UNDERCOVER POLICING INQUIRY

PRELIMINARY HEARING ON THE LEGAL PRINCIPLES THAT APPLY TO APPLICATIONS FOR RESTRICTION ORDERS UNDER SECTION 19 OF THE INQUIRIES ACT 2005

I N D E X

Tuesday, 22 March 2016

(10.31 am)

Opening remarks

THE CHAIR: Good morning, everyone.

Before we commence today's business, I am afraid I need to remind you of some of the house rules. You have probably seen this already on a notice. I'm only repeating it now so that those who haven't read it are aware of it.

First of all, cameras and recording equipment are not allowed in the building. There must be no recording of the proceedings in this room, except by the Inquiry. A transcript of the proceedings will be prepared and will be placed on the Inquiry's website.

Secondly, could I ask you all, please, to make sure that your mobile phones are either switched off or on silent. Thirdly, no telephone calls from this room, please, except during any breaks.

Finally, text and Twitter are allowed, but I need to remind you of a rule that was imposed at the opening of the Inquiry and will apply at every hearing. No statement made in the hearing can be transmitted until at least 60 seconds has elapsed since the statement was made. The reason for that is that it will enable anyone who wishes to interrupt in order to object to the

transmission of that statement. To give you an obvious example, if somebody mentions a name and the Inquiry has made an order that that person should be anonymous, then someone can get up and object to its transmission.

Those are the house rules, as it were. I come next to the purpose of today's hearing. As you know, so far the Inquiry has been considering preliminary issues that relate to the way in which the Inquiry is going to approach its task of investigating undercover policing. The issue with which we are concerned today is restriction orders.

As you know, I am sure, core participants and witnesses can apply to the Inquiry for an order that evidence, documents or information that is provided to the Inquiry should not be disclosed to anyone outside the Inquiry team. They can apply for restrictions on the way in which oral evidence is received; for example, by the exclusion of the public or indeed the exclusion of everybody but the Inquiry team.

As a result of a ruling that I made at the outset, some of our core participants are already known by ciphers, rather than by their real names. That was in order to maintain their confidentiality for the time being, until they were able to make a formal application under section 19 of the Inquiries Act 2005 for

a restriction order.

Several applications for anonymity have now been notified to the Inquiry, both by police officers or former police officers and by core participants who have been affected by undercover policing, and I expect to receive, during the course of the Inquiry, many more applications not just to treat witnesses anonymously, but also to prevent other sensitive evidence, documents and information from being made public.

The Inquiry has deliberately approached this problem incrementally. The purpose of doing that is to make sure that the Inquiry receives submissions from everybody involved so that, before I embark on making individual decisions, I am fully aware of the arguments presented by all different interests in the Inquiry.

What has happened so far is that I have invited written submissions from core participants as to the law that I must apply and as to the factors that I should take into account when considering whether to make a restriction order and, if so, in what terms. The written submissions that I have received have been admirable, but having received them, I decided that the Inquiry should hold this oral hearing in order to discuss the issues further and so that any one range of interests can comment on the submissions of another.

When this hearing is over, probably tomorrow, I will prepare a written ruling and in that ruling I will explain the legal principles on which I will act and in general terms the approach that I will take to the task of considering applications for restriction orders. But I will not at that stage be making any restriction orders. Before I can consider making restriction orders, I will need evidence from the applicants, further written submissions as to the reasons why such an order should be made in the circumstances of any particular case, and I will need to consider the objections to such an order. It is possible that when I start to consider these applications, I will need a further hearing with further oral submissions on the merits of particular applications.

Although this is very much a preliminary hearing, therefore, it seems to me that it is also a very important one and it has not escaped many of you that it is a very important one. It is clear to me that the decisions I have to make about the terms of any restriction orders are going to determine how the Inquiry goes about its business of investigation.

There is a stark difference of opinion between the police service core participants and the non-police non-state core participants as to whether any and, if

so, how much information about undercover policemen and their operations should be put into the public domain.

If I can distil the dilemma that will face the Inquiry, it is in saying that part of my task will be to assess on the one hand the weight of the public interest in the openness of the proceedings of this Inquiry and the harm that might be done if much of it was held in private and, on the other, the public interest in keeping sensitive information private and the harm that might be done if it were to be disclosed.

So I want to make sure, before I get down to making decisions, that I have as much assistance as possible from those whose interests are represented at the Inquiry and that is why we are here today. I have asked today's speakers to concentrate primarily on the factors that they say represent the public interest that should prevail, but of course I'm prepared to hear submissions on anything that is relevant to the issue of restriction orders.

In a moment I'm going to hand over to Mr Barr, who is leading Counsel to the Inquiry, but before I do, can I just tell you what the timetable will be today? We will break at about 11.45 for 15 minutes in order to give the transcribers a rest and no doubt ourselves, we will take a lunch-break between 1 and 2, we will break

again in the afternoon at 3.15 for 15 minutes and we will finish as close as we can to 4.30. That's enough from me for the time being.

Mr Barr?

MR BARR: Thank you, Sir.

Submissions by COUNSEL TO THE INQUIRY

MR BARR: All of the advocates who have made written submissions are here this morning and I know that at least one of the unrepresented core participants wishes in due course to address you.

THE CHAIR: Who is that, Mr Barr?

MR BARR: Helen Steel, Sir.

THE CHAIR: Thank you.

MR BARR: If any others wish to address you in due course, if they could notify me, I would be grateful.

THE CHAIR: Thank you.

MR BARR: Since circulating our note on the legal tests applicable for applications for restriction orders dated 29 January this year, we have had the benefit of sight of the legal submissions made on behalf of various core participants and on behalf of a number of media organisations. Those submissions raise a number of issues which we have explored further in a supplementary note which has been circulated to the advocates this morning and which is being posted on the Inquiry's

website.

I propose, therefore, only to deal with the main points which we have raised in that further note orally today in summary form in order to leave the other advocates with as much time as possible to address you.

We observed at the outset that the differences between the core participants as to the correct legal tests under section 19 of the Inquiries Act 2005 are much narrower than the differences between them as to the results which they contend should flow from the application of those tests.

Turning first to the right to life enshrined in Article 2 of the European Convention on Human Rights, read with the Human Rights Act 1998, the question has arisen as to what the proper test is once that right is engaged; in other words, once you are satisfied that there is a real and immediate risk to life. The question is whether you can then take all circumstances into account in deciding what protective measures are reasonable or whether you are limited simply to considering questions of practicality. We consider that the answer is the former wider interpretation and we've set out in our further note authority for that proposition from the case of Rabone v Pennine Care NHS Foundation Trust [2012] 2 AC 72.

In relation to Article 8 of the Convention which deals with private life, we note that in a number of submissions core participants have asked that they be informed if a document contains a reference to them before the document is circulated to ensure that their rights under Article 8 of the Convention are safeguarded.

We acknowledge that it will be for the Inquiry to ensure in its work that it does not violate the rights to privacy of those who participate or who are referred to in evidence. However, Article 8 is a qualified right. There will undoubtedly be instances where it is necessary to put personal information into the public domain and there will be other instances where it is equally clear that it is unnecessary to do so.

The procedure for dealing with this issue has been written into paragraph 15 of the draft redaction protocol, however it is not envisaged that every reference to a third party in a document will give rise to the need to consult the third party affected. We anticipate that in most cases the Inquiry team will be able to make the necessary judgment. In those cases where we think it is necessary to consult, we will do so.

We would point out that a process which required

consultation in respect of every reference to personal information would be unworkable and it would in itself become an argument tending in favour of private hearings. We wish to avoid such an outcome.

Turning now to the question of the public interest. We have appended to our further note our provisional list of the public interest factors which are likely to arise in relation to public interest applications. We have deliberately described the list as "provisional" because we consider that it will only be when considering a specific application that all of the relevant factors in relation to that application will be capable of conclusive identification. We would like to emphasise to those who read our list that the weight to be attached to the relevant factors is the important factor, not the number of factors which we have listed.

Ms Kaufmann and Ms Brander in their submissions have carefully analysed the public interest in openness. To this we have added references in our note to cases which discuss the importance of openness in public inquiries, Wagstaff [2001] 1 WLR 292 and Persey [2003] QB 794. We set out various quotations in our further note which explain the approach the court took there. It is clear that the thrust of those cases is that in an inquiry like this, with a strong forensic role, there is a particular importance in openness.

Some of the reasons for that referred to in that case law include the need for communal catharsis and an opportunity for those in authority to be held to account; public venting of anger, distress and frustration; a public stage.

Mr Squires QC and Mr Stoate, in their written submission, emphasise the gravity of the allegations which relate to the elected representative core participants and which the Inquiry will be investigating. Those allegations are indeed grave. We respectfully agree with them that it is important to investigate those issues as publicly as possible.

It is also important to recognise that theirs are not the only matters of fundamental importance which the Inquiry will be investigating. There are many others. Investigating the impact of undercover policing on protest movements calls into question whether basic democratic freedoms have been undermined. Investigating the impact of undercover policing on people from ethnic minorities gives rise once again in a public inquiry to profoundly important questions of racial equality. The particular adverse impact of undercover policing on women who were the subject of deceitful relationships means that attitudes towards women in the context of undercover policing also fall to be examined. In all of

these cases, the more publicly police conduct is examined, the better.

Moving now to the investigative obligations under Articles 3 and 8 of the European Convention on Human Rights -- that is Article 3, the prohibition on torture, inhuman and degrading treatment, and Article 8, the right to privacy -- it is clear to us that both rights can give rise to an investigative obligation. However, both rights are qualified in this sense: Article 3 is absolute in its non-investigative aspects, but there are qualifications on the investigative duty. There have been numerous public inquiries in which the Article 3 investigative obligation has been engaged and in which witnesses have been granted anonymity. They include the Baha Mousa Public Inquiry by way of example.

We have summarised in the further note the objects and the parameters of those obligations. I do not go into the detail here because it is the view of the Counsel to the Inquiry team that the qualifications on these investigative obligations are such that in reality they are unlikely to make any difference substantively to the outcome of applications for restriction orders. This is because, in any event, you, Sir, will be striking the balance between competing interests and, after all, striking a fair balance between competing

interests also lies at the heart of the Convention.

That is not to say that these obligations can be ignored. You, of course, Sir, have to act in compliance with Convention obligations. Our point is simply that, in an inquiry which is going to be as public as possible, these obligations are in practice unlikely to add.

Those, Sir, are the summary observations that I would like to make orally. Those who wish to read the full details can do so by looking at the note and attached schedule on the website.

THE CHAIR: Thank you very much for the time being.

Mr Hall?

Submissions on behalf of the Metropolitan Police Service by

MR HALL

MR HALL: Sir, on behalf of the Metropolitan Police Service, I intend to deal directly and in turn with the matters raised in your issues for consideration document of 17 March.

THE CHAIR: Thank you.

MR HALL: Subject to correcting two references, I don't intend to refer to our submissions, but we adopt them. Those references -- there are two corrections to make -- paragraph I.5(ii) -- I don't know if you want me to do that now, Sir, or just give you the references. That should

refer to section 20(4), rather than 19(4) --

THE CHAIR: Thank you.

MR HALL: -- and paragraph III.3 should refer to paragraph 7.7 of the code -- that's the written code -- not 7.6.

Sir, the only thing I want to say before turning to the questions raised is to reiterate at the outset the Metropolitan Police Service's commitment to give your inquiry the fullest possible assistance. What will not be generally appreciated is the amount of time, personnel and resources that the Metropolitan Police is deploying in order to respond to the demands of your inquiry. I know that in due course a protocol will be published showing the extent of access that the Inquiry team have to Metropolitan Police information, including, if the Inquiry wishes it, embedding someone at the Metropolitan Police Service.

That commitment to allow you, as chairman, to get to the truth of the matters that has led to the institution of the Inquiry in the first place should not be underestimated and I appreciate there will be those who are either unwilling or unable to believe that the Metropolitan Police wishes to cooperate and of course it may not be possible to persuade everybody that that is the case.

I should put publicly on record before you and your

Inquiry team how committed the Metropolitan Police Service is, from the commissioner down, to ensuring that you get at the truth and I submit it would be unfair and inaccurate to invite you to proceed on any other basis.

So, Sir, turning to the questions: the first question raised is the relevance of widespread public, Ministerial and Parliamentary concern. Sir, concern comes in, as you know, at the beginning of the Act under section 1(1). It is concern that will lead a Minister to instituting a public inquiry; in other words, that fires the starting gun. But when it comes to the making of restriction orders, concern is only mentioned once and that's section 19(4).

Sir, if I can take you directly to it, it's at tab 14 of your first volume and 19(4)(a) tells you that one of the matters that you should take into account is "... the extent to which any restriction order, attendance, disclosure or publication might inhibit the allaying of public concern".

No reference there to allaying of wider concern, such as Ministerial or Parliamentary concern. We say that's unsurprising because this is an independent judicial process which must decide all matters independently and fairly. It's a hallmark of a judge-led inquiry that when you come to determine the

public interest, you do that as an independent judge, not driven by perceptions of what other people's concerns are.

So we say it would be wrong to try to decide in a general way whether to make a restriction order or not on the basis of your or indeed anybody else's perception of public, Ministerial or Parliamentary concern. It simply requires an independent and fair approach to the criteria laid down in the Act.

