Application by the Scottish Police Federation and others for a restriction order in the Sheku Bayoh Inquiry
Decision by chair

Decision

[1] For the reasons set out below, I grant the application and make a restriction order under section 19(2)(b) of the Inquiries Act 2005 (the 2005 Act) prohibiting the disclosure and publication of the report by John Sallens (forming part of PIRC-02599(a)). I am satisfied that this restriction is required by a rule of law, namely, that the document is subject to legal professional privilege.

Introduction

[2] This is an application for a restriction order under section 19 of the 2005 Act. The terms of reference of the Sheku Bayoh Inquiry require the Inquiry to examine the investigation into the death of Sheku Bayoh conducted by the Lord Advocate and the Police Investigations and Review Commissioner (PIRC). The Inquiry has already examined extensive evidence in relation to investigations by each of these bodies. This application relates to a limited and narrowly focused aspect of the examination by the Inquiry of the investigation by the Lord Advocate and PIRC. The application is made by the Scottish Police Federation (SPF) and the nine police officers and former police officers who attended at Hayfield Road on the morning of Sunday 3 May 2015 (the attending officers). A number of the attending officers were involved in the restraint of Mr Bayoh.

Background

[3] In the aftermath of the death of Sheku Bayoh, Peter Watson, solicitor, of PBW Law acted for all the attending officers, as well as the SPF. In the Inquiry Mr Watson

continues to represent the SPF as well as two of the attending officers. The remaining attending officers are represented by legal representatives, individually in the case of Alan Paton, and in groups in respect of the remaining officers.

[4] After the death of Sheku Bayoh, having been instructed by the attending officers, Mr Watson engaged John Sallens, a precognition officer, to carry out certain investigations and precognitions. Mr Sallens produced a report (the Sallens report) which is the subject of the application.

[5] On 3 September 2015 Mr Watson sent to each of the Lord Advocate and PIRC a letter to which the Sallens report was attached. The letter to the Lord Advocate was in the following terms:

> "We thought that it would be appropriate to share with you a summary of our investigations to date on behalf of those whom we represent in relation to the death of Sheku Bayoh.
> This report summarises our finding thus far and we hope that this is of assistance to you. We will copy this to the Commissioner of PIRC. For the avoidance of doubt, this report is sent to you in confidence. We would ask your undertaking that the report is not shared with any third party, particularly those representing the family of the deceased."

The letter to PIRC was in the following terms:

> "We enclose a copy of the correspondence with the Lord Advocate and the report referred to. Again we draw to your attention that this is sent to you in confidence and is not to be distributed or shared with any third party, in particular those representing the family of the deceased."

[6] As originally drafted, the application extended to the letters as well as the Sallens report. It is now restricted to the Sallens report. The application asserts that the Sallens report is subject to legal professional privilege in the form of litigation privilege and cannot be disclosed.

[7] The Inquiry seeks to examine the response, if any, of the Lord Advocate and PIRC to the Sallens report. In order to do so it would require to disclose the Sallens report.

The Lord Advocate, the Police Service of Scotland and the Police Investigations and Review Commissioner

[8] It is convenient at this point to note the roles and functions of the public bodies involved in the investigation of the death of Sheku Bayoh. Since time immemorial the Lord Advocate has been the head of the prosecution system in Scotland, supported by the Crown Office and Procurator Fiscal Service (the Crown). The Lord Advocate is also responsible for the investigation of sudden deaths in Scotland, including deaths in police custody. An investigation into such a death may, or may not, involve an indication of criminality on the part of the police.

[9] The Police Service of Scotland (Police Scotland) was brought into being in April 2013 by the Police and Fire Reform (Scotland) Act 2012 (the 2012 Act). The existing Scottish police forces were merged. At the same time a new body, the PIRC, was created by the 2012 Act to replace the Police Complaints Commissioner for Scotland. The functions of PIRC are set out in section 33A of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (the 2006 Act) as amended by the 2012 Act. So far as relevant for present purposes, section 33A provides:

> "The Commissioner's general functions are—
>
> …
>
> (b) where directed to do so by the appropriate prosecutor—
>
> (i) to investigate any circumstances in which there is an indication that a person serving with the police may have committed an offence;
>
> (ii) to investigate, on behalf of the relevant procurator fiscal, the circumstances of any death involving a person serving with the police which that procurator fiscal is required to investigate under [section 1 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016]"

In 2015 fatal accident inquiries were conducted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14).

