IN THE MATTER OF THE INQUIRIES ACT 2005

AND IN THE MATTER OF THE INQUIRY RULES 2006

THE ANTHONY GRAINGER INQUIRY

RULING RE: APPLICATION FOR P.I.I.

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1. On 30 October 2015, acting as Judge Coroner in what at that time was the inquest into the death of Anthony Grainger, I upheld claims by (among others) Greater Manchester Police ('GMP') to withhold disclosure of certain categories of material on grounds of public interest immunity.

2. On 17 March this year, the Government announced its decision to convert the inquest into a public inquiry. With one exception, I have not been asked to revisit my earlier rulings on public interest immunity. The solitary exception relates to material concerning GMP's use of Covert Vehicle Tracking Devices and Covert Vehicle Locating and Positioning Devices (hereinafter compendiously referred to as 'vehicle tracking devices', or 'VTDs').

3. GMP continues to assert its claim to public interest immunity in respect of its use of such devices and the evidence gathered by such use. However, Counsel to the Inquiry ('CTI') now submit that some modification of my earlier ruling is required. They accept that matters relating to 'methodology' should remain redacted from documents disclosed to Core Participants ('CPs'), but argue that no serious harm would be caused to an important public interest by revealing the mere fact of the use of such devices or the data thereby obtained. Alternatively, they submit that, to the extent that any such harm might be caused, the balance of the public interest nevertheless favours disclosure.

4. When I considered this matter in October last year, it was (as I stated at the time[1]) as a matter of 'broad principle' and on an expedited basis, before completion of the disclosure process. It had already by then become apparent that the investigation could not proceed as a conventional inquest and that I would accordingly have to invite the Government to cause a public inquiry to be held. Since then, CTI and I have been able to conduct a more thorough examination of the VTD material in the light of all the other evidence that has now been obtained and disclosed.

5. It is common ground that in revisiting this issue, I should again apply and determine the four questions identified in *R v Chief Constable of West Midlands Police ex parte Wiley*,[2] *R v H*,[3] *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[4], and *Al-Rawi v Security Service*.[5]

6. In addition to the written material I had before me when I issued my rulings in October last year, I now have the following:
    (i) Further open submissions on behalf of GMP dated 12.12.16;
    (ii) Closed submissions on behalf of GMP dated 14.12.16;
    (iii) Further closed submissions on behalf of GMP dated 20.12.16;
    (iv) Submissions on behalf of Gail Hadfield-Grainger dated 12.12.16 (which mainly concern the issue of holding closed hearings, but which do touch on issues of public interest immunity);
    (v) Submissions on behalf of John and Marina Schofield and Stuart Grainger dated 13.12.16;
    (vi) Open submissions from CTI dated 13.12.16; and
    (vii) Copies of each of the pages of material within the documents disclosed by the Inquiry to CPs which related to GMP's use of VTDs (divided by CTI as between (i) those which disclose the fact of use of a VTD/the data obtained as a result) and (ii) those which disclose VTD methodology).

[1] *Open Ruling on P.I.I. Applications*, 30 October 2015, §3.
[2] [1995] 1 AC 274.
[3] [2004] 2 AC 134.
[4] [2009] 1 WLR 2653.
[5] [2012] 1 AC 531.

7. On 15 December 2016, I heard open oral submissions in relation to this aspect of P.I.I. from counsel for John and Marina Schofield and Stuart Grainger, as well as counsel for Gail Hadfield-Grainger, and I heard open and closed oral submissions from CTI and counsel on behalf of GMP.

8. On 20 December, at the Inquiry's invitation, I received further closed written submissions from Miss Whyte on behalf of GMP in relation to the matters covered by paragraphs 17 – 22 of this ruling.

9. The material with which I am presently concerned was obtained by the authorised use of vehicle tracking devices which were covertly fitted to a number of cars connected to Mr Anthony Grainger and certain of his associates during the weeks leading up to Mr Grainger's death. Of the five vehicles identified in paragraph 16 of GMP's closed written submissions, three are relevant for present purposes, namely the stolen Audi A6 *RO08 LOD*, the stolen BMW *YA06 ZDT*, and Anthony Grainger's own VW Golf *HN55 PVT*.

