COUNSEL TO THE INQUIRY'S NOTE ON THE LEGAL TESTS APPLICABLE TO APPLICATIONS FOR RESTRICTION ORDERS

Introduction

1. The purpose of this note is to assist the Chairman and persons who wish to apply for restriction orders during the course of the Inquiry. It is confined to consideration of the legal tests which arise in connection with such applications.

2. Procedural issues have been addressed elsewhere by the Inquiry. To date the Chairman has given directions setting out the procedure for persons who are currently provisionally anonymous to apply for restriction orders (directions dated 27 January 2016, paragraph 9, found at https://www.ucpi.org.uk/wp-content/uploads/2016/01/160127-Directions.pdf). At the time of writing the Inquiry is consulting non-state body core participants on a draft redaction protocol. When finalised, the protocol will be published on the Inquiry's website. It will set out the procedure by which the Metropolitan Police Service should apply for restriction orders in relation to the contents of documents which it produces to the Inquiry. It will also address how such applications will be dealt with procedurally. Further procedural steps will be outlined as and when necessary.

3. At the heart of this note is consideration of s.19 of the Inquiries Act 2005 ("the 2005 Act") which concerns restrictions on access to both persons attending at an inquiry and documents given, produced or provided to an inquiry. Part I below provides an overview of s.19. In order fully to explain s.19 it is also necessary to consider the statutory context in which it sits. Part II of this note deals with that context. Section 19 imports other legal rules into the test for restriction orders (through s.19(3)(a)). The most significant are considered in Part III below. Finally, the neither confirm nor deny policy is examined in detail in Part IV. In Part V we make some concluding remarks.

Part I – Section 19 of the Inquiries Act 2005

Restriction Orders and Restriction Notices

4. Section 19 confers upon the Chairman and the Minister who caused the inquiry to be held the statutory power to place restrictions on attendance at an inquiry, or at any particular part of an inquiry; and to disclosure or publication of any evidence or documents given, produced or provided to an inquiry. In this case the Minister concerned is the Home Secretary. A restriction imposed under s.19 by the Minister is imposed by way of a "restriction notice" whereas a restriction so imposed by the Chairman is by way of a "restriction order". See ss.19(1) and 19(2) of the 2005 Act which state as follows:

> *(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.* (Emphasis added).

5. As is apparent from the phrase "in either or both of the following ways" emphasised above, the Minister's power to impose a restriction notice co-exists with the Chairman's power to impose a restriction order. It is therefore possible for the Minister to impose restrictions which go beyond those imposed by the Chairman and vice-versa.

6. In relation to these co-extant powers the Metropolitan Police Service has agreed, at paragraph 29 of the draft Redaction Protocol, that the expectation will be for the Metropolitan Police to seek a restriction order rather than a restriction notice:

> *"Where public interest issues or other s.19(3) issues arise, the Inquiry expects the above procedures to be used for seeking a restriction order from the Chairman rather than a restriction notice being issued under s.19(2)(a) by the relevant minister".*

The Statutory Limits on the Grounds for making a Restriction Order

7. The power conferred on both the Chairman and the Minister to impose restrictions is limited and defined by s.19(3) of the 2005 Act. This important subsection provides two separate and distinct bases for the imposition of a restriction. The first basis for a restriction is one which is required by a statutory provision, enforceable Community obligation or rule of law: see s.19(3)(a). The alternative basis is a restriction which the Minister or Chairman considers to be conducive to the Inquiry fulfilling its terms of reference or to be necessary in the public interest: see s.19(3)(b). Subsection 19(3) of the 2005 Act is worded as follows:

> *A restriction notice or restriction order must specify only such restrictions–*
>
> *(a) as are required by any statutory provision, enforceable Community 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).*

8. It will assist the Inquiry if applicants for restriction orders identify which limb of s.19 their application is made under, i.e. whether it is made under s.19(3)(a), 19(3)(b) or both. In relation to an application under s.19(3)(a) it will further assist if the specific statutory provision, enforceable Community obligation or rule of law relied upon is also identified. In relation to s.19(3)(b) applicants can assist by identifying which limb of the provision they rely upon: i.e. whether it is contended that the restriction sought is conducive to the Inquiry fulfilling its terms of reference or necessary in the public interest or both.

9. S.19(3)(a) imports a wide range of statutory provisions, enforceable Community obligations and rules of law into the s.19 test. Some of these are of such importance that we consider them separately in more detail in Part III of this note (at paragraph 47 onwards): Articles 2, 3, 6, 8 and 10 of the European Convention on Human Rights; the common law duty of fairness and the duty of confidentiality.

10. The particular matters mentioned in subsection 19(4), as referred to at the end of s.19(3)(b) 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 to 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).

11. Subsection 19(5) defines the phrase "harm or damage" in s.19(4)(b) as follows:

(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 of any part of the United Kingdom;

(d) damage caused by disclosure of commercially sensitive information.

12. The word "injury" in s.19(5)(a) above is not qualified in any way and is wide enough to include psychiatric injury.

13. A feature of the statutory system is its flexibility. It is capable of conferring a range of restrictions, calibrated to the particular requirements of the circumstances, from the minimal and specific right through to closed hearings.

14. Examples of the different purpose of restriction orders granted in previous inquiries, and how that purpose was achieved, are set out below:

14.1. Restricting the publication of someone's identity such that they participate in the Inquiry anonymously:

- limiting the people present in the court room during the applicant's evidence; delaying the publishing of the applicant's evidence to ensure no identifying features are included; limiting the questions which can be asked to avoid trespassing on any part of the applicant's evidence contained in a 'confidential annex': http://webarchive.nationalarchives.gov.uk/20140212151345/http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/231111-S19-restriction-order-HJK.pdf

- restricting the disclosure or publication of the applicant's name, personal and professional addresses (past or present), image of the applicant whether artistic or photographic, any other information, including current occupation, which would tend to lead to the identification of the applicant save to any witness where to do so was relevant to the Inquiry's Terms of Reference; reference to the applicant by use of a cipher instead of his name: http://webarchive.nationalarchives.gov.uk/20150115114702/http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/military_evidence/restrictionorder-m004-amended.pdf

  and

  http://webarchive.nationalarchives.gov.uk/20150115114702/http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/key_documents/131104restrictionorder-kevinwright.pdf

- screening of the applicant in the event that he is required to attend court to give evidence under a cipher: http://webarchive.nationalarchives.gov.uk/20150902162348/https://www.litvinenkoinquiry.org/wp-content/uploads/2014/10/Restriction-Order-9.10.14-50109770_1.pdf

  and

  http://webarchive.nationalarchives.gov.uk/20150902162348/https://www.litvinenkoinquiry.org/wp-content/uploads/2015/01/Restriction-Order-28-1-15.pdf

14.2. Restriction by redactions made to evidence and documents or withholding that material in its entirety:

- Redaction of personal information; redaction of commercially sensitive information; redactions to reflect the conditions of confidentiality by which the applicant obtained the information being given to the Inquiry: http://webarchive.nationalarchives.gov.uk/20140212151345/http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/S19-Order-Schedule-29.11.12.pdf

- Redaction of personal information of individuals other than witnesses: http://webarchive.nationalarchives.gov.uk/20150115114702/http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/key_documents/120928amendedgro.pdf

- Redaction of parts of witness statements and exhibits provided to the Inquiry by named witnesses: http://webarchive.nationalarchives.gov.uk/20150423111725/http://www.midstaffspublicinquiry.com/sites/default/files/Restriction_Notice_8.pdf
- Redactions made to evidence and documents listed in a series of Schedules: http://webarchive.nationalarchives.gov.uk/20120809191124/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/globalrestrictionorder8911.pdf

14.3. Restricting the disclosure or publication of anything contained in a document or of any oral evidence given of the source of intelligence passed from one agency to the police, to be carried out by redaction and by limiting questions and answers while the public is in attendance at a hearing: http://webarchive.nationalarchives.gov.uk/20150406091509/http://azellerodneyinquiry.independent.gov.uk/docs/Restriction_Order_14_May_2012.pdf

14.4. Restriction of disclosure or publication of video and audio footage by limiting attendance in the court room; delaying publication of the transcript of the evidence until it has been checked to avoid revelation of the sensitive material: http://webarchive.nationalarchives.gov.uk/20150406091509/http://azellerodneyinquiry.independent.gov.uk/docs/Restriction_Order_Air_Surveillance_Video_2012.10.24.pdf

14.5. Restricting the disclosure or publication of sensitive training manuals and procedures: http://webarchive.nationalarchives.gov.uk/20150406091509/http://azellerodneyinquiry.independent.gov.uk/docs/Restriction_Order_2013.06.18.pdf

14.6. The measure of restricting a future witness's attendance in court whilst other witnesses give evidence was rejected: http://webarchive.nationalarchives.gov.uk/20150406091509/http://azellerodneyinquiry.independent.gov.uk/docs/Ruling_final_version_8_June_2012(1).pdf

14.7. Restricting the publication or disclosure of the evidence of a witness known by a cipher save as published in a redacted fashion on the Inquiry's website: http://webarchive.nationalarchives.gov.uk/20101210142120/http://billywrightinquiry.org/filestore/documents/rulings/Billy_Wright_Inquiry_Order_24032009.pdf

14.8. Restricting all medical evidence relating to the health or fitness of witnesses to give evidence: http://webarchive.nationalarchives.gov.uk/20150423111725/http://www.midstaffspublicinquiry.com/sites/default/files/Restriction_Notice_6.pdf

15. We should add at this stage that personal data such as home addresses and telephone numbers will be redacted by the Inquiry unless relevant in any event.

Part II – The Statutory Context and its Significance

16. Sections 1, 17, 18, 20, 22 of the 2005 Act are of relevance in the context of applications for restriction orders. So too is rule 12 of the Inquiry Rules 2006. We consider each in turn below.

Section 1 – Public Concern

17. Section 1(1) of the 2005 provides that:

> *"A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that-*
>
> *(a) particular events have caused, or are capable of causing, public concern, or*
>
> *(b) there is public concern that particular events may have occurred.*

18. It is clear from the above wording that a precondition for the setting up of a public inquiry under the 2005 Act is public concern in one or both of the senses used in the subsection. In the present case, events have caused public concern and there is further public concern that further events of a similar nature may have occurred.

19. There is a strong public interest in the Inquiry being able to carry out its work and get to the bottom of the matters which it is required to investigate in order to discharge its terms of reference. This aspect of the public interest is relevant to those instances where a balancing exercise falls to be conducted. For example, where an applicant contends that a redaction is in the public interest for the purposes of s.19(3)(b). In such a case the public interest in the restriction sought has to be weighed in the balance against the public interest in an open and thorough inquiry which will address the public concerns which have led to the Inquiry being set up.

20. In the Azelle Rodney Inquiry the Chairman specifically referred to s.1 when explaining the need for as public an inquiry as was possible. He put it in the following terms at paragraph 5(a) of his ruling on anonymity and screening dated 18 January 2012.

> *"...Given the subsequent need to devise and institute a by-pass of the legal problem, hopefully effective, and all that that has entailed, it will not be until September 2012 that the public hearing commences. In these*

circumstances, I refer to section 1 Inquiries Act as already cited: "public concern" is manifestly justified and has to be addressed. Granted that the public cannot receive the full true explanation for the delay, I put a premium on achieving as "public" an inquiry as it is possible so that at the least to counter or neutralise the obvious alternative surmise, namely a sustained "cover up". Again, I cite the Act, this time section 18(1) which enjoins me to seek to secure that members of the public can seek to secure that members of he public can "see and hear"."

