**INQUIRY INTO THE DEATH OF DAWN STURGESS**

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**JOINT OPEN SUBMISSIONS OF THE METROPOLITAN POLICE SERVICE AND THAMES VALLEY POLICE IN SUPPORT OF AN APPLICATION FOR RESTRICTION ORDERS**

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## INTRODUCTION

1. These joint submissions are filed on behalf of the Commissioner of Police of the Metropolis ("MPS") and the Chief Constable of Thames Valley Police ("TVP"). Together, the two police forces, through SO15 and CTPSE, are responsible for Operation Verbasco. By these OPEN written submissions, Operation Verbasco makes an application for orders under s19 Inquiries Act 2005 ("restriction orders"). This OPEN document sets out the governing principles in relation to this application.

2. Separate CLOSED submissions address the detail of the application. Those CLOSED submissions are supported by evidence, including a witness statement signed by Det Supt Luke Williams of Counter Terrorism Policing ("CTP"), the Senior Investigating Officer for Operation Verbasco. Det Supt Williams has set out his experience and background in his statement. It includes working as a Senior Investigating Officer on both proactive investigations to prevent terrorist incidents, and on reactive investigations following terrorist incidents, including in inquest proceedings and on matters affecting national security.

3. This application is made over a sample of documents which were proposed by Operation Verbasco and the subject of discussion with (and approval by) the Inquiry Legal Team ("ILT"). Operation Verbasco is aware that His Majesty's Government ("HMG") makes an application over a separate sample of documents, in respect of which there is a small overlap. Upon the Chair ruling on Operation Verbasco's application, it is anticipated that it should be straightforward to apply approved redactions to a large number of documents, albeit a further application for other restriction orders is likely to be necessary in the future.

## PRINCIPLES

### Section 19 of the Inquiries Act 2005

4. Section 19 of the Inquiries Act 2005 empowers the Chair to make restrictions upon the attendance of the public at an inquiry and on the disclosure or publication of any evidence or documents provided to an inquiry.

5. Section 19(3) provides that, in making a restriction order, the Chair must specify only such restrictions:

    a. As are required by any statutory provision, retained enforceable EU obligation, or rule of law (section 19(3)(a)); or

    b. As the Chair considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest (section 19(3)(b)).

6. When considering whether a restriction order should be imposed under section 19(3)(b), the Chair must have regard "in particular" to the matters set out in section 19(4):

    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 such a 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; and

    d. The extent to which not imposing any particular restriction would be likely-

        i. To cause delay or to impair the efficient or effectiveness of the inquiry; or

        ii. Otherwise result in additional cost (whether to public funds or to witnesses or others).

7. Section 19(5) provides that (for the purpose of section 19(4)(b) above) a risk of harm or damage includes "in particular" a risk of: (a) death or injury; (b) damage to national security or international relations; (c) damage to the economic interests of the UK or any part of the UK; or (d) damage caused by disclosure of commercially sensitive information.

8. The public interest factors listed at s19(4), as supplemented by s19(5), are not exhaustive. The use of the words "includes in particular" in s19(5) makes plain that risk of damage to any relevant public interest can (and should) be considered under section 19(3)(b). As held by Sir Christopher Pitchford, as Chairman of the Undercover Policing Inquiry, the public interest in effective policing is a material and important consideration in such applications and the Chairman should have due regard to the potential harm and damage to such effective policing (see Sir Christopher's ruling on Legal Approach to Restriction Orders, 3 May 2016, at [28]-[29] and [36]-[37]).

9. The term "rule of law" in section 19(3)(a) is wide enough to encompass the rules of law applicable to public interest immunity. However, "it is difficult to envisage" a factual scenario in which a document may be restricted on public interest grounds under one subsection but not under the other, since the two tests of the public interest will normally produce the same result (see *R (Metropolitan Police Service) v The Chairman of the Inquiry into the Death of Azelle Rodney* [2012] EWHC 2783 Admin at [38] per Pitchford LJ; the Ruling of Sir Christopher Pitchford, as Chairman of the Undercover Policing Inquiry, on the Legal Approach to Restriction Orders at [27-30] and [71]).

10. The Chair is invited, in deciding these applications, to apply the public interest balance required by section 19(3)(b), having regard to all relevant public interest factors, whether or not expressly listed in subsections (4) and (5), having regard to the principles normally applied in relation to public interest immunity applications (including that due respect is to be afforded to the expertise of the relevant public authority in assessing the damage that would be caused by disclosure).