There is a further objection to taking account of "widespread public, Ministerial and Parliamentary concern". There is no precise way of measuring such concern or how widely such concern is shared. Public concern, as we know, fluctuates and indeed the Inquiry may not know the full picture. Some parts of the public will be very concerned about identifying what went wrong; another part of the public, perhaps the majority, may be most interested in ensuring that the undercover policing tactic is not put in jeopardy. Indeed, there may be members of the public concerned to see that officers and their families are not put at risk by the Inquiry process.

So we say that public concern is a factor in the section 19(4)(a) limited sense, but with the caveat that it is not a very safe guide as to whether or not it is

fair to make a restriction order or not.

Sir, can I turn then to the second issue, which is the presumption of openness. Can I start by saying that, whatever ruling you ultimately make on restriction orders, this will not be a secret inquiry and we would not wish that phrase to gain any currency.

It is important, we submit, not to exaggerate the consequence of restriction orders. There will be a public inquiry. We submit that it is likely that the Inquiry will be able to examine a great deal openly, not just the evidence of the non-state core participants, but a good deal of police evidence.

By way of illustration only, there are four officers, that is three former [Special Demonstration Squad] officers and one former [National Public Order Intelligence Unit] officer, for whom the Metropolitan Police accept [Neither Confirm Nor Deny] is not an option. It seems to us that the Inquiry will be able to explore in considerable openness their role; the rationale for what they did or did not do; their management and supervision; their welfare; their interactions; the policy documents that governed their actions; the awareness of their superiors, both in the police and in the Home Office. Even where officers are granted measures of anonymity, you will be able to explore in public documents, the culture, the supervision and the accountability of the organisation.

Indeed it is quite possible to go through your terms of reference -- and it is an exercise that we have been doing already -- to identify just how much, on every part of your terms of reference, can be heard in public, both from the core participants and from the police. That's not to underestimate the extent of restrictions we may be seeking, but also to emphasise that this is not by a long shot any request for a secret inquiry.

Can I turn then, against that background, to the presumption? Our submission is that there is no presumption of openness for the type of information that concerns the identities of Covert Human Intelligence Sources. Sir, I will refer to them as "CHIS" by the acronym. Sir, as you know, an undercover police officer is a type of [Covert Human Intelligence Source]. The submission really is based upon the interplay between the statutory regime that governs [Covert Human Intelligence Sources]-- that is the Regulation of Investigatory Powers Act 2000 or 'RIPA' -- and the Inquiries Act of 2005.

So you will recall that [the Regulation of Investigatory Powers Act 2000] creates an architecture, effectively, for the deployment of a [Covert Human Intelligence Source], and there must be arrangements for records which identify that person to be kept and the Act provides that that must be kept confidential and the code -- and I will take you to it in a moment -- made by Parliament by affirmative resolution says that disclosure is an

exception; in other words, there is a presumption of confidentiality for the identity of [Covert Human Intelligence Sources].

In case it is objected that this argument only applies to undercover police officers who were authorised after the coming into force of [the Regulation of Investigatory Powers Act 2000], we disagree. The common law which set up the architecture before [the Regulation of Investigatory Powers Act 2000] again shows a presumption that source identity will not be revealed. Our submission is that the passing of the Inquiries Act 2005 nor indeed the decision by the Home Secretary to hold an inquiry did not override [the Regulation of Investigatory Powers Act 2000]. It is not the case that the Metropolitan Police Service, undercover police officers and [Covert Human Intelligence Sources] operated under a statutory regime of confidentiality one day and then suddenly, when the Inquiries Act 2005 was passed or when the Home Secretary announced the Inquiry, that architecture and presumption fell away.

Section 18 of the Inquiries Act 2005, which talks about a general presumption of openness, is not expressed to be in overriding terms, it is not expressed to be of paramount interest and we submit it doesn't override [the Regulation of Investigatory Powers Act 2000].

How does one approach the matter? What is the resolution between the two Acts? We say this: if you were to take a starting point of openness for this category of information, it would be unlawful because it

would be unfair and contrary to section 17(3):

"If undercover officers, their superiors and the organisation for which they serve are bound to act according to a particular regime which values confidentiality above openness, it would be unfair and therefore unlawful to approach disclosure on the basis that there is a presumption of openness.

Now I understand and will pass over the factual question about what the individual officers expected. I understand that you will need to receive evidence about that and you indeed will receive evidence about that, including, for example, the fact that confidentiality is one of the ways in which the police satisfy their statutory duty under the health and safety legislation to protect their officers.

Sir, there are two further points and then I would just like to take you briefly to the Act, if I may. The first point is it is important to avoid a circularity argument which has been raised by some of the non-state participants. That argument says this: there is public concern, therefore you need a public inquiry. In order to fulfil the terms of reference, it must be held in public. Only restriction orders that are conducive to fulfilling the terms of reference are permitted and therefore restriction orders are not permissible.

That's the circular argument at paragraph 91 of Ms Kaufmann's submission and that actually follows from a misreading of the Act. I will take you to section 19 in a moment.

Secondly, some of the non-state participants have drawn on authorities dealing with openness, but those are often drawn from adversarial case law; for example, in the context of control orders, where the state is taking some sort of executive action against an individual and the individual wants to know why that action is be taken. That raises the question about whether an inquiry process should be more or less open than an adversarial process. We say that those authorities do not give you a huge amount of guidance because an inquiry is -- of its own kind it is sui generis.

It is sufficient to refer -- and I will in a moment -- to what Lord Bingham considered in the case of [R v Davis [2008] 1 AC 1128]. He drew a distinction between the openness that is required in an inquisitorial setting and the openness required in a criminal setting.

Sir, can I start by taking you to [the Regulation of Investigatory Powers Act 2000] itself? It is in the first volume of authorities at tab 25. Sir, can I start by taking you to section 29 which is on internal page 56.

THE CHAIR: Yes.

MR HALL: Section 29 falls within part II of [the Regulation of Investigatory Powers Act 2000], which is the part of [the Regulation of Investigatory Powers Act 2000] dealing with a number of covert powers that are used by the police and others.

Subsection (2) of section 29 says that:

"A person shall not grant an authorisation for the conduct or the use of a covert human intelligence source unless he believes ..."

And I'm going to refer to (c):

"... that arrangements exist for the source's case that satisfy... (iii) the requirements of subsection (5) ..."

So that's what applies here. We are not dealing with a relevant collaborative unit.

"... and that satisfy such other requirements as may be imposed by order made by the Secretary of State."

Turning to subsection (5):

"For the purposes of this Part there are arrangements for the source's case that satisfy the requirements of this subsection if such arrangements are in force as are necessary for ensuring - ..."

Then there's a host of welfare requirements that are spelt out, that a person deals day-to-day with the source's welfare, that there is a person with oversight.

At (d) there is a requirement that:

"... records relating to the source that are maintained by the relevant investigating authority will always contain particulars of all such matters (if any) as may be specified for the purposes of this paragraph and regulations made by the Secretary of State."

Sir, I don't need to take you to that, but the order made under that provision is at tab 133, if you want to look at it.

Then (e):

"Records maintained by the relevant investigating authority that disclose the identity of the source will not be available to persons except to the extent that there is a need for access them to be made available to those persons."

So there you have the presumption of confidentiality. It is not absolute, but the starting point is that they will not be disclosed except to the extent that there is a need.

Sir, that's the part of [the Regulation of Investigatory Powers Act 2000] I wanted to take you to in part II. Can I also just refer to the code? Sir, the code of practice made under section 71, it's made using the affirmative resolution procedure, so, if you like, this is a powerful piece of secondary legislation. The code is at tab 79 which is in volume 4 of the authorities bundle.

I'm sorry, I have given you the wrong reference. I'm sorry, 74, in volume 3. Sir, at tab 74, you have the Covert Human Intelligence Sources Code of Practice. The one in the bundle is dated December 2014. The relevant part of that is at page 49.

Sir, this is within chapter 7, which deals with keeping of records. Paragraph 7.7 states that:

"The records kept by public authorities should be maintained in such a way as to preserve the confidentiality, or prevent disclosure of the identity of the [Covert Human Intelligence Source], and the information provided by that [Covert Human Intelligence Source]."

So that is the statutory presumption of confidentiality that protects people authorised under [the Regulation of Investigatory Powers Act 2000].

Can I deal then with the position pre-[the Regulation of Investigatory Powers Act 2000] by reference to the common law?

THE CHAIR: Does the code of practice at tab 74 say anything about the terms in which confidentiality should be offered to a [Covert Human Intelligence Source]?

MR HALL: No, but it recognises that the court may need to have it disclosed to it. So I recognise that one could not give an absolute cast-iron guarantee to a [Covert Human Intelligence Source]that their identity would never be disclosed, for example, to a judge or if the judge ordered to a third person.

THE CHAIR: Right. Thank you.

MR HALL: So for the common law position, it's probably sufficient to refer to the decision of Lord Justice Thomas, as he was, in [R(WV) v Crown Prosecution Service [2011] EWHC 2480], which is at tab 68, which you will find again in volume 3.

Sir, if I can pick it up at paragraph 18, this is, of course, the authority in which Lord Justice Thomas said that public authorities should never reveal the identities of [Covert Human Intelligence Source] except by way of an order of the judge.

Paragraph 18 summarises the position:

"There is a long-established rule of the common law that the identity of informants is not normally revealed in the course of a criminal trial."

There is reference there to the case of [R v Hardy (1794) 24 St Tr 199].

Paragraph 19 recognising the rule is not an absolute rule; reference there to [Marks v Beyfus (1890) 25 QBD 494]and so on.

It is sufficient for me to say that that establishes that before [the Regulation of Investigatory Powers Act 2000] the common law accepted that the identities of [Covert Human Intelligence Sources]would not normally be revealed; in other words, the presumption of confidentiality just as much as occurs after the coming into force of [the Regulation of Investigatory Powers Act 2000].

THE CHAIR: That was to serve a specific aspect of the public interest --

MR HALL: Yes.

THE CHAIR: -- namely that the flow of information relating to the commission of crime should be kept open. And if the identity of informants was general knowledge, the likelihood is that informants would be much more cautious about giving such information.

MR HALL: That may have been the purpose for the rule, but all I'm seeking to establish is that the rule existed and therefore those who became [Covert Human Intelligence Sources]or undercover police officers before [the Regulation of Investigatory Powers Act 2000] were operating under the same architecture of confidentiality as applied after [the Regulation of Investigatory Powers Act 2000].

THE CHAIR: And the rule was subject to the overriding public interest that the disclosure of even that information might be required if it was necessary to avoid a miscarriage of justice.

MR HALL: Absolutely, and the key word there is "overriding" because it is overriding the presumption of confidentiality.

THE CHAIR: There is a very early identification of a balance to be struck between two apparently competing public interests.

MR HALL: We say more than that. It is a recognition of the presumption of confidentiality that may be overridden where the public interest requires it.

THE CHAIR: Don't you accept that confidentiality offered to

and given to informers is an expression of the public interest or is it a rule of the common law that informers' identities will never be revealed?

MR HALL: At root it is a practical way to persuade people to undertake a risky and difficult job.

THE CHAIR: Yes, which is an aspect of the public interest.

MR HALL: Yes, and it would not be fair to start from a presumption that they have lost that. That is why I say, although for perhaps other types of information one could, looking at section 18 of the Inquiries Act 2005, start with a presumption of openness, when one is dealing with this category of information, one must start with the reverse, the presumption of confidentiality.

THE CHAIR: The essence of Lord Justice Thomas' judgment is at paragraph 29(v), is it not?

MR HALL: Yes.

THE CHAIR: Again an expression of the fact that the balance has to be struck between the two interests at stake by the judge or, in our case, by virtue of section 19 by the chairman.

MR HALL: Yes. The terms in which Lord Justice Thomas describes it again are interesting because he refers to an express or implied undertaking of confidence having to be broken; again reflecting the starting point of

confidentiality.

THE CHAIR: Absolutely. Thank you.

MR HALL: Sir, the two other authorities I want to refer to briefly -- and it is going to be brief on this part of my submissions -- can I take you again back to the Inquiries Act 2005, section 19(3)(b), tab 14 of volume 1.

Sir, "Restriction order":

"A restriction notice or restriction order must specify only such restrictions -..."

Then we invite you to note the word "or", which seems to have been insufficiently recognised in the submissions of Ms Kaufmann.

"... as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4)."

So there will be situations in which a restriction is not going to be conducive to the Inquiry fulfilling its purpose, but the public interest will demand it.

Then finally, Sir, [R v Davis [2008] 1 AC 1128], which is in tab 41 in volume 2. Sir, Davis was, of course, the criminal case dealing with anonymous evidence. It is sufficient for me to refer to section 21 where, during the course of his review of the circumstances in which one might have

anonymous evidence, Lord Bingham drew a distinction between the requirements of open justice as they apply in adversarial proceedings and here as apply in inquisitorial proceedings.

THE CHAIR: Not everyone here, Mr Hall, are lawyers, let alone criminal lawyers. This was a case in which a judge had decided that witnesses could give evidence anonymously in a criminal trial.

MR HALL: Yes.

THE CHAIR: This was in 2008. The House of Lords held that at the common law of England and Wales a defendant was entitled to confront his accuser, which meant he was entitled to know who was accusing him. Subsequently, Parliament decided that there were circumstances in which the administration of criminal justice required that the evidence must be received anonymously or not, but they are very limited circumstances.

MR HALL: Indeed.

THE CHAIR: What Lord Bingham is dealing with in paragraph 21 is the difference between a criminal trial, where at that time there was no anonymity, and proceedings such as an inquest. Do you want to read it?

