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IN THE CORONER'S COURT IN NORTHERN IRELAND

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IN THE MATTER OF AN INQUEST INTO THE DEATHS OF JOHN DOUGAL, PATRICK BUTLER, NOEL FITZPATRICK, DAVID McCAFFERTY AND MARGARET GARGAN ('THE SPRINGHILL INQUEST')

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RULING (NUMBER 12)
ON DEPLOYMENT OF INTELLIGENCE MATERIAL

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SCOFFIELD J (*sitting as a coroner*)

Introduction

[1] This is an inquest into five deaths which occurred on 9 July 1972 in the Springhill and Westrock areas of Belfast. A brief summary of the factual background is contained in my ruling of 27 February 2023 ('Ruling No 1'): [2023] NICoroner 24.

[2] This ruling deals, in broad terms, with the potential deployment of intelligence material which is potentially relevant to the matters in issue in this inquest. Submissions have been received from a number of the properly interested persons (PIPs) in the inquest in relation to this. There appears to be consensus between the PIPs that the issues in relation to deployment of this material will have to be dealt with on a case-by-case basis. The purpose of this ruling, therefore, is to set out some general principles which (subject to further submissions) I intend to apply in dealing with the issue of deployment. Hopefully this will assist PIPs in determining whether, and if so when and how, to seek to deploy intelligence materials contained within the PSNI sensitive disclosure in this case; and, conversely, whether, and if so when and how, to object (or not) to the deployment of such material. As I indicated in the course of the recent hearing at which general submissions in relation to these issues were made, the more that these issues can be agreed between counsel so as to avoid the need for the interruption of a witness's evidence for the purpose of legal argument, the better.

[3] The issue under consideration arises, principally, in relation to intelligence materials disclosed to me by the PSNI and, in turn, disclosed to PIPs as potentially relevant material as a result of searches in relation to individuals following Rulings

No 1 and No 3 in this inquest ([2023] NICoroner 24 and [2024] NICoroner 3). The limited basis upon which such searches would be undertaken at the request of the MOD, and the limited parameters of the materials which would be sought, were set out in paras [66] and [71]-[72] of Ruling No 1. That ruling anticipated that, once such materials were provided and disclosed to PIPs (subject to any public interest immunity redactions), there would be a further question as to whether and how such materials could be deployed in the inquest. This is frequently referred to as the 'control stage.'

Legal principles

[4] The well-known two-stage test alluded to above is described in *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, dealing with similar fact evidence. In para [23] of Ruling No 1 in this Inquest, I summarised the position in this way:

> "In the first instance, a coroner should gather material which is relevant or potentially relevant. Where material is relevant or potentially relevant, it should be disclosed (suitably redacted if necessary) to the PIPs. At a further stage often referred to as the 'control stage,' with the benefit of submissions if necessary, the coroner should determine whether potentially relevant material is in fact relevant and capable of properly being deployed in the course of the inquest proceedings."

[5] Humphreys J dealt with the test to be applied at the control stage at para [5] of his ruling on the admission of similar fact evidence in the Coagh Inquest ([2022] NI Coroner 10). Having also referred to the *O'Brien* authority, he described the two-stage test as follows:

> "(i) To be admitted, the material had to be relevant, i.e. potentially probative of an issue in the action;
>
> (ii) Where that test was met, the trial judge must then consider whether it ought to be admitted, bearing in mind, inter alia, the need for fairness to all parties and the interests of justice in avoiding prejudice and the disproportionate increase in the time and cost of proceedings."

