IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON RESTRICTION ORDERS
ON BEHALF OF PETER FRANCIS

Introduction

1. These submissions are made on behalf of Peter Francis ('PF') in response to the Chairman's invitation to the parties to provide submissions on the legal principles that will apply to his consideration of applications for restriction orders.

2. We are grateful to Counsel to the Inquiry ('CTI') for their detailed note on the law in this area and agree that the legal principles are accurately summarised therein.

3. The Chairman has indicated in his note entitled "Hearing Restriction Orders 22 March 2016" that he shall be receiving applications for restriction orders
    i. From the police services to protect from disclosure the identity of undercover officers;
    ii. From the police services to protect from disclosure techniques employed in the prevention and detection of crime;
    iii. From individuals who wish to remain anonymous.

4. We shall address each in turn. Before doing so, we address the question of the importance of openness in an inquiry of this nature.

The question of openness

5. The now defunct SDS was formed in 1968 and operated under a shroud of secrecy for 40 years until 2008. It is important to note that the regulation of Covert Human Intelligence Sources ('CHIS') that came about as a result of the Regulation of Investigatory Powers Act 2000 ('RIPA') (relied upon by Counsel for the MPS in their

submissions (at III)) would only have affected a very small proportion of the life of the SDS.

6. The Chairman is committed to examining the scope of undercover policing as it has been conducted in practice since 1968 (the year the SDS came into being), giving special attention to the SDS, precisely because the public revelations from PF and others, exposed unethical practices in undercover policing which the Home Secretary recognised as causing the kind of public concern that necessitated a public inquiry. There are many victims of these unethical practices, not limited to the women who we now know were deceived into long term and other relationships with UCOs, all of whom will expect both openness and transparency. The Chairman in the *Azelle Rodney Inquiry* recognised the importance of putting "*a premium on achieving as "public" an inquiry as it is possible so that at the least to counter or neutralise the obvious alternative surmise, namely a sustained "cover up"*". He pointed to ss. 1 (public concern) and 18 (1) of the Inquiries Act 2005 (public access).

7. Counsel for the MPS submit that even an Inquiry "*which hears a great deal, perhaps most, of material emanating from the MPS in closed session will be able to fulfil its important public function*" (para II.12). This appears to contradict the Secretary of States submissions, which accept that the Inquiry proceedings need to be as public as possible, but that the "*the need for Inquiry proceedings to be <u>wholly</u> in public must be balanced against the need for 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*.." (para 7) (emphasis added).

8. Whilst it may be, as the MPS assert, that "*there is no rule that inquiries under the Inquiries Act 2005 must have a particular quotient of openness in order to deserve the name*"(II.2), we agree with CTI, that "*the legislative presumption that 2005 Act inquiries, such as this one, should be public is obvious*"(para 26). Restriction orders are an exception to that presumption (as expressed in s.18 of the Act). As far as we are aware, in major inquiries such as *Bloody Sunday*, *Hutton* and *Litvinenko*, only a small amount of highly sensitive material (primarily affecting national security) was withheld from the public domain. In an Inquiry such as this one, where the subject matter itself is the covert/secret activity of state agents (which has been at least

partially uncovered), there must, in our submission, be a very high "quotient of openness" to allay the public concern and to avoid a public outcry that there has been a continued "cover up".

9. In our submission the relevant components of the public interest which the Chairman has to weigh in the balance are:

    i. The public interest in openness;
    ii. The extent to which there has already been disclosure, whether self-disclosed, official or otherwise;
    iii. Whether or not the operational methods used were legitimate;
    iv. Whether or not the operational methods are still deployed;
    v. Whether or not there are any national security considerations.

The identity of UCOs

10. Whether or not anonymity is granted to a particular officer, will depend on where the balance is struck in each case, and in accordance with the case law as set out by CTI. The risk of harm or damage (s. 19 (4) (b)) will have to be properly evidenced in relation to each individual officer in relation to whom a restriction order is sought. A generalised schedule of the kind of harm that may be caused (as in Tabs 1 and 2) simply will not suffice. Redacted documents setting out that the actual or perceived risk will have to be provided to the parties so that meaningful submissions can be made.

