IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON THE LEGAL PRINCIPLES
APPLICABLE TO APPLICATIONS FOR RESTRICTION ORDERS

ON BEHALF OF KEN LIVINGSTONE, DAVE NELLIST,
SHARON GRANT OBE, DAME JOAN RUDDOCK
AND DIANE ABBOTT MP ("THE ELECTED REPRESENTATIVES")

Introduction

1. These submissions are made on behalf of Ken Livingstone (Leader of the Greater London Council, 1981-86; Member of Parliament for Brent East 1987-2001; Mayor of London 2000-08), Dave Nellist (West Midlands City Council, 1982-86; Member of Parliament for Coventry South East, 1983-92; Coventry City Council 1998-2012), Sharon Grant OBE (on behalf of the late Bernie Grant - Councillor for the London Borough of Haringey, 1978-87; Member of Parliament for Tottenham, 1987-2000), Diane Abbott MP (Westminster City Council, 1982-86; Member of Parliament for Hackney North and Stoke Newington, 1987-present, including as Shadow Public Health Minister 2010-13 and Shadow Secretary of State for International Development 2015-present) and Dame Joan Ruddock (Member of Parliament for Lewisham Deptford, 1987-2015, including as a Minister of State and Privy Counsellor). They will be referred to below as "the Elected Representatives" ("ERs").

2. Core Participant ("CP") status was granted to the ERs at various times. Sharon Grant OBE was accorded CP status within the Chairman's first '*Core Participants: Ruling*' dated 21 October 2015. Ken Livingstone was designated a CP within the '*Core Participants: Ruling 2*' dated 2 November 2015; Diane Abbott MP and Dame Joan Ruddock within the '*Core Participants: Ruling 3*' dated 16 December 2015; and Dave Nellist within the '*Core Participants: Ruling 4*' dated 27 January 2016.

3. Mr Nellist applied to the Chairman of the Undercover Policing Inquiry ("the Inquiry")

to make submissions in regard to Restriction Orders ("ROs") on 26 February 2016. On the same day Mr Livingstone, adopting Mr Nellist's submissions, also applied. They both sought to raise specific issues related to the position of the ERs. They also both stated in their applications that they did not have an interest in knowing the real names of the undercover officers.

4. Mr Livingstone and Mr Nellist were given permission by the Chairman on 7 March 2016 to prepare written and oral submissions in respect of:

   (1) the legal principles that apply to applications for ROs under section 19 of the Inquiries Act 2005; and

   (2) the factors that are relevant to the decision-making process as they apply specifically in relation to Members of Parliament and leaders of local government.

5. In separate applications, Dame Joan Ruddock, Diane Abbott MP and Sharon Grant OBE applied to make submissions in regard to ROs on 8 March 2016, all of which were also granted by the Chairman on the same day.

6. These submissions are made in addition to those of the Non-Police, Non-State Core Participants ("NPSCPs") dated 11 March 2016 in relation to ROs. The ERs seek to make a number of broad and overarching submissions of principle relevant to the issues outlined by the Chairman in his Note entitled "*Hearing: Restriction Orders, 22 March 2016*", and to make submissions about the particular factors, in considering ROs, that apply to the position of the ERs in this Inquiry, relating to their particular functions as democratically elected representatives and the constitutional principles which attach to their roles.

Background

7. Before turning to their submissions, the ERs set out, in brief, the allegations about the activities of undercover officers which have led to their involvement in this Inquiry. That is not because the veracity of the allegations fall for determination at this stage. It

is, however, necessary to have in mind the nature and context of the issues which the Inquiry is tasked to examine in relation to democratically elected representatives in order properly to analyse the factors relevant to applications for ROs as they apply to their cases.

8. Dave Nellist had had a close association with *Militant* newspaper, and in 1991 was expelled from the Labour Party. He and others went on to form Militant Labour, which in 1997 changed its name to the Socialist Party – of which Mr Nellist has been a member of the national committee throughout its existence. In November 2002, in the second episode of the BBC documentary *True Spies*, an anonymous police officer claimed that while Dave Nellist was a serving Member of Parliament, the West Midlands police, at the request of MI5, infiltrated Militant and that Mr Nellist was a target.

9. In Rob Evans' book *Undercover* at page 134, former undercover police officer ("UCO") Peter Francis (as 'Peter Black') was quoted as claiming that he was embedded within Militant Labour before and after it became the Socialist Party. Mr Nellist believes that Mr Francis was succeeded in his undercover role by 'Carlo Neri', who – as was claimed by a joint investigation between the BBC and the *Guardian* newspaper – was a UCO during the period 2002-04.

10. On 25 March 2015, Peter Francis revealed that police had monitored other Labour politicians during the 1990s, and continued to do so after they became Members of Parliament. Mr Francis said he read secret files relating to ten MPs during his eleven years working for the Metropolitan Police's special branch, and that he personally collected information on Bernie Grant and Diane Abbott MP, as well as Jeremy Corbyn MP. He also named Ken Livingstone and Joan Ruddock, as well as Harriet Harman MP, Peter Hain (now the Rt Hon the Lord Hain), Jack Straw, Dennis Skinner MP and the late Tony Benn, as having been targets.

11. After the establishment by the Home Secretary of this Inquiry in early March 2015, Mr Hain (one of those revealed as a target by Mr Francis) put an Urgent Question to the Home Secretary on 26 March 2015, requesting that the remit of this Inquiry include the surveillance of the ERs named by Mr Francis. Along with other MPs, Mr Hain also

called for disclosure of all relevant information and for each affected MP to have provided to them their "Personal Registry" (the "pink special branch file" described by Mr Francis as being held in relation to Mr Hain). Reference is made to those Parliamentary proceedings, and the assurances given as to disclosure that would be made to MPs, in the foregoing submissions.

12. Although the full facts are clearly not yet known, the ERs named by Peter Francis, and revealed previously to have had information secretly gathered about them by the police, have in common that they are or have been members of the Labour party, were elected as members of the Labour party in local and central government, and have at various times and in various ways been associated with the left wing of the Labour Party and other left wing and trade union politics.

13. It is not, at this stage, known if ERs were targeted by the police, and if so, why these particular ERs were selected, who authorised them to be targeted and what was the nature of the police operations against them. Given the specific part of the political spectrum with which the allegedly targeted ERs are associated, the obvious inference, at least at this stage (and as indeed was drawn in Parliament), is that the police were (and potentially are) targeting Members of Parliament and elected members of local government because of those individuals' politics and political activities. As set out below, if that is true, it has constitutional implications of the highest order. That, in turn, will be important in the approach taken to the making ROs and the overwhelming importance of the Inquiry getting to the truth and properly and thoroughly fulfilling its Terms of Reference.

