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BY EMAIL ONLY:

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[Martin.Smith@fieldfisher.com](mailto:Martin.Smith@fieldfisher.com)

24 October 2022

Dear Sirs,

**Re: Restriction Notice dated 27 July 2022 relating to the Dawn Sturgess Inquiry**

I received a copy of the above Restriction Notice ('RN') for the first time on 18 October 2022. We are concerned about the contents of the RN, and may seek to bring a claim for judicial review to challenge it. By s.38(1) of the Inquiries Act 2005 the time limit for that claim is 14 days after 18 October 2022. I would therefore be grateful for an urgent response to this letter, in particular to my request in the next section.

**Request for agreement to extend time**

I would be grateful if the Secretary of State could please agree that the time limit for judicial review purposes should not begin to run until pre-action correspondence has been completed. The Secretary of State may have a preference as to the date when the time limit for judicial review will begin to run, but I suggest it is 6 weeks from this letter, namely 6 December 2022.

Although the parties cannot formally extend the time limit, if the parties agree that the time limit for judicial review purposes should not begin to run until pre-action correspondence has been completed, that will normally lead to the court granting an extension. Indeed, the courts encourage this approach, as it may avoid the need for litigation. The courts give "short shrift" to a defendant which refuses to do so without proper justification: *R (Archer) v HMRC* [2019] 1 WLR 6355, §92; *R (Rafique-Aldawery) v St George's, University of London* [2019] PTSR 658, §21.

In the particular circumstances, it appears there would be no good reason for the parties to decline to agree an extension. The aspects of the RN that may be challenged are most unlikely to be put into effect for well over a year, since they concern the Inquiry's report, and written or oral evidence which will be heard at the substantive hearing. Moreover, the RN will continue in force until the court quashes it (or it is altered), which means no damage to national security will occur as a result of delay.

If you agree to this extension of the time limit, this will give the parties an opportunity to try to resolve the matters at issue in correspondence, without the need for court proceedings. If you do agree to the extension, then I would be grateful for your response to the questions below within 14 days. My client will then consider whether to send you a pre-action protocol letter. If you do not agree to the extension, I would be grateful for your response to the questions below by close of business on 26 October 2022.

### **The restriction notice**

§3 notes that no restriction on disclosure is imposed on certain individuals (referred to here as "the paragraph 3 group").

§6 prevents the Chair from referring to the Schedule Material in a closed report. It is unclear whether it prevents him from relying on it for the purpose of his report. That may depend on how significant the Schedule Material ultimately is to his conclusions. It may also depend on the impact of §7 (see below).

§7 appears to prevent reference to that material in any closed written or oral evidence: "Save as provided for in the Handling Restrictions". Insofar as it does prevent that, that would appear to mean that the Chair cannot investigate the Schedule Material or rely on it for the purpose of his report.

The family have not seen those Handling Restrictions. That means it is unclear whether the RN prohibits the Inquiry from hearing closed evidence about, or investigating, any or all of the Scheduled Material in closed proceedings. If it does prohibit that, it would appear to follow that the Chair would be prevented from relying on the material for the purposes of his report.

### **Outline of legal concerns**

This is a short outline of our legal concerns. If a letter before claim is necessary, we will set these out in more detail.

The parts of the RN that are of concern are underlined, below:

*6. Save with the written agreement of the Minister, no reference shall be made by the Chair to the content of the Annex or Schedule Material in any open or closed ruling, judgment or report arising out of the Inquiry.*

*7. Save as provided for within the Handling Restrictions set out in the Annex to this Notice or with the written agreement of the Minister, no reference shall be made by the Core Inquiry Team (or any other person) to the content of the Annex or Schedule Material in any written material or in any Inquiry open or closed hearings.*

It appears that those aspects of §6 and 7 are ultra vires s.19(1) of the 2005 Act, and otherwise unlawful.

S.19(1) of the 2005 Act does not give the SSHD a power to prevent the Chair, as provided for by §6 of the RN, from merely referring to the Scheduled Material in a closed report. S.19(1)(b), so far as relevant, permits the SSHD to impose restrictions on "disclosure or publication of any evidence or documents given, produced or provided to an inquiry".

Making reference to something in a closed report does not amount to publication. Nor does §6 amount to a 'restriction on disclosure' for the purposes of this RN, within the meaning of s.19(1) of the 2005 Act. Disclosure means informing someone of information which they did not already know. By merely writing something in a report, the Chair does not disclose it.

The Chair is not required to disclose the closed report. The only relevant obligation within the Act in respect of a closed report is that in s.24: "*The chairman of an inquiry must deliver a report to the Minister...*" The deliberate choice of the word "deliver" in s.24 indicates that this does not amount to disclosure within the meaning of s.19. Alternatively, §3 of the RN explicitly permits disclosure of the Scheduled Material to the Minister. So §6, in the context of §3, does not amount to a 'restriction on disclosure'.

There is no obligation for the Chair to disclose the report to anyone else. Again, §3 of the RN permits disclosure of the Scheduled Material to "the paragraph 3 group". That means that §6 of the RN does not amount to a 'restriction on disclosure' to the paragraph 3 group. While the s.19(1) power may be used to prevent a report being disclosed beyond that group, it cannot prevent the Chair from writing something in a closed report which will not be disclosed beyond that group. In consequence, the Secretary of State had no power to make the relevant parts of §6 of the RN.

As to §7, as noted above, we do not know whether the Handling Restrictions prevent the Chair from investigating the Scheduled Material or from relying on it for the purpose of his report. The following points are subject to clarification of those issues.

§7 appears to have similar problems to §6. S.19(1) does not provide a power to prohibit information being put in a statement, or being said in oral evidence, provided that that information is not disclosed. It is not inevitable that written or oral closed evidence will be disclosed beyond the paragraph 3 group. A restriction notice may prevent any such further disclosure.

§3 taken with §7 mean that any prohibition on the Scheduled Material being referred to in written or oral evidence, is not a 'restriction on disclosure' within the meaning of s.19(1) of the 2005 Act. This means that the Secretary of State had no power under s.19(1) to make §7 of the RN.

In addition, insofar as §6 and 7 prevent the Chair from investigating and relying on aspects of the Schedule Material which are relevant for the purpose of his report, that undermines the Inquiry's ability to ascertain the matters identified in the Terms of Reference. In consequence, these aspects of the RN would be contrary to s.19(3)(b) of the 2005 Act. Those aspects of the RN would also be contrary to the purpose of the Inquiry in seeking to allay public concern (s.1(1) and s.19(4)(a) of the 2005 Act).

## **Clarification**

As noted above, the family has not seen the Handling Restrictions. In order to be able to advise our clients as to whether to pursue a judicial review, and if so to properly frame any such claim, we would be grateful if the Secretary of State could clarify the following issues:

1. Does the RN prevent the Chair from hearing evidence about and/or investigating any or all of the Schedule Material?
2. Does the RN prevent the Chair from relying on the Schedule Material for the purpose of his report?

I look forward to hearing from you.

Yours faithfully



**Birnberg Peirce Ltd**

CC'd: Martin Smith (Solicitor to the Inquiry)