Direction by the Crown to PIRC

[10] Very soon after the death of Sheku Bayoh the procurator fiscal depute in the Scottish Fatalities Investigation Unit (SFIU) of the Crown instructed the duty investigator of PIRC to conduct an investigation into the death. Initially, at least, the

understanding of both the procurator fiscal depute and PIRC was that the direction was under section 33A(b)(ii) of the 2006 Act relating to a death in custody, rather than an investigation under section 33A(b)(i) where there was an indication that a person serving with the police may have committed an offence. That, however, was a developing position. PIRC continued to investigate the matter as a death in custody, but took the view that if, in the course of the investigation, the evidence indicated that an offence may have been committed, they would revert to the Crown. Evidence introduced in the Inquiry subsequent to the lodging of the application made it clear that the Crown did in due course investigate whether an offence had been committed by one or more of the attending officers.

Submissions

[11] In accordance with the Inquiry's protocol on restriction orders, I invited submissions and supplementary submissions from core participants and the media. In addition, the applicants lodged an affidavit of Mr Watson. Counsel for the families of Sheku Bayoh, the Coalition for Racial Equality and Rights (CRER) and the media parties opposed the application.

Litigation privilege

[12] The basic principles of litigation privilege were not in dispute. They were very recently stated by Popplewell LJ in *Al Sadeq v Dechert LLP*, 2024 WL at para 52, recognising the importance of purpose, and the absolute nature of the privilege:

> "… litigation privilege attaches to communications between a lawyer and its client or third parties which are brought into existence for the sole or dominant purpose of use in the conduct of existing or contemplated adversarial litigation: *R v Central Criminal Court, ex pte Francis & Francis [1989] AC 346* ; *Three Rivers District Council & others v Governor and Company of the Bank of England (No 6) [2004] UKHL 48 [2005] 1 AC 610*. Where legal professional privilege exists, it is inviolate: there is no balancing exercise to be undertaken between the interest in maintaining privilege and competing interests in disclosure of the communications: *R v Derby Magistrates Court Ex pte B [1996] AC 487*; *Three Rivers (No 6)* at [25]. Legal professional privilege was described by Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002] UKHL 18 [2003] 1 AC 563 at [7]* as a fundamental human right, which the European Court of Human Rights has held is part of the right to privacy protected by article 8 ECHR."

[13] In *Three Rivers DC v Bank of England*, [2005] 1 A.C. 610 at para 102 Lord Carswell identified three conditions which required to be satisfied in order to establish litigation privilege:

> "102. The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."

[14] In the application and in the submissions, supported by all the attending officers, it was contended that each of conditions was met in relation to the documents and that privilege had not been waived.

Whether criminal litigation was in contemplation

[15] In assessing as to whether litigation is in contemplation, the authorities use language such as "if litigation is reasonably in prospect"; or "as a general rule at least, there must be a real prospect of litigation as distinct from a mere possibility, but it does not have to be more likely than not." (*United States v Philip Morris Inc (No.1)*, 2004 WL 1054943 and authorities referred to therein).

[16] I do not consider that the fact that the solicitor acting for the families of Sheku Bayoh was calling for prosecution, or that politicians commented on the case, take the matter forward. Whether criminal proceedings would be taken was a matter entirely for the Lord Advocate. At the point at which PIRC began its investigation it was simply unknown whether there would be criminal proceedings. Depending on the development of the PIRC investigation, there might be criminal proceedings, or there might not. In the event, as noted above, the Crown did precognosce the case in order to ascertain whether there should be any prosecution. Looking at the point at which Mr Watson instructed Mr Sallens, it is important to bear in mind that Mr Bayoh died after being restrained by the police and the PIRC investigation could unearth evidence pointing to the commission of an offence by police officers. In these circumstances, I consider that the prospect of criminal proceedings could be said to be more than a mere possibility. Adopting the language of the authorities, I am

satisfied that there was a real prospect of litigation, as distinct from a mere possibility. Criminal litigation is adversarial. Accordingly, I am satisfied that at the time when the Sallens report was created adversarial proceedings were in contemplation.