Section 17 – The Statutory Duty of Fairness

21. Section 17 of the 2005 Act imposes upon the Chairman a statutory duty to act with fairness. It states:

> *(1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.*
>
> *(2) In particular, the chairman may take evidence on oath, and for that purpose may administer oaths.*
>
> *(3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).* (Emphasis added).

22. Whether Lord Justice Leveson (as he then was), in his capacity as Chairman of the Leveson Inquiry into press standards, had complied with the statutory duty of fairness was held to be the crucial issue in judicial review proceedings challenging his in principle decision to grant anonymity to certain journalists. Lord Justice Toulson explained why at paragraph 37 of his judgment in *R (Associated Newspapers Limited) v Leveson* [2012] EWHC 57 Admin; [2012] ACD 23:

> *"As to open justice, if permitting anonymity would further the purposes of the Inquiry without breaching section 17(3), a restriction under section 19 on disclosure of the witnesses' statements in unredacted form would ex hypothesi be permissible under section 19(3) and (4). It is for those reasons that I have said that the critical challenge is the challenge to the fairness of the Chairman's ruling."*

23. In that Inquiry anonymity, subject to conditions, was required in order to encourage journalists who feared career blight to come forward and provide evidence to the Inquiry on the culture and practices within news organisations.

Without anonymity there was a risk that witnesses would not come forward. An in principle decision that the Inquiry would be prepared to receive anonymous evidence from journalists was used to further the work of the Inquiry by encouraging whistle blowers to come forwards. The decision was upheld by the Administrative Court.

24. In considering fairness there were legitimate concerns on the one hand that anonymous evidence might prejudice newspaper organisations (although measures were in place to minimise the risk of prejudice: no newspaper group or individual manager was to be named by an anonymous witness, limited weight was to be attached to such evidence and it was open to journalists who did not recognise the picture painted by an anonymous witness to come forward and give evidence to the contrary). Weighed against the risk of prejudice on the other hand was the public importance of that Inquiry's work. Lord Toulson emphasised the weight to be attached to the public interest in a thorough and balanced inquiry. He was also careful to distinguish a public inquiry from adversarial proceedings. Paragraphs 53 to 56 of his judgment merit full quotation:

> *"53. Above all, it is of the greatest importance that the Inquiry should be, and seen by the public to be, as thorough and balanced as is practically possible. If the Chairman is prohibited from admitting the evidence of journalists wanting to give evidence anonymously, there will be a gap in the Inquiry's work, although the material (or similar material) is already in a real sense in the public domain. There is a point of detail about whether and at what stage Nick Davies' book came to be received by the Inquiry, but that is a point of secondary importance. If the court ruled that the Chairman could not lawfully admit evidence of the kind under consideration, and his report reflected that fact, the result would be that the Inquiry would not have examined a raft of available material. There would be cause for concern that in those circumstances the Inquiry would have failed in a significant regard to achieve its terms of reference, and the credibility of its findings and recommendations would be lessened. It would be open to the criticism of not having heard the full story.*
>
> *"54. It has to be stressed that this is an inquiry; it is not the same as a criminal trial or a disciplinary proceeding. Mr Warby said that the newspaper organisations are "in the dock" and in a metaphorical sense that is true; but it is true because an inquiry has been set up to try to explore as fully as it can the culture and the practices of the newspaper industry in the light of things which have given rise to public concern.*

" 55. In determining where fairness lies in a public inquiry, there is always a balance to be struck. I am not persuaded that there is in principle something wrong in allowing a witness to give evidence anonymously through fear of career blight, rather than fear of something worse. Fear for a person's future livelihood can be a powerful gag. Nor am I persuaded that the Chairman acted unfairly and therefore erred in law in deciding that on balance he should admit such evidence, subject to his considering it of sufficient relevance and being satisfied that the journalist would not give it otherwise than anonymously.

"56. The public interest in the Chairman being able to pursue his terms of reference as widely and deeply as he considers necessary is of the utmost importance. Although the names that have featured most prominently in newspaper coverage of the Inquiry have been largely the names of celebrities, newspaper magnates and politicians, any follower of the Inquiry will be aware that the Chairman has throughout been particularly concerned about the interests of ordinary members of the public, who do not have ready access to media lawyers. I say that in order to emphasise that the issues being investigated by the Inquiry affect the population as a whole. I would be very reluctant to place any fetter on the Chairman pursuing his terms of reference as widely and deeply as he considers necessary. I recognise that his rulings may cause damage to the claimant and other newspaper proprietors. However, such risk of damage will be mitigated to some extent (although not entirely, as I readily accept) by the fact that he will not use anonymous evidence to make specific findings against particular organisations. It is also important to recognise that the evidence in question will be part of a much wider tapestry and that it is open to the claimant and others to present balancing non-anonymous evidence."

Section 18 – Public Access to Inquiry Proceedings and Information

25. Section 18(1) of the 2005 Act creates a statutory presumption in favour of openness. It states:

(1) Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able

(a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;

(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.

26. As is clear from the wording above, the duty to make the proceedings at the Inquiry public is not absolute. It is qualified in two ways. First, it is expressly subject to the power to make a restriction notice or a restriction order under s.19. Second, the Chairman of an Inquiry is obliged to take such steps as he considers reasonable to secure the openness described in sub-paragraphs 18(1)(a) and 18(1)(b). However, the legislative presumption that 2005 Act inquiries, such as this one, should be public is obvious. Thus, the context in which an application for a restriction order under s.19 falls to be considered is as an exception to that general presumption.

Section 20 – Duration of Restriction Notices & Orders, their Variation and Revocation

27. Section 20 of the 2005 Act contains further provisions about restriction notices and orders. In particular, it addresses the duration of a notice or order, their variation or revocation. The section also clarifies the position where there are multiple restriction orders and/or notices. Section 20 provides as follows.

(1) Restrictions specified in a restriction notice have effect in addition to any already specified, whether in an earlier restriction notice or in a restriction order.

(2) Restrictions specified in a restriction order have effect in addition to any already specified, whether in an earlier restriction order or in a restriction notice.

(3) The Minister may vary or revoke a restriction notice by giving a further notice to the chairman at any time before the end of the inquiry.

(4) The chairman may vary or revoke a restriction order by making a further order during the course of the inquiry.

(5) 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 subsection (3), (4) or (7).

This is subject to subsection (6).

(6) After the end of the inquiry, disclosure restrictions do not apply to a public authority, or a Scottish public authority, in relation to information held by the authority otherwise than as a result of the breach of any such restrictions.

(7) After the end of an inquiry the Minister may, by a notice published in a way that he considers suitable

(a) revoke a restriction order or restriction notice containing disclosure restrictions that are still in force, or

(b) vary it so as to remove or relax any of the restrictions.

(8) In this section "restriction notice" and "restriction order" have the meaning given by section 19(2). (Emphasis added).

28. Thus, if the Chairman makes a restriction order which confers full or partial anonymity upon a person, without restriction of time, that protection will last indefinitely. The position would only change if the order was varied or revoked by the Chairman during the course of the Inquiry or by the Minister once the Inquiry has ended. The same would apply to a restriction order imposing redactions on documents.

29. It is implicit in the wording of s.20(3) and s.20(4) that the Minister cannot, during the course of the Inquiry, vary or revoke a restriction order made by the Chairman.

Section 22 – Privileged Information and Public Interest Immunity

30. Section 21 of the 2005 Act confers on the Chairman the power to require a person to give evidence, to produce documents or any other thing. Section 22 limits the ambit of section 21 by reference to existing rules of law. Section 22 states:

(1) A person may not under section 21 be required to give, produce or provide any evidence or document if –

(a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or

(b) the requirement would be incompatible with a Community obligation.

(2) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom.

31. Section 22 does not directly concern an application for a restriction order in relation to a document which has already been given, produced or provided to the Inquiry. Rather it relates to the earlier stage at which a document is first being required from a person by the Inquiry pursuant to a s. 21 notice. Successful objection to a requirement to produce prevents material from being considered by the Inquiry at all.

32. If a person is required to produce a document to the Inquiry and wishes to assert that there are public interest immunity grounds for withholding that document then he or she may raise the issue at that stage. Other examples of rules of law which might equally be relied upon at this stage are legal professional privilege, Parliamentary privilege, the privilege against self-incrimination, the privilege against incriminating a spouse or civil partner, a duty of confidence, or the Regulation of Investigatory Powers Act 2000.

33. However, there is nothing in the wording of either s.22 or s.19 of the 2005 Act which prevents a person from producing a document or other evidence to the Inquiry and then applying for a restriction order in relation to it. Doing so has the effect that the information can be considered by the Inquiry as evidence. The question which then arises under s.19 is not whether the Inquiry can take the material into account but rather whether public access to it should be restricted.

34. We turn to an example which may be of considerable significance to the Inquiry: government material which it might not be in the public interest to make public. An objection to the production of such material for use by the Inquiry in any way would need to be made under s.22 of the 2005 Act. The s.22 objection would then fall to be considered in accordance with the established procedures for determining issues of public interest immunity. These are set out in *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 1 AC 274 and *Al-Rawi v Security Service* [2012] 1 AC 531.

35. A new approach to public interest immunity was required in consequence of the decision in *Wiley* and the problems which had arisen in the *Matrix Churchill* case. The new approach was explained to Parliament on 18 December 1996 by the then Attorney-General, Sir Nicholas Lyell: see Hansard columns 949-958. In summary, and by way of quoting from this statement to the House, the "new approach" involves the following:

> *"The Government are committed to the principle that there should be the maximum disclosure consistent with protecting essential public interests...*

"Since [Wiley] Ministers have had a general discretion to disclose documents without the prior approval of the court, if they consider that to be in the overall public interest...

"Under the new approach, Ministers will focus directly on the damage that disclosure would cause. The former division into class and contents claims will no longer be applied. Ministers will claim public interest immunity only when it is believed that disclosure of a document would cause real damage or harm to the public interest.

"...The Government intend that the test shall be rigorously applied before any public interest immunity claim is made for any Government documents.

"This new, restrictive approach will require, so far as possible, the way in which disclosure could cause real damage to the public interest to be clearly identified. Public interest immunity certificates will in future set out in greater detail than before both what the document is and what damage its disclosure would be likely to do – unless to do so would itself cause damage that the certificate aims to prevent. That will allow even closer scrutiny of claims by the court, which is always the final arbiter."

36. Three distinct questions fall to be considered. First, whether the material passes the threshold test for disclosure in the relevant proceedings. Unless it does so, no public interest immunity issue can arise.

37. Second, if the threshold test is passed, whether the material identified attracts public interest immunity. The test is whether there is a real risk, as a result of the disclosure of the document or information, of serious prejudice / harm to an important public interest: *Wiley* at p281E-H per Lord Templeman; *R v H* [2004] 2 AC 134 at paragraph 36(3) per Lord Bingham; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 WLR 2653 at paragraph 34(ii) per Lord Justice Thomas and *Al Rawi* at paragraph 182. Consideration should be given as to whether safeguards may be imposed to permit the disclosure of the material. The sort of safeguards which are considered when public interest immunity arises in adversarial litigation are in fact the sort of measures which can be imposed in a public inquiry under s.19 of the 2005 Act. We return to s.19 in this context further below. Examples include restricting who can be present at the hearing, requiring confidentiality undertakings, redaction or gisting: see Lord Clarke in *Al Rawi* at paragraph 145(v) in the adversarial context.

