Coroners and Problems Around Disclosure of Documents

This paper considers the powers and obligations of Coroners related to disclosure of documents, and how those powers will change once the Coroners and Justice Act 2009 comes into force.

Disclosure has 2 separate aspects for Coroners namely:

1. The power to obtain relevant documents from witness and others who hold prior to the Coroner’s inquiry; and

2. The exercise of the Coroner’s discretion to provide advance copies of relevant documents to Properly Interested Persons.

These 2 aspects raise different problems and are considered separately.

The Coroner’s power to obtain relevant documents from witnesses and other persons.

A Coroner has to duty to ensure that the “relevant facts [related to an Inquest] are fully, fairly and fearlessly investigated”¹. There are many cases where the Coroner cannot fulfil this duty without obtaining relevant documents from those who were concerned in the events which led up to the death, however much those persons may be reluctant to hand over the documents to the Coroner.

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The Inquest is required to establish who the deceased was, how, when and where the deceased came by his death\(^2\). However in answering these questions it has been recognised judicially that “an inquest can provide the family with the only opportunity they will have of ascertaining what happened.. [and] .. can have a significant part to play in avoiding the repetition of inappropriate conduct and in encouraging beneficial change”\(^3\).

This overall duty may require the Coroner to call witnesses to explain what happened and in many cases the Coroner (and the jury) will want to see documents which were relevant to the material facts to test the evidence against the matters recorded in those documents. In particular the family will have a legitimate interest in testing the oral evidence of those who were concerned in the events leading up to the death of their family member against the records made at the time of the death.

However, under the present law, whilst the Coroner has the right to require individuals to attend to give evidence he or she has no direct power to require a witnesses to attend with documents. In practice persons called as witnesses to an Inquest (particularly if they are employees or office holders of public bodies) rarely refuse to permit a Coroner to provide all relevant documents in advance of an Inquest. Normally a request by the Coroner is sufficient to secure the attendance of the relevant person with prior disclosure of all relevant documents to the Coroner. However there are occasions where witnesses fail to respond to invitations or refuse to bring all or certain categories of documents when they attend to give evidence.

In *R v Southwark Coroner ex parte Hicks*\(^4\) the Court of Appeal gave guidance on the powers of a Coroner. Croom Johnson LJ said:

“A Coroner has himself no power to order the production of documents. His final right is to apply to the High Court for a subpoena duces tecum, ordering their production, but normally that is not necessary”

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\(^3\) Per Lord Woolf in *R v Inner South London Coroner ex parte Douglas-Williams* [1999] 1 All ER 344.

\(^4\) [1987] 1 WLR 1624.
The application is now made under CPR 34.4 for a witness summons\(^5\). The definition of a “witness summons” in CPR 34.2 includes an order for a witness to produce a document or classes of documents. The documents that a person can be required to produce are any documents within the terms specified of the order. This includes any documents that a person can “control”. The term control is widely defined to include documents a person can take physical possession of, has a right to possession of or has a right to inspect or take copies of\(^6\). Thus a senior executive of a public or private organisation would have “control” of virtually all documents held by that organisation.

A Coroner has considerable discretion as to the scope of his or her inquiry and thus, if he has a person who does not co-operate, has a discretion to decide whether to apply to the High Court or not. However, given that the Coroner has a power to apply to the High Court for a witness summons to secure the disclosure of documents, the Coroner must have a duty to consider whether to exercise the power or not in a relevant case. The High Court ought only to interfere with the decision of the Coroner to apply for a summons or not to apply if either (a) the Coroner did not consider whether to exercise the power to apply for a witness summons or (b) bearing in mind the obligation to conduct a full, fair and fearless investigation, the Coroner wrongly exercised his discretion not to make the application. A discretion can only be exercised wrongly in this sense if no reasonable Coroner would have failed or refused to make such an application.

If an application is made by the Coroner to the High Court for a witness summons, the usual practice is for an order to be made \textit{ex parte} and a date is set for the witness to attend with the documents. It is then up to the witness to apply to set aside the summons, explaining the reasons why the witness does not wish to produce the documents. The grounds of refusal would usually be relevance, legal professional privilege or public interest immunity. For details see the notes to CPR 31.3 in the White Book.

\(^5\) Which is the power of the High Court to issue a witness summons in aid of an inferior court or tribunal.

\(^6\) See CPR 31.8.
It is also worth noting that Interested Persons (and indeed the Coroner) have the right to seek disclosure of documents from a public body under the Freedom of Information Act 2000. It is no defence to an application for such disclosure for the public body to say that it refuses to give the documents because they may be used against the public body in an Inquest\(^7\). However it is possible that other exemptions will apply to the disclosure of the documents\(^8\).