[6] At para [6] of his ruling, Humphreys J went on to explain that relevant evidence is legally admissible, but that a judge may, in the exercise of case management powers, nonetheless decline to admit it. Quoting Lord Phillips in *O'Brien*, he further explained that, in considering whether to admit evidence or not (or permit cross-examination) upon matters which are collateral to the central issues, the judge will have regard to the need for proportionality and expedition. They will

consider how controversial the evidence in question is likely to be and whether its admission is "likely to create side issues which will unbalance the trial and make it harder to see the wood from the trees." In addressing these matters, there is an obvious spectrum of evidence from convictions or judicial findings through to mere rumour or suspicion of the commission of some particular act. To be admitted, the evidence of allegations need not be a proven fact but the strength of the evidence is relevant at the control stage.

[7] In *O'Brien* it had also been recognised that the result of the second stage may differ depending upon the mode of trial. Where the decision-maker is a judge alone (or, one might add, a coroner sitting without a jury), the question of the prejudicial effect of the evidence is less likely to be an issue of concern. This was underscored by Morgan LCJ's comments in *Re Jordan's Application* [2014] NICA 76, at para [34], when he contemplated that in the absence of a jury "more emphasis should be given to the principle that all relevant evidence is prima facie admissible and the judge should give it the weight it deserves."

[8] I would also add in the present context that it is trite that coronial proceedings are not bound by the formal rules of evidence. As noted in Leckey and Greer, *Coroners' Law and Practice in Northern Ireland* (1998, SLS) at para 10-02, having referred to the well-known passage from Lord Lane CJ's judgment in *R v South London Coroner, ex parte Thompson* (1982) 126 Sol J 625 about the inquisitorial nature of an inquest:

> "Since the principal function of an inquest is to determine the facts surrounding a death, there is no need for coronial proceedings to be governed by the formal rules of evidence applied in civil and criminal proceedings. As a result, there are few restrictions on the admissibility of evidence at the inquest."

[9] Therefore, for instance, hearsay evidence is admissible in an inquest with the question of evaluating the weight to be given to such evidence being a matter for the coroner taking into account well recognised factors: see Leckey and Greer at paras 10-21 to 10-23; and, to like effect, see Dorries, *Coroners' Courts: A Guide to Law and Practice* (3rd edn, 2014, Oxford) at para 6.98; and *Jervis on Coroners* (14th edn, 2020, Sweet & Maxwell) at para 12-72.

[10] Drawing the above strands together, the following summary might be offered:

(a) An inquest is not bound by the strict rules of evidence and a coroner may therefore consider material which would not meet the strict rules of evidence in other contexts, the key issue being the weight (if any) to be attributed to this material.

(b) Notwithstanding this flexibility, there is still a need for information or evidence taken into consideration by a coroner to be *relevant*. In this context there is a well-recognised distinction between material which is relevant to the facts in issue (in the present context, facts related to the statutory questions which a coroner is required to answer) and material which is relevant only to a witness's credibility. The latter type of evidence may be admissible but is subject to greater control than the former.

(c) Even where evidence or information is relevant, it may still be excluded from consideration or deployment upon a range of grounds. These include where it is unfair to permit the evidence or information to be deployed (but bearing in mind the need for fairness to all parties, which may pull in different directions); and where exploration of the issue, because of its collateral and/or controversial nature, would be disproportionate.

(d) Ascertaining the correct approach – between, on the one hand, excluding evidence or information which is relevant and, on the other hand, admitting it but modifying the weight to be given to it in light of its provenance or of limitations on a party's ability to challenge it – will require the exercise of discretion and judgment, taking into account a range of factors mentioned above.

The position of the PIPs

[11] Only relatively brief argument has been provided by the PIPs on this issue at this stage for the reason mentioned at para [2] above. The position of the NOK was, broadly speaking, as set out in their argument in advance of Ruling No 1, namely that intelligence material is "untested and untestable" and therefore should not be deployed to any degree at all. The position of the MOD, and the individually represented soldiers, was that at least some of this information is highly relevant and capable of being deployed. Several of the cases which touch upon this issue deal with similar fact evidence but Mr Aiken KC argued that there is intelligence material in this case which does not relate to separate incidents (which are relevant only to propensity by reason of similarity in nature) but which sound directly upon the incident in question.

