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CCPC 15(A-D)

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

1 September 1989

The Rt Hon Peter Brooke MP
Secretary of State for Northern Ireland
Whitehall
LONDON S W 1

Dear Peter:

BALLYNERRY INQUEST

You are aware of the three inquests which are being held into the deaths arising from the shooting incidents at Tullygally, Ballynerry and Mullacreavie in 1982. These are the incidents with which the Stalker/Sampson inquiry was concerned. The RUC is obliged to provide the Coroner for the Ballynerry inquest with all the relevant papers and I have been asked to give advice on one aspect of the evidence.

Evidence which the Coroner will undoubtedly consider relevant to his inquiry concerns the contents of the tapes made of the incident at the hay barn at Ballynerry. The tapes having been destroyed, the best evidence can be provided only by the recollection of those who listened to a recording of the incident. Statements have been taken from 11 such listeners, who come from the RUC, the Security Service and the Army. Careful consideration needs to be given to the issues arising in this context.

I have discussed these issues with Senior Crown Counsel, Brian Kerr QC, at a consultation attended by officials from all interested Departments, including your own, and from the Security Service. This letter sets out my views as to how this aspect of the inquest should be approached.

Evidence written or oral?

I have considered carefully the possibility, which did at one time seem feasible, that no oral evidence from the listeners should be made available to the Coroner, but that he should be given written statements and told that they contained all the facts that were relevant to his inquiry.

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Counsel has advised that if the Coroner were to accept such statements instead of oral evidence, his decision on the matter would be successfully challenged by judicial review in the courts. I agree with this advice. I have considered the further question whether it would neverthelesss be valuable to resist giving oral evidence in the first instance, to rely on the written statements and, after an adjournment of the inquest, to test the issue in the courts. My view on this - and the concerted view at the consultation yesterday - is that since it is almost inevitable that the witnesses will eventually have to give oral evidence, the balance of advantage lies very strongly in not trying to avoid this. I accordingly advise that the Crown should not resist the giving of oral evidence by these witnesses, subject to the conditions I mention below.

Screening of Witnesses

As regards the conditions under which oral evidence should be given, I have received the very firm views of the Security Service that it is of paramount importance to the effectiveness of their operations that the identity of their officers should not be disclosed to anyone save the Coroner. It appears that in this respect the position of the Security Service is to be distinguished from that of the RUC, who are content that their officers should give evidence under the same conditions as in the Gibraltar inquest and the Tullygally inquest, where they were screened from the public but not from the jury or from Counsel. I would not expect Army officers to be distinguished from the RUC in this respect, unless in the case of an individual there is a particular overriding reason of an operational nature similar to that affecting officers of the Security Service serving in Northern Ireland.

My advice is that Crown Counsel should acquaint Counsel to the Coroner with the Crown's view that for security reasons it is essential that the identity of the Security Service witnesses be protected from everyone save the Coroner himself. I am advised that it will be easier to persuade the Court to accept enhanced screening for the Security Service if we are prepared to accept only partial screening ('Gibraltar type' screening) for the RUC and the Army. We should be prepared to support our application by a public interest immunity certificate. The certificate (or certificates) should cover both substance - the information and documents to be protected - and procedure - the screening conditions by

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which the identity of witnesses should be protected. In my view you would be the appropriate Minister to sign any such certificate. (You will recall that Tom King signed a certificate for the Tullygally inquest). I have asked officials to begin drafting such a certificate for consideration by Counsel. Counsel is reasonably confident that the Coroner will accede to our conditions. His decision could however be appealed to the High Court, and whilst Counsel believes that we have a very respectable chance of success on any appeal (if necessary to the House of Lords) there can of course be no guarantee.

How much evidence can be excluded?

As regards the substance of the evidence which the witnesses may give, Counsel is reasonably confident that we shall be successful in excluding evidence on matters relating to the Security Service's operations. Any such evidence can be protected by the certificate on public interest immunity. Separate consideration however needs to be given to the circumstances surrounding the destruction of the tapes. Subject to the further views of the Security Service and the RUC, I do not think that evidence on this matter can be protected by the public interest immunity certificate. Counsel considers that we would have a reasonable argument that the circumstances regarding the destruction of the tapes are not relevant to the inquiry; I am less sanguine. He is giving further consideration to whether the fact that the tapes have been destroyed should be disclosed in written evidence, or whether we should wait for it to be drawn out in cross-examination. I consider it inevitable that the fact of destruction will come out in evidence, not least because it is already in the public domain.

Legislation as a fall-back

Having regard to the operational importance which the Security Service attach to protecting both the identity of their officers and the information about their operations, I have felt it necessary to consider the options open to the Government in the event of an unfavourable court ruling on either the screening of the witnesses or the disclosure of evidence about operational matters made the subject of a public interest immunity certificate. In either case an unfavourable court ruling would doubtless be appealed by the Government up to

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the House of Lords. In both cases I believe the Government's prospects of success in the Lords would be good. But in case the Government were to lose, the question of urgent legislation ought to be considered. Such legislation might for example provide that Security Service witnesses were not compellable before a Coroner's court except under conditions specified by the Secretary of State. We are dealing with a contingency which cannot in any event arise before 18 months to two years at the earliest, but contingency work on the content of such legislation will have to be undertaken well in advance of a ruling by the House of Lords.

The civil action against the Chief Constable

I have finally considered the civil action arising out of the hay barn incident which has been brought by Michael Tighe's father against the Chief Constable of the RUC. The Chief Constable has, I understand, been advised that there is no sound defence to the case and has given authority for a settlement to be negotiated. The action does however present timing difficulties, in that an order for discovery has been made against the RUC. It is of course important that documents are not disclosed in the civil action which will complicate the Crown's task at the inquest. It is also important that no explicit admission of liability should be made which could be used against the Crown in the inquest.

I have therefore approved the course proposed by those handling the action, whereby the RUC make an open offer to enter into negotiations with the plaintiff and, while not explicitly admitting liability, state their willingness to have damages assessed by the court if negotiations fail. This should avoid any immediate order for full discovery of all documents relating to the issue of liability being made by the court at the interlocutory hearing scheduled for 8 September.

I am copying this letter to the Prime Minister, John Major, Douglas Hurd, Tom King, Patrick Walker and Sir Robin Butler.

Yours ever,

Patrick


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