IN THE FIRST-TIER TRIBUNAL **EA/2022/0088**

(GENERAL REGULATORY CHAMBER)

(INFORMATION RIGHTS)

IN THE MATTER OF AN APPEAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

BETWEEN:-

Stefania MAURIZI

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) CROWN PROSECUTION SERVICE

Respondents

OPEN WITNESS STATEMENT OF JOHN SHEEHAN FOR THE SECOND RESPONDENT

INTRODUCTION

1. I, John Sheehan, of the Extradition Unit of the Crown Prosecution Service, 102 Petty France, London SW1H 9EA, and I am duly authorised to make this witness statement on behalf of the Second Respondent, the Crown Prosecution Service ("**the CPS**").

2. I am a solicitor employed by the CPS as a Deputy Chief Crown Prosecutor, and I have held the post of Head of Extradition since 5th September 2022.
3. I make this statement from my review of documents relevant to this matter, and matters confirmed to me by colleagues with greater knowledge of the history of the case than myself. Filed and served with this witness statement is a paginated bundle of exhibits which I refer to as Exhibit JS/1 to which I will make reference.

4. This witness statement is made in relation to the appeal by the Appellant against the Commissioner's Decision Notice of 8 March 2022 ("**the 2022 Decision**") under s.57(1) of the Freedom of Information Act 2000 ("FOIA"). The 2022 Decision concerned a request made by the Appellant to the CPS on 12 December 2019 ("**the 2019 Request**") under the Freedom of Information Act 2000 ("**FOIA**") for *"the full correspondence"* on WikiLeaks founder Julian Assange between the CPS and:
    a. The Swedish Prosecution Service ("**the SPA**") between 1 November 2010 and 8 September 2015 not already disclosed in response to the Appellant's previous FOIA request to the CPS of 6 September 2015 ("**the 2015 Request**") ("**Point 1**").
    b. The SPA between September 2017 and 1 December 2019 ("**Point 2**").
    c. The Ecuadorian authorities between 19 June 2012 and 11 April 2019 ("**Point 3**").
    d. The US Department of Justice between 1 November 2010 and 1 December 2019 ("**Point 4**").
    e. The US State Department between 1 November 2010 and 1 December 2019 ("**Point 5**").

5. In the request, the Appellant also asked the CPS to *"explain when, how and why the emails of a named CPS lawyer, [Mr X, a retired CPS officer, name redacted] were deleted"* ("**Point 6**").

6. The purpose of this statement is (i) to describe the documents held by the CPS that are considered to fall within Points 1, 2, 4 and 5 of the 2019 Request; (ii) to provide an explanation of the CPS position in relation to the disclosure of those documents pursuant to the Appellant's 2019 Request; and (iii) to further respond to Point 6.

7. It is not a purpose of this statement to say what if any documents are held by the CPS that are considered to fall within Point 3, in relation to which the CPS has relied on s30(3) FOIA to neither confirm nor deny the same.

POINT 1

8. Point 1 of the 2019 Request sought *"the full correspondence"* between the CPS and the SPA between 1 November 2010 and 8 September 2015 that had not already been disclosed in response to the Appellant's previous FOIA request to the CPS of 6 September 2015.

(i) What the CPS holds

9. Great care was taken by CPS staff to ensure that all information engaged by Point 1 was identified by the end of 2017. I am satisfied from everything I have seen and heard that all such material was identified. The fact that no further such material has come to light since then confirms this to me.

10. It is impracticable to attempt to quantify the scale of the information within scope of Point 1. It is held in various formats and stages of redaction. The nature of native and scanned information held in electronic form makes it impossible to describe in terms of pages or files in the conventional manner. On numerous occasions since 2015, the hard copy material has been sifted, copied, and re-copied in response to various FOIA-related requests. References below to page volumes relate exclusively to the page length of pdf documents created to house items of native and scanned information for review and disclosure purposes, and such references are therefore an artificial measure, and not necessarily reflective of the volume of native and scanned material from which the pdfs were originally drawn.

