REPORT TO THE SERIOUS FRAUD OFFICE

THE COLLAPSE OF *R v. WOODS & MARSHALL* ON 26 APRIL 2021

Brian Altman QC

Rebecca Chalkley

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Contents

A note from the Serious Fraud Office:

The SFO has agreed a limited waiver to legal professional privilege for the purposes of publishing this report.

This report is published alongside five annexes. Two annexes from the original review have not been published for GDPR reasons. The report references appendices to Annex 5, which contain detail that is not critical to understanding the report or its findings and, for the purposes of clarity and sensitivity, have also not been published.

Executive Summary

1. On 24 October 2013, the then Director of the SFO opened an investigation into Serco and G4S electronic monitoring contracts, referred to by the SFO, respectively, as GRM01 and GRM02.

2. The Serco case (GRM01) involved the prosecution of two senior managers of Serco Ltd, Nicholas Woods, the former Finance Director of Serco Home Affairs (a division of Serco Ltd), and Simon Marshall, the former Operations Director of Field Services (within Serco Civil Government), in respect of contracts for the provision of electronic monitoring services within the criminal justice system.

3. The trial on allegations of fraud commenced before Mrs Justice Tipples at Southwark Crown Court on 29 March 2021. Following the discovery in mid-April 2021 of significant disclosure problems, on 26 April 2021 the case against the defendants collapsed with the prosecution offering no evidence against the defendants, when Mrs Justice Tipples refused the SFO's application for an adjournment of the trial to review and remedy the disclosure process in the case. It had been acknowledged by the SFO that the disclosure failures which had been discovered undermined the disclosure process to the extent that the trial could not safety and fairly proceed until the issues had been remedied and that the necessary remedial processes could not be achieved within the confines of the case.

4. Mrs Justice Tipples ruled that she should not grant any adjournment to remedy the case, given its age, the stage that had been reached and having taken into account the nature of the prosecution case. Thus, the prosecution had no choice other than to discontinue the case.

5. As a result of the collapse of the case, and the wider concerns surrounding it, in May 2021, Lisa Osofsky, the current Director of the SFO commissioned me, together with Ms Rebecca Chalkley of counsel, *"To examine the circumstances, facts and matters which*

caused or contributed to the disclosure failures in R v Woods and Marshall before Mrs Justice Tipples at Southwark Crown Court, which resulted in the SFO offering no evidence against both defendants on 26 April 2021".

6. This report deals with the collapse of the GRM01 case in April 2021.

7. It was, in our view, a combination of factors that led to the collapse of the case. The failure to disclose a Home Affairs MD's Report including reference to 'backdated management fees' (which was an essential part of the defence of Mr Woods and Mr Marshall) was the catalyst.

8. In October and November 2019, [Document Review Counsel 1], experienced disclosure review counsel, and, in April 2020, [Document Review Counsel 2], also experienced disclosure review counsel, did not tag the Home Affairs MD's Report as 'potentially disclosable' on the Disclosure tagging panel of Autonomy DRS.[1] In April and May 2020, [Document Review Counsel 3], a third reviewer, having originally correctly tagged the document, later undid the tagging, so that the document, though disclosable, was not disclosed.

9. Together with other issues with the disclosure process, those omissions led to trial counsel and the case team having no confidence in the disclosure process on GRM01: the Home Affairs MD's Report had not been picked up by investigative searches, assurance processes, or the Stage 3 review. Moreover, there was a failure to include the content of Bag 1405 within the disclosure review; a failure to identify within Bag 1405 a number of disclosable documents concerning a separate Serco contract that had not featured in the review before (Merseyrail); a failure to include a number of items specifically requested by the defence as part of the Stage 3 disclosure review; items recorded as having been disclosed by the SFO which the defence claimed not to have received which was not resolved; a failure to include the determinations from Bag 830 within the sub-schedules of digital material; and there were items identified as allegedly

[1] This term is used as shorthand for the 'refer – undermine or assist' determination at Tier One on the tagging panel

incorrectly tagged during the Quality Assurance review conducted from 22 to 25 April 2021, which involved a review of the work of two of the reviewers who had not identified the Home Affairs MD's Report as potentially disclosable and at least two others, including another disclosure review counsel, [Document Review Counsel 4].

10. [DRC 2] and [DRC 1] failed to tag the document as potentially disclosable because they say they understood their role to be limited to the determination of relevance, which, if accurate, suggests serious systemic failures of communication, tasking, training, guidance and/or oversight and monitoring. In the case of [DRC 3], we conclude that the undoing of her original tagging was not intentional; rather we think it more likely to have been inadvertent, albeit inexplicable.

11. We conclude that their failures had nothing to do with their ability, far less their use or understanding of Autonomy DRS, or the relevance or disclosure tests. Each had identified the material as relevant, and so the documents appeared on a non-sensitive unused spreadsheet dated 31 July 2020. However, the reviewers' manual descriptions of the material failed to highlight the significant content. Thus, the material was unidentifiable as disclosable, and was not disclosed to the defence until requested by them in mid-April 2021.

12. It is clear to us that the disclosure reviewers had an embarrassment of internal disclosure guidance documents designed to assist them, but we question how much of it really assisted them. We think they had far too much disparate, detailed and voluminous internal guidance documentation over time, risking a loss of important messaging, particularly as regards focus on the real issues in the case. The Document Review Guidance document was of little practical utility and offered contradictory guidance. Moreover, we have not found any clarity about what the disclosure reviewers in fact received and read.

13. [Disclosure Officer] was appointed Disclosure Officer in October 2017. His inexperience should have disqualified him from appointment as Disclosure Officer on such a large and complex case. Part 2 of the relevant SFO Handbook requires the Disclosure Officer

to have sufficient skill and authority, commensurate with the complexity of the investigation, to discharge the disclosure functions effectively.

14. His perception of being marginalised and undermined is concerning, and, if accurate, suggests he lacked authority. [Redacted for GDPR purposes] The Case Controller, as well as the SFO, institutionally, must bear responsibility for appointing as Disclosure Officer on GRM01 a person who was too inexperienced to fulfil the role, which we find was a serious failing.

15. We are informed by [Case Controller] that he felt [Disclosure Officer] was the most appropriate case team member to be appointed to the role of Disclosure Officer, adding there were only a small number of SFO employees who have acted as Disclosure Officer during a prosecution, and they are usually reluctant to repeat the role. [Case Controller] says experienced Disclosure Officers are *"a rare and sought-after resource"* and typically a case team member is appointed from the available resource and learns the role on the job with appropriate training and support. This approach is wrong-headed. [Disclosure Officer] was ill-equipped to do the job he was given on such a large and complex case, and according to him unsupported. He should never have been put in that position, and neither should the case team and the case.

16. No Quality Assurance review as provided by §64 of the Disclosure Management Document dated 1 April 2020 was conducted after the end of 2019. We are of the view that the failure to carry out continued and periodic Quality Assurance reviews of descriptions and determinations, and the Quality Assurance reviews of relevant Serco material advised by [a Deputy Disclosure Officer], in emails of 25 January and 23 March 2020, was a serious systemic failure, given it was the three reviewers' work on descriptions and determinations on the relevant Serco material that contributed to the collapse of the case.

17. The failure was not however simply a case of non-compliance with the system; we are also of the view that the Quality Assurance review regime was insufficiently defined and

lacked any robustness to avoid the review failings that obtained here. There was no failsafe.

18. Directly responsible for that systemic failure were [Disclosure Officer], the Disclosure Officer, (whose responsibility the Quality Assurance process was) and [Case Controller], the Case Controller, for not following the advice they had received from [Deputy Disclosure Officer], in January and March 2020 regarding the continuation of a Quality Assurance review of relevant Serco material.

19. Indirect responsibility must also be shared by Sara Chouraqui, the Head of Division, by virtue of her leadership role, and her overriding responsibility, as defined by the SFO Operational Handbook, and ultimately by the SFO, institutionally, whose Quality Assurance review regime was inadequate and unfit for such a large and complex disclosure process.

20. That we cannot conclude that any Quality Assurance review of the relevant Serco material would have revealed whether reviewers had not understood their role, and, in particular, had not tagged the Board minutes as potentially disclosable is none to the point. The Quality Assurance process set out in §64 of the GRM01 Disclosure Management Document of 1 April 2020, and that advised by [Deputy Disclosure Officer] in January and March 2020, were not conducted. These failures exposed the GRM01 disclosure process to the risk of unchecked error. Random spot checks conducted by [Disclosure Officer], the Disclosure Officer, did not close the gap left by the failure to follow the system in place (such as it was).

21. Moreover, the process for a Quality Assurance review was not defined in any disclosure guidance (internal or external) that we have found or been informed about and there is no formal guidance in the SFO Operational Handbook. This left too wide an ambit of discretion in the hands of the Disclosure Officer and the Case Controller to determine the nature and extent of the Quality Assurance review.

22. We have identified additional systemic problems of real concern, but these alone or in combination did not, in our judgment, cause or contribute to the collapse of the case. They are:

a. The loss of [Disclosure Counsel 3], previous counsel to the case, [redacted for GDPR purposes] was significant and left a vacuum that was never completely filled. She helped [Disclosure Officer], the Disclosure Officer, *"learn on the job"* with training and support. [Deputy Disclosure Officer] was brought in on GRM01 in October 2019, but only stayed for six months. He detected low morale on the team, in addition to having serious concerns about [Disclosure Officer].

b. [Case Controller] had concerns at the time about staffing and resources, which became more obvious with hindsight. [Disclosure Officer] agrees that the case was not sufficiently resourced internally and externally in terms of numbers. He says the case from the outset was *"starved of resources"* and there was a large turnover of staff.

c. [Disclosure Officer] had concerns about the limited number of reviewers they had for the volume of documents and the time pressures that were put on individual reviewers. [DRC 1] spoke of daily targets and [DRC 4] recalled the rate of review as *"an uncomfortable, concerning and reoccurring theme in this case"*. The restrictions on recruitment at this time also prevented ten document reviewers who were interviewed by [Disclosure Officer] in early 2020 from joining the review team to relieve some of the pressure on reviewers by describing documents. [Case Controller] says they attempted to obtain internal resource to fill this role but were only able to obtain the services of a few reviewers for a short period in this way. [Disclosure Officer] says the lockdown due to the Covid-19 pandemic prevented new reviewers being instructed, as the SFO was unable to issue laptops or provide the necessary training to them. The SFO accepts that from March 2020 to July 2020 there were delays in issuing laptops, but they state there was never a period when they were unable to issue laptops to new members of staff, document reviewers or counsel.

d. The Performance Monitoring scheme was ineffective, if not chaotic, before Sara Lawson QC insisted on the proper use of the scheme. Following her appointment

as General Counsel in May 2019, case teams were actively chased for Performance Monitoring Forms.

e. The backdating of, and failure to provide evidence for, several Performance Monitoring Forms in March 2020 in relation to two of the reviewers means that that it is impossible to know (and we do not speculate about it) whether contemporaneous monitoring of the performance of those reviewers would have revealed the kind of issues that led to the non-tagging and failures to disclose, which could have been identified and resolved before they occurred.

f. We are informed that the backdating of Performance Monitoring Forms was endemic at the time. Despite the understandable desire for compliance with the Performance Monitoring regime for all reviewers, the request for, and completion of, backdated Performance Monitoring Forms without any or any contemporaneous evidence was perfunctory and meaningless. The true gravamen of the backdating of seven Performance Monitoring Forms for [DRC 1] and [DRC 4] is that, in their case, there is no contemporary, evidence-based assessment of their work over a two-year period between 3 November 2017 and 3 November 2019.

g. It is impossible to know (and we do not speculate about it) whether, had the Performance Monitoring Form and Periodic Performance Review scheme been effective in earlier years, any of the three reviewers who had previously worked for the SFO would not have been recruited on GMR01.

h. According to [Case Controller], the facilities now available for remote meetings were not available during the Covid-19 pandemic period and other systems required time to evolve. He says the SFO infrastructure designed to support case teams was also hugely affected, reducing the technical support and facilities available. Important processes such as the production and service of material and recruitment became more complex and time-consuming. According to the SFO, while the teams responsible for supporting case teams were disrupted at the beginning of the pandemic, between March and June 2020, the Materials Management and Facilities teams responsible for the production and service of material were physically on site at the SFO's offices during the entire pandemic period. [Disclosure Officer] also states that the SFO's IT capabilities failed to meet

the impact on working caused by the Covid-19 pandemic restrictions which commenced in March 2020. He states that at the start of lockdown there were no facilities to enable audio or video calls whether on Zoom, MS Teams or any other online conferencing platform. The SFO was *"well behind the curve in terms of IT"*. The effect was that the weekly meetings he had with document reviewers face-to-face before lockdown could not take place initially. He says they did not even have the facility at the start to host a multi-party voice call without using their own personal mobiles and trying to connect the parties, which was a security issue. It is for this reason that regular team meetings with the document reviewers ceased. The SFO disagrees, saying they had telephone conferencing in place from February 2019, and were able to host multi-party calls. They do accept however that the implementation of video conferencing facilities was delayed until October 2020.

23. In the final section of this report, we set out our conclusions and lessons learned, and we make 18 recommendations. In doing so, we make clear that we agree with [Case Controller] that there are no 'silver bullets' that will avoid future such failures, and that any recommendations can only mitigate against the risks of them happening again.

Section 1: Introduction

Background

24. On 24 October 2013, the then Director of the Serious Fraud Office (SFO) opened an investigation into Serco and G4S electronic monitoring contracts, referred to by the SFO, respectively, as GRM01 and GRM02. This was announced on 4 November 2013.[2]

25. This report is concerned only with disclosure failures in the Serco (GRM01) case. This was the SFO's prosecution of two senior managers of Serco Ltd, Nicholas Woods, the former Finance Director of Serco Home Affairs (a division of Serco Ltd),[3] and Simon Marshall, the former Operations Director of Field Services (within Serco Civil Government).[4] The prosecution was in respect of contracts for the provision of electronic monitoring services within the criminal justice system.

26. The trial of Mr Woods and Mr Marshall on allegations of fraud commenced before Mrs Justice Tipples at Southwark Crown Court on 29 March 2021. On 26 April 2021, the case against the defendants collapsed, following the discovery in mid-April 2021 of significant disclosure problems. It had been acknowledged by the SFO that the disclosure failures which had been discovered undermined the disclosure process to such an extent that the trial could not safely and fairly proceed until the issues had been remedied. It was further acknowledged that the necessary remedial processes could not be achieved within the confines of the case. The judge refused the SFO's application for an adjournment of the trial to review and remedy the disclosure process in the case and consequently the prosecution offered no evidence against the defendants resulting in their acquittal.

[2] https://www.sfo.gov.uk/2013/11/04/g4s-serco-investigation-2/
[3] Mr Woods qualified as a Chartered Accountant in 1996
[4] Following a restructuring in September 2011, Home Affairs disappeared, and Mr Marshall became Managing Director of Secure Logistics & Field Services (within Serco Civil Government). In April 2012, he was appointed Partnership Director of Community Services

27. Almost two years previously, on 4 July 2019, Mr Justice William Davis had given his approval to a Deferred Prosecution Agreement (DPA) between the SFO and Serco Geografix Ltd, the detail of which is set out in Section 3 below.

The Independent Review

28. As a result of the collapse of the case, and the wider concerns surrounding it, in May 2021, Lisa Osofsky, the current Director of the SFO commissioned me, together with Ms Rebecca Chalkley of counsel, *"To examine the circumstances, facts and matters which caused or contributed to the disclosure failures in R v Woods and Marshall before Mrs Justice Tipples at Southwark Crown Court, which resulted in the SFO offering no evidence against both defendants on 26 April 2021"*.

29. The Terms of Reference, the full terms of which are appended to this report at Annex 1, invite us *"to report our findings"* and *"to identify lessons learned and to make recommendations"*.

30. This report deals with the collapse of the GRM01 case in April 2021.

31. A Process Protocol, appended to this report at Annex 2, was agreed with the SFO. It sets out the procedures under which this independent review is to be carried out. It takes into account the need for it to be conducted at all times in a way that ensures (a) our independence in determining how to undertake the work in order to discharge the Terms of Reference (b) the thorough examination and consideration of the available evidence and the issues that we consider relevant to the Terms of Reference (c) the fair treatment of individuals connected with the subject matter of the independent review and all other parties whose interests are affected by its work and (d) the independent review reaches its conclusions with all due expedition in the light of need for the SFO to learn any lessons from the collapse of *R v Woods and Marshall* as soon as possible.

32. Although the Process Protocol allowed for the possibility of interviewing those we identified as of importance to this review, in the interests of time and clarity, we opted to invite a number of people to provide us with written accounts. These accounts were

in response to detailed questions, which were provided to them, accompanied by lists of documents. They were often followed by supplementary questions and responses. We are grateful to everyone who responded. One outcome of this process was that we did not find the need to interview anyone in person.

33. We should add that we recognise that the facts and matters we have been asked to examine go back as far as 2013, while the core aspects of what we are being asked to consider occurred during 2019 and 2020. Inevitably memories fade over time, even with the assistance of documentation to refresh memory. Equally, it is important to recognise that some of the events we are considering took place during the Covid-19 pandemic, which impacted on everyone's working lives. The extent to which the impact of the pandemic contributed to what we are examining we will deal with later.

34. We acknowledge the considerable assistance we have received from Sara Lawson QC, SFO General Counsel, Michelle Crotty, Chief Capability Officer, and John Carroll, Chief Operating Officer (now retired), as well as their staff. We record the fact that, in August 2021, we received face-to-face instruction on the Autonomy Document Review System (DRS) at the SFO's offices, and we also acknowledge the inestimable assistance we have received from [Principal Investigator], an SFO Principal Investigator, with many years of experience on Autonomy DRS, who has analysed the relevant audit and review data in connection with three disclosure review counsel who reviewed documents, the non-disclosure of which contributed to the collapse of the case.

[Redacted]

35. [Paragraph redacted for GDPR purposes]

Section 2: The Law and Guidance on Disclosure and the Review Process

The law and guidance on disclosure

36. It is important background to the proper comprehension of the issues we have had to consider in the course of this review to set out the principles underlying the criminal disclosure process. This we do in this section.

37. The control, management and disclosure of unused material in criminal cases, the investigation of which began after 1 April 1997, is governed by the Criminal Procedure and Investigations Act 1996 (CPIA), as amended by the Criminal Justice Act 2003, and by the revised Code of Practice issued under section 23 of the CPIA.

38. In addition to the CPIA and the Code of Practice, and various leading authorities on disclosure including *R v R* [2015] EWCA Crim 194 and *R v H* [2004] UKHL 3, the Attorney General has issued guidance which has been updated and amended at various stages over the last ten years. The current guidelines are the Attorney General's Guidelines on Disclosure. These were effective from July 2022.

39. The guidance considered and applied throughout the GRM01 investigation, according to the Disclosure Management Document (DMD) of 1 April 2020,[5] was the Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners, issued in December 2013, incorporating in the Annex the Attorney General's Guidelines on the Disclosure of Digitally Stored Material (2011).

40. In November 2018, the Attorney General's *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (the Review) highlighted significant concerns with the culture around disclosure, engagement between prosecutors, investigators and defence practitioners, and the challenge of the exponential increase in digital data. The Review made a series of practical recommendations, crucially recognising that the systemic nature of the problem would demand a system-wide approach to improve

[5] The DMD outlines the SFO's strategy, and the approach taken in relation to disclosure

disclosure obligations. These recommendations were incorporated into the later 2020 and current Guidelines.

Underlying principles

41. The concept of disclosure as a fundamental part of the right to a fair trial is set out in the current (2022) Attorney General's Guidelines. §3-4 of the Guidelines emphasise that the law on disclosure provides for a proportionate system in which the defence have access to material which might undermine the prosecution case or strengthen their own case, without the real trial issues being overwhelmed in the process:

> *"A fair trial does not require consideration of irrelevant material. It does not require irrelevant material to be obtained or reviewed. It should not involve spurious applications or arguments which aim to divert the trial process from examining the real issues before the court.*
>
> *The statutory disclosure regime does not require the prosecutor to make available to the accused either neutral material or material which is adverse to the accused. This material may be listed on the schedule, alerting the accused to its existence, but does not need to be disclosed: prosecutors should not disclose material which they are not required to, as this would overburden the participants in the trial process, divert attention away from the relevant issues and may lead to unjustifiable delays.* ***Disclosure should be completed in a thinking manner, in light of the issues in the case, and not simply as a schedule completing exercise****. Prosecutors need to think about what the case is about, what the likely issues for trial are going to be and how this affects the reasonable lines of inquiry, what material is relevant, and whether material meets the test for disclosure."*

42. The *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (the Protocol) reflects similar concerns, beginning with the *"golden rule"* that full disclosure should be made of unused material which weakens the prosecution's case or strengthens that of any defendant; and noting that failure to disclose material to the defence to which they were entitled remains the biggest single cause of miscarriages of justice.

43. At §3, the Protocol states:

> "*However, it is also essential that the trial process is not overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material or by misconceived applications. Although the drafters of the [CPIA] cannot have anticipated the vast increase in the amount of electronic material that has been generated in recent years, nevertheless the principles of that Act still hold true. Applications by the parties or decisions by judges based on misconceptions of the law or a general laxity of approach (however well-intentioned) which result in an improper application of the disclosure regime have, time and again, proved unnecessarily costly and have obstructed justice. As Lord Justice Gross noted, the burden of disclosure must not be allowed to render the prosecution of cases impracticable."*

44. The principles set out and described in the various versions of the Attorney General's Guidelines have largely remained constant. The principal development has been the move towards a more relevant 'issues' focused approach to disclosure. This is also reflected in the approach taken by the Court of Appeal. In *D Ltd v A and Ors* [2017] EWCA Crim 1172 at [100], the Court of Appeal stated, "*So far as any further disclosure is concerned, it will be critical to focus on the true issues in the case*".

Stages of disclosure

45. The various stages of the disclosure process are set out in the common law and in the CPIA. They are as follows:

    a. **The common law (*R v DPP ex parte Lee* [1999] 2 All ER 737).** Material that would fall to be disclosed at that stage would have included material that may support defence submissions for a bail hearing or could lead to the exclusion of evidence or a stay of proceedings.[6]

[6] §6(b)(i) and (ii) of the Attorney General's Guidelines 2013

b. **Initial disclosure pursuant to section 3(1)(a) of the CPIA.** Section 3(1) of the CPIA provides that the prosecutor must disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused or give to the accused a written statement that there is no material of such a description.

c. **Continuing disclosure, following service of a Defence Statement pursuant to sections 5 and 6 of the CPIA.** Throughout the life of the case, after complying with section 3 of the CPIA, and before the accused is acquitted or convicted or the prosecution decides not to proceed with the case, the prosecutor is required to keep under review (pursuant to section 7A of the CPIA) the question whether at any given time (and, in particular, following receipt of a defence statement) there is prosecution material which (a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused and (b) has not been disclosed to the accused. This means that the prosecution must keep under review all material considered at the stage of initial disclosure as well as dealing with any new or further material in accordance with the regime set out in this document.

Descriptions

46. The CPIA requires that relevant unused material is described on the unused material schedule. In each case there are two schedules, one of non-sensitive material (the MG6C) and the second of sensitive material (the MG6D). The schedule of non-sensitive material is disclosed to the defence.

47. It is fundamental to the process that unused material which appears on the MG6C is described clearly and accurately. It is the relevance of that material that should be described, so that the information and not the documentation will form part of the descriptive schedule, i.e., the relevant contents of a document rather than its cover title. Enough information should be provided within that description so that the prosecutor can make an informed decision as to whether the material could satisfy the disclosure test.

Statutory roles

48. The definitions of roles and responsibilities within the disclosure regime are provided for by the CPIA and the Code of Practice.

The Prosecutor

49. The Prosecutor in GRM01 was the Case Controller. [Redacted for GDPR purposes].

50. The Case Controller is a uniquely SFO-created role and has no statutory basis in the CPIA or the Code of Practice. The November 2013 version of Part 2 of the Disclosure chapter of the SFO Operational Handbook (Roles and Responsibilities) states the Case Controller is:

> *"… the person in charge of the investigation and therefore responsible for leading and directing the investigation conducted by the SFO. The Case Controller can be a Lawyer or Investigator. The Case Controller has the special responsibility for ensuring that the duties under the Code are carried out by all those involved in the investigation, and for ensuring that all reasonable lines of enquiries are pursued, irrespective of whether the resultant evidence is more likely to assist the prosecution or the accused."*

51. The list of the Case Controller's various responsibilities includes: *"Appoint the Disclosure Officer and ensure that the person appointed is given sufficient authority within the team to make sure that the CPIA obligations are met."*

52. The responsibility of the prosecutor under the CPIA, the Code and the Attorney General's Guidelines is, in short, to facilitate proper disclosure by:

    a. Advising - and, where necessary, challenging - the Disclosure Officer to ensure that the prosecution's disclosure obligations are met.[7]

[7] §28-34 of the Attorney General's Guidelines 2013

b. Reviewing the MG6C prepared by the Disclosure Officer thoroughly, so as to be satisfied of its quality and content and, where necessary, inspecting items.

c. Taking the ultimate decision as to which items should and should not be disclosed.

Disclosure Officer

53. [Redacted for GDPR purposes] [Disclosure Officer] was the Disclosure Officer on GRM01 from 13 October 2017.[8] In about September 2016, [Disclosure Officer] joined the GRM01 team on a temporary secondment. He had no previous experience as a Disclosure Officer and had not joined a prosecution team before his appointment as Disclosure Officer on GRM01 in October 2017.

54. [Redacted for GDPR purposes]. He is a solicitor by training. [Redacted for GDPR purposes].

55. The 8 September 2017 version of Part 2 of the Disclosure chapter of the SFO Operational Handbook (Roles and Responsibilities) (v4) states:

> *"The disclosure officer should be a member of the case team with sufficient skill and authority, commensurate with the complexity of the investigation, to discharge the disclosure functions effectively. The disclosure officer need not be a lawyer; the disclosure officer may be an investigator on the case team."*

56. The Disclosure Officer has overall responsibility for examining material, revealing it to the prosecutor, disclosing it to the accused where appropriate (following the prosecutor's disclosure determination), and certifying to the prosecutor that action has been taken in accordance with the CPIA and the Code of Practice.

57. The statutory duties of the disclosure officer include:

[8] [A Grade 7 lawyer] had been the first Disclosure Officer on GRM01 until it was split into GRM01 and GRM02 (G4S) in October 2017

a. Ensuring relevant material has been recorded and retained by the case team.[9]

b. Making reasonable and proportionate enquiries with a view to securing relevant material which is thought to exist in the hands of third parties.

c. Preparing the MG6C and providing it to the prosecutor for review.[10]

d. Providing copies to the prosecutor of any unused material that he considers might fall to be disclosed.

e. Specifically drawing material to the attention of the prosecutor for consideration where he has any doubt as to whether it might reasonably be considered capable of undermining the prosecution case or of assisting the case of the accused,[11] and providing copies of any such material to the prosecutor.[12]

f. Certifying to the prosecutor, that, to the best of his knowledge and belief, all relevant material which has been retained and made available to him has been revealed to the prosecutor in accordance with the Code of Practice.[13]

Head of Division

58. The Head of Division C, under which the GRM01 case team operated, was Sara Chouraqui who was temporarily promoted into the role as Head of Division C in November 2019. Her appointment was made permanent on 1 December 2020. As Head of Division, she had responsibility for the Prosecutor and Disclosure Officer and the disclosure process in this case. The 21 February 2018 version of Part 2 of the of Disclosure chapter of the SFO Operational Handbook (Roles and Responsibilities) (v5) provides:

> *"The Heads of Division are responsible for ensuring that prosecutors, disclosure officers and deputy disclosure officers have been adequately trained and have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively. They must also ensure that proper records are kept and that the disclosure management document is up to*

[9] §4 and 5 of the Code
[10] §6.11 of the Code
[11] §7.2 of the Code
[12] §7.3 of the Code
[13] §9.1 of the Code

date. They should ensure that proper scheduling has taken place and the items on the schedule are numbered sequentially and there are both sensitive and non-sensitive schedules of unused material at the appropriate stages of the case."

59. Ms Chouraqui states that, as Head of Division, she managed ten Case Controllers and a number of cases. She had limited contact with the Disclosure Officer. She received assurance from her Case Controllers who report to her and with whom she meets weekly. At the time of GRM01, she says Heads of Division were seeking assurance from their Case Controllers on disclosure. She adds it is not reasonable, nor expected, that Heads of Division should check schedules, when she took assurance from her Case Controllers that schedules were being drafted.

The GRM01 review process

60. The disclosure review in GRM01 was carried out in Tiers and Stages. The Tier One review (Stages 1 and 2) is described at §59-65 of the GRM01 DMD of 1 April 2020.

"59. The disclosure review, which is ongoing, has been conducted in two phases. The first phase is categorised as a "Tier 1 review". Disclosure review counsel and members of the case team reviewed documents using the DRS tagging panel. The documents were described with the assistance of standard templates to ensure clarity and consistency of descriptions. They were tagged according to the following categories in the DRS tagging panel: "May be relevant" or "Non-relevant".

60. Each document was also considered for sensitivity. If an item was deemed to be sensitive, a decision was taken by the Prosecutor as to whether and how it could be appropriately redacted in order to appear in the non-sensitive unused schedule.

61. The second phase of the review has involved documents which had been marked as "may be relevant" and "refer-undermine or assist" at Tier 1 all being reviewed again by the Disclosure Officer, Second Junior Counsel or the Prosecutor.

62. These documents were reviewed to assess whether they satisfied the statutory test for disclosure i.e. it is relevant material which the prosecutor has in his or her possession or has inspected in connection with the case that might reasonably be

considered capable of undermining the case for the prosecution against the accused or of assisting the accused.

63. In determining whether material meets the statutory test, the prosecution and defence cases have been carefully analysed to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges might be resisted. Due regard has been given to any defences set out in interview by any of the defendants and any representations made in writing on behalf of the defendants. These matters will be re-reviewed upon receipt of Defence Statements.

64. Documents reviewed in the Tier 1 exercise were dip-sampled by the Disclosure Officer to ensure consistency of the descriptions and the determinations.

65. A decision has been taken in this case to provide the defence teams with all relevant family documents where an item has been disclosed."

61. §61 of the DMD was intended to represent a second phase of the initial disclosure exercise, whereby the Disclosure Officer, Second Junior Counsel or the Prosecutor would review material that had been identified as 'may be relevant' and 'refer – undermine or assist' (i.e., potentially disclosable) by disclosure review counsel and record it in the Tier One fields of the tagging panel. §64 of the DMD outlines the Quality Assurance (QA) process.

62. Stage 3 of the review (Tier Two) took place after the receipt of Defence Statements. This process is set out in a note prosecuting counsel provided to the court, entitled *Prosecution Note on The Disclosure Process and Quality Assurance*, dated 22 April 2021. §15 to 18 of the note read:

"15. Following service of the defence statements, additional search terms were developed and run based on the additional information within these statements, in order to identify any additional material that would be relevant to the case.

16. These searches were run over both Serco and MoJ data sets and ignored previous determinations. The purpose of this was to:

a. identify material within the pool of already identified relevant items that should be reconsidered in light of defence statements; and

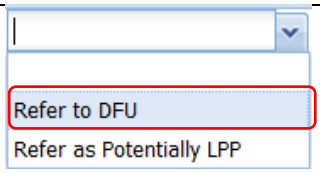
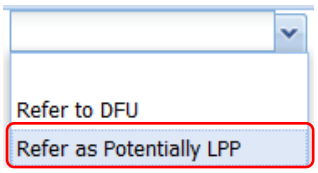
b. provide additional assurance that any items not previously identified as relevant would be captured in light of the defence statements.

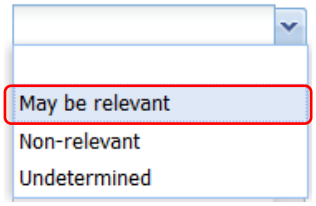
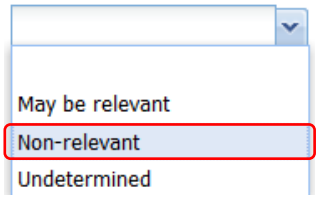
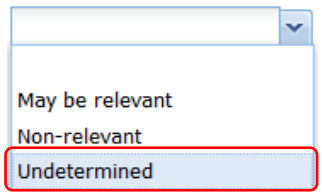
17. In addition, the documents that had been given a determination of 'Potential evidence' in the tier 1 determination, but which were not served as evidence or disclosed, were re-reviewed. The purpose of re-reviewing these documents was for the reviewers to reconsider, post-charge, documents previously deemed to have been significant, in case any materials remained significant evidence and/or were disclosable.

18. The documents were allocated to the review team along with copies of the defence statements, the defence notes regarding disclosure and updated guidance for the review. The Tier 2 review function was used to record the review."

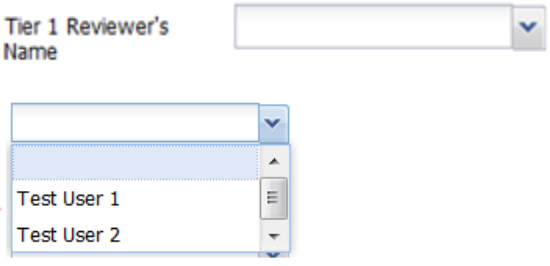
The Autonomy DRS system

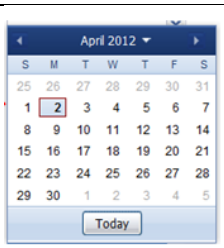
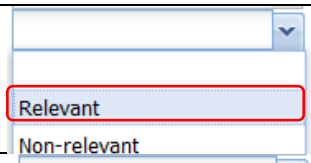
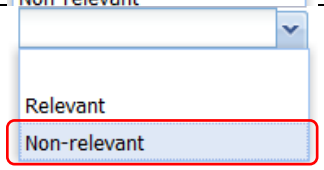
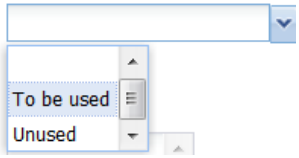
63. The functionality of the Autonomy DRS is described fully by [Principal Investigator] in his GRM01 audit report found at Annex 5 to this report. We do not repeat it here. However, we reproduce below the Disclosure Tagging Panel Guidance which we have taken from the Document Review Guidance document, which was provided to disclosure review counsel. We return to the Document Review Guidance document later. The illustrations set out the Tiers and basic tagging instructions.

