectfully -- it's really an
21 example of the impact or, as I've said the blunt force
22 of Section 56 and how it applies.

23
24 So I won't dwell on Article 10 of the Convention, my
25 Lord. I know it's been raised in one set of written
26 submissions, it is a qualified right and we'd say,
27 respectfully, if any reliance on it is likely to be
28 weaker than the Article 2 reliance and even less likely
29 to succeed.

1 So, in terms of the three scenarios for potential
2 interpretation of the statutory provision, that leaves
3 the absurdity scenario which has helpfully been touched
4 upon by Ms. Fee KC already this morning.

12:00

6 Now, there has been some useful and relatively recent
7 Supreme Court guidance in relation to this but in terms
8 of principles about what the law says and what the
9 common law says in terms of interpreting the statute.

12:00

11 "Parliament can be presumed not to have intended an
12 absurd result."

14 The term "absurdity" is given a fairly wide meaning but
15 a useful language is set out in Binyam, which a number
16 of relevant passages are quoted in a number of Supreme
17 Court authorities. But it's also, I think, the outcome
18 being illogical, unworkable or impracticable and so
19 forth.

12:00

21 As it is a presumption, my Lord, it can be displaced
22 and it would be displaced by the statutory language.
23 So I think at this stage, my Lord, just before I go any
24 further with this I might ask you to -- I'll do this
25 through the hearing bundle if I may, take you to
26 paragraph 43 of the PACCAR decision, so the reference
27 for that is [2023] UKSC 28. And if I could ask the
28 Inquiry to open at page number 70 of the bundle please
29 CHAIRMAN: Is this the authorities bundle?

12:01

1 MR. HENRY: It's a hearing bundle, my Lord, but I can
2 give you the paragraph numbers if you want to stick to
3 the authorities bundle.

4 CHAIRMAN: So what page in the hearing bundle?

5 MR. HENRY: Page 70.

12:01

6 CHAIRMAN: Yes.

7 MR. HENRY: And under paragraph 60 of this written
8 submission you'll see this quotation is taken from
9 Wathén-Fayed, a 2025 decision, but it's quoting
10 paragraph 43 in full of Lord Sales's decision in
11 PACCAR. And what it says at the beginning of
12 paragraph 43 is this:

12:02

13
14 "The courts will not interpret a statute so as to
15 produce an absurd result, unless clearly constrained to
16 do so by the words Parliament has used."

12:02

17
18 So I think if one is thinking about the steps that any
19 court or inquiry would be going through when
20 considering the presumption against absurdity they
21 would be, is the literal application of the language,
22 is it giving rise to an absurd result? I think in this
23 situation the absurdity might be arising from the
24 inability to refer to something that was published into
25 the public domain by a limb of the State. And if such
26 an absurdity arises, does the presumption against
27 absurdity cause it to require a different approach to
28 the statutory language or is that presumption
29 displaced? And I think the guidance you're getting in

12:02

12:03

1 relation to the displacement of the presumption is in
2 the first few lines of paragraph 43 of Lord Sales's
3 decision in PACCAR. And in simple terms, my Lord, are
4 the words of the statute so unforgiving that they do
5 not allow for a more nuanced interpretation?

12:03

6
7 I'm not sure I'll go much further with the absurdity
8 issue other than to -- I should say this is all with an
9 attempt to assist the Inquiry and I should say as well
10 that some of these observations are made somewhat

12:04

11 reluctantly given the blunt force of the statutory
12 provision. But, if one is using the absurdity

13 principle to arrive at a different interpretation of
14 section 56(1), what is that different interpretation?

15 So you, my Lord, will wish to consider very carefully
16 what the parameters of that new interpretation are and
17 in doing so, you, my Lord, may also wish to think about
18 the outworkings of such an interpretation. And by that
19 what I mean is, fast forward to day 14 of the hearing

12:05

20 when reference has been made to a published document,
21 what are the parameters? Is it restricted to something
22 appearing in an evidential summary? Would questions be
23 permitted? Who would they be permitted of? It is

12:05

24 exceptionally commendable that the submissions that
25 were made this morning were thought out in the way that
26 they have been and the position itself is clear, the
27 legal analysis was astute. The Inquiry will want to
28 think ahead, though, to how such an interpretation
29 would work in practice amid the hearing. I'm sorry if

12:06

1 that sounds like placing in any way a barrier in the
2 way, my Lord, but we just wish the Court had the
3 benefit of our analysis.
4

5 So, unless your Lordship has any specific queries about 12:06
6 the absurdity principle point, I'll make some brief
7 observations about some of the other issues which have
8 arisen, before moving on to the latter questions.

9 CHAIRMAN: Yes.

10 MR. HENRY: In one of the written submissions there was 12:07
11 reference to the statutory prohibition only applying to
12 new material. We say the language of the statute does
13 away with that submission relatively quickly.
14

15 Another query has arisen, does a previous breach of the 12:07
16 statutory prohibition imposed by Section 56(1) justify
17 a further breach? I think there's a uniform opinion
18 within the room that the answer to that question is no.
19 If there's been misstep previously that, whether within
20 the confines of these proceedings or previous 12:07
21 proceedings or a different situation, that wouldn't
22 justify a continuation on of a breach of a statutory
23 prohibition.
24

25 A further question or issue raised was the attitude of 12:07
26 the State parties. I think if one were to frame the
27 question in the following way; would the lack of
28 objection, potential consent as it were, by one or more
29 State parties have an influence on the correct

1 application of Section 56? I bring your Lordship back
2 to the first principles, the exercise that's being
3 performed is one of statutory interpretation
4 identifying if we're not utilising Section 3 - and I'm
5 suggesting the Inquiry shouldn't - then what you're
6 left with is identifying what Parliament's intention
7 is.

12:08

8 CHAIRMAN: Yes, it's a question of competence rather
9 than anything else. So the fact that one party doesn't
10 object doesn't advance the matter.

12:08

11 MR. HENRY: That's essentially the point we've made in
12 our written submission, it's of fairly limited, if any,
13 benefit to you in terms of the statutory interpretation
14 exercise.

15
16 In relation to two of the cases that have been
17 mentioned already my Lord, the first the Gohil decision
18 which was helpfully included in HMG's written
19 submissions, we agree with Ms. Fee KC's assessment of
20 that in terms, it doesn't -- the statutory prohibition
21 does not apply if the information can be disclosed in
22 such a way that the provision isn't offended. That is
23 absolutely correct. That would be a fact-sensitive
24 question -- sorry fact-sensitive exercise is a better
25 way to describe it. But in terms of how that assists
26 with the -- it will definitely, or rather if I could
27 take it step back; it may have some purchase in due
28 course but in terms of the public domain material, so
29 material which is already available in the public

12:09

12:09

12:10

1 domain, does the principle articulated in Gohil assist
2 you? I'm not sure that it will. It does provide a
3 measure of reassurance in relation to latter stages.

4
5 Similarly, in relation to one of the latter issues 12:10
6 which is the asking of questions by the non-State CPs
7 in open or in connection with the closed proceeding,
8 does the helpful guidance provided in Gohil assist you
9 with that? I'm not sure it's going to take you very
10 much further. 12:11

11
12 In relation to the NCA v DP case, so National Crime
13 Agency v DP we agree with everything Ms. Fee KC has
14 said in relation to it. We would caution the Inquiry
15 against placing too much reliance on it. It was a 12:11
16 Section 3 Human Rights Act interpretation applied to a
17 specific set of factual circumstances. It won't be
18 lost on the Inquiry that the consequence of the blunt
19 application, in the factual scenario for those four
20 cases was the claimants not being able to take part in 12:11
21 their own proceedings. That was an employment law
22 context and they were adversarial proceedings. And
23 therefore, in approaching the Section 3 exercise, the
24 Employment Appeal Tribunal was not attempting to
25 identify Parliament's intention, as you will be in the 12:12
26 current exercise, it was seeking to try and find a
27 convention-compliant manner and it did so within the
28 confines of those particular facts. Those proceedings
29 are ongoing at the moment, we don't know how they'll

1 end up, we don't know what the ultimate outcome and the
2 approach to appeal will be, so I do respectfully
3 suggest that whilst it's a useful demonstration of the
4 ability to employ Section 3, potentially, in certain
5 circumstances, it's not going to be of great assistance 12:12
6 to you within these proceedings.

7
8 So, my Lord, moving on then to -- I think those
9 submissions, whilst I haven't identified questions 1,
10 2, 3 and 4, I think that probably provides the Inquiry 12:13
11 with our responses to each of those queries.

12
13 what I'll call Question 5, as articulated by
14 Mr. Greaney earlier, which arrived overnight; the first
15 of those referred to the ability to state in the public 12:13
16 domain that the Inquiry was engaging in restricted
17 proceedings. I listened carefully to the helpful
18 response to that question from Ms. Fee, I'm not sure,
19 though, that the Inquiry needs to answer the question
20 posed and place itself in the jeopardy of the question 12:14
21 that is posed. It's perfectly understandable why the
22 query might be raised but the Inquiry in due course on
23 careful reflection might feel that it need not answer
24 that. The Inquiry is holding closed proceedings and
25 they will comprise of different aspects. I'm not sure 12:14
26 that the Inquiry would need to go further than that.

27
28 The final question, my Lord, Question 6 then dealing
29 with --

1 CHAIRMAN: But just to take an example, Mr. Henry; if I
2 was to take the view that applying the statutory
3 interpretation principle of absurdity would mean that
4 it was open to leading evidence of the extracts from
5 the open Gibson Report in the Inquiry proceedings that 12:15
6 would, at a high level, perhaps in varying ways, at
7 least tend to suggest that intercept-related conduct
8 had occurred, and if that was explored in open hearings
9 then it would be possible for representatives to ask
10 questions about the extracts which were disclosed. But 12:15
11 it would be equally obvious from the content of the
12 report, that there had been a closed report and it
13 would be equally obvious that the closed report was one
14 which explored in more detail the content and extent of
15 intercept evidence. So if we let the extracts from the 12:16
16 open report it would be surely open to me to say that
17 having done that we will now hear evidence in
18 restricted proceedings about the closed aspects of the
19 report?

20 MR. HENRY: I think that's probably right, my Lord, and 12:16
21 Ms. Fee has provided you with a potential lawful
22 pathway to that if the decision is made to allow the
23 open reference to the Gibson Report.

24 CHAIRMAN: Any information that was given about what
25 was due to be explored in restricted proceedings or in 12:17
26 any form of closed hearings would have to be considered
27 on a case-by-case basis, but it does seem to me that if
28 I were to follow the suggestions made, it would be
29 rather odd if I couldn't say, having heard the extracts

1 from the open report, we are now going to hear what was
2 in the closed report but doing so in restricted
3 proceedings. Do you think that would be wrong?

4 MR. HENRY: I think within the particular circumstances
5 of these proceedings I think that would probably be 12:17
6 acceptable, my Lord. I do put particular emphasis on
7 the circumstances of these proceedings. I appreciate
8 your Lordship is not dealing with any other scenario.
9

10 So, my Lord, that brings us to, I think what would be 12:18
11 the last general topic that I was going to address you
12 on. I touched upon this at the start and we had a
13 brief exchange in relation to it. Section 56(1)(b),
14 the language "tends to suggest," "may have occurred,"
15 that's the statutory language which is applying to the 12:19
16 query can the CPs pose questions? Well, let me just
17 take a step back a moment, my Lord, and put these in
18 two different categories. So let's deal, first of all,
19 with Section 56 and then deal with the paragraph 23
20 second. So 56(1) first of all. 12:19
21

22 Does the asking of a question itself in relation to the
23 existence or otherwise of intercept-related conduct,
24 does that breach the prohibition imposed by 56(1)(b)?
25 That does tend to be the more rational interpretation, 12:19
26 even the asking of the question itself, and one might
27 be getting into legalistic gymnastics, potentially
28 perilous of interpreting it a different way. That is
29 as a starting point. If we then think about it a

1 little bit more and some of the issues which are being
2 discussed today. The position of knowledge or asking
3 the question from a position of knowledge or otherwise.
4 So, if you are not in possession of the relevant
5 information and ask the question in a speculative way 12:20
6 does that make a difference in the 56(1) context, I'm
7 not sure that it does. And also one gets -- if one
8 follows that line of thought further along the tracks
9 you start to get to a situation where one might have to
10 fill it out which questions are in breach and which are 12:21
11 not. And that process, in itself, if there hadn't
12 already been an interference with the prohibition, the
13 selection of permissible and impermissible questions
14 is, of itself, likely to cause a breach or aggravate an
15 ongoing breach 12:21

16 CHAIRMAN: We would have to have a definition of what
17 knowledge meant for one thing, and then there would be
18 a question of how I would adjudicate on the question of
19 whether a particular questioner possessed knowledge or
20 possessed sufficient knowledge. 12:21

21 MR. HENRY: All of those exercises are likely to bring
22 you closer to contravention of 56(1) as well, because
23 the outcome is likely to identify, with greater
24 clarity, what does or does not exist. 12:21

25
26 Now, that was in the hypothetical, my Lord, and then
27 one comes back to a different scenario. So if the
28 individual is asking the question hypothetically from a
29 purely ignorant point of view and engaging in an

1 exercise of pure speculation, we've discussed that
2 scenario already, what if the individual asking the
3 question has some knowledge based on what's gone into
4 the public domain already, how does that affect the
5 "tends to suggest," "may have occurred" question? And 12:22
6 if the Inquiry wasn't already satisfied that asking a
7 question from a position of no knowledge offended the
8 prohibition, then you're moving closer from asking the
9 question from a position of partial knowledge to a
10 contravention of Section 56 as a result of that partial 12:23
11 knowledge. It's more likely to offend the prohibition.
12

13 So, that's what I wanted to say about the first of
14 these two CP question scenarios, what I call the
15 Section 56 scenario. Moving on to the paragraph 23 12:23
16 query, one would frame that as the "in relation to"
17 question. When this question first came in yesterday
18 evening, my Lord, to be entirely candid with the Court
19 the initial reaction was no, I think that that is too
20 much of a stretch. One can see how it might be 12:24
21 possible to interpret the words "in relation to" to a
22 set of hypothetical pre-existing questions better
23 placed in written format, not specific to any
24 particular chapter and so forth, how it might be
25 possible to interpret such questioning to fall within 12:24
26 the exemption allowed by paragraph 23, in particular
27 23(1).
28

29 If the Inquiry is considering that, it will want to

1 remind itself carefully of what the paramilitary
2 intent, what the legislator's intent was. The starting
3 point was, to put it again in blunt terms, you're not
4 allowed to disclose or any questions about this. And
5 does the utilisation of the language "in relation to," 12:25
6 does it such violence to that intent or does it feel
7 like an uncomfortable circumvention of the intent
8 behind the provision? Ultimately, my Lord, that would
9 be a matter for the Inquiry to determine and, as I say,
10 these submissions are simply made in an attempt to 12:26
11 assist with the legal debate, as best we can.