Outline of Submissions relating to Restriction Orders ("ROs")

14. The ERs make four key submissions which are set out in detail below:

    (1) The Inquiry should operate openly and in public wherever possible, and any departure from that principle should be strictly necessary, clearly justified and a last resort.

    (2) There is a public interest of the highest significance in bringing to light whether

police in the United Kingdom have targeted, and continue to target, democratically elected politicians in undercover operations, and maintain secret files on them, particularly where they are targeted because of their political views and political activities (including seeking to hold state institutions such as the police to account). There is a corresponding and equally overwhelming public interest in ensuring that, if that occurred, the public can have confidence that what happened is fully brought to light, and that it will never happen again.

(3) Those public interest imperatives cannot be fulfilled, and the Inquiry will be unable to satisfy its Terms of Reference, if (as the Metropolitan Police Service ("MPS") submits) ROs are imposed which ensure that in "*the overwhelming majority of instances*"[1] all evidence about the fact or detail of any undercover police deployment (whenever it occurred and whoever was the target), is heard entirely in secret. The Inquiry will be unable to fulfil its Terms of Reference unless the predominant practice is that the undercover names of UCOs, and facts and details of their deployments, are made public.

(4) As a consequence, ROs should not be made unless it is clear that, <u>firstly</u>, they will not compromise the ability of the Inquiry to fulfil its purpose, both in terms of uncovering the truth about the police activities it is tasked to investigate and inspiring public confidence that it has done so; and <u>secondly</u>, that no RO will be made in relation to an individual UCO, operation or target, unless there is a specific and overwhelming public interest in maintaining secrecy in some particular piece of evidence, and no other realistic way of protecting the relevant public interest. There is no proper basis in the Inquiry for ROs to keep secret (virtually) every undercover deployment, let alone any basis for the blanket application of secrecy on the basis of some general "*neither confirm nor deny*" policy.

<u>(1) The presumption and importance of openness of the Inquiry</u>

15. These submissions first address the question of the fundamental importance of the principle of openness in relation to this Inquiry and the approach that should be taken

[1] See MPS submissions of 12 February 2016 at [I.2(ii)]

to applications for secrecy where allegations of state misconduct are being examined.

16. The ERs agree with the submissions of Counsel to the Inquiry ("CTI") that s.18(1) of the Inquiries Act 2005 creates a statutory presumption in favour of openness;[2] and that *"the legislative presumption that 2005 Act inquiries, such as this one, should be public is obvious"*.[3]

17. Further, openness, and open consideration of the evidence, are both fundamental to the rule of law and vital to the proper functioning of the Inquiry. As set out further below, there is an overwhelming public interest in this Inquiry uncovering the truth of the issues and concerns raised by ERs and others, and thereby ensuring that the public have confidence in the Inquiry, and more widely, in the proper and accountable functioning of the police, intelligence and security services. It is also a fundamental element of the rule of law, and the accountability of the Executive, that where (as here) serious allegations of impropriety are made against state authorities, that those allegations are dealt with openly and that the public can see, when that occurs, that any improper conduct of state authorities is brought to light and remedied. That gives rise to four propositions.

(i) Claims of secrecy for evidence of alleged state misconduct

18. Firstly, where allegations of serious misconduct are made against state authorities, and the same state authorities are seeking to prevent evidence of that misconduct being made public in judicial proceedings, the justification for a departure from ordinary principles of open justice must be all the weightier, and the reasons put forward for the departure all the more carefully and critically scrutinised by the courts.

19. The principles applicable to disclosure in cases of alleged state misconduct were considered by the Divisional Court in *R (Mohamed) v SSFCO* [2009] 1 WLR 2653, Thomas LJ held at [41]:[4]

[2] CTI submissions at [25]
[3] CTI submissions at [26]
[4] Unless otherwise stated, emphasis here and below is added.

> *First, it must be and is the duty of a judge in upholding the rule of law to ensure that not only is a particular dispute between parties decided openly, but that matters that come to the attention of the court during the course of a hearing of the proceedings which prima facie constitute an infringement of the rule of law are dealt with openly. The more serious the alleged infringement of the rule of law, the more strongly that principle applies. As Lord Griffiths observed in R v Horseferry Road Magistrates' Court ex p Bennett [1994] 1 AC 42, 61-62: "the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law." It is the upholding of the rule of law in this way that is a factor of the greatest public interest in this case, given the allegations against officials of the US Government and the role of officials of the UK Government in facilitating what is alleged.*

20. Thomas LJ then set out the importance of the allegations raised in the *Mohamed* case, (namely mistreatment of those detained by or on behalf of the US government with UK knowledge) and he continued at [46]:

> *The provision of information of this kind which enables public debate to take place and democratic accountability to be made more effective is one of the bases on which democracy rests. As Lord Bingham made clear in R v Shayler [2003] 1 AC 247, paras 21-26 there can be no assurance that government is carried out for the people unless the facts are made known and issues publicly ventilated.*

21. The passages in Thomas LJ's judgment at [41] and [46] were cited as "*instructive*" by Lord Clarke in *Al Rawi v Security Services* [2012] 1 AC 531. As Lord Clarke observed, while the Court of Appeal in *Mohamed* expressed some disagreement with the Divisional Court on the facts, it agreed with the general approach of principle. Lord Clarke summarised that approach as follows at [184]:

> *...the balance [as to whether or not material should be disclosed] is not to be struck by the Foreign Secretary but by the court. As I read the judgments in* Mohamed *in both courts, in addition to that principle, they support these further propositions. First, the rule of law and the democratic requirement that governments be held to account mean that the case for disclosure will always be very strong in cases involving alleged misconduct on the part of the state and, secondly, that the more serious the alleged misconduct on the part of the state, the more compelling the national security reasons must be to tip the balance against disclosure.*

22. The principles were further endorsed by Ouseley J in *AHK v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) at [38]. Ouseley J described as "*the real significance*" of the approach of the Divisional Court in the *Mohamed* case as follows:

> *[Where] the allegations are of serious misconduct against the bodies responsible for national security, defence and diplomatic relations, the Court will be rightly cautious about allowing a claim for PII to conceal evidence of misconduct to the advantage of the possible wrongdoer.*

23. As the Court of Appeal in *Mohamed* recognised, this does not mean that the Executive is absolutely prohibited from raising a public interest of non-disclosure even where that would conceal evidence of its misconduct ([2011] QB 218 at [182]). It does, however, mean that there is a strong public interest, *"at the very top end of importance"*, of making public any information of the possible misconduct by UK state agents ([184] *per* Lord Neuberger and see also [178] per Lord Neuberger and [274] *per* Sir Anthony May P). That means, as Lord Neuberger observed, the ordinary rule that the judiciary defers to the Executive on its conclusion on matters such as national security may not apply (at [44]): *"as the executive, not the judiciary, is responsible for national security and public protection and safety from terrorist activity, the judiciary defers to it on these issues, unless it is acting unlawfully"*.

