

Ruling in respect of disclosed items

Introduction

1. During the course of the inquests a vast number of documents have been disclosed to Interested Persons (“IPs”), mainly by being uploaded on to the Lextranet database. Before having access to the material disclosed, each Interested Person had to sign a confidentiality undertaking. It stipulated, among other things, that the documentation could only be used “for the purposes of the Inquests and any directly related legal proceedings.” It is agreed that meant the material could only be used if the proceedings had a direct connection to the Inquests. Use of the material for ancillary proceedings, such as criminal proceedings or compensation claims or disciplinary proceedings, was not permitted.
2. Most IPs have applied for a variation or waiver of their confidentiality undertakings. They wish to be able to use the material for other purposes, in particular future criminal, civil and/or disciplinary proceedings. Among those IPs who wish to keep the material are the Independent Police Complaints Commission (“IPCC”) and the Crown Prosecution Service (“CPS”). Additionally, Operation Resolve (“OR”), which has assisted me during the Inquests, and, managed by the IPCC, is independently carrying out a criminal investigation into the events at Hillsborough, seeks access to the material. OR is not an IP.
3. As far as was possible, organisations which had supplied materials were put on notice of the applications. Only two are objecting to the applications. The first is a member of the public who wishes his/her name to be redacted from documents before they are made public. The second is the BBC.
4. These are the reasons for the decision I made on 8 April 2016 in which I made an order in the terms set out in the Form of Order annexed to this ruling.

The statutory background

5. Part 3 of the Coroners (Inquests) Rules 2013 applies to disclosure. By rules 12 and 13:

“12. This Part applies to the disclosure of documents by the coroner during *or after* [my emphasis] the course of an...inquest...

13(1)...where an interested person asks for disclosure of a document held by the coroner, the coroner must provide that document or a copy...

(2) Documents to which this rule applies include-
... (d) any... document which the coroner considers relevant to the inquest.”

6. Regulation 27(2) of the Coroners (Investigations) Regulations 2013 provides:
“The coroner may provide any document or copy of any document to any person who in the opinion of the coroner is a proper person to have possession of it.”

The proposal made by Counsel to the Inquests

The position of those apart from the IPCC, OR and the CPS

7. Mr Hough submitted there was good reason for the present undertaking to be varied so that IPs may use the materials that have been disclosed to them for investigations and proceedings arising from or concerning the disaster. It is likely many IPs will have to deal with the criminal investigation teams of the IPCC and OR and/or be defending criminal and/or regulatory proceedings and/or pursuing or defending civil claims. The investigations are on-going. Some civil claims have already been issued.
8. Material disclosed (including some not yet made public) is highly relevant to the investigations and proceedings. It is in the interests of justice that relevant material should be available for use. It would arguably be inconsistent with the Article 2 rights of the bereaved families if they were deprived of the ability to make use of relevant documentary evidence (especially evidence to which they already have had access within the Inquests).
9. The IPs could be put in the invidious position in which during the course of proceedings related to the Disaster they had control of relevant documents which they would be obliged to disclose but could not because of the terms of their undertaking. They would have to seek a variation from the terms of the undertaking from this court. That could result in an unmanageable situation, with many such applications over a long period of time overwhelming the court. As Mr Hough accepted, such a situation would only arise if IPs kept the material and the present undertaking remained. It would not if (as suggested by the BBC), it were returned.
10. Much of the material is in the public domain anyway. Wholly exceptionally, the Government waived the 30 year rule. The Inquests have involved the public deployment of even more material. It may be a matter of chance whether a document was displayed on the screen during the course of evidence (and therefore displayed

on the Inquests' website), or simply referred to and not displayed. It would be anomalous if material relevant to the Disaster could not be used in legal proceedings arising from it, absent specific justification.

The amended undertaking suggested

11. Mr Hough's suggested undertaking is in the following terms:

- “1. [To] keep all such documentation safe...
2. [To] keep...[it] confidential and not show or provide it to any third party who has not signed an undertaking in this form, except for the purposes specified in paragraph 3 below;
3. Only use such documentation-
 - (a) for the purposes of the Inquests and any directly related legal proceedings;
 - (b) for the purposes of any current or future criminal investigations arising from or relating to the Hillsborough stadium disaster; and/or
 - (c) for the purposes of any current or future criminal, civil or disciplinary proceedings (or reasonably contemplated proceedings) arising from or relating to the Hillsborough stadium disaster.”

