IN THE INQUIRY INTO THE UK'S RESPONSE TO THE COVID-19 PANDEMIC

FURTHER SUBMISSIONS OF EIGHT MEDIA ORGANISATIONS[1]
for hearing on 16th October 2023

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1. These short supplemental submissions are provided on behalf of eight media organisations ("the media organisations") to answer the question posed by the Chair during the hearing on 16th October 2023, namely the relevance of *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57.

2. The issue in *Prince of Wales* was whether the tort of breach of confidence applied where Prince of Wales had circulated handwritten travel journals to chosen individuals in an envelope marked "*private and confidential"*. The journals had been provided to a newspaper by an employee who had a duty to keep its contents confidential (§71). The Court of Appeal held that the key questions were whether the journals were "*information received in confidence"* (§66) and whether there was an important public interest in the observance of duties of confidence that arise between individuals (§67). On the facts, those tests were met. There was an important public interest in respecting the obligations that the employee had assumed (§71).

3. The judgment is not therefore a ruling that everyone who keeps a diary has a reasonable expectation of privacy in the contents of that diary, irrespective of its subsequent disclosure or use in open judicial proceedings. It was, instead, a ruling that where a diary is provided on a confidential basis to other people, there is a public interest in upholding that confidentiality. As in all cases, context is key.

4. There is a world of difference between the facts of the *Prince of Wales* case and the circumstances of this application. The notes have been disclosed to the Inquiry, judged to be "*clearly relevant"*,[2] disclosed to all core participants, and repeatedly referenced in open hearings. Any "*sensitive"* aspect of the notes has been redacted. The reason the unredacted notes have been provided to the core participants is that <u>all</u> of their contents (and not just the

[1] Guardian News & Media Limited, Reach Plc, the BBC, ITN, Telegraph Media Group Limited, Associated Newspapers Limited, Times Media Limited, and News Group Newspapers Limited.
[2] Note from Solicitor to the Inquiry, §2.

passages that may be put in a question to a witness) have been judged to be "*clearly relevant"* to the Inquiry's terms of reference.

5. This submission reflects logic and modern hearing practice. In any Court, tribunal or inquiry, no advocate has the time or resources to put every single relevant quotation from a document to a witness. It is obvious that the relevant parts of the redacted notes will not be limited to the parts that are put to witnesses in oral questions. The Inquiry will be invited to read the redacted notes in full and all core participants will rely on them in preparing questions and in making submissions. The parts that are not put to a witness may contain important context for the parts that are. They may also contain important matters that justify public interest reporting.

6. The Courts have recognised this practice for several decades. As Lord Bingham CJ put it in *Smithkline Beecham Biologicals SA v Connaught Laboratories Inc* [2000] FSR 1,

> "*For reasons which are very familiar, it is no longer the practice for counsel to read documents aloud in open court or to lead the judge, document by document, through the evidence. The practice is instead to invite the judge to familiarise himself with material out of court to which, in open court, economical reference, falling far short of verbatim citation, is made*."

7. To equal effect, Lady Hale held in *Cape Intermediate Holdings Ltd v Dring* [2020] AC 629, §43:

> *"In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material."*

8. These *dicta* apply with even greater strength to a statutory inquiry, where the Inquiry team will consider tens of thousands of documents, hearing time is

limited, and the ability of counsel for the core participants to question is necessarily curtailed.

9. This is why the open justice principle has developed to permit the publication of material relied on in open hearings. Lady Hale was clear that disclosure should not be limited to what the Judge has "*actually read"*, but rather should include all the material that was "*before the Judge"* (*Dring*, §44). The submission made by Sir Patrick Vallance is narrower still: it is that disclosure to the public should be restricted to material that has been formally put to a witness, even if the Inquiry has actually read (and relied upon) other material in the notes.

10. The fact that the material has been provided to the core participants subject to an undertaking also takes Sir Patrick no further. In all Court proceedings, a litigant owes an undertaking not to use a disclosed document for purposes other than the litigation. This undertaking can be implied (as was the old practice at common law, express (as in this Inquiry), or codified (as, in respect of disclosed documents in civil proceedings, at CPR, r.31.22). However, this does not mean that disclosed documents will be confidential even after being referred to in open hearings. Once a document is put before a Court, it is treated as having been read in open Court and it loses its confidentiality. The Court may still restrict its onward use (pursuant to CPR, r.31.22(2)[3]), but the presumption is one of open access. This is the approach even where a document has only been referred to in an open hearing in a brief, marginal, or gratuitous way.[4] In this Inquiry, the notes have been repeatedly referred for good reason by leading counsel to the Inquiry.

11. The media organisation's primary point,[5] therefore, is that once a document is disclosed in quasi-judicial proceedings and referred to in an open hearing, the person who prepared that document no longer has a reasonable expectation of privacy in its contents. The *Prince of Wales* case did not involve material that had been disclosed and relied upon in open Court.

12. Even if any article 8 right remains in the redacted notes that have been disclosed to all core participants and considered in detail by the Inquiry team,

[3] The parallel procedure to an application for a restriction order under s.19 Inquiries Act 2005.
[4] *NAB v Serco Ltd* [2014] EWHC 1225 (QB), §§26–38.
[5] As set out in their written submissions, at §§16-19.

the media organisations' case is that their right to report the contents of the notes under article 10 obviously out-balance any remaining privacy rights. This reflects the usual balance in all Courts, tribunals, and inquiries[6] as well as the obvious public importance in the contents of the redacted notes.

13. The media organisations also do not understand Sir Patrick's insistence, repeated in oral submissions, that he does not have to make an application for a restriction order under s.19 Inquiries Act 2005. The Chair has a duty under s.18 Inquiries Act 2005 to take such steps as she considers reasonable to secure that members of the public (including reporters) are able to "*obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel*." The Solicitor to the Inquiry has confirmed that the Chair's practice, of putting a document on the screen and then making that document available for public disclosure, is part of how the Inquiry complies with that duty.[7] The Chair has a power, under s.19(1), to restrict the disclosure or publication of any evidence or documents given, produced or provided to the Inquiry, but an application for restriction order is the means by which the Chair can exercise that power. What Sir Patrick wants is a restriction on the Chair's usual practice of making available documents "*provided to"* the Inquiry.

14. For these reasons, and those set out in their written submissions, the media organisations respectfully invite the Inquiry to follow its usual approach and to make Sir Patrick's notes available in the usual way. Any exception to this approach would be an unhelpful precedent. All witness statements and disclosed documents are likely to contain material that their deponent considers is private. If applications of this sort are granted, then inquiry and Court hearings will be regularly interrupted by similar applications in the future.

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16th October 2023

[6] As set out in the media organisations' written submissions, §20.
[7] Note from Solicitor to the Inquiry, §9.