24. It was against this background that Lord Judge (at [39]) identified a distinct feature of open justice above and beyond the importance of justice being seen publicly to be done:

> *In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.*

25. Open examination of alleged state misconduct is important for another reason. In *Al Rawi* at [83], Lord Brown referred to the problems in cases concerning alleged misconduct by state agents, if they are *"heard in proceedings from which the claimants were excluded, with secret defences they could not see, secret evidence they could not challenge, and secret judgments withheld from them and from the public for all time"*. He quoted the observations of the Court of Appeal that in those circumstances a judgment is unlikely to satisfy anyone (at [56]):

> *If the court was to conclude after a hearing, much of which had been in closed session*

attended by the defendants but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants but not the claimants or the public, that the claim should be dismissed, there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater.

(ii) Evidence on alleged misconduct can never be heard entirely in secret

26. A second, and related, principle emerges from the authorities, namely: a process considering allegations of state misconduct cannot be a fair one if the entirety of the state's response to the allegations are heard in secret. Where allegations of impropriety by state agents are considered, the wider public will not have confidence that justice has been done where the entirety of the evidence submitted by the state is withheld from the public or from those making the allegations.

27. In *Mohamed and CF v Secretary of State for the Home Department* [2014] EWCA Civ 559; [2014] 1 WLR 4240, individuals made allegations that they were the victims of misconduct by UK state agents in Somaliland and therefore that Control Order proceedings against them constituted an abuse of process. The Government response was to *"neither confirm nor deny"* any allegations about the conduct of its agents, arguing (as the MPS does here) that all evidence about any deployment of UK agents in Somaliland should be considered in closed hearings from which the public and those making the allegations were excluded. That was accepted at first instance, and the High Court held, on the basis of evidence which it heard in *"closed"* sessions, that the allegation of abuse of process was not made out. The Court of Appeal held that did not constitute a fair process.

28. It was not an answer, the Court of Appeal held, that the state authorities had a *"duty of candour to the courts"* ([17]) which could then consider the state's evidence in closed hearings. Nor was it an answer that those making the allegations of abuse *"had every opportunity to set out their positive case on abuse"* as that was not enough *"when they know nothing of the Secretary of State's case on collusion and mistreatment"* (ibid). That is because where the Secretary of State gave her evidence in closed hearings, the court was failing to ensure that it *"maintain[ed] public confidence in the rule of law"* ([19]) (emphasis in

original). The Court of Appeal continued: *"if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust"* (*ibid* quoting from Lord Phillips in AF (No 3) v SSHD [2010] 2 AC 269 [63]).

(iii) The role of investigations in exposing culpable conduct

29. Thirdly, public confidence and adherence to the rule of law requires not only that the lessons that may be learned from an investigation into alleged state misconduct are considered in public, but that specific culpable conduct is exposed.

30. Articles 2 and 3 of the European Convention of Human Rights ("the ECHR") carry with them investigative obligations. The purposes of such investigation is well established and was set out by Lord Bingham in R (Amin) v SSHD [2003] UKHL 51; [2004] 1 AC 653 at [31] (in relation to an investigation into a death in custody). He held that the purpose of investigation was *"to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and … lessons learned"*.

31. Culpable conduct is plainly not *"exposed"* where the state reveals none of the details of what it has done. This is inconsistent with the rule of law. As the Grand Chamber in El-Masri v FYR of Macedonia (2013) 57 EHRR 25 held at [192] (in relation to alleged state involvement in rendition), an investigation into alleged wrongdoing by state officials must include a *"sufficient element of public scrutiny"* because that is *"essential in maintaining public confidence in [the state's] adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."* As quoted by CTI (at their [20]) and the Media (at their [10]), Laws LJ stated in R (E) v Chairman of the Inquiry into the Death of Azelle Rodney [2012] EWHC 563 (Admin) that it was legitimate for that Inquiry to place a *"premium on achieving as public an Inquiry as possible, 'so that at the least to counter or neutralise the obvious alternative surmise, namely a sustained 'cover up'"*.

(iv) Positive duties of disclosure under Article 8 ECHR

32. Fourthly, there are additional obligations of disclosure which arise in this case, not just

because of the Inquiry's role in investigating alleged state misconduct, but also because the Inquiry is itself a public authority obliged to act compatibly with the ECHR.

33. Article 8 ECHR provides: "*Everyone has the right to respect for his private and family life, his home and correspondence.*" Article 8 imposes "positive obligations" on public authorities as well as negative. One of the positive obligations imposed by Art 8 is for the state to afford to individuals access to information about them that is important to their private life.

34. In *Gaskin v United Kingdom* (1989) 12 EHRR 36, the Court held that the applicant, who had spent most of his childhood in care, had a right protected by Art 8 to access relevant social services records, including information given in confidence by third parties. The Court stated that the rights of the third parties to confidentiality had to be balanced against the applicant's right to information about his development and private life. In *Roche v United Kingdom* (2006) 42 EHRR 30, the applicant claimed that he was suffering from the effects of exposure to toxic chemicals during tests carried out on him at Porton Down barracks in 1962-63, arguing that the state had failed to provide him with information about the tests, again in breach of its Article 8 positive obligation. The Court affirmed its decisions in *Gaskin*, holding that Article 8 included an obligation to disclose information where that was necessary to ensure *effective* respect for private and family life. The Court described the obligation (at [162]) as:

> *a positive obligation … to provide an 'effective and accessible procedure' enabling the applicant to have access to 'all relevant and appropriate information' … which would allow him to assess any risk to which he had been exposed during participation in the tests.*

35. For an individual to have a file, or information, kept on them with details gathered from undercover operations is plainly an interference with their private life. It is also an interference for the individual not to be told about the detail of the information, what was gathered about them, by whom and when. That information is important to enable them to understand interactions they had with individuals, whether someone who they thought was a friend or colleague was, in fact, an undercover officer spying on them, and whether potentially very private information is held about them by the

police or other public bodies. The state, in this instance through the Inquiry itself which has been tasked with examining the relevant issues, has an obligation under Art 8 to provide that information save where non-disclosure can be shown to be required pursuant to Art 8(2) ECHR.

