THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON BEHALF OF THE NPCC

ON THE PRINCIPLE OF NEITHER CONFIRM NOR DENY

INTRODUCTION

1. This report outlines some of the history and subsequent national adoption of the Neither Confirm Nor Deny ('NCND') stance and seeks to provide an awareness of the framework, cases and rationale upon which NCND is based.

2. NCND is intended to protect covert assets, tactics and methodology from unnecessary and dangerous public exposure and this document intends to provide a framework which will enable consistent decision making where any possible deviation from the position is being considered. NCND is not exclusive to undercover Police activity and has particular relevance to the work of Security and Intelligence Agencies.

3. References to court judgments, enactments and decisions made are included in order that context is added to the document.

BACKGROUND

4. Whilst there is relevant case law going back many years, the term 'Neither Confirm Nor Deny' has been in use for many years and potentially originates from the Global Marine

Explorer Project (often described as Glomar) in which the Central Intelligence Agency (CIA) of the United States of America (USA) allegedly sought to recover materials for military and intelligence purposes from a sunken Soviet submarine in the Pacific Ocean.

5. In February 1975 a document was leaked to the media at the time which appeared to describe the project. A request made under United States legislation similar to the Freedom of Information Act in England and Wales was submitted by a journalist asking for confirmation of the project and the records relating to the attempted recovery of the submarine.

6. The CIA refused to 'either to confirm or deny' the existence of the project or provide records. This was upheld by the United States' courts who agreed the response was acceptable in the interests of National Security. The argument accepted in support of the stance of the CIA was that to have either confirmed or denied the project and the potential recovery of the sensitive material could have provided a key strategic benefit to the Russians at a time of significant tension between the two super powers.

DEVELOPMENT IN ENGLAND AND WALES

7. In England and Wales the underlying principle of NCND owes its origins to the rule of law known as Public Interest Immunity. This right to withhold the disclosure and production of documents and to refuse to answer questions on the ground that the answering of the question would be injurious to the public interest has been approved and upheld in numerous common law decisions as a matter of public policy and the principle is reflected for example in section 28 of the Crown Proceedings Act 1947. As well as

providing for the non-disclosure of information, that provision also provided for the non-disclosure of the *existence* of a document if it was contrary to the public interest to do so.

8. This had particular relevance to the work of informants, and the Court recognised early on that special provision had to be made to protect their identities. In the case of *Attorney General v Briant* in 1846, Pollock, C.B held that:

> *"The rule clearly established and acted on is this that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person … and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer."*

9. In 1890, the Court of Appeal in *Marks v Beyfus* (1890) 25 QBD 494 recognised that there could be a public interest in the prosecution refusing to disclose the nature or source of information in particular circumstances where it was necessary to protect the identity of informants and sources of criminal intelligence.

10. The desire to protect those engaged in such activities, their sources, the methodology and tactics used, together with society at large, from threat and harm has led to the assertion of public interest immunity where the disclosure of information or documentation about such activity has been sought. The agencies involved in intelligence or covert activities have sought to assert, as a matter of public interest, immunity from disclosing any documentation or responding to any questions that would be injurious to the public interest.

11. However, as recognised by the Lord Chief Justice of Northern Ireland in *Scappaticci* [2003] NIQB 56 effective protection of the public interest has required the development of a particular type of response (the NCND response).

12. The facts of *Scappaticci* were stark. On or about Sunday 11 May 2003 articles began to appear in newspapers, followed by television coverage, to the effect that Mr Scappaticci had been an undercover agent working within the Irish Republican Army (IRA) for the security service as an informer, with the code name of Stakeknife. At this time there was a belief that the IRA pursued and executed persons suspected of being a CHIS, and it was not in dispute that the naming of Mr Scappaticci as Stakeknife had put his life at risk. Mr Scappaticci had made vigorous attempts to dispel the suspicion by making public denials, through press statements and a television appearance, however the press interest had not diminished.