	Tag	Instructions
1	Referral	
	 *Optional	**Fault/Problem** In the Referral box, select '**Refer to DFU**' when there is a technical problem with reviewing the document. This includes, for example, a hyperlink not working, a corrupted message, or a missing attachment. **What happens next?** These files will undergo Exception Processing (EP) in the DFU. There can be 2 outcomes: 1. The referred file is successfully re-processed and will be re-released to the case team. 2. The referred file cannot be processed any further. It will be marked as No Further Action (NFA) and will not be re-released to the case team.
	 *Optional	**LPP** In the Referral box, select '**Refer as Potentially LPP**' for all documents that are potentially LPP. **What happens next?** 1. The Autonomy Introspect system does NOT send automated messages to alert Autonomy Support of newly tagged 'Refer as Potentially LPP' files. 2. You will need to email Autonomy Support to inform them to remove all these files from the case review area, including the Document Library, Review Library and User Workspaces. 3. Autonomy Support will move these files to the LPP folders for independent counsel to review. 4. Once LPP review is completed, files that are deemed LPP will remain in the LPP folder. Files that are deemed non-LPP will be re-released to

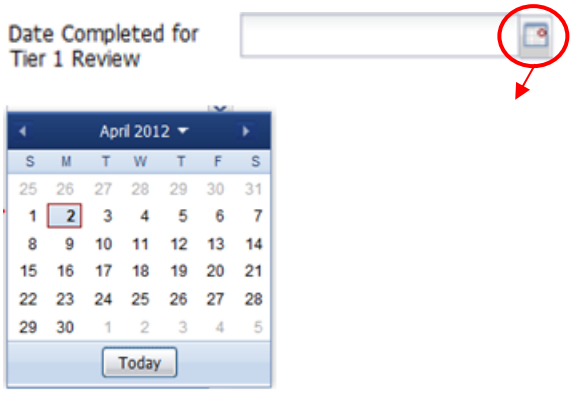
		the Document Library for the case team to review.
2	LPP Determination Completed ☐	Where a LPP determination has already taken place then the box marked "**LPP Determination Completed**" will be ticked. Only files confirmed Non-LPP are released to the case team. The case team can view this checkbox but cannot edit it.
	SECTION (1) – TIER ONE REVIEW – RELEVANCE TEST	
3	Tier 1 Determination ***Compulsory**	
		All materials meeting the test for relevance must be identified by selecting the '**May be relevant**' option in the **Tier 1 Determination** drop down menu. ➢ **Go to SECTION (2)** When a document is marked "**Determination – May be relevant**", Tier 1 Reviewer **MUST** consider whether the item falls within one of the 3 categories below in **SECTION (2)**: • Potential Evidence (tag 4); • Sensitive (tag 7); • Undermine or Assist (tag 9).
		All materials incapable of having an impact on the case must be identified by selecting the '**Non-relevant**' option in the **Tier 1 Determination** drop down menu. ➢ **Go to SECTION (4)**
		If a determination on relevance cannot be made, select the '**Undetermined** option in the **Tier 1 Determination** drop down menu. ➢ **Go to SECTION (4)**

	SECTION (2) - TIER ONE REVIEW	
4	Potential Evidence ☐ *Optional	Select **"Potential Evidence"** for material that may assist the case.
5	Reason for Potential Evidence *Optional	Comment when "**Potential Evidence"** checkbox is selected identifying why the material might assist the case.
6	Exhibit Reference *Optional	To be added at production stage.
7	Refer - Sensitive - Tier 1 ☐ *Optional	Select **"Refer – Sensitive – Tier 1"** for Sensitive material. See the definition and categories of sensitive material set out in the *Operational Handbook – Disclosure – Chapter 1.*
8	Reason for Sensitive - Tier 1 *Compulsory if no. 7 is selected	When "**Refer – Sensitive – Tier 1**" checkbox is selected, enter the reason in "**Reason for Sensitive – Tier 1**".
9	Refer - Undermine or Assist - Tier 1 ☐ *Optional	Select **"Refer - Undermine or Assist – Tier 1"** for material that might reasonably be considered capable of undermining the case for the prosecution against an accused or might reasonably be considered capable of assisting the case for an accused.
10	Reason for Undermine or Assist - Tier 1 *Compulsory if no. 9 is selected	When "**Refer – Undermine or Assist – Tier 1**" checkbox is selected, enter the reason in "**Reason for Undermine or Assist – Tier 1**".
11	Undetermined - Refer to Tier 2 Reviewer ☐ *Compulsory if no. 7 and/or 9 is undetermined	Select "**Undetermined – Refer to Tier 2 Reviewer**" if Tier 1 Reviewer cannot make a decision on any of the categories within **SECTION (2)**.
12	Reason for referral to Tier 2 Reviewer as Undetermined	When "**Undetermined – Refer to Tier 2 Reviewer**" checkbox is selected, enter the reason in "**Reason for Referral to Tier 2 Reviewer as Undetermined**".

	***Compulsory if no. 11 is selected**	
	SECTION (3) - TIER ONE REVIEW	
13	Document Description	A document description **MUST** be entered when "**Determination – May be relevant**" is selected. **See Document Descriptions (Below) for further guidance in applying descriptions.**
14	To be translated ☐ ***Optional**	Tick "**To be translated**" if the document contains foreign language(s) and requires translation.
15	Handwritten document ☐ ***Optional**	Tick this box if the document contains handwritten text. Handwritten text is not searchable because Optical Character Reader (OCR) does not recognise the characters. By selecting this box, it helps the case team to filter and manually review the handwritten documents which are not responsive to keyword search and excluded from the search result list.
	SECTION (4) – TIER ONE REVIEW	
16	Tier 1 Review Complete ☐ ***Compulsory**	Once the Tier 1 Review has been completed, tick "**Tier 1 Review Complete**"
17	Tier 1 Reviewer's Name ***Compulsory**	Select your name from the drop down list for Tier 1 reviewer. Email Autonomy Support if further names need to be added to this Tier 1 Reviewer list. 
18	Date Completed for Tier 1 Review ***Compulsory**	Enter the date completed for Tier 1 Review. 

		
19	Comments  *Optional	The **Comments** textbox is for recording information that cannot be captured by any other tags.
20	SAVE YOUR WORK	**Click on the floppy disk icon**  **or by clicking on the next document.**
	SECTION (5) – TIER TWO REVIEW	
21	Tier 2 Determination *Compulsory	
		All materials meeting the test for relevance must be identified by selecting the '**Relevant**' option in the **Tier 2 Determination** drop down menu.
		All materials incapable of having an impact on the case must be identified by selecting the '**Non-relevant**' option in the **Tier 2 Determination** drop down menu.
	SECTION (6) - TIER TWO REVIEW	
22	Decision  *Optional	Select **"To be used"** if the material will form part of the prosecution case. Select **"Unused"** if the material will NOT form part of the prosecution case. Tags 24-28 MUST be filled out if the material is marked **"Unused".** Tier 2 Reviewer to endorse the decisions made by Tier 1.
23	Served *Optional	Tick this box if the document has been served as part of the prosecution case.
24	Sensitive - Tier 2 *Optional	Select **"Sensitive – Tier 2"** for Sensitive material.

		See the Code in the *Operational Handbook* > *Disclosure of Unused Material* > *page 21*.
25	Reason for Sensitive - Tier 2 *Optional	When "**Sensitive – Tier 2**" checkbox is selected, enter the reason in "**Reason for Sensitive – Tier 2**".
26	Undermine or Assist - Tier 2 *Optional	Select **"Undermine or Assist – Tier 2"** for material that may undermine the case of the prosecution or assist the case of the defence.
27	Reason for Undermine or Assist - Tier 2 *Optional	When "**Undermine or Assist – Tier 2**" checkbox is selected, enter the reason in "**Reason for Undermine or Assist – Tier 2**".
	SECTION (7) – TIER TWO REVIEW	
28	Description agreed *Compulsory	
	Yes No	If **Tier 2 Reviewer** agrees with the **Document Description** made by **Tier 1 Reviewer**, select '**Yes**' in the drop down list. ➢ **Go to SECTION (8)**
	Yes No	If **Tier 2 Reviewer** disagrees with the **Document Description** made by **Tier 1 Reviewer**, select '**No**' in the drop down list. ➢ **Go to tag no. 29 and 30.**
29	Revised description by Tier 2 Reviewer *Optional	When "**No**" is selected in the "**Description agreed"** drop down list, enter comments or the new document description in "**Revised description by Tier 2 Reviewer**".
30	Tier 1 Reviewer to revise	Tick this box when "**No**" is selected in the "**Description agreed"** drop down list. **Tier 1 Reviewer** can use this tag to filter any documents that require revision, and update the

	*Optional	information in the **Document Description** textbox accordingly. Tier 2 Reviewer should NOT tick "**Tier 2 Review Complete**" checkbox in tag 31 until the **Document Description** is agreed.
	SECTION (8) – TIER TWO REVIEW COMPLETE	
31	Tier 2 Review Complete ☐ ***Compulsory**	Once the Tier 2 Review has been completed, tick "**Tier 2 Review Complete**" Do NOT tick this box until the **Document Description** is agreed.
32	Tier 2 Reviewer's Name ***Compulsory**	Select your name from the drop down list for Tier 2 reviewer. Email Autonomy Support if further names need to be added to this Tier 2 Reviewer list.
33	Date Completed for Tier 2 Review ***Compulsory**	Enter the date completed for the Tier 1 Review. 
34	SAVE YOUR WORK	**Click on the floppy disk icon** **or by clicking on the next document.**

Training

64. All disclosure counsel were trained by DRS staff to use Autonomy. The training lasted three hours. The instructions in the DRS training are generic; since each team has different requirements, the DRS training must be supplemented with case-specific instructions. [Disclosure Officer] told us that *"These courses were of relatively short duration and did not cover in detail the tagging panel process or the circumstances and*

usage of the Tier 1 and Tier 2 reviews." No one else who has provided this review with an account has raised such concerns.

65. In addition to the training courses, all disclosure counsel were also provided with a comprehensive training manual. This was modified and supplemented during the Covid-19 restrictions as the DRS team was unable to deliver the training in person.

Utility and fitness for purpose of Autonomy DRS

66. Several persons engaged in the review process to whom we wrote inviting accounts for the purpose of this review were asked for their views on the utility and fitness for purpose of Autonomy DRS.

67. [Case Controller] and [Disclosure Counsel 3] had constructive criticism to make about the system. [Disclosure Officer] had some robust views about it. [Deputy Disclosure Officer] thought it was fit for purpose. Two of the reviewers who failed to tag documents as potentially disclosable, seemingly paradoxically, had little or no issue with the system at all. The following are their key observations:

a. [Disclosure Counsel 3]:

> *"a) The DRS system itself is adequate although the new Axcelerate system has increased functionality;*
>
> *b) All systems are dependent to an extent on the quality of the metadata – no system can fix poor or incomplete metadata;*
>
> *c) Over-reliance on the auto-description function is a mistake. This is merely a concatenation of the metadata and therefore subject to all concerns about metadata. In addition, while the metadata can tell you what a document is called and how long it is, it cannot understand it for you.*
>
> *d) The DRS system has no undo button – if a reviewer realises they have made a mistake they have to re-tag everything affected by the mistake to correct it.*
>
> *e) The DRS system has no 'must fill' function – reviewers can skip a field deliberately or accidentally, without warning. Contrast the position on*

Axcelerate, where a case team can specify that until certain fields are completed, the reviewer cannot mark the document as 'reviewed'.

f) Some of the case team ([Case Controller] and [Disclosure Officer] in particular)[14] *were not very comfortable using Autonomy or addressing technical issues with the MM team.*[15] *Many staff at the SFO would benefit from a greater understanding of digital technology.*

In future, I would recommend all teams to produce a documented quality assurance process, of a standard that can be shown to defence if needed. On DRS, there is no separate panel for checking work – you overwrite a Tier review or use the 'comments' field. Contrast this with Axcelerate,[16] *where a QA panel will record this."*

b. [Disclosure Officer]:

"*Autonomy DRS caused me concerns. Running searches on it would produce one set of results. Re-running the same search a few minutes later sometimes produced different results. Often in terms of numbers the difference was small, but where no one else was working on the material being searched, the results should have been the same. I mentioned this to my case controller and to DRS team on occasions.*

DRS would often be slow and this hindered the reviewers making progress. … IT upgrade work was often done on weekends. This unfortunately was a time when reviewers liked to work, thus increasing time pressure on them at other times.

In my view DRS Autonomy is not fit for purpose. The Police have used HOLMES & HOLMES2 for many years and this appears to have more IT capability than DRS Autonomy. This problem is compounded by the significant delays in material being made available for review on the platform after being booked in by the case team. There were several instances of material being provided on a disc / memory stick and being

[14] [Case Controller] and [Disclosure Officer]
[15] Materials Management Department
[16] Aspects of this platform are addressed later

password protected and time limited, but by the time it was to be processed, the time limit had expired. This was a time limit of many months."

"It was slow, clunky, not very user friendly for me as a disclosure officer. However the biggest concern for me was that when running searches it gave different results."

c. [Case Controller]:

"The DRS could be more integrated with the system for booking material in and recording it at bag level (the ESF).[17] *A more unified system should enable unused schedules to be created from a single source, automated with appropriate safeguards to ensure that bags have not been overlooked. It should also enable users to track from a single location the continuity of a document from its source, processing, review, scheduling and production (as served or unused).*

My understanding is that the SFO Autonomy/DRS system has been adapted over the years of its use and is therefore very reliant upon a relatively few individuals who understand its specific processes and are able to assist when things go wrong or when more expert input is required by a case team. This results in high demand for these individuals, creates bottlenecks and may contribute to errors made by the DRS team where manual input is required.

Autonomy DRS appears to be too reliant on manual input and discretion in releasing material to the case team for review. Processing of material and ingesting it onto the review platform, withholding (where LPP applies) or releasing to the case team for review, should all lend themselves to automated processes, reducing the scope for individual error and better allowing case teams to track material as it moves through these processes. In my view, a document review system could be designed to improve the efficiency of the review and make the management of the review easier, for example, building in processes for quality assurance, alerts where

[17] Electronic Source Form which is the record of what data is booked into Autonomy DRS and is accessible from the Evidence Handling Management Office (EHMO) link on the SFO intranet

material may have been overlooked and automatically recording where material has been served or disclosed to the defence.

The functionality of the Autonomy DRS available to case teams feels outdated when compared to what appears to be available elsewhere."

d. [Deputy Disclosure Officer]:

"DRS can be clunky but it is definitely fit for purpose. The SFO has successfully taken many cases to court using this system. It is very good for organising large volumes of material and creating an audit trail of who's done what with a document during the case."

e. [DRC 2]:

"*In general, I found the Autonomy system to be user friendly. On occasion there were operational IT "glitches" which would be reported to the SFO's IT team and remedied (these might be, for example, a delay in documents "opening" which was unconnected to wifi speed). Other than these, I do not recall making any complaints as to the adequacy of the Autonomy system."*

I can see no harm in the reviewer being given a clear reminder that the family toggle is on ... Other than that, I am not able to give an opinion on whether Autonomy is fit for purpose, other than to say it performed adequately for the Tier 1 review process in which I was asked to participate."

f. [DRC 4]:

"On one level, the Autonomy DRS system was fairly easy to operate once you were familiar with it. On the other hand it seemed that a lot was crammed into one page on the screen. The icons and boxes were small. This made it less user friendly.

Whilst bulk coding and using the family button may be useful in some instances, as a starting point, I believe that bulk tagging and family tagging should be discouraged because of the risk of erroneously tagging documents in a similar way which may not in fact warrant the same tag or description.

The boxes in which we could type text (eg description) were very small. It was not possible to see the whole of an entry unless it was very short. Equally it was not ideal for writing anything of considerable length into the system

directly. It was easier to draft the text on a word document and then cut and paste that into the system. Two screens were ideal.

… better designed alerts would be beneficial.

I would suggest that any new software package try not to cram all the information into one page, but to rather have multiple tabs with a view to ensuring that entries could be seen in their entirety alongside the original documents."

g. [DRC 1]:

In answer to the question whether Autonomy DRS was fit for purpose, [DRC 1] simply answered, *"Yes"*.

Section 3: The Prosecution Case

The case in summary

68. Mr Woods and Mr Marshall were jointly charged with fraud by false representation under the Fraud Act 2006 on Count 1 of the indictment, and Mr Marshall was charged alone with fraud by false representation under the Fraud Act 2006 on Counts 2 and 3.

69. The SFO's allegation at the trial of Mr Woods and Mr Marshall (the defendants) was that they were, by means of false financial reporting, party to the commission of a fraud against the Ministry of Justice between 2011 and 2013.

70. In essence, the SFO's case was that the defendants had assisted or encouraged [PHB][18] (the Senior Finance and Commercial Manager who performed the financial function of running the contract) to represent falsely to the Ministry of Justice that financial models submitted on behalf of Serco Ltd, as required under the electronic monitoring contract with the Ministry, reported costs actually incurred in delivering the services under the contract. The prosecution case was that the reported costs were not true and accurate but were false and misleading; the defendants knew it and they had thereby acted dishonestly.

71. The purpose of the financial models was to give the Ministry confidence that the taxpayer was not overpaying for the tagging services provided by Serco, and that the Ministry was getting value for money. The prosecution alleged that, despite this, a significant part of the costs Serco Ltd reported in each of three relevant financial models was based on false transactions that were invented. The bogus scheme alleged by the SFO involved Serco Geografix Ltd. This was a wholly owned subsidiary of Serco Ltd, which manufactured and leased the electronic tagging equipment to Serco Ltd to enable it to service the contract. They charged Serco Ltd £500,000 a month for fictitious costs.

[18] The SFO decided to terminate the investigation into [PHB] on 2 May 2019 on grounds that the public interest stage of the full Code test in the Code for Crown Prosecutors was unlikely to be met given his state of ill-health

72. The SFO's allegation was that, from early 2011, faced with the prospect of having to report substantial profits obtained from the electronic monitoring contract, the defendants were parties to devising a scheme whereby management fees were charged across to Serco Ltd by Serco Geografix Ltd. The monthly payments made by Serco Ltd to Serco Geografix Ltd were then returned to Serco Ltd as a general dividend payment.

73. The original five-year contract ran from 1 April 2005 to 31 March 2010. The alleged criminal conduct occurred during extension periods to the original contract, which was extended in 2009 for two years and then again from December 2010 to March 2013.

74. The prosecution asserted *"The false representations as to costs were made in order to conceal [Serco Ltd's] high profit margins and so stop the [Ministry of Justice] from taking steps to recover any of [Serco Ltd's] previous profits or otherwise reduce the revenue stream [Serco Ltd] obtained as a result of the continuing operation of the contracts."* [19]

75. In simple terms, at the heart of the prosecution case was the allegation that the defendants were party to a scheme in which false management charges were reported to the Ministry of Justice so that Serco's future or past financial gain from the electronic monitoring contract would not be threatened because the Ministry of Justice would have no visibility of the true profits being made by Serco.

Deferred Prosecution Agreement

76. On 4 July 2019, Mr Justice William Davis gave his approval to a Deferred Prosecution Agreement (DPA) between the SFO and Serco Geografix Ltd. In entering the DPA, Serco Geografix Ltd took responsibility for three offences of fraud and two of false accounting. These five offences arose from a scheme, which it was said was intended dishonestly to mislead the Ministry of Justice as to the true extent of the profits being made between 2010 and 2013 by its parent company, Serco Ltd. These profits were from its contract for the provision of electronic monitoring services. By deceiving the Ministry of Justice about the true extent of Serco Ltd's profits, Serco Geografix Ltd had prevented the

[19] §12 of the Prosecution Opening Note (version 6 - 26 March 2021)

Ministry of Justice from attempting to limit any of Serco Ltd's future profits, recovering any of its previous profits, seeking more favourable terms during renegotiations of contracts, or otherwise threatening its contract revenues.

77. Under the DPA, Serco Geografix Ltd paid a financial penalty of £19.2 million and the full amount of the SFO's investigative costs (£3.7m). This was in addition to £12.8 million compensation already paid by Serco to the Ministry of Justice as part of a £70 million civil settlement in 2013.

Section 4: The Defence Case

78. In this section, we outline what we understand to be the main and significant aspects of the defence case.

79. By letter dated 24 October 2019, Peters & Peters LLP, solicitors representing Simon Marshall, made representations on his behalf to the SFO. They submitted that the evidential threshold of the full Code test in the Code for Crown Prosecutors was not met for the offences they believed the SFO was considering in his case, and, if it were met, there was no public interest in prosecuting him.[20] No letter of representations was served on behalf of Nicholas Woods by his leading counsel, Neil Saunders, or his solicitors, Hickman Rose LLP.

80. In their letter of representations, Peters & Peters relied, among other things, on what Mr Marshall had said to the SFO in his interview under caution in June 2016. This was to the effect that around March 2011 Mr Woods had approached him about the way Serco presented its 'Open Book Submission' to the Ministry of Justice.[21] Mr Marshall had later learnt that a proportion of Serco's profits from the contract was not shown in the Open Book Submission and instead was moved to Serco Geografix Ltd by way of internal charges to Serco for the rental of electronic monitoring equipment. By increasing the charges from Serco Geografix Ltd, the disclosed profit on the contract stayed at or close to 14%.[22] Mr Marshall understood that the reason for doing this was to avoid the potential for the customer trying to invoke an incentive clause in the contract. Mr Marshall also understood that the practice of obscuring the profit figure was longstanding and widely known about within Serco and had been the case since the outset of the contract in 2005, although the mechanism for doing so had changed

[20] §6-11

[21] 'Open Book Submission' is a reference to a requirement of the electronic monitoring contract stipulating that Serco provide a financial model to the Ministry of Justice every six months to *"take account of actual revenues and costs incurred"*

[22] This figure had come from Serco's Best and Final Offer, which was relied on in relation to the original contract and both extensions in 2009 and 2010, and these charges were then ultimately repaid to Serco in the form of dividends

in 2011.

81. Peters & Peters also submitted that, from a point in 2011 onwards, a decision was taken by others within Serco management to include a monthly charge of £500,000 from Serco Geografix Ltd over and above the usual equipment lease charges. Financial submissions were only provided in relation to Serco Ltd, and consequently the funds were obscured from the Ministry of Justice. The letter added that *"The decision to implement this monthly charge was not taken by Mr Marshall but was taken by and was known about at the highest levels of Serco"*.

82. The letter also referred to pre-interview disclosure provided by the SFO which *"demonstrates that the practice of obscuring profits was known about widely within Serco and was discussed openly by email and in internal presentations and other materials"*. [23]

83. In the course of his interview under caution, the SFO had invited Mr Marshall to direct them to any material that supported his account. Accordingly, on 9 November 2016, Peters & Peters wrote to the SFO to share further information that Mr Marshall considered would assist the SFO investigation. The letter included, *"We have no doubt that you will have made extensive document requests of Serco, and so as well as emails will have had sight of all material prepared for and after Board Meetings of the Serco Civil Government Executive Management Team, Serco Technology and Business Group, and Home Affairs Group. Whilst these were not included in Mr Marshall's bundle,[24] he cannot think of any specific documents that you are unlikely to have already, and as such has nothing which might assist you at present."*

84. In the event, on 12 December 2019, the current Director of the SFO authorised the charging of the defendants and thereafter they were served with Requisition Notices requiring them to attend Westminster Magistrates' Court on 22 January 2020.

[23] §40

[24] This was a reference to the bundle of pre-interview disclosure provided in advance of his interview under caution with the SFO

85. By letter dated 15 May 2020, Peters & Peters questioned the SFO's approach to disclosure as outlined in the DMD of 1 April 2020. They complained that the DMD *"is not sufficiently clear or comprehensive to allow the defence to engage meaningfully with the investigation and disclosure exercise in this case"*.

86. Among other requests, Peters & Peters sought guidance provided to the disclosure review team. They argued that §63 of the DMD only recorded the general assertion that *"In determining whether material meets the statutory test, the prosecution and defence cases have been carefully analysed to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges might be resisted. Due regard has been given to any defences set out in interview by any of the defendants and any representations made in writing on behalf of the defendants. These matters will be re-reviewed upon receipt of Defence Case Statements."* Accordingly, Peters & Peters sought *"disclosure of all guidance and information provided to the SFO review team for the purposes of assessing whether material is relevant or disclosable …"*.

87. By letter dated 8 June 2020, [Case Controller], the Case Controller, did not accept that the DMD was deficient, and, as an overarching point, made clear that the SFO had *"sought to act in a proportionate manner by following reasonable lines of enquiry and by focussing its enquiries towards obtaining relevant material with a view to identifying material that might reasonably be capable of undermining the prosecution case or assisting the defence case"*.

88. The letter later added *"Every disclosure review, especially in document-heavy cases, requires reviewers to form an individual decision over the documents being reviewed. It is therefore not possible to provide an exhaustive list of what may satisfy the disclosure test. The reviewers are aware of the nature of the allegations, the roles held by individuals and the content of their interviews, as well as written representations made on their behalf. They have been specifically reminded of paragraphs 6 and 7 of*

the Attorney General's Guidelines,[25] *including the fact unused material may be used as part of the trial or to assist in making legal applications. Review counsel have been encouraged to err on the side of caution by referring borderline material to the Disclosure Officer, Case Controller and/or Junior Counsel for a Tier 2 review."* We believe, given what we have been told was the process set out in §61 of the DMD, that the reference to *"Tier 2"* may be a confusion with the second phase of the Tier One review.

89. The letter invited Peters & Peters to set out their client's case in correspondence, if they wished to do so, to be confirmed in due course in their Defence Statement. The SFO said they would review it and ensure those conducting the review continue to be appraised of the defence(s) being advanced.

90. On 20 July 2020, counsel for Mr Marshall provided a note entitled *Note re Initial Disclosure - 20 July 2020*. It emphasised that the trial was then fixed to commence on 18 January 2021, and, at a hearing on 6 July 2020, the Recorder of Westminster, HHJ Taylor, had indicated that, notwithstanding the ongoing disruption to the courts caused by the Covid-19 pandemic, the January 2021 fixture was a *"workable trial date"* towards which the parties should work.[26]

91. It was against that background and tight timeframe that counsel set out "*an advance indication of matters likely to form part of Mr Marshall's defence and likely to give rise to relevant and disclosable material*." The note continued, "*This indication is provided well in advance of the deadline for service of the defence statements (8 September 2020) in order to help the prosecution to comply with its obligations and, in particular, to ensure that all disclosable material is provided to the defence well in advance of the*

[25] These paragraphs refer to the Attorney General's Guidelines in force from December 2013. §6 provides that, in identifying material that meets the test for disclosure, consideration should be given e.g., to the use that may be made of it in cross-examination, its capacity to support legal submissions, to suggest an explanation of the accused's actions or to have a bearing on scientific or medical evidence. §7 states that while items of material, viewed in isolation may not be reasonably considered to be capable of undermining the prosecution case or assisting the case for the accused, several items together can have that effect. Both paragraphs were quoted fully at §23 of the Document Review Guidance provided to disclosure review counsel

[26] §1

trial. With the same aim in mind, we seek disclosure of the guidance and information provided to the SFO disclosure review team for the purposes of the initial disclosure exercise. *Transparency will ensure that the defence and the Court can be satisfied that the prosecution has fully understood the defence case (as advanced in interviews given by both defendants) and adopted an appropriate approach to disclosure with that in mind, or bring to light any deficiencies in the process at a stage when there is still time for them to rectified."* [27]

92. The detail of the advance indication given included the practice of transferring margin from Serco Ltd to Serco Geografix Ltd. It was asserted that this was longstanding and was widely understood by a large number of individuals at all levels of Serco, including members of the Serco Group Board, Serco Ltd directors, Serco senior management and senior members of the commercial, legal or accounting functions. It was considered to be in accordance with the electronic monitoring contracts signed with the Ministry of Justice. It was also considered to be lawful, accepted business practice, Serco company policy, and was further considered to be sanctioned and encouraged by Serco senior management and/or was in fact sanctioned by Serco senior management.[28]

93. The letter in response from [Case Controller], dated 27 July 2020, stated the SFO did not consider the defence was entitled to its internal guidance. He added that the disclosure review had been conducted by members of the Bar, that it was not possible to provide the defence with an exhaustive list of what may satisfy the disclosure test *"as this process inevitably required counsel to exercise their judgement over each document. Therefore, the absence of matters within any internal review document does not establish that this material, has not been referred to the Disclosure Officer and/or the Prosecutor. As we have already advised you, review counsel have been encouraged to err on the side of caution in relation to referring any borderline material."*

[27] §3-4
[28] 31(b)

94. In the letter, [Case Controller] referred to the content of his letter of 8 June 2020 which dealt with the issue of internal review guidance, and to the Plea and Trial Preparation Hearing (PTPH) on 19 February 2020 before HHJ Taylor, in which she rejected a similar application for the disclosure of internal disclosure strategy documents (DSDs). [Case Controller] added, *"As described in the DMD and in our letter of 8 June 2020, the disclosure review in this case has been conducted using a two tier approach. Therefore, counsel making the Tier One determination are referring matters which "potentially" meet the disclosure test for Tier Two review"*. [29] As we shall see below, according to what we have been told by three document reviewers, this is not their understanding of the breadth of their role.

95. [Case Controller]'s letter also referred to the advance indication of issues provided in the 20 July 2020 note. In it, [Case Controller] asserted *"The SFO is committed to actively engaging with you on the issues in the case and disclosure in relation to those issues once your client has served his Defence Statement on 8 September 2020."*

96. In a further note, entitled *Note for 14.9.20 Hearing*, dated 11 September 2020, counsel for Mr Marshall criticised this response, saying the SFO had *"simply refused to engage with the advance indication provided"*. [30]

97. Both Mr Marshall and Mr Woods served very detailed Defence Statements, respectively dated 8 September and 10 September 2020. We cannot possibly do justice to the detail of either document within the confines of this report. They both covered a multiplicity of different and complex issues. We have been selective in our summary.

[29] The Tier Two review [Case Controller] mentioned here is apt to be confused with the use of the Tier Two fields of the DRS tagging panel during the Stage 3 (continuing disclosure) review following the receipt of Defence Statements. The Tier Two review mentioned by [Case Controller] was in fact a reference to that which is set out at §61 of the DMD: Thus, the Tier Two [Case Controller] was writing about in his letter was the second phase of the initial disclosure exercise, referred to at §61 of the DMD, whereby the Disclosure Officer, Second Junior Counsel or the Prosecutor would review material that had been identified as potentially disclosable by disclosure review counsel

[30] §7

98. In short, Mr Marshall denied the prosecution case that the management charges in the financial models were *"false charges and costs"* originating from *"sham transactions"* which were *"made up and did not exist"*.[31] Mr Marshall did not consider them to be sham or false transactions. He denied dishonesty. One feature of his case was the longstanding company policy devised and implemented by others, long before his arrival, of transferring margin from Serco Ltd to Serco Geografix Ltd.[32]

99. In Mr Woods' Defence Statement, equally selectively and in brief, he relied on the fact that the methodology adopted in the financial models had been in place since 2005. Further, that the management charges were lawfully agreed between the two entities and would be properly accounted for in the books. The profits reported to the Ministry of Justice in the financial models would reflect the additional charges made by Serco Geografix Ltd which would reduce the profit margin reported. Furthermore, he asserted that the adjustments reported in 2011 arose from an ongoing instruction from Tom Riall, the CEO of the division at Serco in which Mr Woods worked, to bring down the reported profit in the financial models. Mr Woods' case was that Mr Riall was fully aware of the practice of utilising charges between the entities to do this. Mr Woods believed this to be a legitimate direction and in line with company policy. He said this was the continuation of a practice from earlier years and was supported by a commercial rationale that reflected activity between the two companies. He too denied dishonesty.[33]

100. It is abundantly clear that the defences had been advanced consistently, and, if it had not been clear before, it was perfectly clear at the latest from the detailed content of the Defence Statements that both defendants were placing reliance, among other things, on the fact that the management charges between the two companies as a means by which reportable profit margins were to be reduced was not only a longstanding established practice and reflective of company policy, but also was widely known and understood by those at the highest level of Serco management.

[31] §128 (and §153-155 Prosecution Statement)
[32] §138
[33] §18

101. The defence teams had clearly engaged with the SFO in order to ensure that material that passed the disclosure test was disclosed and was disclosed at the earliest time possible given the imminent trial date. We do not think the SFO was wrong to decline the defence request for disclosure of their internal guidance to the disclosure reviewers. However, we think the request should have compelled the case team to reconsider and recheck whether the guidance the reviewers had been provided with had stressed the essential points on the factual defences of the defendants, which had been known to the SFO, and offered practical and clear guidance. By the time the Defence Statements had been served, three reviewers had not tagged the Board minutes,[34] which supported the defence cases. As we shall see below, two of the three say it was not their role to tag documents for anything other than relevance, and expressly or impliedly refute any suggestion they had missed or failed to recognise the importance of the document. One other reviewer, who was not involved in the review of the Board minutes, supports their understanding of the limit of their role.