36. As to the current Inquiry, the four principles set out above were articulated in damages or other civil claims, in the context of Control Order proceedings and in cases concerning investigations required by the ECHR. This Inquiry has been created with the express purpose, not of determining private rights and obligations as between individuals and the state, but specifically to uncover the truth, bring to public attention and allay public concerns about allegedly serious misconduct by state authorities. In that context the need for openness, and for the public to be able to see that justice is being done, that appropriate lessons are learned and that misconduct is exposed, are all the more pressing. The principles in the authorities referred to above apply, *a fortiori*, to a public Inquiry. They operate as minimum standards and the starting point in relation to the Inquiry's obligation of openness.

(2) Overwhelming public interest in a thorough and effective inquiry

37. As set out above, an open legal process where allegations are made of state misconduct is, as a general proposition, an important element of adherence to the rule of law. In the present context the imperative to bring to light and thoroughly investigate the alleged misconduct is of overwhelming importance. If police in the United Kingdom have been secretly targeting and maintaining files on democratically elected politicians because of their political views, that is incompatible with the proper functioning of a democracy and inconsistent with the proper relationship between an elected legislature and the police. There is an overwhelming imperative that the Inquiry, whether through ROs being made or otherwise, is not impeded in investigating those matters and bringing to light any conduct that is inconsistent with those key constitutional values.

Parliament and the rule of law

38. It should be uncontroversial that democracy, democratic accountability and the proper

functioning of the democratic process are fundamental to the rule of law; and that a commitment to representative government and loyalty to democratic institutions are themselves fundamental constituents of our collective political morality. It is equally uncontroversial that elected representatives, whether in local government as councillors, council leaders or elected mayors, in central government or as Members of Parliament, are in a position of trust with regard to their constituents and to their functions as representatives of the people. The House of Commons within the United Kingdom's constitutional scheme plays a central role in representing the public and in holding government democratically accountable.

39. As a consequence Members of Parliament are accorded Parliamentary Privileges to ensure that their ability to represent, and communicate with, their constituents is unimpeded. Those Privileges are the sum of rights (including free speech and freedom from arrest in civil matters) enjoyed by each House of Parliament collectively as a constituent part of the High Court of Parliament, and by Members of each House individually – without which they could not discharge their individual functions (which exceed those possessed by other bodies or individuals) or the collective functions of Parliament. The Commons asserted in 1675 that privilege existed so that Members might *"freely attend the public affairs of the House, without disturbance or interruption"*,[5] and enshrined various aspects of Parliamentary Privilege in the Bill of Rights 1689. Among the most important is enshrined in Art 9 of the Bill of Rights which provides *"That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."*

40. Parliamentary Privilege covers everything said or done by a Member in the exercise of his or her functions as a Member in the transaction of Parliamentary business, including communications between one Member and another, or between a Member and a Minister, whether or not in the Chamber of the House of Commons,[6] as well as attendance at private party meetings[7] amongst other functions. There also exists a convention (known as the 'Wilson Doctrine') that communications between Members of both houses of Parliament and between Members of Parliament and constituents will not be subject to interception, and, along with legally privileged information, such

[5] CJ (1667-87) 342
[6] HC 101 (1938-39)
[7] Committee of Privileges, HC 138 (1946-47) paras 17 and 21

communications are treated as "Confidential Information" in the relevant RIPA code of practice (Home Office Code of Practice on Covert Surveillance and Property Interference).[8]

41. The rationale for these Parliamentary Privileges, and for the particular protections given to MPs in the functioning of democracy, is clear. They enable MPs to speak freely in Parliament and to enable constituents to communicate unimpeded and in secret with their elected representatives. As *Erskine May* states: *"Certain rights and immunities such as freedom from arrest and freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members"*. As *Erskine May* concludes, it may be a breach of Parliamentary Privilege *"[w]hen any of these rights and immunities is disregarded or attacked"*.[9]

42. Briefings that MPs regularly receive on a wide range of local and national issues, closely relating to the business of Parliament, will be covered by Parliamentary Privilege. If such briefings were given or influenced by (for example) UCOs masquerading as constituents, policy advocates or anyone else, there is a clear risk of interference with the proper functioning of the Houses of Parliament and the ability of MPs to speak "unimpeded". Additionally, there is a risk of a chilling effect on the ability of constituents to raise issues of concern with their MP, which might in turn prevent elected representatives from raising matters of concern with Ministers or within the House, again impeding their role as elected representatives. This chilling effect is particularly pernicious given that it is impossible to quantify the number of constituents now reluctant to raise important issues for fear of unwarranted surveillance.

43. In recent years the arrest of Damian Green MP and the search of his parliamentary office (although factually entirely different to the issues at stake here) reflects the sensitive nature of the constitutional relationship between the police and democratically elected representatives, particularly in circumstances where police conduct has (as the Committee which examined the case found) fallen below

[8] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97960/code-of-practice-covert.pdf
[9] p.203

acceptable standards.[10] However, the concern which has accompanied the revelations of Mr Francis and others, and the potential impact it has on MPs ability to perform their functions, has been of an altogether different magnitude. This was made clear in recent Parliamentary proceedings, including in the debate accompanying Peter Hain MP's Urgent Question on Undercover Policing on 26 March 2015.[11] Parliamentarians, including members of the Government, expressed repeated concerns that the actions of the Special Demonstrations Squad ("SDS") and others, as revealed by Mr Francis, were an affront to democracy, to Parliamentary Privilege and Parliamentary sovereignty, to the principles of confidentiality between elected representatives and their constituents, and to the wider public interest.