38. A gist is more restrictive than redactions but will be justified where the risk of harm to the public interest that would be created by disclosure in a less restricted form

outweighs the public interest in knowing the scale of the redactions: *R(Maya Evans) v Secretary of State for Defence and Associated Newspapers Limited* [2013] EWHC 3068, per Lord Justice Richards at paragraphs 30 and 36.

39. Third, if applying the "real risk of serious harm" test the material attracts public interest immunity, the final question is whether the public interest in non-disclosure is outweighed by the public interest in disclosure of the material for the purpose of doing justice in the proceedings – referred to as the *Wiley* balance. The Government body from which the evidence is required must consider and balance the relevant competing public interests and agree to the disclosure of the material if it is satisfied that the overall interest favours production to the Inquiry. If not so satisfied, the decision shifts to the Chairman who will need to decide whether the document or other evidence must be produced to the Inquiry.

40. We consider that save in the most exceptional circumstances, the nature of this Inquiry is such that the more appropriate route for consideration of public interest issues will be s.19 of the 2005 Act. In other words that a Government body should produce the information to the Inquiry so that it may be used as evidence. The question for consideration will be what restrictions, if any, should be imposed on public access to that evidence.

41. On its face, s.19(3) provides two routes under which public interest considerations may be considered. The privilege against disclosure on public interest immunity grounds is a rule of law and therefore falls within the wording of s.19(3)(a). Public interest considerations are also expressly a permissible ground for a restriction order under the second limb of s.19(3)(b). The difference may in practice be academic. However, if a choice has to be made, we suggest that s.19(3)(b) better reflects the reality of the situation. This is because in adversarial litigation when relevant evidence is seen by a judge for the purposes of determining a public interest immunity question, and it is excluded, it must not be relied upon by the court. In a public inquiry, by the time s.19 falls to be considered, the question for the Inquiry is not whether the Inquiry panel can have regard to the material as evidence: it can. Rather, the question is whether restrictions should be placed on public access to the material. As we have explained above, a separate route, under s.22 of the 2005 Act, would need to be taken by a Government body contending that for reasons of public interest immunity the Inquiry should be prevented from using a relevant document at all.

42. The Chairman will, on an application for a restriction order on public interest immunity, made via the s.19(3)(b) route, need to consider the same three questions which fall to be considered in relation to a public interest immunity

application. He will, of course, need to have regard in particular to the matters mentioned in s.19(4).

43. In *R(Metropolitan Police Service) v The Chairman of the Inquiry into the Death of Azelle Rodney* [2012] EWHC 2783 (Admin), the court touched upon the different routes under s.19(3) in the context of a public interest immunity application. Lord Justice Pitchford stated as follows at paragraph 38.

> *"38. Public interest immunity ("PII") is a well known feature of the rule of law by which parties to legal proceedings, civil or criminal, will be prevented from disclosing evidence it would be against the public interest to disclose. It is a curious feature of section 19(3) that separate protection is given to evidence which must be restricted by a rule of law and evidence which it is necessary in the public interest to restrict as defined by subsections (4) and (5). Subsections (4) and (5) specify any risk of harm or damage which may be avoided or reduced by a restriction order including (but not limited to) death or injury, damage to national security, international relations, national economic interests and damage caused by the disclosure of commercially sensitive information. It is difficult to envisage evidence the "owner" of which is obliged not to disclose on the grounds of PII and which may be the subject of a restriction order under section 19(3)(a), which it would not also be in the public interest to restrict under section 19(3)(b). Ms Studd QC points out that there may be a duty of confidentiality owed by an inquiry, or the participants in an inquiry, which must be fulfilled notwithstanding the absence of any direct national or public interest save that the restriction order is "conducive to the inquiry fulfilling its terms of reference". We have doubts whether this is the explanation for the two-handed protection offered by section 19(3)(a) and (b) but this is not a conundrum with which this court is presently concerned because it is accepted on all sides that the two hour footage in the hands of the Inquiry is undoubtedly material in respect of which MPS is entitled to seek a restriction order".*

44. Turning now from public interest immunity to a discrete point relating to the producing of information to the Inquiry. Special considerations apply to information the disclosure of which is prohibited by Chapter I of Part I of the Regulation of Investigatory Powers Act 2000. Such information can by operation of the statute be disclosed no further than to the panel of an Inquiry and counsel to the Inquiry. Even disclosure to those persons can only be made where the panel is satisfied that the exceptional circumstances of the case make the disclosure essential to

enable the inquiry to fulfil its terms of reference. See Part I of the 2000 Act and especially s.17, s.18(7)(c) and s.18(8A) thereof.

Rule 12 – Potentially restricted evidence

45. Rule 12 provides (amongst other things) for material which is the subject of an application for a restriction order to be treated as if the order sought had been made until the application has been determined. Its effect is to ensure that the purpose of an application for a restriction order is not defeated before a decision has been made. Specific provision is made for limited disclosure in confidence to be made to another person of potentially restricted evidence where this is *necessary* for the determination of the application. Such a disclosure cannot be made without first affording the person who produced the document the opportunity to make representations.

46. The meaning of the word 'necessary' in rule 12 was considered by the Administrative Court in *R(Metropolitan Police Service) v The Chairman of the Inquiry into the Death of Azelle Rodney*. It was construed narrowly. At paragraph 42 of its judgement the Court held at follows:

> "*...In our judgment, the word "necessary" in rule 12(4) is not used in a sense synonymous with the words "convenient" or "desirable". Nor, despite the requirement upon the chairman in section 17(3) to have regard to the need to avoid unnecessary costs, does cost effectiveness have a role to play in his judgment; costs incurred in a properly conducted PII application are necessarily incurred. In our judgment, what is required is the chairman's conclusion that without limited disclosure the section 19 application cannot satisfactorily be determined..."*

Part III – Key Statutory Provisions and Rules of Law

For the Purposes of Section 19(3)(a) Inquiries Act 2005

47. In this part of our note we do not attempt an exhaustive examination of all of the statutory provisions, enforceable Community obligations or rules of law which could possibly justify a restriction order being made under s.19(3)(a) of the 2005 Act. However, we seek to consider the major statutory provisions and rules of law which are likely to arise. We have already considered public interest immunity in Part II above and so do not deal with it below.

Article 2 European Convention on Human Rights – the Right to Life

48. Article 2 of the European Convention on Human Rights ("the Convention") provides that everyone's right to life shall be protected by law.

49. It is well established that Article 2 imposes a positive obligation on contracting states to protect life. However, the threshold for that obligation to be engaged is a high one. There has to be a real and immediate risk to life before the authorities are required by Article 2 to take protective steps. If that threshold is reached then the authorities must do all that can reasonably be expected of them to avoid that risk. The seminal authority for these proposition is *Osman v The United Kingdom* [1998] EHRR 101. At paragraph 116 of its judgment the European Court of Human Rights stated:

> *"In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person... it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life... Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2... For the Court, and having*

> *regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case".* (Emphasis added).

50. Article 2 has been the subject of judicial consideration in the context of anonymity applications made in a number of public inquiries. The leading case on this issue is *In re Officer L and others* [2007] 1 WLR 2135, HL. The case arose from a challenge to a refusal to grant anonymity to police officers living in Northern Ireland. They were to give evidence in the Robert Hamill Inquiry. The appeal to the House of Lords confirmed that in all contexts, including a public inquiry, the positive obligation arises when the risk is "real and immediate" and that it is a high threshold. The case is also domestic authority for the proposition that for the purposes of Article 2 of the Convention the risk must be objectively well founded. Subjective fears are of themselves insufficient to engage Article 2. Lord Carswell (with whom Lords Hoffmann, Woolf, Brown and Mance agreed), having quoted from *Osman* expressed the position in the following terms at paragraph 20:

> *"Two matters have become clear in the subsequent development of the case law. First, this positive obligation arises only when the risk is "real and immediate". The wording of this test has been the subject of some critical discussions, but its meaning has been aptly summarised in Northern Ireland by Weatherup J in Re W's Application [2004] NIQB 67 at [17], where he said that "a real risk is one that is objectively verified and an immediate risk is present and continuing". It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words, the threshold is high. There was a suggestion in para [28] of the judgment of the court in R (on the application of A) v Lord Saville of Newdigate (No 2) [2001] EWCA Civ 2048, [2002] 1 WLR 1249 (also known as the Widgery Soldiers case, to distinguish it from the earlier case with a very similar title) that a lower degree would engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. I shall return to this case later, but I do not think that this suggestion is well founded. In my opinion the standard is constant and not variable with the type of act in contemplation, and is not easily reached. Moreover, the requirement that the fear has to be real means that it must be objectively well-founded. In this respect the approach adopted by Morgan J was capable of causing confusion when he held that the tribunal should have commenced by assessing the subjective nature of the fears entertained by the applicants for*

anonymity before going on to assess the extent to which those fears were objectively justified. That is a valid approach when considering the common law test, but in assessing the existence of a real and immediate risk for the purposes of Article 2 the issue does not depend on the subjective concerns of the applicant, but on the reality of the existence of the risk. As the Court of Appeal indicated (at [33]), the existence of subjective fears is not a prerequisite to the finding that there is a risk which satisfies the test of art 2 and, conversely, if a risk to life exists, Article 2 will be engaged even if the person affected robustly disclaims having any subjective fears. That is not to say that the existence of a subjective fear is evidentially irrelevant, for it may be a pointer towards the existence of a real and immediate risk, but in the context of Article 2 it is no more than evidence". (Emphasis added).

51. Commenting on this passage in *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1 AC, Lord Hope said (at paragraph 66):

> *"In In re Officer L [2007] 1 WLR 2135, para 20, Lord Carswell said that the real and immediate test is one that is not readily satisfied, the threshold being high. I read his words as amounting to no more than a comment on the nature of the test which the Strasbourg court has laid down, not as a qualification or a gloss upon it. We are fortunate that, in the case of this vitally important Convention right, the Strasbourg court has expressed itself in such clear terms. It has provided us with an objective test which requires no further explanation. The question in each case will be whether on the facts it has been satisfied."*

52. He also reiterated, at paragraphs 69 and 70, Lord Carswell's conclusion in *In Re Officer L* that the test is the same when the risk is attendant upon some action that an authority is contemplating putting into effect itself:

> *"... It was said that the [police officer] owed a duty of care to Giles because, by involving him in the prosecution of Brougham, in particular by requesting him to be a witness at Brougham's trial, he had exposed Giles to a risk to his life. The argument was that Giles was thereby placed into a special category of witnesses, not shared by all members of the public, to whom a lower threshold applied. This argument was encouraged by the Court of Appeal's observation in R (A) v Lord Saville of Newdigate [2002] 1 WLR 1249, para 28, that it was not appropriate to apply the Osman test in the case of soldiers or former soldiers who were to be called by the authorities to give evidence in circumstances where their lives were said to be at risk of terrorist violence. The judge in this case said that where it was the conduct of the state*

authorities that has exposed an individual to the risk of his life the Osman threshold is too high. If there is a risk on the facts, she said, then it is a real risk, and 'immediate' can mean just that the risk is present and continuing. The Court of Appeal said that this proposition was supported by the authorities [2007] 1 WLR 1821, para 76.

I would confine the decision in Lord Saville's case to its own facts. The way the test was expressed in Osman offers no encouragement to the idea that where the positive obligation is invoked the standard to be applied may vary from case to case. The standard is, as Lord Carswell said in In re Officer L [2007] 1 WLR 2135, para 20, constant and not variable with the type of act in contemplation."