Sole or dominant purpose

[17] It was common ground that a fatal accident inquiry is an inquisitorial process. It is accepted by the applicant that, because a fatal accident inquiry is inquisitorial rather than adversarial, litigation privilege would not attach to the documents if they were prepared for a contemplated fatal accident inquiry.

[18] The question as to whether the purpose was the sole or dominant purpose is a question of fact to be determined objectively in each case. The application explains that in the aftermath of the death of Sheku Bayoh, Mr Watson instructed Mr John Sallens to conduct an investigation and obtain precognitions. The application continues:

> "Mr Sallens' instruction was on the expectation that a Fatal Accident Inquiry would be held in due course. Further, standing the ongoing investigation being undertaken by PIRC at the material time, any such investigation by Mr Sallens would be relevant in any potential criminal proceedings that followed."

On the face of it, the wording would suggest that the dominant purpose was preparation for the mandatory fatal accident inquiry. In the affidavit, however, Mr Watson asserts that the dominant purpose was preparation for potential criminal proceedings or misconduct proceedings. At paragraphs 3-4 Mr Watson deponed:

> "3. …However, the anticipation of an FAI was not why PBW Law were instructed. Where there is to be an FAI in such circumstances, the practice of the SPF is to leave that to Police Scotland until and unless the FAI process has started and it has become apparent that police officers might be blamed personally. In that situation, it is common for SPF to arrange for representation of individual officers. However, that is not what happened here, in 2015.
> 4. Rather, the reason for the engagement of PBW Law at that stage was the fact that PIRC would be investigating potential criminality, or wrongdoing that might lead to misconduct proceedings, on the part of the individual officers. The decision was taken to try and secure as much contemporaneous witness evidence as was then available, in order to be able to defend criminal or misconduct proceedings. That would not be done were all that was in contemplation was an FAI, and that was not the case here."

[19] Mr Watson went on to state that it seemed to him that proceedings of some sort were reasonably in prospect. At paragraph 6 he deponed:

> "As an illustration of this, and without disclosing any more of privileged material than is absolutely necessary, I met with the officers involved on 6 May 2015. Each was concerned at the prospect of criminal proceedings. I tendered advice on the law of self-defence at that meeting, and followed this up with advice in writing by way of email the following day, 7 May 2015. I would not have been advising on the law of self-defence if all that was in contemplation was an FAI."

[20] At paragraph 14 of the affidavit Mr Watson depones that his purpose in sending the Sallens report to the Lord Advocate and PIRC was an attempt to persuade them that criminal proceedings were not warranted.

Conclusion

[21] Turning to the tests in *Three Rivers (No 6)*, I conclude that at the time when Mr Sallens carried out the work and at the time when it was passed to the Lord Advocate and PIRC adversarial criminal proceedings were in contemplation. On the basis of the affidavit of Mr Watson, I conclude that the dominant purpose of the Sallens report was preparation for potential criminal proceedings. In these circumstances I am satisfied that litigation privilege does attach to the Sallens report.

Waiver

[22] A number of cases were referred to in the submissions on waiver of privilege, including *Scottish Lion Insurance Co Ltd* v *Goodrich Corporation and others* 2011 SC 534. In the opinion of the Inner House delivered by Lord Reed in that case, the court set out a number of general principles in relation to waiver of privilege. At paragraph 46 the court dealt with the nature and purpose of privilege, its loss and the possibility of waiver:

> "Privilege is the name given to a right to resist the compulsory disclosure of information (*B* v *Auckland District Law Society*[1], per Lord Millett, para 67). It exists in order to maintain the confidentiality of the information in question. It follows that privilege will be lost if the information in question ceases to be confidential: if, for example, it is published in the press. In such circumstances there is no longer any confidentiality to maintain, and the information therefore ceases to be privileged. Waiver of privilege can be distinguished from loss of privilege (see, eg *B* v *Auckland District Law Society*, paras 68, 69). It will

[1] [2003] 2 AC 736

> arise, as we have explained, in circumstances where it can be inferred that the person entitled to the benefit of the privilege has given up his right to resist the disclosure of the information in question, either generally or in a particular context. Such circumstances will exist where the person's conduct has been inconsistent with his retention of that right: inconsistent, that is to say, with the maintenance of the confidentiality which the privilege is intended to protect."

