

**Ruling on application to disclose the number of documents covered by Inquests' PII
ruling made on 13th September 2019**

1. At the Pre-Inquiry hearing on 22nd November 2019 Mr. Weatherby QC, on behalf of a number of the families of the deceased, submitted that I should direct disclosure of the number of documents covered by my PII ruling.
2. **Background:** The Home Secretary on behalf of HM Government had made a PII application to me relating to material in the possession of the Security Service and Counter Terrorism Police relating to information that they had about Salman Abedi before the bomb attack. I upheld that application in both open and closed judgments. As a consequence of that ruling the Inquests have been converted into a Public Inquiry because I do not consider that a proper Article 2 compliant investigation could be held without investigation of the material covered by the PII ruling.
3. **The Submissions:** Mr. Weatherby QC, while accepting that nothing should be disclosed which could damage national security, argues that the families and the public should be given as much information about the withheld information as is consistent with that. He asks that disclosure is made of:
 - (a) The number of documents relevant to each topic within the Terms of Reference of the Inquiry that are being withheld.
 - (b) The total number of documents being withheld as a result of the PII ruling.
4. He argues that revealing the number of documents could not damage national security and therefore in accordance with the principle of open justice his request should be met.
5. Mr. Cooper QC on behalf of the families he represents, supports the application. He accepts that disclosure of the number of documents will 'provide no significant information about content or import'. He also accepts that providing the number of documents has the capacity to mislead as several documents could contain the same information. Balanced against that, he argues that it is difficult to see how disclosure of the number of documents could affect national security and therefore the balance is in favour of disclosure.

6. The Home Secretary argues that disclosure of the information sought could affect national security. She says that to provide the information could offend the principle of 'neither confirm nor deny' (NCND). The principle of NCND is helpfully summarised in the judgment of Maurice Kay LJ in *Mohamed Ahmed Mohamed, CF v Secretary of State for the Home Department* [2014] EWHC Civ 559 as a subset of public interest immunity, but it is not a trump card to be played by the State for its own benefit. In other words, the principle of NCND is to withhold from disclosure and to refuse to provide information on the ground that to do so would be injurious to the public interest, in this case national security.
7. It is further argued by the Home Secretary that disclosure of the number of documents relevant to each topic in the Terms of Reference would enable inferences to be drawn as to the contents of the documents which have been withheld under the PII ruling. It might allow inferences to be drawn as to the relative importance in the minds of the Security Service of different topics because of the numbers of documents withheld. Against this the Home Secretary submits that disclosure of the number of documents will not materially assist the families and it might mislead them.
8. GMP also resist the application. They do so on the basis that the number of documents being withheld from disclosure is irrelevant to any issue in the Inquiry and that provision of the numbers is capable of being misleading. For those reasons they say the requested disclosure should not be made.
9. Counsel to the Inquiry, while emphasising the importance of open justice, argues that in this case the balance of the arguments is against disclosure. CTI submit that it would be impossible to draw any reliable inference from the number of documents withheld and it would be possible to be misled as to its true significance, if any. CTI also take the view that the submissions of the Home Secretary, that disclosing the information risks damaging the principal of NCND and could allow inferences to be drawn which may damage national security, have merit.
10. **Discussion:** While I fully understand the basis and justification for the use of NCND, I do not think that it is engaged in this case. NCND is used by the Government in situations where, if it were to directly answer a question which might relate to national security, its refusal to answer in other cases might make it obvious what the answer is. In terms of national security, NCND often comes into play and the Courts have upheld the right of the Government to adopt such a response even in answer to specific allegations made in court proceedings. In this case, the Inquiry is being asked to disclose the number of documents covered by the PII ruling. It is open to the Government to argue, as they have, that because of inferences which could be drawn from the information as to the nature of the PII material, that information should also be covered by the PII ruling.
11. I, like Mr Weatherby QC, find it difficult to understand how the disclosure of the number of documents could realistically affect national security. While I understand what the Home Secretary is saying as to the possible damage to national security, it

seems to me to run contrary to the central argument of GMP, which is also relied on by the Home Secretary, that it is impossible to reach any reliable conclusions from the number of documents covered by the ruling whether or not divided into different categories.

12. The principal objection to disclosure is that the information sought is not relevant to the Terms of Reference of the Inquiry and supplying the information is capable of misleading CPs and the public as to its true significance. As part of the Inquiry process, on my behalf, the Solicitors to the Inquiry have and are in the process of collecting any information which is capable of being relevant to the Terms of Reference of the Inquiry. Having considered the evidence collected, I will exclude certain evidence as being irrelevant to the Terms of Reference. The obligation of the Inquiry is to supply relevant evidence to the CPs as it is that evidence which will be considered by me in reaching my conclusions. I do not consider that the mere number of documents covered by my PII ruling is relevant in any way to my investigations and there is no realistic prospect that I will be referring to it in my report.
13. In my judgment, the information sought is irrelevant to the Terms of Reference of the Inquiry and therefore is not disclosable. Having said that I might have disclosed the number of documents, as an exception to the normal rule, if I considered that it would genuinely assist the families in having some idea of the amount of information which has been covered by the PII ruling.
14. I have reached the conclusion that it would not assist in giving a true picture of the amount of information which has been withheld. As has been pointed out in submissions, disclosing the number of documents will not give any true reflection of the amount of information which has been withheld. For example, the same information can appear in a number of documents. There can be discussion in a number of other documents as to its true meaning and what steps could and/or ought to have been taken in consequence of the information. It follows that one piece of information can be contained in a very large number of documents. The contrary is also true. It follows that I do not consider that providing this information will assist the families in any real sense in getting any sort of idea of the quantity of information which has been excluded from the public hearings.
15. Disclosing the number of documents has the potential to be misleading. By way of example, if the number was a large one then the families and the public could consider that a very large amount of information has been withheld which might not be correct.
16. **Decision:** Having taken all these matters into account I have decided it would not be right to disclose the number of documents covered by my PII ruling.

Sir John Saunders
8 January 2020