10. The significance of the VTD material is not in dispute. In the first place, the movements of the vehicles are in themselves directly relevant to the events which the Inquiry is investigating. Secondly, the intelligence secured by the devices used to track those vehicles was available to the investigation team at the time and thus falls squarely within the terms of paragraph (ii) of the Inquiry's Terms of Reference, namely "information available to those who planned the operation". The more rigorous analysis of material that has taken place since my original decision has, if anything, highlighted the latter point's significance, because the bare fact that planners had available to them constant, uninterrupted knowledge of the exact whereabouts of each vehicle, and were consequently not wholly dependent on conventional surveillance or other sources of intelligence, is likely to be an important factor in any evaluation of the planners' thought processes and decisions.

11. With those considerations in mind, I now turn to the four questions I must determine.

Q1. Is there a public interest in bringing this material into the public domain?

12. When I first considered this matter in October last year, it was in the context of inquest proceedings. In the absence of any mechanism for holding closed hearings, material that could not be made public could not be received at all. As Miss Whyte correctly points out, that is not the present situation. It would be open to me to receive the VTD evidence in closed session without disclosing it to CPs or the public. In that sense, the strength of the public interest in bringing the material into the public domain may be said to have diminished since the present Inquiry was set up. At the same time, I remind myself that an important function of such an Inquiry is to allay public concern[6]. Further, section 18 of the *Inquiries Act 2005* creates a presumption of public access to inquiry proceedings and information. For those reasons alone, there is a powerful public interest in the openness of the process itself, including the provision of access to important evidence of the kind I am now considering. I might add that without such access, the effective participation by CPs in the work of the Inquiry will inevitably be impeded. That is an important consideration where, as here, the investigative obligation imposed by Art.2 ECHR is engaged.

13. Because information as to the exact whereabouts of each vehicle was available to the planners at all times, it will be very difficult to confine this category of evidence to closed hearings. Indeed, so pervasive is it that it cannot readily be segregated from the rest of the intelligence to which planners had access. Like the cosmic background radiation, it is a constant, omnipresent clue to the past. To a greater or lesser extent, it is likely to have been a factor in many of the decisions taken by those who planned Operation Shire after the deployment of VTDs. It will scarcely be possible for them to explain those decisions without making some reference to the material. To have to move constantly between open and closed sessions solely for that purpose would be disruptive to the work of the Inquiry, a difficulty which bringing the material into the public domain will remove or, at the very least, greatly mitigate. The fact (which I acknowledge) that the same difficulty may prove inescapable in relation to certain other categories of sensitive material does not diminish the legitimate public interest in making such highly relevant information public.

[6] *Inquiries Act 2005*, section 1(1).

14. For those reasons, notwithstanding the fact that it would be possible for the Inquiry to receive this evidence without bringing it into the public domain, I remain of the view that there is a clear public interest in doing so.

Q2. Will disclosure bring about a real risk of serious harm to an important public interest and, if so, which interest?

15. Here again, circumstances have altered since I last considered this question in October 2015. As I said at that time[7], there is clearly a strong public interest in the detection and prevention of serious crime, in the service of which various technical methods, some of them sensitive, have achieved considerable success. I added this observation:

> "In my judgment, those undoubted benefits would be significantly compromised should the manner and method of their deployment become matters of public knowledge."

I remain of that view. There is, however, an important distinction to be drawn between methodology (or 'manner and method') and output (or 'product'). It is true, of course, that the content of this kind of intelligence cannot be disclosed without at the same time revealing that it had originated from the use of covert technical equipment, but the mere fact of such use need not betray any sensitive details of its methodology. Given the entire output data, it might, I suppose, be possible to make an educated guess as to the locations and times at which the devices had been fitted and subsequently removed, but it is difficult to see how even that information could significantly compromise future operations. It would surely come as no surprise to any person to learn (if it be so) that a covert device had been fitted and removed at dead of night while the vehicle was unattended and the risk of detection was correspondingly low.