53. A point that was expressly left undecided by the House of Lords in *Re Officer L* was whether, if Article 2 had been engaged, the public interest in the credibility of the Inquiry concerned could have been taken into account when assessing what protective steps would reasonably have been required by Article 2. At paragraph 21 Lord Carswell stated:

"Secondly, there is a reflection of the principle of proportionality, striking a fair balance between the general rights of the community and the personal rights of the individual to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they have to take to avoid being in breach of Article 2. As the European Court of Human Rights stated in Osman v United Kingdom 29 EHRR 245, para 116, the applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the state is not expected to undertake an unduly burdensome obligation: it is not obliged to satisfy an absolute standard requiring the risk to be averted, regardless of all other considerations: cf McBride, "Protecting Life: A Positive Obligation to Help" (1999) 24 EL Rev Human Rights Survey HR/43, HR/52. It has not been definitively settled in the Strasbourg jurisprudence whether countervailing factors relating to the public interest – such matters as the credibility of the inquiry and its role in restoring public confidence – as distinct from the practical difficulty of providing elaborate or far-reaching precautions, may be taken into account in deciding if there has been a breach of Article 2. It does appear that it may be correct in principle to take such factors into account (cf In re Donaghy's Application [2002] NICA 25(1) and In re Meehan's Application [2003] NICA

34), but I would prefer to reserve my opinion on the point." (Emphasis added).

Article 3 of the European Convention on Human Rights – Prohibition of Torture

54. Article 3 provides:

> *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

55. Torture was defined by the Strasbourg court in *Ireland v UK* (1978) 2 EHRR 25 as *"deliberate inhuman treatment causing very serious and cruel suffering"*; to be deliberate it must be intended to cause suffering, and it must be inflicted for a purpose.

56. Inhuman or degrading treatment need not be intended to cause suffering. The degree of suffering involved is lower, although ill treatment must attain a minimum level of severity if it is to fall within Article 3 and must cause *'either actual bodily injury or intense physical or mental suffering'*. The threshold level is fact sensitive:

> *"it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."* (Kudla v Poland 35 EHRR 198 at §91)

57. The Chairman of the Baha Mousa Inquiry, Sir William Gage, accepted the submission, agreed by all counsel, that the threshold test beyond which all reasonable protective measures must be taken was the same for Article 3 as it is for Article 2, namely a real and immediate risk. At paragraphs 16 & 17 of his Ruling on Detainees Anonymity Applications he stated as follows:

> *"16. Miss Hetherington submits, and all counsel agree, that the test of applicability for both Article 2 and 3 is the same as that described by Lord Carswell, namely that of a real and immediate risk to life or the risk to the freedom from torture, cruel and inhuman or degrading conduct. Miss Hetherington and Mr Garnham further submit that Lord Carswell's reference to the test as setting a high threshold is merely adjectival and not part of the legal test.*
>
> *17. I accept these submissions, although describing Lord Carswell's reference to a high threshold as adjectival does not seem to me to add anything of substance to assist in the application of the test. The words "real and*

immediate risk" demonstrate, as Lord Carswell states, that the test is not readily satisfied". (Emphasis added).

Article 6 European Convention on Human Rights – Right to a Fair Trial

58. Article 6 of the Convention concerns the determination of rights. Since s. 2 of the 2005 Act prohibits the determination by the Inquiry of any person's civil or criminal liability, Article 6 does not apply in the context of a statutory public inquiry.

59. The non-application of Article 6 of the Convention in the inquisitorial forum of an inquest was confirmed by the European Court of Human Rights in the case of *Bubbins v The United Kingdom*, Application no. 50196/99, 17 March 2005, at paragraph 156. The Strasbourg Court there stated as follows.

> *"156. The Court recalls in this connection that it has had occasion to discuss the compatibility of a judge's decision to grant anonymity to a prosecution witness with the requirements of a fair trial under Article 6 of the Convention. Admittedly the inquest proceedings did not involve the determination of a criminal charge against Officer B. For that reason, and in so far as the applicant relies on Article 6 to contest the fairness of the procedure, her complaint must be considered incompatible ratione materiae with the provisions of the Convention. Nevertheless, the principles which emerge from its Article 6 case-law on the issue of anonymous witnesses (see, for example, Doorson v. the Netherlands, judgment of 26 March 1996, Reports 1996-II, p. 470, § 70, Van Mechelen and Others v. the Netherlands, judgment of 23 April 1997, Reports 1997-III, p.p. 771-772, §§ 51-55) are not without relevance to its Article 2 assessment of whether the inquest guaranteed, firstly, the applicant a sufficient measure of participation in the investigation into the death of Michael Fitzgerald and, secondly, an appropriate forum for securing the public accountability of the State and its agents for their alleged acts and omissions leading to the death of Michael Fitzgerald."* (Emphasis added).

Article 8 European Convention on Human Rights – Right to Private and Family Life

60. Article 8 provides as follows:

> *"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or*

the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

61. Where an applicant for a restriction order relies on rights under Article 8 of the European Convention, the first question which arises is whether publication of the relevant material is something which falls within the ambit of that article. For this to be the case, the matters to be published or the likely consequences of publication must affect one or more of the overlapping personal interests protected by Article 8, namely private life, family life, home or correspondence. The Strasbourg court has held that private life is a broad concept which is incapable of exhaustive definition (*Costello-Roberts v the United Kingdom*, 25 March 1993, §36). It can include professional life *(Niemietz v Germany* (1992) 16 EHRR 97,29). However, it does not protect, for example, interpersonal relations of broad and indeterminate scope (*Botta v Italy*, 24 February 1998 at §35), and a minimum level of seriousness is required (*Gough v United Kingdom,* 23 March 2015 at §184).

62. Since Article 8 is a qualified right, where a course of action has constituted, or would constitute, an interference with the protections of Article 8(1), the second question is whether any such interference may be justified under Article 8(2) (that is, whether any limitation on the right is in accordance with law, necessary and proportionate, and for one or more of the legitimate aims set out in the article).

63. The Inquiries Act 2005 makes provision for the gathering of evidence (section 21), and hearing of evidence on oath (section 17), and further makes provision in relation to public access to evidence, documents and hearings (section 18), subject to such restrictions as may be imposed under section 19. This is supplemented by further provisions in the Inquiry Rules 2006 (see particularly rules 9, 10, 12 and 18). The gathering, hearing and publication of evidence in compliance with these provisions (including consideration of any application for a restriction order) is therefore "in accordance with law". However, any interference must also be necessary and proportionate and in pursuit of a legitimate aim under Article 8(2).

64. Where the interference involved in giving evidence in public or in publication of information would not be necessary, proportionate and in pursuit of a legitimate aim, Article 8 of the Convention will provide a legal justification for the making of a restriction order. The Chairman of the Azelle Rodney Inquiry, which was a 2005 Act Inquiry, considered Article 2, Article 8 and fairness when determining applications for screening and, in some cases, anonymity. That Inquiry was required to address the shooting by a police officer of Mr Rodney. The Chairman,

Sir Christopher Holland, made a provisional ruling on anonymity, which was then reviewed. In relation to the officer who fired the fatal shots, who was known as E7, it is clear from the terms of the review ruling that Article 8 played an important part in the Chairman's decision to permit E7 to give evidence whilst screened. Sir Christopher maintained his provisional decision to that effect for the reasons set out below which appear at paragraph 17 of the review ruling.

> *"I turn to screening as propounded in paragraph 7 hereof by reference to the facilities of Court 80. As to this I provisionally commented 'The evidence of this witness is central to this inquiry; it is inevitably going to be of some length; and ideally it should be open to public scrutiny and consideration. That said his Article 8 ECHR case is markedly strong. His subjective concerns for his subsequent safety and that of his family command careful respect.' There followed a provisional ruling upholding his application for screening. I have been invited by the deceased's family to revisit this aspect: I have done so, only to remain satisfied that the situation of this witness merits the screening provisionally ordered. If anything the material the subject of the review has now served to strengthen the merits of screening."*

65. Illustrating the fact-sensitive nature of the proportionality test under art.8(2) of the Convention, Sir Christopher concluded that there would be no unjustified interference with the Article 8 rights of other firearms officers for them to give evidence without screening given that they had the benefit of other protective measures. At paragraph 19 of his review decision he stated as follows:

> *"My primary consideration, as with use of "E" numbers, has to be the respective ECHR considerations. Essentially, with respect to each officer in turn, given safe means of access and egress provided for Court 80, given the sustained use of "E" numbers, given the sole focus upon April 2005 events meaning for most a relatively short sojourn in the witness box, does it remain necessary on ECHR grounds to add to "E" number anonymity, shelter behind a screen? I am not satisfied that exposure to those there present creates unjustified interference with Article 8 rights. I may add that by so ruling I am giving weight to the underlying concern of an inquiry established under the Inquiries Act 2005: that it should be public. Justification of a restriction order with respect to E7's evidence does not readily extend to the remaining thirteen "E" officers. The sustained resort to screening that is sought ill serves the public, and as one after another utilises the screen, simply to speak of what he did overtly and in daylight seven years before, the respective images of this Inquiry and the MPS are threatened."*

66. The Divisional Court rejected a challenge to the latter decision (reported as *R(E) v Chairman of the Inquiry into the death of Azelle Rodney* [2012] EWHC 563 (Admin)). Lord Justice Laws, with whom Mr Justice Simon agreed, described the central question in the following terms at paragraph 19.

> *"In his provisional ruling the Chairman had concluded that the high threshold of "real and immediate" risk to life, which had to be shown if a positive duty under Article 2 of the European Convention was to arise (see Officer L, paragraph 20), had not been met. That conclusion was not challenged at the oral hearing on 9 January 2012 and has not been challenged before us. The Chairman was therefore concerned to balance the factors arising at common law and under Article 8 which told for or against screening. The central question in this court is whether his striking of the balance was marred by any legal error". (Emphasis added).*

67. Lord Justice Laws explained the importance of openness in the context of the Azelle Rodney Inquiry and held that it justified the premium on achieving as public an Inquiry as possible which had been placed upon it by the Chairman. Paragraph 26 of the judgment is set out below.

> *"Next, there is, in my judgment, a very pressing public interest in openness on the facts of this case. It concerns, after all, a man sitting in a car with no weapon in his hand who has eight shots fired at him at close range causing his death. Because of intelligence considerations there is factual material which cannot be publicly divulged. There has been a long delay in the investigation. It seems to me the Chairman was fully entitled to put what he called a premium on achieving as public an Inquiry as possible, 'so that at the least to counter or neutralise the obvious alternative surmise, namely a sustained "cover up"'. The witnesses whom we are concerned with are central to the immediate circumstances of the shooting. As the Chairman said at paragraph 11(a), Silver's "potential contribution to allaying public concern is self-evident"'. Some evidence may have to be given in closed session."*

68. Article 8 of the Convention was also touched upon in the Northern Ireland Court of Appeal's decision in *Re A and others' Application for Judicial Review (Nelson Witnesses)* [2009] NICA 6. The judicial review arose from a decision of the Rosemary Nelson Inquiry to refuse anonymity to former members of the Royal Irish Regiment. The soldiers in question had been on duty in Lurgan on the day on which the prominent solicitor Rosemary Nelson was murdered in that town. The Inquiry was investigating whether any action or omission by police, army or other state agent facilitated or obstructed investigation into the killing. None of the

witnesses were going to be required to give oral evidence but their witness statements were to be published. They wanted to remain anonymous and feared that they would be at risk from terrorists if identified. The case is principally of interest for its consideration of the common law duty of fairness which we discuss below at paragraph 77. In holding that the Inquiry had not erred the majority (Lord Chief Justice Kerr and Lord Justice Higgins) did not consider Article 8 separately from the balancing act required by the common law duty of fairness. However, in his dissenting judgment Lord Justice Girvan, unlike the majority, specifically referred to Article 8. He confirmed the potential application of Article 8, the need for it to be specifically considered and, following observations made by Lord Bingham in *R v Davis* [2006] 1 WLR 3130, at [35], emphasised the distinction between adversarial and inquisitorial proceedings in this context. Having already concluded that the Inquiry had erred in its application of the common law duty of fairness, Lord Justice Girvan referred to Article 8 in the following terms at paragraph 33 of his judgment.

