

## THE LEVESON INQUIRY

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### URGENT APPLICATION BY PUBLIC BENEFIT ORGANISATIONS FOR DIRECTIONS REGARDING GOVERNMENT CORE PARTICIPANTS

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1. This is an application on behalf of Full Fact, English PEN, the Media Standards Trust and Index on Censorship ('the applicants'). Each of us is a non-profit organisation constituted for the public benefit and has been a witness to the Inquiry. We represent different but complementary perspectives on the issues the Inquiry faces.
2. On Friday, 04/05/2012, eight Ministers of the Crown were granted core participant status (the 'Government CPs'). The Chairman's ruling grants those ministers advance access to Inquiry evidence and widens the confidentiality circle to include 'advisers', as yet unidentified to the public. It also enables those ministers to request redactions before material forming part of the evidence reaches the public gaze.
3. During submissions on Friday, the meaning of 'advisers' was not questioned. It was not something counsel acting for the Government voluntarily expanded upon<sup>1</sup>. We are concerned that unless otherwise specified, 'advisers' may include politically-appointed Special Advisers, which for reasons set out below we do not believe should be permitted. We hold further concerns about the present anonymity of ministerial staff entering the confidentiality circle, and other concerns relating to the redaction process. All our concerns stem from an interest (and the public interest) in the transparency of the Inquiry process, and consequent public faith in the Inquiry and its outcomes.
4. We believe maximum transparency is in the interest of all core participants, including Government CPs, the Inquiry itself and most importantly the public. To some extent, therefore, the burden of proof rests on any who would oppose what we consider to be necessary and reasonable suggestions for improving the transparency of the process as it relates to Government CPs.

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<sup>1</sup> Though we have not of course had sight of the Government's written submission.

5. If it is felt counsel's input would assist in framing or debating the issues we now raise, we would ask for funding to be made available under the Inquiry Rules. There is a stark asymmetry between the resources available to our organisations and those available to the government.

### First concern: Special advisers

6. We believe an unintended consequence of Friday's ruling is that it opens the door for anyone whom a Minister might entrust to assist him or her to be put forward to join the confidentiality circle.
7. We do not think Special Advisers should be included in that circle.
8. The role of Special Advisers has already been at issue in this process, with the resignation of the special adviser to the Secretary of State for Culture, Olympics, Media and Sport. Whereas ordinary civil servants are subject to a general requirement to behave with impartiality and objectivity, Special Advisers are expressly exempt. As explained in the Code of Conduct for Special Advisers:

“Special advisers are temporary civil servants appointed under Article 3 of the Civil Service Order in Council 1995. They are exempt from the general requirement that civil servants should be appointed on merit and behave with impartiality and objectivity.”<sup>2</sup>

9. The fundamental role of Special Advisers is to bridge the gap between Party and Government, as made clear in that Code: ‘Special advisers are employed to help Ministers on matters where the work of Government and the work of the Government Party overlap and where it would be inappropriate for permanent civil servants to become involved’. They are ‘politically committed and politically aware’ and - unlike the ordinary civil service - they are ‘the source of political advice and support’<sup>3</sup>.

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<sup>2</sup> Cabinet Office *Code of Conduct for Special Advisers* (June 2010) para. 4

<sup>3</sup> *Ibid*, paras. 1 and 2

10. In that paragraph of the Code, 'political' means party political: all civil servants have to be astute about all kinds of small-p political matters.
11. We think it would be inappropriate to appear to allow any potential party political element into the Inquiry's confidential proceedings. Yet that would be the effect of allowing Special Advisers into the confidentiality circle. We do not think a Minister's publicly funded participation in the Inquiry process (which we speculate might include their private office, and potential legal assistance through the Government Legal Service) should be conflated with the personal and partisan role of a Special Adviser. We think the public are entitled to know what sorts of public servants Ministers feel they need to help them prepare to assist the Inquiry, and that the public would be understandably disturbed if among those staff given access were some for whom partisan advocacy is one of their principal roles.
12. We submit that if it is the Government's position that there are good reasons *why* politically-appointed Special Advisers need to be among those included, the case for the same needs to be made explicitly on the record and should be subject to argument, rather than being a quiet side-effect of Friday's application.
13. For the reasons outlined above, we would seek to contest any such application. In the mean time, we ask for a direction that Special Advisers not be allowed into the confidentiality circle.

