In the matter of section 19(3) Inquiries Act 2005

Application for restriction order by BEIS

Final Decision

Introduction

1. The Department for Business, Energy and Industrial Strategy ("**BEIS**") has made an application dated 24 June 2022 for a restriction order, a draft of which has been submitted in the following terms:

> "(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."

2. In line with the Protocol on Redaction, Anonymity and Restriction Orders (the "**Redaction Protocol**"), I issued a 'minded to' note expressing my preliminary view on the application on 29 June 2022. I subsequently received submissions on behalf of the Core Participants who are represented by Hudgell Solicitors and Howe & Co (who collectively represent over 200 current and former Subpostmasters, managers and assistants) and (albeit after the deadline) on behalf of Post Office Limited (the "**Post Office**"). Both Fujitsu and UK Government Investments (a company wholly owned by HM Treasury and which oversees the Government's 100% shareholding in the Post Office) have confirmed that they have no submissions to make in response to my 'minded to' note. I have not received any further submissions from BEIS or any representations from the media.

3. In light of the fact that BEIS have not provided any submissions seeking to undermine or answer my 'minded to' note, I considered whether it was necessary for me to add to the reasons that I have already given. However, I have decided that it may help draw a line under this matter if I set out in further detail why I have reached my decision.

4. In their submissions, both BEIS and the Post Office propose inviting the Information Commissioner's Office to make submissions on this application. I do not consider that this

is necessary. All of the submissions have been published on the Inquiry's website (and widely publicised on social media and elsewhere) and the Information Commissioner has been free to express an interest should he have wished to do so. More importantly, as will be clear from my reasons below, I am not making any significant legal pronouncements in this decision; it rests on the particular facts and circumstances with which this Inquiry is concerned. My decision is also consistent, I believe, with the approaches that have been taken in a number of other statutory inquiries and does not represent a departure from current established practice. Finally, this matter needs to be determined as soon as possible in light of the urgent need to disclose BEIS documents to Core Participants in advance of hearings due to take place in September. Any further delay risks serious disruption to the hearing timetable.

Background

5. The Inquiry has so far identified 408 documents which have been disclosed by BEIS and which have been determined to be relevant to the Inquiry's Terms of Reference. These documents include Ministerial Submissions, notes and briefings to Ministers, minutes of meetings and reports of a group known as the Horizon Project Review Group, briefing notes, reports and official letters. The majority of documents which have so far been identified are more than 20 years old, relating to Phases 2 and 3 of the Inquiry. They will in due course be disclosed to Core Participants and witnesses, subject to the process of redactions. If they are referred to during the Inquiry's hearings, they will also be published on the Inquiry's website.

6. All of these documents have been through an initial redaction process ("**Stage 1**") that has been undertaken by the Inquiry prior to returning the documents to the document provider for their own redaction comments and representations ("**Stage 2**"). I understand that a process such as this is usual in statutory inquiries.

7. In accordance with the Redaction Protocol, the Inquiry has completed the following steps during Stage 1:

> "9. On receipt of the documents, the Inquiry will review all documents before disclosure to ensure it complies with its own obligations under the UK General Data Protection Regulation and Data Protection Act 2018. The Inquiry's approach to redaction of personal data is governed by the relevance of that data to the Inquiry and the necessity of its disclosure.

10. The Inquiry will normally redact private addresses, private email addresses, private telephone numbers, dates of birth and signatures. Such information will be redacted without the need for any restriction order or order for anonymity (save where the particular information is relevant to the Inquiry's Terms of Reference).

11. The Inquiry will decide whether any other information needs to be redacted on a case-by-case basis."

8. The documents therefore already contain redactions to personal data and redactions have been considered on a case-by-case basis (insofar as is possible based on information that is known to the Inquiry). For example, throughout these documents, there are proposed redactions to signatures and personal contact details. Document reviewers are mindful of the underlying relevance of the information to be disclosed and, where it is clear to a reviewer that an individual name is not relevant for the purpose of the Inquiry, the name is redacted.