44. In laying the Urgent Question about the matter in Parliament, Peter Hain MP stated:

> *It is one thing to have a police file on an MP suspected of crime, child abuse or even co-operating with terrorism, but quite another to maintain one deriving from campaigns promoting values of social justice, human rights and equal opportunities that are shared by millions of British people. Surely that means travelling down a road that endangers the liberty of us all.*[12]

Jack Dromey MP stated:

> *The allegations in the newspapers today will send a chill up the spine of all those who value free speech, democracy and campaigning for one's beliefs. Being investigated not for crime but for political beliefs is quite obviously unacceptable… this is an affront to parliamentary democracy – to the sovereignty and independence of this House. It is also an affront to the vital principle, the breach of which can be very serious indeed, of confidentiality between a Member of Parliament and those he or she represents.*[13]

The Minister of Policing, Criminal Justice and Victims, Mike Penning MP, said that *"the whole House shares [those] concerns"*, That was why, he explained, the Inquiry had been established which would examine surveillance of Members of Parliament (and other elected representatives).[14]

45. Others in Parliament made reference to the particular concern regarding the confidentiality of communications between elected representatives (in local or central

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[10] See HC 62 (2009-10) para. 140
[11] 26 Mar 2015, Col 1581
[12] *ibid* Col 1582
[13] *ibid* Cols 1582-3
[14] *ibid* Col 1583

government) and their constituents, the sensitivity of which is and should be obvious. They also stressed that the political activities in which they were engaged and which appeared to have led to their being put under surveillance (such as *"campaigning for the rights of women and works and the right to demonstrate"* (Harriet Harman MP) and campaigns about policing, such as the Stephen Lawrence campaign (Diane Abbott MP)) were not undermining democracy, but *"essential for democracy"*.[15]

46. It is not known at this stage whether any of the allegations relating to ERs are true. Nor is it known what the nature of any targeting of ERs by UCOs was, which ERs were targeted, whether they were targeted because of their politics or because they were involved in particular campaigns (including those concerning the actions of the police). Nor is it known how they were targeted (whether, for example, UCOs were working in MPs'/ councillors'/ the GLC leader's/ London Mayor's offices, or were involved in any of their campaigns, policy formation or political decisions, or whether they masqueraded as constituents purporting to seek the assistance of their MP, Mayor or councillor). It is not known who authorised any operations, whether the operations were known about or even instigated by other politicians with whom the police may sympathise (and at what level), or how any information gathered was used (for example, whether it was ever used for the purpose of discrediting those politicians being targeted by providing information to the press).

47. None of these issues are a matter for determination at this stage. What is important is that if UCOs were, in fact, spying on and/or maintaining secret files about democratically elected politicians (including, as seems likely in some cases, the very politicians who were supposed to be overseeing their activities: see further below), and targeting them on the basis of their politics, that is a matter of the utmost constitutional importance. As set out in the following section, it is difficult to exaggerate the threat it poses to a democracy if the police, rather than being subject to democratic accountability and being politically neutral, are targeting elected politicians because of the nature of their political beliefs. The public interest in that being brought to light and thoroughly investigated is overwhelming.

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[15] See, for example, the interventions by Harriet Harman MP at 26 Mar 2016 Col 1584, and Diane Abbott MP at Col 1588.

Democratic Accountability of the Police

48. As was recognised by the United Nations International Police Task Force (1996):

> *In a democratic society, the police serve to protect, rather than impede, freedoms. The very purpose of the police is to provide a safe, orderly environment in which these freedoms can be exercised. A democratic police force is not concerned with people's beliefs or associates, their movements or conformity to state ideology. It is not even primarily concerned with the enforcement of regulations or bureaucratic regimens. Instead, the police force of a democracy is concerned strictly with the preservation of safe communities and the application of criminal law equally to all people, without fear or favour.*[16]

As Don McKinnon, Commonwealth Secretary-General has written, among the central features of a democracy, along with regular elections and an independent judiciary, are an *"army and police force under the control of an elected civilian government"*.[17]

49. These principles, and the link between police adherence to the rule of law and the proper functioning of a democracy, have been recognised by the courts. To give one example, in *R v Maxwell* [2010] UKSC 48, Lord Collins said (at [110]):

> *Public confidence that the police will act properly and lawfully is one of the cornerstones of democracy. Without proper police conduct and without public confidence in the honesty of the police, the rule of law and the integrity of the criminal justice system would be seriously undermined.*

50. As well as the police's adherence to the rule of law, it is critical that the police are accountable to democratically elected bodies. The police have, within the period to be considered by this Inquiry (from the establishment of the SDS in 1968), been held to account locally by independent Police Authorities. Such authorities were established as part of policing reforms in 1964, in 1994 (at which time a proportion of 'independent' police authority members were required to be drawn from local communities) and in 2002. The current system of Police and Crime Commissioners (established by s.1 the Police Reform and Social Responsibility Act 2011) and in

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[16] United Nations International Police Task Force, 1996 - cited in Commonwealth Human Rights Initiative Report 'Police Accountability' (2005):
http://www.humanrightsinitiative.org/publications/chogm/chogm_2005/chogm_2005_full_report.pdf

[17] http://www.theguardian.com/world/2006/sep/27/pakistan.mainsection

London first through the Metropolitan Police Authority for the Metropolitan Police Service (under s.310 of the Greater London Authority Act 1999), and latterly through the Mayor's Office for Policing and Crime (under s.3 of the 2011 Act) further ensures that the police are held to account by democratic bodies, and have a mandate directly from the people they serve.[18] In the case of the Metropolitan Police they are, by statute, democratically accountable to the elected Mayor of London and members of the Greater London Authority.

51. Whether the actions of UCOs undermined the democratic accountability of the police was one of the issues that Parliament considered needed to be examined by this Inquiry. Intervening in the Urgent Question on Undercover Policing, Sir Tony Baldry MP made the point that: *"...all of us need to have confidence, as do our constituents, in the integrity of the police, and ... every part of every police force needs to be democratically accountable and to carry out their actions lawfully..."*[19] Mike Penning MP, the Policing Minister, agreed. He stated: *"It is important that the country has confidence in the way the police operate, and that is exactly why the Home Secretary has instigated the inquiry"*.[20]

52. If the allegations about the conduct of the SDS in relation to the ERs are found to be true, not only were those democratic bodies to which the police were supposed to be held to account unaware of their activities, but someone may have been authorising the police to target the very ERs responsible for overseeing their activities. Intervening in the Urgent Question, the former Home Secretary Jack Straw MP described *"an extraordinary situation where I as Home Secretary, and from 1997 to 2000 the police authority for the Metropolitan police, not only knew nothing about what appears to have been going on within the Metropolitan police, but may also have been subject to unlawful surveillance as Home Secretary"*.[21] The Policing Minister again agreed. He noted that if Jack Straw was being secretly investigated by the police when he was Home Secretary, *"someone must have authorised [it]"*, and *"it sounds ludicrous that that should have taken place in the mother of all democracies, and we have to find out exactly what when on."*[22] It may also be that the same happened in relation to Ken Livingstone while he was London Mayor and had

[18] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118242/chapter-two.pdf

[19] 26 Mar 2015, Col 1584
[20] *ibid*, Col 1582
[21] *ibid*, Col 1586-87
[22] *ibid*, Col 1588

responsibilities and oversight roles in relation to the MPS. Officers from the MPS may, unbeknownst to him, have been spying on him at the time.