11. In its initial response of 10 February 2020, the CPS originally withheld all of the requested Point 1 information, relying on the exemptions at s 40 and s 30 FOIA [OB/48-50]. Following the Appellant's ICO complaint on 24 July 2020, the CPS reviewed the information contained in the 3 August 2017 disclosure and unredacted some of it for further disclosure on 1 September 2021. The covering letter stated that the passage of time since the 2015 Request had affected the s 30 public interest balance and enabled this further disclosure [Exhibit JS/1,OB/532-533]. The enclosed disclosure comprised a 333-page Pdf [Exhibit JS/1, OB/534-866]which was in effect

a copy of the 3 August 2017 disclosure, with some of the previously redacted words now unredacted, and without three pages which would have remained fully redacted in any event [Exhibit JS/1, CB/190-522].

12. Following a subsequent review of information contained in the pdf bundles initially disclosed on 9 November 2017 (91 pages), 17 November (12 pages) and 20 December 2017 (nine pages), the CPS then made further disclosure on 17 March 2022, by providing the same pdf bundles with some previously redacted words now unredacted. [Exhibit JS/1, OB/870-1063 and CB/526-637]. The passage of time was again considered to have operated on the public interest balance regarding the s30 exemption.

13. As part of this overall process, emails from 2014 and 2015 which had been previously partially disclosed in 2017 were disclosed with fewer redactions on 1 September 2021, and on 17 March 2022.

14. In each of the 2017, 2021 and 2022 reviews, the material was analysed line by line, word by word. Great care was clearly taken to ensure that aside from exempt personal information, the only remaining withheld/redacted information can be generally characterised, although not exclusively so, as words and phrases which are directly connected to the giving of legal advice, and therefore subject to legal professional privilege (LPP).

(ii) The CPS position in relation to disclosure of these documents

15. For the reasons given in the statement of Mr Cheema dated 3 August 2017, at paragraphs 38-39 (Exhibit JS/1, OB/1075-1076) and 43-44 (Exhibit JS/1, OB/1077), it was considered in the 2017, 2021 and 2022 reviews that the disclosure of LPP material would be likely to damage the fragile relationship of trust and confidence between the CPS and foreign authorities. I confirm that the effective conduct of extradition proceedings is entirely conditional on this, and that the divulgence of privileged correspondence into the public domain will always make it likely that a chilling effect will follow in respect of ongoing and future extradition work, to the detriment of domestic and international criminal justice. This is why the disclosure of any

information at all by any UK government agencies in relation to Extradition cases is very rare.

16. The four tranches of disclosure between August and December 2017 were prompted by the news in June 2017 that the SPA had disclosed some of the correspondence between itself and the CPS. In fact, the SPA appears to have previously deleted a substantial proportion of this material. Therefore the 2015 and 2017 SPA disclosures only included a part of the material converted into the 448 pdf pages by the CPS in 2017. This limited disclosure by the SPA did not amount to a waiver of confidentiality in relation to that or any further material held by the CPS, but in reviewing it against s.30 and s.40 FOIA, in 2017, 2021 and 2022, it seems clear to me that a relatively liberal approach was taken in the context of the SPA having disclosed some of the material, as well as the passage of time. This liberal approach to the application of FOIA might be characterised as seeking to put the appellant into the position she would have held, had the SPA retained all correspondence and disclosed it in accordance with the scheme adopted by them in their 2015 and 2017 disclosures.

17. In light of the above, I am certain that the amount of information disclosed to the appellant in this case between August 2017 and March 2022 is much greater in volume and type than would usually be disclosed in response to such a FOIA request. I am also satisfied that if there has been any uncertainty in the application of FOIA exemptions to individual words and phrases in relation to the Point 1 material, then it has been exercised to the benefit of the appellant.

18. This is reflected in the suggestion by the appellant that much of what has been disclosed is ‘trivial’ (Appellant’s witness statement, para 22), which in turn begs a question in relation to how the public interest might be served by its disclosure at all, in that case, and I seek to answer this in my consideration of the Part 2 material below.

POINT 2

19. Point 2 of the 2019 Request sought *"the full correspondence"* between the CPS and the SPA between September 2017 and 1 December 2019.

(i) What the CPS holds

20. The CPS initially identified 24 pages of information falling within the timeframe of Point 2 by running a time-period specific search on the electronic case management system. The emails which were triggered by the search were in fact automatic internal emails generated by the electronic storage process and therefore out of scope of Parts 1 and 2. Therefore the 24 pages need not have been reviewed against FOIA, and it was explained in the letter of 17 March 2022 that no material was held in relation to Part 2.