12 CHAIRMAN: The two sections, Section 56 and
13 paragraph 23 have to be considered alongside each other
14 and I suppose one might say that the paramilitary
15 intention in relation to Section 56 was to exclude the 12:26
16 opportunity to ask any questions relating to intercept
17 in open proceedings, but that's been balanced by the
18 opportunity to have closed proceedings at which those
19 very issues can be explored. But, of course, those who
20 can appear at those restricted proceedings are 12:26
21 identified in paragraph 23 itself. And it would seem
22 obvious that it would only be those who can appear at
23 those proceedings who could ask questions in those
24 proceedings. But I just wonder whether that's the end
25 of the matter or whether it might be the case that 12:27
26 looking to the terms of section 23(1), there would be
27 an opportunity for Core Participants to convey proposed
28 lines of questioning to Counsel to the Inquiry in order
29 that they, being permitted attendees, could ask those

1 questions in the restricted hearings.

2 MR. HENRY: May I answer it in the following way, my
3 Lord: It is possible to arrive at that interpretation.
4 If such questions were permitted they would technically
5 be closed proceedings questions. And if a framework 12:28
6 was being devised in order to facilitate those kinds of
7 questions being asked, the way in which HMG have
8 suggested they should be asked, in my respectful
9 submission, eminently sensible, not specific to any
10 particular chapter, in writing in advance. Think of 12:28
11 the alternative, if a witness is in the witness box and
12 is asked a question and has to say, I can't answer that
13 in open proceedings --

14 CHAIRMAN: That would tend to suggest a contravention
15 of Section 56. 12:28

16 MR. HENRY: Precisely, my Lord. What we're engaged in
17 at the moment is a rather difficult legal analysis
18 exercise but one also has to have sight of what are the
19 practical ramifications once we go further down the
20 road as to the outworkings of all of this. And that 12:29
21 can help inform the principal decision as well. Those
22 are my respectful observations, my Lord.

23 CHAIRMAN: There's one thing which I was going to ask
24 you if you had a view on, Mr. Henry. You've touched on
25 some of the suggestions that the other Core 12:29
26 Participants have made in the course of their written
27 submissions. There was one that is in my mind that I
28 don't think you did touch on, and that's the suggestion
29 that I might request the Secretary of State to progress

1 urgent amendment of the legislation; would you have any
2 view on that?

3 MR. HENRY: I would leave that as entirely a matter for
4 the Inquiry, my Lord.

5 CHAIRMAN: All right. Thank you.

12:30

6 MR. HENRY: Thank you, my Lord.

7 MR. GREANEY: Thank you, Mr. Henry. It seems to us,
8 subject to in your view, Sir, there's value in asking
9 Mr. Southey to at least make a start on his submissions
10 and run through until about 1:00 p.m.

12:30

11 CHAIRMAN: Are you content with that, Mr. Southey?

12 MR. SOUTHEY: Certainly, Sir.

13
14
15 SUBMISSION BY MR. SOUTHEY:

12:30

16
17 MR. SOUTHEY: Sir, if I may what I propose do is focus
18 on how we say Section 56, in particular, should be
19 interpreted. I do that in part because, in my
20 submission, both of the submissions you've heard so far
21 do, to some extent, implicitly or expressly recognise
22 perhaps quite how draconian the statute is if it's
23 interpreted in the way they suggest. And our argument
24 is that there is an alternative interpretation. And
25 that's really at the heart of what we say. So that's
26 what I'm going to focus on.

12:30

12:31

27
28 But before I do that can I make three preliminary
29 observations about the factual background. Firstly, if

1 Section 56 is as broad as certainly some of the
2 submissions seem to suggest, it does cause real
3 practical difficulties and impacts in a significant way
4 on the way in which family Core Participants can
5 participate and the way in which open advocates can
6 participate.

12:31

7
8 To give you some examples, restricted inevitably
9 because of the restrictions in place before today's
10 hearing. Firstly, and I don't think I can say more
11 about this given the restrictions imposed for today's
12 hearing; there will be limitations about what open
13 advocates can say about the Terms of Reference. The
14 Terms of Reference make reference to intercept conduct,
15 effectively. And that invites, effectively, CPS
16 potentially to engage with them but limitations on open
17 CPS, in those circumstances, if Section 56 is as broad
18 as suggested, are very real. As I say, I'm not sure I
19 can say much more about that. Actually the one thing
20 perhaps I can add to that is that in particular what
21 open CPS will potentially be unable to do is reference
22 material that is publicly available, widely circulated
23 and of real concern to them.

12:32

12:32

12:32

24
25 Secondly, the difficulties complying with this probably
26 are clear because, and again I'm not sure I can go into
27 greater detail, but certainly our review of some of the
28 submissions that have already been made, indicate that
29 counsel, including Counsel to the Inquiry may breach

12:33

1 section 56 if section 56 is interpreted as broadly as
2 suggested. Now, that's not a criticism of anyone, it's
3 an indication, though, how responsible experienced
4 counsel were making submissions that they believed
5 essentially were simply referencing material in the 12:33
6 public domain in a sensible way but in a way that
7 potentially breaches section 56 if it's interpreted as
8 broadly as suggested.

9
10 It also, thirdly, prevents reference to open material 12:34
11 filed by state agencies without any objection to it
12 being made open, apparently, which, again, restricts,
13 we would submit, the ability of open to advocates and
14 open to CPs, family CPs to participate in a way that on
15 the face of it doesn't appear to have any 12:34
16 justification. And that's something I'll come back to.

17
18 Now, some of those problems - and I would also add that
19 there would appear to have been breaches in the past in
20 relation to inquiries, the Rosemary Nelson Inquiry, for 12:34
21 example, it would appear to be potentially an example
22 of that. Now, some of that --

23 CHAIRMAN: Well, in Mr. Justice Horner's own
24 decision --

25 MR. SOUTHEY: Yes. 12:35

26 CHAIRMAN: -- one might take the view that there's a
27 breach set out.

28 MR. SOUTHEY: If section 56 is as broad as suggested.
29 Now that's why I'm going to submit it's necessary to

1 look with care at Section 56 and we have an alternative
2 interpretation, but, yes.

3 CHAIRMAN: Another view is that perhaps Section 56
4 hasn't been given the care that it requires in other
5 proceedings?

12:35

6 MR. SOUTHEY: Well, it may be but that's correct. But
7 all I'm suggesting is that there are two things that
8 arise from this and I accept that it may be that
9 Section 56 hasn't been given the care. But one, one
10 has to think carefully about whether Parliament could
11 have intended to disrupt in the way that it would
12 potentially disrupt the operation of normal open
13 proceedings. And, secondly, whether it intended to do
14 that in circumstances where all the indications are
15 nobody saw that there was any problem with the normal
16 operation. Experienced counsel are very conscious of
17 being cautious about referencing things that might
18 cause harm and yet that doesn't seem to be a problem.

12:35

12:36

19
20 Now, that touches on, just as a sort of introduction,
21 something that my learned Friend, Ms. Fee KC, said when
22 dealing with the Big Brother Watch case, another
23 example, potentially, on the face of it, if Section 56
24 approach is as broad as some people argue, an another
25 potential example of a breach. Now, my learned Friend
26 seemed to suggest that there was some sort of
27 distinction between, I think she used the language high
28 level discussions of capacity and a more granular
29 consideration. The problem with that, in our

12:36

12:36

1 submission, is that doesn't fit, and it's why we submit
2 one needs to look carefully at Section 56, that doesn't
3 necessarily fit with Section 56. Section 56 doesn't
4 appear to distinguish between that, it doesn't seem to
5 make any difference whether one says there's been 12:37
6 massive processing of data as a matter of policy or
7 whether an individual has had their phone intercepted,
8 it doesn't seem to make any difference on the face of
9 Section 56. That's not how we submit you can interpret
10 Section 56 in a way that avoids the problems. And I'll 12:37
11 come back to how we say you can.

12 CHAIRMAN: All of these observations are accurate,
13 Mr. Southey, but it's equally obvious that the courts
14 have felt able to examine the concept of the statutory
15 bar and have been content to explore the operation of 12:38
16 the statutory bar in circumstances which on a literal
17 application would tend to suggest that
18 interception-related conducted had taken place. I
19 wonder if there's a difference that one should take
20 note of between an analysis and an examination of the 12:38
21 concept of the bar and its content for the purposes of
22 legal debate as opposed to an examination of the impact
23 of the prohibition in relation to evidence.

24 MR. SOUTHEY: well, that's not the statute -- on the
25 face of it the statute doesn't draw that distinction. 12:38
26 what I would submit, Sir --

27 CHAIRMAN: It doesn't, I know that, but we can see that
28 that distinction appears to have been drawn.

29 MR. SOUTHEY: But I would submit there's a different

1 distinction that potentially comes into play and the
2 distinction is this, if one talks about high level
3 operations one is generally just confirming something
4 which is not secret. I mean I'm cautious about what I
5 can say given the restrictions here, but Government 12:39
6 agencies are not. The existence of Government agencies
7 and in a broad level what they do is not a hidden fact,
8 it's a matter of public record basically.

9 CHAIRMAN: It's explained, for example, in the
10 statutory provisions of the interception of the IPA. 12:39

11 MR. SOUTHEY: Absolutely, and there are websites issued
12 by public bodies which talk about, in broad terms, what
13 they do. That means that if you reference those sorts
14 of statements, if I were to ask a question based on
15 those sorts of statements, the act of asking a question 12:40
16 doesn't increase public knowledge, public suspicion,
17 public awareness of what is going on because it's
18 already there. The difference is, and the real concern
19 - and we submit that's the underlying concern in this
20 legislation and that's why where, for example, DP is of 12:40
21 value because it identifies that as being a matter of
22 underlying concern - is if, for example - and I want to
23 emphasise, this is not factually the case in this case,
24 I have nobody up my sleeve - but if I have, for
25 example, a whistleblower who had approached the Fox Law 12:40
26 legal team and said I can tell you this happened on
27 this date on this occasion, absolutely not what has
28 happened, certainly as far as I'm aware. Then what I'm
29 doing if I start making reference to that in any way is

1 I'm adding to public knowledge, I'm adding to public
2 awareness. I'm adding to public concern because it's
3 something that isn't already there. If I simply ask a
4 question saying there was this media report, is it
5 true? That act of asking the question doesn't in any
6 way change public knowledge. It is simply -- I'm not
7 suggesting I've got any reason to believe it's
8 accurate, I am just referring to the fact that
9 something is already in the public domain. And that
10 doesn't change something. And that's what, in my
11 submission, is notable about things like Big Brother
12 Watch, because it's talking about high level --

12:41

12:41

13 CHAIRMAN: The answer to the question that you've just
14 suggested might change the extent to which information
15 is in the public domain?

