

## UNDERCOVER POLICING INQUIRY

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### SIXTH PRELIMINARY HEARING: LEGAL PRINCIPLES TO BE APPLIED TO APPLICATIONS FOR RESTRICTION ORDERS SUBMISSIONS ON BEHALF OF SECRETARY OF STATE FOR THE HOME DEPARTMENT

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#### Introduction

1. These submissions are made on behalf of the Secretary of State for the Home Department ('the Secretary of State') for the purpose of the sixth preliminary hearing, which is to identify the legal principles to be applied to applications for restriction orders.<sup>1</sup> It follows that these submissions are confined to issues of principle and do not address the factual basis of any application that the Secretary of State may in due course make.
2. These submissions have taken into account the witness statement of Paddy McGuinness dated 21 January 2016; and Inquiry Counsel's Note. Further, the Secretary of State has seen in draft the submissions of the Metropolitan Police Service ('the MPS') and the National Crime Agency ('the NCA'); and has seen the submissions on behalf of the National Police Chiefs Council on the principle of Neither Confirm Nor Deny dated 21 January 2016.
3. In light of the comprehensive submissions made by Inquiry Counsel and the core participants identified above, the Secretary of State has confined her submissions to the core issues.

#### Summary of the Secretary of State's position

4. The Secretary of State's position may be summarised as follows:
  - (a) The Secretary of State accepts that, save in exceptional circumstances, the route for the consideration of public interest issues in this Inquiry should be s.19 of the Inquiries Act 2005. See paragraph 9, below.
  - (b) Material may be withheld on public interest grounds under either s.19(3)(a) or 19(3)(b) and the Inquiry should apply the same three stage test (relevance; damage; the *Wiley* balance) under both limbs.
  - (c) For the reasons set out in the witness statement of Paddy McGuinness, the policy of 'neither confirm nor deny' ('NCND') is necessary to preserve the effectiveness of law enforcement techniques, including those of the police. This is a weighty public interest.

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<sup>1</sup> See paragraph 40, Costs of Legal Representation Awards Ruling, 16 December 2015

- (d) The application of the NCND policy is a sub-set of PII and requires a balancing exercise in any given case. However, any departure from the policy must not be made in such a way as to undermine the effectiveness of the policy as a whole.

### **The role of the Secretary of State in relation to policing**

5. Annex A to this document sets out the role of the Secretary of State in relation to policing and provides the context in which these submissions are made. In short, the Secretary of State is responsible to Parliament for ensuring the overall efficiency and effectiveness of the police in England and Wales.
6. The Secretary of State takes very seriously the allegations with respect to the conduct of undercover policing by the Special Demonstration Squad ('the SDS'), and other police undercover units. She has consistently sought to uncover the truth in relation to these allegations, first by commissioning two independent reports (the *Stephen Lawrence Independent Review* by Mark Ellison QC; and the *Investigation into links between the SDS and the Home Office*, by Stephen Taylor), which were subsequently published; and then by announcing this public inquiry. The Secretary of State is therefore committed to restoring public confidence in the police by uncovering the truth of these allegations, and doing so in as open a way as possible.
7. However, the need for Inquiry proceedings to be wholly in public must be balanced against the need to ensure that law enforcement agencies, and those responsible for countering terrorism, serious and organised crime, and other grave threats, have effective powers to enable them to do so. It follows that requests to restrict the disclosure or publication of material in the public interest must be considered in the context of the overall need to ensure that the ability of the police, and other agencies, to counter crime remains effective.

### **The Secretary of State's submissions in relation to the legal principles to be applied to restriction orders**

#### ***Disclosure to the Inquiry***

8. Section 22(2) of the 2005 Act provides for the withholding of material from an Inquiry on public interest grounds. Section 19 sets out the process by which restrictions on the disclosure or publication of evidence and material that have been provided to an Inquiry should be considered and made on public interest grounds (by way of restriction order or notice).
9. The 2005 Act, read together with the Inquiry Rules 2006 ('the 2006 Rules'), contains a number of protections for sensitive material (ss.19, 20, 22, 23 and 25 of the Act; rule 12 of the Rules). Further provisions relating to the practical

application of those protections are contained in this Inquiry's draft redaction protocol with the MPS. The Secretary of State accepts that the nature of this Inquiry is such that, save in exceptional circumstances, the route for the consideration of public interest issues should be to seek a restriction order under s.19 of the 2005 Act. In other words, that the Home Office will produce the information to the Inquiry so that it may be used as evidence. The question then will be what restrictions, if any, should be imposed on public access to that evidence (see paragraph 40 of Inquiry Counsel's Note). However, in exceptional circumstances, statutory provisions relating to restriction notices pursuant to s.19(2)(a) or to a claim of public interest immunity pursuant to s.22(2) remain available to the Secretary of State.