> *"Having regard to the conclusions which I have reached it is unnecessary to consider the issue of the potential impact of art 8 on the outcome of the appeal. This was an issue which was not really explored in the course of the appeal. The appellants wish for perfectly justifiable reasons to keep private their past associations with the Army. A refusal of anonymity impacts upon their privacy and their private lives. In R v Davis [2006] 1 WLR at 313 Judge P considered that exposing witnesses to the danger of retaliation engages art 8. The House of Lords in its decision did not deal with art 8. It concluded that the accused's right to a fair trial required that a defendant should be confronted by his accusers in order that he might cross-examine them and challenge their evidence. This pointed to the necessity of withholding anonymity in order to safeguard the rights of the accused under art.6. Had art 8 been in issue the requisite necessity would be established for the purposes of art 8.2. Such considerations as arose in R v Davis do not arise in an inquiry in which there is no trial and no accused and the inquiry is inquisitorial (see Lord Bingham's reference to anonymity in inquests at para [21] of his speech [2008] 3 All ER 461.) If art 8 is engaged the question would arise as to whether the necessity for revealing their past Army associations had been established. Had I come to a different conclusion on the other issues in the appeal further argument on the question of art 8 would, in my view, have been necessary. I considered that before the Inquiry reaches a final decision on the question of anonymity it would need to address the issue".*

69. Lord Bingham's reference to inquests, cited in the above quotation, was as follows:

> *"The House has approved the admission of anonymous written statements by a coroner conducting an inquest: see R v Attorney General for Northern Ireland, Ex p Devine [1992] 1 WLR 262. But, as Lord Lane CJ pointed out in the transcript of his judgment of the court in R v South London Coroner, Ex p Thompson, reported in part at (1982) 126 SJ 625, an inquest is an inquisitorial process of investigation, quite unlike a criminal trial; there is no indictment, no prosecution, no defence, no trial; the procedures and rules of evidence suitable for a trial are unsuitable for an inquest: see R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson [1995] QB 1, 17. Above all, there is no accused liable to be convicted and punished in that proceeding".* (Emphasis added).

70. These comments could equally have been made about a public inquiry which, in common with inquests, is inquisitorial in nature.

71. Although we have set out above the learning on Article 8 in the context of statutory public inquiries, we find it difficult to conceive of circumstances in which Article 8 would lead in practice to a different conclusion to that which would result from application of the common law and statutory duties of fairness.

Article 10 European Convention on Human Rights – Freedom of Speech

72. Article 10 provides as follows:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

73. In common with Article 8 of the Convention, Article 10 is a qualified right. It is of potential application in the context of a public inquiry and an application for a restriction order. For example, on the one hand a fearful witness may seek to rely

upon it in order to be able to express his or her evidence freely. On the other hand, the subject of an anonymous witness' evidence may wish to receive information about the identity of the witness in order to respond fully and freely. Precisely this situation arose in the Leveson Inquiry. However, the Administrative Court held that in practice neither Article 8 nor Article 10 added anything to the statutory duty of fairness. At paragraph 36 of his judgment in *R(on the application of Associated Newspapers Ltd) v Leveson* Lord Justice Toulson put it as follows:

> *"As to the European Convention, some of the factors relevant to conducting the Inquiry fairly are also the subject of Articles of the Convention, particularly Articles 8 and 10, but they do not add anything to his statutory duty. Applying those articles involves the self same exercise of acting fairly towards the different groups to which I have referred. Article 10, for example, might be seen differently when viewed from the perspective of the journalists who wish to be free to tell their experiences without fear of the risk of career blight, by the alleged victims and members of the public who wish to hear what the journalists have to say, and by the newspaper organisations who wish to receive information about the identity of the journalists so that they can respond fully and freely".* (Emphasis added).

The Common Law Duty of Fairness

74. The common law duty of fairness has played a conspicuous role in case law relating to anonymity in public inquiries. As discussed above (paragraph 21 onwards), the requirement to be fair has, since the coming into force of the 2005 Act, been given statutory force through s.17. There is no reason to suppose that there should be any difference in standard between the statutory and common law duties of fairness.

75. The common law duty of fairness, in the context of an application for anonymity during the course of a public inquiry, was considered in *In Re Officer L.* The House of Lords confirmed that discharge of the duty requires a balancing exercise between relevant competing factors. These can include the subjective fears of the witness concerned (in contrast to the position under Article 2 of the Convention). At paragraph 22, Lord Carswell stated as follows.

> *"The principles which apply to a tribunal's common law duty of fairness towards the persons whom it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision made in respect of an art 2 risk. They entail consideration of concerns other than the risk to life, although as the Court of Appeal said in the Widgery Soldiers case [2002] 1*

WLR 1249 at [8], an allegation of unfairness which involves risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well founded, can be taken into account, as the Court of Appeal said in the earlier case of R v Lord Saville of Newdigate, ex p A [1999] 4 All ER 860, [2000] 1 WLR 1855. It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health. It is possible to envisage a range of other matters which could make for unfairness in relation to witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination."

76. Lord Carswell in *In re Officer L* set out how he considered an Inquiry might approach a case in which both Article 2 of the Convention and the common law duty of fairness fell to be considered. His approach is set out at paragraph 29 of his opinion as set out below.

"In pursuit of this end, I suggest that the exercise to be carried out by the tribunal faced with a request for anonymity should be the application of the common law test, with an excursion, if the facts require it, into the territory of Article 2. Such an excursion would only be necessary if the tribunal found that, viewed objectively, a risk to the witness's life would be created or materially increased if they gave evidence without anonymity. If so, it should decide whether that increased risk would amount to a real and immediate risk to life. If it would, then the tribunal would ordinarily have little difficulty in determining that it would be reasonable in all the circumstances to give the witnesses a degree of anonymity. That would then conclude the exercise, for that anonymity would be required by Article 2 and it would be unnecessary for the tribunal to give further consideration to the matter. If there would not be a real and immediate threat to the witness' life, then Article 2 would drop out of consideration and the tribunal would continue to decide the matter as one governed by the common law principles. In coming to that decision the existence of subjective fears can be taken into account, on the basis which I earlier discussed (see para 22). For the same reasons as those which I have set out in para 20, however, I would not regard it as essential in every case to commence consideration of the issue by seeking to identify such subjective fears."

77. Application of the common law duty of fairness, post the decision in *Re Officer L*, was specifically considered in the judicial review proceedings arising from the Rosemary Nelson Inquiry. We have already referred to these proceedings at

paragraph 68 above. The Northern Ireland Court of Appeal held that the common law duty of fairness required the Inquiry to balance all relevant factors. It rejected the argument that once a risk to life had been established there had to be a compelling justification not to grant anonymity. That argument was itself based upon a passage in Lord Woolf's judgment in *R v Lord Saville of Newdigate ex parte A* [2000] 1 WLR 1855. The Northern Ireland Court of Appeal held that Lord Woolf's observation fell to be read in the factual context of the Bloody Sunday Inquiry. The level of risk to which the soldiers seeking anonymity in *ex parte* A were exposed was such that Article 2 of the Convention might have been engaged. Lord Chief Justice Kerr's reasoning is summarised at paragraph 24 of the judgment.

> *"Largely for this reason, I have concluded that Lord Woolf did not propound a rule intended to be of general application to the effect that where a risk to life arose, compelling justification was required before a claim for anonymity of witnesses could be refused. Put simply, the context here is different. Whereas in ex parte A the decision might well have infringed the applicants' rights under art 2, in the present case it has been determined that this does not arise. I am of the view that a risk falling short of that required to activate art 2 of ECHR falls to be assessed simply as one of a number of factors in an even-handed evaluation of competing interests rather than as a matter which requires to be offset by compelling justification".* (Emphasis added).

78. Lord Justice Higgins, having referred to the test suggested by Lord Carswell at paragraph 29 of *In re Officer L* (see above at paragraph 76), expressed himself in the following terms at paragraph 11 of his judgment.

> *"It is clear from these passages that the application of the test involves balancing various factors, not least the fears expressed by the applicants and the wider considerations of the nature of the Inquiry, in this instance, inter alia, whether the death of Rosemary Nelson was facilitated by any wrongful act within the Army or other State Agency. It is not a test in which the applications for anonymity could only be refused if there was compelling justification for doing so. The justification put forward for refusing anonymity is one of the factors to be weighed in the balance. As Mr Eadie QC, who with Miss Grange appeared on behalf of the Inquiry submitted, there may be instances in which compelling justification might be required to refuse the application, but this was not one of them. The Inquiry Panel correctly applied the test approved in Officer L's Application."* (Emphasis added)

79. Lord Justice Girvan (who did not dissent as to the applicable legal test required by the common law duty of fairness) put it this way at paragraph 23 of his judgment.

> *"What the common law requires is fairness to the individual witness in all the relevant circumstances of the individual case. The determination of what is fair requires the carrying out of a balancing exercise. The nature of such an exercise necessarily requires putting into the scales the arguments and factors favouring the granting or withholding of anonymity. The passage from Lord Woolf should not be read as stating a broad overriding principle that the common law duty of fairness in any case where a claimed risk to life and subject fears arise requires that anonymity should be granted in the absence of compelling reasons. How the balance is struck in individual cases will, of course, be fact specific. Where there is a risk to life of a witness the extent of the risk is a highly relevant factor to be put into the scales. Common sense and humanity would lead to the conclusion that the greater the risk the more persuasive the case for anonymity and the more the court would have to be persuaded that the countervailing factors are even more persuasive so as to lead to a refusal of anonymity. Using the terminology in Ex parte Brind [1991] AC 969 there would have to be a competing public interest of sufficient importance to justify withholding anonymity". (Emphasis added).*

80. That the common law requires a balancing exercise was accepted in *R(E) v Chairman of the Inquiry into the Death of Azelle Rodney*. We have already discussed this case at paragraph 66 above in the context of Article 8 of the Convention. Lord Justice Laws accepted that the decisions on anonymity and screening made by the Chairman of the Azelle Rodney Inquiry required the factors arising at common law to be balanced at paragraph 19 of his judgment. He emphasised the need for special scrutiny at paragraph 32 with the following words.

> *"These issues are important and they are sensitive. It is right that they should be scrutinised with special care. They were so scrutinised by Sir Christopher Holland and it seems to me, as I have already indicated, that his approach to the matter, following a very carefully evolved procedure expressly designed to ensure a high degree of fairness was, in the circumstances, well justified. I accordingly decline to grant judicial review leave."*

81. The duty of fairness will be violated if applicants are deprived of the opportunity, wherever possible, of viewing documentation or information which is likely to influence the decision-maker's mind absent some issue of confidentiality or public interest immunity: *Re Witnesses A, B, C, K and N's Application for Judicial*

Review, Northern Ireland Queen's Bench Division [2007] NIQB 30, per Gillen J, at [41], applying *Doody v SSHD* [1994] 1 AC 531, HL at 560D-G, per Lord Mustill. This judicial review arose from the Billy Wright Inquiry and the material paragraph from the judgment reads:

> *"I conclude that these words yield important insights into the concept of fairness. They accommodate the strong impulse for practical justice. Accordingly it is my view that the Panel risks offending against these principles if applicants are deprived of the opportunity, wherever possible, of viewing documentation or information which is likely to influence the decision-maker's mind absent some issue of confidentiality or public interest immunity".* (Emphasis added).