Second concern: anonymity of ministerial staff who are in the confidentiality circle

14. The Chairman has consistently expressed his determination that the Inquiry be conducted in 'a spirit of complete transparency'. We support that approach, as something we consider crucial to public faith in the Inquiry and its outcomes.
15. We submit that in order to apply the spirit of complete transparency to the Government CPs it would be natural to carry over the principles functioning in the Freedom of Information arena to the level of disclosure the Inquiry chooses for itself. To that end, we would suggest that the names of those granted access to the confidentiality circle to support Government CPs be published as follows:

- Senior Civil Servants (and Special Advisers if applicable) must be identified by name, title and department.
- Other civil servants must be identified by title and department.
- Any others must be identified as the Inquiry Team thinks best.

16. This approach draws on principles set out in guidance published by the Information Commissioner, titled 'Freedom of Information Act Awareness Guidance No 1: Personal Information'<sup>4</sup>. That guidance suggests:

... 'if the information requested consists of the names of officials, their grades, job functions or decisions which they have made in their official capacities, then disclosure would normally be made ... it may also be relevant to think about the seniority of staff: the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair'.

17. To take a convenient example of these principles operating in practice, the Department of Health explained in a recent Freedom of Information response<sup>5</sup> that it has a:

'Departmental policy of withholding the names of third parties and officials in the Department of Health and other Government Departments who are not at Senior Civil Servant rank ...

... The nature of the work conducted by civil servants below Senior Civil Service SCS grade is such that they are not responsible for projects and policies of sufficiently high profile as to merit a public interest in knowing their identities. Accountability for such projects and policies is properly at SCS grades, and there are mechanisms in place for holding such individuals to

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<sup>4</sup>

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_1\\_-\\_personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_1_-_personal_information.pdf)

<sup>5</sup> <http://www.whatdotheyknow.com/request/108628/response/278668/attach/3/IR687608%20reply%20Rowell.pdf>

account. We do not believe that releasing names would add any value to the legitimate interest in knowing that there is named accountability for the actions of Civil Servants.'

(emphasis added)

18. We have no reason to believe that policy is not universal. It operates in other departments<sup>6</sup>, and has the force of common sense.

19. It is our submission that it would be anomalous for our suggested approach not to apply and therefore for the government to be held to a lower set of standards in this arena than it holds itself to in its other business.

### Third concern: redaction

20. Concern has been expressed on newspaper websites - and on other public forums such as Twitter – that in addition to the privilege of seeing evidence in advance, Government CPs have the ability to suggest redactions before material reaches the public gaze. Inevitably, where there is discretion to hide things from the public, there will be worries about abuse among the public.

21. Paragraph 24 of the Protocol<sup>7</sup> makes clear that the redaction process involves a process of negotiation. Core participants propose, and the Inquiry Team responds. The potential for core participants to 'try their luck' by proposing redactions to information that may be uncomfortable for them is tacitly acknowledged in the Protocol, where at paragraph 18 it states that 'The Inquiry expects POIs to adopt a measured approach to the provisional redaction of documents'.

22. In our submission, a proportionate way of meeting this concern lies in the first of the twin-track procedures set out in paragraph 15 of the Protocol. That paragraph provides that:

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<sup>6</sup> <http://www.whatdotheyknow.com/request/77520/response/201833/attach/3/FOI%20Reference%2011%200851.doc>

<sup>7</sup> Inquiry protocol relating to receipt and handling of documents including redaction: <http://www.levesoninquiry.org.uk/documents/>

'Within time limits to be specified by the Inquiry each POI must either:

provide a numbered schedule of the broad categories of the reasons why certain documents (or parts of them) may not be capable of being put into the public domain. The schedule should be in a form that can be made public. From time to time, the schedule may need to be expanded or updated.

*or*

provide a copy of the document(s) with provisional redactions highlighted in yellow (if the provisional redactions are accepted by the Inquiry Solicitor, the text will appear [blank / black] on the DMS [Document Management System])."

23. We submit that Government CPs proposing redactions should follow the first of these tracks, and that the resulting schedules be made public, as the Protocol envisages, whether or not the proposed redactions are agreed. This would create an incentive for the Government CPs to adopt the measured approach called for in paragraph 18. It will be for the Inquiry Team to ensure that the schedules are sufficiently informative to be meaningful to the public.

### The need for this application

24. These limited and conservative measures would, we submit, go a long way to alleviating the natural fears of the public. At the end of the day, they provide (a) a limited degree of transparency about those other than the named core participants who are being granted access to confidential Inquiry materials, and (b) greater transparency about the process of redacting evidence.