12:42

16 MR. SOUTHEY: well, it would but it's no different -
17 and this is the third point in terms of the background
18 I was going to make - if one -- and it links into a
19 point that I was also going to address which is one of
20 the concerns that is expressed in writing by HMG is how
21 is it fair to us that if there is open material that is
22 going to be referred to we can't respond to it? I
23 don't know what your level of experience with this is,
24 Sir, but in tribunals like the Special Immigration
25 Appeals Commission where secret evidence is heard, in
26 High Court proceedings where secret evidence is
27 concerned, the role of the open advocate, quite often,
28 is to say, for example, on the open material you don't
29 have evidence of involvement in terrorism, or whatever

12:42

12:42

1 the question is. And the witness will say, I can't
2 answer that in open. And that's obviously frustrating
3 but it serves a purpose because it puts on record a
4 concern that the open participant wants to have
5 explored. It doesn't say, necessarily, that question 12:43
6 will be asked in closed, the Special Advocate who would
7 generally be present in those proceedings might have
8 good reason not to ask the question. But it puts on
9 record a concern. It doesn't add to public knowledge
10 about anything. That then allows for participation by 12:43
11 the applicant in a way that doesn't do any harm, it's
12 no different to NCND in one sense, it doesn't in any
13 way -- the answer saying I can't answer in open is
14 simply, it doesn't imply that there is something
15 necessarily in closed. All it's saying is, because I 12:44
16 don't want to reveal what I know in closed I'm not
17 going to answer that question.

18 CHAIRMAN: But that's to engage the national security
19 sort of issues that might justify closed hearings.
20 We're in a different territory altogether. 12:44

21 MR. SOUTHEY: We are, but the point I'm making is, and
22 this is where again going back DP, we say DP is
23 relevant, this goes back to the point I already made
24 what concern seems to have been in practice. If that
25 mechanism doesn't add to the state of public knowledge, 12:44
26 effectively, it's difficult to see what the objection
27 to that is.

28 CHAIRMAN: But there's no such test in Section 56.

29 MR. SOUTHEY: I'm not sure I accept that. Can I come

1 to the language of Section 56 in a moment. But before
2 I do that can I make just one final point about this.
3 I've already drawn attention to the submission that HMG
4 makes in relation to some matters about the potential
5 unfairness of not being able to address something and 12:45
6 we submit there is no unfairness, it can obviously be
7 addressed in closed. But the really striking thing
8 about the submissions that you've heard so far from the
9 public authorities is that both public authorities
10 appear to accept that at least in relation to some 12:45
11 material that's in the public domain there's no reason
12 why it shouldn't be referenced. They accept the
13 presumption of absurdity could arise in relation to
14 some of the material that's arisen. Now, that's an
15 important starting point because, for example, and I'll 12:45
16 come back to this, reference has been made to the
17 Article 2 case law. Now, I don't want to rehash
18 arguments that have been advanced in relation to that,
19 but those arguments were put in the context of a
20 situation where it was an underlying assumption, it may 12:46
21 not expressly have been said, but there was an
22 underlying assumption that there was good reason for
23 material to be held in closed. That's a critical
24 distinction here. None of the submissions here say
25 that there is good reason why material that's already 12:46
26 in the public domain, widely circulated can't be
27 referenced. And there is no obvious reason why it
28 can't be referenced if what you're doing by referencing
29 it is not adding, in one sense, to the state of public

1 knowledge.

2 CHAIRMAN: I think you're a bit too broad there are you
3 not, Mr. Southey, because the submissions that we've
4 heard already acknowledge that some material that's in
5 the public might be capable of being referenced, 12:46
6 namely, material that's been publicly avowed by the
7 Government. Nobody has suggested that just because,
8 for example, a newspaper article contains a description
9 of intercept activity, that that should be capable of
10 being heard. 12:47

11 MR. SOUTHEY: I'm not sure people completely addressed
12 that, I think there's some submissions -- the only
13 answer that's been put in relation to that is the point
14 I've already addressed about unfairness. How is it
15 fair to the State for it to be unable to respond to 12:47
16 that in open? Obviously, that issue would arise in
17 relation to -- if you think about a media -- there's a
18 media report that alleges someone's is an informer --
19 if there's a media report that alleges someone is an
20 informer, NCND means that the State can only respond to 12:47
21 that in closed. That's not unfair on the face of it.

22
23 But our point is, the implicit underlying justification
24 must be for being able to refer to material that the
25 State has avowed to, is that by referring to it you 12:48
26 don't add anything to the state of public awareness
27 about intercept material, all you're doing is
28 referencing something that is already widely available
29 and an informed individual who's interested in the

1 subject will potentially be aware of. If all you do
2 when you reference a media article is say, for example,
3 this media article is a matter that we would like
4 investigated, we would want questions asked about it,
5 we want the Inquiry to consider the truth of that 12:49
6 article, you're not adding to people's sort of
7 understanding of whether intercept evidence has taken
8 place. By doing that, you're not in any way changing
9 the knowledge people have of the extent of intercept
10 evidence, what you're doing is simply participating by 12:49
11 drawing attention to a matter of concern to you. The
12 awareness of intercept material has arisen because of a
13 prior act which is the publication of the article and
14 the concerned individual who's interested in it will
15 form their own views on the credibility of that 12:50
16 article, the reliability of the newspaper reporter or
17 journalist, or TV journalist who produced that report.
18 Asking the Inquiry to investigate whether it's accurate
19 doesn't in any way add to the credibility of that
20 material. 12:50

21 CHAIRMAN: What do you mean when you suggest the
22 concept of asking the Inquiry to investigate whether
23 this is accurate? Do you mean exploring it with a
24 witness in open hearing?

25 MR. SOUTHEY: We would submit -- well, there are two 12:50
26 potential ways of doing this and we would say -- we
27 would advocate the first of what I'm going to describe
28 but I accept there's a possible alternative way which
29 may or may not have advantages. The first way would be

1 to, potentially, explore it in the way that you would
2 normally do with a witness who's giving evidence about
3 national security, because it puts the question on
4 record. What I envisage is, I would ask a witness
5 from, say, the Security Services, have you read this 12:51
6 newspaper article, is this newspaper article accurate?
7 And I would anticipate the response, that can't be
8 answered in open. It could possibly be dealt with by
9 you, Sir, as the Chair saying that can't be answered in
10 open. That would simply be a reflection of Section 56, 12:51
11 it wouldn't say anything more about the credibility of
12 that article. But it would put on record the fact that
13 the families, and this is important to them, wanted the
14 correctness of that to be considered. It doesn't add
15 in any way. 12:52

16
17 The alternative way, obviously, would be for, I
18 suppose, would be for us, depending on what a ruling
19 said, to be given an opportunity to put in writing
20 areas of concern that we would wish to have raised 12:52
21 based on open material. I mean the effect of this, I
22 think, would have to be that of a ruling, if it was as
23 broad as some of my learned Friends suggest it should
24 be, would have to be that probably there would have to
25 be a list of INQs which were regarded as sensitive in 12:52
26 some way and couldn't be referenced and we would then
27 have to, potentially -- one way of dealing with it
28 would be for us to be invited to identify matters of
29 concern that we want to be raised in relation to those.

1 But it is important, and again I'm going to come back
2 to this, I mean it is an important part of
3 participation, we would submit, that we are able to
4 raise issues of concern. Your ruling in relation to
5 Special Advocates recognise we need to be able to 12:53
6 communicate with Counsel to the Inquiry and if there's
7 open material that we are unable to raise concerns
8 about, that is a significant restriction and it's a
9 restriction, in our submission, without justification.
10 Nobody has put forward a justification, if that 12:53
11 material is open and if all we are doing is simply
12 saying this is material that's already available, what
13 are the answers to it.

14
15 Now, that's the context in which one should look at 12:53
16 Section 56.

17 CHAIRMAN: But you accept that the answers could be
18 explored in closed?

19 MR. SOUTHEY: I've got no -- I'm not seeking to argue
20 that there aren't things that have to be dealt with 12:54
21 through a Schedule 3 hearing. Obviously, there's a
22 certain amount of argument in the judicial review and
23 any appeal in relation to it about the scope of
24 Schedule 3 but I have no doubt that there are some
25 materials that will have to be considered through a 12:54
26 Schedule 3 hearing. No question about that. My
27 concerns, and I want to be really clear about it, my
28 concerns are -- and I recognise, for example, as I say,
29 that if a whistleblower were to come forward to Fox Law

1 from one of the State agencies tomorrow and say you
2 don't know this but this is what... that would cause a
3 real problem. We wouldn't be able to deal with that.
4 We would have to think of a way of directing them to
5 the Inquiry. We couldn't put arguments forward in 12:54
6 relation to that. Where our concern is is that there
7 is already clearly both official reports and media
8 reports that on the broad interpretation of Section 56
9 are potentially caught. And on the broad
10 interpretation of Section 56 that is being advocated 12:55
11 for by some parties, we are simply going to have to
12 hold our hands up in relation to that material and not
13 make reference to it. And that's where our concern is.
14 CHAIRMAN: We touched yesterday on issues that might
15 arise out of your knowledge of the McVicker Report. 12:55
16 MR. SOUTHEY: Yes.
17 CHAIRMAN: Does the McVicker Report touch on
18 intercept? MR. GREANEY: Sir, we wonder whether
19 that's a question that Mr. Southey ought not to
20 answer, at least without a period of reflection. 12:56
21 MR. SOUTHEY: [REDACTED]
22 [REDACTED]
23 [REDACTED] [REDACTED]
24 [REDACTED]
25 [REDACTED] [REDACTED] 12:56
26 [REDACTED]
27 CHAIRMAN: All right.
28 MR. SOUTHEY: Can I turn then to the language of
29 Section 56.

1 CHAIRMAN: well, perhaps that would be a convenient
2 point to break off.

3 MR. SOUTHEY: Certainly, Sir.

4
5 THE HEARING ADJOURNED FOR LUNCH AND RESUMED AS
6 FOLLOWS:.

12:58

7
8 CHAIRMAN: Mr. Southey.

9 MR. SOUTHEY: Sir, two things that arose from this
10 morning's submissions that before I go on to what I was 14:01
11 going to say about the interpretation of Section 56.
12 One is, in one sense it demonstrates the difficulty of
13 it, I had the slightly disconcerting experience of
14 leaving the room here, going downstairs and seeing
15 myself on the TV because of the time delay, I realised 14:01
16 as I was watching my own submissions that in response
17 to a question from you, Sir, I conceded, effectively,
18 that there will need to be Schedule 3 hearings. Now,
19 what I then thought about was that on a strict
20 interpretation of Section, 56 that is problematic in 14:01
21 one sense, and it, again, demonstrates in one sense the
22 absurdity because it demonstrates how difficult it is
23 to actually comply with the law in circumstances where,
24 for example, you have the Terms of Reference. And I've
25 already made the submissions I have made on the Terms 14:02
26 of Reference.

27
28 The second thing was I did over the lunchtime receive
29 direct instructions from one of the Core Participants I

1 represent who made the point - and, again, it
2 demonstrates the absurdity - that what we're talking
3 about here and what we're focused on is documents such
4 as media reports and reports that are in the public
5 domain that Core Participants, their legal 14:02
6 representatives, et cetera, could draw to the attention
7 of the public through a press conference outside the
8 front doors of the building, they could say whatever
9 they want to say about those reports and what their
10 views are of those reports and yet that same thing 14:03
11 can't be said in this room. That's the effect of the
12 submissions and that does demonstrate the lack of
13 justification for what we're talking about.

14
15 Now, as I say, that's the context in which one should 14:03
16 look at Section 56. And our basic point about
17 Section 56, I think it's in the Inquiry bundle at
18 page 2 and it may be worth having it in front of you,
19 is that where you look at there are, we submit, two
20 possible interpretations and they arise, essentially -- 14:03
21 they are both consistent, we would submit, with the
22 language. And they arise on the basis of what we've
23 said based on case law we accept in different contexts
24 about the meaning of "disclosed" and "tends to
25 suggest." And they rise in this way; what we submit is 14:04
26 that this provision could either be concerned with the
27 situation where what you're seeking do is refer to, for
28 example, evidence that discloses information or which
29 tends to suggest, or the alternative interpretation is

1 that it's the act of adducing that evidence or the act
2 of, yes, the act of adducing evidence that's in issue.
3 In other words -- I'm not explaining myself very well
4 at the moment but what I'm trying to say is this
5 provision could either be concerned with the fact that 14:05
6 there is underlying material that comes within 56(1)(a)
7 or (b), or it could be concerned with your actions, a
8 person's actions before the Tribunal and whether they
9 come within (a) and (b). And that has a different
10 effect because if one's concerned -- if one has, and 14:05
11 I'll try and illustrate what I am trying to say by the
12 example of the media report. If there's a media report
13 that says there was an intercept in a particular set of
14 circumstances, that is evidence, natural language,
15 which either discloses, if it's new information, or it 14:06
16 might be said to tend to suggest that there was
17 interception-related conduct.

18
19 If that is available in the public domain then mere
20 reference to it, we submit, doesn't add to public 14:06
21 knowledge, public awareness, public beliefs about
22 interception conduct. And it doesn't add to it because
23 the public can be taken to know that I don't have any
24 inside knowledge, I'm referencing it simply because it
25 exists and I'm referencing it because we're saying it 14:06
26 needs to be investigated. It doesn't need -- it
27 doesn't add -- and that's why we say that the question
28 about interpretation, there are two possible
29 interpretations here. As I say, my act of adducing, to

1 focus on that phrase for a moment, if it's something
2 already in the public domain doesn't disclose anything
3 because it's already disclosed what's in the public
4 domain, it doesn't tend to suggest because I'm asking
5 questions in circumstances where I don't have any 14:07
6 inside knowledge. And that's a reasonable thing for
7 the public to be aware of, it can be made clear I don't
8 have any inside knowledge. And that's at the heart of
9 our argument is that there are these two possible
10 interpretations. The one we argue for, we submit, 14:07
11 avoids absurdity, it is consistent with the objectives
12 of Parliament and it ensures that there is maximum
13 openness and family participation.

