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B.07591

MR WICKS

The Peter Wright Case: Discovery of Documents

Flag C

My submission of yesterday described the documents which we are being pressed to discover to the court in Australia and the procedure for making a claim of public interest immunity (PII).

2. The Australian Government have now said that they will support, by giving evidence in court on Monday 24 November, a claim by us for PII on classes of documents. They would say that, if they were the plaintiff in the case, they would be claiming PII. They would not require to see the documents for which we were claiming PII. But the judge would have the right to see those documents, and would be likely to exercise it. As reported in my minute of yesterday, the strong advice of our Counsel in Australia is that the judge could be relied on to keep confidential the documents he saw for this purpose.

3. The documents to be discovered are still as described in paragraph 2 of my minute of yesterday, but our Counsel are trying to limit the range of the damage assessments we would have to discover. Instead of our discovering assessments of damage relating to each earlier publication in its entirety, we would discover them only in so far as they assessed likely <sup>in the book</sup> damage from revelations to the author by former members of the security services.

4. The relevant file on the television interview by Cathy Massiter in 1985 is a file of the Law Officers' Department. It covers consideration of the question whether criminal proceedings should be taken against Massiter or other people.

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The Attorney General has reviewed this file, which is not sensitive in terms of national security, and decided that it could be shown to the judge in Australia and that we would claim PII on grounds not of national security but because possible criminal prosecutions were under consideration.

5. The files on the other four earlier publications are files of the Security Service, and on Nigel West's book "A Matter of Trust" there are also Cabinet Office papers. We have made folders, which are attached, of the papers from the files which might relate to the demand for discovery.

6. Officials have looked at each paper in these folders, to judge whether it is strictly relevant to the demand for discovery and whether it could be shown to the judge in connection with a PII claim. Inside the front cover of each folder is a summary of the contents and of officials' views.

7. These papers present broadly four types of problem with regard to discovery -

(a) papers which relate to legal action contemplated or taken by the Government in relation to publication of the earlier books, etc. The main example is Nigel West's "A Matter of Trust" (green folder), where many of the papers are part of the negotiation through which we secured deletion of passages from the book;

(b) documents where sources of the Security Service are revealed or might be deduced;

(c) papers concerning consideration within Government of policy with regard to various publications before they appeared;

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(d) assessments of the damage that forthcoming publications might do, with comments on the contents showing which revelations were new and which were true; such papers reveal the names of many members of the security and intelligence services.

8. Officials consider that papers in group (a) can be shown to the judge in Australia in connection with a claim for legal professional privilege and, in the case of most documents, for PII. Other groups are more sensitive. The salient example of (b) is the identification in the flagged paper in the pink folder about Wright's television appearance in 1984 of Mr Glencross of the IBA as a source of the Security Service. In showing that document to the judge, our people in Sydney could be asked to persuade him that he need not know the name of the source, which would be erased before the document was passed to him. Group (c) is not very large. Difficult examples are flagged on the buff folder of Cabinet Office documents and the blue folder concerning Pincher's "Their Trade is Treachery". If our Counsel are successful in narrowing the demand for discovery on the lines described in paragraph 3 above, we may avoid showing complete damage assessments (group (d) above). The most significant example is flagged on the blue folder on Pincher's "Their Trade is Treachery". This one goes so far as to identify by name in paragraph 13 persons who are referred to but not identified in the book itself. Another significant example is flagged in the buff folder of Cabinet Office papers.

9. It would be an entirely new step for the Government to show many of these documents to an outsider, namely the Australian judge. We should obviously continue to negotiate hard for further narrowing of the demands for discovery and

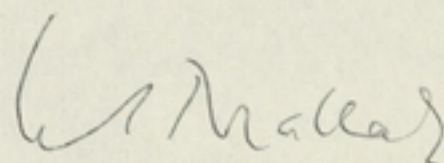
should not show documents to the judge except where it is necessary in our interest in order to maximise the chances of securing PII. But, subject to those points, it will ultimately be a question of showing the documents relevant to the demand for discovery to the judge or giving up a claim of PII. To give up that claim would leave us with an order for public discovery of sensitive documents, and to avoid meeting that we would have to give up the main Peter Wright case in Australia.

10. The attached documents have been shown to the Attorney General who considers it a lesser evil to show the documents to the judge, relying, as we must, on the assurances of Counsel that the judge will not show them to others. (There is, of course, no question of showing them to the other side's extremely hostile counsel, Mr Turnbull.) If the Prime Minister, the Foreign and Commonwealth Secretary and the Home Secretary agree, Sir Robert Armstrong should be instructed to work as hard as possible to narrow the demand for discovery and to show documents to the judge only when that is essential in the interest of our PII claim, but ultimately to show any of the attached documents on a personal basis to the judge. The Attorney General considers that, if we fail in our claim for PII at first instance, we should appeal against that decision; Sir Robert Armstrong could also be given instructions to this effect.

11. Since Sir Robert Armstrong will need time to prepare this complex material for the hearing on discovery on Monday 24 November, his instructions should leave London early on Saturday 22 November (which is Saturday evening Sydney time).

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12. I am sending copies of this minute and the attachments to the Private Secretaries to the Foreign and Commonwealth Secretary and the Home Secretary, and to Michael Saunders in the Law Officers' Department.



C L G Mallaby

21 November 1986

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