**Public Interest Immunity, by analogy**

11. The foundational principles of public interest immunity were addressed by the House of Lords in *Conway v Rimmer* [1968] AC 910:

> "940 It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.
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> …

> 954 The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities; and it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution, but after a verdict has been given, or it has been decided to take no proceedings, where is not the same need for secrecy."

12. The House of Lords described the assertion of PII as a "duty". This was further emphasised by Bingham LJ in *Makanjuola v Commissioner of Police of the Metropolis* [1992] 3 All ER 617, 623 (emphasis added):

> "Where a litigant asserts documents are immune from production or disclosure on public interest grounds **he is not (if the claim is well founded) claiming a right but observing a duty.** Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in the litigation. This does not mean that in any case where a party holds a document in a class prima facie immune he is bound to persist in an assertion of immunity even where it is held that, on any weighing of the public interest, in withholding the document against the public interest in disclosure for the purpose of furthering the administration of justice, there is a clear balance in favour of the latter. But it does, I think mean: (1) **that public interest immunity cannot in any ordinary sense be waived, since, although once can waive rights, one cannot waive duties;** (2) that, where a litigant holds documents in a class prima facie immune, he should (save perhaps in a very exceptional case) assert that the documents are immune and decline to disclose them, since the ultimate judge of where the balance of public interest lies is not him but the court."

13. In *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 WLR 2653 at [34] the Divisional Court set out the four questions which should be posed in resolving a PII application: (1) whether there is a public interest in bringing the material into the public domain; (2) whether disclosure will bring about a real risk of serious harm to an important public interest and, if so, which interest; (3) whether the real risk of serious harm to the public interest can be protected by other methods or more limited disclosure; and (4) if the alternatives are insufficient, where the public interest lies.

14. The principles governing the approach to PII were considered in *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274 and summarised in *Al Rawi v Security Service and Others* [2012] 1 AC 531 at [145] (see also, for the practice, [147] – [149]). As to the present context, although this is not an inquest, there are significant parallels, particularly where an

inquiry is fulfilling the inquest function (*R (Cabinet Office) v Chair of the UK Covid-19 Inquiry* [2023] EWHC 1702 (Admin) at §54). In *Secretary of State for Foreign and Commonwealth Affairs v Asst Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin) (the *"Litvinenko Case"*), Goldring LJ's approach (set out at [53-61]) is informative as to how to approach PII in relation to national security in the inquest context, emphasising the starting point and importance of public justice, the fact that where there is evidence that disclosure would cause a real risk of harm to national security, that will generally be sufficient to justify withholding that information, and the relative institutional competences of the tribunal and the body charged with maintaining national security.

15. The weight to be afforded to the expertise of the public body providing the assessment of the damage to the public interest that would be caused by disclosure has been repeatedly emphasised, at the highest level, particularly in cases concerning national security (see, for example, *Conway* above at 943F 952A and the *Litvinenko* case at [57]).

16. This approach is grounded in the principle of relative institutional competence, as recognised by Lord Scarman in *CCSU v Minister for Civil Service* [1985] AC 374 (at 406G) and recently re-iterated by the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765 at [55]-[62], [109].

17. As Lord Neuberger MR (as he then was) observed in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65; [2011] QB 218 at [135]:

> "it is salutary to bear in mind what Lord Reid said in the Conway case, at p943g, namely 'cases would be very rare in which it would be proper [for a court] to question the view of the responsible minister that it would be contrary to the public interest to make public the content of a particular document'. Especially, I would add, when it comes to issues such as national security, and all the more so at a time when terrorism is such a threat and the sharing of intelligence of such importance in combating that threat…"

18. In the present context, Operation Verbasco submits that very substantial weight is properly to be afforded to the judgement of a specialist police officer of the seniority of Detective Superintendent Williams, who has expert knowledge of the subject matter.

**Typical categories of harm and damage**

19. In the paragraphs which follow under this sub-heading, general submissions are made in respect of categories of harm and damage to national security which typically arise in applications such as this.

20. By making these submissions, Operation Verbasco neither confirms nor denies whether all principles are applicable in this case. The details of the application are advanced only in CLOSED documents. The purpose of setting out these principles is to allow Core Participants and the media to participate in OPEN hearings in a way which does not itself harm national security.