11. The case of *DIL and others v MPC* [2014] EWHC 2184 demonstrates that the NCND policy cannot be used as a bar to disclosure or confirmation of identity. As CTI point out, in that case the police could not rely upon NCND in relation to certain undercover officers. The court examined the state of public knowledge in the case of each UCO and summarised it as follows at [17]:

> "The state of public knowledge and official confirmation or otherwise about undercover officers of the MPS alleged to have engaged in sexual relationships to facilitate their infiltration of target groups may therefore be summarised as follows: (a) Mark Kennedy (alias Mark Stone) has been named authoritatively by the CACD and HMIC, and in the judgments in the AKJ litigation; (b) Jim Boyling (alias Jim Sutton) has self-disclosed, and the Commissioner has confirmed that "Sutton" is

under investigation by the Department of Professional Standards; (c) Bob Lambert (alias Bob Robinson) has self-disclosed, and has been named by the IPCC as under investigation though in a different context; (d) Mark Jenner (alleged to be the man using the name Mark Cassidy) and John Dines (alleged to be the man using the name John Barker) have each been identified by the *Guardian*, in the book *Undercover* and by one of the Claimants, but there has been no official confirmation of their identity (e) Peter Francis has self-disclosed, and has been identified in Mr Ellison's report as a
former officer in the Special Demonstration Squad."

12. The court found that reliance on NCND in relation to Mark Kennedy, Jim Sutton and Bob Lambert was unsustainable. The same would undoubtedly apply to Peter Francis (against whom there was no complaint and therefore there was no ruling as far as NCND was concerned) who was officially identified by Mark Ellison QC as a former SDS officer.

13. It is submitted that given the post-DIL apology made to the claimants by the MPS, that NCND cannot be sustained in relation to Mark Jenner and John Dines, the two other men named by the claimants as UCOs they had relationship with. The apology is official confirmation of their statuses.

14. Further, as far as a promise of life-long confidentiality is concerned, Peter Francis will say that he was never promised this. He was unaware of the concept of NCND during the course of his employment nor was such terminology used in any written documentation relating to his role as an undercover officer.

Deployments / police techniques

15. The conduct and management of undercover police operations that the Inquiry will be investigating took place many years ago, and (so far as the SDS are concerned) relate to a branch of the MPS that has been disbanded. Further, much information is now in the public domain (see DIL for example); and much will be the subject of open evidence from PF and many of the activists who were infiltrated. Also, in relation to undercover operations against political, justice and environmental activists (as opposed to those used in relation to serious crime and to counter terrorism), there are no real national security considerations. In our submission, these factors weigh against the need for a restriction order to protect sources and methods.

16. In addition, as made plain by Bean J (as he then was) (at p[42]) in the DIL case, NCND cannot apply to illegitimate police tactics:

> "One of the justifications for NCND is that police operational methods should not be revealed. This is in my view clearly intended to apply to operational methods which continue to be in use or are likely to be used in future. Moreover, just as (in the well known words of Page Wood V-C in *Gartside v Outram* (1856) 26 L.J.Ch 113) "there is no confidence as to the disclosure of iniquity", so there can be no public policy reason to permit the police neither to confirm nor deny whether an illegitimate or arguably illegitimate operational method has been used as a tactic in the past."

17. Given what we already know about the illegitimate SDS tactics, there is a strong public interest in examining openly the extent to which SDS deployments were either illegitimate or arguably illegitimate. The MPS should not be permitted to NCND the use of illegitimate tactics. The evidence of such tactics should be given in public and so should the MPS response – either confirming or denying the use of such tactics (together with any supporting evidence).

18. Applying a case by case analysis (without recourse to a general claim of NCND) will enable the Chairman to afford protection of the identity of undercover officers and specific protection for highly sensitive operations and (on-going) techniques (e.g. counter-terrorism) without allowing restriction orders to be used as a blanket tool for keeping secret unethical policing of essentially lawful protest groups.

Other witnesses who wish to remain anonymous

19. As with police officers, whether or not anonymity is granted to a particular (non-police) witness, will also depend on where the balance is struck in each case. At this stage we make no specific submissions in relation to such witnesses but reserve the right to do so at the oral hearing or when we have further information.

Ben Emmerson QC

Maya Sikand

7 March 2016