Neutral Citation No: [2023] NICoroner 4	*Ref:* [2023] NICoroner 4
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* 12/05/2023

IN THE CORONER'S COURT IN NORTHERN IRELAND

BEFORE THE CORONER
MR JUSTICE HUDDLESTON

IN THE MATTER OF AN INQUEST INTO THE DEATHS OF DANIEL DOHERTY AND WILLIAM FLEMING

OPEN RULING ON THE CLAIM FOR PUBLIC INTEREST IMMUNITY

Introduction

[1] The subject inquest to which this ruling relates involves an investigation into the deaths of Mr Fleming and Mr Doherty on 6 December 1984 at Gransha Hospital, Derry. Both men who were active members of the Provisional IRA (PIRA), as acknowledged by PIRA at the time, were on "active service." They were shot dead by British military soldiers. The first inquest into those deaths was heard on 9 December 1986.

[2] The Ministry of Defence (MOD) and the Police Service of Northern Ireland (PSNI) have both applied on the grounds of Public Interest Immunity (PII) to withhold from disclosure evidence which would otherwise be disclosed. In fact, three such applications have been received - one in relation to PSNI material, one in relation to Security Service material (SyS), and one in relation to Ministry of Defence material. The first two (on behalf of PSNI and SyS) are grounded on certificates signed by the Minister of State at the Northern Ireland Office, Mr Steve Baker MP. The MOD application is based on two certificates signed by the Secretary of State for Defence, the Rt Honourable Ben Wallace MP. The PII claim in each case is made in respect of parts of the documents identified in a (CLOSED) sensitive schedule to the Certificate. As is common in the nature of PII applications, the application extends to oral evidence relating to the information which is the subject of those certificates. If granted indeed the PII exception applies to the information and not the documentation. Equally, where upheld, that information is not something that I can take into account in relation to my ultimate findings.

[3] This is the OPEN RULING in respect of the PII applications. As a result of my decisions on the applications it has not been necessary to also produce a CLOSED RULING. Pursuant to section 17B(3) of the Coroners Act (Northern Ireland) 1959

("the Coroners Act"), the rules of law governing the withholding of evidence on grounds of PII apply to inquests in the same way as they apply to civil proceedings in any court in Northern Ireland. The principles are well-established, and the acknowledged task faced by a judge or coroner is to perform a balancing exercise between two important and generally competing aspects of the public interest. The first is the public interest in making sure that all relevant evidence is available, not just to the Properly Interested Persons (PIPs) but also to the court. That is self-evidently an essential plank in the principle of the open and transparent administration of justice. That principle, however, must be weighed against the second competing interest – that of a continuing public interest in preventing harm being caused to national security. The inquest into the death of Alexander Litvinenko *(Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin)) gave the opportunity for Goldring LJ to set out a number of applicable principles which he does at paras [53]-[61]:

> "53. First, it is axiomatic, as the authorities relied upon by the PIPs demonstrate, and as the coroner set out in his open judgment, that public justice is of fundamental importance. Even in cases in which national security is said to be at stake, it is for courts, not the Government, to decide whether or not PII should prevent disclosure of a document or part of a document.
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> 54. Second, as I have said, the issues which we have had to resolve only concerned national security. The context of the balancing exercise was that of national security as against the proper administration of justice. Had the issues been such as have been touched upon by the PIPs in their submissions, different considerations might well have applied.
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> 55. Third, when the Secretary of State claims that disclosure would have the real risk of damaging national security, the authorities make it clear that there must be evidence to support his assertion. If there is not, the claim fails at the first hurdle. In this case there was unarguably such evidence. The coroner did not suggest otherwise.
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> 56. Fourth, if there is such evidence and its disclosure would have a sufficiently grave effect on national security, that would normally be an end to the matter. There could be no disclosure. If the claimed damage to national security is not "plain and substantial enough to render it inappropriate to carry out the balancing exercise," then it must be carried out. That was the case here.
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> 57. Fifth, when carrying out the balancing exercise, the Secretary of State's view regarding the nature and extent of damage to national security which will flow from disclosure should be

> accepted unless there are cogent or solid reasons to reject it. If there are, those reasons must be set out. There were no such reasons, let alone cogent or solid ones, here. The coroner did not seek to advance any. The balancing exercise had therefore to be carried out on the basis that the Secretary of State's view of the nature and extent of damage to national security was correct.
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> 58. Sixth, the Secretary of State knew more about national security than the coroner. The coroner knew more about the proper administration of justice than the Secretary of State.
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> 59. Seventh, a real and significant risk of damage to national security will generally, but not invariably, preclude disclosure. As I have emphasised, the decision was for the coroner, not the Secretary of State.
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> 60. Eighth, in rejecting the Certificate the coroner must be taken to have concluded that the damage to national security as assessed by the Secretary of State was outweighed by the damage to the administration of justice by upholding the Certificate.
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> 61. Ninth, it was incumbent on the coroner to explain how he arrived at his decision, particularly given that he ordered disclosure in the knowledge that by doing so there was a real and significant risk to national security."

