INQUIRY INTO THE DEATH OF DAWN STURGESS

OPEN SECTION: APPLICATION ON BEHALF OF HER MAJESTY'S GOVERNMENT FOR A RESTRICTION ORDER IN RESPECT OF NAMES

1. The following application is made in accordance with the direction of the Chair dated 4 April 2022 that 'HMG is to file any application in principle for a restriction order…in respect of names by 31 May 2022'.

2. HMG applies for a restriction order to continue in force indefinitely to prevent direct or indirect disclosure of the names and designations (if appropriate) of the following categories of HMG staff: (a) all staff below Senior Civil Servant ('SCS') grade and the military equivalent of below one star rank; (b) all SCS not officially publicly linked to the 2018 events; and, (c) all UK Intelligence Community staff ('UKIC staff'), unless publicly avowed such as the Chief of SIS and MI5's Director General, including any cover names used by such staff. These are collectively referred to below as 'the relevant staff' and 'the relevant names'. For the avoidance of any doubt, the term 'staff' refers to former staff as well as those who continue to work for HMG. It also includes external staff such as contractors or experts who may have been brought in at the time to assist and advise.

3. In accordance with the Protocol on Applications for Restriction Orders dated 14 April 2022, this application comprises this OPEN section, a CLOSED section and supporting evidence in the form of a CLOSED Damage Assessment and certificate signed by the Secretary of State for the Home Department.

4. HMG and the Home Secretary recognise that this application is unusual and probably unique. Great thought and care has been put into preparing the application and the underlying Damage Assessment. It has been compiled with advice and input from subject matter experts across HMG and after full consideration of other alternatives.

Legal Framework

5. Section 19 of the Inquiries Act 2005 ('the Act') provides in relevant part:

> **Restrictions on public access etc.**
>
> (1) Restrictions may, in accordance with this section, be imposed on—
> (a) attendance at an inquiry, or at any particular part of an inquiry;
> (b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.
> (2) Restrictions may be imposed in either or both of the following ways—
> (a) by being specified in a notice (a 'restriction notice') given by the Minister to the chairman at any time before the end of the inquiry;
> (b) by being specified in an order (a 'restriction order') made by the chairman during the course of the inquiry.
> (3) A restriction notice or restriction order must specify only such restrictions—
> (a) as are required by any statutory provision, retained enforceable EU obligation or rule of law, or
> (b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).
> (4) Those matters are—
> (a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
> (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
> (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
> (d) the extent to which not imposing any particular restriction would be likely—
> (i) to cause delay or impair the efficiency or effectiveness of the inquiry, or
> (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).
> (5) In subsection (4)(b) *'harm or damage'* includes in particular---
> (a) death or injury;
> (b) damage to national security or international relations;
> (c) damage to the economic interests of the United Kingdom or any part of the United Kingdom;
> (d) damage caused by disclosure of commercially sensitive information.

6. Section 20(5) of the Act provides:

> Restrictions imposed under section 19 on disclosure or publication of evidence or documents ('disclosure restrictions') continue in force indefinitely, unless—

(a) Under the terms of the relevant notice or order the restrictions expire at the end of the inquiry, or at some other time, or
(b) The relevant notice or order is varied or revoked under subsections (3), (4) or (7).

The Public Interest Test

7. Section 19(3) of the Act provides its own public interest test: a restriction order should specify only such restrictions as are 'necessary in the public interest'. Factors to be considered in a measurement of the public interest are listed in section 19(4) as supplemented by subsection (5); these are not exhaustive.