14
15 The second thing I should say in passing about -- 14:07
16 CHAIRMAN: Mr. Southey, which is the one you argue for?
17 MR. SOUTHEY: We argue that what this is concerned with
18 is whether or not my actions, essentially, for example,
19 in making a submission increase public awareness or
20 increase public suspicions about intercept conduct. 14:08
21 And, as I say, all I'm doing is referring to material
22 in the public domain. In my submission, I'm not doing
23 that because the public will be aware, and should be
24 aware that I haven't got any inside knowledge, I don't
25 know if a media report is accurate. All I'm asking 14:08
26 when I ask about a media report is, essentially, for
27 the Inquiry and for witnesses to address that through
28 the Schedule 3 hearing process.

1 As I say, that, we submit, is a tenable construction of
2 the legislation. The alternative is -- the
3 legislation, we submit, can only mean two things,
4 either it means I can't reference a widely available
5 public newspaper article, we submit that's where you 14:09
6 get absurdity, why shouldn't that be considered when,
7 as I say, I can reference it outside of the front door
8 of the Inquiry proceedings; or it can mean my actions,
9 or it can be concerned with my actions and whether my
10 actions disclose something that wouldn't otherwise be 14:09
11 available. Whether my actions tend to suggest and
12 provide further support, effectively, for concerns that
13 there may have been intercept material. That's why, if
14 I wanted to ask a question about a whistleblower, on my
15 arguments, I'd still be prohibited because I would be 14:09
16 adding something to the public domain, a whistleblower
17 who simply came to Fox Law. But if I'm simply
18 referring to something that is in the public domain
19 already, without putting forward anything that
20 corroborates that, supports what's already in the 14:10
21 public domain, then, in our submission, my actions in
22 adducing that evidence, my actions in asking that
23 question, my actions in making that submission, don't
24 disclose anything. The disclosure has already
25 occurred. They don't tend to suggest anything. The 14:10
26 logical approach for a member of the public who hears
27 my submissions based on that material is for them to
28 decide whether or not they believe the newspaper
29 report, whether they think the newspaper report is

1 credible. whether they think it comes from a credible
2 source.

3
4 we've cited authorities, I accept they're not on point,
5 there are two authorities which support that analysis, 14:11
6 that what one's looking at here is, essentially,
7 because of the use of the language of "disclose" and
8 "tends to suggest," one's looking at material that has
9 a degree of -- or actions, one's concerned with actions
10 that have a degree of credibility in their own right 14:11
11 that add to the state of public knowledge.

12
13 If that interpretation is right, in our submission, it
14 causes no problems for the public authorities because
15 it simply enables people to reference material that is 14:11
16 already in the public domain, but avoids all the
17 problems that have been highlighted. It would fit with
18 everything that's happened in the past.

19
20 And can I give you an example of one of the problems 14:11
21 that would potentially arise? There was a certain
22 amount of -- a short exchange, I think, in the morning
23 about the judicial review. Now, thinking about the
24 judicial review; if you take the strict interpretation
25 of Section 56 that some of the parties have argued for, 14:12
26 the applicant in the judicial review could not have - I
27 don't think I'm stepping over the line if I make this
28 assertion - could not, in one sense, have advanced some
29 of the arguments that led to the success of the

1 judicial review because they depended on an assertion
2 based on public material, they depended on an assertion
3 in relation to intercept conduct. And that's
4 prohibited. Now, the reality is if you accept our
5 interpretation, that's not a problem because the 14:13
6 actions simply refer to material that was already in
7 the public domain and said this needs to be
8 investigated. There isn't then a problem. But if
9 asserting includes, essentially, material referencing
10 something that's already in the public domain it has 14:13
11 the potential of limiting the right of access to the
12 court. It would have made -- it would mean, it's very
13 difficult to see how the judicial review or certainly
14 the arguments in the judicial review could ever have
15 been brought. Because they depended on assertions 14:13
16 about material in the public domain, or they depended,
17 rather, on an argument there is material in the public
18 domain that needs investigating.

19 CHAIRMAN: Can I just think about that for a moment,
20 Mr. Southey? 14:14

21 MR. SOUTHEY: Yes.

22 CHAIRMAN: If a whistleblower comes to you and says
23 here's information which I'm aware of, I'm now going to
24 impart to you but it's not otherwise in the public
25 domain -- 14:14

26 MR. SOUTHEY: Yes.

27 CHAIRMAN: -- what's the position there? Are you
28 allowed to explore that in the Inquiry proceedings or
29 not?

1 MR. SOUTHEY: As I understand it, in those
2 circumstances, because that is not in the public
3 domain, the most I could do would be direct the
4 whistleblower to the Inquiry and say to the
5 whistleblower you need to contact the Inquiry, I am not 14:14
6 allowed to develop. Now what I could do, of course --
7 CHAIRMAN: well, no, just pause for a second.
8 Presumably, could you have a discussion with that
9 person.
10 MR. SOUTHEY: Yes. 14:15
11 CHAIRMAN: And you could learn what the information was
12 that he wanted to impart to you.
13 MR. SOUTHEY: Yes.
14 CHAIRMAN: But is your argument that you couldn't then
15 have him called as a witness and ask him about it? 14:15
16 MR. SOUTHEY: Yes, that's where I would have a problem.
17 I wouldn't also be able to say to a witness, I have a
18 witness who says X happened, is that true, for example.
19 I wouldn't be able to do that because that, again,
20 would be adding to the state of public knowledge. 14:15
21 CHAIRMAN: And what if about a whistleblower instead of
22 going to you goes to a journalist and the journalist
23 writes up an article about what the whistleblower has
24 told them, is that now in the public domain?
25 MR. SOUTHEY: Yes, and there's an important caveat that 14:15
26 I need to put to that, what I could potentially do in
27 those circumstances, in my submission, is reference the
28 media report. So I would be able to say there's a
29 media report, we want that investigated. Because it's

1 in the public domain it's -- I wouldn't be saying
2 anything about the credibility. Where I would get
3 into --

4 CHAIRMAN: You could say that to Counsel to the
5 Inquiry, for example, but are you suggesting that you 14:16
6 could ask the newspaper journalist about the content of
7 the article, about the information that he was given by
8 the whistleblower?

9 MR. SOUTHEY: No, what I'm trying to do there is expand
10 beyond what's already in the public domain. What I 14:16
11 couldn't also do to, just to give another example of
12 the limitations, and I accept this, is I couldn't
13 say -- I couldn't make a submission, for example,
14 saying I've spoken -- the other potentially ethical
15 problems about doing this, but I couldn't make a 14:16
16 submission saying I've spoken to this witness, they are
17 available to give evidence, they would support what's
18 in this article, for example. You couldn't do that
19 because you are adding -- what you're seeking to do is
20 adding to the cogency of what's already in the public 14:17
21 domain.

22 CHAIRMAN: So the way round that would be for you to
23 direct the whistleblower, or for the journalist to
24 direct the whistleblower to Counsel to the Inquiry.

25 MR. SOUTHEY: Yes. 14:17

26 CHAIRMAN: If it then transpired that the
27 whistleblower's information, if led in public, would
28 fall within the scope of section 56(1) and the
29 whistleblower's evidence could be taken in restricted

1 hearing proceedings?

2 MR. SOUTHEY: Yes. But my point is that there is --
3 and, ultimately, this is a case for you, Sir, there is
4 an obvious distinction in one sense between handling
5 material that's already in the public domain in a way 14:18
6 that doesn't in any way suggest and provide any sort of
7 support for that material, it just handles it -- it's
8 saying, effectively, this is something to be
9 investigated. That's not a problem. I mean, that's
10 what the Terms of Reference in one sense do. And going 14:18
11 beyond that, and putting forward something that adds to
12 the cogency of that material, positively advancing some
13 sort of material that adds to the cogency of that. And
14 that's the distinction we say. And we say that's
15 entirely consistent with section 56 which talks about 14:18
16 questions being asked adducing, in other words it's the
17 actions of a party which are in issue and which you
18 mustn't disclose.

19 CHAIRMAN: But you do accept that the journalist who
20 gets information from the whistleblower and writes it 14:19
21 up cannot give evidence about what the whistleblower
22 told him?

23 MR. SOUTHEY: Well, sorry, if a whistleblower goes to a
24 journalist about intercept material, in principle I
25 would have thought, it would seem to me that there 14:19
26 would be all sorts of -- the State would, potentially,
27 be able to rely on confidentiality, the law in relation
28 to confidentiality, potentially provisions of 2016 Act
29 to prevent publication, et cetera, that would be

1 independent of the Inquiry and that would have nothing,
2 in one sense, to do with the Inquiry. But let's assume
3 that in some way the journalist was able to get round
4 that, in those circumstances, in my submission, once
5 you got to that point that's when something would be in 14:20
6 the public domain but all you could reference in those
7 circumstances was whatever was in the public --
8 whatever the newspaper report said.

9 CHAIRMAN: But I'm not sure what you mean by that. I
10 can easily understand that you can say to Counsel to 14:20
11 the Inquiry, not in the course of the hearing but in
12 the course of communication, there is a topic that I
13 would like explored, and you could say the basis of it.
14 That's not the same as then having the journalist in
15 open evidence explaining what he was told by the 14:20
16 whistleblower.

17 MR. SOUTHEY: Sorry, if I suggested -- I'm not
18 suggesting that the journalist should be able to
19 explain in open evidence, where I'm drawing the line
20 is, and sorry if I was unclear about that I apologise 14:21
21 for that, all I'm suggesting is as far as I am able to
22 go, I accept, but I do submit I must be able to go this
23 far, I can reference the newspaper article -- because
24 I'm not adding to the cogency of that article, I can
25 ask the counsel to the Inquiry to investigate it. I 14:21
26 can reference it, potentially, in my submissions at
27 closing saying this needs to be investigated, I'm not
28 adding, in those circumstances, to the cogency of that.
29 where the problem would be -- I accept --

1 CHAIRMAN: But reference it by identifying its
2 existence or by reading it out?

3 MR. SOUTHEY: Either. I can't see the distinction
4 between either of those things because I'm not saying I
5 have any -- if I'm just simply reading it out, I'm
6 saying this is what exists and that's already in the
7 public domain. If I read that article out, I'm not add
8 to go what's already known. I can read that -- as I
9 already submitted, I can read that out outside the door
10 of the court without problems.

14:21

14:22

11 CHAIRMAN: well, the journalist could say outside court
12 what the whistleblower told him.

13 MR. SOUTHEY: well, there's a question mark whether as
14 to matter of law they could say that because of things
15 like confidentiality, et cetera.

14:22

16 CHAIRMAN: If the article has already been written,
17 it's past praying for in that sense in terms of
18 protecting the confidentiality.

19 MR. SOUTHEY: But if all the journalist is saying
20 outside the door of the court is, effectively, this is
21 what's already in my newspaper article, then in
22 principle I would have thought the journalist could say
23 that in the Inquiry in open proceedings, because all
24 they're doing is repeating what's already in the public
25 domain and confirming it's their article.

14:22

14:23

26 CHAIRMAN: It's only got there because of the
27 whistleblower giving him that information. You told me
28 a minute or two ago that I can't have the journalist
29 tell me what the whistleblower told him.

1 MR. SOUTHEY: The distinction I'm trying to draw, which
2 is potentially one of real importance is, when the
3 journalist produces an article, in that article they
4 will be asserting something has been said to them.
5 Someone who is interested in whether intelligence 14:23
6 intercept-related conduct takes place will have that
7 article, they will be able -- that's in the public
8 domain, they will be able to reach their own
9 conclusions about that. If conduct effectively doesn't
10 add to that, we submit, whatever the conduct is in 14:23
11 terms of the Inquiry, it doesn't in one sense change
12 the public's perception about whether intercept
13 activity has taken place. All that's being said is
14 there is this newspaper article. Now, if the
15 journalist comes along and simply says this is my 14:24
16 newspaper article, it's not adding to the cogency of
17 that. The line comes if the journalist is then
18 asked -- what I was trying to address was a situation
19 where the journalist is, for example, asked about the
20 circumstances in which they obtained that article, what 14:24
21 precisely was said to them. Because at that stage the
22 cogency of what they're saying is being investigated
23 and that's where the problem comes.

24 CHAIRMAN: We would just hear this without any
25 understanding of whether it was pub gossip, some sort 14:24
26 official leak or something he dreamt overnight.

27 MR. SOUTHEY: No, it's no different, in one sense, to
28 other closed proceedings, what would then happen,
29 presumably, is there would be a Schedule 3 hearing at

1 which the State would be able to say this guy's a
2 fantasist, he was an agent and what he's saying is the
3 truth, or something in between. The Inquiry would be
4 perfectly able to investigate that through the
5 Schedule 3 procedure but it would have been put on 14:25
6 record, effectively, which is why we want to make
7 reference to it, it would have been put on record by
8 the Core Participants that this newspaper article
9 exists and it's something the Core Participants want to
10 have investigated, effectively. That's the effect. 14:25
11 That's what would happen in open.