MR HALL: "The House has approved the admission of anonymous written statements by a coroner conducting an inquest: see [R v HM Attorney-General for Northern Ireland, Ex p Devine [1992] 1 WLR 262]. But as Lord Lane CJ

pointed out in the transcript of his judgment of the court in [R v South London Coroner, Ex p Thompson, reported in part at (1982) 126 SJ 625], , an inquest is an inquisitorial process of investigation quite unlike a criminal trial; there is no indictment, no prosecution, no defence, no trial; the procedures and rules of evidence suitable for a trial are unsuitable for an inquest: [R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson [1995] QB 1, 17]. Above all, there is no accused liable to be convicted and punished in that proceeding."

So we say that is a good encapsulation of the fact that these are different from many of the authorities that have been relied upon in favour of open justice. That's not to say that open justice is not a significant consideration, but this is not a criminal case. It's not a control order case. It's not a case in which private rights are being vindicated or where a person is accused and one should have that squarely in mind. It is interesting that Lord Bingham found it very easy to distinguish the requirements of common law openness in relation to investigating proceedings from those in adversarial proceedings.

So, Sir, those are my submissions on the second of the issues that you have raised.

THE CHAIR: To be clear, Mr Hall, the observation that you have just made applies to any applicant to anonymity in

this Inquiry --

MR HALL: Absolutely.

THE CHAIR: -- not just a policeman.

MR HALL: Absolutely. Thank you.

Sir, I now turn to the question of public engagement. My submissions on this head will somewhat overlap with the questions to do with fairness towards non-state core participants.

Sir, can I deal firstly with the engagement by core participants or other witnesses who we are told -- although I have not seen the letter myself -- have threatened to refuse to cooperate if the Inquiry does not make certain decisions.

After I have done that, can I deal with whether the Inquiry might be deprived of relevant evidence because effective individuals who are not core participants may not be aware that they have relevant evidence to give.

So starting with the suggestion that some core participants might refuse to give evidence, we submit that cannot be a factor in your consideration. Core participants have relevant evidence to give, as is apparent from their applications and their grant of status by you. The Inquiry has powers to compel evidence if individuals refuse to cooperate. The suggestion that they will refuse to give evidence is

1 therefore a suggestion that can be safely ignored and
2 indeed it should be ignored. It carries no weight in
3 determining the public interest balance and cannot be
4 a factor in your consideration.
5 Similarly, it is not correct that restriction orders
6 will prevent core participants being able to properly
7 participate as core participants. The rights that they
8 have are set out in the Act and the Rules. Those rights
9 are, as you know, Sir, to make opening and closing
10 statement and to apply -- subject to your discretion --
11 to ask questions. The Act does not specify that they
12 are entitled to a particular degree of disclosure and
13 the Act contemplates that any participation by any core
14 participant may be subject to restriction orders that
15 may be made.
16 Sir, it is a point that I will come to later on
17 briefly. As you know, there is no prescribed way in
18 which even participants at an Article 2 inquest -- that
19 is an inquest investigating a death potentially caused
20 by the state -- there is no minimum degree of
21 participation that is specified.
22 We say that underlying quite a lot of what has been
23 said by the non-state core participants is that mistaken
24 understanding about what an inquiry is. It's not
25 a process for satisfying certain rights. We make three

points on this.

Firstly, the Inquiries Act 2005 creates an investigative regime which is to be contrasted with an adversarial regime in which there are parties seeking to vindicate rights.

Secondly, there is persuasive authority from Northern Ireland that you cannot allow private interests to drive a public investigation, especially before the facts have even begun to be established.

Thirdly -- and I will need to come back to [the Regulation of Investigatory Powers Act 2000] -- Parliament has specified that private complaints regarding Part II of [the Regulation of Investigatory Powers Act 2000], that is [Covert Human Intelligence Source]or undercover police officers, are dealt with by the Investigatory Powers Tribunal. That is in a tribunal where the public interest must be protected by closed proceedings.

So, Sir, I don't need to take you to the Act in relation to the investigative regime, but can I take you to tab 83? This is the Northern Irish decision [In the matter of an application by Officers C, D, H & R for Leave to Apply for Judicial Review [2012] NICA 47] which is in bundle 4. Sir, I think I can make the point fairly that Northern Ireland has considerable experience of dealing with hard-fought and contested investigations. Sir, I'm going to pick it up, if I may, at paragraph 6.

THE CHAIR: Which tab are you at?

MR HALL: Tab 83.

THE CHAIR: Thank you.

MR HALL: I will pick it up at paragraph 6, if I may, in the judgment of Lord Chief Justice --

THE CHAIR: Could you just give me a moment, please, Mr Hall?

MR HALL: Sorry, 83, I hope.

THE CHAIR: I go straight from 80 to 86, but I have noticed that 81 and 82 are at the back of my volume 3.

I have it. Just give me a moment to rearrange my folder.

Right. Sorry about that. Tab 83?

MR HALL: Yes. If I could pick it up straight at paragraph 6 of the Lord Chief Justice's judgment. The first sentence reiterates the point we have already looked at in the context of the Davis case, that:

"... an inquest differs from a criminal trial in that it is an inquisitorial process. No one is facing a criminal charge, no finding of guilt can be made and no penalty can be imposed."

My Lord, the precise context of paragraph 6 was looking at -- you can see from what follows -- the need to avoid satellite litigation. But I'd like to draw attention, if I may to, if you like, some of the sensible guidance that the Lord Chief Justice gives. I'm going to pick it up, if I may, without wishing to skip anything, at line 8 beginning, "If one were to

apply ..."

THE CHAIR: Which paragraph are you reading?

MR HALL: Paragraph 6, and it is line 8 I want to pick it up at.

THE CHAIR: I'm not looking at the same authority, obviously. What I have is the application by officers C, D, H and R.

MR HALL: I'm sorry, my Lord. This is completely my fault. Every judgment begins with new paragraph numbers.

THE CHAIR: I see.

MR HALL: So I am in fact looking at the judgment of Lord Justice Girvan.

THE CHAIR: Right. Yes, I have it now.

MR HALL: Forgive me. You can see why I assumed it was the Lord Chief Justice because I thought it was going to be following through. But, no, it is paragraph 6 in the judgment of Lord Justice Girvan. Thank you.

So the first sentence of paragraph 6 makes the point about an inquest differing from a criminal trial. The context here is the need to avoid satellite litigation. I would like to pick up what the judge says at about line 8, the sentence, "If one were to apply ...":

"If one were to apply the same rationale as applies in the criminal context in relation to anonymity and other procedural orders such as screening orders, it

can equally be said that until the inquest is underway and it can be seen what the real issues are and what way the interested parties are affected in their ability to deal with the evidence affected by the anonymity orders there is no proper way in which that assessment can be made. It must be for the coroner to evaluate the fairness of the inquest as it proceeds. The coroner has ample powers if he concludes that there is such unfairness that he should intervene."

I pause there, recognising I'm not reading the whole of the paragraph.

The point is that, in considering the fairness to everyone, in particular the non-state participants, and considering the question of public engagement, it may not be obvious at the very outset to what extent people would be really inhibited until one has started to look at the evidence and seen the extent to which there really is inhibition. This ties in somewhat with my concern that the process should not be painted as a request for a secret inquiry.

As I say, there is a considerable amount of police evidence that can be heard in open, we recognise, and it may be that the feared lack of participation will not materialise to the same degree as is currently being expressed. We say that that passage there in the

judge's judgment is a good, commonsensical and fair approach to take matters in stages.

Then the next passage in the same judgment is over the page at paragraph 7. We say, again, this is an important reminder about the public and the private interests. I'm going to pick it up at the bottom of that page. The final paragraph begins:

"While the European Court of Human Rights recognises that the next-of-kin ..."

- so we are dealing with an Article 2 inquest here -

"... have a legitimate interest in the inquest proceedings this does not mean that the inquest is a lis inter partes between the next-of-kin and the state. There is a clear danger of this principle being lost sight of in a contentious inquest such as the present one which the parties may come to feel is adversarial whereas in fact it is inquisitorial. The interests of the next of kin are legitimate but not paramount. The coroner's function is to ensure a full, fair and dispassionate investigation butit is not the function of the coroner and the jury [not] to resolve a dispute or to determine the civil rights or criminal liability of any participant."

I think I may have --

THE CHAIR: There is a double negative there.

MR HALL: There is a double negative there, which may be why I stumbled.

My Lord, we say the obvious common sense and wisdom of that passage applies equally in the context of an inquiry as a reminder that it is not a process for resolving private interests, however important those private interests may be.

Sir, the next authority on this topic is to take you back, as I signalled, to [the Regulation of Investigatory Powers Act 2000] and to make good the submission that Parliament has expressly provided a closed mechanism for dealing with complaints under Part II. If you like, it is a slightly more technical argument, but can I take you to tab 25 in volume 1? Sir, can I pick it up at section 65, which is headed "The tribunal"?

Sir, section 65(2) provides that:

"The jurisdiction of the Tribunal shall be -..."

Then under (a):

"... to be the only appropriate tribunal for the purpose of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection 1(a) of that section [that is proceedings for actions incompatible with Convention rights] which fall within subsection (3) of this section."

Then I will take you to subsection 3:

"Proceedings fall within this subsection if -..."

It is (d):

"... they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5)."

Subsection (5) refers to other conduct to which Part II applies.

Now, Sir, "Challengeable circumstances", subsection (7):

"For the purposes of this section conduct takes place in challengeable circumstances if... it takes place with the authority, or purported authority, of anything falling within subsection (8)_..."

Then subsection (8)(c):

"The following fall within this subsection... an authorisation under Part II of this Act..."

That is quite a lot of subsections to look at. Fortunately the High Court, in [AKJ v Commissioner of Police for the Metropolis [2013] 1 WLR 2734], which I will not take you to, but you have it in tab 66 of your authorities bundle, confirm the effect.

That is, if you are bringing a human rights claim in relation to any conduct which has been authorised under [the Regulation of Investigatory Powers Act 2000] -- so this is a human rights claim, conduct authorised under [the Regulation of Investigatory Powers Act 2000] -- it must be brought in the Investigatory Powers Tribunal.

That matter went up to into the Court of Appeal, my Lord. The argument was made -- this was in the context of sexual relationships by alleged undercover officers -- that a sexual relationship cannot possibly fall within this scheme, and the Court of Appeal said, "No, it does".

So, my Lord, the point that I make is that Parliament has expressly provided machinery for looking at private complaints under the Human Rights Act. That mechanism is that those should be heard in the Investigatory Powers Tribunal, which protects confidentiality. Sir, you will see that at section 69(6). This is referring to the rules that are made under the Investigatory Powers Tribunal rules:

"In making rules under this section the Secretary of State shall have regard, in particular, to -... (b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services."

The rules reflect that. There is a presumption of closedness; a presumption of protection of

confidentiality.

So, Sir, it is rather like the submission that I made in relation to the expectation under section 29. In that public context officers and [Covert Human Intelligence Sources] have an expectation of confidentiality. In the context of private complaints by individuals, again there is an expectation or a balance has been struck by Parliament that those private matters would be dealt with in private.

So we say, of course, that one needs to look at the private interests that have been engaged by what undercover officers may or may not have done -- of course I accept that and I don't shy away from the wrongdoing that is bound to be identified during the course of the Inquiry -- but you should not be, we say, too swayed by the need to vindicate private rights because Parliament struck the balance that they should be dealt with in private.

Sir, can I then turn to the lines of inquiry point? Sir, it seems to us that this is a matter that will need to be considered in stages. The Inquiry is having everything disclosed to it. You will see and your team will see documents; accounts given by undercover officers to [Operation] Herne and to [Mark Ellison QC]. Your team, Sir, will be able to interview any witness that they wish. You

and your team will know whether there are categories of members of the public who are unaware that they may have relevant evidence to give.

You and your team will know whether there are individuals or groups who are currently unaware and who need to be approached. You will probably need, for example, to consider that in the context of the very difficult issue over the parents of children whose identities were used. Should they be approached or not? But you will have a sense of whether or not there is a section of the public whose relevant evidence is never going to come before you by looking at the documents that have been disclosed to you.

Of course, you will be able to form a view about whether you are being hampered by a lack of engagement by members of the public. It may be that, given the engagement of such large numbers of core participants who have expressed a willingness and a desire to assist you, that this is not a factor. But what shouldn't be done is to speculatively publish details of undercover deployments in the hope that it might generate lines of inquiry that are not currently apparent to you; in other words, to publish, hoping to gather evidence that may not be apparent to you. We say that would be speculative and therefore unfair and contrary to

section 17(3).

So, Sir, that's what we say about the lines of inquiry point. It is a difficult one, but cannot --

THE CHAIR: Can I ask you to consider another aspect of the lines of inquiry issue? At a practical level, as you rightly say, the Inquiry will receive, frankly, a vast quantity of information about undercover work. As you say, if it comes across a document or category of documents which leads us to think we should follow up and find members of the public who were affected and we find them, what do we say to them?

MR HALL: This is going to have to be grappled with in the context of the parents. That's something that we have been thinking long and hard about.

THE CHAIR: Do you want to deal with this at another section of your submissions? Have I interrupted you?

MR HALL: I think the answer is that I was proposing to deal with that when we come to the hearing of the preliminary issue of what to do about children's identities because it seems to me that that was a particularly good concrete example of where one would need to address this issue.

THE CHAIR: We will come back to it.

MR HALL: I will address it.