102. We note that the Document Review Guidance (which was dated 5 July 2017) set out for the reviewers under the heading 'Disclosure Guidance' a list of non-exhaustive examples of material that might meet the test of disclosure.[35]

103. Reviewers were told:

> *"17. What follows should be considered as guidance as to the categories of material that are likely to be reasonably considered as capable of undermining any future prosecution of the individuals under investigation or of assisting the defence case. It is important to keep these categories in mind when conducting the review. 18. These categories apply to material that might be considered by the prosecutor as meeting the test for disclosure. Such material should also be marked as relevant by tagging the material as may be relevant. However, as has previously been*

[34] Also referred to elsewhere as the Board report or Home Affairs MD's Report
[35] Page 24, §17-18, Table 2

stated, the categories of material that may be relevant are much wider than the categories of material listed in Table 2 and the relevance test and disclosure test should not be confused."

104. The listed examples were prefaced by this cautionary note:

"The following are examples of material that should be brought to the attention of the prosecutor as they might reasonably be considered capable of undermining the case against a person under investigation or of assisting a person under investigation. They should be tagged as 'refer – potential to undermine or assist'. The prosecutor will then decide whether an item does meet the test for disclosure."

105. We appreciate that the list was expressed to be non-exhaustive, but it was from July 2017 and apparently not revised or updated. We note that none of the examples given in the Document Review Guidance made explicit reference to material suggesting that the use of management charges was a longstanding established practice, reflected Serco company policy, and was known and understood at the highest level of Serco management.

106. However, it is right to observe that the disclosure review team was provided with several other guidance documents to aid their task. They included the Marshall letter of representations of 24 October 2019, the date of which happens to be the day after [DRC 1] first review of the missed documents. [DRC 1], we know, returned to review these documents in November 2019. We return to this. The letter of representations was, we understand, provided to the reviewers on 29 October 2019, thus between [DRC 1]'s two reviews. [DRC 2] and [DRC 3] reviewed the missing documents in April and May 2020.

107. As we observe below, material revealing any or all the list of factors set out above was both relevant and disclosable, yet in the case of two disclosure review counsel, the Board minutes they reviewed going to these issues was tagged as 'may be relevant' but was not tagged as 'refer – undermine or assist'. In the case of a third disclosure

review counsel, she, having read the Board minutes, apparently also having understood, and appropriately identified and tagged them as potentially disclosable, inexplicably later undid the tagging.[36]

108. In his written response to us for this review, [Case Controller], the GRM01 Case Controller, makes clear there was other material to similar effect that formed part of the prosecution case. He tells us several similar references to backdated management fees and management charges appeared in documents that formed part of the prosecution case. He adds that the fact that the management fees were agreed between two legal entities within the Serco group and that individuals senior to the defendants knew of their existence were not disputed facts.

109. Adrian Darbishire QC, leading counsel for Mr Marshall, agrees. In a note to us for the purposes of our review, Mr Darbishire QC states that the significance of the missing Board minutes was in truth no greater than any of a number of other similar documents, all of which showed how widespread within Serco Ltd – not Serco Geografix Ltd – was the understanding of the methods used to reduce the profit under the electronic monitoring contract.

110. As we conclude below, the failure to disclose the missing Board minutes (to which we shall return below) is not a complete answer to why the case collapsed.

[36] Albeit each of the three disclosure review counsel did not review every document, collectively, they are the Home Affairs Managing Director's Report - June 2011 dated 13 July 2011, attached to emails dated 13 July 2011 and 22 July 2011, and the Civil Government Q3 Board 2011 - Home Affairs Managing Director's Report dated 22 July 2011, attached to an email dated 4 November 2011

Section 5: The Counsel Team

Introduction

111. [Disclosure Counsel 3] is a member of the Bar of England and Wales [redacted for GDPR purposes], employed by the SFO as a Grade 7 lawyer under a fixed term contract working on a different team within the division. In February 2015, she was transferred from that case team to [Case Controller]'s team, and appointed Deputy Disclosure Officer, from which point she worked only on GRM01 and another case. In May that year, [Disclosure Counsel 3] worked only on GRM01. [Redacted for GDPR purposes] her fixed term contract ended and could not be renewed as it had a maximum period of 24 months, and so she was formally instructed as disclosure review counsel on GRM01. She explains that because she had conducted interviews of suspects and witnesses as a Grade 7 lawyer, she was unable to accept instructions to become part of the trial counsel team as this would potentially breach Bar rules (the duty to maintain independence). She discussed this limitation with [Case Controller], and they concluded it was appropriate for her to be instructed as disclosure review counsel. (We deal with her explanation of the substantive distinction between disclosure review counsel and disclosure junior below.)

112. [Redacted for GDPR purposes] [Disclosure Counsel 3] left the independent Bar to work full time for the SFO. She notified the case team of her departure [and spent time][37] with Michael Goodwin QC and [Disclosure Officer] explaining what work had been done on disclosure on the case. She then produced a highly detailed and extensive disclosure review handover note and spent two extended sessions in [redacted for GDPR purposes] with Michael Goodwin QC, [Disclosure Officer], [Case Controller] and others going through the content of the note to ensure it was understood.

113. [Disclosure Counsel 3] tells us in her written response that, thereafter, she had no role on GRM01, other than to attend a second part of a handover meeting [redacted for

[37] Redacted for GDPR purposes

GDPR purposes] and by answering the occasional email. [Disclosure Counsel 3]'s disclosure review handover note is an impressive document.

Disclosure review counsel and disclosure counsel

114. [Disclosure Counsel 3] explained to us the substantive distinctions between disclosure review counsel and disclosure juniors. **Disclosure review counsel** (or disclosure counsel) are fully qualified barristers with current practising certificates. They are instructed to deal with the review, under the supervision of the Disclosure Officer (and Deputy Disclosure Officer if there is one). They are not instructed to represent the SFO at court. The SFO expects disclosure review counsel to have a working knowledge of the CPIA and the Attorney General's Guidelines, as well as a good understanding of how disclosure fits into the investigation and trial process. They are expected to commit to working for at least two days a week for at least three months, preferably more and for longer.

115. [Disclosure Counsel 3] informs us they are usually paid the same day rate as counsel on the SFO C Panel, regardless of whether they are on the Panel.[38] She adds the day rate has not changed in a decade, yet in that time the day rate offered for disclosure review work by other organisations and public inquiries has increased substantially. [Disclosure Counsel 3] informs us that the business case for disclosure review counsel had specified C Panel counsel. However, at no point of which she is aware was there availability (or indeed interest) from C Panel counsel.

116. She informs us that disclosure review counsel will agree their allocated hours for the month in advance with the case team. As junior counsel, they will often split their time between working for the SFO and court work or other commitments, including domestic responsibilities. As a result, many effectively carry out their instructions part-time. The degree of responsibility given to them, and the degree of supervision they receive, varies from team to team.

[38] £250 plus VAT a day, based on a seven-hour day

117. By contrast, **disclosure juniors** (also known as second or third etc junior counsel) are fully qualified barristers with a current practising certificate, almost always on the SFO Panel. They must be someone with sufficient experience to step into the role of the junior above them at trial, if needed. They are expected to represent the SFO at trial and will assist in the drafting of documents. They should lead on disclosure matters within the trial counsel team.

118. In December 2018, the disclosure review team consisted of [DRC 2], [DRC 1] and [DRC 4] together with six others. According to [Disclosure Counsel 3], the Case Controller had budgeted for 12 disclosure counsel, but this number was not reached in her time on the case due to a lack of suitably qualified candidates. This does not appear to be accurate. An email we have seen from her to [DRC 2] of 21 December 2017, confirming [DRC 2] instruction as disclosure review counsel, notes *"there are now 12 disclosure counsel on this case…"*.

119. [Disclosure Counsel 3] tells us that although the SFO did not formally advertise for disclosure review counsel, an email would be sent out to those barristers' chambers with barristers on the SFO Panel or to sole practitioners who had worked for the SFO on disclosure reviews in the past. She has produced to us two such emails seeking to recruit disclosure review counsel from April 2017 and October 2017. The one from April 2017 reads:

> *"The SFO have a requirement to start in April subject to security clearance:*
> *We are looking for 3 Panel C equivalent counsel (1-5 years Call), for document review work at the SFO. For the first 4 weeks counsel will be required to work in the office, after that remote working will be considered.*
> *This will be for a period of five months.*
> *The Panel C rate of £250 +VAT per day will apply.*
> *Please send CVs of any interested candidates to +commercial by Thursday 6th April."*

120. The October 2017 email reads:

"The Serious Fraud Office has a requirement for 6 Disclosure Counsel. Counsel need to be available from November until September 2018.
This instruction will be paid at a daily rate of £250."

121. [Disclosure Counsel 3] says the take up from both emails was poor, and at no time did she have more suitable candidates than positions available. This was exacerbated by the number of other teams requiring disclosure review counsel at the same time (which advertised for between six and twenty counsel each in 2017).

122. Candidates submitted their CVs, and so long as they were fully qualified (post-pupillage), had current practising certificates, and had some practical experience of criminal law (prosecution or defence), they would be invited for interview. At interview, candidates were asked about their criminal law experience, and working with the CPIA, and why they wanted to do desk-based disclosure work for the SFO. They were invited to articulate the disclosure test and provide certain casework examples. They were asked about their past use of large databases and document review software, their availability and why they wanted to work part-time or flexibly. It was, we are told, an advantage if a candidate had worked at the SFO or on another criminal disclosure review.

123. [Disclosure Counsel 3] says the SFO's Commercial Section had advised that disclosure review counsel were hard to find due to a dwindling supply at the Bar, coupled with increased requirements from the SFO and other large-scale law enforcement bodies (principally the Financial Conduct Authority and public inquiries). They suggested the case team would be more successful if they were willing to take reviewers part-time and to have them work from home for extended periods.

124. In [Disclosure Counsel 3]'s opinion, the standard of candidates was adequate, but no more than that. She was disappointed that there were not more very junior barristers willing to work almost full-time for a year to gain the experience but, given they could earn more by attending court, she was not surprised. Because of the number of other document-heavy cases at the SFO, she estimates there must have been over 50 junior

barristers engaged in disclosure or Legal Professional Privilege (LPP) work at once, and that given the reduced size of the criminal, says *"I think we had literally exhausted the supply".*

Training and internal disclosure guidance

125. In her handover note, [Disclosure Counsel 3] wrote a section headed 'Training and reading-in'.[39] It said that all disclosure counsel were trained by DRS staff to use Autonomy. Those who had used the system before, such as [DRC 4], [DRC 1], [DRC 2] and others, were offered refresher courses. [Disclosure Counsel 3] adds all disclosure reviewers completed extensive reading in, with further documents made available to them when the case team considered it would be of assistance. She listed the kind of documents they would be given. They included:

- Introduction document for GRM01
- Updated investigation strategy
- Disclosure Strategy Document
- Chronologies
- Defendant interview plans
- Evidence summaries
- Advices and concept notes
- SFO Operational handbook chapter on disclosure
- Document Review Guidance

126. The most up-to-date account of what the reviewers were given is to be found in the *Prosecution Note on the Disclosure Process and Quality Assurance* of 22 April 2021. It reads:[40]

> *"Throughout the review, the review team were provided with relevant documents to guide their work and given the time to read them and opportunities to raise any queries. This included:*

[39] §64-65
[40] §3

a. *Document review guidance (individually on joining from 2018 and the team was provided with an updated guidance document on 25 September 2020);*
b. *Case Summary and Case Statement (13 January 2020 and 15 September 2020);*
c. *Letter of representation from those representing Mr Marshall dated 24 October 2019 (29 October 2019);*
d. *Defence Disclosure Notes from summer 2020 (21 September 2020); and*
e. *Defence Statements (15 September 2020).”*

127. What is apparent is that the material provided was detailed and voluminous. It is likely that the key important points were lost in the detail. We do not in fact know if the guidance was read or fully understood. There does not appear to have been any process to audit or certify that those charged with the review had received, read and understood the material provided. [DRC 4] does not believe there were any checks to ensure they had understood the documents provided. [DRC 2] cannot now recall, although she does recall the Disclosure Officer confirming at meetings or by email (during the Covid-19 pandemic lockdown) that instruction documents (or documents more generally) provided had been read. [DRC 1] simply has no recollection.

Performance monitoring

128. The SFO employs a system for monitoring the performance of the counsel it instructs. Its Managing Counsel guidance for 2019 sets out the process for managing counsel and completing Performance Monitoring Forms (PMFs) for the purpose. The guidance states:

> *“Counsel’s performance whilst engaged by the SFO will be monitored. The SFO expects high standards of the counsel it engages, as well as the people instructing and monitoring them. The guidance below is designed to help people complete the relevant forms and contributes towards the monitoring and improvement of counsel’s performance and/or withdrawal of instructions.*
> *The Performance Monitoring Form (PMF) is designed to provide useful feedback to the case teams, the commercial team and General Counsel, concerning*

counsel's strengths and areas for improvement. The comments should be factual, objective, clear and evidence based. Future assessments of the SFO Counsel's Panel List will also take this feedback into account.

[…]

The completed PMF must provide objective, accurate, evidence based examples form [sic] the case team on whether counsel performed to the required standard."

[Emphasis added]

129. The guidance document also states that six months from counsel's initial instruction a first Periodic Performance Review (PPR) must be booked and take place within a month of the six-month initial instruction of counsel. Completion of a PMF is mandatory following the PPR and must be sent to the SFO's Commercial Section within seven days of completion. Six monthly thereafter, a PPR must be held and a new PMF completed at six monthly intervals. The guidance adds *"Case Controllers are responsible for completing the PMF with any relevant input from the case team. The completed PMF must provide objective, accurate, evidence based examples form the case team on whether counsel performed to the required standard."*

130. In the event that counsel's performance is consistently poor in relation to one or more areas, it must be brought to counsel's attention and a response invited. This should be recorded and retained and reflected on the PMF. If the performance issues are not rectified and persist, then that should be formally reported promptly with all the evidence, facts and correspondence between counsel and the case team to the Commercial team within seven days. Examples of poor performance may include poor inadequate work, not knowing the relevant law, failure to comply with Bar Standards Board (BSB) standards and the BSB Handbook and repeated unavailability and misconduct. Completed forms would be stored on the 'counsel' section of the case folder (on the shared network drive) and submitted to the Commercial team who would review and advise General Counsel where necessary.

131. We are informed that the PMF scheme was ineffective, if not chaotic, before Sara Lawson QC insisted on the proper use of the scheme. Following her appointment as

General Counsel in May 2019, case teams were actively chased for PMFs. Ms Lawson QC also commenced a programme of 'Engaging counsel' training sessions in around October 2019. It included compulsory training for Case Controllers and others who instructed counsel on the use and need for PMFs. We have been provided with PowerPoint slides from November 2019 for the training sessions. The slide on PMFs states:

> *"The completed PMF form represents the case team's opinion on whether counsel performed to their expectations in each of the key performance areas.*
> *The completed form must be sent to Commercial Section for review.*
> *Where expectations are not 'fully met', the reasons for this must be noted by providing a clear and accurate log of areas where Counsel has failed to meet the expected standards. The PMF should then be sent to Commercial section for review. Commercial section will then agree next steps with the Case Controller, HOD*[41] *and Sara Lawson.*
> *Poor performance must be brought to the attention of counsel during monthly reviews and timescale for improvements must be agreed."*

132. We are informed by the SFO that [Disclosure Officer] attended the training on 26 November 2019. [Disclosure Officer] however tells us that he cannot confirm he did attend, as he does not retain his training records. We have no reason to doubt that [Disclosure Officer] did attend the training on the given date. [Case Controller] confirms he attended the training on 3 February 2020. Although the slides also mention the holding of PPRs, we are informed that there was no uniform uptake of the PPR scheme, despite the guidance making the PPR mandatory, with the completion of the PMF designed to follow it.

133. PMFs are important. The Managing Counsel guidance states:

[41] Head of Division

"The Performance Monitoring Form (PMF) is designed to provide useful feedback to the case teams, the commercial team and General Counsel, concerning counsel's strengths and areas for improvement. The comments should be factual, objective, clear and evidence based."

134. If completed as intended, evidence based PMFs should record counsel's performance at regular intervals, allowing the SFO to make decisions about the counsel they instruct, including future recruitment. The PPR regime was doubtless designed to complement the forms. Our sense is that before 2019 the scheme had been allowed to become little more than a perfunctory, if not unused, process. We return to PMFs below in relation to each of the relevant disclosure review counsel to whom we now turn.

[DRC 1]

135. [DRC 1's instruction on another SFO case][42] was due to come to an end. The Disclosure Officer on that case knew the GRM01 team was trying to recruit disclosure review counsel and introduced them by email. They arranged to meet in the office and [Disclosure Counsel 3] interviewed her.

136. [DRC 1] 's CV reveals she [redacted for GDPR purposes] was called to the Bar of England and Wales [redacted for GDPR purposes]. [Redacted for GDPR purposes] her CV evidenced relevant SFO experience in the use of software and databases. It also showed she had experience of hard copy papers, research and recording of evidence for the preparation of schedules for trial. Additionally, it is clear from her CV that she had relevant experience assisting in investigating banks which allegedly contributed to the manipulation of the LIBOR rate, and a multinational company alleged to have fraudulently misstated its profits which were reported to the London Stock Exchange. We have not seen her original letter of engagement. [Redacted for GDPR purposes] The letters of extension of her engagement show her fee was the full day rate of £250 plus VAT, based on a seven-hour day.

[42] Redacted for GDPR purposes

137. The DSD of 13 October 2017 for GRM01 states *"Currently the deputy disclosure officers on GRM01 are [Disclosure Counsel 3], [Document Review Counsel 5] , [DRC 4] and [DRC 1]. All are counsel with experience at having conducted disclosure reviews. [Disclosure Counsel 3] was previously employed as a member of the case team and therefore has substantial case knowledge and is familiar with SFO review guidance. The remaining deputy disclosure counsel have received a Case Briefing pack, document review guidance, this disclosure strategy document and SFO guidance on disclosure."* [DRC 1] informs us she does not recall being appointed Deputy Disclosure Officer and believes she was *"disclosure counsel only with no enhanced duties."*

138. In her written response to us, [DRC 1] says she is no longer at the Bar [redacted for GDPR purposes].

139. The fact [DRC 1] left the Bar [redacted for GDPR purposes] only came to light when Sara Lawson QC was chasing up PMFs. She was unable to establish whether [DRC 1] was in fact still qualified when she was working for the SFO [redacted for GDPR purposes]. However, we have learned from [DRC 1] that she did remain qualified and did not apply to de-register as a member of the Bar until [after she stopped work on GRM01].[43] It was in October and November 2019 [redacted for GDPR purposes] that she conducted key document reviews, to which we shall come. [DRC 1] was due to attend the office in March 2020 to dock her laptop and to catch up with [Disclosure Officer], her line manager, but this was not possible due to the Covid-19 pandemic and because in March 2020 her laptop had developed a problem so that she had to stop work, which is when she last worked on the case.

140. The PMFs we have been sent for [DRC 1] cover the periods 3 November 2017 to 3 May 2018 (dated 3 May 2018), 3 November 2018 to 3 May 2019 (dated 3 May 2019), 3 May 2019 to 3 November 2019 (dated 3 November 2019, albeit the Word file is dated 'Nov 18'), and November 2019 to 3 May 2020 (dated 29 December 2020).

[43] Redacted for GDPR purposes

141. The PMF for 3 November 2017 to 3 May 2018 purported to be completed by [Disclosure Officer] on 3 May 2018. He ticked the 'satisfactory' boxes,[44] among other things, for her ability to meet deadlines, availability, accuracy,[45] IT and presentational skills, value for money, delivery and innovation. Apart from in relation to her 'availability', where he said she worked an average of 15-20 days a month, no evidence was provided for his ratings in the boxes. The PMF for 3 November 2018 to 3 May 2019 purported to be completed by [Disclosure Officer] on 3 May 2019. He also ticked the 'satisfactory' boxes, among other things, for her ability to meet deadlines, availability, accuracy, IT and presentational skills, value for money, delivery and innovation. Again, apart from in relation to her 'availability', no evidence was provided for his ratings in the boxes. The PMF for 3 May 2019 to 3 November 2019 purported to be completed by [Disclosure Officer] on 3 November 2019. He again ticked the 'satisfactory' boxes, among other things, for her ability to meet deadlines, availability, accuracy, IT and presentational skills, value for money, delivery and innovation. Once again, apart from in relation to her 'availability', no evidence was provided for his ratings in the boxes.

142. Finally, the PMF for November 2019 to 3 May 2020 was completed by [Disclosure Officer] on 29 December 2020. Again, he ticked the 'satisfactory' boxes, among other things, for her ability to meet deadlines, availability, accuracy, IT and presentational skills, value for money, delivery and innovation. In this PMF, he provided evidence for his ratings in each of the boxes. In this last PMF, for her 'accuracy', he stated *"Counsel's completion of the DRS was satisfactory. Work was mainly relevance determinations and not descriptions in this period."*

143. Each PMF was produced on a template which bore the footer 'TREAT IN CONFIDENCE WHEN COMPLETED – Version 4 29.01.20'. We have seen email exchanges passing between the Commercial Section and [Case Controller] and [Disclosure Officer]

[44] On a three-point scale of 'improvement required', 'satisfactory' and 'above expectations'
[45] The 'Accuracy' box in the PMF is said to mean "*Accurate and up to date record keeping. E.g. fee notes, work logs and adherence to system for monitoring hours."*

between 10 February 2020 and 30 March 2020. An email of 11 March 2020 from [Disclosure Officer] to the Commercial Section suggests [Disclosure Officer] sent the first three PMFs for [DRC 1] (among other reviewers) on that date. Apart from the fourth and final PMF in her case (dated 29 December 2020), they were saved electronically to [the shared drive][46] on 12 March 2020. Thus, the first three PMFs in her case were not completed until March 2020 and were therefore backdated.

[DRC 4]

144. [Redacted for GDPR purposes]. [Disclosure Counsel 3] tells us she had ample experience including at the SFO [redacted for GDPR purposes]. [DRC 4] attended the office for interview. [Disclosure Counsel 3] and [Disclosure Officer] interviewed her.

145. Her CV reveals she was called to the Bar [redacted for GDPR purposes]. It provided ample evidence of criminal law experience, including instruction by the SFO as disclosure review counsel on cases of bribery and fraud [redacted for GDPR purposes]. Her initial instruction was for a period of five months. The fee stipulated in the letter was the same as [DRC 1]'s. As she recalls it, she began working on the case in early May. She could see why the remuneration might be regarded as reasonable, however, she considered the quality of the work required and the pressure it imposed *"would make the sums in question seem on the low side."* Despite this, she thought she would accept instructions on these terms again if it suited her to do so.

146. The Document Review Guidance document of 5 July 2017 which was provided to disclosure review counsel stated, *"If review counsel are to be employed on the GRM01 case, consideration will need to be given as to whether they will be appointed as deputy disclosure counsel in relation to the case"*. The document then stated that [DRC 4] and [DRC 5] were instructed as Deputy Disclosure Officers as of 30 May 2017.[47] As we saw above, the DSD of 13 October 2017 also named her as Deputy Disclosure Officer. Like [DRC 1], her position is that she was given no different instructions, brief or job description. She believes that the title was later removed.

[46] Redacted for security reasons
[47] §11-12

147. In the case of [DRC 4], we have been provided with eight PMFs completed by [Disclosure Officer]. The PMFs cover the periods 3 November 2017 to 3 May 2018 (dated 3 November 2018), 3 May 2018 to 3 November 2018 (dated 3 November 2018), 3 November 2018 to 3 May 2019 (dated 3 November 2019), 3 May 2019 to 3 November 2019 (dated 3 November 2019), 4 May 2019 to 4 November 2020 (dated 18 September 2020) [sic], 4 November 2020 to 4 May 2020 [sic] (dated 18 September 2020), 4 May 2020 to 29 November 2020 (dated 29 December 2020),[48] and 3 September 2020 to 1 March 2021 (dated 4 March 2021).

148. All were completed by [Disclosure Officer] on the version 4 PMF template dated 29 January 2020. As in the case of [DRC 1] , [Disclosure Officer] had rated [DRC 4]'s work as 'satisfactory', among other things, for her ability to meet deadlines, availability, accuracy, IT and presentational skills, value for money, delivery and innovation. In the case of these PMFs, regarding her 'availability', [Disclosure Officer] wrote [DRC 4] had worked on average 15-20 days a month, and in the 3 November 2019 PMF, regarding her 'interpersonal skills', he wrote *"[DRC 4] has been very helpful in relation to QA work and as a conduit with the team"*. Apart from that, he failed to provide any underlying evidence in support.

149. In the case of those PMFs that [Disclosure Officer] completed in September and December 2020 and March 2021, he rated [DRC 4]'s work as 'satisfactory', and he provided evidence to support it. In relation to her 'accuracy', he wrote *"Counsel's completion of the DRS was satisfactory. Work was mainly relevance determinations and not descriptions in this period."*

150. As in the case of the three PMFs for [DRC 1], four of the PMFs for [DRC 4] were sent by [Disclosure Officer] to the Commercial Section by email on 11 March 2020 and were saved electronically to the [shared drive][49] on 12 March 2020. Each was created on a version of the PMF template that was not in existence at the time of their

[48] The information we have been provided suggests this PMF was saved on 22 December 2020
[49] Redacted for security reasons

purported completion and dating. Thus, the seven PMFs were created in March 2020 and backdated.

151. We enquired of the SFO why and on whose authority the completion of the PMFs had been delegated to [Disclosure Officer], given the terms of the Managing Counsel guidance. We were told by the SFO that the form-filling is usually delegated to the lawyer managing counsel, because it is they who will have the evidence. That was [Disclosure Officer] in this case. [Case Controller] tells us that *"although it is the responsibility of the Case Controller to ensure that PMFs are competed and submitted, this does not mean that the Case Controller must complete the form"*. That is not what the guidance says. [Case Controller] says he understood that the practice across the office was for the Disclosure Officer to complete the forms for disclosure review counsel. Accurate or not, it was and remained the Case Controller's responsibility under the guidance not merely to ensure their completion but to complete the PMFs. [Disclosure Officer], for his part, maintains the guidance is clear: it was the Case Controller's responsibility, yet in all the relevant email traffic in February and March 2020 on the subject of PMFs, including from him, we found no protest about it not being his responsibility to complete them.

152. [Disclosure Officer] informs us that he had not been tasked to complete PMFs until late 2019/2020 when the Commercial Section began chasing them. He informs us that prior to this he had been unaware of the PMF forms or any requirement for anyone to complete them. Given we have little doubt that he took the 'Engaging counsel' training in November 2019, which included instruction on the use of PMFs, we find these assertions difficult to accept. More recently he has told us that after this length of time he cannot say when he became aware of the 2019 Managing Counsel guidance.

153. Additionally, [Disclosure Officer] informs us that it was difficult to answer many of the questions in the PMFs in the case of document reviewers other than their 'availability' for which he had information, and he was not prepared to invent information or to falsify documents. Yet in an email of 27 February 2020, [Case Controller] asserted to

the Commercial Section *"We have been monitoring performance carefully"*. The basis for the assertion, [Case Controller] tells us, was, in part, having on 25 February 2020 enquired of [Disclosure Officer] as to progress with the PMFs, [Disclosure Officer] told him in an email of 26 February 2020 *"I have got to be honest and say they are not written up. I have prioritised getting the disclosure reviewed especially with the deadlines we have. I speak with and review the work of disclosure counsel regularly it's a case of not having written up the forms. I will spend today doing the forms"*. [Emphasis added]

154. [Disclosure Officer] also informs us that the Commercial Section had told him he had to produce backdated forms despite his protestations that it was inappropriate. Thereafter, the Commercial Section chased up some missing PMFs and, on 25 March 2020, he sent on the missing PMFs. [Disclosure Officer] tells us that he had completed the backdated forms simply by ticking the 'satisfactory' boxes and providing no evidence supporting his rating, but this was rejected. Indeed, in their 30 March 2020 response to his email, the Commercial Section wrote to him (joining [Case Controller] to their email), saying, "*There isn't enough evidence on any of these. I'm sorry but Sara Lawson will return them to me asking for you to elaborate. She has done on other cases. Please elaborate on each area.*" [Disclosure Officer] says he was told he had to provide *"comments"*, which he tells us he told them was *"meaningless"*. The Commercial Section informs us that they have checked the Commercial inbox and cannot see any further emails that complete the chain, albeit acknowledging that, although instructions to staff were to use the Commercial inbox, they cannot definitively say it was used all the time. If [Disclosure Officer] was claiming to have provided perfected PMFs, they inform us they did not receive any perfected PMFs thereafter, in particular, for [DRC 4] and [DRC 1] . While there are records of other PMFs for them both, they relate to later periods. Neither [Disclosure Officer] nor [Case Controller] who we have asked about it claim that perfected PMFs were in fact provided to the Commercial Section, despite the terms of the 30 March 2020 email. [Case Controller] concedes it was his responsibility *"to ensure that perfected PMFs were submitted"* and says he did not chase [Disclosure Officer] due to the multiple demands and pressures at the time. As we have commented before, it was [Case

Controller]'s responsibility under the guidance to complete them.

155. Separately, we have been told by the Commercial Section that PMF backdating was endemic at the time. Despite the desire for compliance with the PMF regime for all reviewers, the request for, and completion of, backdated PMFs without any or any contemporaneous evidence was no more than a perfunctory and meaningless exercise. The true gravamen of the backdating of the seven PMFs for [DRC 1] and [DRC 4] is that, in their case, there is no contemporary, evidence-based assessment of their work over a two-year period between 3 November 2017 and 3 November 2019.

156. As we shall see later, the questions around [DRC 1]'s review occurred during her work on 23 October 2019 and on 26 November 2019, when there is an absence of contemporary information about her performance. In saying that, we are not saying that contemporary reporting would inevitably have shown there to be problems with her work. The point is we cannot now know.

157. It is also notable that the periods in the two PMFs for [DRC 4] dated 18 September 2020 appear to be misdated: the first of the two PMFs was presumably intended to show 4 *November* 2019 (not 4 May 2019) as the period start date and 4 *May* 2020 (not 4 November 2020) as the period end date, and the second PMF was presumably intended to be 4 *May* 2020 (not 4 *November* 2020) as the period start date and 4 November 2020 (not 4 *May* 2020) as the period end date. If that is so, then the PMF for the period 4 May 2020 to 29 November 2020 (dated 29 December 2020) is largely duplicative of the revised period covered by the second of the two PMFs dated 18 September 2020. Moreover, the PMF for the period 3 September 2020 to 1 March 2021 (dated 4 March 2021) in part overlaps with the preceding PMF. The date confusion in some of the PMFs illustrates a perfunctoriness about the system and the lack of compliance.

[DRC 2]

158. According to [Disclosure Counsel 3], [DRC 2] [redacted for GDPR purposes] was

interviewed by [Disclosure Officer] and [Disclosure Counsel 3] on 20 December 2017.

159. [Disclosure Counsel 3] had been concerned, reading her CV, that she might not have sufficient criminal experience [redacted for GDPR purposes]. However, [Disclosure Counsel 3] informs us she was persuaded to interview her mostly because she had worked for another case team. [Redacted for GDPR purposes] We are told she came across well in interview.

160. [DRC 2] was called to the Bar [redacted for GDPR purposes]. Her CV shows that she worked for the SFO on document reviews on several cases [redacted for GDPR purposes]. She was formally instructed [redacted for GDPR purposes] for an initial three days a week. Her fee was identical to that of the other reviewers. In her written response to us, [DRC 2] says she had been willing to accept instructions at that day rate, and if, today, her [other work][50] permitted such a commitment, she saw no reason why she would not accept instructions as a disclosure reviewer again – we assume she means on the same terms.

161. In her case, we have seen three PMFs for the periods 2 July 2019 to 2 January 2020 (dated 17 September 2020), 3 January 2020 to 1 July 2020 (dated 17 September 2020) and 1 July 2020 to 1 January 2021 (dated 4 March 2021). All were completed on the version 4 template. [Disclosure Officer] assessed [DRC 2] as 'above expectations' for meeting deadlines and availability and in all other respects as 'satisfactory'. In the first PMF dated 17 September 2020, his evidential assessment was *"Fast work and so far appears accurate. Counsel's completion of the DRS was satisfactory"*. He entered a similar comment in the second PMF of 17 September 2020. In the one dated 4 March 2021, he wrote *"[DRC 2] has delivered at pace and has been accurate in her work."*

162. In this regard, albeit [Disclosure Officer] did not limit himself to the accuracy of her record-keeping, which is the apparent intention of the 'accuracy' box on the form,

[50] Redacted for GDPR purposes

nonetheless, we question on what basis he was able to record her work accuracy in September 2020 as regards the work she had performed between July 2019 and July 2020, which includes the relevant month (April 2020) in which we know she did not tag the relevant documents as 'refer – undermine or assist'.

[DRC 3]

163. [DRC 3] was first instructed to work on GRM01 as disclosure review counsel. Her letter of engagement [redacted for GDPR purposes] states her initial instruction to work ten days a month had been approved [redacted for GDPR purposes]. Her initial appointment was extended thereafter. As in the case of the others, her fee was the full day rate of £250 plus VAT, based on a seven-hour day. [Redacted for GDPR purposes] she was promoted to the trial counsel team and instructed as disclosure junior. However, the formal letter of engagement [redacted for GDPR purposes] was in identical terms to her original engagement letter, in this instance stating her instruction *"as Disclosure Counsel"* was for an initial three-month period [redacted for GDPR purposes].[51] Her fee was identically expressed [redacted for GDPR purposes].

