

# The Baha Mousa Public Inquiry

Inquiry Chairman: The Right Honourable Sir William Gage

## Protocol for the Production of Documents and Other Evidence to the Inquiry by the Ministry of Defence

This protocol addresses:

- **the production of documents to the Inquiry by the Ministry of Defence (“MoD”); and**
- **the procedures for redaction of such documents.**

Although this protocol concerns production of evidence to the Inquiry by MoD, the Inquiry would ordinarily expect to adopt the same approach with other government departments, to the extent that they may be involved with the Inquiry.

## Background and Aims

1. This protocol is designed to ensure:
  - (a) that all Core Participants and the public know how the Inquiry approaches the provision of documents to the Inquiry by MoD, and the procedure for applications to redact documents. Practical and transparent procedures in this regard will be an important part of the effective running of the Inquiry;
  - (b) that the Inquiry promptly receives documents from MoD;
  - (c) that the provision of these documents to the Inquiry is not delayed by the need for prior applications to be made in respect of the documents;
  - (d) that the distribution of documents to other Core Participants is achieved expeditiously even if, initially, the documents are redacted. In particular, the Inquiry wishes to avoid a backlog in the distribution of documents to other Core Participants pending decisions under section 19 of the Inquiries Act 2005;
  - (e) that appropriate provision is made for MoD to make applications for a restriction order from the Chairman;
  - (f) that other Core Participants are able to raise concerns about the extent of redaction of documents.

2. Section 18(1) of the Inquiries Act 2005 (“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.”*

3. Section 19 of the 2005 Act provides as follows:

- “(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, enforceable Community 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.”

4. Sections 20 and 22 of the 2005 Act provide as follows:

“20 Further provisions about restriction notices and orders

- (1) Restrictions specified in a restriction notice have effect in addition to any already specified, whether in an earlier restriction notice or in a restriction order.
- (2) Restrictions specified in a restriction order have effect in addition to any already specified, whether in an earlier restriction order or in a restriction notice.
- (3) The Minister may vary or revoke a restriction notice by giving a further notice to the chairman at any time before the end of the inquiry.
- (4) The chairman may vary or revoke a restriction order by making a further order during the course of the inquiry.
- (5) Restrictions imposed under section 19 on disclosure or publication of evidence or documents (“disclosure restrictions”) continue in force indefinitely, unless—
  - (a) under the terms of the relevant notice or order the restrictions expire at the end of the inquiry, or at some other time, or
  - (b) the relevant notice or order is varied or revoked under subsection (3), (4) or (7).

This is subject to subsection (6).

- (6) After the end of the inquiry, disclosure restrictions do not apply to a public authority, or a Scottish public authority, in relation to information held by the authority otherwise than as a result of the breach of any such restrictions.
- (7) After the end of an inquiry the Minister may, by a notice published in a way that he considers suitable—
  - (a) revoke a restriction order or restriction notice containing disclosure restrictions that are still in force, or
  - (b) vary it so as to remove or relax any of the restrictions.
- (8) In this section “restriction notice” and “restriction order” have the meaning given by section 19(2).

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22 *Privileged information etc*

- (1) *A person may not under section 21 be required to give, produce or provide any evidence or document if—*
  - (a) *he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or*
  - (b) *the requirement would be incompatible with a Community obligation.*
- (2) *The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom.”*

5. Rule 12(1) of the Inquiry Rules 2006 provides as follows:

- “(1) In this rule—*
- (a) *“potentially restricted evidence” means any evidence which is in the possession of the inquiry panel, or any member of the inquiry panel, and which is the subject of a relevant application which has not been determined or withdrawn;*
  - (b) *“relevant application” means an application which is*
    - (i) *made by any person that evidence or documents are the subject of a restriction notice made by the Minister pursuant to section 19(2)(a) of the Act;*
    - (ii) *made by any person that the chairman exercise his discretion under section 19(2)(b) of the Act; or*
    - (iii) *made by any person that evidence or documents be withheld on grounds of public interest immunity,**and which entails the withholding of evidence from the public.*
- (2) *Subject to paragraph (3), potentially restricted evidence is subject to the same restrictions as it would be subject to if the order sought in the relevant application had been made.*
  - (3) *Where the conditions in paragraph (4) are satisfied, the chairman may disclose the potentially restricted evidence to a person who would not otherwise be permitted to see it.*
  - (4) *The conditions are that—*
    - (a) *the chairman considers that disclosure to an individual is necessary for the determination of the application; and*
    - (b) *the chairman has afforded the opportunity to—*