8. While this is not an application for public interest immunity ('PII'), the case law relating to such applications assists. A PII application requires the decision-maker (and applicant) to reach a balance of the public interest, sometimes described as a balance of competing public interests and known at the *Wiley* balance[1]: see *R v Chief Constable of West Midlands Police ex p Wiley* [1995] 1 AC 274, at 288 and 306-307. The major difference between a PII application and an application for a restriction order is that, if a PII application is upheld, the material will be entirely excluded from proceedings; not only may some parties, core participants or interested persons be unable to see it, but the court will be unable to rely upon it. Where a restriction order is granted, the Inquiry

[1] Under the *Wiley* balance, the applicant and the court need to consider the following questions:
a. whether the material in question passes the relevance threshold for disclosure in the proceedings. If it does not, then the material is not disclosable and no PII issue arises;
b. if the threshold test of relevance is passed, whether the material identified as relevant, and which would therefore normally fall to be disclosed, attracts PII. The test is whether there is a real risk that disclosure of the documents or material would cause serious harm to the public interest (in this context, the public interest in the protection of national security). The applicant and the court are also required to consider whether any harm could be prevented by other means;
c. if, applying the test of 'real risk of serious harm', the material attracts PII, the third question is whether the public interest in non-disclosure is outweighed by the public interest in disclosure of material.

is still able to see and consider the material in question and rely on it in reaching its conclusions.

9. On the question of whether disclosure would bring about a real risk of serious harm to an important public interest (in the context of PII but of equal application here), Lord Neuberger MR in *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 WLR 2653 observed at paragraph 131:

> National security, which includes the functioning of the intelligence services and the prevention of terrorism, is absolutely central to the fundamental roles of the Government, namely the defence of the realm and the maintenance of law and order, indeed, ultimately, to the survival of the State. As a matter of principle, decisions in connection with national security are primarily entrusted to the executive, ultimately to Government ministers, and not to the judiciary. That is inherent in the doctrine of the separation of powers, as explained by Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2013] 1 AC 153, paras. 50-53. In practical terms the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and in the intelligence services.

10. In paragraph 135, Lord Neuberger referred with approval to the observations of Lord Reid in *Conway v Rimmer* [1968] AC 910, 943, that:

> ... cases would be very rare in which it could be proper to question the view of the responsible minister that it would be contrary to the public interest to make public the contents of a particular document.

11. The Supreme Court, in the recent case of *R (Begum) v Special Immigration Appeals Commission* [2021] 2 WLR 556 (SC), reviewed the authorities and endorsed the approach taken in the cases cited above.

Application

12. HMG applies for a restriction order covering the relevant names because it is necessary in the public interest (s19(3)), having regard in particular to any risk of harm to the

relevant staff and other individuals (s19(4)(b)), and damage to national security (s.19(5)(b)), that could be avoided or reduced by any such restriction.

13. The principal competing public interest factors for consideration under s19(3)(b) and (4) of the Act include, insofar as they can be listed in this OPEN application:
    a. the need to allay public concern about the subject matter of the Inquiry, and to maintain public confidence in its process, impartiality and fairness;
    b. the need to avoid or reduce a risk of harm to the relevant staff, other current and future HMG staff; and
    c. the risk of damage to national security.

14. As noted above, it is open to the Chair to consider other matters in addition to those listed in s19(4). In this instance, where the Inquiry has been established following the suspension of an inquest, HMG respectfully submits it would be appropriate for the Chair to have regard to the impact that the making of a restriction order may have on Dawn Sturgess's family.

15. It is suggested that when considering whether or not to make a restriction order restricting disclosure (whether of names or in respect of future applications) the Chair might be assisted by adopting the following approach:
    a. identifying the public interest in disclosure of names;
    b. identifying the public interest in non-disclosure of names;
    c. assessing the risk and level of harm and/or damage to the public interest that would follow disclosure of names;

d. assessing the risk and level of harm and/or damage to the public interest that would follow non-disclosure of names;

e. weighing up the public interest balance.

16. If the Chair considers that disclosure of information might create a risk to life or of inhuman or degrading treatment, sufficient to trigger the State's obligations under Articles 2 or 3 of the European Convention on Human Rights, then there is no balancing exercise to be conducted; the public interest in non-disclosure must prevail.