16. For all practical purposes, the use of covert vehicle tracking devices must now be regarded as being in the public domain. A simple internet search will produce a barrage of online advertisements from the suppliers of such devices or from detective agencies boasting of their ability to deploy them on behalf of their customers. Any sensible member of the public would reject as absurd the idea that law enforcement agencies were not making use of them in the fight against organised crime.

[7] *Closed P.I.I. Ruling (GMP)*, 30 October 2015, §17.

17. It is perfectly true that in my closed ruling of October 2015 I expressed the view that, even if people may suspect the deployment of tracking devices, "the use of such methods by law enforcement agencies is not widely known and ought not to be publicly confirmed"[8]. When I made that observation, I was not aware of the extent to which such matters have already entered the public domain. The researches of CTI have revealed four past cases of potential relevance: *Donachie v Chief Constable of Greater Manchester Police* [2004] EWCA Civ 405; *R v Wootton and others* [2012] NICC 10; *R v Smith and others* [2013] EWCA Crim 2102; *R v Duffy and others* [2015] NICC 13. In each case, open reference was made to the fact that VTDs had been fitted to suspect cars. Although all are reports or transcripts of legal proceedings, they were not, of course, cited in support of any proposition of law, but were drawn to my attention purely for their relevant factual content, and specifically to rebut a suggestion on behalf of GMP that the fact of the use of VTDs had not been disclosed in any previous court proceedings.

18. Apart from *Donachie v Chief Constable of Greater Manchester Police*, the examples cited are, in my judgment, of comparatively limited value and need to be approached with a degree of caution. *Wootton* and *Duffy* were non-jury terrorist cases from Northern Ireland. *Smith* was an appeal against sentence. I think Miss Whyte is entirely right to say that immunity is not lost simply because similar material has been referred to in other proceedings. A past failure to assert or justify a claim to public interest immunity cannot, by itself, extinguish the duty to advance such a claim whenever it arises in subsequent cases. The same objection, however, may also be said to apply to Miss Whyte's own contention (which, with respect, I do not accept) that "as soon as this tactic is disclosed in a public Inquiry context … other agencies will no longer be able to protect the tactic as it has been protected to date".

19. The relevant facts disclosed by the cases of *Wootton*, *Duffy* and *Smith* confirm that there has been some open reference in the past to the fact of VTD deployment by law enforcement agencies. As Miss Whyte concedes, those references are not confined to law reports of the kind which might be thought unlikely to have an extensive readership; the *Duffy* case, in

[8] *Ibid.*

particular, received wider publicity[9] precisely because the prosecuting authority's unwillingness to reveal details of vehicle tracking methodology led to the collapse of the trial. However, none of those three cases concerned GMP.

20. The case of *Donachie* is very different. It was a claim for damages for negligence and breach of statutory duty brought against GMP by one of its officers. In the course of his duties, as long ago as 1997, the claimant had been required to attach a tracking device to a suspect vehicle. The device was defective, and the claimant alleged that he had sustained injury and loss as a result of the stress he had suffered through having to make multiple attempts to fit it without being caught in the act. The Court of Appeal allowed his appeal against the trial Judge's dismissal of his claim, and the claimant eventually went on to secure an award of damages in the region of £2 million. Not surprisingly, given its unusual facts and the size of the award, the case attracted national publicity. CTI's research has identified archived online reports confirming that at least two large circulation news organisations covered the case[10]. The reports go beyond the mere fact that a VTD had been deployed and include some details of methodology, including where the device had been placed, where the suspects were at the time, and the presence of a van containing other officers conducting surveillance whilst the device was fitted.