164. [Redacted for GDPR purposes] [Case Controller] completed a document entitled *Business Case for Engagement of Counsel* regarding [DRC 3]'s instruction. It was agreed by Sara Chouraqui, the Head of Division C, and approved by Sara Lawson QC, SFO General Counsel. It said that [Disclosure Counsel 2] who had been instructed as a junior had become increasingly occupied with matters of case presentation, with less time dedicated to disclosure issues, and, with the increase in defence challenges to the prosecution's disclosure exercise, together with a large number of defence disclosure requests, the team required dedicated counsel assistance in responding to those requests and so that trial counsel had an understanding of the issues and the disclosure provided. He wrote that [DRC 3] had been instructed on GRM01 as disclosure review counsel and was an *"obvious choice"*. [Redacted for GDPR purposes] *"Her familiarity with the evidence in the case, SFO systems and the disclosure issues*

[51] The letter of engagement refers to her instruction as 'disclosure counsel'. We understand she was made third junior/disclosure junior

faced by the office, together with her excellent data management skills, will be particularly valuable for the role." [Case Controller] added that her work on the disclosure review had been *"first rate"*. The initial three-month period of instruction [redacted for GDPR purposes] was based on the trial then being listed to start in January 2021.

165. We have also seen a further letter of engagement that was sent to [DRC 3]. The engagement was *"for Disclosure Junior"* (albeit the body of the letter confusingly stated her instruction was *"as Disclosure Counsel"*). [Redacted for GDPR purposes] In it, her fee was expressed as £75 plus VAT an hour, with a full day rate of £250 plus VAT, based on a seven-hour day.

166. In his written response to us, [Case Controller] adds, *"As an existing member of the disclosure review team, with good case knowledge, understanding of DRS and data management skills, [DRC 3] was ideally placed to fill this role. She was highly regarded by [Disclosure Officer] and Michael Goodwin QC for whom she had worked closely. Through my earlier reviews of the items referred as potentially meeting the disclosure test, I was aware that she had a good understanding of the case and disclosure principles."* [Emphasis added]

167. What [Case Controller] tells us suggests that in his mind [DRC 3] had not only been reviewing items for relevance but also potential disclosure, and she showed a good understanding of the case and the principles.

168. [DRC 3]'s CV from 2019 shows she had recent, albeit not extensive, relevant practical and academic experience in crime. She was called to the Bar [redacted for GDPR purposes], and so she was very junior. We have been supplied with two PMFs in her case covering the period 11 February 2020 to 10 August 2020 (dated 15 September 2020) and 10 August 2021 (presumably *2020*) to 1 February 2021 (dated 4 March 2021), both completed by [Disclosure Officer] on the version 4 template. In both, [Disclosure Officer] rated [DRC 3] as 'above expectations' when meeting deadlines, as regards her interpersonal skills and accuracy, and as 'satisfactory' in all other relevant

areas. He supplied evidence in support. In the 4 March 2021 PMF, as regards her value for money, delivery and innovation, he wrote *"[DRC 3] is relatively new to SFO working and has been keen to learn and add value where she can. Perhaps the best recommendation I can make of [DRC 3] work and her attitude is that in late November she was also instructed as a Disclosure Junior in the case, despite her relative inexperience. This review is about her work as a disclosure review counsel only. She has excelled at this work."*

169. [DRC 3] was not on any SFO Panel. However, the responses we have received from trial counsel indicate [DRC 3] was highly regarded, was a valued member of the team, and was considered to have had sufficient experience and competence to fulfil her new role. We accept that.

Trial counsel

170. The trial counsel team was Michael Bowes QC, who was leading counsel, Michael Goodwin QC, first junior counsel, who took silk in 2019, and [Disclosure Counsel 2], second junior/disclosure junior. All are highly experienced and respected practitioners in this field of work.

171. Michael Bowes QC was formally instructed as leading counsel on GRM01 by letter dated 28 November 2013. We are told that he has been on the Prosecution QC Panel since 2012. Michael Goodwin QC was formally instructed as first junior by letter dated 11 September 2014. Our information is that he was on the Prosecution A Panel from 2012 and has been on the Prosecution QC Panel since 2020. [Disclosure Counsel 2] was engaged as second junior counsel/disclosure junior by letter of instruction dated [redacted for GDPR purposes] for an initial period of one year. [Redacted for GDPR purposes] At the time of his instruction, he was also working on another SFO case to which he was obliged to give precedence; GRM01 was then at the pre-charge stage (charging was in December 2019).

172. Another junior member of the Bar, [Disclosure Counsel 1], had been instructed as disclosure junior on GRM01 [redacted for GDPR purposes] in anticipation of

[Disclosure Counsel 3]'s departure from the case [redacted for GDPR purposes]. [Disclosure Counsel 1] only had [redacted for GDPR purposes] other professional commitments [so Disclosure Counsel 2 took][52] his place on the team.

173. Clarification of the roles of counsel was provided in the DMD of 1 April 2020.[53] Michael Bowes QC is shown as leading counsel, Michael Goodwin QC junior counsel and [Disclosure Counsel 2] second junior and disclosure counsel. [Disclosure Counsel 2] tells us he was fulfilling two roles: "*In my role as Disclosure Counsel, I continued to advise upon disclosure strategy and to assist with the drafting of documents, but a lot of my time was spent on roles more commonly associated with junior trial counsel long before any change of label in November 2020."* He adds "*When [DRC 3] went from being a reviewer to Disclosure Counsel [redacted for GDPR purposes], I did not step away and leave her to tackle disclosure on her own. I viewed the counsel team as a team and I was … on hand to answer any queries and to give my opinion on disclosure issues."*

Continuity of counsel

174. Notes to one of the slides for the PowerPoint 'Engaging counsel' training presentation dealing with choosing counsel on the SFO Panel list includes, *"Continuity of counsel is essential"*. Everyone who we have asked denies that the turnover of counsel affected the case. [Case Controller] says there was an effective handover to ensure continuity. Equally, they categorically dispute that [Disclosure Counsel 2]'s move into this dual role coupled with [DRC 3]'s appointment [redacted for GDPR purposes] as disclosure junior (given her relative inexperience) left any gap in the monitoring or oversight of the disclosure exercise. We are prepared to accept that.

175. [Disclosure Counsel 3] felt her departure from the GRM01 team [redacted for GDPR purposes] was disruptive, as her tasks were absorbed by other people who already had a full schedule. [Case Controller] thinks, with hindsight, the loss of [Disclosure Counsel 3] from the role [redacted for GDPR purposes] was significant. We agree. This

[52] Redacted for GDPR purposes
[53] §3

appears to us to be symptomatic of a wider question of the SFO adequately staffing and resourcing the case to which we return later.

Roles and responsibilities

176. We are satisfied that the roles and responsibilities of the trial counsel team were sufficiently clearly articulated, and each understood their role. Leading counsel is a very senior, very experienced and highly regarded member of the Bar. The first junior, Michael Goodwin QC, who took silk in 2019 and the second junior, [Disclosure Counsel 2], are both also very experienced and well-regarded practitioners.

177. Three members of the disclosure review team we have focused on ([DRC 2], [DRC 1] and [DRC 4]) were sufficiently experienced in the work to understand their roles, and they were able to apply the relevant tests. All three were clearly experienced in, and understood how to use Autonomy DRS.

178. In the case of the fourth reviewer on whom we have to focus, [DRC 3], what she lacked in experience she made up for in terms of ability. Her promotion to the trial team as third junior/disclosure junior [redacted for GDPR purposes] was based on her all-round knowledge of the case and her ability. There is no question in our mind about her understanding of the relevant tests or the training she received, which we can safely assume followed the format in [Disclosure Counsel 3]'s note.

Remuneration of disclosure review counsel

179. [Disclosure Counsel 3] is of the view that, compared to the rates available for similar work in other organisations, the SFO rate offered to counsel is no longer adequate to attract sufficiently skilled candidates, and this rate is unlikely to attract counsel willing to coordinate reviews and take a role in managing teams, yet, as she stresses, lower fees do not mean counsel is free to perform poorly. This is of course correct. [Disclosure Officer]'s view is that, given the low rates of pay offered and the big time demands, it will only be junior members of the Bar who are predominantly attracted to the role. [Case Controller] tells us, that in his view, the rates of pay for disclosure review counsel are not reasonable recompense for the nature and quality of the work

expected. He says he is aware that other organisations pay higher rates for work on cases which arguably does not have the same level of profile or risks attached.

180. It is our view that the remuneration paid for disclosure review counsel has been static for many years, is out of step with what other organisations pay for such work and is not reasonable. The current rates of pay make this important work unattractive, and counsel who are willing to do it will go where the rewards are higher, such as the private sector and public inquiry work. This makes the SFO uncompetitive, particularly at a time when the attrition rate of junior counsel at the Bar is increasing through unsustainable publicly funded rates of pay. We understand the SFO is also facing real challenges in recruiting junior counsel of sufficient quality because the need to cover court work makes them unavailable for long-term disclosure work. This is making and will continue to make the SFO's task of building reliable and experienced case review teams much more difficult.

Section 6: The Disclosure Failings

Staffing and resources

181. It is critical to the process that the person appointed as Disclosure Officer has sufficient skill, knowledge and authority, commensurate with the complexity of the investigation, to discharge their disclosure functions effectively. As we have said before, [Disclosure Officer] had no previous experience as a Disclosure Officer and had never worked on a prosecution case before his appointment. He had no previous experience of working with DRS Autonomy. Prior to this, he had been working for two-and-a-half years in the International Relations team working on Letters of Request.

182. [Case Controller] says he was aware at the time that [Disclosure Officer] required significant support as Disclosure Officer, given his experience, abilities and the scale of the exercise and disclosure challenges. He felt [Disclosure Officer] was the most appropriate case team member to be appointed to the role of Disclosure Officer. He says there were only a small number of SFO employees who have acted as Disclosure Officer during a prosecution, and they are usually reluctant to repeat the role. As a result, says [Case Controller], experienced Disclosure Officers are *"a rare and sought-after resource"* and it is typical that a case team member is appointed from the available resource, and *"learns the role on the job with appropriate training and support"*. [Case Controller] tells us that he was only able to appoint a Disclosure Officer within the constraints he faced.

183. He adds that [Disclosure Officer] had the appropriate training for the role, *"However, greater opportunities for bespoke disclosure officer training may have enabled [Disclosure Officer] to obtain some additional skills and improve his performance, particularly concerning the management of the review."* He says that after [Disclosure Counsel 3] became disclosure review counsel, *"given her previous experience and the early stage of the review, she undertook many of the tasks of the disclosure officer in tandem with [Disclosure Officer], assisting [Disclosure Officer] to learn on the job."*

184. Additionally, [Case Controller] tells us that [Disclosure Officer] needed support in using Autonomy DRS and organising data more generally. For his part, [Disclosure Officer] appears somewhat dismissive of the training he had on Autonomy, saying, *"These courses were of relatively short duration and did not cover in detail the tagging panel process or the circumstances and usage of the Tier 1 and Tier 2 reviews. The training was classroom based, involving a group of us sat at computers doing exercises after a few minutes teaching."*

185. [Case Controller] says it was important that suitably experienced disclosure counsel was instructed at that stage who could critically examine the disclosure exercise to date and advise on ongoing strategy. [Disclosure Counsel 1] and [Disclosure Counsel 2] were, in his view, well placed to do so. However, in fulfilling more of an oversight role, their instruction left a communication gap between the reviewers and the core prosecution team that [Disclosure Officer] was unable to bridge. So, despite disclosure juniors taking on an oversight role, the loss of [Disclosure Counsel 3] in 2019 left a vacuum for a more hands-on role in supporting [Disclosure Officer] in the management of the review that, in our view, was never in fact completely filled.

186. [Disclosure Counsel 3] highlighted several 'red flags' in her response to us:

a. The volume of material which she felt was the most serious risk including custodian mailboxes which would more than double the reviewable material with little prospect of increased review resources.
b. To get through the material more quickly, she tells us they had been instructed to review some of the Serco data without entering descriptions. She considered there would always be a point at which they would have to come back and enter descriptions, because she thought the auto-description was no more than a typing aid. Therefore, she says, this was no more than delaying a task for the limited benefit of providing the case team with faster access to potential evidence and documents that might undermine or assist. In fact, since both reviewing and describing documents require reading the whole item in the 'near native' view, arguably it takes longer to conclude the review.

c. The biggest red flag was she was not being replaced. Managing up to ten disclosure counsel at one time (and six LPP counsel) had become almost a full-time role, and that was without approving their timesheets or writing business cases. This work was to be split between the two Disclosure officers ([Disclosure Officer] on GRM01 and [another member of staff] on GRM02 (G4S)) who already had full schedules. She adds, as Grade 7 lawyers on their cases, they were expected to involve themselves in many issues on the cases, as well as picking up this work.

187. [Disclosure Counsel 3] believed that the disclosure review counsel she recruited were of sufficient call and experience. All, she says, were capable of producing descriptions and determinations. However, none had sufficient skill to step up as a trial disclosure junior, and none of the disclosure counsel she dealt with had the inclination or the skillset to take over her role of allocating work, checking work and generally supporting the Disclosure Officer. [Disclosure Officer] informs us he had no concerns about their experience for the roles disclosure review counsel were fulfilling.

188. [Disclosure Officer] is, however, critical of the role that he was left performing, which he described as the control and management of unused material, rather than the role of a Disclosure Officer. He says he was instructed to produce various MG6C and MG6D forms[54] by [Case Controller], the Case Controller, at various times, who then reviewed the schedules before they were served. So, he felt he was largely an assistant to the Case Controller. [Disclosure Officer]'s view is the Disclosure Officer should be *"a fulcrum of the prosecution case. The Disclosure Officer is an integral part of the team and would be expected to get feedback on all disclosure issues from Trial Counsel and others on the case team"*. This, he says, did not happen in this case.

189. [Disclosure Officer] has told us that from the time the forensic accountant's report was prepared and throughout 2021, *"the Disclosure Officer was side-lined and not kept informed by Trial Counsel or anyone else of the disclosure issues that had arisen. By*

[54] Respectively, the non-sensitive and sensitive unused material schedules

this time the role I was fulfilling was that of admin support to the prosecutor and not that of a Disclosure Officer". He maintains he was, in effect, not acting as Disclosure Officer at this stage, and says he was not fully sighted on disclosure issues as he was not at court or involved in discussions at court or after court hearings.

190. While this is [Disclosure Officer]'s perception of how he was treated, his complaints against individuals are non-specific and beyond the scope of this review, and we have not sought to resolve them. We have included the fact of them nonetheless for completeness. The SFO informs us these issues were not raised at an organisational level, where staff have available to them several mechanisms to do so. They say also the first time any issues were raised about disclosure was the weekend before the case collapsed.

191. [Case Controller], for his part, when describing the division of labour between [Disclosure Officer] and him, says, *"[Disclosure Officer] was responsible for the management of the review, ensuring that the review strategy was applied, creating schedules of unused material and ensuring that material that met the CPIA test for disclosure was brought to the attention of the prosecutor*."

192. In 2019, the Head of Division sought someone experienced, and technically able, to join the team. In October 2019, [Deputy Disclosure Officer] (a Senior Executive Officer (SEO)) joined as Deputy Disclosure Officer. However, he was only able to fill the role for a limited time, and he left in March 2020.

193. [Deputy Disclosure Officer] direct line manager was [Deputy Disclosure Officer's line manager], a Principal Investigator. She had ultimate responsibility for all evidential aspects of the case (e.g., ensuring signed statements were obtained from witnesses and overseeing the production of exhibits to be used during the trial). She did not have the capacity to be involved in the disclosure review. [Deputy Disclosure Officer] tells us that [Deputy Disclosure Officer's line manager] was very good at ensuring they had regular meetings to discuss his work and how it was progressing. She regularly made notes of these meeting in which he intentionally did not raise several issues on the case as they

arose because team morale was already low. Instead, he says he tried to address each issue as they arose with a solution.

194. However, upon leaving the team, [Deputy Disclosure Officer] says he told [Deputy Disclosure Officer's line manager] and [Case Controller] in a meeting with just the three of them that he had concerns that [Disclosure Officer] did not understand what was required of him as Disclosure Officer on a case of that size and, that, if they did not make a change, they would risk the case regressing into the state it was in before he joined the team. While [Deputy Disclosure Officer's line manager] was supportive of his points, [Case Controller] said that he would take it away and think about how best to deal with it. [Deputy Disclosure Officer] never followed up with [Case Controller] as to whether he acted on this meeting. He also never raised these concerns directly with [Disclosure Officer] as he was a senior grade to him, and he did not think it was appropriate for him to do so in the circumstances. We make clear we have not sought to resolve whether [Deputy Disclosure Officer]'s concerns were well-founded.

195. [Case Controller] says that after [Deputy Disclosure Officer]'s departure from the team in March 2020, he became involved in the creation of schedules with [Disclosure Officer] with the assistance of an investigator experienced on Autonomy DRS. A replacement for [Deputy Disclosure Officer] was found, and [a Grade 7 lawyer] joined the team, but, says [Case Controller], he did not have the skills and was unable to support [Disclosure Officer]. This lack of support can only have fuelled [Disclosure Officer]'s sense of marginalisation.

196. For his part, [Disclosure Officer] says that the introduction of members of staff at various stages of the case such as [Deputy Disclosure Officer]'s work in relation to disclosure or other lawyers who towards the end worked on the issue of the forensic accountant's failure to comply with his disclosure obligations *"undermined the role of the disclosure officer and made it impossible for the disclosure officer to discharge his duties."*

197. In terms of the staffing and resources, [Case Controller] says *"I do not now think that the case was sufficiently staffed and resourced in terms of numbers and quality, given the particular challenges posed by the case and the risks associated with it. I had concerns regarding this at the time but it is more obvious with hindsight. It is of note that the GRM02 strand of the case (G4S) now has significantly more resource than GRM01 did at an equivalent stage in the proceedings."*

198. From [Disclosure Officer]'s point of view, *"the case was not sufficiently resourced internally and externally in terms of numbers. The case from the outset was starved of resources. For several years, very little progress was made in the investigation. This meant the document reviewers had started work at a time when it was not clear who was to be charged or with what. Finding sufficient reviewers was always a challenge, largely owing to the rates of pay. The GRM01 team had taken a decision before I joined the team to allow the document reviewers to work from home as well as in the office, in order to increase the pool of document reviewers available, and to increase the number of hours the instructed reviewers were able to work. In addition, certainly internally there was a large turnover of staff and by the time I joined the case, it was 3 years old, yet by its termination, I was one of the longest serving team members."*

199. By contrast, [Disclosure Counsel 2] felt the case was sufficiently staffed, although the case could have benefited from an additional person on the disclosure side who was an expert on DRS, while [Deputy Disclosure Officer]'s view was that in terms of the volume of staff the case had more than enough: *"What the team lacked was anyone who had experience (within the last decade) from the prosecution side of hands-on managing a disclosure exercise of this scale."*

200. We take seriously, and regard as accurate, the comments and criticisms made by the Case Controller, who had been in the role from the commencement of the GRM01 investigation, and by the Disclosure Officer, who had been in that role from October 2017. By contrast, [Deputy Disclosure Officer] had only worked on the GRM01 case for six months between October 2019 and March 2020. We draw two conclusions from this, namely, that the case was understaffed for much, if not all, of its life, and

[Disclosure Officer] was insufficiently experienced to perform the role he was expected to fulfil.

201. We have previously touched on the impact of the Covid-19 pandemic, but it bears a little further examination here when considering the overall picture. The Covid-19 pandemic inevitably affected working on GRM01. [Case Controller] tells us the pandemic restrictions meant that for the majority of the proceedings stage and the entire run up to the trial, the case team and reviewers faced unusual working conditions, missing the ad hoc guidance and support available within a team working physically in the same location.

202. [Case Controller] was aware of at least one counsel reviewer who was unable to take up the post following the introduction of the pandemic restrictions in early 2020. Restrictions on recruitment at that time also prevented ten document reviewers who were interviewed by [Disclosure Officer] in early 2020 from joining the review team to relieve some of the pressure on reviewers by describing documents. He says they attempted to obtain internal resource to fill this role but were only able to obtain the services of a few reviewers for a short period in this way.

203. [Case Controller] says *"These factors combined to heighten the pressure on the case team and reviewers and to reduce the ability of the case team to communicate and provide guidance and support to each other and the review team. It also meant that the reviewers faced very tight deadlines and less scope for communication with the case team, and those monitoring the review less scope to implement and record effective quality assurance. From a personal perspective, in over 20 years working in high pressure legal environments, I have never before worked so intensively or felt the same pressure as experienced during the proceedings stage of this case."*

204. [Case Controller] informs us that he too harboured concerns regarding the time pressure placed on reviewers in their disclosure tasks which he raised with counsel and the court in applying for a number of adjournments in the timetable for disclosure. Although relatively short adjournments were granted, he understood from discussions

with counsel that there was a determination for the trial to proceed in early 2021 due to issues regarding availability of courtrooms during lockdown, and this impacted upon the length of adjournments that were sought and granted.

205. [Case Controller] also points out that the first Magistrates' Court hearing was on 22 January 2020; the first appearance at the Crown Court was on 19 February 2020 with the trial originally listed for 18 January 2021. Defence Statements were provided on 8 and 10 September 2020. The trial eventually began on 29 March 2021, just over 14 months after the first appearance. What however cannot be overlooked is that the then Director of the SFO had accepted this case for investigation in October 2013, the defendants had been interviewed under caution in 2016 and were charged in December 2019. Thus, by the time of trial, not only had the case been in existence for some eight years, but the defendants had known they were under investigation for around five years.

206. [Disclosure Officer] says he also had concerns about the limited number of reviewers they had for the volume of documents and the time pressures that were put on individual reviewers: *"They were being urged all the time to work faster, review more documents to meet deadlines … in increasing speed, there is an increased risk of errors."* In agreement with [Case Controller], he says that in early 2020 arrangements were in place to employ ten more document reviewers. The lockdown due to the pandemic prevented their being instructed, as they were unable to issue laptops or provide the necessary training to them. He says he had carried out a series of interviews and was about to instruct them when lockdown happened.

207. The SFO does accept that from March 2020 to July 2020 there were delays in issuing laptops, but they state there was never a period when they were unable to issue laptops to new members of staff, document reviewers or counsel.

208. [Disclosure Counsel 3] had arrangements in place to manage the disclosure review team, which, pre-Covid-19, included regular meetings with them all. [Disclosure Counsel 3] informs us that, apart from three reviewers who lived far from London or had difficulty

travelling, she had them attend the office for their first few weeks and discuss their work as they went along. She did this as she considered it would be easier to raise issues in person, and they could discuss what they had read with each other. In addition, she says, many reviewers experience technical issues accessing data, which are no more than teething problems that the case team can resolve themselves, rather than have them raise a ticket with the IT Support team.

209. She created tables of the material that needed to be reviewed, beginning with the Serco material. She monitored progress and estimated the dates on which disclosure review counsel would finish batches.

210. She arranged a fortnightly meeting with all reviewers, including a remote dial-in facility for those who were detained at court or located far from London. She made extractions of reviewers' work in their first few weeks (using the CSV extraction tool) and printed them out, then went through them by hand, marking errors. She then showed them to disclosure review counsel to illustrate where they needed to improve their descriptions.

211. [Case Controller] says that during the Covid-19 pandemic, the SFO infrastructure designed to support case teams was hugely affected, reducing the technical support and facilities available. Important processes such as the production and service of material and recruitment became more complex and time-consuming. The SFO informs us however that while the teams responsible for supporting case teams were disrupted between March and June 2020, during the early months of the pandemic, the Materials Management and Facilities teams responsible for the production and service of material did physically attend the SFO's offices during the entire pandemic period.

212. [Disclosure Officer] says that at the start of lockdown there were no facilities to enable audio or video calls whether on Zoom, MS Teams or any other online conferencing platform. In his view, the SFO was *"well behind the curve in terms of IT"*. The effect was that the weekly meetings he had with document reviewers face-to-face before lockdown could not take place initially. He says they did not even have the facility at the start to host a multi-party voice call without using their own personal mobiles and trying

to connect the parties, which was a security issue. It is for this reason that regular team meetings with the document reviewers ceased. This was replaced, he says, by him regularly having phone calls with individual document reviewers, which created a considerable amount of extra work for him and took up his time. It also made it much harder to have discussions with the document review team about what was happening. Emailing was also employed but that was much slower than a face-to-face conversation with the whole team present. [Disclosure Officer] says *"For an organisation that is at the forefront of serious crime, such as the SFO, its IT capabilities were found to be seriously lacking at the start of the pandemic full stop."*

213. The SFO however points to the fact all staff had access to telephone conferencing facilities from February 2019 and the number of lines were increased in March 2020 to enable communication, when the majority of staff moved to remote working. Additional lines were allocated to operational divisions for the use of staff. It was, says the SFO, therefore possible for training to be provided over the phone (we observe hardly ideal) and for team/staff meetings to continue. They also observe that the SFO had the facility to host multi-party voice calls for up to 125 people via 'BT meet me'. Moreover, a quick guide for remote working was issued on 12 March 2020 on the SFO intranet. As for video conferencing facilities, the SFO says it had none in place in March 2020; security obligations and the SFO's IT infrastructure system meant that video conferencing facilities were delayed and implemented in October 2020 (Skype) and replaced by MS Teams in July 2021.

214. Nonetheless, caution is required about the real impact of the pandemic restrictions, because all the questioned disclosure reviews to which we return below did not occur during lockdown. While the questioned document reviews conducted by two of the disclosure review counsel occurred in April and May 2020, shortly after the first lockdown was imposed on 23 March 2020, the other disclosure review counsel's questioned reviews took place in October and November 2019, well before it.

215. [DRC 2] tells us she has no recollection of being under pressure in terms of time, number of documents to review or work allocation. She does not recall being provided with any

particular targets for the numbers of documents to be reviewed daily. She does recall being told collectively in team meetings of the number of documents which had been reviewed and which remained to be reviewed, but that was done in a collegiate atmosphere of working together to a common objective rather than seeking adherence to a specific, and personal, target. She recalls that during the lockdown, [Disclosure Officer] considered video meetings, however the SFO did not have a system to facilitate this type of conferencing. As a result, no virtual team meetings were held. However, she says, had she had any queries, she would not have felt restricted in any way from raising them with the Disclosure Officer by phone.

216. By contrast, [DRC 1] recalls there being daily targets for the review of documents and at times their review numbers would be reported to them in meetings to inform them if their speed was sufficient. Similarly, [DRC 4] recalls that the rate at which they reviewed the documents was *"an uncomfortable, concerning and reoccurring theme in this case"*. She recalls once being told by a Disclosure Officer (who she does not identify) that she was the slowest which she says was *"disappointing to hear*". The difference of perception among [DRC 2], [DRC 1] and [DRC 4] about pressure may be one of subjectivity and levels of tolerance. As we have indicated above, [Disclosure Officer] recalls the reviewers were being urged all the time to work faster and review more documents to meet deadlines.

217. In her account to us, [DRC 2] points to the fact her instructions changed during the review by reference to emails sent to the disclosure team on 2 June 2020 and three months later on 21 September 2020. [DRC 1] recalled the guidance changing in the early years, both verbal and by email.

218. It may be recalled, [Disclosure Counsel 3] told us that to get through the material more quickly the team had been instructed to review some of the Serco data without entering descriptions. She considered there would always be a point at which they would have to come back and enter descriptions, because she thought the auto-description was no more than a typing aid. She was proved right. On 2 June 2020, [Disclosure Officer] sent the disclosure team an email attaching a document with the file name *GRM01 –*

Description Guidance. In the email, he wrote *"We are now rapidly moving towards the next phase of the review. This is going back and back filling descriptions into (Serco) items you previously marked as MBR [may be relevant], but did not describe them."*

219. Three months later, on 21 September 2020, [Disclosure Officer] sent the team a further email, bearing the subject line 'GRM01 URGENT UPDATE'. [Disclosure Officer] says this email was sent on the instruction of [Case Controller]. In it, [Disclosure Officer] said he hoped they were *"coping with the rapidly changing lockdown situation"*. He informed them that a recent court hearing had changed things, and they now had a *"very truncated trial preparation period"* to get the case trial ready for the anticipated January 2021 start date. He told them that, apart from a number of specific documents, they were no longer going to be describing documents. He thus instructed the team to *"cease immediately with your descriptions"*. He added the defence were going to present them with a list of documents for which they wanted the SFO to enhance the auto-descriptions in which case some of them would be asked to describe documents.

220. He told the team it was vital they read the Prosecution Case Statement and the Defence Statements, which he attached to his email. In relation to the material that they were being asked to review, [Disclosure Officer] told them *"On Autonomy at 01 Review Library > 20200805 SERCO PE is a folder of some 8477 documents that you and your colleagues have marked PE … You are to select a folder in the same way as you did for the Descriptions …"* Thus, the task was limited to a folder of documents marked 'PE' i.e., potential evidence. Their task, he said, was to review documents for two things: to see if they should be served as potential evidence and to reconsider them for disclosure (under the SFO's obligation of continuing disclosure) following the review of the Defence Statements, the Prosecution Case Statement and other attachments to the email (Peter & Peters letter on disclosure of 15 May 2020, the Marshall *Note re Initial Disclosure* of 20 July 2020, what was described as a Note for Further Case Management Hearing (FCMH)[55] and two further documents). This was the initial Stage 3 process, and

[55] This is believed to be the Marshall *Note for 14.9.20 Hearing*

the team was instructed to complete the sections 5-7 Tier Two determination fields on the tagging panel on Autonomy DRS.

221. It is tolerably clear that the change of instruction was the SFO response to the receipt of very detailed Defence Statements, and the hearing that took place on 14 September 2020, at which HHJ Taylor made orders for the Stage 3 disclosure exercise. [Disclosure Officer] says he sent the email on [Case Controller]'s instructions. Written advice provided to the SFO by trial counsel on 22 September 2020 was expressly designed, among other things, to address further lines of enquiry following the receipt of the Defence Statements and compliance with the SFO's continuing duties of disclosure under the CPIA. The SFO copied the advice into a guidance document for the disclosure team entitled *GRM01 Review Guidance for Disclosure Counsel in conducting the Stage 3 disclosure review*, which it is believed was emailed to the reviewers on or about 25 September 2020.

Underlying generic issues

222. It clear that the case suffered from several underlying generic issues, but alone or in combination we are of the view that they do not offer any real explanation for the eventual collapse of the case. The main and important ones, to which reference has already been made, appear to be:

a. The loss of [Disclosure Counsel 3] to the case in January 2019 was significant and left a vacuum that was not completely filled.

b. [Disclosure Officer], who was not the original Disclosure Officer on GRM01, but became the Disclosure Officer from 13 October 2017, had never before performed the function of Disclosure Officer and had never been involved in any prosecution case for the SFO. [Case Controller] says this is not an untypical scenario. [Disclosure Counsel 3] helped him *"learn on the job"* with training and support. He is clearly resentful, feeling that he was marginalised and undermined in the role.

c. [Deputy Disclosure Officer], who was brought in on GRM01 in October 2019, but only stayed for six months, detected low morale on the team, and (rightly or

wrongly) had serious concerns about [Disclosure Officer]'s level of understanding of the role as Disclosure Officer which he voiced to [Case Controller] and [Deputy Disclosure Officer's line manager].

d. [Case Controller] had concerns at the time about staffing and resource; this became more obvious with hindsight. [Disclosure Officer] agrees: the case was not sufficiently resourced internally and externally in terms of numbers. He says the case from the outset was *"starved of resources"* and there was a large turnover of staff.

e. [Case Controller] observes the trial began on 29 March 2021 some 14 months after the first appearance in January 2020. The timetable for the case from first appearance to trial was tight but we note his observations ignore the length of time the case had been under investigation and the inevitable impact that had on the defendants. Nevertheless, there were clearly time and other pressures on the disclosure team, in terms of the volume of material, resources and the occasional change of instructions.

f. [Disclosure Counsel 1]'s tenure as disclosure junior on GRM01 was relatively short (around ten months' duration) and, although [Disclosure Counsel 2] was instructed to replace him [redacted for GDPR purposes], [Disclosure Counsel 2] found himself occupying a dual role both as second junior and disclosure counsel including after [DRC 3]'s instruction as disclosure junior in November 2020. Continuity of counsel is ideal, if not essential, but we do accept that counsel turnover, even in key roles, is an inevitability on a case that spans many years, as this case did.

g. While there were facilities in place, it is apparent that the SFO's IT capabilities and infrastructure failed fully to meet the impact on working caused by the Covid-19 pandemic and the lockdowns which commenced in March 2020.

Inadequate descriptions

223. The defence complained about the inadequacy of the descriptions applied to items in the schedules of unused material. The significance of the inadequate description of items was that it did not allow the defence to identify documents they would want to see.

224. In her disclosure review handover note,[56] [Disclosure Counsel 3] explained that auto-descriptions which were applied to items on Autonomy DRS were little more than a restatement of their metadata. Auto-descriptions, she wrote, were more accurately described as *"technology-assisted descriptions"* which can shorten the typing task for disclosure reviewers. She said that in May 2017 she had worked with the RAVN team[57] on developing a suitable format for GMR01, which was applied across the Serco bags which had been responsive to key word searches. She explained if the reviewer wished to edit the auto-description, they copied the text of the 'Auto-description' field in the DRS disclosure panel into a Word document, edited it as they read the document in its native application, then pasted their work into the 'Document Description' box.

225. By letter dated 2 October 2020, Hickman Rose, solicitors for Mr Woods, sent the SFO an initial schedule listing items from the sub-schedules of non-sensitive unused material which were inadequately described. It will be recalled that in his email to the disclosure team of 21 September 2020, [Disclosure Officer] had informed them that the defence were going to present the SFO with a list of documents for which they wanted the SFO to enhance the auto-descriptions. Hickman Rose estimated that 11% of items identifiable from the schedules originating in the period 1 January to 31 August 2011 were *"so poorly described as to make it impossible to form any proper assessment as to the likely relevance of the underlying material to the issues in the case or to determine whether they meet the test for disclosure."*

226. Hickman Rose said that the items they had separately listed on a spreadsheet covering the items during the January to August 2011 period lacked sufficient detail about the likely provenance of the underlying document (e.g., author, sender/recipient, date/time information, source), and observed that many were based on automatically generated metadata which, while helpful, gave no indication about the content of the

[56] §26-35

[57] RAVN Systems' applied cognitive engine (ACE) AI platform was used by the SFO on the Rolls-Royce case

underlying document. Due to the timescale, they invited the SFO to disclose all the items they had identified rather than provide them with further and better descriptions.