82. The considerations to be taken into account when balancing the competing interests between screening and the need for openness in a public inquiry were examined in *Re an Application for Judicial Review by the Next of Kin of Gerard Donaghy (Deceased), Northern Ireland Court of Appeal, unreported.* We have already referred to the case in the context of Article 2 of the Convention, this being one of the few examples in inquiry case law in which the high threshold for engagement of Article 2 was held to have been met: see paragraph 53 above. Accordingly, both the common law duty of fairness and the requirements of Article 2 fell to be considered. The judicial review proceedings arose from a challenge to the Bloody Sunday Inquiry's decision to permit certain police officers to give evidence from behind screens. Both the Northern Ireland Court of Appeal and Mr Justice Kerr (as he then was) were careful to explain how the fact that the issue arose in the context of a public inquiry distinguished it from adversarial proceedings.

83. Mr Justice Kerr stated that: *"The Inquiry is not an adversarial proceeding and the openness of the proceedings, although compromised is not destroyed. Moreover there is a balance to be struck between those seeking to reduce the risk occasioned by their giving evidence in open court and the preservation of public confidence"*. (See p.2 of the judgment).

84. In upholding the decision to permit screening Lord Justice Nicholson also accepted that the effect of screening was to impair but not to destroy openness. At page 12 of the judgement he stated as follows:

> *"As was submitted on behalf of the Tribunal the police witnesses will be named; their evidence will be heard, transcribed and reported; they will be seen by the Tribunal (who are the decision makers in what is an inquiry, not a trial) and by*

the lawyers (who will be able to make submissions as to the significance, if any, to be attached to the "demeanour" of the witness and the proceedings will still take place in public)".

85. The case is also of interest because the Court of Appeal rejected an argument that reliance upon risk assessments provided by the Police Service of Northern Ireland undermined the independence of the Bloody Sunday Inquiry: see page 8 of the decision.

86. A failure to have regard to a previous grant of anonymity constitutes a breach of the common law duty of fairness whether or not the terms of the previous grant of anonymity amounted in law to a legitimate expectation. However, a pre-existing grant of anonymity is not necessarily determinative but a factor to be considered in the balancing exercise: *R v Lord Saville of Newdigate and others sitting as The Bloody Sunday Inquiry, ex parte B, O, U and V* (unreported, 30 March 1999, CA). In that case the Bloody Sunday Inquiry's decision that the soldiers concerned would be granted partial but not full anonymity was held to be flawed. The Tribunal had failed to take into account the anonymity granted to those soldiers in the 1972 Inquiry into the same events held by Lord Widgery. Lord Woolf stated as follows.

"Legitimate expectation can, and often is only regarded as one aspect of the general requirement of fairness which the court on an application for judicial review has a responsibility to safeguard.

"...

"However in deciding what is appropriate and what is fair in relation to the soldiers, what Lord Widgery had said in 1972 could not be ignored; a clean sheet approach, which second tribunal could be said to have adopted was not acceptable.

"...

"To reveal the names now would be in direct conflict with the anonymity granted by the Lord Chief Justice in 1972 because it would be possible to discover who appeared under which letters in 1972.

"When the matter is reconsidered by the tribunal they should take into account what are no more than obvious inferences which are to be drawn from what Lord Widgery said. They do not bind the second tribunal to take any particular course, but they do indicate that the second tribunal are required to take into

account matters which so far they may not have taken into account having regard to the reasoning which they gave". (Emphasis added).

87. Lord Justice Ward agreed. He expressed himself as follows.

> *"There may be a risk that that anonymity would be imperilled by their giving evidence* [original emphasis]*. Such a risk would undermine the protection which they were given by Lord Widgery and so undermine the basis upon which they gave evidence to him. That risk and their legitimate expectations in maintaining their anonymity were relevant factors to take into account and the Saville Tribunal were in error in ignoring them in the way that they did. The assessment of those matters and the weight to be given to it is of course entirely a matter for them. Other factors, such as public confidence in their deliberations, are obviously among the other relevant matters which they must assess and weigh and bring into the appropriate balance".* (Emphasis added save where stated to the contrary).

88. We dwell on this decision because it may be that undercover police officers have been given assurances by their forces about anonymity. If so, the circumstances are different from those considered in The Bloody Sunday Inquiry but any assurance will fall to be taken into account in its factual context. The Inquiry will need to know what assurance, if any, has been given and in what circumstances. The Court of Appeal in The Bloody Sunday case was critical of the Bloody Sunday Inquiry for not investigating in more depth the details of the grant of anonymity in 1972.

89. In the same case Lord Justice Otton not only agreed that the duty of fairness was engaged and had been breached. He also questioned whether it was fair to impose upon a person seeking anonymity the burden of justifying their claim. He put it as follows:

> *"For my part, I would also go so far as to suggest with respect to the distinguished members of the tribunal, that they might wish to reconsider the fairness of imposing the obligation "on those who seek anonymity of any kind to justify their claim", as indicated in the tribunal's decision (ref ADL p.369), and paragraphs 9 and 10 of their solicitor's affidavit. Similarly, they may wish to revisit their requirement that there must be "concrete evidence of specific threat". This is particularly so in the light of that part of their July statement which is as follows:*
>
> > *"Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of*

that task does not necessarily require that the identity of everyone who gives evidence to the Inquiry should be disclosed in public. The Tribunal will know the identity of all witnesses and, unlike a court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary.

"Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth. Witnesses are unlikely to come forward and assist the Tribunal if they believe that by doing so they will put at risk their own safety or that of their families. Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the families and the wounded contend, but who will not co-operate with the Tribunal without assurances as to their anonymity."

"I accept Mr Christopher Clarke QC's submission that as a matter of law no legitimate expectation of any kind arises. However, it is worth bearing in mind that the genesis of the concept of legitimate expectation is the requirement of the decision maker to act fairly. It may still be possible for the tribunal to reach a decision that it would be fairer to impose the obligation on those seeking to remove the anonymity (rather than on those seeking to sustain it) and to satisfy the tribunal that there is no real or significant risk or some other formula which is less onerous on the soldiers." (Emphasis added).

Duty of Confidence

90. The unauthorised use or disclosure of information which has the necessary quality of confidence about it and has been imparted to the recipient in circumstances importing an obligation of confidentiality is prohibited by the law of tort. Information which gives rise to a reasonable expectation of privacy is also protected from misuse. Other legally binding obligations of confidence may arise in other circumstances, for example by operation of statute or as a matter of contract. The duty of confidence may be outweighed by the public interest in disclosing the confidential information, for example if it is matter of real public concern. Accordingly, it will be a matter for the Chairman, if confidence is asserted, to conduct a balancing exercise taking all relevant circumstances into account when deciding whether and, if so, to what extent restrictions should be ordered. Articles 8 and/or 10 of the Convention (including the freedom to receive information under Article 10) may be engaged, depending on the facts. Where both are engaged, the correct approach to resolving a conflict of those rights was

explained in *Re S (A child)* [2005] 1 AC 593 at paragraph 17 in the following terms.

> *"The interplay between Articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 AC 457. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither Article has* as such *precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case".*

Part IV – The Neither Confirm Nor Deny Policy

91. The practice of the police and some other government departments of neither confirming nor denying requests for information in certain circumstances is often referred to using the acronym 'NCND'. We are aware that it is the position of the Metropolitan Police that it will publicly neither confirm nor deny whether a person is or has been an undercover police office. The same approach has been adopted by Operation Herne.

92. We note that the Government's rationale underlying the policy is explained in the witness statement of Mr McGuinness which has been provided to the Inquiry and posted on the Inquiry's website. The rationale has also been explained in various authorities. One example is that given by Lord Chief Justice Carswell in the Northern Irish case of *In re Scappaticci* [2003] NIQB 56. The context of that case was intelligence gathering in relation to a violent terrorist organisation in Northern Ireland. The claimant sought official confirmation that he was not an agent fearing that newspaper articles and television coverage suggesting that he had informed on the Irish Republican Army had put his life at risk. The Northern Ireland Office's decision neither to admit nor deny whether Mr Scappaticci was an informer was upheld by the court. Lord Chief Justice Carswell explained why at paragraph 15 of his judgment, set out below.

> *"To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some case endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent so possibly placing his life in grave danger.*
>
> *"...If the Government were to deny in all cases that persons named were agents the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be greatly reduced. There is in my judgment substantial force in these propositions and they form powerful reasons to maintain the strict NCND policy."*

93. *In re Scappaticci* is but one example of a case in which the 'neither confirm nor deny' policy has been respected by a court. The courts have long recognised the legitimacy of the policy as a means of protecting those interests which it serves to protect. In cases where those interests involve national security the courts are very slow to take a different view from the government as to whether national security will be threatened if the policy is not applied: *McGartland and Another v Secretary of State for the Home Department* [2015] EWCA Civ 686, at paragraph 38. We explore other contexts further below (see paragraph 99 onwards).

94. It is important to recognise that the 'neither confirm nor deny' policy is neither a rule of law nor a legal principle. That this is the case is clear from the authorities. For example, Lord Justice Burnett stated so in terms at paragraph 74 of his judgment in *Al-Fawwaz v Secretary of State for the Home Department* [2015] EWHC 166 (Admin):

> *"NCND is not a rule of law or legal principle but a practice which has been adopted to safeguard the secrecy of the workings of the intelligence agencies. It is also relied upon by others such as the police and HM Revenue and Customs in connection with some aspects of their work..."*

95. Consequently, when the policy is invoked in the context of litigation, a court is not automatically obliged to respect the policy. Lord Justice Maurice Kay communicated this proposition forcefully at paragraph 20 of his judgment in *Mohamed and another v Secretary of State for the Home Department* [2014] EWCA Civ 559 which is set out below.

> *"Lurking just below the surface of a case such as this is the governmental policy of "neither confirm nor deny" (NCND), to which reference is made. I do not doubt that there are circumstances in which the courts should respect it. However, it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so. In the present case I do not consider that the appellants or the public should be denied all knowledge of the extent to which their factual and/or legal case on collusion and mistreatment was accepted or rejected. Such a total denial offends justice and propriety. It is for these fundamental reasons that I consider the appellants' principal ground of appeal is made out. The approach to their abuse of process applications was*

largely flawed. I make no comment on the merits of those applications." (Emphasis added).

96. The above quotation is also authority for the further important proposition that the foundation of the policy is public interest. Consequently, application of the policy is to be regarded as a subset of public interest immunity. Exceptions can and should be made where there is a more important countervailing public interest. Thus, in *McGartland* the court proceeded on the uncontested basis that:

"Reliance on NCND has to be justified on grounds of public interest and it is ultimately for the court to decide whether the public interest sought to be protected by NCND outweighs the public interest in the administration of justice." See paragraphs 37 & 41.

97. Exceptions are made to the 'neither confirm nor deny' policy by state bodies. For example, in *Baker v Secretary of State for the Home Department,* a decision of the Information Tribunal, the Tribunal considered what it described as "admitted exceptions" made by the Security Service at paragraphs 33 & 34.