13. The Minister of State at the Northern Ireland Office refused to confirm or deny allegations made in the press that Mr Scappaticci was an undercover agent for the Government. Mr Scappaticci sought to judicially review the decision of the Minister of State on the grounds that the Government owed him a duty under Article 2 ('Right to life') of the European Convention on Human Rights (ECHR 1998) to reduce the danger to his life by confirming that he was not Stakeknife. The Minister's response was that it was Government policy to make no comment on intelligence matters and that accordingly she could neither confirm nor deny the allegations.

14. The Lord Chief Justice observed that:

- To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations.
- To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists.
- Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger.
- If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight.
- Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced.

15. In the LCJ's view, these considerations formed powerful reasons for maintaining the strict NCND policy.

NCND TODAY

16. Her Majesty's Government, the Security and Intelligence Agencies, the Police Service and other law enforcement agencies have all for many years used the terminology 'Neither Confirm Nor Deny' or 'NCND'.

17. It is more accurate to describe NCND as a Government stance as opposed to policy and it is used by law enforcement, intelligence and security agencies to protect national security. It has been applied and approved by the courts in a number of different contexts. It has been applied both where disclosure is sought of whether an individual is a UCO, but also of information that might reveal directly or indirectly that a person is a UCO (sometimes known as the 'mosaic effect').

18. The courts have emphasised that NCND is not a 'trump card' to be played by state organisations for their own benefit. As it was put in one case '*It's not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it'*. It will still always be for the party claiming reliance on NCND to clearly articulate the potential damage which would arise were there to be a departure from NCND and it should be considered on a case by case basis. It is then for the Court to balance the public interest in the disclosure of the information against the public interest in protecting it.

19. The term NCND has become more widely used and recognised since the introduction of the Freedom of Information Act (FOIA) 2000 where the principle is expressly mentioned in Section 2 of the Act in the context of a description of the effect of some of the exemptions within Part 2 of the Act.

20. Two recent cases have considered the application of NCND.

21. In *DIL and Others v Metropolitan Police Commissioner* [2014] EWHC 2184 (QB), the High Court heard a claim for damages arising from long term sexual relationships with alleged UCOs. The Claimants were able to point to considerable media exposure and

other evidence pointing to what they alleged were their true identities. Mr Justice Bean considered the authorities and drew together the following principles:

- There is a very strong public interest in protecting the anonymity of informers, and similarly of undercover officers (UCOs), and thus of permitting them and their superiors neither to confirm nor deny their status; but it is for the court to balance the public interest in the NCND policy against any other competing public interests which may be applicable.
- There is a well-established exception in a criminal trial where revealing the identity of the informer or the UCO is necessary to avoid a miscarriage of justice.
- Even where an individual informant or UCO has self-disclosed, the police (or the Secretary of State) may nevertheless be permitted to rely on NCND in respect of allegations in the case where to admit or deny them might endanger other people, hamper police investigations, assist criminals, or reveal police operational methods.
- Self-disclosure is relevant, but it does not have the same significance as official confirmation by the police force concerned, Her Majesties Inspectorate of Constabulary, a Minister or a Court.

22. Applying these principles to the facts of the individual UCOs in that case, Bean J. held that:

- In the case of an individual who had been officially named by the Commissioner the NCND was unsustainable.

- In respect of the individuals who self-disclosed and who had been subject to official confirmation either inadvertently or with justification, it would not be appropriate for officials to retain the NCND stance.

- However the NCND stance was appropriate in respect of individuals who had been widely publicised by the media as being undercover officers, but who had neither self-disclosed nor been confirmed by officials as undercover police officers.

23. In *McGartland v Attorney General* [2015] EWCA Civ 686 the Court of Appeal had to consider the application of NCND in the context of an application for a 'closed material procedure'.

24. Mr McGartland claimed to be an agent for the Royal Ulster Constabulary and or Special Branch in Northern Ireland between 1987 and 1991 which resulted in a security compromise, impairment to health and non-receipt of a promised payment, and was claiming damages. His partner also claimed impairment to her mental health.

