

THE UNDERCOVER POLICING INQUIRY

UNDERTAKINGS: SUBMISSIONS IN RESPONSE ON BEHALF OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

1. The sixth preliminary hearing is: “to give Core Participants the opportunity to make representations as to the form of undertakings the Inquiry should seek, if any, and in respect of whom they should be sought” (paragraph 37, Cost of Legal Representation Awards Ruling, 16 December 2015). The Inquiry has the benefit of Counsel to the Inquiry’s Note on Undertakings of 8 January 2016 (“CTI’s Note”). The Inquiry has now also received position statements from a number of core participants on this issue. The Secretary of State for the Home Department’s submissions in response are as follows.

Undertaking from Attorney General in relation to criminal proceedings

2. There is a broad consensus in the position statements that an undertaking should be sought from the Attorney General in relation to Inquiry witnesses. It is generally agreed (in those statements) that the undertaking sought should be (at least) coextensive with the privilege against self-incrimination, and possibly similar to those obtained in the Azelle Rodney and Baha Mousa Inquiries.
3. There is a principled basis for seeking an undertaking that is co-extensive with the privilege against self-incrimination, as CTI’s Note (at paragraphs 27 and 87) and the position statements demonstrate. It is a matter for the Inquiry whether any undertaking sought should extend further than the privilege against incrimination in order to encourage openness.

Disciplinary proceedings and Home Office officials

4. It is open to the Chairman to seek an undertaking limiting the use to which evidence provided by Home Office officials to the Inquiry could be used in disciplinary proceedings against them. CTI’s Note is correct (at paragraph 90) that the potential justification for seeking an undertaking would be to encourage people to be forthcoming but that it falls to be balanced against the importance of enforcing discipline. This is a difficult balance to strike.
5. Where disciplinary undertakings have been sought and granted in relation to public inquiries, their nature has varied widely and has depended on the circumstances of the

particular inquiry. The Baha Mousa and Al-Sweady Inquiries obtained limited undertakings, extending only to previous failures to disclose misconduct or to the previous provision of false information about misconduct (CTI's Note, paragraphs 63 and 66). Sir William Gage declined to seek a wider undertaking in the Baha Mousa Inquiry because "Such a restriction would, in my view, unreasonably restrict the ability of the authorities to hold accountable by disciplinary or administrative proceedings those who had been guilty of misconduct".¹ Wider undertakings were provided to the Rosemary Nelson and Hutton Inquiries, although they did not extend to allegations of misconduct justifying summary dismissal for gross misconduct (CTI's Note, paragraphs 55 and 75). It would appear that no undertaking was sought by the Litvinenko Inquiry.

6. In relation to an undertaking concerning Home Office officials, it is unclear at this stage to what extent, if at all, there is a concern that Home Office officials might not be forthcoming. It is therefore too early to determine whether it is necessary seek an undertaking. It is also too early to determine what form a requested undertaking should take. It is to be noted that no core participant position statement suggests that such an undertaking should currently be sought, although this is clearly a matter that should be kept under review. Should the Chairman consider it necessary to seek an undertaking in relation to Home Office officials, any decision in this regard would be that of the Home Office Permanent Secretary in relation to Home Office officials or the Cabinet Secretary in relation to the wider Civil Service.

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NICHOLAS GRIFFIN QC

ROSEMARY DAVIDSON

¹ Rulings (First Directions Hearing), 6 January 2009 at paragraph 35
http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/link-edfiles/baha_mousa/key_documents/rulings1.pdf