[12] I was grateful for the helpful and detailed written submissions received on behalf of the two non-state and non-NOK PIPs, Mr Pettigrew and Mr Dudley, which dealt specifically with intelligence information relating to them. Further submissions, to similar effect, were recently received from Mr Bassett BL on behalf of a number of forthcoming witnesses in respect of whom intelligence material had been disclosed. His submissions focused on article 8 and data protection law (in particular, the principle of proportionality in terms of disclosure or use of such material and minimisation of data processing in this context). These issues are likely to be addressed in the course of individual decisions on deployment at the control stage.

General guidelines on deployment in the present case

[13] Before addressing in general how I intend to approach the question of deployment of intelligence materials in this case, it is worth saying something about what 'deployment' means in the present context. It seems to me that it connotes two essential concepts. First, at its most basic, evidence or information which is deployable is capable of being taken into consideration by the coroner in the exercise of his or her fact-finding function. It is material upon which a PIP may place reliance in making submissions as to the facts which should be found in the case.

[14] Second, evidence or information which is deployable is information which may be put to a witness in the course of questioning as calling for a response. The determination of whether this is permissible or not in any particular instance will overlap with a coroner's general power and responsibility to control the questioning of witnesses to ensure that it is relevant, fair and not oppressive. I anticipate that it is this second issue which is likely to be the most contentious issue in this case, where intelligence material may be put to a witness in open court as to their status or actions in or around 1972, in circumstances where this material is unlikely to have been previously disclosed in such a forum, or indeed at all.

[15] It is, of course, possible that material which has been disclosed as a result of intelligence searches could be used by counsel to assist in formulating lines of questioning which they pursue (and might well have pursued in any event) without any reference to the sensitive materials. In those circumstances, I would not consider the material to have been deployed, at least at that point. If reliance was later placed upon it in submissions, there may be a question of fairness to a witness if they have not been given a fair opportunity to respond to the gist of any criticism or allegation. However, appropriate questions can be asked of a witness without necessarily taking them to intelligence material which relates, or purports to relate, to them. The process which has been followed (in order to permit those individuals in respect of whom searches have produced potentially relevant intelligence material to make representations before this material was disclosed to PIPs in a form which revealed their name) means that each such witness who is called will have had a previous opportunity to see the material relating to them, should they wish to. In addition, the formulation of witness bundles containing materials which counsel intend to put to a witness should provide a further safeguard in that respect.

[16] Turning then to when and how intelligence material can (and cannot) be deployed in this inquest, and bearing in mind that this will have to be addressed in large measure on a case-by-case basis, I would make the following general observations:

(a) The mere fact that information arises through intelligence gathering does not, of itself, mean that it is incapable of being deployed in an inquest in either of the senses described at paras [11]-[12] above.

(b) The fact that, in most if not all cases, the source of the information and/or its intelligence grading will be unknown will be relevant to the questions of (i) whether it can fairly be put to an individual at all and/or (ii) the weight which will be given to the information if it is capable of being deployed.

(c) If intelligence material is to be put to a witness with the source and/or grading unknown, it must be borne in mind that it is not, of itself, direct evidence of the matters stated. It is merely evidence that the authorities received information suggesting that something occurred. This means that certain formulations would be inappropriate (such as, "There is evidence to show that you did [x]"; or "The police know that you did [x]"). More appropriate formulations would require to be used (such as, "The police received intelligence suggesting that you did [x]"). Bearing this in mind, consideration should be given to how much reference to the intelligence materials might add, over and above simply asking the witness, "Did you do [x]?"

(d) I recognise that witnesses will be inhibited from challenging the source of intelligence which may have been received in relation to them. I will obviously take that into account. Generally speaking, however, the basic requirements of fairness are likely to be met if the witness has the opportunity to respond to the substance of the intelligence. They may then accept its contents, deny its contents, or rely upon their privilege against self-incrimination where that arises (which might well be often in this context) and decline to answer.

