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

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

A. Introduction and Summary

1. These submissions are provided on behalf of eight media organisations (the "**media organisations**") to assist the Inquiry on its approach to an application by Sir Patrick Vallance to restrict access to evidence from his handwritten notes.

2. The starting point in this Inquiry ought to be openness and transparency. The Inquiry's usual approach to disclosure follows on from this starting point, and also reflects: (a) the statutory context, (b) the applicable authorities, (c) the benefit of openness to the investigative process, (d) the seriousness of the issues, and (e) the media's interest in reporting issues of public interest that arise from the evidence before the Inquiry.

3. The exception that Sir Patrick seeks gets the law the wrong way round. Sir Patrick does not have a reasonable expectation of privacy in the redacted notes. They have been disclosed to the Inquiry, judged to be "*clearly relevant"*, provided to all core participants, and repeatedly referenced in open hearings. Any "*sensitive"* aspect of the notes has been redacted. In the circumstances, article 8 is not engaged. Even if it is, any article 8 right is obviously outbalanced by the rights of the media, and the public, under article 10.

4. Although Sir Patrick Vallance seeks to put the burden on the Inquiry of justifying its approach, what he actually seeks is a restriction order under s.19 Inquiries Act 2005, without any engagement with the principles that the statute requires. Any such application for a restriction order would be inconsistent with the five points set out at §2, above. It would also set an unhelpful precedent that may be followed by other witnesses and core participants in the future.

5. For these reasons, the Inquiry is respectfully invited to refuse this application.

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[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.

B. The starting point

6. The starting point in any public inquiry is that the Inquiry is public and that its proceedings ought to take place in public. It follows that the public ought to have access to inquiry hearings and to the evidence that is adduced in inquiry hearings. This reflects recent rulings in the Independent Inquiry relating to Afghanistan,[2] in the Dawn Sturgess Inquiry,[3] and in the Undercover Policing Inquiry.[4] As the authorities make clear, there is "*what really amounts to a presumption that [a public inquiry] will proceed in public unless there are persuasive reasons for taking some other course.*"[5]

7. The Inquiry's usual practice, of displaying the evidence on screens in the hearing room and then disclosing the evidence to the public, reflects this approach. It also reflects five particular points.

8. **First**, this presumption of disclosure follows from the applicable statutory scheme. The existence of public concern is a pre-condition for the holding of an inquiry: s.1(1) Inquiries Act 2005. There is a duty on the Chair to permit the public to attend the inquiry: s.18(1). As the Inquiry team has explained, displaying the evidence on a screen and then providing it to the public are two ways in which the Chair complies with this duty.

9. Section 19(4)(a) then requires the Chair to consider "*the extent to which any restriction on attendance, disclosure or publication might inhibit the public concern"*. The premise behind s.19(4) is that public proceedings (and the public disclosure of evidence in the Inquiry) will tend towards the allaying of public concern, while restrictions on public disclosure will tend to inhibit that process. As the point of a statutory public inquiry is to allay the public concern that caused its institution, openness is the "*starting point"* under the Inquiries Act 2005. "*The policy of the Act"* is "*towards the openness of an inquiry's proceedings."*[6]

10. While restriction orders are permitted, pursuant to s.19(3), the statute recognises them as exceptions. Only clear and compelling evidence that an

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[2] Transcript, 25th April 2023, p.10, lines 11-14.
[3] Ruling, 19th August 2022, §7.
[4] Undercover Policing Inquiry, "*Restriction Orders: Legal Principles and Approach Ruling"*, §82.
[5] *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, at 310-311 and 320.
[6] Undercover Policing Inquiry, "*Restriction Orders: Legal Principles and Approach Ruling"*, §82.

exception is necessary (for the reasons set out in s.19(4)) can justify the making of a restriction order. This is the test required for an interference with open justice at common law,[7] and the same test applies *a fortiori* to this Inquiry.