21. The Appellant's Witness Statement (paragraph 25) refers to emails between the CPS and SPA dated 2019, and exhibits 8 pages of emails between the CPS and SPA dated between 25 April 2019 and 7 May 2019 at Exhibit 3, from which they infer that there must be many more emails that have not been disclosed. Following receipt of this information, staff in the CPS Extradition Unit conducted a search of our electronic case management system to identify any correspondence within scope of Point 2 of the 2019 Request. Over 150 pages of information was identified as being within scope, which had not previously been found. As a result, the CPS is currently undertaking a review of this material under FOIA and will inform the Appellant of the outcome of this review as soon as possible.

(ii) The CPS position in relation to disclosure of these documents

22. The above material is currently under review by two CPS lawyers, but in fairness I should say now that I expect that a less liberal approach will be taken to this material than to the information reviewed previously, since 2017.

23. Having recently come across to the CPS Extradition Unit from an equivalent role in Serious Economic and Organised Crime in the CPS, I have been keen to understand and review the handling of the FOIA requests and litigation in this case, and to apply my knowledge and experience to it. This has involved more than 100 hours of work for

me since 5 September 2022. Having got to grips with the history of events since 2015, as far as I am able, I think that all of the decision-making to date has been justifiable, and I am certain that good faith has been applied at every point. However, having now taken stock, I have decided that a strategic refresh is appropriate at this point in time.

24. In my view, all of the information contained in this material which has already been disclosed to the appellant by the SPA, is exempt under s.21 FOIA. All personal information will be exempt insofar as s.40 and the extant Data Protection principles apply. The remainder of the material was created in relation to criminal proceedings, albeit concluded at the time, so the s.30 FOIA exemption is engaged, and the material will be disclosable unless the public interest balance falls in favour of withholding it. This is to apply the law as it is now, and was in February 2020.

25. The public interest balance will include consideration of all known relevant factors in favour of disclosure to the appellant, and these have been set out in various formal documents. However, it is hard to imagine where there could be a significant public interest in disclosing the information contained in correspondence between the CPS and its extradition partners which is not covered by LPP – e.g. the greetings, pleasantries and courtesies which have been disclosed to date. I take it from the Appellant's comments about the disclosure of "trivial" information that this is very unlikely to be disputed.

26. The public interest factors in favour of withholding information will primarily include the inherently confidential nature of the correspondence, and the deep chilling effect that disclosure of such material has on the relationship of trust and confidence between the CPS and foreign states. These factors are examined and demonstrated in more detail below, but I should mention now that I believe the lawyer/client duty of confidentiality does not significantly decline with the passage of time. Also, I am satisfied that the sensitivity of international relationships and the chilling effect of the disclosure of information which was originally exchanged in confidence, has increased substantially since 2019, and/or is more easily demonstrable now than it was then. It follows that the impact of both of these factors in the public interest balance has not declined with the passage of time, as previously expected, and in my view it has increased in respect of the second factor.

27. I turn first to confidentiality. In extradition proceedings the CPS acts as the representative of the foreign requesting authority before the courts in England and Wales, and as such there is a clear expectation of confidentiality in respect of correspondence, which is equivalent to that between solicitor and client. Broadly, all information about the client and their case that comes into the solicitor's knowledge, by whatever means is subject to the ongoing duty of confidentiality, except in very limited exceptions. This is a regime which I operated day-to-day in private practice from 1991 to 2006, before I became a government lawyer, and it is my starting point for considering what information is confidential and how much weight that confidentiality should be given in the public interest balance. This goes beyond any consideration of information which may be subject to legal professional privilege (LPP).

28. My approach to the information currently under review is that it is held by the CPS in confidence insofar as the correspondence in its entirety was created with the expectation of ongoing confidentiality with the requesting state, as it would be between solicitor and client. There is the expectation that confidentiality will continue to apply except insofar as any of the limited exemptions apply, and even then disclosure is never an automatic response. [redacted] This principle applies as much to personal comments, greetings and pleasantries as to words and phrases strictly characterised as LPP, because none of the correspondence on a case file should have been created or held for any reason but to aid continuing communication with a view to progressing the case. Any elements of any communication falling outside this ambit, because they are solely intended to progress a purpose other than the case, should not be on the case file.

29. Given that such confidentiality does not wane with time, and is critical to international criminal justice, it is unlikely that it will be matched by any competing set of public interest factors, especially when bolstered by the substantial chilling effect that disclosure has.