(e) Notwithstanding the above, the guiding principle in relation to deployment must be an assessment of how relevant the material is to the issues which I am required to resolve in this inquest. That should be addressed taking into consideration the further matters mentioned below.

(f) Deployment in either sense is much less likely to be permitted where the information is collateral to the events which are the focus of this inquest. This is particularly so where the intelligence relates to a separate event, where the relevance or materiality of the information would depend to some degree upon the conduct of a satellite fact-finding inquiry. The inquest is concerned with what happened at the time of the deceaseds' deaths; not what others were doing around that time.

(g) Deployment is also less likely to be permitted where the substance of the information post-dates the events with which these inquests are centrally concerned, for the reasons summarised in para [73] of Ruling No 1.

(h) In my present view, the product of the intelligence searches conducted does not, save perhaps in some limited respects, speak directly to the events of

9 July 1972 (ie there is little by way of intelligence falling within category (i) described in para [71] of Ruling No 1). Therefore, the most relevant aspects of it are likely to be those which suggest that a person was or may have been a member of an unlawful association at the time of their participation in the events with which this inquest is concerned, for the reasons summarised in para [65] of Ruling No 1.

Article 2 and 8 redactions

[17] It is also appropriate to say something briefly in this ruling in relation to a number of redactions – relating to names and other identifying details – which have been applied to the sensitive materials on article 2 and 8 grounds. That is because these redactions, whilst retained, represent a further impediment to deployment of certain material, about which a number of PIPs (principally the MOD) have made representations in recent days.

[18] The article 2 and 8 redactions were applied by the PSNI when the sensitive materials were disclosed. It appears that there have been some instances of over-redactions, perhaps out of an abundance of caution and/or perhaps as a result of the process which was adopted in this case in order to try to expedite the disclosure process (which resulted in less checking of redactions, at that point, by the Legacy Investigation Unit (LIU) than would usually be the case). Where an over-redaction has been identified by the LIU this has been, and is being, corrected. An example might be the use of the name "Sean Doyle" in relation to a Sluagh of the Fianna where the name is not referring to an identified individual but merely the title of the section concerned.

[19] Aside from over-redactions of the nature above which ought not to have been applied, LIU is also rolling back other such redactions where this is appropriate, either to reveal the name of the person referred to or by means of replacing the redaction with a civilian cipher (each of which is provisional only at this point unless and until a successful application for anonymity has been made). A general submission has been made that it is inappropriate for <u>any</u> such redactions to be maintained on these materials on either article 2 or article 8 grounds. I do not accept that for the reasons given below.

[20] I made clear when I gave Ruling No 1 that, if material was to be disclosed to PIPs as potentially relevant which related to civilians and arose through criminal record searches or intelligence searches, I would advise the individual of that and give them an opportunity to make representations before making the disclosure to PIPs. That reassurance was repeated in the course of the judicial review proceedings which challenged Ruling No 1. It was provided so that individuals who appear in this material do not simply find that it has been disclosed without having the opportunity to make representations about that or, for instance, to argue that they should be given anonymity. Unfortunately, this process has taken some time in respect of some of those for whom searches were requested ("searched individuals").

In most instances, redactions relating to searched individuals have now been rolled back; but there are a number who have sought legal advice or representation whose positions still require to be finalized.

[21] In the absence of any material suggesting as much, much less an expert threat assessment (and there having been no request from any party for such an assessment), I have not proceeded on the basis that an article 2 risk arises in relation to an individual merely on the basis that it is suggested in intelligence material that they may have had some paramilitary involvement many years ago. However, I have proceeded on the basis that an article 2 risk to an individual named in the intelligence materials could arise where it is said or suggested that they provided information to the security agencies in some way, whether about others or perhaps even in relation to themselves or their activities. This is a fundamental aspect of the state's case in seeking public interest immunity (PII) on the grounds of source protection. In the present case, the certificates signed by the Minister of State for Northern Ireland and relied upon by the PSNI make the case, in terms, that disclosure of cooperation with the security or intelligence agencies gives rise to a real risk of retaliation against any person confirmed (or credibly suspected) of having done so. Without confirming or denying whether this is the case in the present inquest, where such an issue was to arise and to not have been adequately catered for by the assertion of PII in the Minister's certificate, I would consider that a proper basis for maintaining an article 2 redaction.