11. **Second**, the authorities underline the importance of openness to a statutory investigation. *Kennedy v The Charity Commission* [2015] 1 AC 455 considered a quasi-judicial inquiry by the Charity Commission. Even in that context, Lord Toulson observed, at §124, that the "*considerations which underlie the open justice principle in relation to judicial proceedings apply also to those charged by Parliament with responsibility for conducting quasi-judicial inquiries and hearings*." Thus, both s.18 and the common law principle of open justice speak with one voice: the starting point is a presumption of openness. The significance of the constitutional principle of open justice *"… has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions*."[8]

12. The open justice principle permits an inquiry to make evidence before it available to the general public. Thus, "*[i]n a case where documents have been placed before a judge and referred to in the course of proceedings … the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong*".[9] This strong default position can only be out-balanced if there is a strong countervailing argument.[10]

13. **Third,** openness facilitates the Inquiry's investigative process:

    a. Openness protects public confidence in an investigation. As Lord Atkinson put it in *Scott v Scott* [1913] AC 417*,* at 463*:* "*in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient*

[7] See, most recently, *R (Marandi) v Westminster Magistrates' Court* [2023] 2 Cr App R 15, per Warby LJ, §43, and Mostyn J, §87.
[8] *Khuja v Times Newspapers Ltd* [2019] AC 161, per Lord Sumption, at §13.
[9] *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, §85; endorsed in *Cape Intermediate Holdings Ltd v Dring* [2020] AC 629, §§38 and 44.
[10] *Guardian News and Media*, §82; *Dring*, §§46-7.

administration of justice, the best means for winning for it public confidence and respect".[11]

b. Openness deters inappropriate behaviour on the part of those involved in the inquiry and makes uninformed and inaccurate comment about proceedings less likely.[12] Openness can counter or neutralise any suggestion of "*cover up"* in an investigation.[13]

c. Openness encourages new witnesses to come forward. Open justice can result in evidence becoming available which would not become available if the proceedings are conducted behind closed doors.[14]

14. **Fourth**, the seriousness of the subject matter of this Inquiry underlines the need for full transparency. The matters in issue in this module of this Inquiry are of clear public interest and importance. The importance of these issues gives rise to a concomitant need for public scrutiny. This critical need to ensure that serious issues are addressed will be undermined if the evidence is not fully available to the public.

15. **Fifth**, permitting access to the Inquiry's evidence enables the media organisations to carry out their task of reporting and investigating stories of wider public interest. Judicial (or quasi-judicial) proceedings will often expose matters of public interest worthy of discussion that are separate to the narrow task of doing justice between the parties in a particular case (or, by analogy, to fulfilling the terms of reference in an Inquiry).[15] It is well-recognised that a journalist "*may need to research historic cases to investigate issues of public interest and concern".*[16] A "*serious newspaper should be able to see identified documents from an earlier court file because they may bear on a current story*

[11] See also per Viscount Haldane, at 438, per Lord Atkinson, at 463, and per Lord Shaw of Dunfermline, at 477; *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, per Lord Woolf MR, at 977; *In re S (A Child)* [2005] 1 AC 593 at §§29-30.
[12] *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, per Lord Woolf MR, at 977; *R v Sarker* [2018] 1 WLR 6023, §29(iv). *Kaim Todner* was approved and applied in the inquiry context in *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292.
[13] *R (E) v Chairman of the Inquiry into the Death of Azelle Rodney* [2012] EWHC 563 (Admin), per Laws LJ, at §26. In his final report in the *Thames Safety Inquiry*, Clarke LJ (as he then was) stressed, at §5.1, that: *"… it is of great importance that members of the public should feel confident that a searching investigation has been held, that nothing has been swept under the carpet and that no punches have been pulled"*.
[14] *Ex p Kaim Todner* [1999] QB 966, per Lord Woolf MR, at 977.
[15] *Home Office v Harman* [1983] 1 AC 280, per Lord Scarman, per Lord Scarman, at 316.
[16] Law Commission of New Zealand: "*Access to Court documents"* (30th June 2006), §2.4.

or article which it is interested in publishing."[17] The Courts have therefore treated the reporting of a newsworthy aspect of proceedings as advancing the open justice principle.[18]

C. The Application

16. Sir Patrick Vallance suggests that he does not have to make an application. Instead, he insists that any disclosure of his notes would represent an interference with his article 8 rights that the Inquiry will have to justify. This gets the law the wrong way round. It is for Sir Patrick to show that article 8 applies. This involves asking whether he has a reasonable expectation of privacy in respect of the notes now.