12
13 I mean, I'm not actually suggesting the journalist
14 should be called because if all you can refer to is the
15 newspaper article I can't see what the purpose of that 14:26
16 would be. But, in principle, the distinction I'm
17 drawing is between him or her in principle being able
18 to give evidence that they wrote the article, I
19 suppose, because it doesn't add to the state of public
20 knowledge, and going further with them which is where 14:26
21 there would be, effectively, an investigation of the
22 cogency of their allegations. And that's what I accept
23 Section 56 prohibits.

24
25 But otherwise, the alternative scenario, if this 14:26
26 newspaper article comes out, this important newspaper
27 article, the alternative is family CPs, because there
28 doesn't seem to be any alternative interpretation in
29 between, family CPs are simply denied the opportunity

1 to make reference to something that's potentially of
2 central importance to them, which is a very real
3 restriction on their participation. They have no idea
4 whether or not because there won't be any discussion
5 about it.

14:27

6
7 Perhaps, I may be misunderstanding, but one thing that
8 seemed implicit in the questions you were asking me is
9 that there might be a distinction between, say, raising
10 a concern with Counsel to the Inquiry and referencing
11 an open document in the course of the Tribunal
12 proceedings. It's difficult to see how that fits with
13 the language of Section 56(1). Because if it does
14 include material that's already in the public domain,
15 Section 56(1) prevents us doing anything in connection
16 with legal proceedings which tends to suggest. Now we
17 say it doesn't tend to suggest anything if we simply
18 reference something that's already in the public domain
19 because it doesn't add to the sort of general
20 awareness. If literally referencing something in the
21 public domain is an act of tending to suggest, then
22 talking to Counsel to the Inquiry and saying on some
23 sort of basis we have a concern about this newspaper
24 article, that's a problem.

14:27

14:27

14:28

25
26 So, we say the key issue has to be whether the actions
27 of a party, family CP or anyone else essentially mean
28 that there is an increased belief or increased
29 knowledge that intercept activity has taken place.

14:28

1 It's whether the actions you undertake as a CP or
2 anybody else increase those suspicions.

3
4 Before we move off the language of Section 56 can I
5 just make one other point about Section 56(1). The 14:29
6 submissions of HMG, at times, have suggested that what
7 might be key is whether HMG have essentially consented
8 to or confirmed the accuracy of something in the public
9 domain and so, essentially, permitted something to
10 become public. In our submission, that's not what 14:30
11 Section 56(1) -- that can't be an element of the
12 Section 56(1) test and it can't be an element of the
13 Section 56(1) test in part because the provisions of
14 Section 56(1) are objective on their face. They are
15 concerned with whether, as a matter of fact, there will 14:30
16 be disclosure. They're not concerned with what the
17 views the Secretary of State are. I mean, it would be
18 very easy for these provisions to say something about
19 the Secretary of State's consent but they don't. And,
20 as I say, that's why, in our submission, if you like, 14:30
21 the position of the Secretary of State isn't the answer
22 to the potential absurdities that are accepted to
23 exist.

24
25 Can I then turn to our Convention arguments and can I 14:31
26 start with Article 10 which is what we do in the
27 written submissions? Now my learned Friend, Ms. Fee, I
28 don't think addressed Article 10. My learned Friend,
29 Mr. Henry, did and sort of just waved it away,

1 effectively, and said if Article 2 can't get you home
2 how can Article 10 work?

3
4 Article 10 and Article 2 are concerned with different
5 things. Article 10, to state the obvious, is about, 14:31
6 among other things, the right to receive information.
7 That's why it's been recognised that if you impose
8 restrictions on reporting of legal proceedings, for
9 example, Article 10 is in play. And if authority is
10 needed for that, it's at page 97 of our bundle, a 14:32
11 judgment of the Supreme Court, Lord Reed, in A v BBC
12 and it's at para 47.

13
14 And why does Article 10 matter? Article 10 matters in
15 this context because it's clearly expressed in terms 14:32
16 where there needs to be justification. Now, if one is
17 talking about situations where public authorities are
18 conceding, for example, that there may be absurdity if
19 certain things are unable to be discussed, you're in a
20 situation where there clearly is no justification for 14:32
21 withholding the material. Yesterday I think it was I
22 made reference to The Sunday Times v The UK judgment
23 and The Sunday Times v The UK judgment is a clear
24 example of, firstly, the European Court of Human Rights
25 saying you need to have justification for interfering 14:33
26 with Article 10 rights and it needs to be a powerful
27 one. But, secondly, indicating justification
28 potentially falls away if something becomes public.
29 It's the Spycatcher case, we've given you the

1 references in our submission. That's why Article 10 is
2 so powerful here because we're in a situation where, on
3 the interpretation of Section 56 that is argued for by
4 public authorities, material that's already in the
5 public domain can't be referenced in these proceedings. 14:33
6 And the effect of that is it prevents the public
7 being aware that, for example, family Core Participants
8 are specifically trying to raise concerns about a
9 particular document or a particular report. And that,
10 in our submission, is very difficult to fit with 14:34
11 Article 10.

12
13 Now, we do also rely on Article 2. Now, what I should
14 make clear about Article 2 and it's important in
15 relation to this. Obviously I accept that closed 14:34
16 proceedings - and I don't think it's ever been my case
17 really that this isn't the case - there are
18 circumstances in which closed proceedings can be
19 compatible with Article 2. There's no question about
20 that. I also accept there's some flexibility in terms 14:35
21 of the procedure that can be adopted. The critical
22 point again here, is what all of the cases that have
23 previously been concerned with, as far as we can see,
24 and we're not aware of any case that's contrary to
25 this, are cases where there's been some justification 14:35
26 put forward, or some powerful justification put forward
27 for restricting public and party and next of kin
28 involvement.

1 Now, we're in a situation, again, where one is
2 potentially talking about, at least in some cases of
3 there being no justification or no sufficient
4 justification. And in those circumstances we do submit
5 there is a real issue under Article 2 and the issue 14:35
6 arises because if you look at, for example, Jordan and
7 the text is the same in lots of cases and it's page 164
8 of our authorities bundle. In Jordan, and there are
9 plenty of other cases obviously that make the same
10 point, the European Court makes the well-known points 14:36
11 about the need for public scrutiny and the need for the
12 next of kin to be involved. well-known points and
13 trite law probably. But it's important, the reason I
14 just draw attention to the authority is that that
15 citation starts, and as far as I'm aware it starts in 14:36
16 all other cases in the same way with the words "for
17 the same reasons," now what do they refer to? They
18 refer to the need for public confidence in adherence to
19 the rule of law and the need to avoid tolerance of
20 unlawful acts. 14:37

21
22 If the State is able to put to a judicial authority a
23 good reason, potentially a reason that's consistent
24 with Article 2, why there needs to be closed
25 proceedings, one can see that in terms of meeting those 14:37
26 sorts of concerns about public confidence, the public
27 will have understood that a judge has decided that
28 there is a good reason why this part of the proceedings
29 need to be in closed, the judge will have been -- that

1 will give a degree of public confidence, or that will
2 establish a degree of public confidence in relation to
3 what has happened. If we're in a situation where
4 material that is widely available can't be referenced
5 by family members in circumstances where, we would 14:37
6 submit, no good reason has been put forward by the
7 State, that undermines public confidence because it
8 raises a question of why isn't the State at least
9 willing to recognise that the family members should be
10 able to advance arguments about that sort of material. 14:38
11 It has a very different effect. If there is no
12 justification for what is happening, the consequences,
13 we submit, on public confidence are different. And so
14 that's why we argue that there's an Article 2 point
15 here. I just want to repeat given what's been said, 14:38
16 it's not that in some way the need for Schedule 3
17 hearing, for example, is a breach of Article 2, what
18 we're talking about here or the focus here is on the
19 circumstances -- what our focus is on is on reference
20 to material that is already in the public domain. And 14:38
21 that, in our submission, lacks justification.

22
23 Now, when looking at those materials, both my learned
24 Friends sought to discount DP. Now I accept obviously
25 it was in a different context. But, DP in our 14:39
26 submission, can't be just completely sidelined. The
27 reason why we say it can't be sidelined is the
28 consideration by the Employment Appeal Tribunal of the
29 Human Rights Act interpretive obligation. Now,

1 obviously, to get to that interpretation we need to
2 establish a breach and that's why I've made the
3 submissions I've made about Articles 2 and 10.

4
5 DP, I should say, is at page 199 of the bundle.

14:40

6
7 But if you go to para 53 of that judgment --

8 CHAIRMAN: Is this in your list of authorities?

9 MR. SOUTHEY: Yes. I think it may be in more than one
10 place, but the page reference I've got is to ours. I
11 think that's right. Because of the way these have been
12 produced, I've slightly -- let me bring that up on my
13 screen, I think that's right. Yes, it is. I'm taking
14 you to the passage where it starts, and you'll see at
15 the bottom of that page, 199, there is consideration of
16 the interpretative obligation.

14:40

14:41

17
18 what's critical, in our submission, about this is that,
19 firstly, the tribunal, when considering that,
20 recognises, essentially, that effectively, even if it
21 interprets it in the way it needed to interpret it to
22 ensure compliance with the Human Rights Act, it was
23 possible do that without sensitive material getting
24 into the public domain. In other words, the focus was
25 on whether harmful material would get into the public
26 domain. You see that, it's in para 53 and it's sort of
27 about half way down the page. But, more importantly,
28 over the page at para 55, you'll see what is said about
29 the purpose of the Investigatory Powers Act. And what

14:41

14:41

1 is said by the judge about the purpose of the
2 Investigatory Powers Act is to prevent sensitive
3 material/information getting into the public domain.
4 The intent was said to be to ensure a proportionate
5 protection of national security.

14:42

6
7 Now, that's important in terms of whether or not we're
8 right about the application of the Convention, because
9 it fits back with what we've said about the two
10 interpretations. If you interpret Section 56 as simple 14:42
11 preventing a conduct, effectively, which increases
12 knowledge, belief, et cetera, in their having been
13 intercept material, that doesn't go against the
14 objectives identified in para 55. If you say it
15 prevents any reference to material that's in the public 14:43
16 domain, which is effectively what others are arguing
17 for, that goes beyond these objectives. It produces a
18 disproportionate impact.

19
20 Can I say also --

14:43

21 CHAIRMAN: You may know a bit more about this case than
22 I do, Mr. Southey.

23 MR. SOUTHEY: I'm not sure about that, but anyway.

24 CHAIRMAN: The first question that came to my mind was,
25 why Section 56 is engaged in the context of this case. 14:43
26 It doesn't actually explain what the claim before the
27 Tribunal was. So, for example, it's some sort of
28 employment-related issue but it doesn't tell us what.

29 MR. SOUTHEY: Sorry, I've just lost it in my electronic

1 copy. I think the problem appears to have been that,
2 I'm just looking for the reference if I can find it, I
3 may not be able to. I think the issue may have been
4 that the nature of the employment would have been I
5 think difficult to investigate, essentially, without -- 14:44

6 CHAIRMAN: well, that's what it says but that's what I
7 mean. I don't understand that really without knowing
8 what the complaint was. So usually one would have an
9 understanding of why the employer had taken action
10 against the claimant and the claimant's reaction to 14:45
11 that. Now, it's obviously not going to be the case,
12 but, for example, if the employee was dismissed or
13 disciplined because of poor timekeeping, well that can
14 be addressed very straightforwardly without engaging
15 Section 56. 14:45

16 MR. SOUTHEY: Yes. I mean the assumption was -- part
17 of the problem is, it's the sort of difficulty we're
18 having here, because of, if you like, the potential
19 impact of a wide interpretation, it appears as though
20 it was recognised the argument needed to take place on 14:45
21 the basis of an assumption that it would be difficult
22 for the person who is advancing the claim to advance
23 their claim in circumstances where they were
24 potentially revealing that they handled intercept
25 material. 14:46

26 CHAIRMAN: well, I guess that must be so.

27 MR. SOUTHEY: That's what paragraph 5 seems to
28 indicate.

29 CHAIRMAN: But it makes it a bit difficult to

1 understand the practical application of the case. But
2 in the same vein it made me wonder why the opportunity
3 to have closed proceedings with the benefit of a
4 Special Advocate, which is available in terms of the
5 employment legislation --

14:46

6 MR. SOUTHEY: Yes.

7 CHAIRMAN: -- wasn't the answer and it's not addressed
8 at all.

9 MR. SOUTHEY: The problem, I think --

10 CHAIRMAN: In that situation, the claimant would be
11 able to tell the Special Advocate what the
12 circumstances of his job were, the circumstances in
13 which he came to be disciplined, and why he thought
14 that was wrong and the Special Advocate could deal with
15 all of that in closed hearings.

14:46

16 MR. SOUTHEY: well, except the problem may well have
17 been how is the individual going to assert, for
18 example, in open, which they would potentially need to
19 do because the Special Advocate has to build on their
20 case, how are they going to assert, remember assertions
21 are caught by Section 56, part of their case if
22 Section 56 has a broad meaning?