The specific applications of the IPCC, OR and the CPS

12. Mr Hough proposed that after the Inquests the IPCC, OR and the CPS receive all material held by the Inquests' team, except for material protected by legal professional privilege and unredacted copies of medical reports obtained for the purposes of the Inquests. There is a joint application by IPCC, OR and the CPS entirely to waive the obligations under the existing undertakings. While not itself formally an IP, OR has sought to abide by the spirit of the present undertaking. As it is put in the joint application:

“Although Operation Resolve do not actually need to make this application, it is made on their behalf in order that there is no confusion or lack of clarity on the part of Interested Persons as what the IPCC, OR and CPS are permitted to do with the material disclosed throughout these Inquests once the Inquests have been concluded. For the avoidance of doubt, both teams have been able to use the material as necessary to pursue enquiries on behalf of the Coroner...

The investigations will continue after the Inquests have ceased...it is proposed that the material contained on the Coroner's database will be

transferred across to the IPCC and OR as investigation teams for the purpose of the ongoing criminal enquiries [excluding legally privileged material]... All material gathered or generated as part of the Inquests is of potential relevance to the ongoing criminal and disciplinary investigations...”

13. Mr Hough submitted that it is in the interests of justice there is a thorough investigation of the Disaster. Enquiries should not be hampered. Multiple applications for material should not be necessary. Mr Hough submitted it is not necessary to impose on those authorities duties only to use the material for the purpose of relevant investigations and proceedings. Their retention and use of material is governed by statutory obligations (under the Criminal Procedure and Investigations Act 1996 and its Code of Practice) and under Common Law.
14. A small number of BBC materials were not thought to be relevant for the Inquests. However, it is understood they came not from the BBC direct, but from the IPCC. It is unnecessary further to refer to them.

The individual’s request that his/her name be redacted from documents

15. As Mr Hough submitted, it would be both impracticable and undesirable to delete from disclosed documents the names of witnesses and others mentioned. It would be a huge task. It would render the understanding of the documentation as a whole difficult, at times impossible. Those alone are sufficient bases to refuse the application.

The BBC’s submissions

16. The BBC, for reasons I well understand, does not agree with Mr Hough’s suggestions. In his clear and balanced submissions, Mr Wolanski accepted that this was a matter of case management requiring the exercise of my judicial discretion. He submitted it was not an easy task in this unique situation, but that I should not exercise my discretion in the way Mr Hough suggested.
17. In paragraph 6 of its original position paper (which did not deal with issues relating to the investigating authorities), the BBC stated its position was that:

“...all BBC material provided to...IPs should be returned to the Coroner at the conclusion of the inquest. Failing that, the BBC submits that:

 - (a) The IPs should be permitted to retain copies of broadcast material and unbroadcast material save as falls into the categories in (b) below.

(b) The following materials should be returned to the Coroner at the conclusion of the Inquest:

- (i) Rough transcripts of unedited interviews from ‘Inside Out,’ broadcast...on 18 February 2013.
- (ii) Transcripts of interviews from Panorama, ‘How they buried the truth.’
- (iii) Unbroadcast written material, including additional transcripts, email correspondence, notes and notebook entries, held by journalists who worked on [the Panorama] programme.”

18. Mr Wolanski described (b)(iii) as the most pertinent. They are the working materials of journalists not anticipated to see the light of day. There is a particular sensitivity about such material. Mr Wolanski accepted that none of the documents within that category had particular individual sensitivity. The concern was based on general principles.

19. In a helpful and detailed statement, Mr Jordan, the Director of Editorial Policy and Standards at the BBC, set out what the concerns were. Among other things, he said that the disclosed material includes a “large quantity” of journalistic material disclosed directly to me as well as material disclosed to OR and/or the IPCC for their investigations, which they passed on to me. Mr Jordan placed considerable reliance on the BBC’s editorial policy as set out in its “Editorial Guidelines.” Mr Wolanski took me through them. Among other things, he drew my attention to the distinction drawn in the Guidelines between transmitted and untransmitted material. All requests for transmitted material “in connection with court proceedings, or other procedures which may regard the material as evidence...must be referred to the Programme Legal Advice and Editorial Policy.” When requested for such material, the BBC will “normally require a written agreement that the material will be used for purposes that maintain the integrity of the material and the BBC.”