21. Given the degree of publicity that the *Donachie* case attracted when it was reported in 2006, I think I must accept that the (unsurprising) fact that GMP has been using VTDs since at least 1997, and has deployed them against 'ordinary' criminal suspects as opposed to alleged terrorists, must now be taken to be in the public domain. Together with the *Wootton*, *Duffy* and *Smith* cases, it significantly undermines the point I made in my earlier ruling that the use of such methods by law enforcement agencies is not widely known and ought not to be publicly confirmed. Such use – by the very police force with which this ruling is concerned – has already been publicly confirmed in the news reports to which I have referred.

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[9] See for example: http://www.rte.ie/news/2015/1022/736821-shane-duffy-paul-john-duffy-damien-danny-duffy/
http://www.irishnews.com/news/2015/10/24/news/mi5-surveillance-most-sophisticated-ever-seen--303792/
http://www.irishnews.com/news/2015/10/23/news/pps-urged-to-carry-out-surveillance-review-after-case-collapses-over-tracking-device-ruling-303043/
http://www.ibtimes.co.uk/mi5-drone-secrecy-causes-million-pound-trial-colin-duffy-relatives-collapse-1525991

[10] http://www.standard.co.uk/news/2million-payout-for-detective-in-bungled-operation-7177054.html
http://www.dailymail.co.uk/news/article-410719/2million-payout-detective-bungled-operation.html

22. It follows that the risk of serious harm to the public interest that I have to consider amounts, in reality, to the residual risk of harm that might be occasioned by revealing that VTDs, already publicly known to be have been available to GMP for at least 19 years, were used in this particular investigation in 2012. I remain of the view that to reveal technical details relating to methodology would give rise to a real risk of serious harm to the public interest in the detection and prevention of crime. However, for the reasons set out in the preceding paragraphs, I do not accept that disclosure of the mere fact that VTDs were used in this case, together with the content of the intelligence obtained, would bring about any such risk.

Q3. Can the preservation or protection of the imperilled interest be achieved by alternative means, sort of non-disclosure?

23. In view of the answer I have provided to the preceding question, it is not strictly necessary for me to go further, but I take the view that for the sake of completeness I should nevertheless do so.

24. Because the use of VTDs meant that planners had the capacity to know exactly where each of the relevant vehicles was at any given time, it is not in my view feasible to isolate portions of the data and present them in a 'gist'. If the public (and CPs) are to follow this important aspect of the evidence, they need to be aware that investigators had the facility of continuous access to the data. As a matter of practical reality, therefore, it seems to me that the public interest in disclosing the data extends to the entirety of it, and not just a few selected portions. That being so, there is no advantage, and some detriment, in trying to devise an alternative to disclosure.

25. The suggestion[11] that I might disclose the VTD material to legal teams pursuant to rule 12 of the *Inquiry Rules 2006* is misguided, because that provision applies only to such disclosure as the Chairman considers is necessary for the determination of an application for a restriction order[12], and not for any broader purpose.

[11] *Submissions by John and Marina Schofield and Stuart Grainger*, 13 December 2016, §9.
[12] *Inquiry Rules 2006*, rule 12(4)(a).

Q4. If the alternative is insufficient, where does the balance of public interest lie?

26. Examination of the material with which I am presently concerned is, in my view, central to this Inquiry's task. The intelligence obtained from the use of VTDs forms an essential element of the "information available to those who planned the operation". It is not realistically possible to make such intelligence public without, in the process, revealing the fact that VTDs had been used to obtain it. If and in so far as there may be a real risk of serious harm to the public interest in the detection and prevention of crime as a result of disclosing the bare fact of VTD deployment and the content of the information this obtained, I am convinced that such risk is (if I may be permitted a further astronomical figure of speech) totally eclipsed by the powerful public interest in receiving the relevant evidence in open session.

27. For the avoidance of doubt, I make it clear that the public interest requires that nothing beyond the fact of deployment and the content of the information obtained must be revealed. Specifically, no technical details relating to methodology or deployment should be disclosed. It ought to be sufficient to indicate that the information made public represents only what the Inquiry regards as being relevant to its task, without betraying that the data is, in fact, complete.

HHJ Teague QC
Chairman
22 December 2016