14:46

23 CHAIRMAN: well, that's what I'm wondering; why would
24 they need to assert it in open at all? why would the
25 whole thing not be capable of being dealt with by the
26 Special Advocate in closed? And we get no hint of that
27 at all.

14:47

28 MR. SOUTHEY: As I say, part of the problem may be --
29 well, if you read Section 56 literally there is a

1 problem with, potentially, giving instructions to the
2 Special Advocate.

3 CHAIRMAN: I don't accept that.

4 MR. SOUTHEY: To bring proceedings in the first place,
5 it goes back to the point I was making about the
6 judicial review, to bring proceedings in the first
7 place you potentially need to make assertions. That's
8 where the problem appears to potentially arise.

14:47

9 CHAIRMAN: If one took that literal approach this case
10 wouldn't be before us because it would never have got
11 off the ground.

14:48

12 MR. SOUTHEY: That's why in fact the Employment Appeal
13 Tribunal concluded that section 56 didn't violate the
14 Convention because it could be read in a way that was
15 compatible. But the key point I make about it, in any
16 event, is whatever the reason, whether it was properly
17 brought or whatever, one has a judicial statement which
18 identifies what the objectives of the 2016 Act are and
19 section 56, in particular, and it supports the
20 argument, effectively, that the concern is about
21 adding, effectively, to what is already known by the
22 public or believed by the public.

14:48

14:48

23
24 In that context, Sir, can I also just address, unless
25 there's something you want me to come back on in DP.
26 Can I also address Schofield, because Schofield, in our
27 submission, doesn't really address this issue. The
28 assumption in Schofield, and it's quite clear, is that
29 there was - and nobody seems to have challenged this -

14:49

1 that there was material that could not have been
2 disclosed in that case within the scope of Section 56.
3 And that's why what was being sought was a declaration
4 of incompatibility. There wasn't any argument about
5 how Section 56 operated, what was caught by Section 56 14:49
6 or not. And to that extent, in our submission, it
7 doesn't assist. It's simply an argument about whether
8 there was an incompatibility in circumstances where
9 there are the difficulties bringing a prosecution that
10 you're aware of. 14:50

11
12 what I would say about Schofield is that, what the
13 concern expressed -- the main justification put forward
14 for the restrictions was, and one sees it at para 37,
15 was the risk of disclosure of techniques. Now, that 14:50
16 sort of concern -- none of the concerns that are
17 expressed in Schofield as a justification for
18 Section 56, none of them, in our submission, prevent a
19 party referencing material that's in the public domain
20 in an, attempt, essentially to say this is something 14:50
21 that needs to be considered without adding, if you
22 like, to the knowledge of the public. It suggests that
23 what was an issue, what was a concern was, essentially,
24 increasing public knowledge or public beliefs about the
25 way interception we operate. 14:50

26
27 The points I've made about the Convention, in our
28 submission, also are supported by the principle of
29 legality. The principle of legality, as is well known,

1 means that Parliament needs to be clear if it is
2 restricting fundamental rights. I can take you to it
3 if need be but I'm very certain, Sir, that you're well
4 aware of ex parte Simms and what Lord Hoffman said in
5 that. Open justice is, obviously, a fundamental right 14:51
6 as well. And what that means, in our submission, it's
7 sort of, in one sense, a step along the way to the
8 arguments about absurdity. What it indicates, in our
9 submission, is if, effectively, this is a provision
10 which is going to prevent consideration in open of 14:52
11 material that is already open, it's difficult to see --
12 you would need very express language and in our
13 submission, given the two interpretations we say are
14 possible, that language isn't present.

15
16 Now, the final thing I should just comment on is the 14:52
17 presumption against absurdity. You've already been
18 taken to it, it's well known, I'm not sure I need to
19 take you back to Bennion, what I would say about it is
20 this: HMG, in particular, and to some extent PSNI, 14:52
21 recognise that may be in play. They make submissions
22 which, in essence, seem to suggest that, effectively,
23 the presumption - and this is my language obviously not
24 theirs - can almost act as a sort of a
25 get-out-of-jail-free-card in circumstances where the 14:53
26 consequences of a particular interpretation are, well
27 are absurd.

28
29 In our submission, it's important to recognise that the

1 presumption against absurdity is a principle that's
2 applied when interpreting legislation. It's still
3 about interpretation, it's not about sort of allowing
4 the Court to disapply the legislation. And so for it
5 to apply, or for it to be applied you have to find a 14:53
6 route by which it can be applied. You can't just say I
7 don't like the result in this case so this case can't
8 be treated in that way. Language still matters. The
9 presumption can be displaced if the language is clear
10 enough. And so, the question comes back how do you -- 14:54
11 if there is absurdity, and there seems to be an
12 acceptance there is, how is Section 56 to be
13 interpreted in a way that avoids that absurdity?

14
15 The only way we can see that it can be interpreted is 14:54
16 if it's interpreted in the way we submit it should be,
17 which is that there can be no objection to simply
18 referencing material that is already in the public
19 domain. The objection is if in some way you act in a
20 way that increases knowledge of intercept-related 14:54
21 conduct or increases belief that such conduct has taken
22 place.

23
24 Can I deal, then, and probably my answers to it, I
25 think that deals, albeit not in exactly the way in 14:55
26 which they were asked, with the questions that were
27 asked initially by the Inquiry. Our submission is
28 there is a distinction between publicly-available
29 material and other material and if material is publicly

1 available then there can be no objection to reference
2 to it, providing you don't handle it in a way or do
3 something that effectively seeks to bolster the cogency
4 of any material that's already in the public domain.

14:56

6 Can I then turn to the two questions that were raised
7 yesterday? The first question was concerned with
8 information about listing a Schedule 3 hearing. In the
9 circumstances of this case, particularly given the
10 Terms of Reference, it would be our submission that
11 indicating that Schedule 3 hearings are going to take
12 place adds nothing to the state of knowledge of anyone.
13 For a long time that has been, effectively, the
14 assumption, working assumption I think of everyone
15 given the Terms of Reference that Schedule 3 hearings
16 will be required. And so it's difficult to see how
17 they increase awareness.

14:56

14:57

18
19 Now, that links in with something that was, I think,
20 submitted both by HMG and PSNI and it's consistent with
21 their submissions. Their submission was, essentially,
22 there could be -- I think both of them made these
23 submissions, but certainly HMG made this submission
24 that on the facts of this case any listing information
25 or revealing that a Schedule 3 hearing is going to take
26 place wasn't objectionable but it might be in other
27 circumstances. We would accept it might be in other
28 circumstances. I mean, if you were suddenly in
29 relation to a public inquiry where the Terms of

14:57

14:57

1 Reference were different to say well, we're going to
2 hold a schedule 3 hearing, that may indicate that
3 there's an issue about intercept material when nobody
4 is aware of one. But clearly, in this case, it is
5 absurd to suggest that there aren't issues that arise
6 in relation to intercept material.

14:58

7
8 So we submit that there can be no objection to
9 information about listing being provided.

14:58

10
11 Then in terms of whether questions can be submitted.
12 In our submission, in principle, providing the
13 questions are based on material in the public domain,
14 they can be submitted. Now, in one sense the
15 submissions of HMG were, in one sense, quite revealing
16 about this, because HMG's submission was that questions
17 could be asked providing they are asked on a
18 hypothetical or speculative basis. Now, that raises a
19 question of what does that mean? If it simply means we
20 can say was there any intercept material when we don't
21 have any basis for it, it's difficult to see how that's
22 of any real effect. It is genuinely speculative but
23 where does that take, that's not advancing the case in
24 any way it's just guessing. If what they meant by that
25 was that we can say we've read this report, we don't
26 know whether it's accurate or not but we would ask for
27 this to be investigated and consideration to be given
28 to whether it's accurate. That, in our submission, is
29 only permissible if our interpretation is correct. And

14:58

14:59

14:59

1 our interpretation, to repeat myself, is that by doing
2 that we are not adding to any knowledge, we're just
3 identifying something that's in the public domain and
4 making it clear we want it investigated.

5 15:00
6 But that's the realistic situation in which questions
7 are going to be asked. They're the real questions that
8 families want to ask. And they are speculative in one
9 sense because we don't know whether a newspaper report
10 is accurate. We don't know, that's what we're asking 15:00
11 the Inquiry to investigate. But if in fact that sort
12 of question can't be asked, it poses a very significant
13 interference with the rights of families to
14 participate. Not only does it stop them asking
15 questions, it stops them making submissions. It stops 15:00
16 them saying in submissions you need to consider as part
17 of preventability X and Y. And that's a very real
18 restriction on their ability to participate without
19 good reason because it really is impossible to see if
20 all they're doing is referencing something like a 15:00
21 newspaper report that's in the public domain and all
22 they're doing is saying this is a matter that we say
23 needs to be investigated, it's really difficult to see
24 what the objection to that is. Simply made, putting on
25 record that they expect something to be investigated 15:01
26 and something that's already known.

27
28 Sir, I think that covers everything I need to cover, I
29 hope that's of assistance.

1 CHAIRMAN: It is, Mr. Southey, thank you very much.
2 MR. SOUTHEY: Sir, can I just mention, I've indicated
3 to Counsel to the Inquiry I need to leave by 3:40
4 because of travel arrangements and a commitment I've
5 had for 12 months. I apologise for that. 15:01
6 CHAIRMAN: Did you want to leave just now?
7 MR. SOUTHEY: I will stay as long as I can but I just
8 wanted to make clear there's no disrespect.
9 CHAIRMAN: No, of course not.
10 MR. GREANEY: Sir, I was going to suggest that we take 15:01
11 a break now for the benefit of the shorthand writer,
12 which will give Mr. Southey an opportunity to leave.
13 And after that we can hear in, I would expect a single
14 session, from Mr. Mansfield and then from Mr. Kane.
15 CHAIRMAN: 3:15 did you say? 15:02
16 MR. GREANEY: 3:5 please, yes.
17
18 THE INQUIRY ADJOURNED BRIEFLY AND RESUMED AS FOLLOWS:
19
20 CHAIRMAN: Mr. Greaney. 15:16
21 MR. GREANEY: Sir, as I indicated we'll hear from
22 Mr. Mansfield next.
23 CHAIRMAN: Thank you.
24
25 SUBMISSION BY MR. MANSFIELD: 15:16
26
27 MR. MANSFIELD: Good afternoon.
28 CHAIRMAN: Good afternoon, Mr. Mansfield.
29 MR. MANSFIELD: I will hopefully be brief and practical

1 at this stage rather than academic. And I would like
2 to return to how I started yesterday with a series of
3 prepositions that arise out of what I was saying there
4 and, in particular, some of the submissions that have
5 been made today, particularly on behalf of His 15:16
6 Majesty's Government, which will illustrate what we say
7 in the first proposition is, that unless the
8 legislation is altered, amended, as we put in our
9 submissions on this part of the process, then
10 Section 56 is, effectively, going to emasculate your 15:17
11 ability to hold and conduct a public inquiry into one
12 of the key issues.

13
14 Now, the key issues are spelt out in the Terms of
15 Reference, they've already been referred to just 15:17
16 briefly by Mr. Southey today. The Terms of Reference
17 are on the website. The Terms of Reference make very
18 clear to everybody reading them one of the issues, one
19 of the main issues. And if Section 56 is to be
20 retained and employed in this Inquiry, you may, 15:18
21 respectfully, have to look again at the Terms of
22 Reference and how they're expressed because they too,
23 bear upon Section 56.

24
25 I would ask you in this context therefore, to go back, 15:18
26 if you wouldn't mind, I'm not going to use many
27 documents but this is the submission that we made in
28 the closed materials bundle and I asked you to look at
29 one paragraph yesterday and I would ask you to look at

1 another now. It's page 167 in the closed materials
2 bundle, and it bears upon our submissions in this
3 section.

4
5 If you have 167 in front of you, the paragraph I read 15:19
6 yesterday comes at paragraph 7.1, it and relates, as I
7 read yesterday, to the widely canvassed issue squarely
8 in the public domain. And the word there that I've
9 used is "monitored or tracking of the bomb car and the
10 bombers." Interestingly, these are words that are also 15:19
11 within the context of the Terms of Reference. We say,
12 therefore -- and what I want to do first this
13 afternoon, is to put in practical terms what the
14 problem is and then what the solution. The solution,
15 of course, we put in fairly short form won't take long. 15:19
16 So the problem that we say can only really be rectified
17 by government and legislation, unfortunately.

18
19 We say the Government should have thought in the first
20 place if they want an effective public inquiry, and I 15:20
21 say the emphasis is on "public" and disclosure, to
22 answer the key questions, and we say that's why the
23 legislation is required.

24
25 May I therefore pass to sub-paragraph 7.2, this is now 15:20
26 of some considerable relevance given the submissions
27 made this morning. May I just read this paragraph,
28 it's the only thing I want to read: "Plainly" and this
29 is a reference to monitoring of bomb car and bombers:

1 "Plainly, these are controversial and sensitive
2 matters. They need finally to be discovered or
3 dispelled. The principle, but not exclusive genesis,
4 for part of this contention can be found in the two BBC
5 Panorama programmes (Summary, Chapter 3, Part 7)..." 15:21

6
7 of which we had observations about that yesterday.