Sir, I can see the time. I have one short reference

to make on this point. Shall I just make that and then I can see the time for the shorthand writers?

THE CHAIR: Of course.

MR HALL: So the final point to make is just to say that you have been referred to an article by a former special advocate in the terrorism context at tab 119 [Chamberlain, M. 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) Civil Justice Quarterly 28 (3) 314-326]. I will not take you to it. What we say is that you need to look at the full context of the article. It was concerned with a very different adversarial context and it was dealing in quite special circumstances, where a Security Service witness was called by the Secretary of State --

THE CHAIR: Which volume are you in?

MR HALL: Volume 6. I will take you to it.

THE CHAIR: Yes.

MR HALL: I will just take you to it then. I don't think the pages are numbered, but if you turn to the eighth page and go right to the bottom where it begins, "Such reporting ..."

THE CHAIR: Yes.

MR HALL: "Such reporting may consist of snippets of information whose reliability depends upon its source, its reliability and its precise form. As to reliability, it may not be clear to the special advocates whether the information is direct or indirect

evidence. The person called to give evidence on behalf of the Security Service may not necessarily have been involved in the intelligence-gathering process, so the original format of the intelligence may also be a matter of conjecture. The Government's assessment of the reliability of the information may be presented at a high level of generality. The result is that, 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 the reliability is necessarily dependent on the Government's own assessment."

If I'm right, that's the paragraph that Mr Squires cites a passage from.

The point is that here you and your team will have access to the actual source. There is no question of what this paragraph is referring to, which is a witness giving second-hand evidence about intelligence which is very difficult for the special advocate to test. Here you are going to be hearing from the undercover officers themselves. You and your team will be able to test their reliability, their credibility. So the particular issue that the special advocate Mr Chamberlain was referring to in his article simply does not arise.

THE CHAIR: We will break there and I will return at ten past 12.

(11.53 am)

(A short break)

(12.05 pm)

THE CHAIR: Yes, Mr Hall.

MR HALL: Sir, to respond to your question about lines of inquiry, I think our answer is: wait and see. If it turns out on analysis of the evidence that you think that there is evidence from other people that you need, then that would be a factor in favour of disclosure, but it would be one factor and it wouldn't be determinative. It is difficult to go beyond that because it is all hypothetical at this stage.

THE CHAIR: Just to make sure that you and I are on the same wavelength with this, what I have in mind is your written submission that disclosure of anything should not be made if, in combination with any other information that might be available, it was capable of identifying an undercover police officer. So that we are not confused over our terminology, we know that an undercover officer will have a true identity and an undercover identity and, as I understood your written submissions -- although I could have misunderstood -- you were saying that even the disclosure to a potential witness of an undercover identity would fall within that category and therefore disclosure should not be made --

MR HALL: Yes.

THE CHAIR: -- hence my question. If the Inquiry is to function at all, if it does follow up a lead which it has as a result of your full disclosure, how can we follow it up if we are not able to inform an uninformed member of the public that they were in fact the target of undercover policing?

MR HALL: You may not be able to if the public interest in keeping the identity of that officer confidential requires it. It goes back to section 19(3)(b), conduciveness to fulfilling the terms of your Inquiry is one of the reasons for making a restriction order, but you may have a situation in which, hypothetically, you couldn't receive some relevant evidence because the public interest in, say, protecting the interests of an undercover officer trumped that, but it would depend on the particular circumstances.

Just take an example: there is a violent group who has been infiltrated by an officer. Members of that violent group may say, "We were not at all violent. We were simply a protest group", and they put a general observation out, "We would like to know if we were infiltrated". Of course, if you didn't hear from members of that group, you could be -- but, again, it would depend on the circumstances -- deprived of

relevant evidence. Whether ultimately you decided to require disclosure of the cover name or the dates or anything about the deployment would depend upon all the circumstances and it could be -- and we will likely submit would be -- trumped by the interests of the officer him or herself and the public interest in safeguarding the undercover tactic.

THE CHAIR: That being so, how would the Inquiry be in a position to form a judgment of whether there was proper justification for the targeting if they only hear one side of the story?

MR HALL: Again, one would have to wait and see. It may be that the Inquiry could, because of all the disclosure that it had, form a fairly good view. One is not resolving, I suggest, whether or not a particular group was or was not violent extremists. One is going to look at what were the prior sources of information that the police had before they decided to deploy and was it reasonable to deploy in those circumstances. There will be situations, no doubt, where information would have suggested it was a good idea to deploy, and in the cold light of day and with hindsight, it might appear that it wasn't.

THE CHAIR: I don't think it is going to be fruitful for me to follow up this exchange with you because we are here

for a limited purpose today, but I did want you to understand some of the practical anxieties that I have about the functioning of the Inquiry.

In that regard, I want to put to you another scenario. Suppose that a member of the public does come forward suspecting that they have been reported on by an undercover officer and, by reason of information which the Inquiry has but the witness does not, the Inquiry decides to hear their evidence. If you are right, if a decision has to be made to hold the proceedings partly in private and partly in public, we would have a situation, would we not, when there would be parallel hearings; the undercover officer giving evidence in private, with no one else there but the Inquiry and the police services, and then a public hearing, in which the witness is giving evidence when the Inquiry would know, you would know, that they were talking about an undercover officer, but the witness would not.

Any thinking member of the public at the back of the court would draw the inference that this witness wouldn't be giving evidence unless they were describing an interaction with an undercover officer. Another reasonable member of the public might say, "This is demeaning to the witness". Why should the very person affected not be told that they have been affected and

that the issue is what happened?

I raise this because it goes to the proceedings of the Inquiry itself. To my mind, since I am in charge of them, they are very important.

MR HALL: I understand. What is going to be interesting is to see who is in that position; who says "I want to know if I was infiltrated". One of the difficulties that the Inquiry is going to have to grapple with, one suspects, is that there would be people --

THE CHAIR: It is not just those who come forward and say "I want to know".

MR HALL: Yes.

THE CHAIR: This is the process of obtaining the material in an inquisitorial way.

MR HALL: I understand that. The true answer to the question that you posed is that every step that is taken must be considered extremely carefully because of the interests at stake. That's the first point. That includes exactly the point that you raised, which is how you hear from a witness without appearing to give away whether or not a person is an undercover officer.

THE CHAIR: So that we understand one another, to use the politicians' phrase, you don't rule anything in or anything out. As a statement of principle, you say that it all depends on the facts of every single application?

MR HALL: Absolutely.

THE CHAIR: All right.

MR HALL: And it's worth making the fairness point, which is that individual interests may or may not be legitimate. There are -- and I will come on to this -- people who disagree very fundamentally with undercover policing at all. There are those who may not be entirely frank with the Inquiry about what their activities were and why they want --

THE CHAIR: I think you are straying outside the strict ambit of my questions --

MR HALL: Forgive me.

THE CHAIR: -- which were entirely uncontroversial, as I see it.

All right.

MR HALL: Can I turn then to category 4? I have already begun to address this: fairness towards non-state core participants.

So the starting point is obviously that section 17(3) of the Act does not confine fairness to any particular category of person at all. Fairness is a general consideration that applies equally to state participants and those who are witnesses.

Can I make three further short points? The first is one I already mentioned, that non-state core

participants are not a homogeneous group. There are very different interests at play here. The facts may be very different and the interests of fairness for each non-state core participant may differ from individual to individual. In fact, it would be the hallmark of unfairness to lump individuals together and one must be discriminatory in the positive sense. One must look at the particular facts that pertain in each case.

Secondly, it is clear -- and I do not shy away from it -- that there has been wrongdoing towards some core participants. But two wrongs do not make a right or, to put it another way, if one concluded that a particular officer had not acted properly, that does not mean that they are not entitled to fairness. Fairness applies to criminal defendants even after they have been convicted and fairness certainly applies to every person who comes before the Inquiry.

Thirdly, I need to put down a marker about something which has been raised to do with psychological evidence, and the suggestion -- I think in Ms Kaufmann's submissions -- that there may be an overriding fairness in names being named because of ongoing psychological damage to core participants if they are not told of those identities.

All I can do is express the hope that expert

evidence on the need for disclosure is not going to be advanced as a determinative factor. If it is advanced, then we will need to make submissions at the relevant time, but I do reiterate that fairness is in the context of a public inquiry and public rights, not in the context of vindicating private rights. That may be a relevant consideration if that sort of evidence is advanced.

Sir, the only authority I want to refer to now -- I don't need to take you to section 17(3) of the Act, but could I take you to the Azelle Rodney case [R(E) v Chairman of the Inquiry into the death of Azelle Rodney [2012] EWHC 563 (Admin)], which you will find at tab 38 in volume 2. The point that I wish to draw from this is the position of the shooter, E7, by contrast to the position of the other officers.

Now the Azelle Rodney decision, upheld by the Divisional Court, is sometimes referred to to demonstrate that anonymity may not be required in the interests of openness. So at paragraph 26 you have the pressing interest in openness on the facts of this case:

"It concerns, after all, a man sitting in a car with no weapon in his hand who has eight shots fired at him at close range causing his death."

Lord Justice Laws continued five lines in:

"It seems to me the Chairman was fully entitled to put what he called 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'". The witnesses whom we are concerned with are central to the immediate circumstances of the shooting."

Then, Sir, what you will have read from this decision is that, at paragraph 29, the chairman's decision was a reasonable one. There was no answer -- second sentence of that paragraph -- to the Inquiry's concern;

"... it was unclear why any officer would be at risk, or perceive himself at risk, by giving evidence with the protection of a cypher but without screens in an environment where cameras, or phones with cameras would be excluded..."

So far so good.

But the interesting point is that counsel, of course, made a distinction between the position of the shooter and the non-shooters. At paragraph 30:

"As for any alleged inconsistency with a direction made in favour of E7, as the officer who fired the shots, he is surely likely to be the subject of special attention. Making his a special case was, as it seems to me, a reasonable judgment. Mr Beer, with considerable skill, deploys a greater focus on E7 as a

reason to conclude that there is in fact less reason for publicity in relation to the other officers. But I do not think that E7's case conditions the scope of the public interest issue relating to the screening of the other firearms officers. The Chairman was entitled to make his a special case."

What I draw from this is that where you have the officer who, if you like, was most wrong because he was the direct cause of the death, nonetheless the chairman treated him with conspicuous fairness and granted in his case, by contrast to the other officers where there was less wrongdoing, anonymity. The grounds for that, Sir, are summarised at paragraph 17.

THE CHAIR: Is that not simply a reflection of an assessment of possible harm? Greater protection may be needed for a witness who is more likely to suffer harm if exposed.

MR HALL: Yes, it is. Perhaps I can just say I respectfully agree, and that concerns about, "Well, he was the officer who did most wrong", if you like, didn't lead to his exposure, because the argument that's been raised is, well, where you have an officer where there is a prima facie case of wrongdoing, effectively the balance can only go one way. The Azelle Rodney case is an obvious example of where that was not the case.

In fact, I will take you, if I may, to paragraph 17.

Paragraph 17 sets out the chairman's ruling on officer E7. As you can see from the internal paragraph -- I'm just picking up five lines up:

"...his Article 8 ECHR case is markedly strong. His subjective concerns for his subsequent safety and that of his family command careful respect."

That is absolutely right. The fact that he had Article 8 interests -- strong Article 8 interests -- was not outweighed by some identification that he was a wrongdoer and the chairman was conspicuously fair, particularly fair, to that individual.

So, Sir, that's all I have to say about fairness towards non-state core participants.

Can I turn then to public accountability? Sir, this raises a question of a process versus outcome, if I can put it like that, and the question as to whether or not there needs to be accountability through hearing of evidence in open as opposed to findings.

We say that accountability can be satisfied through your findings. We also say that public accountability is not a significant factor in deciding on whether to have restriction orders in the course of your hearing. We make three points:

Firstly it is clear from authority that it's not necessary for accountability purposes to hear evidence

openly.

Sir, a good example of that is what happened in the Litvinenko judicial review. You will recall that the government said, "We don't think that it is worth having an inquiry because it will all be closed anyway", and the Divisional Court said, "That's just not right: (a), quite a lot of it can be open and, secondly, there will be accountability through the findings".

Secondly, Sir, accountability will be achieved through delivery of the unredacted report to the Secretary of State. She is ultimately responsible for the police. She is responsible to Parliament and, through Parliament, to the public at large.

Thirdly, the question about accountability does beg the question of whether one is referring to individual accountability or institutional accountability. If what is meant by "accountability" is holding individual officers to account for their wrongdoing and exposing them in order to punish them, then we would strongly resist that --

THE CHAIR: That's not the use I make of those words. It is the accountability of the Inquiry itself.

MR HALL: Ah, I misunderstood. I misunderstood. Perhaps I will address that point after lunch. In that case, can I just take you, though, to the accountability point

in the context of the Act? Back to tab 14 in volume 1 [the Inquiries Act 2005], if I may.

Sir if I can pick it up at section 24. Section 24 requires that the chairman of an inquiry must deliver a report to the Minister, setting out the facts determined by the Inquiry panel and the recommendations and anything else that the panel considers to be relevant to the terms of reference.

Section 25(1), that it is the duty of the Minister or the chairman, if subsection 2 applies, to arrange for reports of an inquiry to be published. Obviously that publication may be completely open; it may be completely closed; it may be half-open, half closed.

Then section 26, that provides for

the laying of reports before Parliament or Assembly, and whatever is required to be published under section 25 must be laid by the Minister either at the time of publication or as soon after as is reasonably practicable before the relevant Parliament or Assembly.

