



# **Inquest into the death of Alexander Perepilichnyy**

**Coroner: His Honour Judge Nicholas Hilliard QC**

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## **RULING ON PUBLIC INTEREST IMMUNITY AND RELATED ISSUES**

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### **Background**

1. The Home Secretary has made a second public interest immunity (“PII”) application to this court for an order permitting certain sensitive documents to be withheld from use in the inquest on the grounds that their disclosure would damage the public interest in national security. It is supported by a PII certificate dated 18 June 2018 and signed by him.
2. The first PII application was upheld in the High Court by judgment of Cranston J dated 23 November 2016, in which he said that he had no hesitation in finding that the balance came down in favour of non-disclosure.
3. In a written ruling dated 22 May 2017, I concluded that there was no basis for me to disturb Cranston J’s ruling, but said that I would of course keep that under review as these proceedings progressed. I have done so.
4. I have now received a large volume of open evidence, both oral and written, with 16 days of hearings in June 2017 and April 2018.
5. I have asked Her Majesty’s Government (“HMG”) to update the searches previously conducted in response to the original requests made by the Senior Coroner for Surrey to the Home Secretary and Foreign Secretary in letters dated 6 April 2016. These had already included requests for any information, if it existed, in the possession of the Security Service and the Secret Intelligence Service relating to:

1. Threats to the personal safety or life of Mr Perepilichnyy in the period 1 January 2012 to 10 November 2012.
2. Third party involvement in the death of Mr Perepilichnyy on 10 November 2012.
6. The updated searches again addressed the question of whether Mr Perepilichnyy was an agent for, or had any other contact with, British Intelligence Agencies prior to his death. This question had been previously addressed as part of the first PII application before Cranston J.
7. Separately, in a letter dated 21 April 2018, the Solicitor to the Inquest wrote to the previous Home Secretary on my behalf, asking for information about a review that she had announced would be conducted into allegations of Russian state involvement in 14 deaths in the UK. One of those cases was that of Mr Perepilichnyy. This review followed the nerve agent attack in Salisbury against Sergei and Julia Skripal.
8. The Government Legal Department responded, undertaking to provide any further relevant material to me.
9. I have now been provided with the report prepared for the Home Secretary's review. Some of the information in the report touches upon issues with which this inquest is concerned. I am not of course conducting inquests into the other 13 deaths, but I have not seen anything which provides new evidence of any specific link between them, or any of them, and Mr Perepilichnyy's case of a kind that might assist me in determining how he died. More broadly, though, I have admitted into evidence in this inquest some of the conclusions of the Litvinenko Inquiry and will admit as evidence a letter from Sir Mark Sedwill to NATO about the Skripal case. As the inquest has proceeded, it has been plain that this is obviously important and cogent evidence as regards questions of willingness/intent to kill and capability and I also have a joint statement from the three expert toxicologists, dated May 2017.
10. The Home Secretary has claimed PII over the report by way of certificate dated 18 June 2018. His counsel has made OPEN and CLOSED submissions in support of that application. He has also claimed PII over the answers to the questions posed at paragraphs 5 and 6 above.

11. Initially, the Home Secretary's PII application also covered a sensitive report prepared by the US Government (USG). It no longer does so because, following discussions between the USG and my legal team, I am satisfied that the substance of that report has now been disclosed openly in the form of a letter from the USG, which I quote in full at paragraph 38 below.
12. I do not consider that the remainder of the USG report is relevant and as a result, no PII application arises in respect of it.

### **Public Interest Immunity Ruling**

13. The legal principles to be applied to applications for PII are well-established and uncontroversial. They are set out in the judgment of Cranston J in his judgment at [73-75] and in the PII certificate signed by the Home Secretary.
14. In deciding whether the sensitive material should be disclosed, I must balance the public interest in its disclosure against the public interest in its non-disclosure (in this case the public interest in national security), following the procedure described in *R v. Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274.
15. The Home Secretary's view, as set out in his PII certificate dated 18 June 2018, is that to disclose the material would bring about a real risk of serious harm to national security. He advances OPEN and CLOSED reasons in support of that position. He then goes on to weigh the public interest in national security against the public interest in there being as open an inquest as possible, taking into account the relevance and importance of the material to this case and having regard to his counsel's advice. He concludes that the material should not be disclosed, but recognises that the court is the ultimate decision-maker in this regard.
16. On the side of the balance in favour of disclosure is the public interest in ,and fundamental importance of, open justice and the objectives of an inquest, as identified in *R(Amin) v. Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653. In that case which involved a death in custody, Lord Bingham emphasised the "centuries old" requirement to investigate such deaths publicly and that:

*“The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if justified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others” [31].*

