IN THE MATTER OF THE INQUIRIES ACT 2005
AND IN THE MATTER OF THE INQUIRY RULES 2006

THE POST OFFICE HORIZON IT INQUIRY

APPLICATION FOR RESTRICTION ORDER

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1. The Department for Business, Energy and Industrial Strategy ("the Department") has disclosed a very large number of documents to the Inquiry. Some of these documents include the names of civil servants working within the Department and other Government departments. In accordance with the Inquiry's Protocol, the Department has provided all such documents in unredacted form, so that the Inquiry can consider for itself whether the personal data may lawfully disclosed.

2. Upon the invitation of the Inquiry, the Department now applies for a restriction order pursuant to s.19 of the Inquiries Act 2005, which would result in the redaction or anonymisation of the names of junior civil servants[1] unless, in respect of each or any of them, the Chair determines that disclosure of their identity is necessary in order for the Inquiry to fulfil the Terms of Reference.

3. For the avoidance of doubt, this application relates exclusively to junior civil servants. No application is made in respect of the names of any senior civil servants.

4. This application is made entirely in open, with no closed section as envisaged in the Inquiry's Protocol on Redaction, Anonymity and Restriction Orders[2]. A draft of the restriction order sought is attached to this application.

Relevant legal principles

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[1] Namely those at Grades 6 and 7, Senior Executive Officer ("SEO"), Higher Executive Officer ("HEO"), Executive Officer ("EO") or Administrative Officer/Assistant levels

[2] https://www.postofficehorizoninquiry.org.uk/key-documents/protocol-redaction-anonymity-and-restriction-orders

The Inquiries Act 2005

5. Section 18(1) of the Inquiries Act 2005 provides as follows:

> "***Public access to inquiry proceedings and information***
>
> (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.*"

6. This therefore places a duty on the Chair to take reasonable steps to secure public access to the Inquiry's proceedings and information in any case, but – importantly – this duty is subject to any restrictions imposed by a restriction order made under s.19.

7. Section 19 provides in relevant part as follows:

> *"**19 Restrictions on public access etc***
>
> *(1) Restrictions may, in accordance with this section, be imposed on–*
>
> *… (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–*
>
> *… (b) by being specified in an order (a "restriction order") made by the chairman during the course of the inquiry.*
>
> *(3) A restriction notice or restriction order must specify only such restrictions–*
>
> *(a) as are required by any statutory provision, retained enforceable EU obligation or rule of law…"*

8. The Chair is therefore empowered to impose such restrictions on disclosure of the names and identities of junior civil servants "*as are* ***required*** *by any statutory provision*" (emphasis

added). By adopting this statutory language, Parliament plainly intended that the general interest in securing public access to disclosed documents should be subordinate to any conflicting statutory requirement. That is to say, in any case where any statutory provision requires a restriction on public access (including disclosure), a restriction order must be made in order to restrict it.

The Data Protection Act 2018 and UK GDPR

9. For the purposes of this application, the relevant statutory requirements under s.19(3)(a) are found in the Data Protection Act 2018 ("DPA").

10. Pursuant to Article 6(1) of the UK General Data Protection Regulation ("UK GDPR"), to which the DPA refers, and s.8 of the DPA itself, personal data may be processed where it is necessary for the performance of a task carried out in the public interest or in the exercise of the controller's official authority.

11. The DPA also imposes a duty upon data controllers (of which the Inquiry is one) to process personal data in line with the six data protection principles and to implement appropriate technical and organisational measures to ensure this is done (see ss.34 and 56).

12. The six data protection principles and the policy framework for their implementation in the course of this Inquiry are set out in the Inquiry's own Data Protection Policy[3]. The following statements in that Policy are relevant to this issue (emphasis added):
    a. In relation to the first data protection principle ('personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'):
    "*The Inquiry will ensure that personal data is* ***only processed where a lawful basis applies****, and where processing is otherwise lawful*".
    b. In relation to the third data protection principle ('personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed'):

3 https://www.postofficehorizoninquiry.org.uk/key-documents/special-category-and-criminal-conviction-personal-data