21. The categories which may arise in a case of this nature are set out in the following subparagraphs.

    a. Damage to policing techniques, capabilities and operations: Under this heading, applicants typically seek to prevent damage to the interest of national security through the undermining of operational methodology and capabilities. Damage to national security may be caused both by allowing a hostile actor to discover that the police have a capability or by identifying a gap in capability.

    b. CTP employs a broad range of techniques, methods and sensitive capabilities across all strands of CTP's Contest strategy (Pursue, Protect, Prepare and Prevent). Protecting sensitive techniques and capabilities is essential so as not to undermine CTP's core responsibilities and capabilities to protect the UK from terrorism and Hostile State Acts.

    c. If Hostile State Actors, Terrorists or Organised Crime Groups were aware of the operational details of how CTP operates, deploys resources, and investigates incidents, it would reveal to adversaries of the UK what type of capabilities can and will be used. This information can then be used to frustrate the UK's capabilities and undermine CTP's ability to protect the public and protect the UK's national security.

    d. The Independent Reviewer of Terrorism Legislation, Lord Anderson recognised in his December 2017 report on *Attacks in London and Manchester, March – June 2017* at [2.4] – [2.5] that notwithstanding the "strong public interest in it being generally known what powers may lawfully be used by the authorities, and the extent to which

such use is liable to impinge upon people's rights and freedoms", it "is quite a different matter to disclose how such capabilities were deployed in specific operations, particulars in a threat environment when other operations of a similar nature may still be in progress".[1]

e. Damage to sources of information: There is a strong public interest in protecting the sources of information, whether those are individual human informants or public or private sector entities. CTP relies on informants to provide information or assistance willingly, and in confidence. The Courts have consistently recognised the high degree of protection with which informants should be afforded.

f. In *D v NSPCC* [1978] AC 171, in the context of safeguarding children, the House of Lords recognised that there is a "well established rule of law that the identity of police informers may not be disclosed in a civil action" because "if their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime" (at 218).

g. That being the position in respect of ordinary policing, the sensitivity of sources of information in the context of national security is heightened further, because (a) the matters being investigated are generally more grave, (b) the hostile actors generally have greater capability and resources, and (c) disclosure of identities may breach the Article 2 and 3 ECHR rights of informants (see *Re Scappaticci* [2003] NIQB 56 at [19]).

h. These principles, which apply with particular force in respect of individual human informants, also apply in respect of corporate informants (i.e. a public or private entity providing information voluntarily to the police). That information is capable of being of equal value to human intelligence and accordingly anything which would deter informants from giving information may significantly harm national security.

i. Damage to liaison relationships: This category covers damage to the interests of national security through the disclosure of material which has been received in confidence by CTP from domestic and international partners. Disclosure of the relationship itself is capable of causing significant harm in some cases. The damage could take the form of harm to international relations at a state level, harm to specific

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664682/Attacks_in_London_and_Manchester_Open_Report.pdf

police to police relationships, and/or a full or partial cessation of information sharing where that information is important for safeguarding national security.

j. The assessment of the impact on something as specific as an international relationship "calls for an experienced judgment of the climate of opinion" in that country and accordingly it would be "inappropriate" for the courts to reject "best qualified evidence" about that relationship where it is available (see *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60; [2014] 3 WLR at [46]).

k. Information likely to be of use to hostile actors: Under this heading, applications would typically be made in respect of damage to the interest of national security through disclosure of information to hostile actors (both terrorist and criminal), either directly or indirectly, where that information would be valuable in causing harm in or to the UK. This is a residual category, since it has significant overlap with the first category: damage to policing techniques, capabilities and operations.

22. In addition to arguments of national security, the Inquiry may make a restriction order in respect of material the disclosure of which would cause damage to on-going and future policing operations, and the prevention and detection of serious crime. This was recognised by the House of Lords in *R v H* [2004] 2 AC 134 at [18] as "the public interest most regularly engaged".

23. A further public interest in support of which a restriction order may be made is the public interest in maximising police resources. The ability of police officers to continue to perform their functions effectively is an important consideration (see *R v Bedfordshire Coroner, ex p Local Sunday Newspapers* [2000] 164 J.P. 283). There is a clear public interest in maintaining valuable police resources and the availability of officers for specialist roles such as covert policing and the investigation of terrorist threats (see *R v Mayers* [2009] 1 Cr.App, R. 30 at [30]).

## THE APPLICATION

### Background

24. In making this application, Operation Verbasco has well in mind that open justice favours the disclosure and deployment of relevant evidence in public hearings. The granting of a restriction order is inevitably to some extent the infringement of that principle.

25. However, notwithstanding the similarities between the legal tests for PII and restriction orders, there is a critical difference between the effect of the two mechanisms.

    a. A successful claim of PII is exclusionary: material which is the subject of a claim will not be admitted in proceedings and may not be considered by the Tribunal.

    b. In contrast, the mechanism provided by s19 of the Inquiries Act 2005 enables evidence to be considered, tested and subjected to rigorous examination where in any other proceedings (including an inquest) it would normally be excluded. A restriction order is not a means of allowing evidence to be suppressed.