[23] At paragraph 47 the court made two further points. First, waiver does not depend on the subjective intention of the person entitled to the right in question but is judged objectively. Waiver of legal professional privilege is determined on an objective analysis of the conduct of the person asserting the privilege. Secondly, privilege may be taken to have been waived for a limited purpose without being waived generally: in other words, the right to resist disclosure may be given up only in relation to a particular context. The court referred to *Goldman* v *Hesper*[2], a case on taxation of costs, and *B* v *Auckland District Law Society* as examples of limited waiver.

[24] The Inner House identified a number of situations in which the issue of partial waiver may arise. One example, which is of relevance to the application, arises where a person has chosen to disclose a privileged communication in particular circumstances and has subsequently asserted privilege in order to prevent disclosure of the same communication in different circumstances.

[25] *Scottish Lion Insurance* was concerned with an application to the court to sanction an arrangement between Scottish Lion Insurance and its creditors under section 899 of the Companies Act 2006. That process involved a sequence of events in stages. These included meetings of creditors at which creditors cast their votes. Following the meetings the votes were given a weighting depending on the value of the creditor's claim against Scottish Lion. For the purposes of the valuation exercise creditors wishing to vote could submit documentation supporting the valuation of the claim. A dispute arose in relation to the valuation process. The court appointed a proof at which each party could lead evidence in support of its contentions. The court made an order for production at the proof of the documentation submitted in support of the valuation of the claims. In response, one creditor claimed legal professional privilege in respect of its documentation, which had already been produced at an

[2] [1988] 1 WLR 1238

earlier stage.

[26] The Inner House held that for the person to submit material for the purpose of the second stage of the statutory procedure for approval of a scheme of arrangement was inconsistent with his subsequently resisting the disclosure of that material when it is necessary at the third stage of the procedure in order for a relevant challenge to be properly considered. Such conduct in respect of those two stages of the process was incompatible with the proper operation of the statutory procedure:

> "[62] Against this background, when the noters submitted privileged documents to the petitioner with the intention that they should be relied on for the purpose of valuing the noters' votes, they must be taken to have done so in the knowledge that the disclosure of those documents to the court, to the reporter, and to creditors who opposed the granting of the application under sec 899 , might be necessary to satisfy the court that it had jurisdiction to grant the application and that sanction ought to be granted. In these circumstances, the noters must be taken to have waived any right to object to the disclosure of the documents in question in the present proceedings, to the extent that disclosure is necessary to enable the court to deal with the petitioner's application and the respondents' answers. Since the Lord Ordinary's assessment that disclosure is indeed necessary for that purpose is not challenged, it follows that the documents in question must be produced."

[27] In *British Coal Corp v Dennis Rye Ltd (No 2),* [1988] 1 WLR 1113, a case referred to in the opinion of Lord Reed, the plaintiffs had disclosed documents to the police to assist in a criminal investigation as a result of which charges were brought against the defendants. In accordance with the requirements of disclosure in a criminal case, documents which were covered by litigation privilege were disclosed to the defendants prior to, and during, the trial. A question then arose whether the plaintiffs could assert privilege in respect of the documents in civil proceedings brought against the defendants. The court held that privilege had not been waived in respect of the civil proceedings. The plaintiffs had made the documents available for a limited purpose only, namely, to assist in the conduct of the criminal investigation and trial. That action of the plaintiffs looked at objectively could not be construed as a waiver of any rights available to them in the civil action for the purpose of which the privilege existed. The criminal proceedings and the civil action were separate processes.

[28] In *R (ex p Belhaj) v DPP (No 2)* [2018] 1 WLR 3602 the claimants alleged that they had been unlawfully rendered from one foreign state to another where they had been imprisoned, tortured and subjected to other serious maltreatment by the authorities and that the rendition had been carried out with the assistance of the British Secret Intelligence Service and one of its senior officers. For the purpose of the investigation of these allegations the Foreign and Commonwealth Office disclosed privileged material to the police and the prosecuting authorities. The disclosure was subject to a limited waiver that the documents were provided for the sole purpose of assisting with the investigation and legal privilege had not been waived for any other purpose, including any future prosecution or civil claim. The Crown Prosecution Service concluded that there was insufficient evidence to prosecute. That position was upheld on a statutory internal review. The claimant sought judicial review. An issue arose as to the effect of the waiver. The claimants asserted that limitation on waiver was ineffective because the processes of decision and internal review, along with the subsequent process of judicial review, formed a single composite whole such that waiver for one meant waiver for all. The court, distinguishing *Scottish Lion Insurance*, held that there was no inevitable or necessary nexus between the decision on prosecution and a subsequent claim for judicial review of the ultimate decision arrived at. These were discrete processes, not one composite process.