"The Inquiry will only collect and/or disclose ***the minimum personal data*** *that it needs for the purpose for which it is collected and/or disclosed. The Inquiry will ensure that the data it collects is adequate and relevant."*

c. In relation to the sixth data protection principle ('personal data shall be processed in a manner that ensures appropriate security of the personal data'):
"The Inquiry will ensure that appropriate organisational and technical measures are in place to protect personal data. ***These include robust redactions processes that govern the protection of personal data. These processes ensure that - save where consent is provided by the data subject - only personal data necessary for the Inquiry's performance of its functions will be disclosed outside the Inquiry*** *or to those instructed by the Inquiry."*

13. Article 4(1) of the UK GDPR defines 'personal data' as (emphasis added):
"*any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly,* ***in particular by reference to an identifier such as a name****, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".*

14. The public interest in disclosure of junior civil servants' names was considered by the Upper Tribunal (Administrative Appeals Chamber) in *Cox v Information Commissioner and Home Office* [2018] UKUT 119 (AAC). That case analysed the relationship between the DPA and the Freedom of Information Act ("FOIA"), but it involved the same competing interest as are in issue here: privacy/protection of personal data on the one hand, and public accountability on the other[4]. Importantly, the statutory restriction on disclosure contained in s.40(2) FOIA is, as relevant, substantively similar to that in section 19(3) Inquiries Act (see [42]).

15. In *Cox*, the Upper Tribunal reviewed the caselaw and noted in particular the judgment of Lady Hale in *South Lanarkshire Council v Scottish Information Commissioner* [2013] 1 WLR 2421

[4] The case concerned a FOIA request relating to Home Office immigration policy, and the Tribunal acknowledged that "*there is a plain public interest in tracing the development of possibly controversial policies from their birth to their implementation*" (see [25]).

which set out three questions to determine whether the first data protection principle has been complied with:

> *"(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*
>
> *(ii) Is the processing involved necessary for the purposes of those interests?*
>
> *(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?"*

16. The Upper Tribunal held that there is no general presumption in favour of disclosure of officials' names, for four reasons. **First**, as it explained at [41]:

> *"…starting with the 'proposition' or 'assumption' (if not in express terms a presumption) that there is a legitimate interest in the identification of public officials exercising public functions or powers in the public interest necessarily involves the imposition of an unwarranted gloss on the carefully calibrated statutory balance between DPA and FOIA interests. Indeed, as Mr Paines submitted, the Appellant's case in effect reverses the position as enshrined in the DPA – rather than the personal data of public servants being protected unless there are strong reasons to disclose them, instead such personal data would have to be disclosed unless there are specific reasons why it would be wrong to do so."*

17. **Second**, the inherent value in public disclosure underpinning FOIA is – under the statutory scheme in place – trumped by the requirements of the DPA (see [42]).

18. **Third**, the focus of the first of the three questions set out by Lady Hale in *South Lanarkshire Council* is on the legitimate interests of the individual requester, not the more abstract interests of the public at large (see [43]).

19. **Fourth**, the case-law makes clear that it is a context-specific and fact-sensitive question whether the legitimate interests of an individual requester do involve the disclosure of officials' names (see [46]):

> *"there cannot be, simply by virtue of the nature of an individual's employer, an additional legitimate interest that trumps that individual's fundamental DPA rights."*

20. The Upper Tribunal therefore upheld the decision of the First-tier Tribunal that only names of senior civil servants should be disclosed, and not those of junior civil servants.

21. A similar approach has been adopted in numerous other cases. For example, in *Good Law Project Limited v Secretary of State for Health and Social Care* [2021] EWHC 1223, O'Farrell J held that the identity of junior members of staff was unlikely to be relevant (see [30]) in the context of a challenge to decisions about contracts for the supply of personal protective equipment during the COVID-19 pandemic, where allegations had been raised about bias and impropriety on the part of Ministers and civil servants.

Application to the Inquiry's process

22. The Department fully acknowledges the importance of public transparency in the Inquiry's process. It set up this independent Inquiry with precisely that in mind; and, for example, it has chosen to waive its absolute right to claim legal professional privilege, and has disclosed privileged documents, in order to assist the Inquiry to fulfil its Terms of Reference.