53. To ensure and restore public confidence after such revelations, the Inquiry must consider whether that occurred and how it was allowed to happen. This was expressly acknowledged by the Minister in the debate on Urgent Question on Undercover Policing. In answer to Jack Straw, Mike Penning MP said:

> *[Mr Straw] knows from his experience how difficult it is, and to realise that he was in the dark about authorisations that have taken place – that is exactly what the inquiry has to consider. Lord Justice Pitchford must have full access, and even though the right hon. Gentleman will sadly be leaving the House, I am sure he will give him all the help he can in future to find out why Home Secretaries, Ministers and police managers were not informed about what was going on inside the Met. That is what the inquiry must do.*[23]

54. The inference that covert policing of democratically elected representatives because of their political views and/or involvement in particular campaigns or issues, goes to the heart of the proper functioning of a democracy and the proper relationship between democratically elected politicians and the police force. It also goes to the free exercise by citizens of their fundamental civil and political rights, as well as their ability freely and confidentially to communicate with those who are elected to represent them at local and national level. It is critical that the public have confidence that those matters will be thoroughly investigated and that any specific instance of misconduct is brought to light.

(3) The ability of the Inquiry to fulfil its Terms of Reference

55. The Terms of Reference of the Inquiry as announced by the Home Secretary on 16 July 2015 included particular reference to examining the effect of undercover police operations on the public in general; ascertaining the state of awareness of undercover police operations within the government; establishing the impact of the undercover policing on individuals; identifying and assessing the adequacy of the justification, for authorisation, operational governance and oversight of undercover policing, as well as the adequacy of the statutory, policy and judicial regulation of undercover policing.

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[23] *ibid*, Col 1587

Given what is at stake, it is critical that the Inquiry is able to fulfil those Terms of Reference.

56. The MPS approach to ROs is set out at [I.2(ii)] of their submissions of 12 February 2016. They are as follows: "*...it is likely that in the overwhelming majority of instances the MPS will be submitting that considerations of fairness and the public interest come down in favour of not disclosing the fact of or details of an undercover police deployment including, but not limited to, the identity of undercover police officer*". As the NPSCPs observe, that is likely to lead to nothing less than secrecy in respect of all evidence concerning the undercover operations about which there has been such concern, save where there has already been official confirmation of the real identity of an individual UCO and the operation in which they were involved (which does not apply in relation to any of the ERs).

57. In the case of the ERs, the allaying of public concern takes on a specific angle. That is the specific concern of the masses of people who may have been directly touched by the undercover policing as a result of ERs carrying out their functions. These people include constituents, parliamentary and local government staff, journalists, attendees at meetings with ERs, and others.

58. The ERs submit that the secrecy proposed by the MPS approach would render this Inquiry unable to fulfil its terms of reference. That is so for two distinct but closely related reasons:

(1) It will significantly impede, if not make it impossible, for the Inquiry to be able to carry out its work and get to the bottom of the matters which it is required to investigate; and

(2) It will make it significantly harder, if not impossible, for the Inquiry to achieve public confidence and to allay public concern.

(1) Getting to the truth

59. Getting to the truth includes revealing which ERs were targeted and why. The importance of the Inquiry being able to reveal as much information as possible to the

ERs who were concerned that they had been the subject to undercover operation was stressed by the Government in Parliament when it explained the rationale for the Inquiry to MPs.

60. During the Urgent Question on Undercover Policing, Mike Penning MP was repeatedly asked to disclose to MPs who had or feared they had been targets of undercover surveillance details of what had happened. In answer to Harriet Harman MP, Mr Penning undertook to *"make sure that as much as can be released is released"*;[24] likewise to Jeremy Corbyn MP he promised *"to ensure that as much information as possible is passed to current and past Members of Parliament"* and to *"do everything I can to ensure that the answers come forward"*;[25] similarly to Mike Gapes MP he stated he would *"do everything I can to make sure as much information as possible is passed on to colleagues in this House and to those who have left this House"*.[26] Joan Ruddock MP stated that she wanted to know who authorised surveillance of her and on what grounds.[27] Mr Penning responded: *"that is exactly why the inquiry is being put in place"*; and he expressed *"every sympathy with Members of the House … and that is why the inquiry is being held"*.[28] Diane Abbott MP asked for an unredacted copy of the file maintained about her and information on who authorised her to be placed under surveillance and on what grounds. Mr Penning responded: *"I will do everything I can to make sure that the documents are released"*.[29]

61. This disclosure is not only important to the MPs who asked questions of the Minister in Parliament. It is important that members of the public who are represented by and interacted with their elected representatives discover which of those interactions, or conversations, or correspondence they thought was confidential, was subject to undercover surveillance. As far as the effective working of the Inquiry is concerned, the importance goes much further.

62. The MPS proposal that no evidence be given which acknowledges the existence of any specific undercover deployment is likely to make it impossible for the Inquiry to get to

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[24] 26 Mar 2015, Col 1584
[25] *ibid* Col 1586
[26] *ibid* Col 1589
[27] *ibid* Col 1585
[28] *ibid* Col 1586
[29] *ibid* Col 1588

the truth of what happened. There is considerable experience with closed processes in other contexts, such as Control Order/TPIMs imposed on those suspected or believed to be terrorists, where, notwithstanding that national security is at stake, far more is disclosed in open court than the MPS are proposing in this Inquiry. Even then, and with the conscientious efforts of Special Advocates and judges, it is recognised that it is extremely difficult to test the credibility of evidence in closed proceedings. As Martin Chamberlain QC, who has acted as a Special Advocate, has written: *"save for those cases where the material produced can be shown to be unreliable by reference to other closed material, the court's assessment of reliability is necessarily dependent on the Government's own assessment."*[30] Such evidence not only cannot be tested but, as Lord Kerr explained in *Al Rawi* at [93], may positively mislead:

> *What [...] could be fairer than an independent arbiter having access [at a closed hearing] to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial.*

63. In the vast majority of Control Order/TPIM cases the evidence being heard in *"closed"* will be allegations against the controlled person not evidence of misconduct by state agents. As set out below, there is an obvious risk in the present context, where a purpose of the proceedings is to determine whether state agents are guilty of misconduct, that they will not provide complete and honest answers where their evidence cannot be challenged. Even in *Al Rawi*, the individuals who claimed they had been the victim of misconduct by state agents could at least describe what happened to them, which could then be put to the state witnesses in closed hearings. As set out above, despite all that, it is very difficult to obtain reliable and properly tested evidence through such process where evidence is heard in secret and those who might respond to it and the public are excluded.