227. Peters & Peters also sent the SFO a letter of the same date, among other issues, making much the same points as Hickman Rose, and they too attached a first tranche of inadequately described items as 'Annex C'. They offered the SFO the same pragmatic approach as Hickman Rose: to disclose all the items they sought which were inadequately described.

228. Neither defence spreadsheet apparently included the Board minutes that were not disclosed, although each of those documents was entered on a non-sensitive unused material schedule of 31 July 2020 on an Excel spreadsheet boasting 22585 rows. The schedule was entitled *Serco 3 Email stores (part 2)*. The relevant non-disclosed documents were entered into rows 22309 (S56959), 22310 (S56960), 22338 (S56988), 22339 (S56989), 21540 (S56190) and 21541 (S56191). We shall return to these documents later.

229. There were additional complaints about the adequacy of descriptions as regards non-sensitive unused schedules served on 30 October and 6 November 2020 in joint defence letters of 3 and 11 November 2020. We are unclear whether, and, if so, how, the issue of inadequate descriptions was finally resolved.

The Home Affairs Report

230. On 13 April 2021, during the trial, defence counsel for Mr Marshall made a request by email for *"a document entitled 'Home Affairs MD's Report – July 2011' prepared by Elaine Bailey for the Civil Government EMT, date 13 July 2011. We believe the document refers to the Monthly Charges, described as a 'backdated internal management fee'."* The defence sought any copy of the report in possession of the SFO, including GRM01B001453–48054-DOC3449189 and GRM01B001453–48054-DOC3449199 2011/07/13 email from Yvette Carter to Nadine Hambleton with subject 'Home Affairs MD Report'.

231. Three emails and attachments responsive to the request were found and disclosed by the SFO that same day. They were:

- GRM01B001453–48054-DOC3144562 – Email Carter to Hambleton 22-07-2011 – 1526
- GRM01B001453–48054-DOC3144566 – BU MD Report May June 11
- GRM01B001453–48054-DOC3449198 - Email Carter to Hambleton 13-07-2011 – 1526
- GRM01B001453–48054-DOC3449199 - BU MD Report May June 11
- GRM01B001453–48054-DOC3454233 - Email Hambleton to Gillen 4-11-11 – 1504
- GRM01B001453–48054-DOC3454235 – CG Q3 Board – Home Affairs MD's Report – 01-08-11

232. The items above were all contained on a hard drive that was 'bagged' and booked into the SFO Materials Management system as Bag GRM01B001453 (Bag 1453) on 15 May 2019. The hard drive was received in response to a notice issued under section 2 of the Criminal Justice Act 1987 to Serco on 12 February 2019 (a section 2 notice). Bag 1453 was a replacement for Bag 1406, which had been received on 6 March 2019 but could not be processed due to technical issues.

233. The section 2 notice was for live and archived email stores from the Serco/KPMG Clearwell Database for the period 1 January 2010 to 30 April 2013 inclusive for the following data sources: Nadine Hambleton, Graham Cottrell and Elaine Bailey.

234. The bag contained 245,489 documents from these mailboxes. This did not include material duplicative to items that had been responsive to previous requests and therefore represented the balance of the mailboxes for those individuals, minus 9,008 potentially privileged documents, which were provided separately in Bag 1405 (as to which see below).

235. The issue in this case arose because three documents (and their families) had been reviewed by three different disclosure review counsel, and all three documents covered the same or similar ground. As indicated above, the documents (which were emails attaching a document entitled *Home Affairs MD's Report for June 2011*) had been scheduled on the non-sensitive unused schedule served on the defence on 31 July 2020,[58] but they had not been marked for disclosure and had not therefore been disclosed.

236. On 15 April 2021, the court was informed that, following the defence disclosure request of 13 April, three separate reviewers had marked the report as 'not disclosable'.[59] We note that the Home Affairs MD's Report itself was short – just over three pages in length. The report referred to the *"backdated internal management fee charged to Electronic Monitoring England & Wales"* and was clearly disclosable. Three reviewers had separately and independently tagged the document as 'relevant'. [DRC 1] and [DRC 2] had not also tagged the document 'refer – undermine or assist'. In the case of [DRC 3], she had initially tagged the item as 'refer – undermine or assist', but she had subsequently changed the tag. We shall come back to this in more detail later.

237. On 6 November 2020, Hickman Rose wrote to the SFO in light of the SFO's letter to them of 30 October 2020 as regards the SFO's review of disclosure following the receipt of the Defence Statements. They raised several issues in the letter. Among them were eight specific additional disclosure enquiries, as they related to issues set out in the Defence Statement. They included requests for *"Serco Limited Board Minutes, Board Papers and associated materials and communications, 2009-2013"*. They argued *"This material should be reviewed for any discussion of the adjusted charges between [Serco Geografix] and [Serco Ltd] and the process of accounting for those charges in the former company documentation"*. Hickman Rose also sought, among other items, *"Minutes and materials for board meetings of the Serco Civil Government."*

[58] S56190, S56191, S56959, S56960, S56988, S56989
[59] We take this to be shorthand for not tagging the 'refer – undermine or assist' box

238. On 16 February 2021, a few weeks before the start of the trial, Hickman Rose again wrote to the SFO on the subject of Serco Board materials. They pointed to the fact they had conducted a search of the Serco unused schedules[60] and the *Schedule of Non-sensitive Unused Material consolidated* and had found only five items which referenced Serco Ltd Board materials,[61] and concluded that those materials were missing from the schedules. They therefore sought reassurance that the SFO was in possession of all Serco Ltd Board minutes, papers and associated materials and communications from 2009 to 2013. In fact, two of the non-disclosed documents scheduled on 31 July 2020 contained the words 'CIVIL GOVT BOARD MTG – 1 AUG [I]' (S56960) and 'presentation to board' and 'Document for Civil Government Q3 Board Meeting' (S56988). It is unclear to us whether, and, if so, how or why, they were overlooked.

239. In February 2021, the defence applied for several orders under section 8 of the CPIA in relation to the expert evidence.[62] The prosecution responded in a note entitled *Prosecution Response to the Defence Consolidated Section 8 Application*, dated 26 February 2021. Further to the prosecution's response, the defence withdrew the application. Apart from some limited further enquiries that the prosecution agreed to undertake, the requests had either been provided by the prosecution or were no longer pursued by the defence.

240. The prosecution note made clear it intended also to deal with all outstanding disclosure requests. One such outstanding request was that made on behalf of Mr Woods in the Hickman Rose letters of 6 November 2020 and 16 February 2021 in relation to the request for *"Serco Limited Board Minutes, Board Papers and associated materials and communications from 2009 to 2013"*. In the note, the prosecution said it had *"pursued reasonable lines of enquiry in respect of Board level knowledge of the matters that form*

[60] The letter footnoted these schedules as *"Serco 1 bags laptops desktops folder locations and hard copy; Serco 2 Email stores (part 1); Serco 2 Email stores (part 2); and Serco 4"* but, puzzlingly, not the schedule dated 31 July 2020 entitled 'Serco 3 Email stores (part 2)'

[61] None were the documents referenced above

[62] By section 8 of the CPIA *"If the accused has at any time reasonable cause to believe that there is prosecution material which is required by section 7A to be disclosed to him and has not been, he may apply to the court for an order requiring the prosecutor to disclose it to him"*

the basis to the prosecution, including the pre-2011 conduct". They added that the lines of enquiry included obtaining or searching for data, the detail of which was then set out. However, the note continued *"The SFO will request the Serco Limited Board Minutes, Board Papers and associated materials from 2009 to 2013."*

241. On 2 March 2021, by agreement, Mrs Justice Tipples thus ordered *"The SFO will obtain, review, schedule and, where applicable, disclose material sought concerning Serco Limited Board minutes by 10 March 2021."*

242. In order, however, to enable a few documents to be checked by independent counsel for privilege the judge revised the order on 9 March 2021 in these terms: *"The SFO will obtain, review, schedule and, where applicable, disclose material not responsive to privilege search terms concerning Serco Limited Board by Monday 15 March 2021. Any such material responsive to privilege search terms to be reviewed, scheduled and where applicable disclosed by Friday 19 March 2021"*.

243. Resulting from the further enquiries undertaken and in accordance with the amended order, updated schedules were served on 15 and 19 March 2021 concerning Serco Ltd Board materials (as well as other schedules with which we are not concerned). None of the items was determined as meeting the disclosure test.

244. As a result of an entry in the 15 March 2021 schedule, on 24 March 2021, Hickman Rose for Mr Woods wrote concerning an outstanding Serco Ltd Board minute and making further enquiries regarding Serco Ltd Audit Committee meetings. The letter also made a number of requests for specific documents from an earlier served schedule. The SFO responded by email on 26 March 2021 providing a further updated schedule and a small number of items of disclosure. It also undertook to make further enquiries concerning the Serco Ltd Audit Committee meetings. From the further enquiries on the Serco Ltd Audit Committee meetings, an updated schedule was served on 8 April 2021 with three items disclosed.

245. In his response to us, [Case Controller] highlights the fact that the defence requests leading to the section 8 application in March 2021, and the subsequent engagement by the defence (resulting in the service of updated schedules and disclosure), did not concern the divisional Board papers that subsequently became the focus of attention as a result of the disclosure issues that arose at court. [Case Controller] maintains that the defence engagement in the lead-up to, and resulting from, the aborted section 8 application in March 2021, concerned the Serco Ltd Board and Audit Committee material, which did not include any reference to the 'management charges' that were the subject of the prosecution.

246. While that may well be right, and although it may be accurate to suggest that the focus at that time was on the Serco Ltd Board, we are not prepared to accept the implication that documents relating to divisional Board papers had been understandably out of focus. As early as 9 November 2016, Peters & Peters had written, *"We have no doubt that you will have made extensive document requests of Serco, and so as well as emails will have had sight of all material prepared for and after Board Meetings of the Serco Civil Government Executive Management Team, Serco Technology and Business Group, and Home Affairs Group. Whilst these were not included in Mr Marshall's bundle, he cannot think of any specific documents that you are unlikely to have already, and as such has nothing which might assist you at present."* [Emphasis added]

247. In his response to us, [Case Controller] candidly admits, with the benefit of hindsight, he would have acted differently, particularly as regards the Stage 3 disclosure strategy and the failure to conduct a targeted review at that stage into the monthly Serco divisional review meetings to identify any gaps and, in particular, search for a full set of reports and minutes for the reviews held during the key period of the case. We agree. He now considers that *"both the prosecution case and the disclosure process would have been improved by identifying at that stage or earlier as complete a record available of the monthly Serco divisional review meetings and making any further enquiries necessary as a result. Importantly, this would have led to a re-review at that stage of the non-disclosed Home Affairs MD report and would also have provided a more complete picture of its context. The reviews conducted for Stage 3 disclosure were based upon*

search terms, custodians and time periods responding to the issues identified in the defence statements, but would have required a more thematic investigative review targeting the relevant meetings to provide a more complete picture."

248. He adds, *"This would have been resource intensive and would almost certainly have required investigative input from the case team at a stage when resources were being deployed reactively to meet court imposed deadlines and defence demands elsewhere ... The defence did raise the issue of board reports and minutes in a letter dated 6 November 2020 but this did not form part of the extensive legal argument concerning disclosure that followed, including the three day s8 hearing in December 2020. Subsequent correspondence from the defence focused upon the Serco Limited and Serco Geografix Limited board meetings (as opposed to the divisional board) and further focused reviews and enquiries were made in respect of these in the run up to trial as outlined in the prosecution response to the further s8 application dated 26 February 2021 ... The Serco divisional board meetings did not get the attention it required from the prosecution until the undisclosed Home Affairs MD report was raised at trial."*

Bag 1405

249. Following the response to the 13 April request, on 14 April 2021, the defence for Mr Marshall made further disclosure requests by email: *"Further to the below disclosure, please would you confirm the attendees at: (i) the SCG EMT meeting on or about 13 July 2011; and (ii) the Civil Government Q3 Board Meeting on 1 August 2011, and disclose any documents which might reasonably be considered capable of demonstrating who attended the meetings or what was discussed."*

250. Following the receipt of this request, the SFO carried out a search of the unused material. During this search process, it was discovered that a single 'digital bag' of unused material (Bag 1405) had not been the subject of the disclosure review process and items from this bag had not been scheduled.

251. Bag 1405 contained 9,008 documents, as indicated above, also taken from the mailboxes of Nadine Hambleton, Graham Cottrell and Elaine Bailey for the same period

(i.e., between 1 January 2010 and 30 April 2013) that were responsive to LPP search terms. These items were accordingly reviewed by independent LPP counsel, and 8,687 items were determined not to be LPP. Accordingly, those items were released from LPP quarantine on 29 April 2020. However, upon reviewing the disclosure request of 14 April 2021, the SFO discovered that the 8,687 items from Bag 1405 had not been reviewed for the purposes of relevance or disclosure following their release from LPP quarantine.

252. Once the issue had been brought to the attention of the SFO, Bag 1405 was subjected to review. This resulted in 2,079 documents being responsive to the search criteria set out in the DMD. When 'family' documents (e.g., parent emails and attachments) were included, this resulted in 4,458 items requiring review for relevance and disclosure.

253. The cause of the problem appears to have originated from a misunderstanding between [Disclosure Officer] and the technical team which processed digital material (the DRS Team). Emails shows that [Disclosure Officer] requested that, upon release from quarantine, the items in question be placed into the area of the DRS known as the 'Review Library'. In doing so, he was not aware that the DRS team had interpreted this to mean that that should be the sole location of the documents rather than also locating them in the 'Document Library', which acted as the central location of all un-quarantined documents held in respect of the case. Subsequent searches for the review were run over the Document Library and another area of the DRS system known as the 'Review Management Area' but not the 'Review Library'. As a result, the items were missed and were not included within the disclosure review.

254. Guidance was provided on 16 April 2021 to disclosure counsel for the review of Bag 1405. Particular emphasis was laid on material showing that the existence of the management charge was widely known within Serco and, in particular, that the defendants reported to those more senior than them regarding the charges. Reviewers were told *"Where reference is made to management charges/management fees/back-dated charges in any documentation associated with these meetings should be flagged for disclosure and brought to the attention of the disclosure officer and the prosecutor.*

Any reference to the practice of using charges from [Serco Geografix Ltd] (or [Technology and Business Group] within which [Serco Ltd] sits) to reduce the profit margin reported to the [Ministry of Justice], should also be flagged as disclosable in the same way."

255. The items were re-reviewed and disclosure of 39 items was made on 18 April 2021. The 39 disclosable documents concerned a separate Serco contract that had not featured in the review to date (Merseyrail). According to [Case Controller], the significance of these documents had yet to be fully investigated when the case collapsed but preliminary investigations suggested that the issue might not have been as significant as first thought.

Other disclosure issues

256. There were other disclosure issues in addition to the non-disclosure of the Home Affairs MD's Report and the failure to review the Bag 1405 items released from quarantine. They were:

- The apparent failure to include a number of items specifically requested by the defence as part of the Stage 3 disclosure review.[63]
- Items recorded as having been disclosed by the SFO which the defence claimed not to have received.[64]
- The failure to include the determinations from Bag 830 within the sub-schedules of digital material.[65]

257. Other items were identified as having apparently been incorrectly tagged during a QA review exercise conducted from 22 to 25 April 2021.[66] In particular, the QA process undertaken since the discovery of the failures to tag the Board minutes as 'refer – undermine or assist' revealed that, since 15 April 2021, further defence requests were

[63] Referred to at §5-6 of the Prosecution Disclosure Note of 19 April 2021
[64] Referred to at §4 of the Prosecution Disclosure Note of 19 April 2021. It was never resolved whether this was a prosecution or defence error
[65] Referred to at §10-14 of the Prosecution Disclosure Note of 19 April 2021
[66] Referred to at §16-28 of the Prosecution Disclosure Note of 26 April 2021

made for similar material to that originally identified. Those items were reviewed and considered to meet the disclosure test. Four items had not been tagged 'refer – undermine or assist' by [DRC 2].

258. On 24 April 2021, as part of the QA review then being conducted, [Case Controller] identified seven further items reviewed by [DRC 2] that were not marked 'refer – undermine or assist', and one further item reviewed by [DRC 1] . These were all emails with key attachments. The attachments were duplicated within the served material, but the emails were not and, it said, should have been marked for disclosure (i.e., tagged as 'refer – undermine or assist'). Because the SFO expected such items to be marked for disclosure, notwithstanding the fact the attachments featured elsewhere in the evidence, this raised further concern about the review work.

259. As a result of these discoveries, the SFO sought to scope out how the identified concerns could be remedied. They established that [DRC 2] had reviewed around 94,000 items and had marked around 24,000 relevant and around 70,000 not relevant (we deal with the exact figures below). Although the previous focus of the QA had been upon [DRC 2]'s application of the disclosure test, there was now also concern following a dip-sampling review of her relevancy determinations. This revealed eight further documents which had been marked as 'not relevant' which, in the opinion of the case team, were relevant. It was felt that the initial dip-sampling supported the possibility that [DRC 2]'s application of the relevance test might also have been unreliable.

260. A targeted QA re-review of about 3,500 items which was conducted revealed 19 documents which had been marked 'may be relevant' but were not marked 'undermine or assist'; it was said they should have been determined as disclosable. Two of those documents had not previously been disclosed to the defence. Nine of those items (including the seven items referred to above) were reviewed by [DRC 2]. Another reviewer, [DRC 4], was responsible for five of the items. Most of the documents identified in the re-review process had been served or disclosed previously. However, the team were of the view that the reviewers should have identified the documents as

having met the disclosure test and their failure to do so brought into question other documents reviewed by them.

261. [Case Controller]'s re-review had also identified another document reviewed by [DRC 1] , which should have been disclosed and had not been disclosed. Thus, in light of these issues, it was clear that the review determination failures might not be limited to just those that had been identified. We return to this topic in more detail later.

The particular tagging failures

262. [Principal Investigator] is a Principal Investigator at the SFO and has been in that role for nearly four years. He has worked on SFO investigations and has used the Autonomy DRS system for over ten years. His knowledge and understanding of Autonomy are drawn from that experience. He has been working on GRM02 since October 2017 and that has overlapped with GRM01. Additionally, while GRM01 was at trial, he was brought in to assist the GRM01 team with some of the disclosure challenges they were facing with reference to the use of Autonomy.

263. We invited [Principal Investigator] to review the audit data of each reviewer's work in the documents and report to us. Rather than attempt to replicate his report here, and for the sake of complete technical accuracy, we have annexed at Annex 5 to this report his GRM01 audit report dated 27 September 2021, as well as his Appendices A-E, which are the Autonomy DRS audit reports for the work of the reviewers on the relevant documents and their families.[67]

264. [Principal Investigator]'s report and the Appendices were sent to [DRC 2] and to [DRC 1] electronically for any comment they wished to make about them.[68] In [DRC 2]'s response to us, she says she was not involved in the review process, had not seen the instructions to [Principal Investigator], or the documents provided to him, and had not

[67] Appendix A ([DRC 3]), Appendix B ([DRC 2]), Appendices C and D ([DRC 1]), and Appendix E (full audit report))
[68] [DRC 2] and [DRC 1] were sent [Principal Investigator]'s previous draft dated on its face 18 September 2021. The annexed report is dated 27 September 2021 on its face which is the date [Principal Investigator] finalised the content. The only two other changes are the removal of the 'draft' watermark, and a correction to the year date on page 14 from '23 October 2020' to '23 October 2019'

seen any of his working papers or analysis. She said she had not seen the documents DOC3449198, DOC3449199, DOC3449203. Later in her response, she said "*the [Principal Investigator] Note is assumed to be accurate without me being given the opportunity of seeing the source data upon which it is based*." She said also she was relying on her recollection as she was limited to the documentation we had sent her.

265. The purpose of [Principal Investigator]'s report is set out at the beginning:

> *"1. The purpose of this note is to set out the following information:*
> *The data captured by the Autonomy Audit records in respect of three review counsel in connection with their work on GRM01 and specifically in respect of three families of documents.*
> *What conclusions can be drawn from the available data."*

266. We do not agree that [DRC 2] has not seen the source data or the analysis. The analysis is set out in great detail in [Principal Investigator]'s report and the source data is the audit data, which is to be found in the Appendices, in particular, in [DRC 2]'s case, in Appendix B. Moreover, [Principal Investigator] is not an expert witness in litigation but, at our request, has helped us as best he is able, given his lengthy experience with, and knowledge and understanding of, Autonomy DRS, within the confines of his remit. Therefore, we decline the invitation implicit in what [DRC 2] says to provide her with his working papers etc., in effect to convert this into a quasi-adversarial process. We are quite sure it will profit no one.

267. [DRC 2] told us she has no means of gainsaying the conclusions reached by [Principal Investigator], save as she sets out in her note. She told us:

> *"As will be apparent from what follows, I think there may be a degree of confusion on [Principal Investigator]'s part in the event that he considers it was part of my role as a Tier 1 reviewer to mark documents as "disclosable". The decision for disclosure is one that is made by the Disclosure Officer, Second Junior Counsel or the Prosecutor (paragraph 61 of the Disclosure Management Document).*

Whilst I therefore assume, but do not know, that the conclusions reached by [Principal Investigator] concerning the dates and times I accessed certain documents are accurate, I note that [Principal Investigator] has made no reference to the Disclosure Review Guide, the Updated Disclosure Strategy Document or the Disclosure Management Document and no conclusions have been drawn as to whether or not my review was in line with those documents and principles contained within."

268. She expanded on this later in her response. She told us *"A Tier 2 review would then be undertaken by others to decide whether a document was disclosable. In the papers which have been sent to me (I have no recollection of reading this document although it may have been provided to me) is a document produced by the Prosecution dated 1 April 2020 (Document 9) which describes the disclosure process as follows:*[69]

"59. The disclosure review, which is ongoing, has been conducted in two phases. The first phase is categorised as a "Tier 1 review". Disclosure review counsel and members of the case team reviewed documents using the DRS tagging panel. The documents were described with the assistance of standard templates to ensure clarity and consistency of descriptions. They were tagged according to the following categories in the DRS tagging panel: "May be relevant" or "Non-relevant" …

61. The second phase of the review has involved documents which had been marked as "may be relevant" and "refer- undermine or assist" at Tier 1 all being reviewed again by the Disclosure Officer, Second Junior Counsel or the Prosecutor.

62. These documents were reviewed to assess whether they satisfied the statutory test for disclosure i.e. it is relevant material which the prosecutor has in his or her possession or has inspected in connection with the case that might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the accused."

[69] This is the DMD

269. This, she said, reflected her understanding – *"the disclosure team was undertaking a first sift and others would undertake an assessment as to whether the document was disclosable"*. Later in her response, she added, *"The [Principal Investigator] Note states at paragraph 29*[70] *that "none of the three were tagged as meeting the disclosure test". Marking the document as disclosable was for the Tier 2 reviewer, not me. In any event, I do not recall there being a 'disclosable' tag."* Later still in her response, she continued, *"the purpose of the Tier 1 review was to mark documents as 'may be relevant' or 'not relevant'. It was not part of the Tier 1 review to mark documents as 'disclosable'. I do not therefore agree with the conclusions reached in the [Principal Investigator] Note in this regard ..."*

270. If all [DRC 2] is criticising is [Principal Investigator]'s use of the word 'disclosable', then we understand why she says what she does. We are however satisfied [Principal Investigator] understands the role of the reviewers, and the process, and was using the word as nothing more than convenient shorthand. Indeed, in his report where he deals with the tagging panel, he explains that the 'refer – undermine or assist box' *"… is a check box, which the reviewer should check if they consider that the item <u>might</u> meet the test for disclosure."*[71] [Emphasis added]

271. If, by her assertions, she means the task of disclosure review counsel at Tier One level was to identify items both for relevance and <u>potential</u> disclosability she is correct. If she means that it was no part of her function to do more than determine and tag items for relevance, then this is not what was intended or understood by the case team. We are clear from the DMD and the Document Review Guidance, as well as other documentary material we have seen and refer to in this report, that the disclosure reviewer at Tier One was expected to make an assessment essentially of two things: (1) relevance and (2) <u>potential</u> disclosability (i.e., 'refer – undermine or assist'). As we have said in a previous section, §61 of the DMD describes the second phase of the Stage 1 (initial disclosure) exercise, whereby the Disclosure Officer, Second Junior Counsel or the Prosecutor would review material that had been identified as <u>potentially</u> disclosable by

[70] This is in fact at §32
[71] Page 22

disclosure review counsel. It was not disclosure review counsel who decided disclosability within the test for disclosure. That was for the Disclosure Officer, Second Junior Counsel or the Prosecutor. Box 9 of the tagging panel instructions which are graphically copied into the Document Review Guidance deals with the determination whether an item tagged in box 3 as 'may be relevant' should be tagged 'refer – undermine or assist'. We have referred to it as 'potential disclosability'. As we have understood the position, the Disclosure Officer, Second Junior Counsel or the Prosecutor then made the Tier One determination on disclosability of the item in accordance with §61 of the DMD.

272. Furthermore, the Document Review Guidance included narrative instruction on both the relevance and disclosure test, which would have been otiose if disclosure review counsel's task did not include a review of relevance and of potential disclosability.

273. The Tier Two review on GRM01, as we have been informed and said before, describes the use of the Tier Two fields of the DRS tagging panel during the Stage 3 (continuing disclosure) review exercise following the receipt of Defence Statements.

274. Yet, [DRC 2] is not alone in claiming her role as disclosure review counsel was limited to the relevance test. [DRC 1] has informed us that she too understood her role was no more than to tag documents as 'may be relevant' or 'non-relevant'. In her response, [DRC 4] adopts the same approach to her role. All three point to the DRS tagging panel illustration in the Document Review Guidance which expresses the relevance determination box as 'compulsory', whereas the 'refer – undermine or assist' box is expressed only to be 'optional'. Other 'optional' boxes in the DRS tagging panel illustration in the Document Review Guidance at Tier One include 'refer to DFU (Digital Forensics Unit), 'potentially LPP', 'potential evidence' and 'sensitivity'. We are informed by [Principal Investigator] that the illustration in the Document Review Guidance is not how the DRS tagging panel appears when used in real time. He suggests that the word 'optional' was used to ensure that the tag was used only when appropriate. By contrast, he says the 'may be relevant', 'non-relevant' and 'undetermined' boxes at Tier One are

depicted in the Document Review Guidance as 'compulsory' as one of them will apply to every item considered by a reviewer.

275. We do however see that, if the Document Review Guidance was being followed religiously, not only were the words 'compulsory' and 'optional' apt to confuse, but also the Guidance document offered little practical help. We say that because we note also that box 3 of the DRS tagging panel illustration in the Guidance document at Tier One states:

> *"When a document is marked "**Determination – May be relevant**", Tier 1 Reviewer **MUST** consider whether the item falls within one of the 3 categories below in **SECTION (2)**:*
>
> - *Potential Evidence (tag 4);*
> - *Sensitive (tag 7);*
> - *Undermine or Assist (tag 9)."*

276. There was thus a serious contradiction of instruction between the mandatory direction in box 3 ('Section (1) – Tier One Review - Relevance Test') and the appearance of the word 'optional' in box 9 'refer – undermine or assist' ('Section (2) – Tier One Review'). [DRC 2] tells us she believed, therefore, there was no requirement to complete 'optional' boxes, which reflects [DRC 1] and [DRC 4]'s overall stance.

277. We refer below to an email from [Disclosure Officer] to the whole GRM01 disclosure team dated 26 November 2019 in which he set out, albeit briefly, core advice received from [Disclosure Counsel 2] on 25 November 2019 (for which also see below) about the reviewers' review work including suggested best practice when marking documents 'refer – undermine or assist'. [Disclosure Officer]'s email was sent at 16.25 that day. On the assumption [DRC 2], [DRC 1] and [DRC 4] received the email, given what they have said about their understanding of the limit of their role, it is difficult to comprehend how in light of the email's content they did not raise questions about their tasking. Indeed, [DRC 1] was re-reviewing the relevant Board document and email between 15.47 and 15.50 (UK time) on 26 November 2019, around half an hour before

[Disclosure Officer]'s email should have arrived in her inbox, an email in which it was implicit that marking documents 'refer – undermine or assist' was within the scope of her role.

278. Given what we learned, we sought assistance from [Principal Investigator] on what the review data on GRM01 shows. [DRC 1] reviewed 24,857 documents at Tier One. Of those items, on one occasion only did she tag a document as 'refer – undermine or assist', a rate of 0.00402%. [DRC 2] reviewed 93,394 documents on GRM01 at Tier One. Of those, only on 30 occasions did she tag a document as 'refer – undermine or assist', a rate of 0.032%. These are very low rates which could suggest that those documents they did mark 'refer – undermine or assist' were overwhelmingly potentially disclosable. However, it is difficult to comprehend why [DRC 2] tagged even 30 documents in this way if she thought it was not her job to do so. In [DRC 1] 's case, we cannot rule out a one-off error in the tagging by her of a single document in that way.

279. As a result of these figures, we asked [Principal Investigator] to search the data to see if these returns were representative among all the GRM01 reviewers. What he found was that the proportion of items being marked 'refer – undermine or assist' at Tier One among disclosure review counsel of very large numbers of documents was very low. The highest percentage rate belonged to [DRC 3] who reviewed 14,427 documents but only tagged 52 of them as 'refer – undermine or assist', which equates to 0.36% of them. There are, says [Principal Investigator], caveats to the data. Reviewers may have accidentally marked up GRM02 material as it shared the same area on Autonomy as GRM01 and some of the tagging may have been done earlier on in the investigation when relevance was the main, if not sole, consideration. There may be other caveats of which we are unaware.

280. This raised the further question how this disclosure review was in fact functioning. [Principal Investigator] informs us that sometimes the SFO start a review during the investigation stage of the case before they know who is going to be charged and with what offences. Under those circumstances, reviewers (normally document reviewers rather than counsel) are often instructed only to consider relevance and then, at its

broadest, the idea is to have items described and to filter out the clearly wholly irrelevant material. But that does not apply when the review is taking place later in the process and a proper determination can be made concerning the disclosability of an item.

281. We invited [Principal Investigator] to revisit the review date to ensure no mistake was being made. He looked more widely at the 'refer – undermine or assist' field at Tier One and found that 3,621 items had been tagged as 'refer – undermine or assist' but that the overwhelming majority of those (2,391) were marked by [a trainee investigator] working on the case for a period at that time), and the next highest (464) were marked by [Disclosure Counsel 2]. A further 4,169 were marked as 'undermine or assist' at Tier Two, but the data is problematic because it captures the work done by [Principal Investigator] and others after the discovery of the disclosure issues in April 2021, and so the data obscures the original review work. Moreover, material that was scheduled as relevant was subsequently disclosed following defence requests without the Tier One/Tier Two fields being updated. He found there were 22,793 items marked as having been disclosed that were not marked as 'refer – undermine or assist' at Tier One or 'undermine or assist' at Tier Two.

282. The claim by the disclosure review counsel from whom we have sought and received responses that they understood their role to be about relevance with no real emphasis on potential disclosability appears to be consistent with the review data on Autonomy. However, we are confident the case team did not intend or understand that to be the approach they were taking. If the reviewers genuinely misunderstood their role to be wholly or primarily limited to a relevance review, it suggests systemic failures of communication, tasking, training, guidance and/or oversight and monitoring.

283. In her original response, [DRC 2] maintained she had no recollection of the three items she reviewed. For context, she pointed out to us that in April 2020 alone she had reviewed documents for 168 hours over 24 days, and she provided her work log which supports what she says. She observes that the considerable length of Appendix B which covers her work from 19 April to 24 April 2020 bears witness to the sheer number of

documents she must have reviewed in the period.[72] She does not recall the methodology she adopted in viewing the documents.

284. Given [DRC 2] had not been sent the actual documents the audit data shows she reviewed, on 25 April 2022, she was sent the following:

- Email dated 13 July 2011 from Yvette Carter to Nadine Hambleton with the subject 'Home Affairs MD Report [I]' attaching a Word document titled *BU MD Report May June 2011.docx* and an image file title image001.gif (**GRM01B001453-48054-DOC3449198**).
- Word document attached to the email titled *Home Affairs MD's Report – June 11*, prepared by Elaine Bailey and dated 12 July 2011 (**GRM01B001453-48054-DOC3449199**).
- A .gif file containing Serco's logo that appears to have been a standard footer in Serco emails (**GRM01B001453-48054- DOC3449203**).

285. [DRC 2] was also given the opportunity to make any further comment she wished. On 28 April 2022, [DRC 2] responded *"With regard to the 3 underlying documents – the gif, email and report – thank you for sending those. I have no recollection of reviewing them and nothing to add to my submission provided on 18 February."* She has since informed us that her initial description of DOC3449199 was*: "2011/07/13 Report by Serco, by Elaine Bailey, dated 12/07/2011 titled 'Home Affairs MD's Report – June 11' prepared: SCG Home Affairs EMT for period: June 2011 – with the following headings: Executive Summary– Financial Performance; Operational Performance."*

286. We also sent [DRC 2] two additional documents which it is clear she had not been sent, as intended: the Woods Defence Statement dated 10 September 2020, and a document entitled *Instructions for Review on GRM01*, which was apparently attached to the email of 2 June 2020 (referred to above), both of which she pointed out were after her review in April 2020. She added that the latter document related also to a task which she was

[72] There are 20,464 entries, albeit multiple entries will often cover the same viewing

not asked to perform because *"as I understand it, the document relates to a Tier 2 review role to mark documents as 'disclosable' or not"*. We have already dealt with the possible confusion between the second phase of the Tier One review set out in §61 of the DMD and the Tier Two review at Stage 3 following the receipt of Defence Statements.