9. There will always be cases where the Inquiry's own reviewers are not aware of a case or context-specific reason why it is not necessary to disclose an individual's name. It may be that an individual only held a purely secretarial role and had no substantive knowledge of the matters contained in the document. It may also be that an individual has good personal reasons for not being identified, which may outweigh the importance of their name being identified. Additionally, there may be some cases of human error, where a name should have been redacted but was missed.

10. As part of the redactions process, in order to take into account case or context specific reasons, there is the Stage 2 process. The Protocol provides as follows:

"12. When the Inquiry has decided which documents it intends to disclose to core participants with a view to putting them in evidence, it will inform the providers of documents (PoDs) so that those PoDs may indicate which part or parts of the document (if any) they seek to have redacted on the grounds that its disclosure is not relevant and necessary for the purposes of the Inquiry. Reasons must be given by PoDs for each proposed redaction.

13. The Inquiry will consider all requests for redaction. PoDs will be notified before the document in question is disclosed to the core participants.

14. The Inquiry expects PoDs to adopt a measured approach when seeking redactions and will redact documents only where there is a good reason to do so." [emphasis added].

11. I have underlined the two key sentences. It is expected, and I understand usual in statutory inquiries, for proper reasons to be given where additional redactions are sought and the good reasons explained.

12. In the present case, BEIS responded to the Stage 2 process by inserting an identical form of words in the document management system in respect of 227 documents, namely "*Personal information of junior Civil Servants*". No attempt was made within the space provided to explain why the individual name is not relevant to the issues being investigated by the Inquiry or what case-specific reason there may be for redaction. BEIS was asked in early May (and again on 9 June) to include such case-specific reasons for redactions, but this request was rejected. It is in those circumstances that BEIS was asked to file the application for a Restriction Order which has now been provided to the Core Participants and the media and published on the Inquiry website.

13. I circulated my 'minded to' note on 29 June 2022 and the entries within the document management system have remained unchanged by BEIS, stating only that the redactions are made because they contain the "*Personal information of junior Civil Servants*". As I have already explained, BEIS has not responded to either my 'minded to' note or the submissions from Core Participants.

The Law

*The Inquiries Act 2005 (the "**2005 Act**")*

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

> *"(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".*

15. Section 19 of the 2005 Act addresses restrictions that may be imposed on public access. It is necessary to set that out in full:

> *"(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.

(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, 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).

(4) Those matters 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).

(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."

*The Data Protection Act 2018 (the **"DPA 2018"**) and the UK GDPR*

16. The processing of personal data is governed by the UK GDPR read together with the DPA 2018. The UK GDPR imposes obligations on both data controllers (here the Inquiry) and data processors who are required to process data *inter alia* lawfully, fairly, and in a transparent manner in relation to the data subject (Article 5(1)(a)). In order for processing to take place lawfully, there must be valid grounds under the UK GDPR (known as a 'lawful basis') for collecting and using personal data.

17. The Inquiry's privacy notice sets out the lawful basis for the Inquiry's processing in respect of data that is not special category data (a category of data that is not relevant for the purpose of this application). The privacy notice states as follows:

> *"For data which does not fall within the definition of special category data (see below), the Inquiry will rely on the legal basis described below for processing. When processing your personal data, the Inquiry will, at all times, consider whether the processing or disclosure of such data is necessary for the Inquiry proceedings and functioning.*
>
> *In respect of the core functions of the Inquiry:*
>
> *the primary legal basis relied on for lawful processing by the Inquiry of personal data is Article 6 (1)(e) GDPR: processing that is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. The Chair has official authority to perform the core function of the Inquiry in order to investigate the matters falling within the Inquiry's terms of reference.*
>
> *In respect of material provided to the Inquiry (in particular, by witnesses) where you as the data subject have given consent to the processing, Article 6 (1) (a) GDPR will also apply.*
>
> *The processing of evidentiary material is necessary for compliance with legal obligations, which is provided for under Article 6(1)(c) of the GDPR. This includes section 18 (1) of the 2005 Act that provides, subject to restrictions notices, that the public are to have access to inquiry proceedings and information."*