25. The Secretary of State had filed a limited defence to the claim, stating that Her Majesty's Government would neither confirm nor deny whether an individual is or ever has been an agent of the Security Service and that application of the policy deprived her of the ability to plead a positive case in response.

26. The Court of Appeal observed that reliance on NCND has to be justified on grounds of public interest and it is ultimately for the court to decide whether the public interest

sought to be protected by NCND outweighs the public interest in the administration of justice.

27. On the question of whether there had been 'official confirmation' of Mr McGartland's alleged role as an MI5 agent, the Court considered in detail the question of what is meant by this. Richards LJ noted that whilst material contained ample official confirmation of Mr McGartland's role as a *police* informer,

> "…in my judgment none of it amounts to official confirmation that he was an agent of the Security Service (or Security Services) as pleaded by him as the underlying basis of his claim; and whilst Miss Kaufmann asserted that nothing turns on whether he was an agent of the Security Service as distinct from a police informer acting as an agent of the state, the court must in my view proceed by reference to the case as pleaded. The material to which I have referred also supports the view that the Security Service was involved in Mr McGartland's settlement, but again it falls short of official confirmation of the position. Finally, the claimants 'pleaded case as to breach of duty takes one into areas of operational methodology that are not and could not be expected to be the subject of any official confirmation.
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> This is of course an unusual case, in that Mr McGartland (and presumably his partner too) maybe taken to have personal knowledge of many of the matters pleaded. But what the claimants' allege is not necessarily accurate and this is not, as it seems to me, a situation in which 'self-disclosure' is an answer to the Secretary of State's reliance on NCND".

28. It follows that in the two most recent cases, the public interest in maintaining NCND has been recognised and the question of whether there should nonetheless be disclosure has turned on whether there has been 'official confirmation' that an individual is a UCO.

COVERT PERSPECTIVE

29. The ability to covertly monitor individuals suspected of involvement in crime has obvious benefits to law enforcement. As society has become increasingly mobile, diverse and technologically capable, covert techniques have become ever more critical to successful law enforcement.

30. Covert techniques can be used effectively in response to a range of policing issues, from enhancing community safety and tackling anti-social behaviour, through to fighting serious and organised crime and combating terrorism.

31. As criminals increase their knowledge and their criminal methods become more sophisticated, traditional investigative techniques become less productive. Covert investigative techniques (where the intention is that the subject remains unaware that their movements, communications and/or other activities are being monitored) are capable of providing a wealth of useful intelligence and compelling evidence.

32. The use of covert methods whether they be human or technological deployments are sometimes the most cost effective, efficient and often the only viable method which can be used to obtain evidence or information against organised individuals or groups conducting a range of serious and complex crimes and it is essential that this operational effectiveness is maintained.

UNDERCOVER PERSPECTIVE

33. The role of an undercover operative (defined in Regulation of Investigatory Powers Act 2000 RIPA as a Covert Human Intelligence Source, CHIS) is arguably the most dangerous undertaking a Law Enforcement Agency 'LEA' will ever ask an individual to take. The undercover officer when recruited carries out this role in the clear expectation that the LEA will protect their identity during deployment, post deployment including into their retirement and even post their death. This 'contract' is role specific and not reliant upon the nature and capabilities of the group or individual subject of infiltration.

34. All organisations have a duty of care to protect the identity of individuals working undercover, their immediate family, colleagues and members of the public that have provided covert support and who may be affected by the disclosure of the operative's identity.

35. All undercover operatives are volunteers, they have to successfully pass a number of difficult selection criteria, psychological testing, and training processes, all of which are expensive for organisations to implement and maintain. The individuals are required to invest a considerable amount of their own time which impacts on them and their families in order that they prepare themselves for the criteria to become an undercover officer.

36. Any corrosion of the belief that organisations will attempt to protect the identities of officers by all means possible and where appropriate by the use of NCND, would in turn lead to the position where organisations could no longer credibly encourage officers to

volunteer for this treacherously difficult work on the basis that their identities and roles would be protected.