[4] Whilst the balancing exercise in light of those principles ultimately rests with the court, I also have regard to the observations of Lord Neuberger MR in the case of *R(Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2011] QB at 218, where it is acknowledged that:

> "131. It seems to me that, on grounds of both principle and practicality, it would require cogent reasons for a judge to differ from an assessment of this nature (ie in respect of PII) made by the Foreign Secretary. National security, which includes the functioning of the intelligence services and the prevention of terrorism, is absolutely central to the fundamental role of the Government … As a matter of principle, decisions in connection with [it] [ie PII] are primarily entrusted to the executive … and not to the judiciary."

The PII applications

[5] Having considered all of the material which is subject to the PII applications in the present case there is no doubt that it meets the relevancy test and, therefore, prima facie, would be subject to disclosure under section 17A of the Coroners Act.

[6] Those who have provided the PII certificates accept that the material is relevant but assert that there is a real risk of serious harm to national security which would be caused by its disclosure in this case.

[7] The evidence of both competent ministers is that the threat of terrorist violence remains. At the point when the certificates were provided that threat was assessed as "substantial" throughout the United Kingdom but, I am cognisant of the fact that in Northern Ireland, at least, that has been increased to "severe" with effect from 23 March 2023 following an attack on a serving member of the PSNI. It is also argued, on behalf of the military witnesses, that those who were involved in this incident were members of a specialist military unit ("SMU") and that revelation of their identities and appearances would cause them, individually, a real risk of harm. It is suggested that that risk extends not just to them but to their families. It is argued, on that basis, that the application for PII, therefore, include the consideration of special measures – in this case (i) anonymity for those former members of the SMU whose names are included in inquest documentation and for one member of Army Legal Services known as Soldier O, an Army lawyer who provided advice to members of the SMU following this incident; and (ii) screening for the SMU members who give evidence to the inquest and for Soldier O.

[8] Through the certificates which I have mentioned and their Sensitive Schedules, the applicants have, inter alia, identified the following public interests as being at play in relation to this application:

(a) Protection of source information, ie, information relating to persons who may have provided information or assistance to any of the individual agencies in confidence. The certificates suggest that the failure to protect the identities of such persons may cause harm to their personal safety, a loss of confidence in state agencies and, therefore, a lack of willingness for others to cooperate in the future. It is argued in respect of the redacted information that there is the potential of a piecing together of information in a mosaic style approach which heightens the need for the present PII application.

(b) There is concern that absent the PII application there is in documentation that would otherwise be disclosable information relating to the identity of individuals which, the certificates allege, would increase the likelihood of harm to personal safety and, again, undermine confidence.

(c) There is expressed a desire to protect the operational abilities of the agencies concerned. The suggestion is that information in relation to operational capability and strategy would, if it became known in the public domain, potentially cause harm to future operations. Some examples of that have been provided to me:

(i) Methodology

Namely that disclosure could undermine operational capability and jeopardise safety of personnel and/or the methodology adopted in counter

terrorism.

(ii) Information relating to organisation of and roles with agencies

Disclosure of which would impair the ability of agencies to perform their functional requirements.

[9] Having considered the materials in detail (on more than one occasion) (a point to which I shall revert) and having received submissions in a number of both OPEN and CLOSED hearings, I am satisfied that the application for PII should be allowed and further that disclosure of names and reference numbers (however described) of SMU military personnel and a member of Army Legal Services staff would give rise to a real risk of serious harm to the public interest. Accordingly, SMU military personnel and the member of Army Legal Services Staff giving evidence to this Inquest and referred to in inquest documentation will be identified by the following ciphers A, B, C, D, E, F, G, H, I, J, O, P, Q, R, S, T. The identity of them will be known only to CSNI and the coroner.

[10] As PII attaches to information rather than to specific documents I have also determined that it follows that the military witnesses will be entitled to special measures in addition to anonymity – in this case, where they give evidence to the inquest, screening in order to protect the disclosure of their identities. Anonymity and screening will be granted but on the basis that in each case the witnesses will be available and visible to the coroner and all of the legal representatives.