"33. There are some well-established circumstances in which the Service does acknowledge that information has been collected and is still held. Sometimes, the information may be released. These circumstances, as Mr Burnett QC put it in his oral submissions to us, can be grouped together as cases where the person concerned already knows "conclusively" that there is information held upon him. Another situation which can arise is where the Service itself decides that the acknowledgement should be made, and even that the information should be published, because that is seen as assisting the proper performance of its statutory functions, or as otherwise being in the public interest. This too becomes a case of "official confirmation" that the information is held. These and similar cases, Mr Burnett QC submits, are "well recognised exceptions" to the policy of answering requests with some variant of the formula NCND. They are "dictated by common sense".

"34 This group of cases (which is not closed) includes:

(a) Members or former members of agencies who know that data are held.

(b) Individuals who are subject to removal from the United Kingdom on grounds of national security who have become conclusively aware of Security Service interest in them.

(c) Those involved in criminal proceedings who have conclusively become aware of Security Service interest in them.

(d) Others in whom Security Service interest has been publicly confirmed in [Court or other] proceedings".

"We shall call these the "admitted exceptions" to the NCND policy".

98. Three further examples of instances in which there had been voluntary departures from the 'neither confirm nor deny' policy were identified by counsel to the Litvinenko Inquest (as it then was) in their submissions on public interest immunity. First, there were departures made by Sir Richard Dearlove, Director of Operations at the Secret Intelligence Service, during the course of his evidence to the Diana, Princess of Wales inquests. Second, departures were made by the then Foreign Secretary in relation to the death of Neil Heywood in China. Third, departures were made by witnesses from the Secret Intelligence Service and Government Communications Headquarters during the course of the inquest into the death of Gareth Williams. See paragraph 5 of the submissions which can be found at: http://webarchive.nationalarchives.gov.uk/20150902162348/https://www.litvinenkoinquiry.org/wp-content/uploads/2012/12/counsel-to-the-inquest-submissions-19.2.13-50090873_11.pdf

99. In addition to exceptions voluntarily made, there are numerous examples of cases in which courts and tribunals have declined to follow the policy. An example of this is the case of *Baker* cited above. The appellant was a Member of Parliament. He wished to know whether the Security Service held or had held information about him. The Security Service's blanket policy was to give a 'neither confirm nor deny' response to such requests unless the case fell within one of the admitted exceptions set out above. The existence of a blanket policy in these circumstances was held to contravene Article 8 (set out at paragraph 60 above) on the ground that it was wider than necessary to protect national security. It was common ground that some personal data relating to individuals were processed (held) by the Security Service which could be released by them without endangering national security (paragraphs 83 - 84, 113(B)).

100. Not every circumstance in which there is a blanket policy of giving a 'neither confirm nor deny' answer in response to a request will be unlawful. Whether it will be so is fact sensitive. In *R(Manzarpour) v Secretary of State for the Home Department* [2014] EWHC 1086 (Admin) the policy of refusing to confirm or deny whether an extradition request has been made or received until such time as a person is arrested in relation to the request was upheld:

"The Defendant relies heavily upon the blanket policy, which is set out in Hansard in the text of a Parliamentary answer by the Minister of State at the Home Office, Lord Henley, on 1 May 2012, but which is said to have been in place for at least ten years, namely:-

> *"As a matter of longstanding policy and practice, we will neither confirm nor deny whether an extradition request has been made or received until such time as a person is arrested in relation to the request, so that people do not have the opportunity to escape justice by leaving the country before they are arrested."*

"It is plain that the UK Government is entitled, in the exercise of prerogative or common law powers, to have a blanket policy (see R(Sandford) v Secretary of State for Foreign and Commonwealth Affairs [2013] 1 WLR 2938), and the justification for the policy is summarised in the Parliamentary Answer. If an affirmative answer is given to such a question, then the opportunity is being given to a person whose extradition has been requested by a friendly state, to evade and frustrate that extradition request, in breach of the UK Government's international obligations. Unless the same answer – neither confirm nor deny (NCND) – is given in every case then an inference will inevitably be drawn by the questioner in a given case from a refusal to answer."

101. The claimant in *Manzapour* wished to know whether he would be arrested if he returned to the United Kingdom in circumstances where he feared that an unmeritorious extradition request might have been made. It was of relevance in *Manzapour* that the defendant had considered whether to make an exception to the blanket policy but decided that there was no need to do so. Moreover, it was also significant that there were strong protections within domestic law to prevent an unjust extradition (including any violation of the claimant's rights under Article 8 of the Convention) if there had in fact been an extradition request. See paragraphs 14-16.

102. Returning to the theme of instances in which courts or tribunals have declined to follow the 'neither confirm nor deny' policy, a second example is *Belhaj and others v Security Service and others* [2015] UKIPTrib 13_132-H. It illustrates how the question whether 'neither confirm nor deny' should be respected in a particular case is not an all or nothing affair. The case was heard by the Investigatory Powers Tribunal. It concerned whether the claimants' legal professionally privileged communications had been intercepted, analysed, used, disclosed or retained. By the time of the relevant hearing the respondents had already conceded that from January 2010, the regime for the interception/obtaining,

analysis, use, disclosure and destruction of legally privileged material had not been in accordance with the law for the purposes of Article 8(2) of the Convention and was accordingly unlawful.

103. The relevant issue was whether the open decision should state whether any of the claimants' privileged communications had been intercepted etc. and, if so, what details should be made public. The respondents contended that the 'neither confirm nor deny' policy should be respected and the answers to the above questions should remain confined to a closed ruling. The Tribunal decided that the public interest in making known that there had been unlawful activity in relation to the individual claimants outweighed the interest in respecting 'neither confirm nor deny'. However, it went on to conclude that 'neither confirm nor deny' and the public interest which underpinned it nevertheless had a role to play in deciding how much detail to make public. The tribunal said, at paragraph 19:

> *"We consider that it is contrary to the interests of the public and inconsistent with public confidence in this Tribunal, who are trusted to investigate matters, which investigation for the most part has to be carried out in closed proceedings, for the situation to be that the answer of no determination by reference to s.68(4)(a) could mean that there has been no interception, or could mean that there has been lawful interception (both as now, in order to preserve NCND) or could mean that there has been unlawful interception. That level of ambiguity would place the validity of all the decisions of this Tribunal in doubt. The Tribunal has been entrusted with the task of investigating complaints, to a large extent in closed proceedings, and without divulging details which might place security at risk. It would, in the Tribunal's judgment, undermine public confidence that Parliament had created a means of holding the relevant public agencies to account, if the Tribunal's findings of unlawful conduct by the Intelligence Agencies could be concealed on the basis of a non-specific submission of a risk to public safety."*

104. It added, at paragraph 21:

> *"We do not agree that NCND has no longer any applicability at all after a successful complaint... Certainly the Tribunal must have regard to matters such as those set out in paragraph 7 above, whose disclosure could have very damaging effects on the ability of the Respondents to protect the public... If, as will be the case, the making of a determination in favour of a complainant thereby discloses that there has been interference with a complainant's Convention rights, that is a consequence of such contravention, and in our judgment cannot be avoided. NCND is not in itself a statutory rule... It will however remain the duty of the Tribunal to bear in mind in supplying such*

additional information that it is under the Rule 6(1) duty to secure the continued protection of the public by the Respondents."

105. *Chief Constable of Greater Manchester Police v McNally* [2002] 2 Cr App R 37 617 is an example in the context of civil litigation against a police force in which the public interest in doing justice between the parties was held, on the particular facts, to outweigh the public interest in neither confirming nor denying whether a person was a police informer. Although both the factual and legal context is very different, we mention the case because of the confirmation given in the judgment of the need to balance competing public interests in a case-specific manner. Lord Justice Auld reflected upon developments in the case law in the following terms at paragraph 21.

> *"The acceptance of the Court in Savage, Powell and Whitmarsh of the need to soften the rigidity of Lord Diplock's statement of the law in D v NSPCC so as to permit a balance of competing public interests in a case specific manner is part of a wider jurisprudential move away from near absolute protection of various categories of public interest in non-disclosure. See, for example, the observations of Lord Woolf in R v Chief Constable of West Midlands Police, ex p. Wiley [1995] Cr.App.R. 342; [1995] 1 AC 274, HL, at 288D-291F, and the approach of Sir Thomas Bingham M.R. in Taylor v Anderton [1995] 1 WLR 447, CA, at 462F-H and 465F-G. Now, with the advent of Human Rights to our law, this move has the force of European jurisprudence behind it; see Osman, at paras 149-154; Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249 at 288 and 291, paras 72 and 778; and Brown v Stott [2001] 2 WLR 817, PC, per Lord Bingham of Cornhill at 824D-828B and 836B-D, per Lord Steyn at 839C-840A and the Right Hon. Ian Kirkwood at 862B-E. Although the reasoning in these cases was directed in the first instance to the extent and manner of application of the Article 6 right of fair trial when confronted by a conflicting public interest claim, it is plain from the various formulations of the principles to be followed that that is simply the other side of the coin. Thus, Lord Bingham, in Brown v Stott, put the matter in the following way at 836B-D:*
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> > *"The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute.Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing non greater qualification than the situation calls for ... The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual*

differences and recognising differences of degree. Ex facto oritur jus. The Court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see Sporrong and Lonnrothj v Sweden (1982) 5 E.H.R.R. 35 at 52, para. 69; Sheffield and Horsham v United Kingdom (1998) 27 E.H.R.R. 163 at 191, para.52". (Emphasis added).

106. *DIL and Others v Commissioner of Police of the Metropolis* [2014] EWHC 2184, QB is a case of particular interest because it concerns the 'neither confirm nor deny' policy in the context of events which the Inquiry will be investigating. All of the litigants in that case are core participants in the Inquiry. However, we should make clear at the outset of our consideration of that case that the Inquiry is not bound by its outcome. The court's assessment of the competing public interests was undertaken in the context of private law claims for damages and not a public inquiry with its particular need for openness. Moreover, there have been significant factual developments since DIL was decided. The Metropolitan Police has issued an apology to all of the claimants (amongst others) and settled their civil claims. Lord Justice Bean reviewed the development of the law in relation to the way in which courts have treated the public interest in protecting the identities of agents and informers at paragraphs 25-38. The passage is too long to quote here in full but repays reading.

107. In summary the evolution of the learning, in the context of adversarial litigation, considered by Lord Justice Bean was as follows:

    (1) The common law has long recognised a rule of policy whereby the identities of informers must not be revealed: *Attorney General v Briant* (1846) 18 M & W 168.

    (2) The general principle that the identity of an informer must not be disclosed is subject to the duty of the trial judge to ensure the fairness of the trial: *Marks v Beyfus* (1890) 25 QBD 494.

    (3) There is a strong, and absent any contrary indication, overwhelming public interest in keeping secret the source of information; but there is an even stronger public interest in allowing a defendant to put forward a tenable case in its best light: *R v Agar* (1990) 90 Cr App R 318.

    (4) Self disclosure by an agent or informer does not necessarily obviate the need to respect the 'neither confirm nor deny' policy. It depends on the facts. Compare *Savage v Chief Constable of Hampshire* [1987] 1 WLR

1061 (civil claim allowed to proceed) with *Carnduff v Rock* [2001] 1 WLR 1786 (civil claim struck out).

(5) Competing public interests must be balanced in a case specific manner: *Chief Constable of Greater Manchester Police v McNally* (see paragraph 105 above); *AKJ v Commissioner of Police for the Metropolis* [2013] 1 WLR 2734, QB (see for instance paragraph 217), CA; *Mohamed and CF v Secretary of State for the Home Department* [2014] EWCA Civ 559 (see paragraph 20).