The powers of Coroners to require disclosure from those who hold relevant documents will change when the Coroners and Criminal Justice Act 2009 comes into force. Schedule 5 provides for the powers of Coroners and gives full powers to require witnesses to disclose documents as follows:

\[(1)\] A senior coroner may by notice require a person to attend at a time and place stated in the notice and—

(a) to give evidence at an inquest,
(b) to produce any documents in the custody or under the control of the person which relate to a matter that is relevant to an inquest, or
(c) to produce for inspection, examination or testing any other thing in the custody or under the control of the person which relates to a matter that is relevant to an inquest.

(2) A senior coroner who is conducting an investigation under this Part may by notice require a person, within such period as the senior coroner thinks reasonable—

(a) to provide evidence to the senior coroner, about any matters specified in the notice, in the form of a written statement,

\(^7\) There appear to be an increasing number of Inquests where family members are using the Freedom of Information Act 2000 (or equivalent legislation in other countries) to obtain far wider disclosure than public bodies are prepared to give within the court process, particularly where those documents have been passed to a second public body from whom disclosure is sought. This can lead to family members having copies of official documents related to circumstances which led to a death which the public body has sought to keep confidential. It is thus worth Coroners reminding reluctant public bodies that making early and controlled disclosure can be in their interest.

\(^8\) It is beyond the scope of this paper to identify the relevant exemptions under the Freedom of Information Act 2000, and to explain which are absolute exemptions and which are subject to a public interest test.
(b) to produce any documents in the custody or under the control of the person which relate to a matter that is relevant to the investigation, or
(c) to produce for inspection, examination or testing any other thing in the custody or under the control of the person which relates to a matter that is relevant to the investigation

It is unclear when these powers will be implemented as the Ministry of Justice says that the date is “to be decided”⁹ – which often means “no time soon”.

**Disclosure to Properly Interested Persons.**

Entirely different considerations arise where the Coroner has documents and needs to decide whether to provide copies of them, or some part of them, to the Interested Persons. The Coroner has a considerable discretion as to how to conduct an Inquest, subject to an overriding duty to conduct an Inquest in a fair manner. In one part of the litigation arising out of the death of Blair Peach, in 1980 the Divisional Court appeared to provide a clear rule that there was no right for an Interested Person at an Inquest to call for documents which had been disclosed to the Coroner. The Court held that the refusal by the Coroner to disclose these documents to the family did not mean the Inquest was unfair¹⁰.

However it is unclear how much, if at all, that clear rule still applies. The case was always of doubtful authority because the judgment of the Divisional Court in *ex parte Peach* was overturned on other grounds by the Court of Appeal although this was not a point that was pursued on appeal. The continuing authority of *ex parte Peach* was doubted by Sullivan J in *R (Bentley) v HM Coroner District of Avon* [2001] EWHC Admin 170 who said “I do not read Lord Widgery's dicta in Peach as authority for the proposition that refusal of any form of advance disclosure to a person falling within r 20 can never amount to a breach of natural justice”. He also said at paragraph 65:

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“The proposition that a person will not be able to participate in proceedings in an effective way in the absence of advanced disclosure is increasingly recognised”

This wider approach to disclosure has recently been upheld by the High Court by Beatson J in Butler, R (on the application of) v HM Coroner for the Black Country District [2010] EWHC 43 (Admin) where a Coroner was criticised for not disclosing material that had been collected by the HSE despite a general understanding that this was subject to the usual HSE embargo. The present position is probably that the duty for the Coroner to ensure that the Inquest is carried out in a fair manner requires disclosure of documents held by the Coroner to Interested Persons unless the Coroner has a good reason to withhold disclosure.

There may of course be a number of different reasons why a Coroner might decide that, in the circumstances of a particular inquest, documents should not be disclosed. There may be public interest issues that need to be determined on an individual basis, following the same approach as a Court would take in other cases. Another good reason may be that documents are not considered by the Coroner to be relevant to his inquiry albeit that they may be relevant to other proceedings arising out of the death of the deceased. It must be right that an Interested Person cannot use the Inquest as justification for obtaining documents that are sought for other proceedings.

When considering which documents are and are not relevant and/or should be disclosed to Interested Persons, it will be highly relevant whether the Inquest is or is not within the scope of Article 2 of the ECHR. Article 2 has both substantive and procedural elements and so the level of disclosure required to hold a fair Inquest under Article 2 may well lead to a need to disclose copies of a wider class of documents to a Properly Interested Person than in other Inquests.

However the overall message of cases such as R (Bentley) v HM Coroner District of Avon and R (on the application of) v HM Coroner for the Black Country District is that disclosure of documents held by the Coroner to Properly Interested Persons is increasingly becoming the norm and Coroners will need to have good reasons which
are properly recorded as part of the Inquest process if a decision is made not to provide advance disclosure to Properly Interested Persons.