17. I bear in mind the importance of those aims. In the context of this inquest, it is important that concerns about the possible poisoning of a Russian national in the UK by organised Russian criminals or the Russian state are dealt with as fully as possible.
18. I have borne in mind the judgment of Lord Templeman in *Wiley* at 281G-H, where he identified that, as a general rule, the harm to the public interest by the disclosure of a document dealing with defence of national security is self-evident and precludes disclosure. I also have noted what Goldring LJ said in *Secretary of State for Foreign and Commonwealth Affairs v. Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin); [2013] Inquest LR 258, when summarising the relevant principles applicable to the balancing exercise, namely that:
  - (i) “...a real and significant risk of damage to national security will generally, but not invariably, preclude disclosure” [59].
  - (ii) When carrying out the balancing exercise, the Secretary of State’s view regarding the nature and extent of damage to national security which will flow from disclosure should be accepted unless there are cogent or solid reasons to reject it [57].
19. I have subjected the Home Secretary’s claim to PII to rigorous scrutiny. I have considered the reasons he has advanced in OPEN and in CLOSED hearings as to the risk to national security and why he considers that the balance comes down in favour of non-disclosure. I do not consider that there are cogent or solid reasons for rejecting the Home Secretary’s view that there would be a real risk of serious harm to national security if the sensitive material that I have seen were to be disclosed openly into the inquest. I accept his assessment on this aspect.
20. I have considered the specific submission made by counsel for Legal and General that when considering the public interest in openly answering the question of whether Mr

Perepilichnyy was an agent for, or had any other contact with, British Intelligence Agencies prior to his death, I should not, to use the words of Maurice Kay LJ in *Secretary of State for the Home Department v Mohamed* [2014] 1 WLR 4253 at [20], automatically salute the “neither confirm nor deny” (“NCND”) flag.

21. HMG has specifically addressed this question in the material provided to me. Plainly, the Home Secretary is neither confirming nor denying the position openly. Although not a legal principle or rule of law, the basis and justification for NCND is well-established: see *inter alia* the judgment in *Al Fawwaz v. Secretary of State for the Home Department* [2015] EWHC 166 (Admin) at [74-79] and the oft-quoted passage of Carswell LCJ in *Re: Freddie Scappaticci's Application* [2003] NIQB 56at [15]. I have paid these submissions close attention and I am satisfied first, that for the reasons advanced to me in the CLOSED hearing, this is not a question of automatically acceding to the practice of NCND, and second, that there would be a real risk of serious harm to national security if HMG's response were to be disclosed.
22. I have carried out the balance myself. I acknowledge the very considerable public interest in open justice and in addressing fully the circumstances of Mr Perepilichnyy's death. I have considered the significance to this inquest of the material over which PII is claimed. I have considered again the material covered by the previous PII certificate and the material covered by the 18 June 2018 certificate. I have reviewed the material carefully and set it against all of the evidence that I have now received and which has been given in public. I have also reflected on the matter further since the hearing on 27 June 2018 at which the note of 26 June 2018, provided for the assistance of Interested Persons, was considered, and I have taken account of submissions which were made about it.
23. Thus, having reviewed the PII material and the open inquest evidence again and in depth since the 26 June 2018 note was drafted, I am now satisfied that such relevance as there may be in the PII material (over and above what is already publicly available in the inquest evidence) is so marginal and/or minimal as to mean that it will afford me no assistance in resolving the central question in this inquest as to how Mr Perepilichnyy died.

24. I have had particular regard to whether the effect of any relevant sensitive material is replicated in the evidence I have heard publicly. The evidence in this inquest has ranged far and wide and has in the event sometimes dealt in public with what has also been gleaned to the same or similar effect in circumstances which must remain secret. Nothing would be gained in this inquest by revealing sensitive methods of working or by disclosing nuances of information where the central thrust is itself clear and already publicly evidenced.
25. Thus, having conducted a balancing exercise, and having considered the reasons advanced in OPEN and CLOSED hearings by the Home Secretary as to the risk to national security and therefore to the public interest in non-disclosure, I am satisfied that the balance comes down in favour of non-disclosure and in upholding the PII certificate. In addition, I am myself aware of no additional lines of enquiry that could usefully be pursued. I should record that the Home Secretary's review into the 14 deaths has been concluded. In a letter to the Chair of the Home Affairs Select Committee, dated 23 August 2018, he has said that the police have confirmed that there is no basis on which to re-open any of the investigations. And so far as I am aware, they have not been asked to.