287. In the email of 21 September 2020 which [Disclosure Officer] sent to the disclosure team (also referred to above), of which [DRC 2] was then still a member, [Disclosure Officer] pointed to the fact that the team had received the Prosecution Case Statement and the two Defence Statements on 15 September 2020. The team was instructed to complete the sections 5-7 Tier Two determination fields on the tagging panel on Autonomy DRS in undertaking their work. Thus, assuming [DRC 2] received the email, she must have understood what was meant by this Tier Two review, which makes her comments to us about the limit of her function as disclosure review counsel difficult to understand.

288. In [Principal Investigator]'s view, despite initially reviewing the Word document for as much as 15 minutes, [DRC 2] did not tag it as 'disclosable' (to use his word) suggesting to him that she did not notice the reference to a backdated internal management fee or, if she did, failed to appreciate its significance. [DRC 2] for her part states that the mere fact she tagged the item as 'may be relevant' shows that she did appreciate its significance. If that is so, then it is difficult to understand why she did not also tag it 'refer – undermine or assist', whether she thought it an 'optional' requirement or not.

289. [DRC 1] , who has also received the [Principal Investigator] report and Appendices, was unable to comment on it, saying she had no recollection of reviewing the Word document. In her case, [Principal Investigator] says little can be drawn from her review. She appears to have reviewed each item individually. When considering the two substantive documents in the family she looked at both around the same time, suggesting she was using them to place each other in context. She even appears to have viewed the Word file in native format giving the best possible view of it. He thinks the fact [DRC 1] failed to tag the document as 'disclosable' (again to use his word) suggests

to him that she did not notice the references to a backdated internal management fee or, if she did, she failed to appreciate its significance.

290. Unlike the two other reviewers, [DRC 3] had tagged the relevant documents as 'may be relevant' and 'refer – undermine or assist', but subsequently undid the tagging. That might suggest that she had no misunderstanding about her role or what the Guidance meant. In their *Disclosure Note* to the court of 16 April 2021, trial counsel suggested this could only be explained by 'user error'. The only account from [DRC 3] is to be found in the *SFO Disclosure Note* to the court of 19 April 2021, in which is written,[73] *"The system does not record [DRC 3] reason for [changing the tagging] and she does not recall he reason. Given [DRC 3] original decision, [DRC 3] states that it is very unlikely that having assessed the document as being Refer Undermine Assist, she would then have reassessed it and changed her mind. The removal of the Refer Undermine Assist tag appears therefore to have been a mistake."*

291. [Principal Investigator] says it was impossible to reconstruct from the tagging history what [DRC 3] was thinking but he felt it could reasonably be inferred that, on 29 April 2020, she saw something in the Word document that made her conclude that it met the test for disclosure,[74] whereas on 4 May 2020 when she re-reviewed it for slightly longer, she did not see anything within the document that she thought met the test. He is of the view that given the time she spent looking at the documents and the fact that these tags appear to have been made on a single document basis, undoing her previous tagging appears to have been intentional. If so, the removal of the 'refer – undermine or assist' tag was not simple user error or a mistake.

292. Trial counsel sought to explain the reviews in their various notes to the court in April 2021.[75] There is very little between their assessment and [Principal Investigator]'s. It is

[73] §26

[74] When viewing the parent email for the Word document, [DRC 3] had entered into the free text box 'Reason for Undermine or Assist – Tier 1' the word *"Attachment"*. [Principal Investigator] thinks it can be inferred from this that she viewed the email as disclosable not because of its content but because she had tagged the attached Word document as disclosable. The positive inference we take from it is that she had tagged the attached Word document because she recognised its potential disclosability in light of its content

[75] SFO Disclosure Note dated 16 April 2021 (§9-10); Disclosure Note dated 19 April 2021 (§29-33)

remarkable that each reviewer omitted to tag or mistagged the same replicate documents, albeit in different ways at different times, but that is no more than coincidence. The April 2021 QA review process revealed other documents had allegedly been mistagged by two of these three reviewers.

293. [Principal Investigator]'s conclusions are, we think, as close as we are likely to get to a forensic understanding of what happened so far as the tagging issues are concerned. We are minded, however, to apply caution to his other conclusions as regards [DRC 2] and [DRC 1] 's work in light of what they say about the limit of their role, the contradictory nature of the content of the Document Review Guidance, and the possible inferences to be drawn from the GRM01 review data.

294. In the case of [DRC 3], the position is more complicated. She clearly did tag the document as potentially disclosable during her first review on 29 April 2020. [Principal Investigator] says it is impossible to say why she considered it to meet the test for disclosure and whether she had noticed the key sentence *"The primary reason for the upside is the backdated internal management fee charged to Electronic Monitoring England & Wales…"*. However, she had clearly understood the significance of the content of the Home Affairs Report from the fact she had used the free text box to write *"Attachment"*. We feel in her case it is more likely than not, albeit inexplicably, that she undid the tagging inadvertently, rather than intentionally.

295. [Deputy Disclosure Officer] is of the view that Autonomy DRS is a useful tool when used properly. He says that it can be 'clunky', but it is fit for purpose, and the SFO has successfully taken many cases to court using this system. He thinks it a very good for organising large volumes of material and creating an audit trail of who has done what with a document during the case.

296. We asked whether better designed alerts to warn reviewers of the consequences of using either tool was an idea he endorsed. [Deputy Disclosure Officer] said that the bulk-code button on Autonomy DRS must be selected in a drop-down menu, which is not a button that is easily pressed by mistake. He believes that the reviewers who bulk-

coded documents in this case intended to press the bulk-code button. The issue, as he saw it, was they had selected the wrong documents. As he puts it, *"No system in the world can detect that a user has selected the wrong documents, this is human error. This mistake would only be caught by having adequate quality assurance checks in place."*

297. However, based on what they tell us, this was not a case of them using the bulk-coding tool and selecting the wrong documents, any more than it was 'human error' in the sense the non-tagging was through inadvertence. On the basis of their accounts of the limitations of their role, they failed to tag the relevant documents, because it was only an optional requirement to do so. In contrast, [DRC 3] had originally recognised the significance of the document and had tagged it 'refer – undermine or assist', but we find later inadvertently, yet inexplicably, undid the tagging. Clearly, these failures had nothing to do with their ability, far less their use or understanding of Autonomy DRS, or the relevance or disclosure tests. Moreover, while far from ideal for an organisation like the SFO, we do not regard the limitations imposed by the Covid-19 pandemic as causative of, or contributory to, the failures. However, their descriptions were such that the relevant documents on the 31 July 2020 spreadsheet of unused material could not be identified as disclosable and, together with these failures, this contributed to the case collapse.

Axcelerate

298. Lastly, we are informed that the SFO is now using a new DRS system known as 'Axcelerate'. Some cases were commenced on the new system in May and June 2018. However, as we understand it, the SFO is still using Autonomy DRS because not all cases have been or can yet (if ever) be migrated on to the new system. [Deputy Disclosure Officer]'s opinion is that Axcelerate does have more advanced user rights. For example, document reviewers can no longer tag documents that are not allocated to them.

299. The new system, says [Deputy Disclosure Officer], has better workflow automation which makes it easier for teams to ensure QA reviews are carried out. We turn to the QA review in the next section.

Section 7: The Quality Assurance Process

Background

300. [Disclosure Counsel 3] gave an early warning about the need to pay attention to the QA process. In her handover note [redacted for GDPR purposes], she made clear *"Quality Assurance of the disclosure counsel product needs to be reconsidered. I began my reviewing everything disclosure counsel looked at, then by dip sampling their work, and provided feedback one-to-one and in team meetings. It has not been possible to continue to review 10% of their work as intended ... As mentioned in the 'red flag' section at the start of this paper, the task of quality assurance needs to be split across reviewers as it is very time-consuming, and the team will need to consider whether it needs to be done as a priority bearing in mind there are a lot of other priority tasks."*

301. The 'red flag' she had listed at the beginning of her note to which she was referring was her concern that *"almost all QA of other staff's work was conducted by me. Over-reliance on one person is always a risk. Going forward the team should spread the task of checking descriptions to mitigate against losing staff, also because there is far too much for one person to do. The Disclosure Officer should consider a focused period of QA after the main descriptions are done."*

302. [Disclosure Counsel 2] had only been involved in the case a relatively short time when on 25 November 2019 he produced a detailed document entitled *Note following a Review of the Undermine/Assist Documents*. He had reviewed all the items in the 'undermine or assist' folders, as of November 2018, and, where necessary, overturned the determinations.[76] Insofar as QA was concerned, he wrote:[77]

> *"<u>The need for further review</u>*
>
> *As I alone have now reviewed (and in some cases overturned) all of the documents marked u/a in the case, there will need to be some QA of my work in due course*

[76] [Disclosure Counsel 2] had continued this work (but for 15-20 documents) into 2020, as is evident from an email he sent [Case Controller] and [Disclosure Officer] on 28 June 2020

[77] §4-5 and Action 1

because, whilst one person reviewing all of the material brings a level of consistency which can be absent from a review conducted by many reviewers, it is not desirable for one person to have made the decisions without an element of QA being performed (this echoes the points made by [Disclosure Counsel 3] in her handover note).

As I have only reviewed items initially marked u/a (and the occasional family item), a QA check should be easily achieved by searching for items I have reviewed at Tier 1."

303. We make the general observation that if reviewers genuinely understood that marking items as potentially disclosable was a mere optional requirement on GRM01, then we find it hard to reconcile what the three reviewers have told us, and the detailed work [Disclosure Counsel 2] did in November 2019. Put simply, who had been making the 'undermine or assist' determinations as of November 2018 he had been working on?

304. [Disclosure Counsel 2]'s advice proved to be perceptive. [Disclosure Counsel 2] advised that once charging decisions had been made and the ambit of the prosecution case was clear, the reviewers need to be reappraised of the nature of the allegations and what was likely to undermine the prosecution case.[78] Trial counsel later reminded the SFO of [Disclosure Counsel 2]'s advice in an advice of 21 April 2021, which was designed to assist the SFO's preparation of a note on the QA procedures in respect of the anticipated criticism of the disclosure process.[79]

305. In his note of 25 November 2019, [Disclosure Counsel 2] also advised about the quality of the descriptions and gave other best practice examples. The most relevant best practice example directly related to the disclosure issues surrounding the three undisclosed documents. His advice had been:

"11. Most of the descriptions I reviewed were very good, however some reviewers had included phrases such as "may assist defence" in the description (rather than

[78] §7 and Action 2
[79] §1, 7-9

in a comments box). In my view, this should not happen as, for example, I have reversed some of the decisions that these documents are capable of undermining or assisting (e.g. when the document may have assisted another strand like overcharging which is no longer being pursued). If this type of phrase is included in the document description and is then marked as not disclosable but the description is not amended, this will create problems as it will appear on the unused schedule and cause the defence to ask questions. In my opinion, whilst this was a rare occurrence, the reviewers should be reminded not to include these types of comment in the document description field.

12. If there is any doubt about whether a document is u/a, in my opinion, the reviewers should copy the particular wording into the description. For example, if there is a particular phrase of potentially high relevance within a long email chain and a description of the general subject matter of the chain would not alert the defence to the presence of a short phrase that could lead them to requesting disclosure of the item, the key phrase should copied into the description and be placed in quotation marks. That way, even if the reviewers make the decision this item does not u/a, the defence will be alerted to the underlying wording of particular relevance and will be in a position to request material at a later stage. I would recommend that the reviewers be reminded of this option as it will assist when they come to describe the documents, many of which are yet to be described."

306. As counsel reported to the SFO in their advice of 21 April 2021,[80] the reason for the November advice was to cater for the very incident which arose in respect of the Home Affairs MD's Report, where the key phrase regarding the backdated management fee was not in the document description. In the case of the reviews by [DRC 2] and [DRC 3], their manual descriptions had been created after the November 2019 advice was provided to the SFO. In the case of [DRC 1] , we have assumed that her manual description was created before the advice, as her reviews had taken place on 23

[80] §23

October and 26 November 2019 (the day following the date of [Disclosure Counsel 2]'s note).

307. Trial counsel said in the advice of 21 April 2021 they were concerned that if the advice in the 25 November 2019 note were disclosed, it would raise questions, either that the advice had not been passed on to the reviewers or not in a sufficient way, as both of the reviewers approaching this task after the advice had failed to apply it or that there were instances of the reviewers failing to follow guidance and this had not been picked up by the SFO as part of its wider QA process.[81] It is notable that trial counsel must have been unaware of an email which [Disclosure Officer] has provided to us, dated 26 November 2019, and addressed to the GRM01 disclosure team. In it, he informed the team:

> *"As a result of some of the QA work being carried out, [Disclosure Counsel 2] our Disclosure Junior has made a number of recommendations to be actioned going forward (no need to change what you have already done):*
>
> *1. He has asked that going forward for all documents that are marked "may undermine or assist", you complete a short rationale in the "Reason for Undermine or Assist – Tier 1" field. This will assist future reviewers to quickly identify why a document has been marked this way.*
>
> *2. He has also suggested that as documents are looked at by more than one person, that any comments are preceded by the reviewers initials, so it is clear who made the comments. E.g. if I made the comment it would start "[Disclosure Officer's initials] - …"*
>
> *3. If you are instructed to do descriptions in future, do not include descriptions such as "may assist defence" in the document description field. If this type of phrase is included in the document description and is then marked as not disclosable but the description is not amended, this will create problems as it will appear on the unused schedule and cause the defence to ask question*

[81] §25

Items one & two are of immediate relevance and should be implemented forthwith. Item 3 will take effect if you are instructed to do descriptions."

308. [Disclosure Officer] accepts it was his responsibility to ensure document reviewers were sufficiently trained and briefed. The email, designed to inform the reviewers of what [Disclosure Counsel 2] had advised, is pithy but we think made the essential points. We are however unclear why Item 3 was not of immediate relevance when the reviewers were continuing to apply manual descriptions, as is clear from what counsel said in their advice of 21 April 2021. In relation to his 'undermine or assist' review, in a further note [Disclosure Counsel 2] produced on 28 November 2019 entitled *Note in relation to Production, Continuity and Outstanding Disclosure Issues*, he stated *"[Disclosure Officer] has already discussed some of the issues raised directly with the reviewers …"*[82] We take this to be a reference to the content of the 26 November 2019 email.

309. In a document headed *Action List 19 April 2021 – Board Minutes*, trial counsel noted:[83]

> *"19. In light of the issues that have come to light, we are of the opinion that there are grounds to require the SFO to provide an explanation to the court of the processes in place. We understand that, in principle, the following are safeguards upon the process:*
>
> *(i) Dip Sampling of the reviewers' work*
>
> *Whilst this is a common quality assurance process, we now understand that this has not been undertaken since 2019."*

310. On 25 January 2020, [Deputy Disclosure Officer] sent an email bearing the subject line 'GRM01 – checklist', among others, to [Case Controller] and [Disclosure Officer], saying, *"This a checklist of documents that (if kept up to date) will help you to manage the case throughout the trial process"*. Item 4 on the list was 'Quality Assurance Review'. It read:

[82] §40

[83] The document we have seen is in fact dated 20 April 2021 and the relevant paragraph is §21 not §19. We assume trial counsel were citing an earlier iteration of the Action List

"[Disclosure Officer] has dip-sampled the Serco material marked as non-relevant and saved his findings which were promising. <u>This now needs to be conducted for Serco material marked as relevant and for all material from other sources</u>. These dip-samples should also be done periodically going forwards when new material is reviewed by disclosure counsel." [Emphasis added]

311. When [Deputy Disclosure Officer] left GRM01 in March 2020, he provided a handover note in the form of an email dated 23 March 2020, bearing the subject line 'GRM01 – The Final Handover'. The recipients of it were [Case Controller], [Disclosure Officer], [a Grade 7 lawyer] and [Disclosure Counsel 2]. [Deputy Disclosure Officer's line manager] was copied in.

312. At the end of the email, [Deputy Disclosure Officer] wrote:

*"**Quality Assurance – [Disclosure Officer]***
This needs to be completed before the digital schedules are provided to defence but can be done after 1st April. A new decision log will also need to be drafted to record how we're conducting the QA.
At some stage we will be back in the office but give me a call if you have any queries before then."

313. [Case Controller] says of [Deputy Disclosure Officer]'s March 2020 advice that he *"did not specify how it should be conducted. I did not give [Disclosure Officer] any instructions concerning the form quality assurance should take"*, adding, *"I am unaware of any formal guidance in the Operational Handbook or otherwise, as to what form a quality assurance process should take and whose responsibility it is to conduct it. As the disclosure officer is responsible for the management and performance of the review, I consider that the disclosure officer is responsible for conducting some form of quality assurance process on the review."*

314. In [Deputy Disclosure Officer]'s view, the main weakness for the SFO is the lack of specificity in the handbook when it comes to QA reviews. He states, *"It needs a section*

which specifies how a quality assurance review should be conducted, the nuts and bolts of how it is actually carried out on the review platform and what needs to be recorded to ensure the review is CPIA compliant." We agree.

Counsel's note on Quality Assurance

315. In their *Prosecution Note on the Disclosure Process and Quality Assurance* of 22 April 2021, counsel set out for the benefit of the court a series of detailed facts about the QA process. They informed the court about the size of the review which had involved 1.9 million documents. They said:

> *"… it is not possible for the Disclosure Officer to review every item acquired during the course of an investigation in order to assess its relevance. Nor is it possible for the Prosecutor to review every item deemed to be relevant to determine if it meets the test for disclosure. Accordingly, the SFO has used a review team of independent barristers to conduct the primary review of material, managed by the Disclosure Officer in post at that time. <u>The responsibility of the review team has been to provide the initial assessment of whether any given item is relevant and, if so, whether it is then disclosable</u>."* [Emphasis added]

316. It is notable that as late as April 2021 trial counsel were asserting that the review team had not only been reviewing for relevance but also potential disclosability. The note then set out the documentation the review team was supplied (and the date of the supply) to support the reviewers:

a. Document Review Guidance (individually on joining from 2018[84] and the team was provided with an updated guidance document on 25 September 2020).
b. Case Summary and Case Statement (13 January 2020 and 15 September 2020).
c. Letter of Representations from those representing Mr Marshall dated 24 October 2019 (29 October 2019).
d. Defence Disclosure Notes from summer 2020 (21 September 2020).

[84] An extract from this guidance had been disclosed to the defence

e. Defence Statements (15 September 2020).

317. There was a section in the note on the frequent communication between the Disclosure Officer and the review team. Meetings were held fortnightly at a minimum. Issues would be discussed with the wider team and the Prosecutor. Minutes were kept. There was an email distribution list for the dissemination, or the seeking, of guidance. Following the Covid-19-related lockdowns, there were one-to-one meetings between the Disclosure Officer and members of the review team, as well as email communication. During this period the Disclosure Officer normally spoke to each member of the review team at least weekly, and he made himself available to the review team outside of standard office hours to ensure that they could seek guidance, when necessary, rather than waiting for a pre-appointed time. This meant that queries were resolved in real time and, if an issue was in doubt, the review team were instructed to pause reviewing items affected by the issue until it had been resolved and clear guidance issued to all reviewers.

318. Insofar as QA reviews were concerned, the note asserted that *"during the early, pre-charge, stages of the document review there were various ad hoc QA checks conducted by the then disclosure officer, in order to check that the review team had understood the scope of the investigation and were correctly applying determinations. This was continued by [Disclosure Officer] when he took over as Disclosure Officer in early-2019"*.[85] The note continued:[86]

> *"Shortly before charging of Nicholas Woods and Simon Marshall, a systematic QA exercise was undertaken in late 2019 to seek to provide assurance that all relevant material was being captured. For all Serco material being reviewed, a random*

[85] This has puzzled us. The note twice refers to [Disclosure Officer] becoming Disclosure Officer in early 2019 (at §4 and §9). This appears to be incorrect. [Case Controller] tells us [Disclosure Officer] was in fact appointed Disclosure Officer on 13 October 2017. Indeed, §22 of the DSD dated 13 October 2017 states *"[Disclosure Officer] has been appointed as disclosure officer on GRM01. [Disclosure Officer] is a Grade 7 lawyer with a background in criminal law and dual accountancy qualifications. He has been part of the case team since September 2016 and is familiar with the issues in the case. [Disclosure Officer] has attended the specialist disclosure officer training that is offered by the SFO."*

[86] §10

sample of at least 1% of each bag of documents reviewed and marked as non-relevant by each reviewer was re-reviewed by [Disclosure Officer]. 6,415 files were re-reviewed as part of this process.

In their instructions, the review team had been told to err on the side of caution and give the benefit of any doubt in favour of an item being relevant. The results of the QA process showed that the review team were correctly determining material as of 6,415 files re-reviewed, only 5 were disagreed with, an error rate of 0.08% (i.e. a rate of 8 documents per 10,000).

Given the very high accuracy rate it was decided that it would be disproportionate to continue undertaking formal QA exercise of this type. Instead, [Disclosure Officer] conducted random spot checks of the review team's work. [Disclosure Officer] had access to the bags the review team were considering and conducted spot checks against the work of all reviewers as well as reviewing particular items when reviewers raised particular issues. Where necessary, [Disclosure Officer] would provide feedback to individual reviewers and, if he identified an issue of general importance, he would email the entire review team. [Disclosure Officer] identified only limited issues during his spot checks and the issues identified tended to relate to being over-cautious with coding rather than failing to identify issues."

319. The note outlined the review that had been conducted following service of the Defence Statements. It said:

"Following service of the defence statements, additional search terms were developed and run based on the additional information within these statements, in order to identify any additional material that would be relevant to the case.

[…]

In addition, the documents that had been given a determination of 'Potential evidence' in the tier 1 determination, but which were not served as evidence or disclosed, were re-reviewed. The purpose of re-reviewing these documents was for the reviewers to reconsider, post-charge, documents previously deemed to have been significant, in case any materials remained significant evidence and/or were disclosable.

The documents were allocated to the review team along with copies of the defence statements, the defence notes regarding disclosure and updated guidance for the review. The Tier 2 review function was used to record the review."

320. This was a reference to the email [Disclosure Officer] sent the team on 21 September 2020, to which we have already referred. The documents listed in the final paragraph quoted above were sent to the disclosure team by email on 15 September and in the email of 21 September 2020, and the updated guidance was sent to them, it is believed, on 25 September 2020.

Observations

321. In her response to us, [Disclosure Counsel 3] observes that [Disclosure Counsel 2]'s review in November 2019 appeared to have only covered documents marked 'undermine or assist'. Her point was the quality of the review of those documents represented a very small risk to the case – the worst that would happen would be accidentally disclosing something that it had been unnecessary to disclose. It was, she said, not clear to her whether the review included items marked 'may be relevant' but not marked as 'undermine or assist', as to which there was medium risk because they could still be seen on the unused schedule. What she was unable to tell was whether he had performed any kind of review of the items marked as 'not relevant' because those represented the highest risk to the case, as they are not shown to defence at all.

322. [Disclosure Counsel 2] did not do so, but, from the further note [Disclosure Counsel 2] produced on 28 November 2019, it is clear that [Disclosure Officer] did. In the note,[87] [Disclosure Counsel 2] referred to over 6,500 Serco items marked 'not relevant' at Tier One that *"have now been dip sampled by [[Disclosure Officer]] … of the items reviewed only 5 have been changed to relevant by [[Disclosure Officer]] and these were regarded as borderline. Therefore, there is confidence that the relevance review performed has been conducted to a high standard."* This appears to be the source of the information that was provided to the court in counsel's note of 22 April 2021.

[87] At §43

323. In this regard, [Deputy Disclosure Officer] informs us that, shortly after [Disclosure Counsel 2] and he joined the team, they attended a meeting with [Disclosure Officer] and the reviewers in a meeting room at the SFO on 16 October 2019. [Disclosure Officer] had initially chaired the meeting and asked whether everyone had enough documents and upcoming holidays. [Deputy Disclosure Officer] recalled taking the lead for the meeting and asking the reviewers questions about what they were finding and their methodology. He could not remember the specifics of the discussions, but the reviewers told him how they were tagging the documents. They established that there were some disparities in what they were doing. [Disclosure Counsel 2] took a note of this meeting which we have seen. It shows [DRC 2], [DRC 1] and [DRC 4], among others, were present. [DRC 3] did not become a reviewer until February the following year.

324. After the meeting, [Deputy Disclosure Officer] discussed with [Disclosure Officer] the need properly to engage with the reviewers about what they were finding during their reviews on the basis that would develop consistent decision-making across the team and ensure everyone was up to date with how the case was progressing. He felt it was important for [Disclosure Officer] to begin a proper QA exercise. The documents marked 'non-relevant' were the highest risk to the team, as this material would not appear on any unused schedule, which is why he asked [Disclosure Officer] to prioritise dip-sampling that material.

325. The discussions at the meeting about what the reviewers were finding made it apparent that they might not be working consistently. In order to address the 'undermine or assist' documents, he recommended to [Case Controller] that [Disclosure Counsel 2] review those documents marked as *"Tier 1 – refer as potentially U/A"* to date and draft an advice that summarised what met the test for disclosure and what did not. The idea was for [Disclosure Counsel 2] to draft it and [Case Controller] to check it before it was circulated to the team as guidance about how they should be tagging documents.

326. [Deputy Disclosure Officer] recalled sitting with [Disclosure Officer] and explaining the process that he should follow. That was to:

a. Use the Master Schedule to identify similar bags which he could quality assure as a group.

b. Pull the documents up on Autonomy to establish how many documents those bags contained and then come up with a proportionate methodology (i.e., small bags with less than ten documents should have all documents reviewed whilst large digital bags would need a suitable percentage reviewed).

c. Once he had decided on a percentage of documents to be included in the dip-sample, he was then to decide on a methodology for selecting those documents. They agreed on sampling a proportionate number of documents that each reviewer had conducted (i.e., if John Smith had reviewed 30% of documents in a bag, then 30% of the dip-sample set would be documents reviewed by John Smith). He then set out how this needed to be recorded in a decision log, which was in fact signed off by [Disclosure Officer] on 16 October 2019 and countersigned by [Case Controller] on 26 November 2019.[88]

d. When conducting the review, he asked [Disclosure Officer] to keep a record of the documents he had looked at and the outcome of his review (i.e., were the documents correctly tagged/described; and if not, what action he was going to take).

327. [Deputy Disclosure Officer] thereafter asked [Disclosure Officer] to draft an initial decision log, which set out the proposed methodology for dip-sampling the 'non-relevant' Serco digital material. After [Deputy Disclosure Officer] had made several edits to the decision log, [Disclosure Officer] finalised it and carried out the review. He showed [Deputy Disclosure Officer] a spreadsheet in which he recorded the documents he had reviewed during the process.

[88] The case decision log records that where the number of files reviewed by any individual in a particular bag was less than 50, then all the files reviewed by that individual would be re-reviewed. Where the number of files reviewed by any individual in a particular bag was over 50, then 1% of files they had reviewed would be re-reviewed, rounded up to the next whole number (e.g., if 110 files were reviewed then two files would be re-reviewed)

328. [Deputy Disclosure Officer] says he explained to [Disclosure Officer] that the QA reviews needed to be carried out in case the review was ever called into question. He tells us that, on leaving the team, in his 23 March 2020 handover email, he told [Disclosure Officer] that he needed to continue doing this for the rest of the material reviewed (i.e., not just the Serco material deemed to be non-relevant).

329. [Case Controller] offers his view of [Disclosure Counsel 2]'s 25 November 2019 note. He says:

> *"The [Disclosure Counsel 2] note dated 25 November 2019 was intended to provide a detailed picture before a charging decision, of the material that had been identified during the review to date as potentially meeting the test for disclosure. From this note I was encouraged that reviewers were following the instructions to err on the side of caution in determining that documents may meet the disclosure test. Where [Disclosure Counsel 2] disagreed with reviewers in the note, this identified documents tagged for disclosure which in his view did not meet the test, but he did not raise a wider concern that reviewers did not understand the case. I understood that his recommendation concerning the provision of further guidance regarding the prosecution case would be followed and I am aware that reviewers were provided with the initial case summary following charge.*
>
> *In addition, [Disclosure Counsel 2]'s identification of the categories of documents for which 'Undermine/Assist' tags had been applied, reassured me that reviewers were identifying the correct themes from the guidance, including the defence points regarding the role of Serco management and the continuance of an existing practice. The reviewers were also provided with a copy of [Disclosure Counsel 2]'s note to reinforce these points and help inform the ongoing review."*

330. Of the 28 November 2019 note, [Case Controller] added:

> *"[Disclosure Counsel 2]'s further note dated 28 November 2019 at paragraphs 39-44 reassured me that the actions of substance from the earlier note were in hand*

and where urgent action was identified, such as the Deloitte material missing from the review, this was actioned at the time. In addition, [Disclosure Counsel 2]'s reference to the risk areas previously identified within [Disclosure Counsel 1]'s report,[89] *reassured me that appropriate action had been taken and I noted his conclusion that none of the matters raised in his note would require a delay to a charging decision."*

331. The documents reviewed by [DRC 1] and [DRC 2] had been tagged 'may be relevant' and were therefore scheduled on the 31 July 2020 non-sensitive unused material spreadsheet. This category of material was in [Disclosure Counsel 3]'s medium risk category because it was on the schedule and could be seen. What created the risk as regards the Home Affairs MD's Report, in particular, was that the descriptions [DRC 1] and [DRC 2] applied to the documents did not reveal its significant content. Similarly, the documents originally correctly tagged by [DRC 3] were also scheduled on the 31 July 2020 spreadsheet, but again the description did not reveal the content of the report.

332. It seems the defence did not identify any of the missed documents as inadequately described. We make perfectly clear this is not a criticism of the defence; far from it. We infer that the descriptions were so poor that the defence were unable to identify them as documents whose descriptions they ought to request be enhanced.

333. Insofar as the high-risk category goes (items marked as 'not relevant'), [Disclosure Officer] performed a dip-sample of them in late 2019, and that dip-sample returned an error rate of 0.08% (i.e., a rate of eight documents per 10,000). The view was thus taken that because of the very high accuracy rate, it was disproportionate to continue the

[89] This, we believe, to be a document authored by [Disclosure Counsel 1], entitled 'Outline Proposals for Report', dated 28 January 2019, the purpose of which was to draft the terms and objectives of a report for GRM01. The outline listed a series of risk assessments in relation to material held by the SFO, including in relation to the review process (had the material been properly identified and described; in the absence of engagement with the defence, how are potential/anticipated defences being considered during the review phase; should there be engagement with any of the suspects and at what stage; how does the review tale account of the changing nature of the investigation over time; is material re-reviewed; items marked potential evidence and undermine/assist; what process is in place for quality assurance of the determinations - dip-sampling)

formal QA exercise. Instead, [Disclosure Officer] conducted random spot checks of the review team's work.

334. For his part, [Disclosure Officer] does not agree with our suggestion to him that the QA process was not performed as intended. He tells us that *"dip sampling was undertaken on a regular basis. Formal records were not kept, but dip sampling was done frequently, on an ongoing continuous basis"*, adding, *"When a larger scale formal dip sampling exercise was undertaken the error rate was minute and after discussion with the case controller, it was decided it was not an efficient use of limited time resources to continue to undertake formal and recorded dip sampling"*. This is clearly a reference to the review he performed in late 2019.

335. [Disclosure Officer] accepted QA was his responsibility. He said he carried out the role under the guidance of the Case Controller. He stressed that he had not acted as Disclosure Officer before, and had not been involved in any prosecution, so he *"relied on the invaluable help and support of the case controller"*.

336. [Case Controller] told us *"I do not know why there was no recorded or systematic dip-sampling after the process conducted and recorded in late 2019. I did not task or enquire with [Disclosure Officer] or others specifically regarding a recorded or systematic dip-sampling after that point, because of priorities elsewhere in the case at that time."* Minutes of a meeting which took place on 25 April 2021 at which [Case Controller] was present (and to which we come in the next section) show he told the meeting that he knew nothing formal was being done as regards the QA review process after the end of 2019, which was *"something I take responsibility for but there was regular informal checking."*

337. There is a straight conflict of account between [Case Controller] and [Disclosure Officer]. [Disclosure Officer] says, "*after discussion with the case controller, it was decided it was not an efficient use of limited time resources to continue to undertake formal and recorded dip sampling."* [Case Controller] says he has no recollection of a conversation with [Disclosure Officer] in which the discontinuation of formal and

recorded dip-sampling was discussed. However, given the importance of the QA review and [Case Controller]'s knowledge of [Disclosure Officer]'s inexperience, we find it hard to accept that [Case Controller] left the decision-making to [Disclosure Officer]. On balance, we think it more likely than not in the circumstances that [Disclosure Officer] did seek [Case Controller]'s assistance with the QA review. [Case Controller] explains also that his mention of *"priorities elsewhere in the case"* was not intended to convey that he was disabled from tasking or enquiring of [Disclosure Officer] or others about it; rather he intended to convey as *"mitigation"* his preoccupation at the time with matters that were reactive and urgent. Nonetheless, he concedes, with what he knows now, that he *"allowed this to slip from his priorities"*, and he accepts that it was his responsibility to ensure that some form of QA review was conducted after the end of 2019.