18. For completeness, Article 6(1)(e) UK GDPR states as follows:

> *"Processing shall be lawful only if and to the extent that at least one of the following applies:*
> *…*
> *(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller"*

The Application

19. BEIS notes that the duty on the Chair to take reasonable steps to secure public access to the Inquiry's proceedings and information (s.18 of the 2005 Act) is subject to any restrictions imposed by a restriction order made under s.19 of the 2005 Act. It argues that Parliament intended that the general interest in securing public access to disclosed documents should be "*subordinate to any conflicting statutory requirement*" and that 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.

20. In respect of the Inquiry's data protection obligations, BEIS relies upon the decision in *Cox v Information Commissioner and Home Office* [2018] UKUT 119 (AAC) (a case under the Freedom of Information Act 2000). In *Cox* the Upper tribunal held that only the names of senior civil servants needed to be disclosed to an individual who made a request for information under s.1(1) of the 2000 Act. It also relies on the judgment of O'Farrell J in judicial review case of *Good Law Project Limited v Secretary of State for Health and Social Care* [2021] EWHC 1223.

21. BEIS submits that a general policy to disclose the identities of junior civil servants would breach the DPA 2018 and UK GDPR and it would therefore be unlawful, both under the 2005 Act itself and under the DPA 2018. Alternatively, BEIS argues, that even if the 2005 Act were to be construed to permit, rather than require, a restriction order where required by any statutory provision, there are good reasons for making such an order.

22. BEIS makes the following points. First, that the legal onus falls upon the Inquiry itself to ensure that it acts lawfully in accordance with the data protection principles and that it has a lawful basis for disclosure. Second, the Inquiry cannot lawfully take a broad-brush approach to compliance. Third, that 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"*. Fourth, that whilst there may be occasions when the identities of junior civil servants may lawfully be disclosed, this will be rare, largely limited to circumstances where there is some proper evidential basis to find "*personal wrongdoing*". BEIS questions why disclosure is necessary for the Inquiry's performance of its functions and submits that anonymisation (or initialisation) would be more appropriate, and a scheme developed to lift redactions where the Inquiry concludes that disclosure in its report is necessary in order to fulfil the Terms of Reference.

23. BEIS is supported by the Post Office to some extent. The Post Office submits that a general policy to disclose the identities of junior members of staff would breach statutory requirements and that the onus falls upon the Inquiry to ensure that it acts lawfully and in accordance with data protection principles. In respect of Post Office staff, it acknowledges that its structures are more complicated than that of BEIS but that nonetheless they share BEIS' concerns about the names of junior employees who "*were not decision-makers and whose identity may well be irrelevant to the Inquiry's Terms of Reference*".

24. The Post Office submits (but has not filed supporting evidence) that personnel at the Post Office have already received communications containing threats and abusive/harassing language and there is a real concern that disclosure of the names of junior employees would lead to an increase in such conduct. Unlike BEIS, the Post Office submit that, subject to the ICO not objecting to the Inquiry's approach, they are content for the time-being for documents to be shared with Core Participants, subject to the restrictions imposed by the confidentiality undertakings. In light of this, the Post Office do not make any application for a restriction order at this stage, but instead submits that they should be provided with sufficient prior notice in advance in respect of documents that may subsequently be referred to in a hearing or otherwise made publicly available so as to consider whether they should object, seek redactions, or restriction orders as necessary.

25. The Core Participants represented by Hudgell Solicitors and Howe & Co oppose the application for reasons that I will set out in greater detail below.