### **Further Matters**

26. Hermitage Capital Management ("Hermitage") have made a number of further submissions to me arising out of the PII application and US material which had originally been part of the application and which I deal with in paragraphs 36-41 below.
27. First, Hermitage ask for the opportunity to make further submissions about the consequences for the inquest should I uphold the PII application.
28. As it happens, I have upheld the application in the terms set out in paragraphs 19-25 above. I am presently satisfied that my investigation into Mr Perepilichnyy's death has been fully and fearlessly conducted and that it is not now necessary for me to pursue any additional lines of enquiry.
29. That addresses, in overall terms, the significance of the sensitive material that I have ruled should not be disclosed. It also represents my present view that the ruling I made

about the consequences for this inquest in May 2017 still stands. In other words, it can and should continue.

30. I will of course keep matters under review until the inquest concludes. In addition, I am mindful of heightened concern following the events in Salisbury. That, however, is not sufficient to alter my decision, given the conclusions I have come to about the PII material in the context of the other material which is already publicly available in this inquest.
31. However, while not inviting further written submissions on the matter from Hermitage Capital Management, or indeed any other Interested Person, I will of course consider such submissions, should they wish to make them.
32. The second submission made by Hermitage is that it is unclear how I can reach the view that this inquest should continue in light of the fact that the report prepared for the Home Secretary contains sensitive assessments concerning allegations of Russian state involvement in the deaths of a number of people. I disagree, for reasons that I have set out in a CLOSED judgment dated 5 September 2018. But as a matter of generality, in any exercise of this kind it would be important to consider whether the material contained anything which was not otherwise publicly available and which could reasonably be said to have any significant bearing on or connection with the issues I have to decide, and on whether any further investigations were necessary. I am satisfied here that the answer to both questions is No.
33. The third issue they raise is whether there is any proper basis for a PII claim in respect of information that has been publicly adduced in evidence at the inquest, or is otherwise in the public domain.
34. I have referred to the effect of information being reproduced in parts of the evidence that has been heard in the inquest. That addresses its practical significance for the purposes of the inquest. However, it does not follow from this that the underlying material over which PII has been claimed has been or can now be disclosed openly, or indeed that a further gist now falls for disclosure. Even identifying the parts of the evidence to which I am referring would risk damaging to national security, as it would highlight matters of sensitivity which the government legitimately seeks to protect.

35. Finally, Hermitage have raised a number of specific questions about the United States Government's report to which I have already referred.
36. In June 2017, BuzzFeed News, an online media company, published an article suggesting that the US Government had passed to British Intelligence Agencies high-grade intelligence, indicating that Mr Perepilichnyy was likely to have been assassinated on direct orders from President Putin or people close to him. It also stated that a highly classified report on Russian state assassinations, compiled for the US Congress by the Office of the Director of National Intelligence in 2016, asserted with "high confidence" that Mr Perepilichnyy was murdered and that this was sanctioned by President Putin. BuzzFeed referred to claims of a desire on the part of the British government not to inflame diplomatic tensions with Russia and reported that because of this, very significant intelligence about Mr Perepilichnyy's death had been suppressed. Of course, I note that since the article was published, the British government has been prepared to express the view that it was highly likely that the Russian state was responsible for the Salisbury attack. Nonetheless, the matters raised by BuzzFeed require examination.
37. Following the publication of the article, I asked the USG for disclosure of material relating to it and material generally about Mr Perepilichnyy. At the same time, I made enquiries of HMG about the matters raised in the article.
38. As a result of those enquiries which took place over a number of months, the USG permitted me and my legal team to inspect a USG report which addressed the enquiries I had raised of them. In a letter from the Office of the Legal Attaché to the US Embassy in London, dated 14 May 2018, the USG further agreed to disclose that:
- "The United States Government (USG) possesses a document referencing United Kingdom (UK) based public media reports that Alexander Perepilichnyy was assassinated in the UK before he was scheduled to testify about a tax fraud network. This report contains no USG reporting concerning the death of Alexander Perepilichnyy."*
39. The "document" referred to in the first sentence of this letter is plainly the "report" referred to in the second sentence and the USG have confirmed that the statement in the



final sentence that the report contains “*no USG reporting*” means that it contains no assessment or analysis of USG intelligence material.

40. Having inspected the USG report provided to me in response to the claims made in the BuzzFeed article, and given that it simply refers to media reports that Mr Perepilichnyy was assassinated, but contains no assessment or analysis of USG intelligence material reporting about his death, I am satisfied that the relevant information contained in that report has now been made public in this inquest and that the report itself does not fall for disclosure.
41. Putting these matters together, I take the view that I have taken my investigations into the allegations regarding Mr Perepilichnyy made in the BuzzFeed article as far as they can go. BuzzFeed themselves have declined to disclose to me the material upon which the article was based. Nonetheless, having engaged in investigations with both the US and UK governments, I am satisfied that the suggestion about the USG report raised in the article is incorrect.

**HHJ Nicholas Hilliard QC**

**September 5, 2018**