Submission of the media parties and others

[29] The media parties, whose submissions were adopted by the families of Sheku Bayoh and CRER, submitted that the badging of a document as privileged or confidential reflects only the subjective intent of a party and not the objective reality of whether privilege exists or is maintained. If the applicant had wished an assurance of confidentiality, it would have been open to it to try to agree that with the Lord Advocate and/or PIRC prior to sharing the material.

[30] The media parties submitted that Mr Watson shared the material with the Lord Advocate and PIRC who had “a direct and potentially ‘adversarial’ relationship” to the

attending officers. They distinguished this from the position in *British Coal Corp* where a civil party shared information with a prosecutor and that information was subsequently used to bring a case in which another person was a defendant.

[31] Under reference to *Scottish Lion Insurance* the media parties submitted that a party will be taken to have waived privilege where their use or provision of a document when providing it to a person can objectively be seen as inconsistent with their maintaining privilege in some subsequent or wider, but related, inquiry where the question of confidentiality is also in issue.

[32] They submitted that given that part of the terms of reference of the Inquiry is to inquire into the operation and actions of the Lord Advocate and PIRC "it is entirely foreseeable and consistent that the privilege also be held not to apply (because it has been waived) when it comes to investigating how their decisions were reached." The media parties summarised the position in the following way:

> "In all of the circumstances of this case, the disclosure of the material to the Lord Advocate and PIRC in September 2015 can be seen to have functioned as a waiver of the privilege in those documents insofar as they were to be used for the investigation of the circumstances of Mr Bayoh's death, whether by these bodies themselves, in any review of their decisions or, as it eventuated in this case, in the context of an inquiry under the Inquiries Act 2005. Privilege in the material has accordingly been waived, as far back as September 2015, and no restriction should now be placed on publication of the material."

Discussion

[33] From the authorities I identify the following propositions relevant to the decision:

- waiver is to be determined on an objective analysis of the conduct of the person asserting the privilege;
- waiver may be lost, for example, by material being published;
- waiver may be general or in a particular context;
- waiver may be limited;
- where waiver has been granted for one purpose, privilege may, or may not, be successfully asserted in respect of another purpose depending on the circumstances;

- where a person discloses in particular circumstances and subsequently asserts privilege in different but related circumstances, the outcome will depend on the circumstances:
    - the civil and criminal processes in *British Coal* were held to be separate processes such that privilege could be asserted in the subsequent civil proceedings;
    - in *Scottish Lion Insurance* the third stage at which privilege was asserted was held to be part of a composite process
    - in *Belhaj* there was no inevitable nexus between the prosecutorial decision and a judicial review of that decision such that privilege could be asserted in respect of the judicial review.

[34] Applying these propositions in the present case, judging the matter objectively, having regard to the terms of the letters dated 3 September 2015 and the affidavit of Mr Watson, I am satisfied that disclosing the Sallens report to the Lord Advocate and PIRC constituted a limited waiver of privilege. The purpose of sending the Sallens report to the Lord Advocate and PIRC was to try to persuade them that criminal proceedings were not warranted. The letters stated that the report was confidential and should not be shared with third parties. It appears that the Lord Advocate accepted the confidential nature of the report: the submissions of the Solicitor General include:

> "However, as the report and covering letter were sent to the Lord Advocate under condition of confidentiality, the Crown team, had they been asked the question, would not have agreed to disclosure absent prior consultation with Professor Watson."

In these circumstances I do not consider that the absence of an undertaking by the Lord Advocate is significant.

[35] Privilege was not subsequently lost. The Lord Advocate did not put the material into the public domain and, as noted above, would not have done so without reverting to Mr Watson.