So one, in our submission -- although this is not a complete answer to the point that I will address -- should not overlook that there is a mechanism in the Act for accountability of whatever you report.

So, Sir, I turn then to the question of -- this is subparagraph 6, "Lesser risk of additional harm after

self-disclosure". We say this issue needs to be considered with considerable care. Firstly, there is need to consider any harm to a self-disclosing undercover officer, him or herself, and what is meant by "self-disclosure". A hypothetical question: does it include self-disclosure in response to doorstepping? Does it include self-disclosure in response to someone who threatens an officer that, if they don't admit who they are, then their home address will be put in the public domain?

We submit that self-disclosure as considered here cannot possibly apply to those sorts of situations. If it did, it would obviously encourage dangerous steps to be taken of people seeking to confront suspected officers in order to secure some sort of self-disclosure which could then play into your ruling on restriction orders.

Even if there was willing self-disclosure, whether or not harm would be less or more will depend upon the facts. There may be less harm if something that has been self-disclosed is later officially confirmed; but there may be a risk of more harm depending upon what has previously been self-disclosed and what is now being put into the public domain. That, Sir, is an application of the mosaic effect which I know that we are going to need

to look at in due course.

So on this topic, Sir, I submit you cannot draw any a priori conclusions. But we also need to look at the harm that could be caused to another person if there has been self-disclosure followed by official confirmation. There may be harm to a family member; there may be harm to someone that the undercover officer has worked with. Of course those people who could be harmed have not self-disclosed. The connection between the self-disclosing officer and that third party may not have been created by the self-disclosure, but official confirmation could result in that link being drawn.

One should not underestimate the potential interest and attention that will flow from the Inquiry deciding not to grant a restriction order and requiring the police to officially confirm an individual.

Then finally, Sir, there may also be knock-on effects to the public interest more generally. It is very important that individuals -- even undercover officers who decide to self-disclose -- cannot force out the disclosure of sensitive information simply by going public about their own identities.

Sir, that point is made good in the case of [Savage v Chief Constable of Hampshire [1997] 1 WLR 1061]. If I can take you to tab 64 in volume 3. Sir, you will recall that Savage is the judgment of

Lord Justice Judge. It concerns a self-discloser. If I can pick it up at page 1067 in tab 64 at letter F. Having looked at the interests of the police informer, Lord Justice Judge said:

"That, of course, is not an end of the matter. It is possible that, notwithstanding the wishes of the informer, there remains a significant public interest, extraneous to him and his safety and not already in the public domain, which would be damaged if he were allowed to disclose his role. However, I am unable to understand why the court should infer, for example, that disclosure that might assist others involved in criminal activities, or reveal police methods of investigation or hamper their operations, or indicate the state of their inquiries into any particular crime, or even that the police are in possession of information which suggests extreme and urgent danger to the informer if he were to proceed. Considerations such as these might, in an appropriate case, ultimately tip the balance in favour of preserving the informer's anonymity against his wishes in the public interest. There is no evidence that any such consideration applies to the present case."

In due course, Sir, we will be putting forward, we hope, fairly comprehensive evidence about the range of

interests that could be damaged by disclosure and that includes by self-disclosure.

Sir, the next authority -- I don't even need to take you to it because it is --

THE CHAIR: Before we leave that passage, I had better ask you, what did Lord Justice Judge mean by the words "and not already in the public domain"? Don't forget that the issue here was whether or not the claim could be litigated at all and the court's anticipation that this might not be the end of the matter was fully realised in the later case of [Carnduff v Rock [2001] 1 WLR 1786]--

MR HALL: Yes.

THE CHAIR: -- in which the court was able to say that if the case was going to be litigated at all, then the whole of the very serious police investigation would have to be filleted and made public in order to resolve the question of whether the informer was entitled to payment or not.

Here Lord Justice Judge could be meaning one of two things by "not already in the public domain". He could be meaning "not so far acknowledged", officially acknowledged, or "not so far revealed by the informer himself in his pleading", for example. To this point, I read it as though "not already in the public domain" refers not to official confirmation, but to what the

1 informer has himself made public.
2 MR HALL: Yes, I think that's how I read it as well.
3 THE CHAIR: All right. Thank you. I just wanted to make
4 sure.
5 MR HALL: I think it is worth following up that with the
6 observation that there is -- and we made it clear in our
7 submissions -- an important difference between something
8 that is in the public domain and something that is
9 officially confirmed.
10 THE CHAIR: Two different things?
11 MR HALL: Two different things.
12 Sir, the next authority that I would just give you
13 the reference to is [DIL and Others v Commissioner of Police of the Metropolis [2014] EWHC 2184] at paragraph 39(3). I am sure
14 you would have looked at that. It may not be necessary
15 for me to take you to it. It's the proposition that
16 self-disclosure is not determinative. I know you have
17 that well in mind. Paragraph 39(3).
18 The other passage I will take you to briefly is from
19 [McGartland and Another v Secretary of State for the Home Department [2015] EWCA Civ 686], which is in volume 2, again, at tab 50.
20 THE CHAIR: Sorry, which volume?
21 MR HALL: Sorry, my Lord, tab 50 in volume 2.
22 THE CHAIR: Thank you.
23 MR HALL: Sir, McGartland was the case of a man who had been
24 officially confirmed as a police informer, but who
25 alleged that he was an agent of the Security Service.

The question was, in part, whether there had been official disclosure or there ought to be official disclosure of the latter alleged status.

If I can pick it up at paragraph 43 in the judgment of Lord Justice Richards, Lord Justice Richards does really two things. First of all he explains why official confirmation of Mr McGartland's role as a police informer did not amount to official confirmation that he was an agent of the Security Services pleaded by him.

The passage I want to refer to is the final sentence, if I may:

"Finally, the Claimant's 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."

So here's, if you like, the point that I don't think Lord Justice Judge was dealing with. This is the interest in even matters that have been alleged publicly not having to be the subject of official confirmation. That may, for example, include sensitive techniques as well as identities.

Sir, I move then to issue 7: less risk of additional harm after third-party disclosure.

Similarly, our submission is that you cannot decide

the relevance of this in the abstract. The fact that some material is in the public domain may mean that there is a greater need for a restriction order. For example, it may be that the lack of official confirmation is all that is holding individuals back from taking aggressive action. It may be that they are still in doubt, but that official confirmation would provide them with the justification in their eyes for taking some action against an officer.

Sir, official confirmation following third-party disclosure could be used to confirm a raft of research. There are undoubtedly people who are very interested to see what official confirmation is going to come from the Inquiry. They will no doubt use that as a springboard or a stepping-stone to try and establish new matters, researching deeper and deeper, with either no regard -- perhaps that's unfair -- perhaps no understanding of the risks that they expose individuals and the tactic to by doing that.

So the next point is to perhaps attack the premise of the question. The premise of the question is that there has been no harm to date by virtue of there being third-party disclosure, so-called. The question can be asked: how significant is it in any case that harm has not yet happened? That may depend upon how widely

allegations have been publicised. Will individuals who might take violent steps have found out? One needs to be realistic about the distinction between allegations that are out there somewhere on the internet and the sort of widespread publicity that can come as a result of the Inquiry.

Again, it will depend upon the particular facts and there is a question of definition here. What is meant by "third-party disclosure"? Does it mean disclosure to one person or on one web-page? Does it apply where an allegation has been made, but suspicions have been put to rest? Does it include any previous allegation that a person was an undercover officer?

Sir, the third point is that the Inquiry should, we say, as a matter of fairness, not encourage those who wish to achieve confirmation by putting more into the public domain of their allegations --

THE CHAIR: I do understand the contextual criticism, but the underlying point is this, is it not: is it a legitimate question that disclosure by the Inquiry would be unlikely to lead to any harm additional to that already the result of disclosure either by the officer himself or by a third party?

I didn't mean by those observations that an answer in principle could be achieved. As you have already

said, each case has to be looked at according to its very particular facts. The prompt for those questions is the case of McNally. I think it was the Chief Constable of Greater Manchester Police v McNally [2002] 2 Cr App R 37, in which Lord Justice Auld, in upholding the decision of Mrs Justice Rafferty, as she then was, to order the Chief Constable to disclose whether the witness or whether an individual was an informer, included the observation that the man who would want to cause the informer harm, if he was an informer, already believed that the man was an informer. That can only have been relevant if it goes to the question of whether disclosure has the capacity to cause additional harm. That's what I had in mind.

MR HALL: I see. The McNally case is an example of assessment on the particular facts.

THE CHAIR: There it looked as though counsel for the Chief Constable may, by the form of his questions, even though the questions were not evidence, have led the jury to a misconception as to the effect of the evidence. That's why the judge said, "I can't leave the jury in this state of ignorance as to whether this man was an informer or not because, if he was, it is very unlikely that he would have done what you, the Chief Constable, are alleging he might have done".

So you can see that it is a relevant consideration. The question is whether it is an effective consideration on the facts of each particular application.

MR HALL: Absolutely.

THE CHAIR: All right. Thank you.

MR HALL: Sir, category 8, wrongdoing. I start by acknowledging again that wrongdoing is likely to be identified on the part of one or other undercover officer. We accept there has been wrongdoing on the part of some officers employed by the Metropolitan Police Service. I need to say that.

What we do not accept, Sir, is that wrongdoing is officers putting themselves at personal risk in order to report on certain groups. You will have to determine whether a deployment was justified or not, looking at the material that you have available to you, but I do need to deal -- because it underpins some of the submissions that are made by the non-state participants that all [Special Demonstration Squad] operations were wholly unjustified.

Sir, it is a matter of official confirmation by Operation Herne that [Special Demonstration Squad] officers reported on left-wing extremism, the far right, Irish terrorist groups and animal rights groups. This hearing cannot be -- and I am sure it won't be as far as you are concerned -- but equally the public should not be affected by the wholly false

proposition that all these groups were peaceful and well meaning. The same can be said of certain environmental groups.

To take one example of one of these groups, they were not made up of a bunch of eccentric, if well-meaning, hippy idealists -- and I'm quoting from one of their former members, who is a core participant before you --

but they supported violent resistance to oppression and they believed that in particular "violence was needed to transform society and challenge the ruling classes".

To take one other example, a judge who passed sentence on one of the members of one of these groups said, "You cloaked your activities with what, in my judgment, was a hypocritical sham, pretence, that you were a vehicle for lawful protest in an area of public concern. It was nothing of the sort".

Sir, in due course you will undoubtedly need to see the sort of public disorder and rioting the police had to address, again, some of it caused or fermented by extremists, and the work the police did to uphold the democratic values of this country by avoiding influence by industrial or extremist means.

It is vital, we say, that no rose-tinted spectacles are allowed to obscure the importance of what the police were doing. Whether they did it in the right way or not

and the mistakes they made on the way do need to be examined, but it is entirely wrong to pretend that the work of the [Special Demonstration Squad] or any other undercover police officer is in itself illegitimate or an example of wrongdoing.

THE CHAIR: That particular reference to wrongdoing is only designed to reflect what Mr Justice Bean said in DIL and others and, indeed even more controversially, in [R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2009] 1 WLR 2653], the national security case that went several hearings in the Administrative Court and the Court of Appeal.

MR HALL: Yes.

THE CHAIR: Whether the fact that the investigation is about wrongdoing is just one of the factors to be considered in respect of any particular application.

MR HALL: Can I deal, then, with what weight we say wrongdoing has?

THE CHAIR: Yes.

MR HALL: I'm going to turn now, if you like, to wrongdoing by the authorities.

Sir, I have four points. The first point is that there is no authority that, just because an allegation of wrongdoing is made, the matter needs to be considered openly. There is authority on that that I will take you to.

The second point is that the fact that there has

been wrongdoing by one officer does not mean that all others within the same squad -- I'm thinking of the [Special Demonstration Squad], for example -- should be considered part of a rotten squad or guilty of wrongdoing by association. That sort of collective approach would be undoubtedly unfair if you were asked to forfeit the anonymity of officers because of what one or two individuals had done.

Sir, the third point is that, even if you conclude, as you are bound to in some cases, that there has been wrongdoing on the part of individual officers or the police institutionally, potentially, you cannot ignore the effect on innocent third parties such as family members when making your decision on restriction orders.

Fourthly, we say it would not be fair to leap to judgment at the restriction order stage by prejudging the nature or degree of the wrongdoing. Wrongdoing could not be determined fairly against any particular individual without evidence and without giving an opportunity to that individual to have his or her conduct considered and maybe any mitigating reasons also considered. For example, even in the case of an officer where there is wrongdoing, that officer might be able to point to a lack of guidance, maybe psychological reasons, for why he acted in that way. Obviously that's a factor that you are going to have to consider under

your terms of reference in module 2.

Now a restriction order that effectively leapt to judgment about wrongdoing and weighed it in the balance before you had heard the evidence would, we say, be unfair and therefore unlawful. We are also uneasy about any attempt to turn the application for restriction orders into some sort of witch-hunt, which is really concerned with alleging wrongdoing in order to out officers. A witch-hunt would not be fair. Indeed, it would put off future Covert Human Intelligence Sources and undercover officers and they would wonder why it was ever worth signing up if they saw everything that they did described in lurid terms which failed to distinguish between individuals and gave them an opportunity to answer serious allegations.

Sir, the authorities on this topic -- shall I deal with the first one? I can see we are getting close to 1 o'clock.

THE CHAIR: Yes.