[11] As regards the details of the documentation, I am also satisfied that the disclosure of information relating to specific dates (as opposed to months and years) and the grading of intelligence information ought also to be protected. I have considered if there is an alternative method for the provision of this information but, on balance, my determination comes down in favour of non-disclosure subject to what I say below.

[12] I am satisfied from my scrutiny of the unredacted material in relation to the 8 folders of documents and redacted witness statements, that these are set at the minimum level necessary to protect the public interest. I say this, however, on the basis that:

(a) I have agreed in CLOSED hearings with those that represent the various agencies that there will be a roll-back of PII in respect of certain pages. These pages will be provided to all the parties in this inquest by way of substitution of those in the bundles that have been disseminated.

(b) In conjunction with the roll-backs which I have agreed in the CLOSED sessions (see above) the parties are also to be provided with a gist of the context leading up to this incident.

(c) There be a sworn statement provided by a responsible senior official in PSNI in respect, specifically, of the searches which have been carried out and

conducted by PSNI in relation to any material which specifically relates to intelligence available to the RUC prior to the incident on 6 December 1984 and liaison between those military witnesses engaged in the special military unit that were involved in this incident and members of the RUC as it then was.

(d) There be a sworn statement provided by a responsible senior official in MOD in respect, specifically, of the searches which have been carried out and conducted by MOD in relation to any material which specifically relates to the operational plan for the SMU on 6 December 1984.

(e) Likewise, it is a specific direction of this ruling that both the MOD and PSNI provide a detailed written response to the observations which have been provided from those who represent the next of kin (NOK) on the PII process.

The Litvinenko Question

[13] Having made a determination that certain materials ought not to be disclosed on the grounds of PII, it is incumbent upon me to consider what has been referred to as the 'Litvinenko question', namely whether I, as coroner, can still carry out a sufficient inquiry into how the deceased met their deaths.

[14] In approaching that question I have firstly considered the statutory purpose of this inquest and, secondly whether, given the exclusions on grounds of PII there is anything that would prevent me fulfilling that purpose. I am satisfied that, even with those exclusions in place, I can still fulfil the statutory purpose of this inquest.

[15] Accordingly, the claim for PII is upheld, but in accordance with established authorities, I will keep the issue under review as the inquest proceeds.

The PII Process

[16] I do, however, have some comments to make regarding how the procedure for the application of PII unfolded in relation to this specific inquest. It goes without saying that given the balancing exercise which the court must undertake in applications for PII it will be sensitive to any questions or issues that may arise in respect of the process as a whole.

[17] In the present instance the process for PII began as long ago as 2 April 2022, ie, over one year before the inquest was scheduled to sit. Various assurances were provided on behalf of those that represent the agencies seeking PII that progress was being made throughout the course of the case management hearings that were carried out during 2022 and into early 2023. Indeed, to particularise those I have set out in an Appendix to this ruling exactly the events which have occurred. As will be apparent from that chronology it was intended **by December 2022** that all potentially relevant material had been identified and been subjected to sensitivity review. Indeed, it was asserted to the coroner on more than one occasion that that quality checking was/had been undertaken.

[18] By the end of January 2023 it was asserted that all matters would be in place to allow a formal PII hearing to be commenced on 20 March 2023.

[19] The Coroner's Service for Northern Ireland received six folders of redacted material from PSNI together with a PII certificate dated 21 February 2023 on 10 March 2023. The MOD folder together with PII certificate dated 5 March 2023 was also received on that date. It was only at that point that I and members of the CSNI team could access the relevant information in unredacted form – and then through the usual security protocols. At the hearing on 20 March 2023, it became almost immediately apparent that there were **substantial** issues with the sensitive bundles around both duplication and over and under redaction of provisionally disclosed materials. It was indicated that the materials were to be reviewed as a matter of urgency with a further closed hearing being scheduled for 23 March 2023. On 22 March 2023 it was relayed to me that there were still further problems which required a rescheduling of that hearing. On that same date a request was received to recall all PSNI sensitive folders. That email was in the following terms:

> "I can confirm that I have been instructed by MOD to seek the recall of the PSNI's sensitive folders (Folders 1-6) from the PIPs. The PSNI sensitive folders contain MOD equity and issues have arisen in relation to same."

I acceded to that application on the grounds of expediency – aware that it would cause inconvenience to the PIPs as indeed it did. Folders 2-6, by agreement, were shredded. That, in my view, was entirely avoidable. I kept copies of folders 2-6 so as to preserve and maintain the record of the first set of papers disclosed, the issues therein and to conduct a proper comparison once the replacement folders had been issued.