Determination

26. It seems to me that BEIS's legal arguments proceed on a misunderstanding of the Inquiry's processes. There is no "*general policy to disclose the identities of junior civil servants"* and the Inquiry does not take a "*broad brush approach to compliance*" as suggested by BEIS. As I have already set out above, there is a well-established document review process that the Inquiry undertakes which considers redactions on a case-by-case basis at Stage 1 (insofar as is possible based on information that is known to the Inquiry). That is supplemented by a Stage 2 process where document providers are entitled to make case and fact-specific proposals for further redactions. This goes above and beyond the process that is undertaken in ordinary litigation, where no judge is expected to carry out their own analysis of whether names contained in disclosed documents should be redacted before being referred to at a hearing in public.

27. In setting the approach to be taken by the Inquiry's document reviewers, I take as a starting point that the Minister has determined that the 'public concern' requirement of s.15(2) of the Inquiries Act 2005 is satisfied and that all documents that have been identified for disclosure have been determined to be relevant to the Terms of Reference of the Inquiry which were set out by the Minister pursuant to addressing that public concern. The matters being investigated by this Inquiry are very serious indeed. Furthermore, in the context of this specific Inquiry, there are a wide range of questions to be answered which go to who knew what and when.

28. One of the issues in the List of Issues asks, if Horizon was not fit for purpose, who knew? Another series of issues concerns 'Government Oversight' and addresses the adequacy of the mechanisms that were put in place. Who received what information within Government is relevant to the matters that I am determining, and, in the particular circumstances of this Inquiry, a bright line cannot be drawn between those individuals who happen to be at Grades 6 and below (referred to be BEIS as "*junior civil servants*") and those who are (or were) at higher grades. The fact that it is government policy that the names of junior civil servants are not usually publicised cannot alter my judgment on that issue.

29. I would note, for example, that an individual who has been referred to as 'Team Leader' in the Posts Directorate of the-then Department of Trade and Industry was a junior civil servant at Higher Executive Officer level. In the documents that I have seen it is clear that even junior officials have had significant involvement in the underlying matters even if they were not the decision-makers.

30. Significantly, there are also names of individuals who have been referred to as "*junior civil servants*" in the application by BEIS but who undoubtedly no longer fall within that category (assuming that they did at the time that the document was produced). One individual who BEIS seek to redact is now a High Commissioner, another individual was promoted over the course of the period covered by this Inquiry and served as a Director General in the civil service. One individual whose name has been proposed for redaction is not (and has never been) a junior civil servant at all but is a Post Office executive. Whilst it has been possible for the Inquiry to conduct its own research and establish this information from open-source searches, it serves to demonstrate why BEIS's proposal for the Inquiry to redact or anonymise in the first instance will not work. Such an approach would also impair the efficiency and effectiveness of the Inquiry and would undermine the important public interest in reaching conclusions and making recommendations within a reasonable

timeframe. In other words, the process that has been established and which is set out in the Redaction Protocol is also necessary for the performance of the Inquiry's function.

31. I agree with the submission made on behalf of those represented by Hudgell Solicitors that (i) officials at lower grades may play a significant role in the formulation of policy in practice: including in the provision of professional advice (reliance on advice being an issue for the Inquiry) and (ii) individuals who may initially have gained knowledge of Horizon at a lower grade may, over the course of the relevant period, have been promoted and their redaction in earlier documents would significantly distort the picture available to the Inquiry. There may well be statutory inquiries where this is not the case, where the matters being investigated do not cover such a long time period, or which focus solely on the decisions of particular political decision-makers or experts, but this is not such an inquiry and the two issues that are identified on behalf of those represented by Hudgell Solicitors are evident from documents that I have seen in this Inquiry.