26. In *R (Jordan) v Chief Constable of Merseyside Police* [2020] EWHC 2274 (Admin) at [17(e)], Chamberlain J rejected the argument that a higher standard of cogency in the arguments advanced by a party asserting PII was required where material would be considered in a Closed Material Procedure. In doing so, he disagreed with Marcus Smith J in *CMA v Concordia International RX* [2018] EWHC 3448 (Ch); [2019] Lloyd's Rep FC 183 at [27-29]. Swift J subsequently expressed his *obiter* agreement with Chamberlain J's reasoning in *R (AIG) v HM Courts & Tribunal Service* [2021] EWHC 584 (Admin). Operation Verbasco submits that the view expressed in *Jordan* and *AIG* is to be preferred.

27. That is all the more the case because this Inquiry was established when it became apparent that some evidence could only be explored in CLOSED session. By letter dated 28 July 2021,[2] the Rt Hon Baroness Hallett DBE (the then-Coroner in the inquest into the death of Dawn Sturgess) wrote to the Secretary of State for the Home Department expressing the preliminary view that a coroner could not hold a full, fair and fearless inquest into Dawn Sturgess's death for reasons of PII. By letter dated 22 September 2021,[3] Baroness Heather Hallett confirmed her view as being final. Accordingly, the Secretary of State established a statutory inquiry. Against that background, it would be curious if a heightened standard of cogency was required to establish a real risk of harm to the public interest, as compared to the inquest proceedings.

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2 https://www.dawnsturgess.independent-inquiry.uk/wp-content/uploads/2021-07-29-Letter-from-The-Rt-Hon-Baroness-Heather-Hallett-DBE-to-the-Secretary-of-State-for-the-Home-Department.pdf

3 https://www.dawnsturgess.independent-inquiry.uk/wp-content/uploads/2021-09-22-Letter-from-The-Rt-Hon-Baroness-Heather-Hallett-DBE-to-the-Secretary-of-State-for-the-Home-Department.pdf

**The CLOSED documents**

28. In CLOSED documents, Operation Verbasco has set out with specificity the factual matters in respect of which this application is made, proposed gists which the Inquiry might direct be used instead of much of the sensitive material so as to convey relevant information to CPs and the public insofar as possible, and the application of legal principles to the material in question. Those documents set out why the application is well-founded.

29. One CLOSED document is a damage assessment. It sets out in detail the risks of harm, including the threat posed by Foreign Intelligence Services (FIS) who may be hostile to UK interests, including the Russian Intelligence Services (RIS).

30. The CLOSED documents in support of this application, including a schedule of proposed redactions, were provided to the ILT in draft in June 2023. There followed an in-person meeting between the ILT and the Operation Verbasco legal team to discuss the application and to give the ILT opportunity to request more information on certain matters and propose further gists in respect of other matters. As a result of that useful meeting, the application was refined before it was issued.

31. It is the considered assessment of Det Supt Williams, having taken account of the views of subject matter experts throughout the MPS, TVP, CTP and law enforcement partners, that the disclosure of each of the pieces of information which is the subject of the application would, at the very least, cause a real risk of serious harm to national security or to the prevention, detection and investigation of crime.

**The subject matter of the application**

32. It is not possible to describe most of the subject matter in OPEN without harming national security and/or the other public interests which the application seeks to protect. The subject matter of the application in CLOSED includes:

    a. The methodology of police operations at the City Stay and Dolphin hotels;

    b. Information relating to policing capabilities, including the details of officer chemical, biological, radiological and nuclear ("CBRN") training, the nature of personal protective equipment ("PPE") and its use.

c. The specific locations and capabilities of automatic number plate recognition ("ANPR") technology;

d. Matters concerning CTP's use of DNA, fingerprints and facial recognition technology (in contrast to its use by mainstream policing);

e. Information in respect of the police use of telecommunications data within investigations;

f. Information concerning the deployment of protective security measures for persons at risk;

g. Matters relating to police forensic capabilities;

h. Certain CTP financial investigative methods; and

i. the acquisition and use of information from third party organisations and members of the public.