8
9 "...and more importantly, the BBC riposte..."

10
11 I want to come back to this in a second. 15:21

12
13 "...which the Rush family have requested is added to
14 the Chapter 3 Summary. These programmes were
15 transmitted in 2000 and 2008 presented by John Ware." 15:21

16
17 I want to come back to that as well.

18
19 "It is the understanding of the Rush family that he has
20 made a lengthy witness statement which is eagerly 15:21
21 awaited by the Core Participants and may have a strong
22 relevance to the prepositions."

23
24 The prepositions of monitoring of cars and bombers.

25
26 "There was cooperation between Mr. Ware and the police 15:21
27 at the time."

28
29 That's contained again in the Summary, Chapter 3

1 Part 7, paragraph 23.

2
3 "And correspondence to that effect can be found in
4 tranche 17."

5
6 Now, I pause. I pause because the interpretations that
7 have been put on the Act to enable some questions and
8 certainly by His Majesty's Government appears to be a
9 focus and concentration on the Gibson Report. And as
10 you found it rather odd, there would be some, what, 15:22
11 given in open and the rest would go into closed? well,
12 we say this is a totally impractical and totally
13 unavoidable situation if 56 is not amended. The reason
14 we say that is, the only way that my learned Friend
15 could get round all of this is to say well, we'll let 15:22
16 the families ask speculative questions. But they're
17 not the questions that need to be asked. And she knows
18 that.

19
20 May I indicate here, we're not dealing with the 15:22
21 possibilities and so on, we're dealing with questions
22 that would be based on material available to the
23 families. And the questions that need to be asked in
24 this field of monitoring are not (inaudible).
25 Section 56 doesn't apply to -- well only applies to 15:23
26 telecommunications intercept, it doesn't apply to all
27 the other forms of intelligence gathering that can be
28 sought and can be conducted at any time. So that the
29 word "monitoring" doesn't tell you which form of

1 monitoring is being asked about. And if in fact the
2 answer to this question in relation to preventability,
3 because that, of course, is the central Term of
4 Reference for this Inquiry. And, therefore, that being
5 a central matter, preventability, you're not going to 15:23
6 ask or want to ask questions, and I make it very clear,
7 these are questions that wouldn't be necessary, of
8 course, not only if, for example, your counsel very
9 thoroughly normally covers nearly everything, it's only
10 if he hasn't covered something that we would want 15:24
11 specific questions asked about the forms of monitoring,
12 because in order to indicate preventability you need to
13 be able to show a chain of reliable, whatever it is,
14 all the way through, and you need to ask whether that
15 is shared. You need to ask how often that had been 15:24
16 done, whether it had been done before. And so as you
17 will see readily, these are very, very pertinent
18 questions.

19
20 Now, the problem with the procedure as a whole if 56 15:24
21 remains, is this; that how is Mr. Greaney going to
22 construct an evidence summary? He's already run into
23 that problem. And, in fact, most of the evidence
24 summary, and I'm not including this in evidence
25 outlines, they're two different things, the evidence 15:25
26 summary which is done for the purpose of these
27 proceedings, runs into trouble on the first page. I'm
28 not going to go through it, but it runs into trouble on
29 the first page. But the summary is very important for

1 informing those who are participating in the Inquiry as
2 to the scope. As I said yesterday, it's an extremely
3 copious and important and very thoroughly research
4 document. But that's only one.

15:25

5
6 Next, Mr. Greaney has to serve upon us an evidence
7 outline to which we can respond. How's he going to
8 that if he can't refer or suggest any witness who might
9 be dealing with the questions I've just very quickly
10 gone through that relate to the issue at stake here, 15:25
11 preventability through one of the strands of
12 investigation on your website? How is this going to
13 happen? It's perfectly clear Mr. Greaney will not be
14 able to say a word, other than a generality which
15 means, as was described in the judicial review, 15:26
16 meaningless, leaving those who represent the families
17 in a position in which we have to draft conjectural
18 questions, no, thank you. Or ephemeral questions, no,
19 thank you. Or guess what's going on, no, thank you.
20 Surely the Government didn't want a situation in which 15:26
21 the families were reduced to a situation of running
22 round in small circles trying to work out what's going
23 on. And then, even if they ask a generalised question,
24 they're not to be told what the answer is, only in a
25 generalised form which won't be an answer to the 15:26
26 questions which they really want to ask concerned with
27 whether the intelligence that may have been gained from
28 a particular method of surveillance, or whatever it is,
29 whether that, combined with other materials, because

1 this isn't the only section of evidence that is dealing
2 with the background to preventability, you'd want to be
3 able to slot that in chronologically and in other ways.

4 CHAIRMAN: I suppose one question, Mr. Mansfield, is
5 whether or not that's a process that's available within 15:27
6 the scope of a public inquiry because often inquiries
7 start off as inquests, as in a way this one did, and
8 become inquiries for the very reason that there is
9 material that cannot be disclosed, cannot be examined
10 in the course of the inquest hearing. So, it might be 15:28
11 national security material or it might be intercept
12 material. And, in those circumstances, one of the
13 benefits that is perhaps thought to attach to a public
14 inquiry is that it can explore those issues. But,
15 everybody knows that it can only do so in the context 15:28
16 of closed hearings.

17 MR. MANSFIELD: well, that's the previous question, if
18 I may say, that relates to the closed material process.
19 We have argued, and obviously it's a matter, entirely a
20 matter for you, we have argued that the balancing 15:28
21 exercise you have to do in that favours disclosure. So
22 this may be one of those inquiries where because the
23 issue at stake is the very matter that everybody wants
24 an answer to, whereas --

25 CHAIRMAN: well, what about if we just restrict that 15:28
26 not to national security issues then but to intercept
27 issues.

28 MR. MANSFIELD: Yes.

29 CHAIRMAN: Surely everybody knows, as you convert an

1 inquest to an inquiry, because the sensitive material
2 constitutes intercept that you're not going to be able
3 to explore it in open hearings.

4 MR. MANSFIELD: Yes. The difference there is, and
5 certainly I was going to cite Sturgess again, having 15:29
6 been involved in that, but in other ones as well, the
7 difference here to the normal one where suddenly or
8 perhaps well in advance you're aware there's going to
9 be national security issues dealing with, well let's
10 say intercept is the obvious question we're dealing 15:29
11 with here, then that might well, and you might well on
12 the Closed Material Restriction Order process, you may
13 still decide should 56 allow you to disclose intercept
14 materials that you would then still have to place a
15 Restriction Order on it if the balancing exercise 15:30
16 you're doing in the restricted process comes down in
17 favour of national security in this category rather
18 than the whole point we've argued yesterday about the
19 need for publicity for the families to know, because
20 the families won't know either. 15:30

21 CHAIRMAN: I'm not sure that's the approach to a
22 Section 56 issue Mr. Mansfield, it doesn't seem to me
23 that there is the public interest or wylie-type
24 balancing type exercise to be involved in Section 56,
25 it's just a prohibition so we don't enter into the 15:30
26 territory of a Restriction Order.

27 MR. MANSFIELD: Yes. That is why we argue or submit
28 that 56, which is, we say - agreeing with your
29 provisional view - it's a blanket ban and it is

1 emasculating the process, including closed material,
2 because you can't do a balancing exercise. But if 56,
3 shall I put it shortly, is removed and you are allowed
4 to disclose then you still have to go through the
5 closed material and the difference is that whereas 15:31
6 normally in a closed material, which doesn't have 56
7 attached to it, it might be disclosed, it might not,
8 possibly the balance is normally in favour of national
9 security where there is an affidavit to that effect and
10 you are, as it were, you've dealt with the Wednesbury 15:31
11 principle as well. So I'm putting the two together. I
12 appreciate that 56 itself gives you no room for
13 manoeuvre whatsoever, neither does it give Mr. Greaney
14 any room for manoeuvre, least of all those who
15 represent the families. 15:32

16
17 Can I just come back to the questioning of witnesses,
18 and I'm concentrating 56, but if 56 goes I'm aware that
19 the closed material balancing exercise is still in the
20 background because where will the material go? In that 15:32
21 one paragraph I read is a very interesting, we say, an
22 interesting document, which, as far as I know, it
23 certainly, we've asked for it to be included in the
24 summary. We were asked if there was anything else, we
25 suggested that. 15:32

26
27 Now, in relation to questions that we would want asked
28 we would want questions asked, not conjectural, ones
29 based on the BBC riposte to the Gibson Report. So if

1 the Gibson Report goes in only the open section, we
2 would want to ask questions based on what the BBC claim
3 in relation to those films. Now, I'm not going to go
4 through, it's available right now on the website if you
5 want to see what the BBC said at the time. This is the 15:33
6 absurdity of the situation we're in. I won't be able
7 to ask questions based on that, but somebody can go and
8 read about it. And they are relevant questions that
9 lead to the truth of what really happened and
10 accountability. Or may do anyway, that's the idea. So 15:33
11 these are very important questions but we won't be able
12 to ask them let alone in relation to Gibson, we would
13 thoroughly object to just the open bits being read and
14 the rest being left to conjecture. That's a prime
15 example of something that we say would provide serious 15:33
16 unfairness and injustice. The same, I won't develop it
17 in detail, if you look down a page to John Ware. He,
18 of course, was the presenter. Now, that statement, it
19 would obviously be redacted. But, once again, there
20 will be issues about what -- this isn't just 15:34
21 conjecture, it's not somebody standing outside the
22 building and coming up to Hugh Southey at the end of
23 the day and broadcasting something, we will have a
24 statement from him and we know what was being said in
25 those two programmes and in conjoined press articles. 15:34
26 Now, these are questions that have to be asked.
27 Mr. Greaney may well ask them in closed sessions but
28 the families and the public need to know what the
29 answer is to this. It may be negative, in which case

1 that shuts that door. It may be positive. One doesn't
2 know, obviously, at this stage what the answers are
3 going to be. But what I want to demonstrate here is
4 that we are faced with an impossible situation if we're
5 going to satisfy the need for a public inquiry into the 15:34
6 Terms of Reference, preventability, one of which, one
7 of which is set out in the first sub-paragraph of this
8 particular paragraph.

9
10 So that's why we say the problem is a massive one. It 15:35
11 isn't one just dealing with have we heard this before,
12 and I can assure you this is not something -- I
13 wouldn't be asking questions to a witness or asking -
14 I'll put it more precisely - because obviously the
15 procedure tends to be handing the questions written in 15:35
16 advance to Mr. Greaney for your consideration. It's a
17 laborious process but, obviously, there'll be a
18 protocol and we'll do it well in advance. But we
19 wouldn't be wanting to know have you heard this before,
20 arising out of materials which we've got already, that 15:35
21 are not redacted, that we should be in a position to
22 ask key questions about whether the intelligence is
23 relevant? How it was obtained? Can it be relied upon?
24 Was it shared? Were there other actions taken. Had it
25 happened before? You immediately see these are very 15:36
26 pertinent matters that if we can't pursue them, we're
27 going to be left and so are you, and I'm saying it's
28 not your fault at all, it's not the Inquiry's fault,
29 the Inquiry have been placed, we say, in an invidious

1 position which you're being asked, as it were to
2 conduct a public inquiry - and I said it yesterday and
3 perhaps I don't want it to sound too glib - but you
4 might end up dealing with a public inquiry on key
5 issues in private.