37. Undercover operatives are often the only viable method which can be deployed to obtain evidence against organised individuals and groups conducting a range of complex and serious crime including drug trafficking, child sexual exploitation and abuse, gun crime, extortion, murder, fraud, money laundering, cyber-attacks and all types of terrorist activity. Such operatives assist the investigation process; they help to prove and to disprove criminality and without their covert work, significant investigations against a range of dangerous individuals and groups would be limited.

38. Organised criminals and terrorists will go to great lengths to insulate themselves against attack by law enforcement, and in particular to identify suspected undercover operatives and ultimately prevent the officers providing evidence against them thus interfering with judicial proceedings. They have been found to use many methods including paying corrupt employees to provide the operative's true identity and on some occasions seeking contracts against undercover operatives with a view to having them killed.

39. Individuals are even employed by crime groups to identify covert methods that are being used against them and vulnerabilities within their organisation.

40. The rapid increase in technological advances including the internet, communications, facial recognition and social media have enhanced the capabilities of individuals and groups to immediately identify individuals who have been disclosed or suspected of being undercover officers.

41. Dedicated websites featuring images and names of individuals believed to be undercover operatives are now a common feature of the internet.

42. Any basic knowledge of the internet and its capabilities allows users to quickly collate information about that individual, the crime group they have worked against, methods used and the undercover officer's immediate family.

43. Whilst any disclosure of covert methodology and tactics educates criminal enterprises and creates risk, there is a distinct difference between the disclosure of the use of a technical device and that of the disclosure leading to the identity of an undercover operative.

44. The risk management plan for a technological disclosure would not normally mean there was a threat to life. Nonetheless the tactics involved are fiercely guarded to prevent erosion of the technology involved. The inadvertent or otherwise disclosure of the identity of an undercover operative can have a potential for an individual, their colleagues and even their family to suffer serious harm and at its most extreme death and protection is vital. Even if threat to the life of an undercover officer, from an individual subject of infiltration, is not in fact a real risk, nonetheless the wider human implications of such a disclosure should not be lost on organisations. Undercover operatives manage their personal lives professionally in a disciplined and necessarily secretive manner, deciding to protect their friends and family from the details of their role to prevent disclosure and subsequent exposure. Public disclosure can have a significant impact upon the individual. Relationships with friends and family can be destroyed, home life in a local community ruined and trust between individuals can be severely curtailed. This would have dramatic consequences for the undercover community.

45. The unmasking of an undercover operative would be seen as a significant achievement for any criminal or terrorist organisation which had been infiltrated or subject to investigation by law enforcement and would be seen as sending a clear message to future operatives that their safety could not be guaranteed. Such groups capable of imparting violent retribution pose a clear threat.

46. In all cases the risk to operatives and informants does not disappear or deplete with time. The operatives may have been involved in numerous operations either before or since the specific case where their identity is being considered. It is apparent that information regarding individuals suspected of being undercover officers and documents or comments made by organisations are being resurrected and researched in acute detail even though they originated several decades before.

47. Exposing their identity, even long after their deployment has concluded, may cause risk not only to them but may cause risk to other individuals associated with the role they performed. This may include other undercover operatives or informants who may be identified once the actions of the undercover operative are explored in detail.

48. The rules concerning unauthorised self-disclosure made by former or serving undercover operatives are clear. In addition to general rules applied to all police officers, nationally trained undercover operatives are bound by a Confidentiality Agreement which states they have a duty not to disclose, by any means, details of any police or agency's operations or investigations and/or their part played in such operations, either whilst or subsequent to being employed.

49. All such operatives are also signatories to the Official Secrets Acts (OSA) 1911 and 1920 which reiterates the important fact that no disclosure may be made without prior official sanction. The same obligations apply to those involved in the management and authorisation of such covert operations and their personnel.

50. In circumstances where such obligations are breached, LEA are required to consider a number of factors prior to deciding whether punitive action would be in the public interest and whether the necessary deviation from the NCND stance would be merited in the particular case. The threshold for pursuing such actions is very high and would require very careful consideration of the likely or potential consequences.