***Restriction of material identified as relevant by the Inquiry***

10. With respect to s.19(3), the Secretary of State agrees that the law in relation to public interest immunity is correctly set out at paragraphs 34 to 40 of Inquiry Counsel's Note, and that, as set out at paragraph 42 of that Note, the same three stage test (relevance, damage, *Wiley* balance) is to be applied under both s.19(3)(a) and 19(3)(b).
11. The Secretary of State is content that as a matter of practice in this inquiry s.19(3)(b) should be the starting point for any application for a restriction order. However, the Secretary of State also adopts the MPS and NCA submissions that the weight that would ordinarily be accorded to the institutional expertise of the Secretary of State as set out in a PII certificate should also be accorded to that institutional expertise in the context of an application under s.19(3)(b).

***The ECHR***

12. The Secretary of State agrees that the summary of the law in relation to Articles 2, 3 and 8 in Inquiry Counsel's Note, and in the MPS submissions, is accurate.

***NCND***

13. For the reasons set out in the witness statement of Paddy McGuinness at paragraphs 8 to 12, the NCND policy is necessary to preserve the effectiveness of law enforcement bodies. Although the statement of Mr McGuinness is primarily directed to the security and intelligence agencies, the Secretary of State agrees with the submissions of the MPS that the same principles apply in relation to other law enforcement bodies such as the police.
14. It is worth emphasising in particular the observation of Mr McGuinness at paragraph 35 of his statement that:

... even if no damage would be caused by the confirmation or denial of a specific piece of information, there is a legitimate public interest in the consistent application of the principle. This is particularly important where it is used to protect the safety of officers or agents.

15. While NCND must be considered on a case-by-case basis, its efficacy in protecting sensitive information (and the identities of informants or law enforcement officers involved in covert policing provide a paradigm example of the most sensitive information that the courts have to deal with) is dependent on the consistent application of the policy. It follows that in conducting the balancing exercise necessary to determine whether to uphold the policy in any given case, there is a consistent and weighty public interest in ensuring that any exception made to the application of the policy will not undermine it in its entirety.

### **Conclusion**

16. The Secretary of State accepts that, in deciding whether to restrict the disclosure or publication of material in the public interest (including as a result of NCND), the Inquiry will need to conduct a balancing exercise in each case.
17. In conducting that balance both the interests of public access to inquiry proceedings and information and the need to protect sensitive police techniques should be afforded significant weight. However, where these two competing factors directly oppose one another, and subject to the overall requirement of fairness, the public interest in ensuring that police techniques remain effective should outweigh the interest in public access to information given that the Inquiry will have access to all relevant material for the purpose of its conclusions and recommendations.

**12 February 2016**

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## **Annex A: The Role of the Secretary of State in relation to policing**

1. The purpose of this Annex is to explain the role the Secretary of State in relation to policing. This is to assist the Inquiry, and to provide context for the Secretary of State's submissions in relation to restriction orders.

### **Responsibility for policing in England and Wales**

2. For the purposes of policing, England and Wales is divided into 'police areas' with a police force for each area. The areas include the Metropolitan Police District (in London); the City of London; and the 41 areas (37 in England and four in Wales) listed in schedule 1 to the Police Act 1996.
3. Each of the 41 police areas listed in schedule 1 are under the direction and control of a Chief Constable;<sup>2</sup> and have an elected Police and Crime Commissioner ('PCC')<sup>3</sup> who is responsible for the maintenance of the police force; ensuring efficient and effective policing in the area; and for holding the Chief Constable to account.<sup>4</sup> PCCs must issue a 'police and crime plan' for their area setting out the strategic objectives for their term of office.<sup>5</sup>
4. Slightly different arrangements are in place for the City of London police and the Metropolitan Police Service ('the MPS') who are each under the direction and control of a Commissioner. There is no PCC for these two police areas; however the Court of Common Council (in the case of the City of London police), and the Mayor's Office for Policing and Crime (in the case of the MPS), perform a similar role to the PCCs in relation to those two forces.<sup>6</sup>
5. Responsibility for policing in police areas is shared three ways between the Secretary of State who is responsible to Parliament for the overall efficiency and effectiveness of the police in England and Wales; the Chief Constables/Commissioners who are responsible for the operational effectiveness of their forces; and the PCCs (and the Court of Common Council and Mayor's Office for Policing and Crime) which are responsible for the strategic direction of their forces, and for holding the Chief Constables/Commissioners to account.
6. Responsibility for police wrongdoing lies with the head of the relevant police force and the PCC or police authority in question. However where alleged police wrongdoing is on a national scale, or such as to undermine public confidence in the police service as a whole, the Secretary of State will, where appropriate, take action to ensure that the effectiveness of the whole police

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<sup>2</sup> Police Reform and Social Responsibility Act 2011, s.2.