20. On the other hand, untransmitted material is dealt with differently.

“Requests from third parties for access to unused material...should normally be referred to Director Editorial Policy and Standards [Mr Jordan]... We never voluntarily allow access to unused material...when it would make it more difficult to gather such material in the future, [or] if the requests appear

to be “fishing” for evidence, [or] if the material identifies a confidential source...

The BBC’s integrity could also be damaged if other organisations and individuals are allowed access to untransmitted material for their own use...

All requests for untransmitted or otherwise unused material...must be referred to Programme Legal Advice and Director Editorial Policy and Standards.

The BBC will not normally hand over unused material in such circumstances, including to the police, without a court order. Sometimes it is appropriate to accede to such an order, at other times it will be necessary to contest it and appeal to higher courts.

The police make significant number of requests for untransmitted material...:

21. Mr Jordan deals with the BBC’s understandable sensitivity regarding untransmitted material and other matters in the following way:

“11...The policy on use of untransmitted materials reflects the fact that it is the BBC’s role to report the news and make programmes. Independence and impartiality are two of the BBC core values and so, where BBC witnesses and records events that result in either criminal or civil proceedings to which it is not a party, it must remain neutral to the investigating authorities.

12 As regards contributors generally...the...Guidelines...[set] out the need to obtain ‘informed consent’ from contributors before they agree to participate...It is important for the BBC to be able to reassure contributors that it will consistently comply with the Guidelines and not provide materials relating to their contributions...except in the circumstances set out in the Guidelines.

13. It would be harmful to the BBC’s relationships with existing and prospective contributors if the BBC failed to comply with its Guidelines. Anyone who consents to participate in a BBC programme should be able to feel confident that the BBC will only use their contribution for journalistic purposes...if the BBC freely provided such materials to third parties this would lead to distrust in our journalists, thereby compromising their ability to undertake research and produce programmes...

15...Journalists must be free to prepare such materials knowing the BBC will not provide them to third parties except as provided for in the...Guidelines. If journalists believed that the BBC would allow third parties unrestricted access to these materials it would inhibit journalists in their work. Journalists

must be free to go about their work knowing that the BBC will protect their materials in accordance with well established policy.”

22. Mr Wolanski emphasised the issue of trust. He emphasised the importance to the BBC of the principles set out in the Guidelines, something I readily accept and understand.
23. At paragraph 5 of its Position Statement, the BBC stated it resisted the IPs’ applications “because [they]...represent a radical and unjustified departure from the ordinary principles which apply (a) to applications for third party disclosure, and (b), specifically, to applications for journalistic materials. If the applications are granted, the significant protections afforded to respondents to such applications will be overridden; this will have a chilling effect on journalism.” They seek the return of the material to the extent I have previously indicated.
24. Mr Wolanski did not accept that if the materials were returned it would put the IPs in an invidious position. If civil or criminal proceedings take place, the IPs would merely have to ask the BBC for the materials, and they would be provided. That is what the BBC has done throughout the Inquests. The documents would be kept secure. Mr Wolanski accepted the artificiality of the situation that would then be created. The IPs presently have (and may have gisted and/or written upon) the documents. They know what they contain. They would return them to the BBC. They would then ask for some of them back again. Mr Wolanski accepted it would be an unusual situation. However, it would not be so “outlandish” as to be impossible to implement. Any problem with having to disclose documents would not then arise.
25. Mr Wolanski submitted the course he was proposing should not raise insurmountable practical problems. It should be possible to identify the material to be returned to the BBC. He accepted additional difficulty might be caused by some IPs’ lawyers having made notes on some of the material.
26. Underlying Mr Wolanski’s submissions was, as he put it, the special feature that all this is journalistic material of one sort or another. He rightly submitted that Parliament (for example in the Police and Criminal Evidence Act 1984) has recognised for some purposes the special status of such material.