17. The notes have been provided to the Inquiry, accessed by the core participants, and considered by the Chair. The Inquiry team assessed that they are "*clearly relevant to the Inquiry's work"*. The Inquiry team then carefully assessed Sir Patrick's article 8 rights when deciding what aspects of the notes to disclose to the core participants. It redacted sensitive material from the notes. The notes have since been repeatedly referenced in open hearings by leading counsel to the Inquiry.

18. The open justice principle therefore squarely applies. Documents which are read out in an open hearing; which the Chair is invited to read in an open hearing; which the Chair has been specifically invited to read outside a hearing; or which it is clear or stated that the Chair has read, are all documents which are treated as having been read in an open hearing.[19] The public is entitled to seek access not only to the material that the Chair has actually read, but also to the material that is before her.[20]

19. There is no reasonable expectation of privacy in respect of material that is treated as having been read out in an open hearing.[21]

20. Even if there were, any such privacy rights would be obviously outbalanced by the countervailing article 10 right to freedom of expression. The ability of the media to impart, and the public to receive, the fullest information about what

[17] *Chan U Seek v Alvis Vehicles Ltd* [2005] 1 WLR 2965, Park J, §43.
[18] *Goodley v The Hut Group Ltd* [2021] EWHC 1193 (Comm), §44.
[19] See, by analogy, *Dring*, §32.
[20] *Dring,* §44.
[21] See, by analogy, *Khuja*, §34(1).

takes place in judicial proceedings is recognised as engaging weighty article 10 considerations. This is so even if the underlying material does not contribute to a debate of public interest.[22] Where, as here, the notes are "*clearly relevant"* to the Inquiry's terms of reference, relate to matters of the most obvious public interest, and have been redacted to remove "*sensitive"* contents, the article 10 rights of the media are stronger still.

D. The Purposes of Transparency

21. The reality is that this is not just an application for an exception to the Inquiry's usual approach to evidence. This is, in reality, an application for a restriction order. To use the language of s.19(1)(b), it is an application for a restriction to be imposed on the "*disclosure or publication of any evidence or documents given, produced or provided to an inquiry"*.

22. A restriction order is not "*required by any statutory provision … or rule of law"* and would inhibit the allaying of public concern for the purposes of s.19(3)(a) and (4). It may be for this reason that Sir Patrick Vallance has not formally applied for a restriction order.

23. If an application for a restriction order were to be made, the Inquiry would be respectfully invited to reject it. This is because any such application would undermine each of the five points set out at section B of these submissions, above.

24. Creating an exception for Sir Patrick Vallance in these circumstances would also undermine the purpose of openness. It would give the appearance that a different rule applies to Sir Patrick Vallance as applies to the other witnesses and core participants. It would prevent full public scrutiny of the material put before the Inquiry. It risks encouraging uninformed and inaccurate comment about the Inquiry proceedings. It would even potentially prevent witnesses from coming forward having seen something in Sir Patrick's evidence that jogs their memory.

25. Creating an exception for Sir Patrick Vallance would prevent the media organisations from carrying out their task of reporting and investigating stories

[22] *R (Rai) v Winchester Crown Court* [2021] EWHC 339 (Admin), §§47-48; approved in the same case in the Court of Appeal: [2021] 2 Cr App R 20, §19 and §§26-7.

of wider public interest that arise from Sir Patrick's evidence (over and above those that are formally read out in an open hearing). Relevant evidence in this Inquiry is not limited to the parts of the evidence that are formally put to a witness. The context of a quotation that is put to a witness is likely to be key to understanding that quotation. It also may give rise to a wider public interest story over and above that witness' evidence.

26. Creating an exception for Sir Patrick Vallance in these circumstances would also create an unhelpful precedent for future witnesses and core participants, both in this Inquiry and in other proceedings. Avoiding such a precedent is one of the key reasons why the higher Courts have warned about the need to be "*vigilant"* about creating a new exception to the open justice principle.[23] As Lord Steyn put it, the "*process of piling exception upon exception to the principle of open justice*" should not be "*encouraged*" or permitted to "*gain in momentum*". Not every media organisation can afford to contest this kind of application if it is to be made in Courts, tribunals, and inquiries across the country.[24]

E. Conclusion

27. For these reasons, the Inquiry is respectfully invited to follow its usual approach to the notes provided by Sir Patrick Vallance and to dismiss his apparent application for a restriction order.

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[23] *Ex p Kaim Todner*, at 977.
[24] *In re S (A Child)* [2005] 1 AC 593, §§33-36.