MR HALL: Can I take you to Marks v Beyfus (1890) 25 QBD 494, tab 62?

THE CHAIR: Is that volume 2 or 3?

MR HALL: I'm sorry, it is volume 3. Sir, Marks v Beyfus, as you know, is the famous old authority about not permitting questions as to whether a person was an informer in the course of a criminal trial.

The passage I would like to refer you to is on page 499, at the end of the Master of the Rolls' judgment. What the Master of the Rolls said was this:

"I may add that the rule as to non-disclosure of informers applies in my opinion not only to the trial of the prisoner, but also to a subsequent civil action between the parties on the ground that the criminal prosecution was maliciously instituted or brought about."

From that I draw the proposition that the mere allegation of wrongdoing does not mean that a matter has to be dealt with openly. In this context, in the context of informers, [Covert Human Intelligence Sources], undercover officers, simply alleging wrongdoing by an officer does not mean that he has forfeited his right to anonymity.

THE CHAIR: Thank you.

It may be that your point is a good one, but I'm not sure that you can derive it from that passage of Marks v Beyfus. The rule would be of no use at all if you could avoid it by bringing civil proceedings. It may be as simple as that. We don't know what was in the mind of Lord Esher at the time when he said what he did.

MR HALL: It is a short passage. But if I have to rely upon common sense for the proposition, then I will do that.

THE CHAIR: How are you doing for time, Mr Hall?

MR HALL: Sir, I have covered 12 out of 18 pages of my notes.

THE CHAIR: I am only asking you so that everybody can bear in mind what our time limit is.

Thank you very much. We meet again at 2.

(1.00 pm)

(The short adjournment)

(2.00 pm)

MR HALL: Sir, two final authorities on the wrongdoing point. First of all, I will take you to section 20(4) of the Inquiries Act 2005 because it is the wrong reference in our submissions. So tab 14.

THE CHAIR: Yes.

MR HALL: This is the power that you have to vary or revoke a restriction order by making a further order during the course of the Inquiry. So if wrongdoing is a factor, then it may be there is considerable utility in that power; in other words, once you have determined the facts to a satisfactory degree, rather than, as it were, jumping the gun at the outset.

The final matter on the authorities -- I don't need to take you to any particular one -- but it is to reply to the submission that's made that there is a body of authorities that says that wrongdoing is a reason for disclosure. A good example of that would be

Lord Clarke's speech in [Al Rawi v Security Service [2012] 1 AC 531]. You will recall the passage.

THE CHAIR: Yes.

MR HALL: What I submit is that one has to be a bit cautious about this because those observations and similar observations -- although I should note that what Lord Clarke said was not adopted by the remainder of the judges of the Supreme Court. It was his own observations -- one needs to be cautious because, in an adversarial context, if you do not have disclosure of state wrongdoing, then it will never be looked at by a judge.

That is one of the reasons why the common law was so adverse to a closed procedure in our role. Here, of course, you have a statutory mechanism that will allow you to address everything. So we say that one should be cautious about that line of authorities and applying them wholesale to this context.

So that's what I say about wrongdoing.

Question number 9 on the list is the loss of blanket/absolute [Neither Confirm Nor Deny] protection. Can I deal with that when I turn to part 2 of the list?

THE CHAIR: Yes.

MR HALL: As far as other factors are concerned, I will reply if matters are raised by the other participants.

So dealing with question number 2, "What are the possibly components of the public interest that tend in favour of the making of a restriction order under section 19(3)(a) and/or (b)?":

"One: the protection of unhindered functioning of police investigation as represented by [Neither Confirm Nor Deny]. At what level of non-disclosure; e.g. undercover named target, is the public interest served? At what level of disclosure; e.g. undercover named target, is the public interest harmed?"

I will add into that the question which was raised, the loss of blanket/absolute [Neither Confirm Nor Deny] protection.

I understand the question is to ask: what would the position be in the absence of a ruling on [Neither Confirm Nor Deny] that had blanket effect?

So the starting point for my submissions is that the importance of being able to give a consistent response is well established as something which the Inquiry should take into account. We set it all out in our submissions. I understand why this issue has been raised in this way, but I think our response is it is not possible to have any general ruling at this stage on the levels of disclosure; in other words, where to pitch [Neither Confirm Nor Deny]. That is because, as we have repeatedly said and acknowledged, the effect of [Neither Confirm Nor Deny] involves consideration

of the whole public interest balance and how that balance turns out will depend upon the particular facts.

It may be that the first actual application that you determine for a restriction order will look at targeting information. When you look at the first real restriction order and have to consider the value of [Neither Confirm Nor Deny] in relation to targeting, that will be a good opportunity to consider more generally what is the effect on other operations if we were to reveal this particular target. Can I give a concrete example of this? Let's say that an undercover police officer was targeted against X in a particular situation and against Y in another operation and that other operation had national security sensitivities. Let's say that both X and Y become core participants. Saying that X was targeted by the undercover officer but refusing to say whether you were targeting Y, who will no doubt be jumping up and down and saying, "Well I want to have disclosure in my case, please", could well be damaging. It will depend upon the facts, but that is a real possibility.

We note that Ms Kaufmann has attempted in her submissions to solve the issue. You will have in mind, Sir, paragraph 49, I think, in her submissions. She said there is another way round it. We think that is

unrealistic and that any question of [Neither Confirm Nor Deny] has to be considered on the facts of the particular case. It's a tricky issue, it's a difficult issue, it's an issue which we say is a perfectly sensible approach, but's not one that you can deal with in the abstract.

So in relation to this, I know that the question has been asked and I don't mean to be disrespectful in not answering it, but we do invite you not to try to draw any a priori or general conclusions until we have seen how a particular restriction order application works.

So, Sir, the next consideration in favour of restriction orders is fairness to the individual, e.g. confidentiality and fear. Of course I emphasise that one has to take account of the range of individuals.

Can I deal with the officers themselves and say this: those who put themselves at the service of society as police officers, fulfilling a role of difficulty and danger, will have organised their lives around the principle that their role would be kept confidential. As we said in our submissions, the question is not whether the Inquiry should grant anonymity, but whether it should take it away.

So fairness comes in two ways: fairness in recognising that their identities are confidential as a starting point to any consideration of the issue and

then fairness in recognising the impact of losing something that has been built up for so many years. You will obviously need to consider in due course any evidence as to the impact upon them, the constant fear to which those who are identified may be subjected and the effect on their health.

Can I ask you just to look at one authority on this topic? It is Re Officer L [2007] 1 WLR 2135, which I know, Sir, you will have well in mind. It's at tab 27 in volume 1. Sir, as you know, Re Officer L was a case involving initially a Northern Irish inquiry. The single speech with which the rest of their lordships agreed -- and I emphasise that -- was given by Lord Carswell. Paragraph 22 contains a passage which we say cannot be overlooked as to its significance.

Part of it has been referred to, but we think that it is important to look at the entirety of the passage beginning at the foot of page 2144. Lord Carswell said:

"The principles which apply to a tribunal's common law duty of fairness ..."

Pausing there, that must be imported into the Inquiry Act under section 17(3):

"... towards the persons whom it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision

made in respect of an Article 2 risk."

So having identified that he needs to identify the principles, his Lordship then identified those principles in the next sentence:

"They entail consideration of concerns other than the risk to life, although as the Court of Appeal said in paragraph 8 of its judgment in [R (A and others) v Lord Saville of Newdigate [2002] 1 WLR 1249]... an allegation of unfairness which involves a risk to the lives of witnesses is preeminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well-founded, can be taken into account, as the Court of Appeal said in its earlier case of R v Lord Saville of Newdigate, Ex p A [2000] 1 WLR 1855."

Then it is in that context that Lord Carswell says this:

"It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health. It is possible to envisage a range of other matters which could make for unfairness in relation to witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination."

We say, quite simply, that that sentence by Lord Carswell, in a judgment with which the rest of the House agreed that it is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, is a very important one for our purposes because section 17(3) means that you have to act fairly and not to act fairly would be to act unlawfully.

Now, I appreciate that that sentence from Lord Carswell's judgment is often cited in order to give the tone. We say, actually, it does more than just give the tone; it actually sets out what the House of Lords said was unfair. We would invite you to consider that not just as the starting point, but really as the key approach. If in fact on the evidence -- and it is always going to depend upon the evidence -- a witness is subjected to fears arising from giving evidence, the more so if it has an adverse impact upon their health, the only question is whether it is avoidable to subject them to those fears.

We say if the Inquiry concludes that there is a way of avoiding that fear by granting a restriction order, by granting some measures, the Inquiry really has little choice in the matter in order to comply with its statutory duty under section 17(3).

So, Sir, that's all we say about fairness to individuals. Can I deal then quickly with harm to the individual?

Sir, we recognise that harm will depend upon the evidence. Can I simply identify the incorrectness of what the non-state core participants have advocated? They have asked you to apply effectively a blanket approach. In Ms Kaufmann's submissions at paragraph 96, she has invited you to conclude that if there has already been disclosure, then a restriction order can serve no purpose.

Paragraph 103, she's invited you to conclude that it is inconceivable that Article 8 interests of officers will prevail. Well, I have already taken you to the Azelle Rodney case where an Article 8 interest did prevail. We say that fairness requires looking at each application on its own merits and not coming with any blanket approach.

Question 4, "Harm to the institution". Sir, we don't say this is a feature. Policing in this country takes place by consent. If there is damage to the institution, so be it. Our concern is harm to individuals and harm to preventing and detecting crime, but not harm specifically to the Metropolitan Police Service.

Question 5 is, "Harm to the function of preventing and detecting crime". Again it is very much a question of evidence. Can I make two points? One is the question has been raised about whether or not deference has any role in evaluating the evidence. It seems to us that that is a question that you will need to address when you look at the actual applications and the actual evidence.

We will submit that deference does apply. "Deference" is a controversial word, but the idea that the Inquiry recognises the particular expertise of the police in this field, we say that is something that you can have regard to. So can I just put down a marker that we will challenge that submission in due course.

The second point I wanted to address in this context is the suggestion that's been made that there can be no effect on the recruitment and retention of undercover officers and [Covert Human Intelligence Sources] by a mass, as it were, exposure of past officers in the [Special Demonstration Squad] and the [National Public Order Intelligence Unit], for example, because this Inquiry is a one-off. We say that's a bold submission. You will need to look at the evidence on the impact of disclosure and it may be you will have to look at what officers assess is the likely impact of disclosure. But there can be no question, we say, of ruling out that disclosure of a large number of

officers -- or even some officers -- in this Inquiry could have real and significant effects on the ability to recruit and retain people who put themselves at risk, to put it mildly.

Question 6 is the non-availability of alternative measures. I understand that, Sir, you are seeking to explore the significance of other means of protection under the restriction orders.

Sir, the first obvious point to make is that, whether there are other means or not will depend upon the evidence, but it is worth saying right now that re-housing an officer to avoid a danger of harm to him and his family will not protect him or his family from the heartbreak of having to leave their home, their schools, perhaps their jobs, and effectively start their entire lives again. So there is always going to be a limit to what other mechanisms can do.

Next, can I tackle head-on, please, the argument that, if there is a risk to life, the police should deal with it by relocating that person and giving them a new identity or requiring them to be accompanied at all times by armed guards? We say that is a breathtaking submission. It would be vastly disruptive for the individual and their family; it would be vastly expensive, which is obviously a relevant factor under

section 19; it would be vastly unfair because it would be perceived as punishment by the Inquiry by prejudging the behaviour of officers. In addition, of course, it would entirely ignore the position of wives, husbands, partners, children and parents.

I also make the point that no programme of protection is 100 per cent effective. If exposing the name of an officer raised the risk to life or limb even by a small but material amount, that would be wrong and unlawful. Even if it was possible to neutralise the objective risk, it is unlikely to remove the constant fear that the officer would feel.

Sir, I probably don't need to take you to section 19(4), but at section 19(4)(d)(ii) that deals with cost as a relevant factor, obviously if the effect of the Inquiry was vast amounts of public expenditure in order to protect officers and their families, you would need to have evidence of that, but it would be a relevant factor to consider.

Then, Sir, under 7 is the question of, "Are there any other factors in favour of restriction orders?" There may be circumstances in which restriction orders are conducive to your inquiry. Getting to the bottom of what happened in the early days of the [Special Demonstration Squad], which you know, Sir, was instituted in 1968 -- and it may be

important to do that, to get to the bottom of why the squad operated in the way that it did -- will depend on witnesses who are no longer police officers. Some of those will be old; some of them may be based abroad; some may be in ill health. Plainly giving them a sense of safety may be an important way of encouraging them to cooperate with the Inquiry.

Sir, the relevant authority on that is the Leveson case [2012] EWHC 57 (Admin) in volume 1, if I may, in tab 17. Sir, it is paragraphs 54 through to 56.

Sir, paragraph 54, after Lord Justice Toulson stresses that it is an inquiry, not the same as a criminal trial or disciplinary proceedings, at 55 he notes that:

"In determining where fairness lies in a public inquiry, there is always a balance to be struck. I am not persuaded there is in principle something wrong in allowing a witness to give evidence anonymously through fear of career blight, rather than fear of something worse. For a person's future life, it can be a powerful gag."

So his Lordship concluded that the chairman had not acted unfairly in deciding to admit evidence because he was satisfied -- this is the last sentence of that last line:

"... being satisfied that journalists would not give it otherwise than anonymously."