338. [Disclosure Officer]'s review was limited to dip-sampling items marked 'not relevant'. Dip-sampling items marked 'not relevant' would not have unearthed the issue of the missed documents because each of the reviewers had tagged them as 'may be relevant', and so they appeared on the 31 July 2020 spreadsheet, albeit they were poorly described. But that is to miss the point of the terms of §64 of the DMD which represented, "*Documents reviewed in the Tier 1 exercise were dip-sampled by the Disclosure Officer to ensure consistency of the descriptions and the determinations."*

339. [Deputy Disclosure Officer] tells us *"In my opinion, this paragraph adequately represented the SFO's position at the time of service. It notified all parties of <u>what the SFO was intending to do</u>, (i.e., carry out a dip-sample of all the material reviewed by the SFO)"*. [Emphasis added] In fact, the plain language of §64 notified the parties of what the SFO <u>had</u> been doing, not what it intended to do. In our view, §64 was misleading. [Case Controller] concedes §64 "*should have been worded to reflect that the only formally recorded dip-sampling to have taken place at that stage concerned the relevancy determinations. Given this 'non-relevant' quality assurance process and the additional informal dip-sampling conducted by [Disclosure Counsel 3] and [Disclosure Officer], the paragraph is accurate, but it could have more precisely represented what had and had not been done at that* stage."

340. [Case Controller] tells us that the DMD was supplemented in correspondence. He points to letters of 8 June 2020 and 27 July 2020. While both deal with aspects of the DMD, neither covers the QA review.

341. We saw above that, on 25 January 2020, [Deputy Disclosure Officer] sent an email to [Case Controller] and [Disclosure Officer], and others, with a checklist. Item 4 'Quality Assurance Review' made clear that, having dip-sampled the non-relevant material, they had to turn to the relevant Serco material as well as material from other sources; and QA reviews had to be conducted periodically thereafter once new material had been reviewed.

342. This recommendation was not carried out. We have seen no evidence that documents were reviewed by the Disclosure Officer, as advised by [Deputy Disclosure Officer] in January 2020, *"for Serco material marked as relevant"* or in the language of §64 of the DMD *"to ensure consistency of the descriptions and the determinations."*

343. [Case Controller] asserts that "*Random dip-sampling is more effective in checking the adequacy of descriptions and whether categories of relevance are being applied correctly; it is easier to assess and compare the approach of reviewers to these areas and identify issues and inconsistency between them. <u>However, random dip-sampling is a blunt tool in assessing the quality of the assessment of the reviewer in referring a document as potentially meeting the CPIA disclosure test</u>".* [Emphasis added]

344. The difficulty with this viewpoint is this is not what §64 of the DMD stipulated. As we have just said, in the language of §64 of the DMD, the process of dip-sampling was designed *"to ensure consistency of the descriptions <u>and the determinations</u>."* [Emphasis added]

345. Indeed, §64 of the DMD did not discriminate between determinations of relevancy and potential disclosability, and the reader was therefore entitled to assume it applied to both. Moreover, §61 of the DMD was also not apt to rescue the situation, because (as

we have understood it) the second phase of the Tier One review only related to documents which had been marked as 'may be relevant' and 'refer - undermine or assist'. Thus, documents tagged as 'may be relevant' only but not marked as 'refer - undermine or assist' inevitably fell under the radar of the second phase of the Tier One disclosure exercise; and they fell also under the radar of the QA exercise stipulated in §64 of the DMD because, in the absence of guidance, its execution had been left to the discretion of the Disclosure Officer and, given our conclusion above, also the Case Controller, and to questions of proportionality.

346. [Case Controller] says, *"It would have been a matter of chance if a quality assurance process based solely upon random dip-sampling identified the disclosure failures that directly led to the collapse of the case. The larger the sample and the more resourced the QA review, the greater that chance becomes. However, in a large, complex case, even a well-resourced QA review based upon a random dip-sample, could easily miss a disclosure failing that raises significant issues for the case"*.

347. It is, we agree, inevitably a matter of speculation whether ongoing, periodic QA reviews of the descriptions and the determinations of the relevant Serco material would have revealed whether reviewers had not understood their role, and, in particular, had not tagged the Board minutes as potentially disclosable . We can never know whether such QA reviews would have revealed such issues with the disclosure exercise, but they might have.

Section 8: The Application for an Adjournment and the Ruling

Quality Assurance advice and review - April 2021

348. It is important now to set out in greater detail the advice provided by counsel and the action taken in the time following the discovery of the particular disclosure failings that led ultimately to the prosecution's lack of confidence in the disclosure review process on GRM01.

349. In the *Prosecution Note on the Disclosure Process and Quality Assurance* of 22 April 2021, to which we have referred before, trial counsel wrote, *"the Prosecution intends in order to provide further assurance, to conduct a further QA review of a sample of documents responsive to the following search terms run across materials held"* for a number of nominated custodians. Those search terms were 'EM' OR 'EMEW' OR 'EM(EW)' OR 'electronic monitoring' OR 'SGL' OR 'Geografix' OR 'Geographix' OR 'management charge' OR 'management fee' OR '500k' OR '£500,000' OR 'Financial Model'. They were targeted at communications regarding the management charge with or among senior managers. The note stated that the searches returned 10,138 documents. The proposal was for the SFO to undertake several steps in respect of those documents. Those steps were:

a. The SFO would completely re-review all 3,351 items that hit the search terms and were tagged as 'may be relevant' to ensure that they had been correctly marked as not disclosable.
b. The SFO would write manual descriptions for the 156 items that only had auto-descriptions at the same time as checking the disclosure determination.
c. The SFO would dip-sample at a rate of 1 in 10 the 6,787 items that hit the search terms but had been marked as 'not relevant' to ensure that they had been correctly marked as not relevant and not disclosable. [90]

[90] There was a 'non-relevant' tag but no 'not disclosable' tag on the DRS tagging panel. We assume what was meant by this was any item not marked 'refer – undermine or assist'

350. The trial was not to resume until 26 April 2021 due to the time needed by the prosecution to address the disclosure issues and the unexpected illness of a juror. Following a conference call of the GRM01 case team on Sunday 25 April 2021, Michael Bowes QC, Michael Goodwin QC and [Disclosure Counsel 2] provided the SFO with advice in writing dated that same day.

351. In the advice, counsel set out a potted history of the apparent disclosure failures by the three reviewers and noted that the judge's view was that the Home Affairs MD's Report was *"a highly significant document in the case"*. They noted that since 15 April 2021, further requests had been made for similar material; the material had been reviewed and considered to meet the disclosure test. It was noted that those items had been marked 'not disclosable' by [DRC 2]. As counsel had set out in the note to the court of 22 April 2021, referred to above, they had accordingly advised the SFO to conduct a re-review of all 'may be relevant' material responsive to certain crucial search terms within the mailboxes of key individuals, which amounted to around 3,000 documents. They had also advised a dip-sample of responsive material marked 'not relevant' amounting to around 7,000 documents to which, in the first instance, they had suggested adopting a dip-sample rate of 10%, resulting in a review of 700 documents. Therefore, the total re-review of this key area would involve a review of around 4,000 documents.

352. They explained they had considered that a targeted re-review of that key risk area (crucial search terms over key individuals) was preferable to a random dip-sample across the wider body of material as the results of any general such dip-sample were unlikely to provide comfort that the key material had been disclosed and the time for a random review had long since passed.

353. They noted (as we have seen in a previous section) that on Saturday 24 April 2021, [Case Controller], the Case Controller, had brought to counsel's attention seven items reviewed by [DRC 2] that were not marked for disclosure and one further item reviewed by [DRC 1] . They were all emails with key attachments; and although the attachments were duplicated within the served material, the emails were not and were 'double-edged' items, in the sense the defence were also likely to place reliance upon parts of

them. And given counsel's understanding that the instructions to reviewers regarding such items was to mark them for disclosure, the fact they were not so marked raised substantial concerns, notwithstanding the fact the attachments featured elsewhere.

354. The 25 April 2021 advice asserted their *"serious concern"* regarding the then unfolding picture about the disclosure process carried out by [DRC 2] both as to her relevancy and undermine or assist determinations.[91] As we have said before, counsel also identified [DRC 1] and [DRC 4] as allegedly having made errors in varying degrees. Preliminary results from the bespoke QA review of the approximately 3,000 items indicated that there were, in fact, as many as four reviewers who had marked material 'not disclosable' when the material should have been disclosed. The majority had been by [DRC 2] but that had only served to confirm counsel's suspicions about the wider review.

355. The advice also recorded their understanding that there had not been any recorded or systematic dip-sampling of relevant material to assess whether the disclosure test had been correctly applied. They advised that would be a normal process to detect issues with reviewers. They wrote: *"Whilst dip sampling may not always discover an issue owing to its random nature, this is widely regarded as a proportionate approach. As cases develop and/or reviewers review a larger sample of material, if no issues are detected, dip sampling rates decline. If issues are detected, rates may increase and the reviewer is given guidance on the issues detected."*

356. As counsel correctly observed, "*The idea of periodic dip sampling and the other disclosure safeguards is that these issues are detected during the course of the review when there is still time to remedy these, rather than at the end when it is too late to remedy and there is the need for substantial work to be re-done, especially when the quantities of material already reviewed are so vast that it is difficult to pinpoint where any errors have occurred."*

[91] §12

357. Counsel concluded that in light of "*the severity and widespread nature of these issues, we are driven to conclude that we have insufficient confidence in the disclosure process to proceed safely without a substantial re-review of the disclosure exercise in this case. It was clear from our conference call at 1pm that this view is shared by the SFO case team, who used those words to describe the present situation."*

358. They added:[92]

> *"Having discussed this with the GRM01 case team involved in disclosure, all agreed that the severity of the problem was such that it would not be safe to proceed with the trial unless such a substantial re-review had taken place. All present agreed that any such substantial re-review could not be achieved within the confines of this trial but would require a substantial adjournment and would result in very large parts of this disclosure exercise being completely redone.*
>
> ***Accordingly our firm and unequivocal advice is that the disclosure problems which have been discovered undermine the disclosure process to the extent that the trial cannot safely and fairly proceed until they have been remedied and that the necessary remedy cannot be achieved within the confines of the trial. As stated above, it was clear from our Conference Call that this view is shared by the SFO case team who took part in the call."***

359. In the advice, Counsel added *"At a bare minimum, there are significant concerns over two of the reviewers ([DRC 2] and [DRC 1]), but … there is the real possibility this extends to other reviewers. The fact the decisions by [DRC 2] and [DRC 1] are not 'one off' decisions and this concerns two independent reviewers suggests there is a significant wider problem that undermines the integrity of the disclosure process"*.[93] Their view was there would need to be a substantial re-review, in particular, of the work of [DRC 2] and [DRC 1] which could not take place within the confines of the trial.

[92] §25-26
[93] §32

360. Prophetically, counsel advised there was no prospect of the prosecution being given any further time to remedy the defects in the disclosure process. They suggested the possibility of a scoping exercise to understand the scale of the problem and design a proportionate response but, again, realistically, knew that that none of the scoping steps they had identified was reasonably capable of being resolved during the trial, let alone the consequent re-review, and a re-review only of [DRC 2]'s work would involve the re-review of tens of thousands of documents, which was not possible within the confines of the trial. Realistically, also, [DRC 1] 's work and the other two reviewers whose work was suspect would have to have been included in the re-review which would increase the task exponentially.

361. The advice also recognised there were additional systemic issues with the disclosure regime on GRM01:

a. Bag 1405 had only come to light when the Case Controller re-reviewed the initial disclosure review regarding the Home Affairs MD's Report after the matter had been raised by the defence. Had that not happened, the systems in place for detecting that Bag 1405 had not been reviewed would not have captured the error. In addition to the report, Bag 1405 contained other documents that were highly material and disclosable, including a Merseyrail minute, in which the CEO of Serco Civil Government commented on a *"company strategy"* which revolved around using management fees as part of *"transfer pricing"*. This accorded with issues the defendants raised in respect of the electronic monitoring contract.

b. On 24 April 2021, counsel were informed that it appeared the disclosure review in response to the Defence Statements (the Tier Two review) had generated some 300 documents referred for disclosure. However, the records indicated these had not been disclosed. It appears that subsequent checks had found that not to be the case and the referred documents had been subject to further review and had been disclosed where they met the test. Although this did not appear to be a live issue, the fact the processes were such that the status of those documents was

so uncertain, especially against the background of the Bag 1405 issue, raised in counsel's mind a further concern over the SFO systems.[94]

362. In their advice, counsel also set out the duties to which they were subject as counsel. They cited extracts taken from the Attorney General's Guidelines on Disclosure (2013) which were in force for much of the case, as the 2013 Guidelines contained greater detail regarding the duties cast upon a prosecution advocate than the 2020 Guidelines. It is important we reproduce them here, with emphasis added:

> *"35. Prosecution advocates should ensure that all material which ought to be disclosed under the Act is disclosed to the defence. However, prosecution advocates cannot be expected to disclose material if they are not aware of its existence. As far as is possible, prosecution advocates must place themselves in a fully informed position to enable them to make decisions on disclosure.*
>
> *36. Upon receipt of instructions, prosecution advocates should consider as a priority all the information provided regarding disclosure of material. Prosecution advocates should consider, in every case, whether they can be satisfied that they are in possession of all relevant documentation and that they have been fully instructed regarding disclosure matters. If as a result the advocate considers that further information or action is required, written advice should promptly be provided setting out the aspects that need clarification or action*
>
> *37. The prosecution advocate must keep decisions regarding disclosure under review until the conclusion of the trial, whenever possible in consultation with the reviewing prosecutor. The prosecution advocate must in every case specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to inspect further*

[94] As we have previously observed, there were three other disclosure issues that were referred to in the Prosecution Disclosure Note of 19 April 2021. This was an additional issue, as it was only discovered on 24 April 2021

material or to reconsider material already inspected. Prosecution advocates must not abrogate their responsibility under the CPIA by disclosing material which does not pass the test for disclosure, set out in paragraph 4, above."

363. Counsel's advice to the SFO was there were two essential options. **Option 1** was to apply to discharge the jury and seek an adjournment to remedy the issues. So far as option 1 was concerned, counsel's conclusion was the situation had been brought about by disclosure failings on the part of the prosecution. In their view, it would be difficult if not impossible to argue that it would be in the public interest or in the interests of justice to discharge the jury at such a late stage to permit the prosecution to remedy the defects and seek a retrial at some future date. They advised *"firmly against the SFO making any application to discharge the jury"*.

364. **Option 2** was simply to offer no evidence. Because in their view the disclosure failings could not be remedied within the confines of the trial and, at all events, the judge would rule it not to be in the interests of justice for the jury to be discharged, there was only one remaining option, which was for the prosecution to bring the proceedings to an end by offering no further evidence.

365. There was an important postscript to counsel's advice, which dealt with the merits of the case. We quote from the advice:[95]

"It is clear that the disclosure that has emerged has weakened the prosecution case.

In particular, we consider that the unused material from Bag 1405 provides strong support for the first defendant's case. This is because a substantial part of his case is that he was instructed by the CEO of Serco Civil Government to bring the profit margin down to bid margin. The prosecution case, in very short order, was that even if this had been the intention of the CEO, that this did not amount to an

[95] §71-74

instruction to invent costs and, even if it did, that would be no excuse for doing so as it would be obvious this was improper.

The first defendant's position is that he thought the use of charges was an acceptable part of company policy. The Mersey Rail document, which is dated within weeks of the CEO's instruction to the first defendant, strongly suggests that charges without any actual basis were "company strategy" for adjusting transfer pricing. This would accord with the first defendant's case.

Until this document came to light, prosecution counsel were unaware of any such "company strategy"."

366. [Redacted for legal professional privilege (LPP) purposes]

The hearing on 26 April 2021

367. On 26 April 2021, the prosecution made its application for an adjournment before Mrs Justice Tipples. They had provided the court with a note of that same date in which were set out, among other facts and matters, the detail of the disclosure and review process, the events that raised concern regarding the review, the Bag 1405 review, the investigation since 15 April 2021, the outcome and the current position.

368. The note asserted "*Taking its responsibilities, obligations and duties seriously, the SFO is of the view that the disclosure problems which have been discovered undermine the disclosure process to the extent that the trial cannot safely and fairly proceed until they have been remedied, and that the necessary remedy cannot be achieved within the confines of the trial*".

369. The note added:

"34. This case is primarily about protecting the public interest and the taxpayer. The allegations are extremely serious and the disclosure exercise is large and complicated as indicated by the fact that the SFO is represented by a team of four counsel. Given the seriousness of the allegations, the SFO requests that it is given

the opportunity to correct the disclosure failings and to have a re-trial in due course.

35. The SFO accepts liability for reasonably incurred wasted costs in respect of this trial.

36. The SFO accepts responsibility for its failings and will be considering how it can implement enhancements to avoid similar issues arising in future cases.

37. The SFO acknowledges that, until it has remedied the disclosure failings, it cannot be certain whether further disclosable materials remain unidentified. If any such materials are identified in due course then they would be disclosed and the Prosecution would assess their significance at that point in time.

38. There was a system in place for this disclosure process. However, as a result of human error, it was not followed.

39. Given the fast developing situation, the SFO does not know how long it will take to remedy the position and it needs to undertake a careful scoping exercise to decide exactly what steps will be required. However, it envisages that this will involve, at a minimum, new reviewers, additional checks and dip-sampling, possibly an audit of the process by a peer review team. The SFO will be considering any further safeguards which it can implement and would propose to report to the court as to our progress on scoping and remediation."

370. Michael Bowes QC read out the note in full, given the public interest in the events. In relation to the application for a discharge of the jury, the judge asked if she was entitled to take account of the nature of the prosecution case. Mr Bowes QC agreed she could, but it was subject to basic principles of fairness, and it was not an appropriate time to hear what would in effect be a submission of no case as the prosecution had not closed its case.

371. Although the prosecution had not put a time factor on the length of time required to re-review the material, Mr Bowes QC agreed with the judge's suggestion that such an adjournment could amount to more than a year.

372. In her ruling, given that same day, Mrs Justice Tipples, said she regarded the Home Affairs MD's Report as *"a highly significant document in the context of the case and particularly in light of the defence case statements which set out the defence consistently advanced by the defendants in this case."* She noted that the prosecution, in seeking an adjournment to review and remedy the disclosure process was *"a mammoth task"* and the SFO had been unable to identify how long it would take. She said that she was required to consider whether it was fair and appropriate to allow such an adjournment. She took into account the stage the case had reached, the age of the allegations and the nature of the prosecution case.

373. Having considered the prosecution application, the judge concluded it was not in the public interest to grant the SFO's application. The investigation had begun seven years previously, the defendants had been interviewed five years previously and midway through the trial the SFO had recognised *"a major failing in disclosure"*. There was uncertainty about how long was required before the matter could be resolved but it could well be over a year before the review process had been completed and the case listed for retrial.

374. The judge also voiced her *"real concerns"* in relation to the nature of the prosecution case against the defendants. [Case Controller] makes the reasonable point that the Home Affairs MD's Report had further significance as its identification at that stage of the trial coincided with the judge raising her concerns about the prosecution case with reference to 'false transactions'. She did acknowledge that she had not heard full legal argument from the parties and was not deciding the application on that basis, but added it was *"unrealistic to say it is not something that I have taken into account in reaching my conclusion"*.

375. Accordingly, the prosecution offered no evidence and the jury, in whose charge the defendants were, on the judge's direction, returned not guilty verdicts in respect of both defendants on all counts.

"The straw that broke the camel's back"

376. In the first of two responses made to us, [Disclosure Officer] said the 'elephant in the room' was the instruction of the accounting expert *"and if trial counsel had not insisted upon this, then more attention and resources could have been directed to the 'normal' disclosure issues"*. He said *"The fact that the disclosure officer was not involved in this very significant disclosure failure, or the attempts to rectify it, shows a significant failure to allow the disclosure officer to do his role. The fact the disclosure officer was not at court when disclosure issues were being discussed again highlights the way the role of the disclosure officer was undermined."*

377. He added he *"was not at court for any of the hearings in 2021, and therefore [redacted for GDPR purposes] I was only partially sighted on what was happening with disclosure. I was not in a position to properly carry out the role of disclosure officer as I was not provided with sufficient information to carry out my role. Trial counsel must shoulder a considerable portion of the blame for this case failing. They took the case team down a route of requiring them to get an accounting expert to say it was not permissible to make up figures to put in accounting documents. This was self-evident, and the contract Serco had with the Ministry of Justice required the use of actual costs and expenses in the accounting documents. By leading the team down this pointless exercise, it led to a situation where in late 2020 an accounting expert was instructed. That accounting expert provided a statement saying he had complied with his disclosure requirements, when it appears he had done nothing of the sort. This resulted in late 2020 and most of 2021 with the Case Controller and others - excluding myself - trying to deal with this torpedo to the case. This then gave the defence ammunition to attack the prosecution over its disclosure obligations. Thus the prosecution case was severely damaged before the defence even mentioned the relatively few documents allegedly mistagged by document reviewers."*

378. Later still, he asserted, *"The significant failings over the forensic accountant's declaration in relation to disclosure caused the Judge to lose confidence in the prosecution case, meaning that when the relatively small number of documents (out of the two million+ documents reviewed) were incorrectly tagged, the Judge had had enough. Once Judicial confidence is lost, it can never be regained. In this case the*

Judicial Confidence was lost by the serving of an unnecessary forensic accountant's statement with the obviously incorrect declaration in relation to disclosure. Neither the statement itself, nor the actions taken by the counsel and the case team were communicated to me, despite my being nominally the Disclosure Officer."

379. In his second response document, on the same theme, [Disclosure Officer] said that the instruction of an accounting expert led to *"perhaps the biggest failing in the case"* and was the matter which, in his opinion, seemed to give the judge the greatest cause for concern in the prosecution case. He stated that there was no need for the instruction of such an expert, and there had been disagreement about it between one member of the trial counsel team, in particular, and other members of the case team, including himself. We state unequivocally that we are not adjudicating here upon the correctness of the advice for the accountancy expert and therefore make no comment, far less criticism, about it. However, the issue cuts across the issues we are asked to review in this report, because of [Disclosure Officer]'s point that the expert had not complied with his disclosure obligations as an expert witness. He also says that he ([Disclosure Officer]) was not involved in what happened. What [Disclosure Officer] says is:

> *"The accounting expert signed a declaration that he had complied with his CPIA requirements. It is very clear that he had not done so, and the defence were very easily able to identify this. If the defence were able to identify this very promptly, then it raises a serious question as to why the case team did not identify these failings, or if they had identified the failings why they did not ensure they were rectified before serving the statement. One explanation may be that there were significant time pressures on the prosecution at this stage. If such a report was needed, which I do not accept, then the report should have been obtained far earlier and not left until the last minute."*

380. He added further:

> *"When the disclosure failings were raised in court, the defence understandably made significant play on this and the prosecution as I understand it sought to*

rectify the problems. Given that the problems related to disclosure issues, it is somewhat surprising that the disclosure officer was not involved in any of these matters. This was a matter that completely bypassed the disclosure officer and was dealt with by, I believe, trial counsel and the case controller and other lawyers on the case team. This effectively meant that as disclosure officer I could not do my job properly.

[…]

A further matter for note, is the huge cost of the forensic accountant's report and the cost in terms of SFO and Counsel staff time in dealing with the fall out of the expert's inaccurate declaration re his compliance with the CPIA requirements upon him. The sums of money paid to the forensic accountant for his report, and the SFO and counsel time involved in dealing with the expert's failings are of huge concern to me as a taxpayer."

381. [Disclosure Officer] then said:

"Whilst this case may have failed when the judge refused to allow the SFO an extension to sort out a disclosure issue, that was not the cause of the case failing. With the benefit of looking at this case with hindsight, it seems to me that the causes of this case failing are numerous. The disclosure issue that was before the court in April 2021 was the final straw that broke the camel's back. If other failings had not happened as outlined above, then it is almost certain in my view that this final issue would not have resulted in the case being dismissed.

[…]

The obvious failings on the disclosure requirements in relation to the forensic accountant's report appear to have caused the Judge to lose confidence in the prosecution case and once lost, Judicial confidence, in my experience, is never regained. Thus, the next issue that arose caused the Judge to throw the case out."

382. Given [Disclosure Officer]'s forthright opinion on this issue, we asked [Case Controller] for his recollection. He informs us that, in May 2020, the SFO decided to instruct an expert accountant to assist the jury in understanding the accounting terms and

principles within the evidence and to rebut any accountancy-based defence put forward by the defendants. Following a tender and interview process, [accountant] of BDO was formally instructed as an expert witness in the case on 14 July 2021. During the course of the proceedings, the SFO served a number of reports from [accountant] that culminated in a joint report dated 15 January 2021, prepared with two accounting experts instructed by the defence.

383. We are told that, from January 2021, the defence raised a number of complaints concerning the expert evidence based upon information disclosed to them by the SFO. The defence consolidated these into an application to exclude the expert evidence dated 8 March 2021, which argued that the expert reports did not comply with Part 19 of the Criminal Procedure Rules,[96] and that accordingly the evidence could not be introduced without leave of the court;[97] that much of the content of the reports was in any event inadmissible, since the opinion provided was inseparable from a series of conclusions on central and disputed questions of fact.

384. We need not set out the complaints and the alleged breaches of Part 19 asserted by the defence or the SFO response to them. The admissibility argument was due to be heard on Monday 22 March 2021. [Case Controller] tells us that over the weekend, prompted by a note from the defence, the parties communicated about whether a set of accounting principles could be agreed on the basis that neither the prosecution nor defence would call expert accounting evidence. Those discussions continued at court on 22 March 2021 and a statement of accounting principles was agreed. The hearing was vacated, and the agreed accounting principles were included in the judge's order. We have been provided with the judge's order of 22 March 2021 which bears out [Case Controller]'s information.

385. [Case Controller] agrees that the defence challenge to the prosecution expert evidence used time and resource. [Case Controller] however *"disagrees strongly"* with

[96] Part 19 of the Criminal Procedure Rules govern expert evidence. They cover, for example, the expert's duty to the court, the introduction of expert evidence and the content of the report
[97] Under rule 19.3(4)

[Disclosure Officer] that the expert issues 'sapped' judicial confidence or had any impact upon the outcome following the disclosure issues that arose later at trial. He adds *"It is not clear how [[Disclosure Officer]] can reach this conclusion as he had very little involvement in the proceedings related to the expert issues and was not at any hearings to gauge judicial confidence."* His absence from hearings in 2021 is one of [Disclosure Officer]'s complaints.

386. [Case Controller] adds:

> *"The later issues that arose concerning the non-disclosure of the documents and other disclosure issues were entirely separate and the by then resolved expert issues could not have had an impact on the outcome that resulted from these. In refusing the prosecution application for an adjournment, the judge referred to the additional non-determinative concern that she had taken into account. At no point did she refer to any issues concerning accounting, the expert or any loss of judicial confidence arising from these."*

387. It is clear to us that the issues between the parties about the expert evidence were resolved a week before the trial began by the agreement of the statement of accounting principles. [Disclosure Officer] contends that must have had a bearing on the judge's confidence about the disclosure process more widely with the revelation of the events in mid-April 2021. [Case Controller] is accurate when he says the judge made no mention of that issue when she gave her ruling on 26 April 2021. Moreover, the hearing transcripts of 15, 19, 22 and 26 April 2021 (which we have read) as regards the recent disclosure failings do not reveal the judge was concerned about the disclosure issues regarding the expert evidence. In fact, the only time the expert evidence was mentioned in those hearing transcripts was by the judge - not in relation to the disclosure issues but in relation to the way the indictment was framed.[98]

[98] Transcript for 22 April 2021 at page 32 line 23

388. There is thus no direct or, for that matter, indirect evidence that there was a loss of judicial confidence by reason of the expert evidence. The judge's ruling was expressly based on the stage the case had reached, its age, and the nature of the prosecution case. Had she also taken account of the disclosure issues expert evidence in arriving at her decision, we would have expected her to say so, yet she made no comment about it. We are therefore not persuaded by [Disclosure Officer]'s contention that there is some link between the final outcome of the case and the issues which arose over the expert.

Salvageability of the trial

389. The Terms of Reference invite us to consider whether more could or should have been done to save the trial.

390. We cannot fault counsel's advice or their reasoning. Prosecuting counsel and the case team more widely took not only what we think was a highly responsible approach to the problem that faced them, but also it was, in our judgment, the only approach available in all the circumstances. It was the prosecution's duty to ensure that the disclosure process had been robust, as well as properly and fairly conducted; ultimately it was the prosecution's duty to discharge its disclosure obligations under the CPIA. This, they were satisfied, they had not achieved, and could not sensibly achieve within the lifetime of the trial and while the trial was continuing. They rightly reached the conclusion that the trial could not safely and fairly proceed until the disclosure problems had been remedied. No one on the case team disagreed.

391. In our judgment, nothing more could (or indeed should) have been done to rescue the situation and the case.

Section 9: Conclusions, Lessons Learned and Recommendations

Conclusions

Identifying the failures

396. We invited [Case Controller] and [Disclosure Officer] to describe what they see as the failures in this case.

397. [Case Controller] believed it was a combination of factors that led to the collapse of the case but the failure to disclose the Home Affairs MD's Report including reference to 'backdated management fees' was the catalyst. The failure of three separate reviewers to identify the document as disclosable, and the documents not having been picked up by investigative searches, assurance processes, or the Stage 3 review, he said, significantly undermined his confidence in the safety of the disclosure exercise. He pointed not only to those failures but also to the failures to include the content of Bag 1405 within the disclosure review; the identification within Bag 1405 of a number of disclosable documents concerning a separate Serco contract that had not featured in the review to date (Merseyrail); the failure to include a number of items specifically requested by the defence as part of the Stage 3 disclosure review; items recorded as having been disclosed by the SFO which the defence claimed not to have received which was not resolved; the failure to include the determinations from Bag 830 within the sub-schedules of digital material; and the items identified as apparently incorrectly tagged during the QA exercise that was conducted from 22 to 25 April 2021. We agree these were all contributory factors that led to the collapse of the case.

398. [Disclosure Officer] says the key failure that led to the collapse of the case was the instruction of the accounting expert causing a loss of judicial confidence. We have covered that contention in the previous section.

399. The catalyst, as [Case Controller] puts it, was that, despite tagging the Home Affairs MD's Report 'may be relevant', [DRC 1] and [DRC 2] did not go on to consider and tag it 'refer – undermine or assist' for the attention of the Disclosure Officer, Second Junior

Counsel or the Prosecutor, as they did not consider it their role to do so. [DRC 3] had originally correctly tagged the document 'may be relevant' and 'refer – undermine or assist' but had later undone the 'refer – undermine or assist' tagging.

400. Although the relevant documents appeared on the non-sensitive unused spreadsheet of 31 July 2020, the descriptions did not highlight the significant content and so these documents were unidentifiable as disclosable material. Therefore, the material was never disclosed.

401. [Principal Investigator], who is an experienced, if not expert, user of Autonomy DRS, has examined the relevant Autonomy audit data for the relevant dates and documents, and has reached the conclusions set out in his report as to the likely methodology used by each of the reviewers. He also provides his rationale for the failure in the case of each of the reviewers to tag the report correctly, about which we have exercised caution, in light of what they have told us regarding their belief about the limit of their role.[99]

402. If [DRC 2] and [DRC 1] appreciated the significance of the Board document, they did not go on to tag it as 'refer – undermine or assist', given the apparent misunderstanding about their role. [DRC 3] had originally recognised the significance of the document and had tagged it as 'refer – undermine or assist', but we find later inadvertently, and inexplicably, undid the tagging. These failures have nothing to do with their ability, far less their use or understanding of Autonomy DRS or the relevance or disclosure test. However, poor descriptions were such that the relevant documents on the 31 July 2020 spreadsheet of unused material could not be identified as disclosable and, together with the non-tagging and mistagging, this contributed to the case collapse.

403. Both [DRC 2] and [DRC 1] claim their role was limited to a review of relevance and say that determinations of potential disclosability (i.e., the 'refer – undermine or assist' tag) was an optional requirement. While their experience on review work, not just on GRM01, renders this a remarkable proposition, the review data for reviewers of large

[99] See Annex 5 to this report

numbers of documents for GRM01 at Tier One might be argued to suggest [DRC 2] and [DRC 1] were not alone in thinking that their role did not, at least primarily, involve a determination of potential disclosability. Indeed, [DRC 4] supports what they say. If this is a sensible inference from the review data (which we are assured is accurate), then there is a serious conflict between the actuality of the disclosure review process and what the case team intended it to be. Moreover, it must follow that the whole disclosure review process on GRM01 is suspect.

404. We think the advisory and other written material we have seen, particularly that produced in the lead-up to the collapse of the case, suggests the case team did not understand the approach reviewers were taking to their task was limited to relevance. If the GRM01 review data is truly representative of a misunderstanding by disclosure reviewers of their role, it is alarming in the context of a disclosure review of this size and complexity. If disclosure reviewers of large numbers of items genuinely misunderstood the scope of their role, it leads inevitably to the conclusion there were serious systemic failures of communication, tasking, training, guidance and/or oversight and monitoring.

405. It is notable that [DRC 2] has no recollection of being under pressure in terms of time, or targets, whereas [DRC 1] recalled there being daily targets for the review of documents and at times their review numbers would be reported to them in meetings to inform them if their speed was sufficient. [DRC 4] said the rate at which they were expected to review documents was *"an uncomfortable, concerning and reoccurring theme in this case"*. [Disclosure Officer] informs us reviewers were being urged all the time to work faster and review more documents to meet deadlines. *".. in increasing speed, there is an increased risk of errors."* We agree that time pressures and targets can lead to error, but, if what we are being told is accurate, inadvertence does not account for the failure to tag the non-disclosed Board minutes as potentially disclosable.

406. The QA review process in April 2021 alleged other errors in [DRC 2]'s work. She was not alone in that regard. [DRC 1] and [DRC 4] had also allegedly made errors. We make clear that we have not re-investigated the SFO's April 2021 QA review process. We

cannot judge the significance of the numbers of apparent errors found following the QA review, given the limited dataset and the fact the case team failed to secure an adjournment to re-review the disclosure exercise. It was because of the team's lack of confidence about the disclosure process, in general, given the findings they had made, that counsel advised the wholesale review of the process, having considered the consequences to the viability of the case. We are mindful of what we understand to be the situation, that [DRC 2], [DRC 1] and [DRC 4] have never been asked about, or sighted on, the detail of the QA review in April 2021, far less had any opportunity to answer the underlying allegations. For that reason, we make no criticism about the findings in the April 2021 QA review process. Its sole importance for the purposes of our review lies in the effect the alleged QA review failures, together with the other historical disclosure failures, had on the SFO and trial counsel's confidence about the disclosure exercise overall, which led ultimately to the collapse of the case.