51. Individuals may be motivated to 'self-declare' for a number of reasons including monetary gain or due to illness, any apparent self-declaration by an individual whether in a relationship or via a media source does not remove the LEA organisational duty of care to that individual, family members or other individuals who they may be associated with.

52. Where a former (or serving) undercover operative apparently self discloses their status and true identity and where they permit their image to be displayed in the national media, this creates a serious risk to their own safety, undercover operatives who they have associated with during their career, informants and that of their family and associates. Any confirmation also has an effect on the authorities' ability to manage risk.

53. This risk applies equally to operations that included criminal proceedings and those where there has been no overt action as a direct consequence of the deployment.

54. The threat is arguably greatest when criminal proceedings have resulted and where undercover operatives concerned were not used in evidence or the informants concerned were successfully afforded the protection of Public Interest Immunity (PII).

55. In such cases, those criminals or terrorists who have been convicted or had other sanctions placed upon them, may feel very good justification for seeking retribution.

CONCLUSION

56. NCND must be considered on a case by case basis but there remains a very strong public interest in protecting the identity of Informants, law enforcement techniques and covert methodology.

57. Any voluntary deviation by authorites from the NCND stance will be seized upon and used to suggest that the public interest does not require a NCND response in other cases. NCND is most effective where it is applied in a consistent manner, recognising that the question of whether it will be upheld by a court is a matter that will depend upon the particular facts of the case.

58. The judgment in *DIL* referred to inadvertent official confirmation. This relates for example to police forces, professional standards departments, the Independent Police Complaints Commission (IPCC) and others investigating allegations against individuals and providing confirmation that they were Police Officers - or Press Officers inadvertently either confirming or denying an individual is a undercover police officer.

59. All Forces must be cognisant of the NCND position and the College of Policing has been asked to provide guidance to officers faced with the difficulties posed by either confirming or denying that an individual is an undercover police officer.

60. The deployment of NCND to protect the true identities of undercover operatives and other CHIS, and the tactics and methodology of deployments, is an imperative matter of great importance for all law enforcement agencies and the Security Service.

61. It is accepted that in some circumstances there may be exceptions to the use of NCND. Such exceptional circumstances must be considered from a broad national strategic perspective and not on a localised force or agency basis.

62. There is a real risk that any, even a very limited breach of the NCND stance will set a dangerous precedent as this;

- May jeopardise the safety of undercover operatives and their family, friends, associates and work colleagues, regardless of the length of time since they had been actively deployed.

- May jeopardise the safety of other CHIS associated with the named undercover operative regardless of the length of time since the deployment took place.

- May expose the tactics and principles which are used in present day covert operations to achieve effective results and safeguard operatives and sources of information.

63. All covert operatives are volunteers. They are prepared to undertake such activity in the public interest. They are a relatively small group of individuals specifically trained with skills, abilities and experiences which enable them to function lawfully, safely and effectively. The selection, training, development and retention of operatives is demanding and expensive and they should never be considered as a disposable resource.

64. The Police service should not be expected to disclose details of their operations, methods, capabilities and sources (whether human or technical), each incident should be considered in isolation and ultimately the decision is a matter for the court.

65. Consistent consideration of the issues and application of the factors involved is essential to ensure that the NCND stance is not eroded.

66. It is evident that numerous organisations and individuals are making determined and rigorous efforts to expose and identify undercover officers, tactics and covert methodology. It is a fact that there are several websites and social media forums dedicated to exposing individuals by name, image or tactics that are suspected of being or have been undercover officers.

67. The gradual erosion of the NCND stance, if it is not maintained consistently, in what is a wholly lawful, necessary and highly effective tactic, will have serious implications

68. The determination and quest for information from individuals and organisations, the extensive research capabilities afforded by the internet and modern communication technologies, creates a mosaic effect that is capable of identifying, the covert methods

and techniques used by law enforcement, endangering individual undercover operatives, their families and colleagues and may ultimately even result in the loss of life.

National Police Chiefs' Council

Dated this 21st day of January 2016