25. As mentioned at the outset, we believe maximum transparency is in the interest of all core participants, including Government CPs, the Inquiry itself and most importantly the public. As Onora O'Neill has argued, "Well-placed trust grows out of active inquiry rather than blind acceptance."

26. We have noted the actual and potential negative impact of Friday's ruling on the public's perception of the Inquiry<sup>8</sup>. The Inquiry is now partly into politicians, commissioned by politicians, reporting to the same politicians and involving privileged access to evidence and the legal right to request redactions for those politicians. Though mere public reaction should not interfere with the Inquiry's ability to carry out its functions, we think in this case it helps bring serious concerns and their significance into focus.
27. We make this application, in part because all four of our organisations have an interest in the outcome of the Inquiry and a belief that public faith in the outcome is important. But we make it also because nobody else has.

### Distinguishing Government CPs from other core participants

28. We have sought a number of additional measures which would not apply to the other core participants. We do not say there would be no benefit in applying these directions more widely, but we do believe there is a special case for applying them to the Government Core Participants.
29. That the Government is the alpha and omega of the Inquiry, its beginning and its end, creates a conspicuous difference between the Government CPs and other possible core participants. The public's reaction so far is a good indicator of that difference. It results from the fact that the Government is not merely a participant, but the entity that will make policy upon receipt of the Inquiry's report.
30. Further, this Inquiry is a policy process. The Chairman has said he is "very concerned that it should not simply form a footnote in some professor of journalism's analysis of the history of the 21st century"<sup>9</sup>. It will be the Government which decides whether or not that is to be the case. The ultimate difference between the Government CPs and all other possible core participants is therefore power, and it is

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<sup>8</sup> As of the afternoon of 06/05/2012, the highest-rated comments on the popular newspaper website, the Daily Mail, included "Here comes the co ver up!" "This action by the government looks very ugly". "Stitch-up". "Cover up is in the making". And "Sneaked out whilst the voting was going on". C.f. <http://www.dailymail.co.uk/news/article-2139529/Leveson-Inquiry-Governments-bid-view-Andy-Coulson-Rebekah-Brooks-evidence.html> at 14:44 on 06/05/2012. Unfortunately the second most popular newspaper website, The Guardian, has not enabled comments on articles with this subject matter and so we cannot offer that comparison.

<sup>9</sup> Lord Justice Leveson, Inquiry transcript, 16 Nov 2011 AM

a matter of fairness to the general public that its involvement be as transparent as possible.

31. In the case of the police organisations involved in this Inquiry, or NHS organisations in other inquiries, they are accountable to the Government for their actions and it has access to the necessary information to judge them. The Government, in its turn, is accountable to the public. The public needs access to enough information to judge them. From the Nolan Principles: ‘Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.’ In our submission, the scrutiny appropriate for the Government CPs comes from Parliament and the Public and the limited and conservative directions sought in this application will make it possible.

32. The assistance with their Government CP’s participation is being paid for out of public funds. It must therefore be aimed at public, not private, benefit (the first of the Nolan Principles) and carried out in a manner which best secures that public benefit. Finally, per the Nolan Principles, ‘Holders of public office should be as open as possible about all the decisions and actions that they take. They should ... restrict information only when the wider public interest clearly demands.’ The Nolan Principles, or properly the Seven Principles of Public Life, are incorporated into the Ministerial Code.<sup>10</sup>

33. Most importantly, we can imagine no good reason why the Government would object to any of the directions we are seeking. We hope these directions can be made with the assent of all core participants.

### The directions sought

34. For all the reasons set out above we seek the following directions, in response to Friday’s ruling, under s 17 Inquiries Act 2005:

- Special Advisers may not be allowed into the confidentiality circle;

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<sup>10</sup> Cabinet Office, *Ministerial Code*, (May 2010) at Paragraph 1.2 and Annex A  
<http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf>

- The identities of those being added to the confidentiality circle to assist Government Core Participants must be published according to the following scheme:
  - i. Senior Civil Servants must be identified by name, title and department;
  - ii. Other civil servants must be identified by title and department;
  - iii. [If allowed into the confidentiality circle] Special Advisers must be identified by name, title and department.
- Redactions made at the request of Government Core Participants must be identified as such;
- “Broad categories of reasons” must be published for any redactions made at the request of Government Core Participants;
- Redactions requested by Government Core Participants but not made must be identified and the “broad categories of reasons” cited in support of those redactions must also be published;
- Government Core Participants must ensure that redaction information is provided in publishable form as set out in the relevant Protocol

Applicants:

Full Fact  
Media Standards Trust  
English PEN  
Index on Censorship

08/05/2012

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