32. I also agree with the submission made on behalf of the Core Participants represented by Howe & Co that redaction of all "*junior civil servants*" will inhibit the important contribution that Core Participants would otherwise be able to make. The wide range of Core Participants in this Inquiry, which includes over 200 Subpostmasters, managers and assistants, Post Office Limited, Fujitsu Services Limited and a wide range of other organisations, individuals, regulators, unions and the police should be able to see those names in order to identify relevant witnesses, identify relevant evidence, suggest appropriate questions for witnesses, draw together themes or suggest lines of further inquiry. In the circumstances of this particular Inquiry there are many people who have been involved in the underlying issues for many years and who may be able to alert me to matters that are relevant to the issues to be determined and that are outside my knowledge, the knowledge of my Assessors or the knowledge of the Inquiry Legal Team. They should be permitted to have that opportunity. But this Inquiry is not just being conducted for the benefit of Core Participants, and I also have in mind the wider public interest in disclosure of relevant evidence beyond Core Participants.

33. Drawing all of the above together, to use the language of the UK GDPR, I consider that it is "*necessary*" for those names of junior civil servants (that have been proposed for redaction by BEIS simply by reason that they constitute "*Personal information of junior Civil Servants*") to be disclosed. Insofar as BEIS's application seeks to ensure that I am satisfied that such disclosure is necessary, I can confirm that I am so satisfied. I would like to reiterate that BEIS has always been able to propose case and fact-specific reasons for

any redactions, including to individual junior civil servants who, for example, by reason of their personal circumstances, should be redacted.

34. In light of the fact that the Inquiry has already considered the necessity of disclosure of the names contained within documents that it is proposing for disclosure (Stage 1) and the fact that it is always willing to consider fact-specific reasons for further redaction (Stage 2) a broad Restriction Order of the type that is proposed by BEIS is unnecessary.

35. I do not consider it necessary to determine whether the *Cox* or the *Good Law Project* cases have relevance to a statutory inquiry; that is so because I am not asserting that there is some general presumption or assumption that all junior civil servants' names should be disclosed or that there is some inherent value in disclosure of their names for the sake merely of transparency. As it happens, however, I consider this determination to be consistent with those decisions. Whether or not names should be disclosed will of course depend on the facts, or to use the words of Upper Tribunal Judge Wikeley in *Cox* (at [35]) "*it all depends*" (a phrase echoed by Mrs Justice O'Farrell in the Good Law Project case at [29]). I have explained why on the facts of this Inquiry the disclosure is necessary.

36. I am of the view, too, that I need not determine, definitively, whether, as BEIS submits, s.19(3)(a) of the 2005 Act requires, rather than provides a discretion, to impose a restriction order where a statutory provision requires a restriction on public access. I have found that there is no statutory restriction in this case. I do however note that s.19(3) seems to me to address the limits on a restriction order ("*… must specify <u>only</u> such restrictions*") rather than providing the power to make a restriction order, which can be found instead in s.19(1) and (2) and which are phrased in discretionary terms.

37. Finally, whilst it is not the subject of the present application, I address the suggestion that is made in the submissions that have been filed on behalf of the Post Office that they should be provided with sufficient prior notice of any publication of documents to enable them to consider whether they should object, seek redactions, or restriction orders (and their suggestion that this may somehow require "*future input"* from the ICO).

38. The Inquiry published its protocols some time ago and no challenge has been made to those protocols. The Redaction Protocol was first published on 28 July 2021 and amended on 21 September 2021. That protocol sets out the two-stage process that I have identified above and the procedures for applying for a restriction order and/or anonymity.

39. A statutory inquiry of this kind can never provide Core Participants with a comprehensive list of documents that might arise at public hearings for a variety of reasons, including the fact that the particular significance of a document may not arise until the course of the hearing itself. However, I wish to assure the Post Office (and BEIS, should they wish to follow the same course) that should they consider a name contained in any document that is referred to, or brought on to screen, at a hearing should not be published to a wider audience, then I will hear any such a submission and consider the particular facts on a case by case basis. I issued a Restriction Order on 2 November 2021 which was intended to cater for such circumstances. That said, I trust that any such applications are made only after proper consideration has been given to the need to avoid disruption to the Inquiry's ambitious timetable and the crucial public interest in this Inquiry reaching conclusions and making recommendations as soon as reasonably possible.

Sir Wyn Williams

7 July 2022