23. However, the rubric of the Inquiries Act makes clear that the general interest in enabling public access to documents disclosed to the Inquiry, however important, must defer to any conflicting statutory requirement or rule of law. The DPA and UK GDPR set out detailed statutory requirements; and, for the reasons which follow, the Department submits that a general policy to disclose the identities of junior civil servants would breach those statutory requirements. It would therefore be unlawful, both under the Inquiries Act itself and under the DPA.

24. Alternatively, even if the Inquiries Act were to be construed to permit, rather than require, a restriction order where "required by any statutory provision" (a construction which is not open), the Inquiry should for the following reasons make such an order.

25. The starting point is this. As it has rightly recognised in its Redaction Protocol, the Inquiry has obligations under the UK GDPR and DPA which require it to redact (or anonymise) all personal data *except* where disclosure of that data is necessary to fulfil the Terms of Reference.

26. Clearly this does not place an onus on the data subjects – including junior civil servants – to establish that disclosure of their personal information into the public domain is not

necessary to fulfil the Terms of Reference. To the contrary, the legal onus falls upon the Inquiry itself – as data controller – to ensure that it acts lawfully in accordance with the data protection principles; and that it has a lawful basis for disclosing the personal data of any individual.

27. However administratively convenient it would be, the Inquiry cannot lawfully take a broad-brush approach to compliance. Decisions about the necessity of disclosure of an individual's personal data demand an individualised and fact-specific approach. This is implicitly recognised in its Data Protection Protocol, when referring to "robust redactions processes" for the purposes of compliance with the sixth data protection principle (as set out at §§11(c) above).

28. It is well-established Government policy that the names of junior civil servants are not normally disclosed or otherwise put into the public domain, unless they occupy a specifically public-facing role. By dint of their level of seniority, junior civil servants are as a general rule neither empowered to make nor responsible for Departmental decisions; their role is, generally, to feed in to decisions actually made by senior civil servants and Ministers. Further, they have a general expectation, based on a proper appreciation of the legal principles, that their names will not be revealed in public. All of this is important not only because data protection rights are intrinsically valuable and must be respected, but also to avoid junior civil servants facing unwanted and potentially hostile media or public attention about a controversial or unpopular decision for which they were not responsible and in relation to which they had no decision-making power.

29. On the other hand, the Department recognises that it is likely that disclosure of the names of <u>senior</u> civil servants[5] and Ministers involved in relevant decisions is likely to be necessary in order for the Inquiry to fulfil its Terms of Reference. This is because senior civil servants and Ministers are responsible – and accountable to Parliament and the public – for policy-making and decisions; and, accordingly, they have no well-founded expectation of privacy in relation to their decisions. That places them in a fundamentally different category to junior civil servants.

[5] i.e. Deputy Director and above.

30. None of this is to suggest that there will never be circumstances in which an inquiry may lawfully disclose the identities of junior civil servants. The Department entirely accepts that there may be occasions when the identities of junior civil servants may lawfully be disclosed; but this will be rare, largely limited to circumstances where there is some proper evidential basis to find personal wrongdoing, so that disclosure into the public domain of that person's identity can truly be characterised as a necessary component of the discharge of an inquiry's terms of reference. If such a situation arises, the Department will discuss the point with the Inquiry legal team and seek promptly to agree that appropriate redactions are removed.

31. This leads to the essential question: Why is it necessary, in order to fulfil its Terms of Reference, for the Inquiry to disclose to CPs and the wider world the identities of each or any of the junior civil servants identified in the disclosed documents? Or, to adopt the language of the Inquiry's own Data Protection Protocol, why is that disclosure – in any individual case – "*necessary for the Inquiry's performance of its functions*"?

32. In this respect, it is important to emphasise the extremely valuable role that anonymisation (or initialisation) can play, by protecting the data rights of junior civil servants whilst at the same time enabling Core Participants and the wider public to understand in detail how and why the Department made the decisions it did and, in turn, to scrutinise its conduct at a senior civil servant, Ministerial and corporate level.

33. Further, a two-stage process is possible and – in this context – appropriate. That approach would involve disclosure on a redacted or anonymised basis in the first instance. In the event that the Inquiry subsequently (having taken appropriate representations) concludes that disclosure in its report of the identities of individual junior civil servants is necessary in order to fulfil the Terms of Reference – for instance because of a conclusion of wrongdoing or serious incompetence – it may at that stage lawfully disclose their identities.