Allaying Public Concern

17. The first public interest in the disclosure of names is allaying public concern over the events in 2018 and Dawn Sturgess's death. HMG recognises the significant public concern about the subject matter of this Inquiry and the need to maintain public confidence in its process, impartiality and fairness.

18. The principal means available to this, or any Inquiry, to allay such public concern is public accessibility to its proceedings. Such accessibility can serve to facilitate the investigative process, inform the public and media about its proceedings, permit public debate about matters of national interest, achieve public accountability for the actions of public bodies and foreign states, and provide transparency for the conclusions and recommendations of the Inquiry.

19. Such is the importance of allaying public concern that HMG recognises that the starting point is that no restriction order will be made, in the public interest of openness in the Inquiry and its proceedings, unless it is necessary in the countervailing public interest in the avoidance or reduction of a risk of harm or damage.

20. The public concern can, to some extent, be allayed by the reassurance that relevant material protected by a restriction order will nonetheless be seen and considered by the (independent) Inquiry Legal Team ('ILT') and the Chair. Such material can be used by the Chair in reaching his conclusions, even though parts of those conclusions may need to remain CLOSED. Accordingly, while the public and the family will not be able to scrutinise the restricted material (here, the names of relevant staff), they can be reassured that the Inquiry will do so.

The Interests of the Family

21. It is anticipated that Dawn Sturgess's family and Mr Charlie Rowley will, understandably, wish to know as much information as possible about the circumstances this Inquiry is considering. They may wish to know the names of the relevant HMG staff and believe this is necessary in order for them to understand the full picture of how Ms Sturgess came by her death. If that is the case, there will be a second public interest in the disclosure of names, namely the interest of a bereaved family having access to all the information potentially touching on how their loved one died.

22. While HMG has great sympathy with this wish, such access cannot be facilitated safely. For the reasons set out here and in CLOSED, HMG submits that the risk of harm and damage outweighs such considerations.

Risk of Harm and Damage

23. The two public interests in non-disclosure of names are the risks of harm to the relevant staff and other staff, and the damage to national security. These two matters are

considered separately in CLOSED but for these OPEN submissions are considered together.

24. The threat posed by Russia was set out at paragraphs 8 to 9 of the OPEN Submissions on behalf of HMG for the OPEN Directions Hearing on 25 March 2022. Paragraph 9 of those submissions bears repeating:

> On 21 June 2020, the Intelligence and Security Committee of Parliament ('the ISC') published its report on Russia. In the Open version of this report, the ISC made the following observations:
>
> a. '[Russia] heavily resources its intelligence services and armed forces, which are disproportionately large and powerful.' (paragraph 3)
>
> b. 'It appears that Russia considers the UK one of its top Western intelligence targets...' (paragraph 6)
>
> c. '...it appears to the Committee that Putin considers the UK to be a key diplomatic adversary.' (paragraph 7);
>
> d. 'We have been told, repeatedly, that the Russian Intelligence Services will analyse whatever we put in the public domain...' (paragraph 10);
>
> e. 'GCHQ assessed that Russia is a highly capable cyber actor with a proven capability to carry out operations which can deliver a range of impacts across any sector...GCHQ has also advised that Russian GRU [the Main Intelligence Directorate of the General Staff of the Russian Armed Forces] actors have orchestrated phishing attempts against Government departments – and to take one example, there were attempts against...the Foreign and Commonwealth Office (FCO) and the Defence Science and Technology Laboratory (DSTL) during the early stages of the investigation into the Salisbury attacks.'(Phishing is described as 'the fraudulent practice of sending emails purporting to be from a reputable organisation in order to reveal personal information, such as passwords and credit card numbers') (paragraph 13);
>
> f. 'Russia's cyber capability, when combined with its willingness to deploy it in a malicious capacity, is a matter of grave concern, and poses an immediate and urgent threat to our national security.' (paragraph 15);
>
> g. It also describes the attribution to Russia of 'the attempted hacking of the Organisation for the Prohibition of Chemical Weapons (OPCW) in the Hague' and the joint statement that was made on this subject by the then-Prime Minister, the Rt Hon. Theresa May MP, and the Prime Minister of the Netherlands, Mr Mark Rutte, on 4 October 2018 (paragraph 20)
>
> h. Russia's promotion of disinformation and attempts at broader political influence have included '"hack and leak": the US publicly avowed that Russia conducted "hack and leak" operations in relation to its presidential election in

2016, and it has been widely alleged that Russia was responsible for a similar attack on the French presidential election in 2017' (paragraph 28).