[36] The question then comes to be whether the limited waiver extending to the Lord Advocate and PIRC can be said to extend to the Inquiry. Having regard to the

authorities which I have considered above, I do not consider that there is sufficient nexus between the investigation carried out by the Lord Advocate and PIRC and the role of the Inquiry in examining that investigation. I do not accept that it would have been reasonably in the contemplation of Mr Watson at the time that he delivered the Sallens report to the Lord Advocate and PIRC that their investigations would be the subject of the terms of reference of a public inquiry at a later stage. Accordingly, I consider that there is insufficient nexus between the investigation by the Lord Advocate and PIRC and the work of the Inquiry to allow the limited waiver to extend to the Inquiry.

Whether waiver can be inferred from events between December 2023 and February 2024

[37] A further basis on which waiver could be implied was advanced by the media parties and CRER. This arose from an earlier disclosure of the Sallens report to core participants by the Inquiry. The circumstances were as follows. Since it was set up the Inquiry has ingathered evidence relying on notices under section 21 of the 2005 Act. Before documents may be disclosed to core participants and ultimately published, the Inquiry engages in a process of redaction in order to redact personal details and irrelevant sensitive material. The Inquiry operates this process under a protocol published on the Inquiry's website[3]. In carrying out the redaction exercise the Inquiry will consult the provider of the document, giving the provider an opportunity to make a proposal in respect of the Inquiry's redactions. Where copies of a document have been provided by more than one provider, the protocol stipulates that the solicitor to the Inquiry will determine which provider should be consulted (the appropriate provider). The criteria for making that decision are set out at paragraph 16 of the protocol. In terms of paragraph 17, at the same time as sharing the redactions with the appropriate provider the Inquiry will advise other providers who have shared the document with the Inquiry (alternative providers) of the title and document ID. Alternative providers will have an opportunity to send comments to the solicitor to the Inquiry, including comments on the sensitivity of the document.

[3] Protocol for disclosure and redaction of documents

[38] In response to section 21 requests, both the Lord Advocate and PIRC provided the Inquiry with the Sallens report and the letters to the Lord Advocate and PIRC. The solicitor to the Inquiry determined that PIRC should be the appropriate provider. In December 2023 the Inquiry consulted with PIRC in relation to redactions to the Sallens report. PIRC were content with the proposed redactions. Unfortunately, due to an error on the part of a member of the Inquiry's staff, the Inquiry failed to communicate with the Crown as alternative provider. On 15 December 2023 the Inquiry disclosed a redacted version of the Sallens report to the core participants.

[39] Prior to the hearing in February 2024, which examined evidence of the investigation by PIRC, senior counsel to the Inquiry indicated that she wanted some of the redactions removed in order to explore certain evidence with PIRC witnesses. At that stage the solicitor to the Inquiry consulted with both PIRC and the Crown, both of whom raised concerns. Thereafter, the solicitor to the Inquiry drew the attention of the issues to Mr Watson. In response, the application for a restriction order was lodged. At that point the Inquiry withdrew the Sallens report and the letters from the core participants.

[40] CRER and the media parties contend that the failure of the applicants to take any steps in relation to the Sallens report during the period between December 2023, when it was disclosed to core participants, and February 2024 is inconsistent with the assertion of privilege in February 2024. This, they submit, amounts to waiver of privilege. They submit that the list of core participants is substantial. The applicants could have taken steps to alert the Inquiry to this unauthorised use of the material. It is inconsistent for the applicants now to assert that the material is sensitive material which should never have been disclosed.

[41] It is important to understand that when the Inquiry disclosed the Sallens report to core participants in December 2023 it did so subject to the Inquiry's general restriction order[4]. The general restriction order stipulates that, subject to certain exceptions which are not relevant for present purposes, "no recipient may disclose to any person the source, content or any other aspect of restricted material".

[4] Restriction Order

[42] Disclosure by the Inquiry has not resulted in the Sallens report being published. It has not been put into the public domain. It was for a relatively short period in the hands of core participants under the strictest conditions. On receipt of the application, it was immediately removed. The privilege is that of the attending officers. Given these circumstances and the history of disclosure which I have outlined, I do not accept that silence by the legal representatives of the attending officers during the period between December 2023 and February 2024 can, of itself, be said to constitute waiver of the privilege.

Decision

[43] I am satisfied that legal professional privilege attaches to the Sallens report. The limited waiver in respect of the Lord Advocate and PIRC does not extend to the Inquiry. I must grant the application.

Lord Bracadale

11 July 2024