407. Annex 6 to this report is a paper we invited [Case Controller] to prepare which sets out the GRM01 disclosure figures. What it shows is that, as of 11 March 2021, 6,350,615 documents had been released on to the GRM01 DRS platform for review. 1,899,730 documents were given a determination on the Tier One or Tier Two GRM01 Disclosure Review Panel.[100] [Case Controller] states *"This figure best represents the total number of documents reviewed on GRM01 – namely, those that had a reviewer determination applied. The figure was the basis for the reference to 'approximately 1.9m documents' that was used in our note to the court dated 22 April 2021 which was also stated in court on that day. This figure was subsequently misquoted by the trial judge as '1.3m' in her ruling terminating the case."*

408. [Case Controller] adds *"67 reviewers have entered determinations on DRS, including case team members who conducted reviews of specific areas or assisted in the review. The vast bulk of the review however was conducted by the team of review counsel. The*

[100] In passing, we note that the figures [Case Controller] supplies at §5 for the Tier One determinations (1,897,641) and at §6 for the Tier Two determinations (41,540) are 39,451 documents more than the total at §4 (1,899,730), which are unaccounted for at §4. This might simply be an arithmetical error by [Case Controller] or an error in some of the figures. We have not sought further clarification as it was only the generality of the size of the review in which we were interested

total number of review counsel instructed was 15. The size of the team however fluctuated throughout the review, peaking at 9 reviewers which was the number during the main period of the review (not all of whom were full time)."

409. As we saw, [DRC 2] reviewed over 93,000 documents, [DRC 1] almost 25,000, [DRC 3] almost 14,500 and [DRC 4] almost 41,500 documents, apparently all on GRM01. Others reviewed far more.

410. §64 of the DMD stated *"Documents reviewed in the Tier 1 exercise were dip-sampled by the Disclosure Officer to ensure consistency of the descriptions and the determinations."* Its terms were misleading, as the QA review conducted by [Disclosure Officer] in late 2019 was only "*to provide assurance that all relevant material was being captured."* [101] Moreover, the QA review advised by [Deputy Disclosure Officer] in January 2020 *"for Serco material marked as relevant"* was never conducted, neither was the QA exercise he advised on his departure in March 2020. It ought to have been. There had been no QA review of relevant Serco or other material not marked 'refer – undermine or assist'. Although this category of material carried medium risk, it was the non-disclosure of this category that contributed to the case collapse.

411. The fact we cannot conclude that any QA review of the relevant Serco material would have revealed the review failings is none to the point. The QA process set out in §64 of the DMD and that advised by [Deputy Disclosure Officer] in his January 2020 and March 2020 emails were not conducted. These failures exposed the GRM01 disclosure process to the risk of unchecked error. The random spot checks conducted by [Disclosure Officer] did not close the gap left by the failure to follow the system in place (such as it was).

412. We are firmly of the view that the failure to carry out continued and periodic QA reviews of descriptions and determinations was a serious systemic failure, given it was the three reviewers' work on descriptions and determinations on the relevant Serco material that

[101] §10 of the *Prosecution Note on the Disclosure Process and Quality Assurance* dated 22 April 2021

catalytically contributed to the collapse of the case. It was not however simply a case of non-compliance with a system, we are also of the view that the QA review regime was insufficiently defined and lacked any robustness to avoid the review failures that obtained here. There was simply no failsafe.

413. Directly responsible for that systemic failure were [Disclosure Officer] as Disclosure Officer (whose responsibility the Quality Assurance process was) and [Case Controller], as Case Controller, for not following §64 of the DMD and the advice they had received from [Deputy Disclosure Officer] regarding the continuation of a QA review of relevant Serco material.

414. Indirect responsibility for the failure must be shared by Sara Chouraqui, the Head of Division, by virtue of her leadership role, as defined by the SFO Operational Handbook, and ultimately by the SFO, institutionally, whose QA review regime was inadequate and unfit for such a large and complex disclosure process.

415. Moreover, apart from §64 of the DMD, the process of a QA review was not defined in any disclosure guidance (internal or external) that we have found or been informed about. Both [Case Controller] and [Deputy Disclosure Officer] pointed to the absence of formal guidance in the SFO Operational Handbook. This left too wide an ambit of discretion in the hands of the Disclosure Officer and (given our conclusions about it) the Case Controller to determine the nature and extent of the QA review. We are told by Ms Lawson QC that the handbook is being rewritten to make it shorter, consistent and easier to update and understand. We believe that it is necessary to formalise and standardise guidance on the nature and scope of QA reviews. We make a recommendation about this below.

416. We have identified additional systemic problems, albeit we conclude that none alone or in combination caused or contributed to the collapse of the case, but they are nonetheless of real concern. They are:

a. The loss of [Disclosure Counsel 3] to the case in January 2019 was significant and left a vacuum that was never completely filled. She helped [Disclosure Officer] *"learn on the job"* with training and support. [Deputy Disclosure Officer] was brought in on GRM01 in October 2019, but only stayed for six months. He detected low morale on the team, in addition to having serious concerns about [Disclosure Officer].

b. [Case Controller] had concerns at the time about staffing and resources; this became more obvious with hindsight. [Disclosure Officer] agrees: the case was not sufficiently resourced internally and externally in terms of numbers. He says the case from the outset was *"starved of resources"* and there was a large turnover of staff.

c. [Disclosure Officer] had concerns about the limited number of reviewers they had for the volume of documents and the time pressures that were put on individual reviewers. [DRC 1] informed us about daily targets and [DRC 4] recalled the rate of review being *"an uncomfortable, concerning and reoccurring theme in this case"*. Restrictions on recruitment around the time of the Covid-19 pandemic prevented ten document reviewers who were interviewed by [Disclosure Officer] in early 2020 from joining the review team to relieve some of the pressure on reviewers by describing documents. [Case Controller] says they attempted to obtain internal resource to fill this role but were only able to obtain the services of a few reviewers for a short period in this way. [Disclosure Officer] says the lockdown due to the Covid-19 pandemic prevented new reviewers being instructed, as the SFO was unable to issue laptops or provide the necessary training to them. The SFO does not agree with [Disclosure Officer]'s characterisation of the laptop position.

d. The Performance Monitoring scheme as set out in the Managing Counsel guidance was ineffective, if not chaotic, before Sara Lawson QC insisted on the proper use of the scheme. Following her appointment as General Counsel in May 2019, case teams were actively chased for PMFs.

e. The backdating of, and failure to provide evidence for, several PMFs in March 2020 relating to two of the reviewers means that that it is impossible to know (and we do not speculate about it) whether contemporaneous monitoring of the

performance of those reviewers would have revealed the kind of issues that led to the non-tagging and failures to disclose which could have been identified and resolved before they occurred.

f. We are informed that the backdating of PMFs was endemic at the time. We understand the desire for compliance with the PMF regime for all reviewers, however the request for, and completion of, backdated PMFs without any or any contemporaneous evidence was a perfunctory and meaningless exercise. The true gravamen of the backdating of the seven PMFs for [DRC 1] and [DRC 4] is that in their case, there is no contemporary, evidence-based assessment of their work over a two-year period between 3 November 2017 and 3 November 2019.

g. It is also impossible to know (and we do not speculate about it) whether, had the PMF and PPR scheme been effective in earlier years, any of the three reviewers who had previously worked for the SFO would not have been recruited on GMR01. We make recommendations about aspects of the scheme below.

h. While the SFO did have facilities in place for telephone conferencing, the SFO's IT capabilities failed to meet the impact on ordinary working caused by the Covid-19 pandemic restrictions which commenced in March 2020.

417. We accept the Covid-19 pandemic was an exceptional event, and that security implications for the SFO and its IT infrastructure delayed implementation of video conferencing for many months. We have some sympathy for [Disclosure Officer]'s 'lived experience' around this difficult time, but the pandemic restrictions and their impact do not provide an explanation for the particular disclosure failings in March/April 2020 and cannot do so for failings in October/November 2019.

418. We have previously outlined [Disclosure Officer]'s experience of the Autonomy DRS system; it was, he says, unreliable and would produce different results when searches were run and produced results that were not right because there were issues with the IT equipment. Because of this, he says he had no faith in the Autonomy system to produce accurate figures on searches. He adds this case made virtually no progress for at least three years because of a lack of resources. He tells us also that the length of time it took from a bag of material being booked in by the case team to appearing

on the system could take months which hindered progress. He recalled instances where the SFO was provided with material by a witness on password protected disc or on some other format. However, by the time the material came to be ingested, the password, which was time-limited, had expired. He believes there needs to be an appropriately resourced DRS and Evidence Handling Management Office (EHMO) system to ensure bags of evidence are processed in a timely manner; an appropriately trained and resourced DRS team to ensure that LPP material is quarantined as appropriate, made available promptly for LPP counsel to review, and released promptly when determined not to be LPP.

419. The SFO's inability to recruit during the Covid-19 pandemic is also of real concern. We are mindful of the issues of understaffing and a lack of resources both [Case Controller] and [Disclosure Officer] have told us about. No recommendation from us will make any impact on the funding arrangements between government and the SFO, but we do wish to record that we consider the organisation's IT systems, staffing and resources to be of fundamental importance if the SFO is to maintain its status as the premier agency for the prosecution of economic crime in England, Wales and Northern Ireland.

Roles and responsibilities

420. We are satisfied that the roles and responsibilities of the trial counsel team were sufficiently clearly articulated, and they understood their role. Leading counsel was a very senior, very experienced and highly regarded member of the Bar. The first junior, Michael Goodwin QC, who took silk in 2019, and the second junior, [Disclosure Counsel 2], were both also very experienced and respected practitioners.

421. However, if what we have been told is right, members of the disclosure review counsel team did not understand their role, which is remarkable, given the three members of the disclosure review team we have focused on ([DRC 2], [DRC 1] and [DRC 4]) were experienced reviewers, and understood how to use Autonomy DRS.

422. In the case of the fourth reviewer on whom we have focused, [DRC 3], what she lacked in experience she made up for in terms of ability. Her promotion to the trial team as

third junior/disclosure junior in November 2020 was based on her all-round knowledge of the case and her ability. There is no question in our mind about her understanding of the relevant tests or the training she received which we can safely assume followed the format outlined in [Disclosure Counsel 3]'s note.

423. [Case Controller] was an experienced member of the GRM01 team and had previously worked on SFO cases. [Disclosure Officer] was, by his own frank admission, inexperienced, having never before joined a case team at the SFO and it was his first time as part of a prosecution team. He had no previous experience of working with Autonomy DRS or on SFO prosecutions. He needed support, and he clearly felt sidelined, unsupported, (we think) exposed, and he now appears resentful about it. [Disclosure Officer] told us also that the introduction of members of staff at various stages of the case such as [Deputy Disclosure Officer]'s work in relation to disclosure or other lawyers who towards the end worked on the issue of the forensic accountant's failure to comply with his disclosure obligations *"undermined the role of the disclosure officer and made it impossible for the disclosure officer to discharge his duties."*

424. [Deputy Disclosure Officer] registered his concerns about [Disclosure Officer] to [Case Controller] and [Deputy Disclosure Officer's line manager] when leaving the team in about March 2020. His concerns were serious: that [Disclosure Officer] did not understand what was required of him as Disclosure Officer on a case of that size and, that, if they did not make a change, they would risk the case regressing into the state it was in before he joined the team. [Case Controller] states a replacement for [Deputy Disclosure Officer] was found, and [a Grade 7 lawyer] joined the team, but, says [Case Controller], he did not have the skills and was unable to support [Disclosure Officer]. If accurate, then the lack of support added fuel to [Disclosure Officer]'s sense of marginalisation.

425. [Case Controller] tells us he felt [Disclosure Officer] was the most appropriate case team member to be appointed to the role of Disclosure Officer, adding there were only a small number of SFO employees who have acted as Disclosure Officer during a prosecution, and they are usually reluctant to repeat the role. [Case Controller] says

experienced Disclosure Officers are *"a rare and sought-after resource"* and typically a case team member is appointed from the available resource and learns the role on the job with appropriate training and support. This approach is wrong-headed. [Disclosure Officer] was ill-equipped to do the job he was given on such a large and complex case, and according to him unsupported. He should never have been put in that position, and neither should the case team and the case.

426. Part 2 of the relevant Operational Handbook also requires the Disclosure Officer to have sufficient skill and authority, commensurate with the complexity of the investigation, to discharge the disclosure functions effectively. In our view, [Disclosure Officer]'s inexperience should have disqualified him from appointment as Disclosure Officer on such a large and complex case. His perception of being marginalised and undermined is troubling. If he is being accurate, far from enjoying sufficient authority, he lacked authority. [Redacted for GDPR purposes]

427. The Case Controller and the SFO, institutionally, must bear responsibility for appointing as Disclosure Officer on GRM01 a person who was much too inexperienced to fulfil the role, which we find was a serious failing. Ms Chouraqui tells us she did not appoint [Disclosure Officer], and at no time was his performance brought to her attention. [Case Controller] acknowledges that while [Disclosure Officer] had appropriate training for the role "*greater opportunities for bespoke disclosure officer training may have enabled [Disclosure Officer] to obtain some additional skills and improve his performance, particularly concerning the management of the review."* [Case Controller]'s comment appears to us to be tantamount to a concession that [Disclosure Officer] was not in an optimal position to perform the crucial role he had been appointed to perform.

Disclosure guidance

428. It is clear to us that the disclosure reviewers had an embarrassment of internal disclosure guidance documents designed to assist them. We question how much of it really assisted them in practice. We think they had far too much disparate, detailed and voluminous internal guidance documentation over time, risking a loss of important messaging, particularly as regards focus on the real issues in the case. Despite its

volume, we have examined all the internal guidance we understand the team received. Subject to the comments and recommendations we make in this report, they were nonetheless technically compliant with the law and guidance set out in the CPIA, the Code made under the CPIA, and the Attorney General's Guidelines etc, and to that extent were fit for purpose. The Document Review Guidance document included contradictory guidance, as we have commented before. Moreover, we have not found any clarity about what the disclosure reviewers in fact received and read. We feel it is important that the SFO devise a system for auditing and certifying what they have received read and understood. We make a recommendation about this below.

429. We were also frustrated to find that hard copy documents we saw did not bear the dates they were signed off and document versions were not obvious. We are confident that these documents were held in electronic folders and therefore their distribution to members of the disclosure team by email could be audited. Be that as it may, even though the documents were created and stored electronically, it would be helpful for their date and version number to be found on the document itself rather than having to rely on the date of sending or its digital properties. As an example, we were provided with different hard copy versions of the Document Review Guidance. It was not a simple thing to work out which was the up-to-date document, because the hard copy versions we had were not dated. The electronic version indicated the correct version was dated 5 July 2017. We have assumed that it is the most up-to-date version.

430. We have previously noted that, if 5 July 2017 was the latest version of the Document Review Guidance, the list of non-exhaustive examples of material that might meet the test of disclosure was as of July 2017 and apparently never updated. We noted that none of the examples given in the Document Review Guidance made explicit reference to material suggesting that the use of management charges was a longstanding established practice, reflected Serco company policy, and was known and understood at the highest level of Serco management.

431. It is true that the review team was provided with other guidance documents to aid their task, as well as the Marshall letter of representations of 24 October 2019 provided to

the reviewers on 29 October 2019, and later in September 2020 the review team received the Defence Statements. However, those were documents provided by the defence and they were detailed and factually very complex. [Disclosure Counsel 3] says, that while, overall, the guidance documents did provide the information disclosure review counsel needed to conduct the review, *"I would also have broken down the defence statements into a table of issues, and I would have made the list of categories of material likely to be disclosable more prominent, perhaps by having it as an annex that reviewers could have kept up on screen or printed out as an aide memoire".* There is no evidence that this was considered or done.

432. The Stage 3 guidance which was provided to the reviewers in late September 2020 following the receipt of the Defence Statements did however contain a list of disclosure topics, including that the management charges were merely a continuation of established practice. By then, however, the failures regarding the Home Affairs Report had occurred and the Stage 3 process never captured the missed documents either.

433. [DRC 2] points to the fact of her instructions changing during the review by reference to emails sent to the disclosure team on 2 June 2020. The change was from backfilling descriptions in June 2020 to three months later in September 2020 being told to cease descriptions, following the receipt of Defence Statements and the start of Stage 3 of the disclosure exercise. [DRC 1] (who had stopped working for the SFO In March 2020) recalled the guidance changing in the early years, both verbal and by email. [Disclosure Counsel 3] told us that to get through the material more quickly the team had been instructed to review some of the Serco data without entering descriptions. She considered there would always be a point at which they would have to come back and enter descriptions. This proved to be prescient. However, it inevitably added to the pressures the team was placed under.

The collapse of the case and its salvageability

434. We agree with [Case Controller] who believes it was a combination of factors that led to the collapse of the case, but the catalyst was the failure to disclose the Home Affairs Report. However, the timing of the application to adjourn cannot be ignored.

435. The case had begun at the end of March 2021, two months later than originally intended. The discovery of the non-disclosure took place two weeks into the prosecution case. The then Director of the SFO had accepted the case for investigation in late 2013. The defendants had been interviewed under caution in 2016. Although counsel did not suggest the length of time the prosecution required to re-review the disclosure process, Mr Bowes QC did not dissent from the judge's estimate that it might take a year. Any judge would view that as an unconscionable length of time in which to fix a problem of the prosecution's making, while the two defendants remained in jeopardy. Had the judge acceded to the application, and had the re-review in fact taken a year, the retrial would have commenced more than eight years after the investigation had begun, and more than six years after the defendants' interviews.

436. Moreover, it is perfectly clear that the judge had real concerns with the nature of the prosecution case, albeit she did not decide the application on that issue alone. The re-review the prosecution sought could not be sensibly accommodated in any sensible timeframe.

437. [Case Controller] and Adrian Darbishire QC [leading Counsel for Simon Marshall] agree there was other material to similar effect to the Home Affairs MD's Report that formed part of the prosecution case, with several similar references to backdated management fees and management charges in documents. As we have previously observed, the missed Home Affairs MD's Report was not the only disclosure issue the prosecution had discovered. Together, they contributed to the prosecution's lack of confidence in its own disclosure process, and to the substance of the failed application to the court to re-review the process.

438. Nothing more could (or indeed should) have been done to rescue the situation. The counsel and case team rightly reached the conclusion that the trial could not safely and fairly proceed until the disclosure problems had been remedied.

Postscript - Deferred Prosecution Agreement

439. Before we come to the lessons learned and our recommendations, there is one other issue that we must deal with, as it has been raised by [Disclosure Officer] in his response to us. It concerns the charging of the defendants following the Deferred Prosecution Agreement (DPA).

440. In [Disclosure Officer]'s view, the decision to proceed to charge individuals, made by senior management at the time of the DPA was a wrong decision. He says they were not proceeding against the senior managers and those responsible for the conception of the fraud. They were only ever going to proceed against junior managers who received no benefit from the crime, and, he added, almost certainly would not receive anything more than a non-custodial sentence. This decision, he claims, was made because of the perceived criticism the SFO would attract for entering a DPA without convicting individuals.

441. He informs us that at the time of the DPA he attended a meeting with Mark Thompson, who was then Chief Operating Officer, where he raised his concerns as to whether the SFO should pursue individuals or whether they should stop the case. He says there were several other people at the meeting including the Case Controller and the Head of Division. Views differed across the case team. Mark Thompson said that the SFO would be pursuing individuals because of the backlash that would appear in the media and from fraud watchdogs if the SFO did not pursue them. [Disclosure Officer] says it struck him as allowing the tail to wag the dog and only prosecuting because of concerns about what the media would say rather than making decisions for good legal reasons applying the Code for Crown Prosecutors. He says he was aware that other people shared concerns about the viability of the prosecution against the individuals, whether on evidential grounds or based on the relatively low level of punishment that would be imposed.

442. We asked [Case Controller] to comment on these allegations, given their seriousness. He tells us there are no minutes or notes of a meeting as described by [Disclosure Officer], nor of any other occasion when he aired this concern. [Case Controller] says he has no recollection of him stating such concerns in a meeting or otherwise.

443. Highly significantly, and the principal reason we raise this issue in this report at all, is because as [Case Controller] astutely observes if [Disclosure Officer] had these concerns at the time, he did not record them and raise them as Disclosure Officer for potential disclosure.

444. [Case Controller] states that the decisions to enter into a DPA and to charge individuals were made in accordance with the DPA Code and the Code for Crown Prosecutors, following careful evaluation of evidence and advice from counsel. In doing so, the appropriate evidential and public interests tests were applied at each stage. In assessing individual culpability and the proportionality of prosecuting individuals, the advice and charging decision took into account evidence of internal commercial pressure regarding the reporting of margins to the Ministry of Justice, the knowledge of others concerning the management charges, the defendants' lack of direct financial gain and the fact that a corporate resolution had already been achieved. The conclusion reached was that, notwithstanding these factors, the individual culpability of the defendants was high and that it was in the public interest to prosecute individuals through whom serious corporate offending was committed.

445. [Case Controller] adds the defendants were not 'junior managers', as asserted by [Disclosure Officer]; Nicholas Woods was the Financial Director of the Serco division responsible for the electronic monitoring contract and Simon Marshall was the Managing Director of the area under which the contract sat. Both were statutory directors of Serco Geografix Ltd. The evidential evaluation was that the defendants were the most senior employees participating in the fraud and, in advising that a prosecution of the defendants was in the public interest, counsel referred to the defendants' leading roles in serious criminal conduct. Referring to the Sentencing Guidelines for Fraud, counsel advised that the defendants would be sentenced on the basis of high culpability and the level of harm would fall into Category 1.

446. A second reason we raise this issue here is because Mr Darbishire QC in his note to us criticises the SFO decision to charge the defendants following the DPA, rightly acknowledging that this issue risks straying beyond our remit, saying:

> *"The principal lesson of Serco can only be learned if the SFO asks itself some hard questions about the process which led to the manufacture of a flawed case against an individual, in order to suit the convenience of a DPA. It was abundantly clear that there was simply no process by which the case agreed between the company (on behalf of its non-trading subsidiary) and the SFO was tested."*

447. We agree totally with [Case Controller]. If [Disclosure Officer] had genuine concerns that the defendants had been wrongly charged in the sense that the two-stage test set out in the Code for Crown Prosecutors had not been applied properly or at all, as Disclosure Officer, he should have recorded it or raised his concerns for potential disclosure. He might also have escalated his concerns to the Director. [Disclosure Officer] states that he raised his concerns about the case throughout its lifetime. If so, that is a very different thing from a serious claim that the Code had not been applied properly or at all. That he appears neither to have recorded it nor raised those concerns for potential disclosure, but has made that claim to us, apparently for the first time, is troublesome. We accept what [Case Controller] tells us that the defendants were charged according to the advice received from counsel and according to proper prosecutorial processes, so, even if Mr Thompson was being mindful of the potential for a media backlash in not charging individuals, it had no bearing on the advice and charging decision-making process. We prefer the detailed account [Case Controller] has provided us.

Lessons learned and recommendations

448. During her appearance before the Public Accounts Committee on 9 February 2022, Lisa Osofsky, the Director of the SFO said:

"We did a deep dive into the cases we had and put more controls around our quality control and quality assurance system. We also rolled out an advanced training programme to make sure that everybody who was dealing with disclosure understood the rules."

449. In view of this, we invited the General Counsel, Sara Lawson QC, to inform us about what the SFO had in fact put in place since the collapse of the GRM01 case.

450. In summary, we are informed that the QA review process was identified as a problem of management. Staff were reminded about the rules on disclosure, it was made clear that difficult conversations could not be avoided, that staff must ensure disclosure was conducted properly and disclosure issues were communicated to senior management before they became insurmountable.

451. John Carroll, Chief Operating Officer (now retired), as line manager of the Heads of Division, organised a QA check on all active criminal cases, prioritising those at the pre-trial stage to determine whether all was in order or if remedial action needed to be taken. This was conducted by case teams and checked by Heads of Division. A full checklist was devised. It included the Heads of Division having to conduct dip-samples. The results of this review were fed through each week, then bi-weekly, in Mr Carroll's reports to the SFO Executive Committee (ExCo).[102]

452. Ms Lawson QC also had meetings with case teams to check on disclosure. She saw their DSDs and DMDs, where appropriate. They were examined, and all case teams were asked to make them more relevant to the issues in a case so that the defence could either agree them or seek change to them which, she says, contrasted with the previous habit of simply repeating what the law was rather than specifying what issues had been looked for. She also encouraged teams to chase up insufficient Defence Statements and to raise such issues with judges, if necessary.

[102] The constitution of ExCo has been the Director of the SFO, Sara Lawson QC, Michelle Crotty and John Carroll

453. The SFO also drafted updated instructions to counsel which is now included in the SFO's letter of engagement and was to be sent to all currently instructed counsel. We append these new instructions to this report at Annex 7. The aim of this document was to remind counsel of their responsibilities as prosecution counsel (and not simply for disclosure counsel) and that they share in the responsibility for disclosure and that they should satisfy themselves that disclosure has been conducted sufficiently well when they open a case at trial. It was also designed to remind them to bring any concerns they have on disclosure to the attention of the case team.

454. We have covered the SFO Operational Handbook above. Finalisation of it awaits this report and the Unaoil review being conducted by Sir David Calvert-Smith.

455. The training regime has been improved. Basic disclosure training is being delivered to all document reviewers and will continue to be rolled out to new staff. Basic CPIA training is being provided to non-operational staff. The SFO has implemented mandatory Advanced Disclosure training to all Disclosure Officers, as well as the creation of bespoke disclosure training for Heads of Division to assist them with their responsibilities in the handbook for assuring the disclosure process. Much of the training is also being recorded so that new starters can see it when they start, rather than having to wait for an in-person or team course to be arranged for them.

456. The SFO has created and appointed disclosure champions on Operational Divisions to assist with practical problems. The SFO already has a disclosure working group. There has been standardisation of the case drive structure, disclosure review management documents and 'master schedules' to enable systematic tracking of the processing, review and the QA of items. A Disclosure Officers' Forum was relaunched to provide a forum for Disclosure Officers to share information and best practice, as well as to discuss disclosure issues. It also has a well-being function. A Tier One reviewers' forum has also been established to provide a space for document reviewers to share best practice and promote general well-being.

457. We are told that Ms Lawson QC and Mr Carroll invited every document reviewer and all counsel working on disclosure on SFO cases to meet them. There were several meetings over several weeks, given the number of people involved. They imparted the message, we are told, that they valued the work they did, despite knowing it was often a thankless, boring, and lonely task, but that it and they were vitally important and, if they had any issues, they should raise them. Ms Lawson QC emphasised that, whilst it was a matter for each case team to organise, she expected disclosure reviewers to be involved in regular meetings, if not weekly, to discuss progress and issues, and to keep under review what the issues were and what they were looking for. They both offered to speak to the reviewers personally if they had any further issues and we are told a number contacted them to raise issues which were dealt with. We are satisfied these measures, which, significantly, include QA reviews of active criminal cases, are sensible and appropriate, and will go some way to avoiding the conditions that led to the failures in this case.

458. We invited the views of some the individuals who were directly involved in the case on the lessons to be learned, given their knowledge and experience of working on SFO cases and systems. We also invited from them suggested recommendations. We are particularly grateful to [Case Controller], [Disclosure Officer], [Disclosure Counsel 3] and [Deputy Disclosure Officer] for their views, some of which are coextensive, and in some instances go beyond what the SFO already has in place. We have been assisted by them.

459. We are sure [Case Controller] is correct when he says that the key lessons to be learned from GRM01 more widely are the importance of the disclosure review to the delivery of the SFO's core objectives and recognition of the time and resource required to get it right; the essential role of the Disclosure Officer and disclosure reviewers to this delivery and the need to build this into the SFO's strategy on recruitment, internal deployment, support and training. He also identifies the need for an effective line of communication between the prosecution team and the reviewers; and the need for standardised processes of assurance as well as affording time and resource to apply the same consistently to cases.

460. We agree with [Case Controller] who says there are no 'silver bullets' that will avoid future such failures, and that any recommendations can only mitigate against the risks of them happening again. Mindful of this, we make the following recommendations:

461. **Recommendation 1:** the remuneration for disclosure reviewers is not reasonable remuneration for the work done, or expected to be done, and should be increased to bring it in line with other equivalent organisations.

462. **Recommendation 2:** the SFO must continue to consider the means by which it can adequately staff and resource case teams to ensure, so far as possible, that undue time and resource pressures minimise the risk of human error.

463. **Recommendation 3:** the SFO should consider the resourcing of its Document Review Systems and Evidence Handling Management Office to ensure the timeliness, efficiency and accuracy of the ingestion and processing of bags of evidence for review by case teams.

464. **Recommendation 4:** the SFO should consider ways in which staff may be incentivised to take on the roles of Disclosure Officer and Deputy Disclosure Officer to increase the pool of able and experienced candidates and improve staff retention in those roles.

465. **Recommendation 5:** the SFO should increase the training and support available to Disclosure Officers by (a) deploying Disclosure Officers on non-charged cases to assist Disclosure Officers on charged cases, especially when the case is close to or at trial in order to augment the available resources where needed most (b) in addition to mandatory Advanced Disclosure training, provide Disclosure Officers with bespoke Disclosure Officer training, focusing upon the management of the review and of reviewers (c) only appointing sufficiently trained and experienced Disclosure Officers and (d) appointing sufficiently trained and experienced Deputy Disclosure Officers, where appropriate.

466. **Recommendation 6:** the SFO should revise the Operational Handbook to introduce standardised methodologies for the disclosure process, as well as introduce management, oversight and monitoring regimes to ensure that the disclosure process is conducted and audited to the same standard across all case teams.

467. **Recommendation 7:** the SFO should revise the Operational Handbook to include a standardised model for the conduct of Quality Assurance reviews, which ensures (a) that Quality Assurance reviews are compliant with the law and guidance on disclosure and (b) that Quality Assurance reviews are robust, reliable and proportionate.

468. **Recommendation 8:** in modelling standardised Quality Assurance reviews, the SFO should introduce a system of regular and routine inspections and audits of the disclosure process on active cases at key milestones by someone not only sufficiently experienced in disclosure but also independent of the case.

469. **Recommendation 9:** the SFO should invest (or continue to invest) in technology to ensure that document review and case management systems are obtained, designed and developed with a focus on the disclosure process.

470. **Recommendation 10:** the SFO should invest (or continue to invest) in technology that ensures that case teams can work and meet (and continue to work and meet) securely and remotely online, including adopting back-up/failsafe systems and procedures for exceptional working circumstances, such as those that existed during the imposition of Covid-19 restrictions.

471. **Recommendation 11:** the SFO should ensure that it recruits case teams with sufficient technical skills, and, following initial training, provides continuing refresher training, which should be compulsory, in particular, in respect of its Document Review Systems, data management and disclosure law and guidance.

472. **Recommendation 12:** the SFO should consider providing Case Controllers, Disclosure Officers and Deputy Disclosure Officers with project management training and support in order to improve the management of case teams, time and resources.

473. **Recommendation 13:** the SFO should ensure mandatory compliance by case teams with performance monitoring of all instructed counsel to include (a) Periodic Performance Reviews and (b) the use of the Performance Monitoring Form, as required by the current Managing Counsel guidance.

474. **Recommendation 14:** the SFO should review and, if so advised, revise the Managing Counsel guidance and training for all those engaged in the instruction of counsel. In particular, the SFO should consider whether the Managing Counsel guidance should be revised so that direct responsibility sits (a) with the Disclosure Officer for the monitoring of the performance of disclosure review counsel and (b) with the Case Controller for the monitoring of the performance of trial counsel, while the Case Controller bears overall responsibility to ensure the holding of Periodic Performance Reviews and the completion of Performance Monitoring Forms.

475. **Recommendation 15:** the SFO should consider redesigning the Performance Monitoring Form in particular as regards its applicability to disclosure review counsel, to include as additional key performance indicators (a) the nature and the volume of the work counsel has conducted monthly since the last performance monitoring round (b) the accuracy of all aspects of their review work and (c) the letter of engagement to counsel should be redesigned to include a section on Performance Monitoring.

476. **Recommendation 16:** the SFO should ensure that (a) its internal generic disclosure guidance documents are reviewed, simplified, rationalised, regularly revised and updated (b) they offer reviewers not merely technical but also real practical guidance (c) its case-specific disclosure guidance is regularly reviewed, revised and updated and focuses on the known and foreseeable issues in the case (d) the SFO employs a standard form of version control bearing the date and a unique version number for all internal guidance documentation (e) each case team maintains an audit record of the

detail of the guidance documentation provided to its disclosure review counsel (document version number, date and recipient) who should be invited to certify on a dedicated form what they have read, when they did so and that they have understood the guidance and (f) those certifications should be attached to the Disclosure Management Document and any amended Disclosure Management Document.

477. **Recommendation 17:** the SFO should ensure that the representations made in the Disclosure Management Document about its approach, processes and intentions - whether past, current or future - are accurate and complied with. Where appropriate, the Disclosure Management Document should be updated (if need be, by way of a supplementary document) to reflect any changes and/or developments in the approach or process, as well as in the relevant and/or live issues in the case. It should operate as a living document, ensuring complete transparency and defence sign-up to approach and process. It should serve to gain and maintain the confidence of the court, the defence and the SFO itself in the disclosure process.

478. **Recommendation 18:** the SFO should ensure that it encourages and engages with the defence in the disclosure process. Disclosure should be treated as a two-way street, so that engagement identifies and focuses on the real issues in the case, in order to direct defence disclosure requests and prosecution reviews.