- (i) *the person providing or producing the evidence to the inquiry panel; or*
  - (ii) *any other person making the relevant application, to make representations regarding whether disclosure to that individual should be permitted.*
- (5) *Any person who is shown potentially restricted evidence pursuant to paragraph (3) shall owe an obligation of confidence to the person who provided or produced the evidence to the inquiry.*
- (6) *A breach of the obligation referred to in paragraph (5) is actionable at the suit of the person to whom the obligation is owed, subject to the defences applying to actions for breach of confidence.”*

## Procedures

### Schedule of categories of reasons for seeking redactions

- 6. MoD should provide to the Inquiry a sequentially numbered schedule of the broad categories of reasons why its documents (or parts of them), relevant to the matters being investigated by the Inquiry, may not be capable of being put into the public domain.
- 7. The schedule should be drafted in such a form that the schedule itself can be made public.
- 8. From time to time, the schedule may need to be expanded or updated.

### Provision of all documents in unredacted format to the Inquiry

- 9. In this protocol, “document” means anything in which information of any description is recorded. The Inquiry’s request for copies of documents is broad-ranging. It may (depending on context) include copies of plans, photographs, video footage, policy statements, meeting notes and minutes, manuscript notes, memoranda, correspondence (post and / or fax) and internal and external email communications. The Inquiry may also request physical evidence and where it does, references in this Protocol to “documents” should be taken to include reference to physical evidence.

10. MoD should provide the Inquiry with all documents requested by the Inquiry and documents it possesses which it considers to be relevant as soon as possible in unredacted form (save only that it may make redactions where it intends to claim legal professional privilege).
11. In light of the procedural protections provided for in paragraph 16 below, provision of documents to the Inquiry must not be delayed on the grounds that MoD may seek the redaction of the document or some part of it before it is published or provided to other Core Participants.
12. MoD should ensure that it retains original versions of all documents and physical evidence relevant to the Inquiry and that relevant evidence is not destroyed.

### **Indication of redactions sought by MoD**

13. MoD documents will be scanned into the Inquiry's document management system and given a unique reference number ("URN"). Electronic copies of the scanned in documents bearing the URN will be provided to MoD and the URN should be used in correspondence to identify the document.
14. As soon as reasonably possible after production of the unredacted document to the Inquiry<sup>1</sup> (or at the same time if this does not cause delay in the provision of the unredacted document) MoD must either:
  - (a) provide a copy of the document to the Inquiry with provisional redactions marked legibly on it; or
  - (b) indicate that no redactions in respect of that document are sought.
15. The Inquiry expects MoD to adopt a restrained and measured approach to the provisional redaction of its documents. Documents must be provisionally redacted only where MoD considers that the redaction can properly be justified under s19(3)

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<sup>1</sup> Since different quantities of documents will be disclosed at different times, the Inquiry does not seek to put a time limit on this stage of the process but the Inquiry expects appropriate priority to be given to communicating to the Inquiry whether there is any objection to the publication of MoD documents.

or s.22 of the 2005 Act. Regard should be had to the need for other Core Participants to understand the context of relevant passages within documents.

16. In any case where MoD has sought provisional redactions to a document, the Inquiry will treat the document as being “*potentially restricted evidence*” and evidence “*which is the subject of a relevant application which has not been determined*” under rule 12 of the 2006 Rules. Accordingly, the Inquiry will not publish the provisionally redacted parts of the document or reveal the provisionally redacted parts of the document to other Core Participants or to any witness unless:
  - (a) the conditions in rule 12(4) of the Inquiry Rules are met; or
  - (b) an individual witness or Core Participant was the author or recipient of the unredacted document and is thus entitled to see the document in its unredacted form; or
  - (c) MoD has subsequently agreed to the removal or amendment of the redactions; or
  - (d) a written application by MoD for a restriction order has been refused, but in this case, only 14 days after promulgation of the Chairman’s Ruling.