<sup>3</sup> Police Reform and Social Responsibility Act 2011, s.1.

<sup>4</sup> Police Reform and Social Responsibility Act 2011, s.1.

<sup>5</sup> Police Reform and Social Responsibility Act 2011, s.7.

<sup>6</sup> Police Reform and Social Responsibility Act 2011, s.3 (MPS).

system is not undermined, for example through regulation or legislation or, less commonly, by announcing a public inquiry.

### **Police funding**

7. The Secretary of State is responsible for funding the police through an annual grant to PCCs for the purpose of their functions; and to the Court of Common Council and the Greater London Authority for the purpose of their functions as a police authority. The aggregate amount of the grants to police authorities is determined by the Secretary of State each year with the approval of the Treasury.<sup>7</sup>
8. In addition the Secretary of State has a discretion (to be exercised with the approval of the Treasury) to fund the capital expenditure incurred by local policing bodies; and to fund expenditure incurred (or to be incurred) by local policing bodies in connection with safeguarding national security.<sup>8</sup>

### **The Home Secretary's role**

9. The Secretary of State is “ultimately accountable to Parliament and charged with ensuring the maintenance of the Queen’s Peace within all force areas, safeguarding the public and protecting our national borders and security.” She retains the legal accountability for national security and the role that the police service plays within the delivery of any national response.<sup>9</sup>
10. The Home Secretary has a wide range of powers and duties that are primarily set out in the Police Act 1996 and the Police Reform and Social Responsibility Act 2011. The key duties and powers are set out below.
11. The Secretary of State is under a duty to exercise these powers in such manner, and to such extent, as appears to her to be best calculated to promote the efficiency and effectiveness of the police.<sup>10</sup>

### ***The Strategic Policing Requirement***

12. Although Chief Constables and PCCs have a wide discretion to determine local policing priorities and requirements, the Secretary of State is under a duty to issue a document entitled “*The Strategic Policing Requirement*” from time to time setting out what, in her view, are current national threats; and the appropriate national policing capabilities to counter those national threats.<sup>11</sup>

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<sup>7</sup> Police Act 1996, s.46.

<sup>8</sup> Police Act 1996, ss.47-48.

<sup>9</sup> The Policing Protocol, paragraphs 28-29. See The Policing Protocol Order 2011, Schedule 1 (SI 2011/2744)

<sup>10</sup> Police Act 1996, s.36; Police Reform and Social Responsibility Act 2011, s.78.

<sup>11</sup> Police Act 1996, s.37A.

13. The purpose of this document is to ensure that police forces are able to work together in order to provide a coordinated response to national threats. PCCs are required to have regard to this document when issuing their crime plans; and Chief Constables must have regard to both the crime plan and the Strategic Policing Requirement in the exercise of their functions.

***The regulation and maintenance of police services***

14. The Secretary of State has overall responsibility for the regulation of police forces, including the power to make regulations as to the government, administration and conditions of service of police forces,<sup>12</sup> including powers to make regulations with respect to the maintenance of discipline (to be exercised in conjunction with the College of Policing).<sup>13</sup> She also has similar powers with respect to the government, administration and conditions of service of special constables,<sup>14</sup> and police cadets.<sup>15</sup>
15. The Secretary of State has the power to enter into agreements with the PCCs, Common Council or Mayor's Office for Policing and Crime, with respect to the level of performance to be achieved in relation to their national and international functions.<sup>16</sup> These functions include diplomatic protection, national security, and counter-terrorism.<sup>17</sup>

**12 February 2016**

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<sup>12</sup> Police Act 1996 s.50(1).

<sup>13</sup> Police Act 1996 s.50(2).

<sup>14</sup> Police Act 1996 s.51.

<sup>15</sup> Police Act 1996 s.52.

<sup>16</sup> Police Act 1996, s. 96A.

<sup>17</sup> Police Act 1996, s. 101.