30. In my view the chilling effect of such disclosures is greater now than it may have been in 2017, and I give the following specific illustrations of events to support this belief.

31. [redacted]

32. [redacted]

33. [redacted]

34. In summary, the weight of confidentiality in the public interest balance is unlikely to be matched by anything but the very strongest public interest factors in favour of disclosure. I do not believe that this duty of confidentiality wanes with the passage of time. That duty of confidentiality is buttressed by the clear and demonstrable likelihood that disclosure would have a chilling effect on fragile international relationships. Also, that chilling effect appears to be increasing rather than decreasing with the passage of time.

POINT 3

35. The CPS neither confirms nor denies holding information within scope of Point 3. As to the reason why, I would reiterate and refer to paragraphs 34-37 of the Statement of Mr Cheema, exhibited. I agree with the factual picture that Mr Cheema gave.

POINTS 4 AND 5

36. Points 4 and 5 of the 2019 Request sought "the full correspondence" on WikiLeaks founder Julian Assange, between 1 November 2010 and 1 December 2019, between the CPS and the US Department of Justice and between the CPS and US State Department.

(i) What the CPS holds

37. I understand from one of the CPS prosecutors handling the case that the CPS holds information within the scope of Parts 4 and 5, and that it comprises correspondence arising within live extradition proceedings brought by the USA and conducted by the CPS.

(ii) The CPS position in relation to disclosure of these documents

38. The 10 February 2020 Response to the 2019 Request was made within the period of the extradition proceedings conducted by the CPS on the USA's behalf, and these have not yet concluded. The current position is that Mr Assange has lodged an appeal against (inter alia) the Decision of the Secretary of State for the Home Department to extradite him. His legal team has lodged grounds and on 31 October 2022, the CPS filed its response on behalf of the USA. The parties are currently awaiting the Permission decision by a High Court judge.

39. The position is therefore materially indistinguishable from the position when the Appellant's 2015 Request sought CPS-SPA correspondence when Sweden's extradition request was live, except insofar that I believe that confidentiality does not wither with time, and the impact of disclosure on the chilling effect has increased since 2019, as discussed above.

40. The CPS therefore initially relies on the FTT's 12 December 2017 judgment in relation to the Appellant's appeal in respect to that part of the 2015 Request: FTT judgment at [60, 62-63, 67-68]. As to the underlying public interest factors that led to that

determination, I repeat and refer to the exhibited Statement of Mr Cheema at paragraphs 38-42, with which I agree, and my comments relating to an enhanced chilling effect since 2017.

41. In addition to s.30 FOIA, the CPS relies on s.42 (legal professional privilege) in respect of this information. This goes above and beyond the confidentiality factors considered above in relation to s.30 but which are equally applicable to the public interest balance for s.42.

POINT 6

42. By Point 6 the Appellant asked the CPS to *"explain when, how and why the emails of a named CPS lawyer, [Mr X, a retired CPS officer, name redacted] were deleted"*. Mr X was a Level E lawyer who retired from the CPS in 2014.

(i) What the CPS holds

43. The CPS answered a separate FOI request from the Appellant in 2018 concerning Mr X's email account. Amongst other things, that response said that the CPS can confirm there is no correspondence between 1 Jan 2014 and 31 Dec 2014 concerning the deletion of the lawyer's email account. In relation to the FOI request subject to this appeal, the CPS was asked to explain how and why the emails of the CPS lawyer were deleted. As part of the response to that request the CPS said that the lawyer concerned retired from the CPS in 2014 and that deleting the lawyer's email account after retirement was in line with CPS general practice.

RESOURCES

44. I would like to add a contextual comment in relation to the resource impact of handling FOIA enquiries and litigation like this. I am satisfied that the CPS has since 2015 gone far above and beyond its strict duties under FOIA in relation to requests made by this applicant. The cost is not quantified as it is built into the public expense associated with the employment of the officials employed to do such work, and also the

employment of prosecutors like myself and the two colleagues who have worked on this case almost full time over the last two months.

45. In addition to the public expense, the time spent progressing this litigation by highly skilled international prosecutors is time that cannot be spent doing the job for which ,they are employed, namely, the prosecution of criminal cases to the benefit of all.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed

John Sheehan

John Sheehan

Dated 7 December 2022