27. Given that the IPCC had the material anyway, Mr Wolanski accepted there was no real point to be made regarding that body. The main concern was OR. It is not an IP. Over a long period OR has obtained material by application under the Police and Criminal Evidence Act. The process has worked well. It has been very rigorous. OR has had to prove what was sought was relevant. On occasion it has withdrawn or amended its request. That rigour should continue. That is how matters should proceed. If I exercise my discretion under regulation 27(2) of the Regulations the process will be rendered otiose. Mr Wolanski however accepted that as a result of the statutory regime governing each of the organisations, none of the BBC material could be used for any purpose other than investigations and/or proceedings. It could not be used for any collateral purpose.

The BBC's fallback position

28. The BBC in its written submissions had as a fallback position that after 10 years all the material should be destroyed. Perhaps not surprisingly, it was not something Mr Wolanski really pressed if I was against him on his main submissions.

My view

Some general observations

29. I start with some general observations, all, as it seems to me, relevant to the exercise of my judicial discretion.
30. First, I completely understand the BBC's wish to apply its Guidelines. They are there for very good reason. Among other things, they reflect the importance and special status of journalistic material, which throughout I must bear in mind. I understand too Mr Jordan's comments on the issue of trust.
31. Second, the present position is highly unusual, if not unique. It cannot be said to set any sort of a precedent. The BBC, for very good reason, and without objection, has disclosed this material. The IPs have had it for a long time. They know what it contains. They could have summarised it. Even now, they could gist it. In some instances, they have deployed it during the Inquests.
32. Third, there is a further unusual element. OR and the IPCC have carried out detailed criminal investigations during the course of the Inquests, not, as would mostly be the case, completed before it. Those investigations will continue after the Inquests. It is that unusual situation which gives rise to the requests from those organisations.

33. Fourth, there is nothing in the material (especially that disclosed to IPs) of specific or particular sensitivity. There is, for example, no question of endangering BBC employees, or, identifying a confidential source or contributor or the material being used for purposes which might be thought to damage the BBC's editorial integrity.
34. Fifth, the material in question contains accounts from some important witnesses, including those who have made serious allegations.
35. Sixth, on the basis of the suggested undertaking, the retention and use of the material would be tightly controlled. As far as the IPCC, OR and the CPS are concerned, the use to which they could put the material would be strictly circumscribed by their statutory and common law duties.
36. Seventh, in exercising my discretion, I have to have regard the situation as it now is. Extensive disclosure of journalistic material has taken place.

My views on Mr Hough's proposals

37. Those general observations having been made, I agree with Mr Hough's suggested proposals. Requiring IPs to return this material which they have reviewed and used (and in some cases made notes on), would be impracticable and unsatisfactory. It would lead to further effort and expense and be of no real benefit. It would inevitably lead to many requests from IPs for the return of material which they have had, possibly for years. In effect, it would mean the same material passing backwards and forwards, between IPs and the BBC, possibly over years. However accommodating the BBC would be, it seems to me difficult to justify that. Mr Wolanski's acceptance that such a situation would be artificial was right.
38. As I have said, extensive disclosure of journalistic material has taken place. That cannot now be undone. I bear in mind the important issue of trust. However, in the particular circumstances of this case, and respecting the Guidelines as I do, I cannot see that they justify taking a course different from that suggested by Mr Hough. I doubt very much that here the effect on journalism would be chilling.
39. Moreover, even taking account of the fact this includes journalistic material, it is difficult in these particular circumstances to see why special arrangements should be made for the BBC.

The position of the IPCC, OR and the CPS

40. I agree with Mr Hough that it is in the interests of justice for the IPCC and the CPS to be released from their present undertakings. As he points out, the inquests and criminal investigations may together discharge the State's Article 2 obligations. I see no reason or benefit in setting limits on the purposes for which these authorities may use the materials. They are constrained anyway, as I have said.
41. As Mr Hough put it, to place OR in the position of having to make applications under the Police and Criminal Evidence Act to the BBC for these materials would result in a bizarre position. The investigating body, OR, would have fewer materials and less freedom to use those materials than the bodies and people it is investigating. Furthermore, as it seems to me, it would mean the IPCC having more materials and more freedom to use them than OR, whose investigation the IPCC is managing.

Conclusion

42. Finally, I would like to repeat and emphasise that nothing I say is intended in any way to impugn the BBC's Guidelines, which I understand and respect. I have exercised my discretion on the basis of what may well be a unique set of facts in the context of a unique case. I am setting no general precedent.

John Goldring
18 April 2016