[20] On 23 March 2023 (ie, the date for the rescheduled closed hearing) an email was received from CSO on behalf of the MOD to confirm that:

> "It has become apparent that there are inconsistencies in the sensitive information which MOD are seeking to withhold under PII relating to MOD materials that are found within the PSNI sensitive folders. This gives rise to concerns that in places there may have been non-redaction or under redaction of material potentially attracting sensitivities due to issues of national security."

[21] There followed a hearing on 2 March 2023 in which I directed that by 13 April 2023 replacement bundles be submitted to CSNI for consideration and that they simultaneously be disseminated by CSO to the PIPs.

[22] On 12 April 2023, further correspondence was received from CSO indicating that the MOD would not be able to comply with my directions and requesting an extension of time until 28 April 2023, ie, some two weeks **after** this inquest was

scheduled to commence. On that basis I had little alternative but to postpone the commencement of the inquest itself and concentrate on the PII application which was then heard in CLOSED session on 24 and 25 April before commencing the inquest itself on 27 April 2023.

[24] It gives me no pleasure, whatsoever, to have to rehearse this lamentable situation.

[25] As the courts have consistently made clear in dealing with issues relating to PII where the court has to undertake a balancing exercise between two such important and competing public interests, integrity, not just of the certificate itself but of the process upon which it is based, requires the utmost rigour. As Laws LJ made clear in *R(Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 [50]:

> "There is a **very high duty on central government to assist the court with full and accurate explanations** of all of the facts relevant to the issue that the court must decide."

And (continuing to quote) from *R(On the application of Al-Sweady) v Secretary of State* [13]:

> "To state the obvious the systems for dealing with PII claims in the courts of England & Wales [for which one can read this jurisdiction] depend, if a ministerial certificate and schedule are advanced in support of a claim upon the **scrupulous accuracy of the whole of the content of those documents**. The more so, if the content of the schedule is sensitive (as is invariably the case) and cannot therefore be disclosed to the parties seeking disclosure of the underlying material, who thus cannot contest its content. Especially so, if (as here) that schedule deals with issues of national security in relation to which (in accordance with well-established principles) the court must accord the minister's assertions considerable weight in the balancing exercise."

[26] In the present case the next of kin, unsurprisingly, in their submissions raised concerns on the integrity of the process that had been carried out overall by those seeking PII and, its direct impact upon the material which (ultimately) would be disclosed to them. It was, in part, to allay their concerns that the specific directions were given to those who represent the Agencies to reply in OPEN, to the observations which had been received from the next of kin (as above). Another direction was made that the MOD should provide an affidavit from a competent individual authorised for the specific purpose of explaining **in detail** how these defaults came to arise and what steps were taken to deal with them. I await provision of that document, which will be provided in OPEN to the extent possible, and will determine what, if any, further steps I should take when it is received.

[27] The consequent delays in dealing with the materials further disadvantaged all

PIPs in terms of their preparation for the hearing of the inquest itself. It was, specifically for that reason, that the inquest has been re-timetabled to allow for the re-dissemination of material for their further consideration and further time allowed for preparation. I have recorded my dissatisfaction both in the OPEN and CLOSED hearings to which I have made reference in this ruling, but I reiterate those concerns here in the hope that some cognisance is taken of them for the future. This lamentable catalogue of errors should not be repeated.

[28] In spite, however, of all that has happened I am satisfied, having gone through the proposed redactions now in some considerable detail – and as I have said on more than one occasion – that, subject to the conditions which I have expressly referred to at para 12 (and, in particular, the roll-backs which have been agreed with those who represent the various Agencies concerned) that the PII applications in their revised form may be upheld.

[28] For the benefit of future inquests, however, I re-emphasise the principles set out in *Al-Sweady*, namely that there must be greater adherence to the principle of scrupulous accuracy. There are many legacy inquests which are still to be pursued. It simply cannot be the case that, as appears to be the instance here, there is insufficient early preparation (contrary to the assertions which were made to the court at earlier stages of case management), inadequate resourcing and/or inadequate or insufficient communication between those state agencies who seek PII redactions. The integrity of the process which the court must undertake is entirely dependent upon adequate resources being deployed at every level to ensure that the initial task is adequately done, and that appropriate cross-checks are taken long before the hearing of the PII application itself. It is entirely inappropriate for matters to be left so late as to require an adjournment of an inquest itself and/or to place the Coroner's Service and the PIPs under additional pressures in what are already difficult circumstances.

[29] Given all of the steps undertaken as recited here, I am satisfied that we were able to manage the process correctly and adopt the appropriate balancing exercise in the present circumstances, but that may not always be the case and I exhort those involved to take lessons on what not to do in the preparations with which they are faced in making these applications.