25. More information on the risk posed by Russia and its relevance to this restriction order application is provided in the CLOSED damage assessment. The risks posed by Russia, to the extent they can be described in OPEN,[2] which are relevant to this restriction order application include:

    a. The Russian threat to the UK is continuously evolving. The risks presented by Russia are likely to increase in the short to medium term;

    b. Russia poses a serious threat to the national security of the UK and our allies, including by way of interference activity and cyber operations. The challenge posed by Russia will be one of the most significant challenges facing the UK and our allies in years to come;

    c. Within the last 16 years, the attacks on Alexander Litvinenko and the Skripals demonstrate that Russia's intelligence services ('RIS') have conducted reckless criminal attacks on UK soil with the deliberate aim of murdering UK residents;

    d. RIS are among the most capable and motivated sources of cyber and espionage threat to the UK.

26. This information, along with the further detail in the CLOSED Damage Assessment, shows that there is a risk of harm to the relevant staff and others (including but not limited to their families) and a risk of damage to national security if the relevant names are disclosed. The risk posed is substantial, real and immediate.

---

[2] Great care has been taken to include as much information in this OPEN section as possible while not revealing anything that could create or increase the risks identified within this application. The summary included here is not comprehensive.

27. A decision not to redact the names of HMG staff in OPEN would provide Russia, hostile foreign intelligence services, terrorists and capable non-state actors with a target list of the most highly-cleared individuals in HMG and those with the most relevant expertise or knowledge in the very sensitive matters being investigated by this Inquiry. Disclosure would endanger the safety, privacy and careers of those HMG staff. It would increase the UK's vulnerability to espionage and foreign targeting of HMG and the military, especially by Russia but also by others. Degradation of this human resource would increase the threat to the UK of future attacks like the one on the Skripals. It would thereby endanger the UK's national security

28. Furthermore, HMG owes a duty of care to its staff, which it may breach were it to allow HMG staff and those close to them to be exposed to the risk of targeting, surveillance, harassment or even physical harm by foreign intelligence services or others.

29. A restriction order would avoid or significantly reduce this serious risk of harm and damage.

Risk and Level of Harm of Non-Disclosure of Names

30. HMG submits that the risk and level of harm to the public interest that would follow non-disclosure of names is low. It would not, for example, endanger any individuals nor would it negatively impact the UK's national security. Any risk and harm to the public interest would be mitigated by the reassurance provided by the ILT and the Chair seeing the redacted names.

31. Further, in most instances the names of the individuals who are identified in documents are not in themselves significant to the understanding of the evidence. As set out below

under 'Practicalities', it is proposed that where minutes of meetings are disclosed, the government departments and agencies represented at the meeting will be made clear (insofar as is possible). Where it is important for the public and/or Core Participants to know (for example) that the same person was involved in decision-making over a period of time, then that person's name can be replaced with a cipher wherever it appears in relevant documents. In that way, the public can follow relevant evidence without difficulty, and Core Participants can ask informed questions about the roles of key individuals. The possibility of using ciphers is discussed further below.

Risk and Level of Harm of Disclosure of Names

32. The risk and level of harm to the public interest that would follow disclosure of names is very high. It would endanger individuals and their work across HMG and it would negatively impact the UK's national security. These risks could not be mitigated by alternatives to a restriction order (see from paragraph 34 below).