[22] I have also, however, taken the approach that, if a person named in the intelligence is known to be deceased, their name should not be redacted on either article 2 or article 8 grounds. Quite simply, they are no longer in a position to assert or rely upon such rights. In such cases, therefore, any article 2 or 8 redactions applied by the original document holders should be rolled back. Again, it seems that there may have been an element of over-redaction in this regard.

[23] Turning to article 8, I also consider that article 8 considerations arise in respect of the proposed naming of persons in intelligence materials to be disclosed which relate to alleged criminal activities some 50 years ago. These materials are generally confidential (indeed, highly protectively marked) and, as noted above (see para [16](c)), do not represent evidence of wrongdoing, much less a public finding after a judicial determination that the individual had done something wrong.

[24] I recently addressed similar issues, in a different but analogous context, in *Re JR276's Application* [2023] NIKB 107. In that case, which concerned the obtaining and use of patient records by a public inquiry, it was noted that there were analogies to be drawn between the processes adopted by public inquiries and by coroners in this regard. The outcome of the case was that, although an inquiry is not impeded from obtaining sensitive documents relating to an individual in the course of its investigations without notifying that individual in advance, once it has obtained the information it ought to notify the individual (in case there were any submissions they wished to make about how their information should be dealt with) and treat the

material protectively unless and until it was determined necessary to disclose it for the purpose of the inquiry's functions.

[25] In the present case, I have adopted a similar approach. This appears to have been endorsed by the High Court in that, in *Re Gargan and Butler's Application* [2023] NIKB 103, at paras [36]-[37], Colton J contemplated that article 8 rights of persons identified as a result of intelligence searches may be impacted; that this would have to be managed appropriately by the coroner, which would "inevitably include notification to the persons potentially affected and the opportunity by them to make representations"; and that the provision to a PIP of the names or number of persons to be searched may at that stage amount to a breach of the individuals' article 8 rights.

[26] Although the materials in this case do not relate to medical information, they do relate to information which is of a sensitive nature. A number of representations made by searched individuals raised concerns about the effect of the public disclosure or dissemination of such material, for instance in relation to their employment or family relationships. Where roll-backs have been provided in relation to such searched individuals, this is because I did not consider that any article 8 interests overcame the interest in the disclosure of the information to PIPs, particularly in light of the limited nature of the directed searches. The same considerations do not, however, apply to additional names which happen to appear collaterally in a number of the intelligence materials but in respect of whom there is presently no evidence or information to suggest that they were witnesses or participants in the events which the inquest is investigating.

[27] Put another way, the names of searched individuals have been or will be rolled back (either by way of complete removal of the redaction or provision of a cipher and unless, exceptionally, it is appropriate to maintain the redaction on article 2 grounds). The searches were conducted in order to elicit information about the searched individuals where there was a relevant trigger for conducting a search. The trigger set out in para [66] of Ruling No 1 involved physical presence at the events and some additional factor rendering it appropriate to conduct an intelligence search. Although a further anticipated outcome of the search process was the possible identification of further witnesses, I do not consider it appropriate to release intelligence information relating to individuals who were not the subject of a specific search. Unless there is some indication that they were actually involved in the events in question in some way or are a material witness, their article 8 rights are not (at present) outweighed by any need to disclose their name or information. In the first instance, it is a matter for my office to seek to trace any potential witness and ascertain whether or not they may have any relevant information to provide.