15:36

6 CHAIRMAN: And that's what the legislation
7 contemplates.

8 MR. MANSFIELD: Well, that's why I say the legislation
9 -- it's convenient, if I may just use that stepping
10 stone, that's why we say that this piece of 15:36
11 legislation, once it's taken into account should be
12 amended. I can go to the section in our submissions
13 but what we're saying is that my understanding, and I
14 will be corrected by anyone who knows more, is that if
15 you want to, in an emergency, amend legislation of this 15:37
16 kind it can't be done by statutory instrument but it
17 can be done by primary legislation. Furthermore, there
18 are fast track pathways in which it can be done. In
19 other words, one of them is that the measure, the
20 amendment can be introduced into both Houses of 15:37
21 Parliament at the same time. And, of course, the
22 present government has a huge majority, so there's a
23 possibility if they agree. Of course, they have to be
24 approached, and we are asking whether you'd be kind
25 enough to approach to ask if they would make this 15:37
26 particular Inquiry, or provide you with an exception to
27 Section 56 and the Schedule, in particular, Schedule 3,
28 paragraphs 22, 23 are the relevant ones, you know what
29 they are. And we say there is, in fact -- I've drafted

1 something but I'm not going to bore everybody by
2 indicating the wording of a draft but it's not
3 difficult to change. It may well be a government
4 doesn't want to change it, even in these circumstances.
5 But it can be changed to allow you, as it were, the 15:38
6 possibility of disclosure in a wider way than is mapped
7 out in paragraph 22. So the extended exception to this
8 Inquiry would come as paragraph 22(1)(c), you'd have to
9 insert something at that stage. And, of course, it's
10 interesting that the next subsection of the Act is 15:39
11 talking about the fulfilling of the Terms of Reference.
12 So it's already there in terms of what is allowed. And
13 what is allowed under the Act is so limited that it's
14 actually, we say, counterproductive to the main object
15 of why we are all here. 15:39

16
17 I hope that is a helpful synopsis of the practicalities
18 that certainly I've experienced in other inquiries.
19 And I think I finished on this yesterday, I give the
20 illustration in the Salisbury Inquest/Inquiry, what the 15:39
21 arrangement at the end of the day was I was allowed to
22 ask questions in public. So as Mr. Southey said, the
23 agenda was set but we didn't get any answers. And I'm
24 afraid, I said yesterday that was very unsatisfactory
25 but there was a security aspect there. 15:40

26 CHAIRMAN: Was that in relation to intercept, though,
27 Mr. Mansfield?

28 MR. MANSFIELD: I'm so sorry?

29 CHAIRMAN: Was that in relation to intercept or other

1 national security issues?
2 MR. MANSFIELD: I don't know, you see.
3 CHAIRMAN: Your questions, I mean.
4 MR. MANSFIELD: I don't know. I can tell you the
5 questions. 15:40
6 CHAIRMAN: What I am wondering about, you're telling me
7 that in the Salisbury case you were allowed to ask
8 certain questions --
9 MR. MANSFIELD: Yes.
10 CHAIRMAN: -- but the answers were only given in 15:40
11 closed?
12 MR. MANSFIELD: Correct.
13 CHAIRMAN: And I'm wondering if the questions were
14 those that could only be answered in closed because of
15 national security issues or whether the questions 15:40
16 sought to illicit information about intercept which
17 would otherwise be prohibited by Section 56.
18 MR. MANSFIELD: Well, the questions were framed in a
19 way that there might indicate there was telephone
20 communication intercept. I didn't phrase them that way 15:40
21 for obvious reasons, because I couldn't. They were
22 questions -- they were why questions. Why X? Why B?
23 why this? Why not that? And lots were to do with
24 security, in a general sense, of the persons concerned.
25 But I didn't know whether what I was asking was the 15:41
26 result of intercept or non-intercept. The Lord Justice
27 kindly said well, do ask the questions, which I set out
28 in writing anyway as well, but it doesn't matter which
29 form, and I asked the questions. And, of course, I

1 couldn't be told that they were answered in closed
2 either. So I didn't know whether they were even asked
3 in closed. All I could do is ask, and I got an
4 assurance that the gist of what I was asking would be
5 asked, but, of course, more than that, I don't know. 15:41
6 I'm afraid I can't answer the question. And that's the
7 difficulty. In that one, it might have been justified
8 for reasons to do with contemporary politics and
9 security. But this case is far removed from the
10 Salisbury one. 15:42

11 CHAIRMAN: As you explain in your written submissions,
12 the genesis for some of your concerns, at least, can be
13 found in the Panorama programme and in The Sunday
14 Telegraph article.

15 MR. MANSFIELD: Yes. 15:42

16 CHAIRMAN: Now, we now find ourselves in a situation
17 where you say that Section 56, if applied literally,
18 would prevent you from exploring the very issues that
19 you're interested in?

20 MR. MANSFIELD: Yes. 15:42

21 CHAIRMAN: Is that not, in a sense, to say to me that
22 you wanted an inquiry into these issues about the one
23 that you've got turns out not to be suitable for
24 purpose?

25 MR. MANSFIELD: well, our submission is that the 15:43
26 inquiry form of investigation is the only one left for
27 the families and everything else has been tried. And
28 that's why government no doubt decided, I don't know
29 the full reasons, but one of the reasons they wanted a

1 public inquiry. So if this doesn't work nothing will.
2 So we're saying this is -- that's why I said yesterday,
3 we're at a watershed moment. The way to ensure that
4 this Inquiry satisfies the exceptional situation here,
5 the exceptional situation being one which is the 15:43
6 central focus within the Terms of Reference as well, is
7 one concerned with intelligence gathering. So, it
8 would be in one sense put in a colloquial form, what is
9 the point of a government appointing an inquiry into
10 intelligence if, at the end of the day, they can't 15:44
11 really deal with it.

12 CHAIRMAN: They can, though, because the Government
13 would say it can be dealt with in closed.

14 MR. MANSFIELD: Yes. And we say that, therefore,
15 denies the public element. That's what we said 15:44
16 yesterday. That's why, when you get to the closed
17 section, the balance should be in favour of disclosure.

18 CHAIRMAN: We're not doing a balance if we're looking
19 at Section 56.

20 MR. MANSFIELD: No, I realise not for 56, but if 56 15:44
21 goes.

22 CHAIRMAN: But it seems to me that what you're telling
23 me is, the concerns which were triggered by the
24 John Ware article and by the Panorama programme are
25 those that you want explored, however, throughout the 15:44
26 entire period of time that has passed since the
27 Panorama programme was broadcast and since The
28 Telegraph article was published, it has been the case
29 that it is not competent to lead evidence in open

1 hearings in a public inquiry about those matters. The
2 only way you can do it is in closed. That's the
3 benefit, in some circumstances, of a public inquiry,
4 that it has the closed aspect.

5 MR. MANSFIELD: Well, that's the dividing line in a 15:45

6 sense because we say that is the traditional
7 conventional approach and I understand it in most
8 circumstances. This is an exceptional circumstance
9 where -- I appreciate the balancing exercise doesn't
10 apply to 56, there isn't any room for anything. But 15:45
11 basically, traditionally, yes, these matters would be
12 dealt with in closed. But, what hasn't been factored
13 into that, 56 prevents the closed, if you like,
14 investigation into these matters from going beyond

15 that, other than in a way that doesn't disclose the 15:46
16 basic point. And that's why in a -- it's possible to
17 do it, we say it's possible to do it in the time
18 available, just amend the legislation and give you the
19 power you've already got of discretion within the
20 closed hearings to deal with this material without the 15:46
21 shadow of Section 56. I don't think I can put it any
22 more clearly.

23 CHAIRMAN: No, that's very clear, thank you,
24 Mr. Mansfield.

25 MR. GREANEY: Yes, thank you, Mr. Mansfield. So, Sir, 15:46
26 finally on this issue we'll hear from Mr. Kane on
27 behalf of the families he represents.

28 CHAIRMAN: Mr. Kane.

29 SUBMISSION BY MR. KANE:

1
2 MR. KANE: Good afternoon, Sir. You already have our
3 written submission and if you'll permit me just to make
4 one or two preliminary comments --

5 CHAIRMAN: Sure.

15:47

6 MR. KANE: -- purely for the sake of the oral record,
7 as it were. And that is to say that the views which we
8 have - and you'll find this at paragraph 22 of our
9 submission - the views that we have expressed on the
10 scope and effect of Section 56 represent our
11 professional objective, legal views of the legislative
12 framework.

15:47

13 CHAIRMAN: That's what I'm interested in, of course.

14 MR. KANE: Of course. And we also have to acknowledge,
15 however, they're not the views which could be said to
16 form pleasant or acceptable reading to the families
17 whom we represent. Nevertheless, you have asked for
18 our objective views and we are providing those to you
19 and I could spend the next 20 minutes, as it were,
20 going through each paragraph but I know you've had the
21 opportunity to read it.

15:47

15:47

22 CHAIRMAN: And I'm sure would you have expressed the
23 same objective and independent views to the families.

24 MR. KANE: Of course. The law has to be explained to
25 our clients. But I think you will see that in essence,
26 obviously, with great reluctance and obviously our Core
27 Participant families find it difficult to get their
28 heads around, but the terms of Section 56 are very,
29 very tight and they're very restrictive. And we have

15:48

1 answered the questions which you have put to us in a
2 way which points to an acceptance that those
3 legislative provisions are very tight and do not permit
4 the type of suggestions which were being floated. I
5 can't be more frank or direct to you in respect of
6 that.

15:49

7 CHAIRMAN: No, I am grateful to you for that, and they
8 have been the way they are, effectively, since 1985.

9 MR. KANE: Yes, with the previous legislation. And we
10 have looked at the various aspects of those and that's,
11 essentially, where we are. And we looked at the two
12 further questions which came to us last night, and
13 again, regrettably, from the point of view of our
14 clients, we cannot answer those in a fashion which,
15 again, would bring any satisfaction or pleasure to our
16 clients, and we have to accept the restriction in
17 Question 1, if it was merely -- the first part of that
18 question, then our answer would be that, does
19 Section 56 prevent you confirming in open that the
20 Inquiry is conducting restrictive proceedings? The
21 answer to that is it doesn't, but once you link it with
22 the paragraph 23 of Schedule 3 then that answer changes
23 and we are being forthright to you in accepting that.

15:49

15:49

15:50

24
25 And we also, then, considered the next question about
26 the definition of "relevant party." And, again, not an
27 answer we would wish to happily give but we are not a
28 relevant party. And we acknowledge what is said in 56
29 that they use catchall phrases, such as how "things are

15:50

1 done" or "in any manner" and that catches a multitude
2 of situations.

3
4 The second part of Question 2, again, we acknowledge
5 that there is a clear red line between restricted
6 proceedings and what can be done in terms of things
7 which may be within restricted proceedings and once
8 it's tied to paragraph 23, that gives a different
9 complexion.

15:51

10
11 So that's where we are at, Mr. Chairman, and you have
12 our submissions on that in greater detail.

15:51

13
14 Now, that brings us to, I suppose, the well meaning
15 efforts by everyone in this room to see whether or not
16 there are ways to deal with it. And we heard from
17 Ms. Fee this morning on behalf of His Majesty's
18 Government, and within the very constrained language
19 which she used, then anything contained within that
20 which is concessionary in nature, then we welcome that.
21 We're unclear whether or not she is only making those
22 concessions in respect of matters pertaining to the
23 Gibson Report. And while we haven't the power to
24 direct that it might be of assistance if she were to
25 set out in a formal response to you, Mr. Chairman,
26 exactly what it is that is being suggested as
27 permissible in light of what she said this morning.

15:51

15:52

15:52

28
29 In terms of Mr. Mansfield's suggestion, well, again, we

1 heartily welcome that as a suggestion and we would wish
2 it well if it takes wings.

3
4 Finally, we put this out on to the floor, as it were,
5 for your consideration, as to whether or not any 15:53
6 immunity can be sought or obtained from the Attorney
7 General in respect of the application of the
8 prohibitions within Section 56. Now that's, in terms
9 of other inquiries and criminal prosecutions you'll see
10 that we've set that out. How exactly -- 15:53

11 CHAIRMAN: I can understand that a witness might be
12 given immunity from prosecution by the Attorney General
13 in speaking to conduct that the witness engaged in in
14 the past, something of that sort, but I'm not so sure
15 that you could invite me to knowingly, as a judge, to 15:54
16 knowingly break the law on the understanding that I
17 wouldn't be prosecuted by the Attorney General?

18 MR. KANE: Well, the question is, first of all, whether
19 or not you, Mr. Chairman, would end up being prosecuted
20 or whether the person who would be asking the question 15:54
21 would end up being prosecuted, or both. We certainly
22 wouldn't wish to see you being led away in handcuffs.
23 But the point I make to be serious, Mr. Chairman, is
24 this, whether or not, given that there are particular
25 issues, and Ms. Fee has made the concession in respect 15:54
26 of Gibson, Mr. Mansfield has highlighted particular
27 areas which he has concerns about and about which we
28 have concerns.

29 CHAIRMAN: Of course.

1 MR. KANE: And which are in the Terms of Reference, and
2 whether or not there is any merit or value in pursuing
3 - and it's not something which we in our position could
4 pursue - but whether or not there is any merit in
5 pursuing with the Attorney General if there is any, to 15:55
6 use a term which I have taken great exception to as you
7 know, a Memorandum of Understanding as to whether or
8 not there's a way through those particular core issues.
9 Because let's put it like this, Mr. Chairman, if, for
10 instance, I were to ask a question which was quite 15:55
11 clearly in breach of Section 56, you, because of your
12 position within Section 56, one would anticipate would
13 intervene and say Mr. Kane, that's not allowed.
14 However, let's just hypothetically - and you say as a
15 judge you cannot break the law - but if you didn't 15:56
16 intervene who's going to very much about it? The only
17 person, as I understand it, who could deal with that
18 would be the Attorney, and, therefore, I'm floating the
19 suggestion as to whether or not it would be worth
20 exploring that as a way forward on limited issues and I 15:56
21 don't have the answers, I don't know how you go about
22 that, I'm not in a position of authority or standing as
23 you are as chairman of this statutory inquiry but as
24 something which we would encourage perhaps, that
25 consideration be given to. 15:56

26
27 Those are the only comments which I wish to make and I
28 trust they might have been of some limited value.

29 CHAIRMAN: Thank you, Mr. Kane.

1 MR. GREANEY: Sir, that then concludes the hearing to
2 address the discrete Section 56 issue.

3
4 As, Sir, everyone will know we will next meet in open
5 here in Belfast on Monday, 21st March (sic) for the 15:57
6 start of Chapter 3 of the Inquiry's oral evidence
7 hearing.

8 CHAIRMAN: Thank you.

9 MR. GREANEY: 21st September, thank you very much Mr.
10 Kane. 15:57

11
12 THE INQUIRY ADJOURNED UNTIL, MONDAY 21ST SEPTEMBER
13 2026.

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