Then at paragraph 56, it was emphasised that public interest in the chairman being able to pursue his terms of references as widely and deeply as he considers necessary is of the utmost importance. So that is a factor that could lead to the granting of a restriction order in an appropriate case.

Sir, can I then turn to question 3, which is:

"Is there a positive obligation to investigate under Articles 3 and/or 8 ECHR? If so, what if any further impact does the need for effective participation of core participants and putative witnesses in the investigation have upon the level of disclosure of information to them?"

Sir, there are three different ways in which disclosure could come in. Can I just deal with them? The first way that I say we are not concerned about is the question of disclosure where a person's Article 8 rights are being interfered with in adversarial litigation. There is a line of cases, Sir, involving control orders or people who have been excluded for national security reasons from the country, where their Article 8 rights are being interfered with and they want to know why.

They are not in the bundle, Sir, but if I can just give you the reference: IR (Sri Lanka) & Ors v Secretary of State for the Home Department [2011] EWCA Civ 704.

Sir, the Court of Appeal upheld limitations on the ability to see information that affects your Article 8 rights and that was subsequently upheld by the Strasbourg Court. But it seems to us that that is a different issue from what you are concerned with here, so I raise it if only to dismiss it.

The second way in which Article 3 or Article 8 might have an impact on information is whether there is a positive right to information, as in [Gaskin v United Kingdom (1989) 12 EHRR 36].

Sir, Gaskin was a decision where a person wanted to access records about his own upbringing. What you will see -- and I will take you to it shortly -- is that whether or not there is a right to information depends upon the concrete situation that is the particular facts of the case and all the circumstances, including any countervailing interests. In fact, Gaskin is, we say, of limited effect.

The third way in which Article 3 or 8 could arise is the investigative obligation. The leading case is the case of [D v Commissioner of Police for the Metropolis [2016] QB 161].

Sir, it is referred to in your counsel's note that was served this morning. So whether an Article 3

investigative obligation arises will be a matter of fact. Of course it would be an obligation on the state, and how that obligation is fulfilled will require consideration of what's been done to date.

So, for example, if it is a question of identifying someone who has caused Article 3 harm, the state has to make sure that there is a mechanism for identifying such a person and punishing them if necessary. It may be that a combination of disciplinary proceedings, any investigation by the [Independent Police Complaints Commission], investigation by Operation Herne, consideration of criminal offences -- it may be that a combination of what has been done to date will already have satisfied that duty.

You will need to consider, if this arises at all, what has been done to date before answering questions as to whether you, as the Inquiry, need to do something more to avoid the United Kingdom being in breach of its duties.

Sir, in any event -- and this is why we agree with the note that was sent this morning by your counsel -- it is unlikely that any of these considerations are going to make a huge amount of difference. Sir, you are familiar with [Ramsahai v Netherlands (2008) 46 E.H.R.R. 43]in the Article 2 context. Can I give you reference to a domestic authority? It is a speech of Lord Rodger in a case

called [R(JL) v Secretary of State for Justice, [2009] 1 Appeal Cases
588].

At paragraphs 77 to 83, Lord Rodger explains that, even where the Article 2 or Article 3 investigative obligation applies, how it is satisfied will very much depend upon the particular facts and there are no prescriptions above a general need to participate.

Sir, on this topic I just take you to Gaskin at tab 135, which you will find in volume 6. This is the applicant who is taken into the care of Liverpool City Council and then wanted access to information about his upbringing. At paragraph 37, the Strasbourg Court agreed with the Commission:

"The records contained in the file undoubtedly do relate to Mr Gaskin's private and family life in such a way that the question of his access thereto falls within the ambit of Article 8. This finding is reached without expressing any opinion on whether general rights of access to personal data and information may be derived from Article 8(1) of the Convention. The court is not called upon to decide in abstracto on questions of general principle in this field, but rather has to deal with the concrete case of Mr Gaskin's application."

We say similarly that it is only by looking at the particular facts of any particular case would it ever be

possible to identify that an Article 8 right of access to information arises.

Then going to paragraph 49, if I may, it is important to look at what the court actually decided in this case. The court concluded that there had been a violation.

"In the court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information and that such confidentiality can also be necessary for the protection of third persons.

"Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the state's margin of appreciation.

"The court considers how, under such a system, the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the record either is not available

or improperly refuses consent. Such system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case."

Obviously, Sir, you, as the independent assessor of where interests lie, will be able to carry out the role which was lacking in Gaskin. So we say the result in Gaskin does not, in fact, take one very far.

Can I then turn to the final question raised on your list of issues, which is the question, "Is Article 10 engaged in an application for a restriction order? If so, what, if any, further impact does the interest of the media have on the weight of arguments against restriction?"

Sir, I have to now deal with the exam question that was set by your counsel at 9.15 this morning. The position must, we submit, be a little bit more nuanced than the media appear to submit. At the moment you are engaged, if you like, in the investigative side of your role, so your counsel are calling for -- and requests have been made -- information from the Metropolitan Police. That is undoubtedly part of the

Inquiry's function.

It would be very odd to say that the media had a right to access the material that is going from the Metropolitan Police to the Inquiry as part of that early-stage investigation. So we would say that, even though you are an inquiry and a public inquiry, the media's right cannot exist at this stage and what are called the Leander line of cases that was considered in [Kennedy v Charity Commissioner [2015] AC 455] undoubtedly applies at this early stage.

On the other hand, without formally conceding the point, we do recognise considerable force in the proposition that if a witness is giving evidence openly and that one part of his or her evidence is then held in camera and the media and others are prevented from seeing it and reporting it -- we can see considerable force in the argument that Article 10 does therefore apply.

So, we see some merits in the approach that your counsel have suggested in their notes, which is that whether Article 10 is engaged in relation to a particular application for a restriction order will be fact-sensitive.

Sir, on the assumption that Article 10 does apply, can I make these short points? Firstly, it is right to note that Article 10 is a qualified right. It is

qualified for crime prevention, for interests of the rights and freedoms of others, and although it is sometimes overlooked, Article 10 is also qualified to prevent the publication of confidential data, if you look at the full text of Article 10. You cannot ignore, therefore, that Article 10 is a qualified right which is expressly drawn up to protect interests in a proper and proportionate case.

So, secondly, the question is: in almost all cases what is proportionate if there is an interference? We have set out the relevant passage from [Bank Mellat v HM Treasury (No 2) [2014] AC 700]. If it is a question of Article 8 rights versus article 10 rights, then neither has automatic precedence, and if it is a question of unqualified rights, which is Article 2 or Article 3, then the rights under Article 10 must give way.

Sir, the third comment is, in this particular context, again looking at [the Regulation of Investigatory Powers Act 2000] and the common-law rule concerning the confidentiality of [Covert Human Intelligence Sources]. It may well be that convincing reasons for derogating from open justice will be readily found. It is right that the common law has always been very jealous to safeguard open justice, but equally the same judges who have set down the rule of open justice have been very concerned to protect information about informers.

Fourthly, it is debatable how transformative Article 10 is. In the Leveson case, Lord Justice Toulson thought that Article 10 added nothing to fairness.

Fifthly and finally on this, the fact that the media has an interest in reporting may itself be important when looking at the risk of harm. Any disclosure is likely to be widely reported and, the more widely reported it is, the more likely it is that damage may be caused.

Sir, on the authorities I will give you -- if you want to see the full text of Article 10, it is in tab 109 at paragraph 31. Quite often Article 10 is just summarised or bits are cut out.

On the interplay between Article 8 and Article 10, the relevant authority is [In re Guardian News and Media Ltd [2010] 2 AC 697] at tab 82, at paragraph 50. Again, I won't take you to it but Lord Rodger sets out ... The Leveson case is at tab 17. The relevant paragraph is 36.

Sir, those are my submissions on the final question and those are my submissions.

THE CHAIR: Thank you very much.

Mr O'Connor?

Submissions on behalf of the National Crime Agency by MR O'CONNOR

MR O'CONNOR: Sir, you have the written submissions that we

submitted several weeks ago. As was the position there, the [National Crime Agency] today supports the position that has been outlined on behalf of the Metropolitan Police by Mr Hall.

Sir, also as with the Metropolitan Police, may I say right at the start that the [National Crime Agency] is fully committed to supporting the work of this Inquiry. So, in the light of the fact that you have our submissions and the fact that we support the position adopted by the Metropolitan Police, I propose only to make a few short submissions to you today.

Before doing so, though, may I simply introduce those who I represent to those who are less familiar with its position than others. Sir, the National Crime Agency is a government agency whose core role is to combat serious and organised crime. It operates in a wide variety of fields, including drugs offences, fraud, cyber crime and child exploitation.

Although the [National Crime Agency] is not itself a police force, it liaises closely with police forces throughout the United Kingdom in carrying out its work. The [National Crime Agency] also works with law enforcement bodies overseas, a point to which I shall return.

The role of the [National Crime Agency] that I have outlined is similar to that of its predecessor organisations, the Serious

and Organised Crime Agency, also known as "SOCA", and before that the National Crime Squad.

Sir, the [National Crime Agency] applied for core participant status in this Inquiry because it conducts undercover operations, as have its predecessor organisations. The undercover component of the [National Crime Agency's] work is substantial both in terms of the volume and the complexity of the operations that are conducted. In that context, Sir, I should make it clear that neither the [National Crime Agency] nor its predecessor organisations bore any responsibility for the activities of the [Special Demonstration Squad] or the [National Public Order Intelligence Unit].

Sir, the issues for consideration that your team circulated identify a serious of issues that may be said to militate in favour and against the granting of restriction orders in the context of this Inquiry and Mr Hall's submissions have addressed them in turn. So I only propose at the outset to address one of those issues and that is the issue that most concerns the [National Crime Agency's] function, namely the issue at 2(v), the harm to the function of preventing detection of crime that may be caused by disclosure.

Sir, we submit that this will be an important factor for you to consider and to weigh in the balance when deciding whether or not to grant restriction orders. So I shall submit it operates on a number of different

levels. Put shortly, though, Sir, we submit that the Inquiry is likely to obtain a large amount of evidence that is relevant to its terms of reference which, if made public, would harm that function.

So I wonder if I may start by asking you to look at a particular paragraph of the submissions that have been filed by my learned friend Ms Kaufmann. It is paragraph 9 of her submissions. In the second sentence of that paragraph she states:

"This Inquiry is not an inquiry into the use of undercover policing in the context of serious and organised crime, although much of the police submissions and evidence erroneously adopt that focus."

Sir, we submit that that proposition is wrong on a number of different levels. Perhaps I can expand on that in this way: the first point relates to your terms of reference. I imagine that you are very familiar with them. If they need to be accessed, they are, in fact, in the authorities bundles at tab 6, divider 124. Sir, I don't think I need to ask you to go to them.

The short point I make is this: for entirely understandable reasons, the focus of the submissions that have been put in writing that you are hearing today is on the factual issues concerning the activities of the [Special Demonstration Squad] and the [National Public Order Intelligence Unit], but that is by no means all that

you will be considering within your terms of reference. The terms of reference are broad and require you to examine undercover policing in this country from 1968 to date. Although they direct you to consider the activities of undercover police operations targeting political and social justice campaigners, the terms of reference expressly state that the investigation will include but not be limited to those matters.

So, in that context, it seems to us inevitable that this Inquiry will hear evidence going beyond those matters, including, for example, undercover operations that have taken place since the events relating to the [Special Demonstration Squad] and [the National Public Order Intelligence Unit]. So, indeed, given the need for this Inquiry to make recommendations regarding undercover policing in the future, it seems likely to us that you will need to hear evidence about undercover operations that are taking place in the current time, including, quite possibly, undercover operations that are still going on at the time that you hear evidence about them.

So it is clear in that context, we would submit, that evidence of that nature will need to be protected by restriction orders. The reason perhaps is obvious: if evidence were to be heard publicly about such current operations, current techniques, tactics, capabilities and targets would be prejudiced.

Sir, it may be that most of the people in the room would accept that proposition, but we would argue that the point goes further than that because precisely the same sort of damage may be inflicted when you hear evidence about matters that are more historical, including the evidence that you hear about the [Special Demonstration Squad] and the [National Public Order Intelligence Unit].

As Mr Hall has stressed, the question will in each case be one of fact, but it cannot be excluded that evidence you hear about events which took place some years ago, possibly even decades ago, may cover operational tactics or techniques that are still current today. If that is the case, then hearing evidence about those matters publicly will undermine the prevention and detection of crime today. That is a factor that you will need to take into account.

Sir, the whole question of [Neither Confirm Nor Deny] also arises in this context. Like Mr Hall, I would submit that that is not a matter that is suitable for discussion at the principled level of the submissions that you are hearing today, but what I would submit, as Mr Hall has already done, is that the attempt that has been made by some core participants to argue that the whole question of [Neither Confirm Nor Deny] can simply be put to one side for the purposes of this inquiry is unsustainable.

So you have seen the statement from Mr McGuinness, served on behalf of the Cabinet Office. In our submission that statement makes good the proposition that the [Neither Confirm Nor Deny] policy is, in principle, an important tool for maintaining and sustaining policing operations, in particular undercover operations. For that reason alone we would submit that it will be necessary for you to consider that policy when you come to make your decisions on restriction orders. We wouldn't propose to say any more about it at this stage.

Sir, finally on this topic, there is the point that we have flagged in our written submissions about the impact of decisions that you make in this Inquiry on existing operations and particularly existing operations with foreign law enforcement agencies.