64. The problem in present context is much starker. If the Inquiry accedes to the MPS'

[30] Chamberlain, M. 'Special Advocates and procedural fairness in closed proceedings' (2009) *Civil Justice Quarterly* 28(3) 314-326

proposed approach to ROs, and the relevant ERs are not told that they have been the subject to undercover deployments and information secretly gathered about them, it is likely to be impossible for them to provide any evidence about the police's activities to assist the Inquiry. MPs and other democratically elected officials interact with a vast number of people. If they do not know that they were targeted in undercover operations, when and in what way, they cannot provide any evidence to the Inquiry as to what happened to them. They cannot participate in any meaningful way in this Inquiry. This is a relevant consideration to all CPs, but especially so to the ERs because of the numbers of constituents engaged with their MPs and local government leaders through meetings, constituency advice surgeries, protests of other forums. It will also make it impossible for the Inquiry to investigate the impact of the undercover policing upon the ERs or their constituents (one of the elements of its Terms of Reference). That both undermines the public confidence which the Inquiry is intended to promote, but also makes it virtually impossible that the Inquiry can be satisfied it has got to the truth of what happened.

65. The consequence of the approach proposed by the MPS will be that the evidence about UCOs' interactions with ERs contains inaccuracies, is incomplete, or is, in whole or in part, simply untrue, it is likely to be impossible to challenge. If the ERs, or other CPs, are not able to give evidence on any operations in which they were targeted, to explain what the UCOs did and the nature of the material they gathered, it is impossible to see how the Inquiry can be satisfied that it has uncovered a complete and accurate picture. In essence, the Inquiry would be required to trust that the police will properly investigate and reveal their own alleged misconduct, and provide a complete, accurate and honest account of all of their activities. At least as far as the ERs are concerned, no victims of those activities will be able to respond to their account or challenge their evidence. In the context of recent revelations regarding, *inter alia*, the destruction of evidence, and serious and sustained failures by the MPS to disclose relevant material to the Stephen Lawrence Inquiry[31] and in the miscarriages of justice cases,[32] which were uncovered by the Ellison review, it is wholly fanciful to suggest that if the MPS gives its evidence on deployments entirely in secret, that the police will provide a complete and candid account of all their activities to the Inquiry.

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[31] Stephen Lawrence Independent Review, Summary of Findings at pp.11, 13, 15, 16, 17, 31.

[32] See Judge LCJ in R v Barkshire [2011] EWCA Crim 1885 at [1]: "*...elementary principles which underpin the fairness of our trial processes were ignored.*"

(2) Public confidence

66. The Inquiry must be able to analyse critically the police evidence and get to the truth of what happened and the public must be confident that it has done so. As set out in the authorities quoted above, public confidence in the state's adherence to the rule of law requires the public knowing that any state misconduct has been brought to light and examined. That is also for the benefit of the police, if, in fact, some of the allegations against them turn out to be exaggerated or untrue. As Lord Brown noted in *Al Rawi*, if allegations are rejected after hearings *"in closed session"* from which the public and those making the allegations are excluded *"there is a substantial risk that the [the state authorities] would not be vindicated and that justice would not be seen to have been done"*.

67. As Jeremy Corbyn MP stated in the Parliamentary debate on Undercover Policing:

> *If I was under surveillance, or the late Bernie Grant or any of my friends, then presumably the police were at whatever meetings we attended and recorded whatever phone calls we made. I think we have a right to know about that. We represent constituents and are in a position of trust with them. That trust is betrayed by this invasion of our privacy by the Metropolitan police.*[33]

Knowing that any past police misconduct has been brought to light and exposed to public scrutiny is an unavoidable step to rebuilding trust in the police.

68. Unlike other European countries in the 20th century, the United Kingdom has been fortunate (or has considered itself fortunate) that it has not suffered from the consequences of a politically motivated police force that has attempted covertly to target or undermine democratically elected politicians. The public has generally trusted the police as a consequence. If that trust has been misplaced, and UK police officers have targeted politicians because of their political views or activities, it is a public interest of the highest possible order that that trust be restored and that the public can have confidence that it will never again occur. This is especially important because of the chilling effect that the Peter Francis, *True Spies* and other revelations are likely to have had on constituents, including those concerned about state or police

[33] *ibid* Col 1586

misconduct, with their elected representatives, as well as its possible impact on Parliamentary Privilege. Any failure properly to investigate (and be seen properly to investigate) these issues would risk allowing that chilling effect to continue. As such, trust will not be restored if all evidence of, and hearings concerning, the relevant police deployments are held in secret, no details of what the police actually did, to who, why, and who authorised it is available for public scrutiny.

(4) General and blanket justifications for Restriction Orders

"Neither confirm nor deny" (NCND)

69. The MPS argue for the complete non-disclosure of evidence as they consider that anything else would undermine their stance of providing an "NCND" answer whenever questions are asked about undercover police operations and activities. The ERs submit, in agreement with the other NPSCPs, that NCND simply has no role to play in this Inquiry.

70. The ERs adopt and support the position set out by CTI at [94] of their Note, to the effect that NCND is neither a rule of law nor a legal principle.[34] Nor is NCND, in and of itself, a public interest which requires protection. Rather, NCND is a mechanism adopted, on occasion, by the police, intelligence and security services whose officials are deployed in intelligence gathering operation to avoid inferences being drawn if, across time, different answers are given in different instances when individuals ask, for example, if they are under surveillance.

71. NCND has no application to a public inquiry specifically examining undercover policing, tactics and officers. This Inquiry is a one-off event, the purpose of which is to find out what happened in undercover policing operations. As such there will be no *'pattern'* of disclosure/non-disclosure over time from which it will be possible to draw inferences.

72. Unlike other circumstances in which NCND answers may be given, the presumption

[34] See for example *Mohamed and CF v Secretary of State for the Home Department* [2014] EWCA Civ 559 at [20] per Maurice Kay LJ

of openness described above means the public will have an expectation that the Inquiry will provide details of any deployment that can be revealed. Indeed, that was expressly stated in relation to MPs by the Minister in Parliament. There will be no pattern of different answers over time from which any inference can be drawn and nothing done by the Inquiry in the particular context in which it is operating and which will lead to any inferences being drawn if the police or other bodies give NCND answers in the future.