Public Interest Balance

33. HMG submits that the low risk of harm to the public interest in granting the restriction order does not outweigh the high – and very serious risk – of harm to the individuals concerned and the damage to national security that would follow the disclosure of the names of relevant staff. HMG contends that the balance falls in favour of granting a restriction order.

Alternatives to restriction orders

34. Careful consideration has been given to whether there are other means available to avoid or reduce the risks associated with disclosure. HMG has considered, in particular,

whether it might be possible to allow only the Sturgess family, Mr Rowley and their legal representatives and/or the Core Participants to have access to the unredacted documents through some form of confidentiality ring. This is not a viable alternative. Such a step could put the Sturgess family and Mr Rowley, their representatives and the other Core Participants at a greater risk of being the targets of surveillance and/or cyber-attack. These risks are significant and real. HMG believes that, as well as putting those individuals at risk, this option would not protect the national security sensitivities attached to the names of the relevant staff.

35. Furthermore, it will not always be readily apparent what an individual's full role/involvement is without having access to the full raft of CLOSED material. A name that appears on an OPEN document may also appear in a different context in CLOSED. Were that name to be inadvertently disclosed in any way (even between individuals using private email accounts for example), because its full importance had – quite reasonably – not been appreciated, the consequences could be significant.

36. Providing access to the relevant names to Ms Sturgess's family, Mr Rowley and/or their legal representatives would, simply by widening access to the information, inevitably create more risks, both of inadvertent disclosure and also of the targeting of those in possession of the information. In addition to stringent vetting, HMG and UKIC operate a 'need to know' policy, even within their own organisations. This is essential to protecting sensitive material and to preventing inadvertent disclosures. Releasing the relevant names would undermine the integrity of HMG's policies surrounding the protection of national security sensitive material.

37. HMG believes that there are no means other than a restriction order (or notice) that may be available to avoid or reduce the risk of harm or damage. Any other such means would not avoid or sufficiently reduce the risk.

Practicalities

38. While HMG recognises ILT's concerns that this approach could hinder the efficient functioning of the Inquiry, such concerns are outweighed by the very real risk to national security and the safety of individuals posed by Russia. HMG would work with the ILT to ensure that any perceived adverse impact on the Inquiry is limited to the greatest degree possible.

39. HMG proposes that, in the first instance, all names be redacted in OPEN. Tail ends of email addresses (...@fcdo.gov.uk for example) will remain in the document, identifying some senders' and recipients' departments. Where minutes of meetings are disclosed, the government departments and agencies represented at the meeting will be made clear (insofar as is possible). As the scope of the Inquiry crystallises and the Chair and the ILT identify relevant witnesses, those names can be given ciphers, and the redactions removed and replaced with the ciphers on the OPEN documents. This method would protect the individuals while allowing the Inquiry to proceed effectively. It would also allow all Core Participants to track relevant witnesses. It would be open to Ms Sturgess's family, Mr Rowley and other Core Participants to identify documents of interest and ask the ILT to consider whether names on such documents could or should be ciphered.

40. HMG submits that it is not practicable to start by ciphering all the HMG names. At the ILT's request, the Government Legal Department has already undertaken an exercise

to see whether this might be possible, by ciphering a batch of sample documents. The task was found to be very labour-intensive and time-consuming, and the risk of error was high. Many, indeed most, of the HMG names that appear on documents are unlikely to be relevant and it would not be sensible to undertake a large-scale, time-consuming redaction process in respect of them. Carrying out this work would significantly delay the release of material to the other Core Participants. Nor is it possible at this early stage to give the Chair and ILT a list of all HMG names or roles. Until disclosure is complete, HMG itself will not know all the names that will require redaction.

41. The Chair would, of course, respectfully be invited to keep any restriction order under review. If it became apparent that an individual or category of individuals could safely be named, then a restriction order could, and should, be varied.

Conclusion

42. HMG respectfully requests the Chair to impose the restriction order sought.

CATHRYN MCGAHEY QC
BEN WATSON QC
GEORGINA WOLFE

31 May 2022