33. In respect of each sensitivity, Operation Verbasco has been careful to ensure that the redactions go no further than is necessary. As a part of this process, each sensitivity has been framed as narrowly as possible, whilst still properly protecting the public interest(s) for which the redaction is necessary. For example:

a. It is avowed that the police, including CTP, make use of ANPR technology, which can be used to identify the movement of cars across the road network of the UK. Operation Verbasco does not seek to restrict evidence concerning the use of ANPR generally. Rather, the restriction orders sought relate specifically to (a) the precise locations of cameras, and (b) certain capabilities in respect of ANPR. Neither of these matters is of any significant relevance to the Inquiry's terms of reference and the consideration of this evidence only in CLOSED session (if such consideration is required at all) will have little impact on the participation of the family or the allaying of public concern.

b. CTP has already made public information concerning searches which were carried out in the London hotel accommodation occupied by the suspects. The fact of the searches is avowed and that evidence can be given in OPEN without causing harm to national security. The evidence which will be given in OPEN will go further than

information which is already in the public domain. However, Operation Verbasco seeks a restriction order in respect of the methodology of the searches. The way in which the searches were planned and executed is of comparatively little relevance and the restriction of this evidence to CLOSED session will have little impact on the OPEN process. It is however, plainly, highly sensitive: significant harm could be caused to national security if a Hostile State Actor, in a future attack in the UK, was aware of CTP search methodology and took steps to frustrate it.

c. CTP is not seeking to restrict the fact that the following units exist within policing:

   i. The Forensic Management Team;

   ii. The Bomb Data Centre;

   iii. The National Photographic Intelligence Cell;

   iv. The National Terrorist Financing Intelligence Unit;

   v. The Joint Money Laundering Intelligence Taskforce.

   It is seeking to restrict some information about the capabilities, functions and activities of these units, on the basis that were those to be disclosed, they would render them less effective and less able to contribute to the maintenance of national security and the prevention, detection and investigation of crime.

d. CTP can disclose that it uses various methods of prioritisation within its investigations, such as a Red/Amber/Green system. But disclosing how those ratings are applied in specific contexts would reveal what matters CTP regards as more or less important. This would give adversaries the opportunity to shape their activities so they are less likely to draw attention from CTP. CTP seek to restrict disclosure of details of such methods where this level of risk arises.

34. In determining the application, and considering whether the restrictions sought are necessary, the Chair will wish to consider whether any lesser alternatives to the terms of the restriction order sought might address the risk of harm or damage. No lesser alternative will manage the risk because:

a. In the vast majority of examples, the risk at which the application is directed is harm or damage to national security. The courts are slow to go behind judgments as to what national security requires by those charged with protecting it (see e.g. Lord Neuberger MR in *Binyam Mohamed* at [135]) and, where there is a risk of significant harm to national security, it will be rare that this is outweighed by another public interest (see *CCSU v Minister for Civil Service* at 406g).

b. In the context of the most recent annual threat update given by the MI5 Director General Ken McCallum that "the UK must be ready for Russian aggression for years to come"[4], it is foreseeable that CTP capabilities and tactics deployed during the subject matter of the Inquiry may be deployed again against hostile states, including Russia. In *Binyam Mohamed* at [135] Lord Neuberger MR recognised that the public interest in keeping information from terrorists was heightened at times of increased terrorist threat. At this current time of increased threat from Hostile State Actors, the particular information which is the subject matter of this Inquiry is unusually sensitive and could cause peculiar harm to national security.

c. Operation Verbasco has made the application on as narrow a basis as possible.

d. Wherever it has been possible, Operation Verbasco has developed gists of material which it is proposed should be redacted. These gists will allow a reader in OPEN to understand the material to the greatest extent possible without harming the public interest.

e. The Chair has already ruled that a confidentiality ring would not provide a viable alternative to CLOSED hearings in the context of this Inquiry.[5]

35. The public interest in disclosure of the information in OPEN varies with each document. However, even where the material is of little relevance to the Inquiry's terms of reference, the importance of open justice should not be overlooked. It is Det Supt Williams' assessment that the public interest falls in favour of the application being granted in each respect and the information being withheld from OPEN proceedings, subject to gisting. Whilst it is ultimately for the Chair to decide on the public interest balance, very considerable weight should be attached to the evidence of Det Supt Williams, who has expertise in what is

[4] https://www.mi5.gov.uk/news/director-general-ken-mccallum-gives-annual-threat-update
[5] https://www.dawnsturgess.independent-inquiry.uk/wp-content/uploads/2022-08-19-Restriction-Order-Ruling.pdf

harmful to national security and other policing interests and who puts before the Inquiry a detailed and considered damage assessment. Only in a very rare case should such evidence be discounted.

**CONCLUSION**

36. In the circumstances, the Chair is invited to make the restriction orders sought.

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**Aaron Moss**
**Dan Mansell**
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**Jason Beer KC**
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**14 July 2023**