### **Initial distribution and publication of documents in provisionally redacted form**

17. To prevent delay in the distribution of documents, the Inquiry may (and often will) distribute the document to Core Participants, in the first instance, with the provisional redactions sought by MoD.
18. The Inquiry may also publish documents to the public via its website in this provisionally redacted form.

### **Consideration of provisional redactions by the Inquiry team**

19. The Inquiry Team will consider MoD’s proposed redactions.

## **Redactions which appear to the Inquiry Team to be prima facie justified**

20. There will be some cases where the proposed redactions appear to the Inquiry Team to be prima facie justified. For example, the redacted material may be both irrelevant and sensitive; or it may be relevant material where there is an apparent clear and strong public interest in, and / or article 2 ECHR positive duty to ensure, that the material is not published or circulated to other Core Participants.
21. In such cases, the Chairman will usually make a restriction order under s.19(2)(b) of the 2005 Act without requiring any further written application from MoD.
22. Unless there is a particular reason not to do so, such a restriction order will refer to the document and indicate the reasons why the redactions have been permitted by reference to the relevant number within the published schedule of reasons for seeking redactions.
23. Where a restriction order has been made by the Chairman under s.19(2)(b) without a written application having been made, it will be open to a Core Participant who may be dissatisfied with the extent of the redaction specified in the restriction order, to apply in writing to the Chairman to exercise his power under s.20(4) of the 2005 Act to vary the restriction order. In such a case, the Chairman may require MoD to respond in writing to the application, setting out the reasons for seeking the continuance of the restriction order and may then proceed as set out in paragraphs 27-28 below.

## **Other cases**

24. Having considered the proposed redactions, the Inquiry team may seek written reasons for the redactions from MoD and/or seek less extensive redactions than those proposed by MoD.
25. If the Inquiry Team is still not content with the nature of the proposed redactions, it will require MoD to make an application in writing to the chairman for a restriction order.

26. Such an application should be in two parts, an open and a closed part. The closed part must set out in full the reasons and argument as to why it is said that the restriction is necessary, having regard to s19(3) of the 2005 Act. The closed part will be considered only by the Solicitor to the Inquiry, Counsel to the Inquiry and the Chairman. The open part shall be drafted in such a way that it can be provided to the other Core Participants and published. It must contain as much of the reasons and argument from the closed part as is possible without defeating the purpose of the application.
27. On receipt of such an application, the open part of the application will be provided to the other Core Participants and an opportunity will be given to them to make representations in writing. The Chairman may determine such applications on the basis of the written submissions or hear further argument as he sees appropriate.
28. If the Chairman declines to make a restriction order or declines to make a restriction order as extensive as sought by the applicant then, subject to any notice or application made in accordance with s.19(2)(a) or s.38 of the 2005 Act, the document will be circulated to other Core Participants and may be published on the website within 14 days of promulgation of the Chairman's Ruling.
29. Where public interest issues or other s19(3) issues arise, the Inquiry expects the above procedures to be used for seeking a restriction order from the Chairman rather than a restriction notice being issued under s.19(2)(a) by the relevant minister.

### **Legal professional privilege**

30. If and to the extent that MoD wishes to rely on legal professional privilege as a ground for not producing evidence (or parts of evidence) to the Inquiry, it must notify the Inquiry in writing of the material (or parts of material) that it seeks to withhold on those grounds together with a summary of why it is said that the material attracts legal professional privilege.

## **General considerations**

31. The Inquiry team will generally regard as irrelevant information within documents comprising personal information such as telephone numbers, dates of birth and home addresses. Unless particular circumstances exist which make such information of relevance to the Inquiry, the Inquiry is unlikely to object to the provisional redaction of such material from documents supplied to the Inquiry. The Inquiry will redact such material from documents supplied to it prior to disclosure to Core Participants and the public. Such redactions will not require a restriction order but will instead be made on the basis of irrelevance.
  
32. The Inquiry may from time to time need to amend this protocol or adopt different procedures to meet specific problems.

**Gerard Elias QC**

**Nicholas Moss**

**Patrick Halliday**

Issued under the authority of the Chairman on 26 November 2008