34. There is no conceivable reason why, if it adopted that two-stage approach, the Inquiry would be unable to fulfil its Terms of Reference.

35. What would not be appropriate – or lawful – is for the Inquiry to adopt a *presumption* that the identities of junior civil servants may lawfully be disclosed, rebuttable only by some individualised justification for non-disclosure. No warrant for that approach is to be

found in the Terms of Reference and, as explained, it would represent a fundamental breach of the Inquiry's data protection obligations and of individuals' data protection rights.

36. In this respect, it is not sufficient for the Inquiry to point to the general public interest in the matters it is considering within its Terms of Reference as a reason for disclosing junior officials' names. That argument is obviously wrong[6] (and a similar argument was rejected in *Cox*). Nor is it sufficient for the Inquiry to suggest that disclosing junior officials' names is necessary because it is important to see who was involved in the development of policies; whilst the Department does not doubt the relevance of tracing policy development, that can equally well be accomplished were junior civil servants to be anonymised in the documents disclosed to CPs and into the public realm[7].

37. In the premises, the Department invites the Inquiry to make the restriction order in the form attached, resulting in the redaction or anonymisation of junior civil servants' names save where – in any individual case – the Inquiry is properly able to conclude, following an individualised and fact-specific assessment, that disclosure of their identity is necessary in order to fulfil its Terms of Reference.

38. The Department reiterates that it stands ready to assist the Inquiry in any and all ways that it can. As relevant to this application, it stands ready to discuss any situations identified by the Inquiry legal team where the names of junior civil servants are considered relevant and disclosure to be necessary, with a view to reaching swift agreement in such cases.

Suggested procedure

39. The Inquiry's Data Protection Protocol sets out at §§24-27 the procedure to be adopted upon an application for a restriction order. Consistently with that protocol, the Department invites the Inquiry to:

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[6] Such a contention would, obviously, apply to *any* statutory public inquiry; and that would be to ignore the statutory scheme by which any such inquiry is vested with its authority, specifically the provisions of s.19(3) Inquiries Act.

[7] *Cox* concerned requests for information about the development of controversial policies and rejected that general proposition.

(i) Serve this application and draft notice on Core Participants and representatives of the media subject to confidentiality undertakings, and publish it on the Inquiry's website.

(ii) Issue a "minded to" decision, if considered appropriate.

(iii) Invite Core Participants and representatives of the media to make any representations in response, and publish them on the Inquiry's website.

(iv) Given the subject matter, invite representations from the Information Commissioner's Office, and publish them on the Inquiry's website.

(v) Invite Counsel to the Inquiry to file written submissions in response, and to publish them on the Inquiry's website.

(vi) In light of the general and individualised importance of the issue, hear oral submissions on the issue at a hearing.

(vii) Determine the application and give a written ruling, to be published on the Inquiry's website.

24 June 2022

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Temple Garden Chambers

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1 Crown Office Row

DRAFT Restriction Order pursuant to s.19 of the Inquiries Act 2005

NOTICE: Any threat to break this order, or any breach of it, can be certified to the High Court or Court of Session under section 36 Inquiries Act 2005, which will be dealt with as though the breach had occurred in proceedings before that court, and may be punishable by a fine or committal to prison.

Pursuant to s.19 of the Inquiries Act 2005, it is ordered that:

(a) The names of junior civil servants (those at Grades 6 and 7, Senior Executive Officer, Higher Executive Officer, Executive Officer and Administrative Officer or Assistant levels) shall be redacted from, anonymised or initialised in documents disclosed by the Inquiry to Core Participants and to the public and shall not be otherwise disclosed or published in any form, unless express permission is given by the Chair of the Inquiry, or the Solicitor to the Inquiry acting on his behalf.

(b) This order shall remain in force for the duration of the Inquiry and at all times thereafter, unless otherwise ordered.

(c) Any person affected by this order may apply for it to be varied or discharged on giving 24 hours' notice to the Solicitor to the Inquiry.

Dated [ ] 2022