108. In relation to self-disclosure, the Court of Appeal in *Savage* posited some of the reasons why it *might* remain in the public interest not to reveal the identity of an informer if they applied in a particular case. They included if disclosure would: assist others in criminal activities; reveal police methods of investigation; hamper their operations; indicate the state of inquiries in relation to a particular crime; or give rise to extreme and urgent danger to the informer (see paragraph 30). The claimant in *Savage* was suing for payments which he alleged the police had agreed to make in return for information. On the facts of that case the public interest favoured permitting his claim to proceed. In *Carnduff* the claimant was similarly claiming payment for assistance and provided to the police. In his case the balance of competing public interests was held to fall the other way. It was held that a fair trial would inevitably involve the disclosure of information and material by the police, the disclosure of which would not have been in the public interest. In particular, how the police go about the delicate business of tracking and catching serious professional criminals.

109. Since *DIL*, the Court of Appeal in *Al-Fawwaz* has confirmed (at paragraph 75) that the fact that an individual seeks confirmation of what he describes as self-reporting of a relationship does not, without more, undermine the application of 'neither confirm nor deny'.

110. Lord Justice Bean summarised the guidance which he had derived from the authorities which he had reviewed as follows:

"(1) There is a very strong public interest in protecting the anonymity of informers, and similarly of undercover officers (UCOs), and thus of permitting them and their superiors neither to confirm not deny their status; but it is for the court to balance the public interest in the NCND policy against any other competing public interests which may be applicable (McNally; Mohamed and CF v SSHD).

"(2) There is a well-established exception in a criminal trial where revealing the identity of the informer or the UCO is necessary to avoid a miscarriage of justice (Marks v Beyfus; R v Agar): this does not arise in the present case.

"(3) Even where an individual informant or UCO has self-disclosed, the police (or the Secretary of State) may nevertheless be permitted to rely on NCND in respect of allegations in the case where to admit or deny them might endanger other people, hamper police investigations, assist criminals, or reveal police operational methods, (Savage; Carnduff)."

111. Balancing the competing interests in the civil claims before him, Lord Justice Bean concluded that there was no longer any legitimate public interest entitling the Commissioner to maintain a 'neither confirm nor deny' stance in respect of "the general allegation". The general allegation was that officers of the Metropolitan Police Service, as part of their work as undercover officers and using false identities, engaged in long term intimate sexual relationships with those whose activities the Metropolitan Police Service wished to observe; and that this was authorised or acquiesced in by senior management.

112. In coming to this conclusion Lord Justice Bean made an important distinction in relation to operational methods. He distinguished legitimate methods from the illegitimate and current from past in the following terms at paragraph 42 of his judgment. We consider that such distinctions fall to be considered not only in the context of adversarial litigation but also in the context of the Inquiry.

"One of the justifications for NCND is that police operational methods should not be revealed. This is my view clearly intended to apply to operational methods which continue to be in use or are likely to be used in future. Moreover, just as (in the well-known words of Page Wood V-C in Gartside v Outram (1856) 26 L.J.Ch 113) "there is no confidence as to the disclosure of iniquity", so there can be no public policy reason to permit the police neither to confirm nor deny whether an illegitimate or arguably illegitimate operational method has been used as a tactic in the past".

113. As to the question whether the Metropolitan Police had to respond substantively to allegations that individual men with whom the claimants had relationships were undercover officers the Court considered each case on its own facts. All of the men had by that stage been publicly named in the media. Some had self-disclosed and some had been the subject of official confirmation. The Court concluded that the defendant could no longer rely upon its 'neither confirm nor

deny' policy in relation to "Jim Sutton" and "Bob Robinson". In both cases there had been official confirmation that they were undercover police officers. "Jim Sutton" had been identified as such by the Commissioner and "Bob Robinson" by the IPCC. In the latter case, the Court also relied on the fact that "Bob Robinson" was no longer in the police and had self-disclosed.

114. The Court did not require the defendant to either admit or deny whether "Mark Cassidy" and "John Barker" were undercover police officers. In each case the basis for this decision was that neither had self-disclosed or been officially named as undercover police officers.

115. Overall, it is clear that whether or not the 'neither confirm nor deny' policy should be respected or departed from is fact sensitive and also dependant upon the legal context. Lord Justice Burnett put it this way at paragraphs 78-79 of his judgment in *Al-Fawwaz*:

> *"78. Mr Friedman's reliance on the claimant's alleged self-reporting of his relationship with MI5 does not carry him home, in my view. The position is similar to that encountered in both AH and CE where the argument did not prosper. The reasons for the NCND policy do not fall away in self-reporting cases. Neither does the extensive discussion in journalistic material of the claimant's alleged links with MI5 to which he drew our attention. He has pointed to other cases in which a relationship with the intelligence agencies has been confirmed to provide succour to the argument that there should be confirmation (or denial) in his case. A well-known instance relates to Abu Qatada (Mohamed Othman). In an appeal against a deportation order before the Special Immigration Appeals Commission (SC/15/2002) he relied upon the content of three interviews with MI5, which were confirmed and the records disclosed into the open proceedings. It is not clear from the report whether disclosure was resisted by the Secretary of State and ordered by SIAC, or volunteered by the Secretary of State.*
>
> *"79. Either way, that example provides an illustration of the flexibility of approach to NCND and that individual judgements are called for given the particular circumstances and legal context of the request for disclosure. There are instances, and Abu Qatada may have been one, where a departure from NCND was considered necessary in the context of the proceedings in hand or because it positively enhanced national security. One cannot know because the judgment does not deal with why disclosure was made".* (Emphasis added).

116. It is open to a state body wishing to apply for a restriction order in order to give effect to the 'neither confirm nor deny' policy to apply either s.19(3)(a) and/or s.19(3)(b) of the 2005 Act. An application can be made under s.19(3)(a) because consideration as to whether the policy should be respected is a subset of public interest immunity which is a rule of law. An application can be made under s.19(3)(b) inviting the Chairman to decide whether it would be in the public interest to make an order which has the effect of respecting the policy. Either way the Chairman will be required to balance the competing interests for and against respecting the policy. He must do so based on the facts and in the context of a public inquiry with the terms of reference which he has been set.

117. An option which is explored in the cases in which the 'neither confirm nor deny' policy has been considered is whether the use of a confidentiality circle is appropriate. In some circumstances that can provide a solution. However, there are instances in which the approach has been rejected. In *McGartland v Secretary of State for the Home Department* Mr Justice Mitting rejected a proposal that the second claimant and members of her legal team might undergo developed vetting so as to enable them to have personal access to sensitive material: see paragraph 4 of his decision as quoted at paragraph 29 of the Court of Appeal's judgment in that case. His decision on this point was upheld by the Court of Appeal at paragraph 47(ii) for the reasons which he had given. Those reasons were stated in the following terms.

> *"...It is obvious that those details cannot be put into the public domain or revealed to those who have not been the subject of developed vetting or, exceptionally, accepted to be completely trustworthy without the need for vetting (such as judges). Miss Kaufmann submits that, if necessary, the second claimant, herself and her junior and one or more members of the firm of solicitors who instruct them, would be willing to submit to such vetting. The first claimant, she submits, can be taken to be a trustworthy recipient of such information. There are a number of problems with this suggestion: the process of vetting is highly intrusive and would take months; the second claimant, whose mental health is said to be fragile, might not welcome such intrusions; and if the defendant considered that the first claimant could not be trusted with such information someone, presumably a judge, would have to determine whether or not he could be. That would be likely to require oral evidence and it would require material which may be sensitive material, in the statutory definition, to be considered. That would require a Section 6 declaration in itself. Such a procedure is cumbersome and may well be unattainable. In any event, it would not satisfy the defendant's proper insistence upon keeping such techniques closely guarded within the intelligence community".*

118. In *Re an Application for Judicial Review by the Next of Kin of Gerard Donaghy (Deceased)* a confidentiality circle issue arose. If police officers giving evidence to the Bloody Sunday Inquiry were to be screened, from whom were they to be screened? The Tribunal had ruled that only qualified lawyers should be permitted to see the officers give evidence to the panel. The families of the deceased challenged the decision to exclude them. The Northern Ireland Court of Appeal rejected the challenge. Lord Justice Nicholson stated as follows at pp.11-12 of the judgment.

> *"Mr Treacy argued again before us that if the public was excluded from viewing the police witnesses, the families should be permitted to do so.*
>
> *"It was contended that the relevant police witnesses entertain no subjective fears in respect of the families of the next-of-kin and the wounded. The families, as one would expect of them, have behaved in a restrained and dignified way. Many of those who have given evidence have stated that they wish no harm to those who came to give evidence.*
>
> *"It would be necessary to carry out a "vetting" exercise on the 127 members of the families. How this could be done was not indicated. Presumably some investigation would have to be carried out in camera. The Tribunal has stated that it is not really a practical suggestion. Such a view was within the scope of its discretion. In my view it would be outside our jurisdiction to remit that ruling for further consideration.*
>
> *"The Tribunal has made a ruling that only qualified lawyers are to be present when screened police officers are giving evidence. Unqualified lawyers would have to be vetted. Doubtless, they can assist in preparation for cross-examination of the police officers but I cannot accept that Mr Harvey QC or any other member of the Bar who cross-examines a police officer requires the assistance of a lawyer who has no practical experience of advocacy. If there is need for liaison, junior counsel or a qualified lawyer can liaise with them".*

Part V - Conclusions

119. Section 19 of the 2005 Act provides a flexible mechanism for imposing restrictions on attendance at an inquiry and on the disclosure or publication of evidence. The power must be exercised with fairness at its heart both procedurally and substantively. There is a presumption of openness arising from s.18 of the 2005 Act. The authorities demonstrate that the public interest in openness is considerable: both because of the interests of those touched by the events being investigated but also those of the wider public. The public concerns which have given rise to this Inquiry are profound. Restrictions are to be regarded as exceptions to the normal requirement of openness.

120. Restriction orders can be made because they are required by a statutory provision, enforceable Community obligation or rule of law (the s.19(3)(a) route). Alternatively, they can be made because a restriction is conducive to the Inquiry fulfilling its terms of reference or necessary in the public interest (the s.19(3)(b) route). They may in principle cover a wide range of measures including for example anonymity, redaction or non-disclosure of documents, and limitations on the scope of oral evidence.

121. Almost always, decisions whether to make a restriction order for anonymity will require balancing exercises. All material considerations must be considered and taken into account. They will be fact sensitive, sometimes intensely so. For this reason we do not attempt at this stage to list factors for and against the making of an order.

122. Anonymity is being sought by core participants and witnesses in a variety of different situations and their applications are likely to invoke very different considerations. The threshold test for protection under Articles 2 & 3 of the Convention is a high one: real and immediate risk. The risk must be objectively well-founded. The test for protection at common law is more flexible and subjective fears can be taken into account if genuinely held. The leading case of *In re Officer L* provides authoritative guidance on such cases.

123. Anonymity can be granted to give effect to rights under Article 8 of the Convention in an appropriate case.

124. Anonymity can also be granted to encourage witnesses to come forward who would not otherwise engage with the Inquiry, although the evidence of such witnesses will carry limited weight.

125. ‘Neither confirm nor deny’ is a policy, not a rule of law. The legal basis for respecting the policy, when it is appropriate to do so, is as a subset of public interest immunity. If the information concerned is relevant to the Inquiry’s work then a decision as to whether or not to respect the policy in any given situation requires a balancing exercise. The balancing exercise will in each case fall to be performed in its own factual context and in the context of an important public inquiry investigating matters of profound public concern.

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