73. As Maurice Kay LJ explained in Mohamed and CF at [20], NCND is a *"governmental policy"* and *"not a legal principle"*. He continued: *"It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it"*, and he held that application in a particular context required *"justification"*. In the present context, maintaining an NCND stance has no justification. Indeed, it is striking that when asked by MPs in Parliament about release of the files it was believed had been kept on them, and for details of who authorised that they be targeted and on what grounds, the Policing Minister at no stage said that an NCND response was appropriate. Instead he stressed that the Inquiry was set up to answer such questions, and that he, the Minister, would do *"everything [he] possibly can"* to ensure that relevant documents about the targeting of MPs were released.

Premature determination of legitimacy of police methods

74. In arguing for blanket or near blanket secrecy as to the deployment of UCOs, the MPS accept that such an approach cannot be absolute. They accept secrecy cannot apply to any *"[i]llegitimate method that is not and will not be used"*.[35] That concession is rightly made. Bean J (as he then was) in DIL and others v The Commissioner of Police for the Metropolis [2014] EWHC 2184 (at [42]), drew a distinction between legitimate and illegitimate methods:

> *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 (1956) 26 LJ 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*

[35] See MPS submissions of 12 February 2016 at [VI.1]

75. Once it is correctly recognised that the MPS' approach of blanket non-disclosure cannot apply to prevent the disclosure of illegitimate police practices, it is clear that in the context of this Inquiry the approach proposed by the MPS will be unworkable.

76. It will be the ERs' position that police targeting of democratically elected representatives in undercover operations, where the targets were selected because of their politics, is never a legitimate police tactic; hence secrecy cannot be justified. On the MPS approach, those matters will need to be determined now before applications for ROs are determined. That is unworkable. The legality of particular police tactics should be determined, not in the abstract or on the basis of hypothetical facts before the Inquiry begins, but in relation to specific instances of undercover police activity and on the basis of actual facts. Under the MPS approach it would need to be determined now, across the board and in the abstract.

77. That is a further, practical, reason for rejecting the MPS' submission that evidence about all or virtually all of the relevant undercover police deployments should be heard in secret. Instead, specific and compelling evidence as to why details of some particular deployment needs to be kept secret is required. If such evidence is presented, the Inquiry can consider in the particular context of the deployment to which it relates, whether non-disclosure is concealing an illegitimate police tactic or operation.

Generalised evidence about undercover operations/informants in relation to ERs

78. In assessing the risk of undercover policing, the targeting of democratically elected representatives which has been revealed does not come close to the kinds of situations described by Lord Judge CJ in *R v Mayers* [2009] 1 Cr App R 39 at [30]-[33] (and relied upon by the MPS at [III.7] of their submissions) in which officers penetrate dangerous criminal associations and engage in "*covert operations ... undertaken ... as a last resort against those suspected of organized and prolific serious crime, who have been sufficiently careful to render them impervious to more traditional forms of police work*". That situation, and the dangers that may arise from it if former undercover officers are tracked down, bears no relationship to the alleged activities the Inquiry is tasked to investigate.

79. The ERs accept that policing is not risk-free (though uniform policing may in certain circumstances be more risky than policing by UCOs), but in the absence of any evidence specific to a particular officer of real and immediate danger that will result from evidence of past deployments being revealed, and which cannot be managed by the Police Service who have primary responsibility for their officers' safety, it is difficult to see how refusing to disclose the fact of such past deployments will be justified. The ERs are well aware of the importance of the work that the police perform, including in undercover operations, and the public interest in an effective and respected police force. As set out above, Ken Livingstone had responsibilities for the Metropolitan Police during his time as Mayor of London and worked closely with the police to tackle and reduce crime in London. Critical to the police's effectiveness, however, is their accountability, the public's confidence in their impartiality and their adherence to the rule of law. It will be impossible for the Inquiry to get to the truth of what has happened in undercover operations over the past few decades, restore public confidence and ensure that in the future the police are democratically accountable, if all of virtually all of the evidence of police deployments is withheld from the public and those affected. If that means some increased expenditure by the Police Service and short-term alterations to some current operations, that will not come close to outweighing the public interest in an open and effective inquiry.

Article 8 ECHR and potential applications for ROs by the ERs

80. The strong inference from the information revealed so far is that the ERs have been the victims of unwarranted intrusion into their private lives, in violation of Article 8 ECHR, by virtue of undercover police spying and other matters outlined in these submissions. Surveillance of democratically elected MPs and local government leaders clearly fails to respect their rights to privacy protected by Article 8. Likewise, it is part of the bedrock of the democratic process that constituents must be able to have confidence that conversations with their elected representatives are confidential so that they can be free to raise sensitive and issues. Any monitoring (for example) of communications between the ERs and their constituents clearly interferes with the rights not only of the ERs, but the rights of the many constituents who regularly interact with their elected representatives on a wide range of sensitive and personal

issues, to respect for their "correspondence".

81. The Inquiry now risks further breaches of victims' Article 8 rights (or compounding the harm) if intelligence which might have been recorded by the UCOs (and the accuracy of which the ERs have never been permitted to consider) is made public. It is axiomatic that no further such breaches should be take place, and that the Inquiry should respect the privacy of those who have already been subject to invasions of their privacy. Accordingly, each individual NPSCP should be supplied with the intelligence gathered on him/her in advance of its supply to other CPs in order to be given the opportunity to make applications as to relevance and if necessary for ROs if they consider disclosure would breach Article 8.

Conclusion

82. The relevant public interest factors are identified in the NPSCPs' submissions of 11 March 2016 in Part 3. The ERs submit that the relevant public interest factors should be approached as follows:

(1) That the inquiry must take openness as its starting point and any departure from this principle must be a last resort and fully justified.

(2) That the position urged by the MPS, involving the hearing of all or virtually all the police's evidence about deployment of undercover officers in secret or closed session, would prevent the Inquiry from coming near to fulfilling its terms of reference. Such an approach would fail the central duty of the Inquiry of uncovering and bringing to public attention past misconduct and ensuring public confidence in the police, and the position of the police within British parliamentary democracy, is secured for the future.

(3) ROs should not be made which impede the proper functioning of the Inquiry and its ability to discharge those functions.

(4) As to the circumstances in which ROs are appropriate, it is difficult to envisage circumstances in which ROs will be necessary unless compelling evidence can be

presented that, in their absence, there is a real and immediate risk to life that the MPS will not be able to protect against. Ultimately, however, that will be a matter for the Inquiry to decide on the facts of each case.

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