Sir, the submission that we have made and which we maintain is that foreign law enforcement agencies with whom the [National Crime Agency] have a close working relationship are understandably concerned to protect the safety of their officers who are engaged in undercover operations. So were this Inquiry to name --

THE CHAIR: This is a matter for evidence, isn't it, Mr O'Connor?

MR O'CONNOR: Sir, I entirely accept it is a matter for evidence. We don't have evidence before you and will be

providing you with that evidence. I simply wish to flag the point, as we have done in our written submissions. But if, Sir, you have the point, then I won't say any more about at this stage.

So the point we make in summary on this whole issue of the prevention and detection of crime is and is no more than that this will be an important factor for you to weigh in the balance. Of course there will be factors on each side of the balance, but this will be an important factor when you come to determine restriction orders.

Sir, may I move on to another point which relates to the statutory context of the 2005 Act? Again, these are points that we have raised in our written submissions and your counsel have referred to in the supplemental note that they have served this morning. So the context for this submission is the argument that has been raised in some of the written submissions that you have received, which is to the following effect: namely, that the level of public concern about the activities of the [Special Demonstration Squad] is such that any form of closed process in this Inquiry would be unacceptable because, if there were any such form of closed process, this Inquiry would not be able to discharge its responsibility to allay the public concern which has been referred to.

Sir, we respectfully submit that that argument is inconsistent with the statutory context and so we make the following points in that regard. Sir, first of all, all 2005 Act inquiries are founded on public concern. So that is a point which many have made relating to section 1(1) of the Act. We would submit that it is precisely that context, that common context, that gives such significance to section 19, because what one sees there is that, notwithstanding the fact that all public inquiries will, by definition, be dealing with matters of public concern, Parliament has chosen to legislate to allow public inquiries to undertake what is an exceptional procedure.

We make the point in our written submissions that the court have regarded closed procedures as being highly exceptional and indeed not procedures that the courts themselves can decide to adopt. The ruling has been that it is only Parliament that can provide for closed procedures; for example, inquests where there is a close corollary with this procedure, with the Inquiry procedure, have never been allowed to conduct closed procedures.

So the point is that, notwithstanding the context of public concern, Parliament has chosen to allow inquiries to adopt these procedures. In that sense, Sir, we would

submit it has already addressed the tension which has been adverted to between, on the one hand, the need to allay public concern through open procedures and, on the other, holding closed procedures. So we would submit that it simply cannot be said that closed procedures are inimical to performing that function of allaying public concern.

Sir, three final points which I hope to take quite briefly. First of all, the point raised at item 3 of your agenda relating to the investigative obligations under Articles 8 and 3. We have little to add to what has been said by your counsel in their note and also Mr Hall on this topic.

Clearly at least some of the factual issues that are before you in this Inquiry will raise arguable breaches certainly of Article 8 and possibly also of Article 3. In those cases there will be an investigative obligation and this Inquiry may be one of the means by which that obligation is to be discharged.

Where that principle is in play, that is where there is an investigative obligation, the desirability of the individual or individuals in question participating effectively in the investigation will be a factor militating against the making of a restriction order.

Sir, we would respectfully agree with the submission

made by your counsel that, given the array of other factors, many of which will overlap with that consideration, that particular consideration is unlikely to be determinative when you make your decision. So we would simply add this: it is only likely to make a real difference if either Article 8 or article 3 has some sort of mandatory minimum level of disclosure that is required to be made to an individual who is the subject of that investigation.

You will be familiar with the Article 6 case law, in particular the case of [Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269], which in a very different context says precisely that, that there is a minimum level of disclosure that needs to be made for Article 6 purposes. It is a principle that developed in control order case law and has been applied in some other situations.

That clearly does not apply directly here because Article 6 is not engaged in the proceedings. We would simply flag up that we are aware of no case law that sustains a point that there is any form of minimum mandatory level of disclosure under either Article 8 or Article 3, but we would submit that that is what would need to be in play if this point was to make a difference in the balancing exercise.

Sir, next a short point relating to a point made in

the submissions filed by my learned friend Mr Emmerson in his written submissions. Perhaps I could just ask you to turn to paragraph 8 of his submissions.

Sir, this relates to the issue about the amount of closed evidence that may be deployed in any particular set of proceedings, so this is an issue which has been touched on by a number of parties.

Clearly, as Mr Emmerson's submissions accept, there cannot be any "quota", as it were, of closed evidence that is either permissible or not permissible in any such proceedings. It is bound to be fact-specific. But the short factual point here, towards the end of the paragraph or at least towards the bottom of page 2 -- the observation is made that in those inquiries where closed material procedures have so far taken place, that is Bloody Sunday, Hutton and Litvinenko, only a small amount of highly sensitive material primarily affecting national security was withheld from the public domain.

So I'm not in a position to assist in Bloody Sunday and Hutton, but I do know something about the Litvinenko Inquiry, and it was for that reason that I asked for a short passage from the report to go into the bundles.

It is, Sir, at bundle 4, tab 88. What you have here, Sir, is just one chapter of the report or part of

the report, part 7, which deals with closed evidence. I simply direct your attention to paragraphs 7.4 and 7.5, where Sir Robert Owen describes the volume of closed material that was in play in those proceedings.

Sir, thank you. The final point, the unfortunately named principal of deference, you will have seen that we did raise a point about this in our submissions. We note it is not on the agenda. We assume and we respectfully agree that this really will be a matter to come to once you are considering evidence. Like Mr Hall, therefore, we reserve our position until you get to that stage of these proceedings.

Sir, I'm grateful.

THE CHAIR: Thank you very much.

Submissions on behalf of the National Police Chiefs' Council by MS BARTON

MS BARTON: Sir, I represent the National Police Chiefs' Council, the successor organisation to the better-known [Association of Chief Police Officers].

Sir, we have core participant status in order to present a national policing perspective in respect of the terms of reference for this Inquiry. May I say, Sir, that we are fully supportive of the aims of the Inquiry and have taken steps to ensure the fullest cooperation from all forces.

The [National Police Chiefs' Council] supports and adopts the comprehensive submissions made on behalf of the Metropolitan Police Service and those made by the [National Crime Agency]. So, Sir, I have very little that I can usefully add, but if I may take just a few moments to emphasise those matters which, from the [National Police Chiefs' Council's] point of view, may be seen as being most important.

Firstly, Sir, we support and adopt the submission that was made in respect of the non-police non-state submissions at tab 8, paragraph 9, to the effect that the terms of reference of this Inquiry are very much wider than the [Special Demonstration Squad] and [the National Public Order Intelligence Unit] and, in particular, cover national undercover policing issues that will inevitably cover matters such as organised crime group activity and counter-terrorism. That is why it is perhaps a little naive to narrow the scope in order to be able to say that some of these people are already self-declared and therefore the issues are simpler than in fact they are.

Sir, the legislative framework, when looked at as a whole, in our submission does support the submission made by Mr Hall that there is a presumption of confidentiality in relation to the identity of undercover officers. We accept that that is a presumption that is an aspect of public interest. It is not a rule of law. Therefore to answer a question that you asked earlier today of Mr Hall, it flows from

that acceptance that we do not rule anything in or anything out. It is a balancing exercise, but it starts not from a presumption of openness, but from a presumption of confidentiality and one would weigh the various factors from that starting point.

Sir, the nature of these proceedings is very important. We, as lawyers, have used the terms "adversarial" and "inquisitorial". They may not mean very much to those who are sitting at the back of the court, but one of the most important aspects of inquisitorial proceedings is that you and your team, Sir -- and you as a fact finder -- have access to all of the material, unfettered access.

The difference when one looks at adversarial proceedings is that, where a public interest attaches to a document or a piece of information, that document or piece of information must be removed from the decision-making process completely and can form no part of the conclusions. So the consequences of a public interest immunity attaching are very much more serious in the context of those proceedings and indeed sometimes bring an end to those proceedings.

So it is a relevant consideration that any disclosure by the Inquiry would be unlikely to lead to any harm additional to that which is already the result

of disclosure. We fully agree with that and we agree with the submissions with regard to the approach as to wrongdoing.

So, Sir, against the background of those very short submissions, that is the position of the [National Police Chiefs' Council].

THE CHAIR: Thank you very much. Mr Brandon?

Submissions on behalf of the separately represented police officers by MR BRANDON

MR BRANDON: Mr Brandon.

Sir, I appear on behalf of the following core participants: N10, Bob Lambert, self-disclosed and officially confirmed; N14, Jim Boyling, officially confirmed; N15; N16; N26; N58; N81; N123; and N519.

Sir, I can be even shorter than my learned friend Ms Barton has been and say this: we adopt and support the submissions made by my learned friend Mr Hall for the Metropolitan Police very ably. He has covered all the points of principle that we would wish to raise and we have nothing to add.

Sir, we share the view expressed by Counsel to the Inquiry that it is only when considering the particular applications that all relevant factors are capable of being identified. Sir, it is in making those applications -- and we have started that process, as you have seen, Sir -- that I suspect we will be making

rather more fulsome submissions. But at the moment that is all I have to say, unless there is anything, of course, that I can assist you with, Sir.

THE CHAIR: Thank you very much.

Mr Griffin.

Submissions on behalf of the Secretary of State for the Home Department by MR GRIFFIN

MR GRIFFIN: Sir, I represent the Secretary of State for the Home Department and I, too, intend to be brief, focusing on the first three of the issues under 1 on your items for consideration.

Sir, it is our submission that fairness and balance lie at the heart of the correct approach in this Inquiry and you will have potentially significant matters that you will need to weigh very carefully and on the basis of a case-by-case approach. The decision whether or not to make an order under section 19 will be of course yours and you will be the person deciding where the balance comes down correctly.

As far as item 1 is concerned, widespread public, Ministerial and Parliamentary concern, it is right to note, as Counsel to the Inquiry note in their first approach to this, that both elements of section 1 are correctly alive in the context of this Inquiry. This is a situation both where particular events have caused

public concern and there is public concern that particular events may have occurred.

Sir, there have been various statements by the Home Secretary in the lead-up to this Inquiry and on setting its terms of reference that make clear the concern that she holds and that others hold.

May I deal very quickly with the point that Mr Hall made, which is that what is particularly of concern is public concern rather than Ministerial or Parliamentary concern. The only response that I would make in relation to that, apart from the type of submissions that will be made specifically on the part of elected representatives, is that concern from Ministers or arising within Parliament is clearly of itself a manifestation or evidence of public concern and can be taken into account in that way at the very least.

Sir, the Secretary of State has noted her shock and the grave concern arising from the Ellison Review. She has stated that there is the need for the greatest possible scrutiny into what has taken place and the imperative that public trust and confidence in the police is maintained. She suggests that the public must have confidence that the behaviour described in both the Ellison Review and the Operation Herne reports is not happening now and cannot happen in the future.

There is, I suggest, a very strong public interest in this Inquiry being able to work in a way that is thorough and effective. So far as openness is concerned, section 18(1) -- I'm not sure I need to take you to it, Sir. You will have seen it now several times -- requires you to take reasonable steps to secure public access to proceedings and information and, of course, that requirement is subject to the imposition of a section 19 order.

Your opening remarks in July, I suggest, correctly state the situation with regard to openness and the presumption of openness. You said that:

"This is a public inquiry to which, as the name implies, the public will have access. I will therefore start with the presumption that witnesses should give evidence in public ..."

You then went on to say:

"The subject matter of the Inquiry means that there may be circumstances, such as the national interest, continuing police investigations or the rights of individual witnesses, that require me to make an order under section 19."

The Home Secretary is committed to restoring public confidence in the police by uncovering the truth of these allegations and in doing so in as open a way as is

possible.

Sir, as far as the third issue, public engagement and lines of inquiry, I want to deal with that just in one way: that is to acknowledge that the non-state and police submissions are at their strongest where they deal with the problems that would arise if large amounts of evidence concerning undercover officers and undercover operations was held in closed proceedings away from all other core participants. That would mean, as well, the Home Office would not be in attendance at those closed hearings, as I understand the suggestion.

It is accepted that some of the core participants -- non-state core participants -- would be very important witnesses for this Inquiry and there would be difficulty with them effectively participating were large tranches of the most significant evidence held in closed proceedings. So I acknowledge that there is a high public interest in favour of openness that goes on one side of the balance that you will need to consider.

There will be also competing and potentially compelling public interest reasons that will go on the other side of the balance, as has been suggested by the police lawyers already. It will lead inevitably in many cases to a very difficult balancing exercise. All I would wish to add is that you will be able to deploy

all of the various options that are open under the Inquiries Act 2005. I think, as Counsel to the Inquiry put it, you will be able to calibrate potential restrictions from the very minor to the more major in any particular case that you are considering. It is the flexibility of the Inquiry model that will assist you in making these very difficult determinations.

So that is all I want to say, other than to acknowledge the work that Counsel to the Inquiry have put in to the first note and also the note this morning and I'm grateful.

THE CHAIR: Mr Griffin, before you sit down, can I ask you to address the last sentence of your written submissions of 12 February 2016, which I think encapsulates what you have just been saying to me, but I want to ensure that what you have written there is exactly what you want to say.

MR GRIFFIN: Yes. There is no prejudging any of the balancing exercises that you will be undertaking.

THE CHAIR: What do you say: where these two competing factors, that is for and against disclosure, to put it shortly, directly oppose one another and subject to the overall requirement of fairness -- so you put that at the top of your tree --

MR GRIFFIN: Yes.

THE CHAIR: -- the public interest in ensuring that police

techniques remain investigative should outweigh the interest in public access to information, given that the Inquiry will have access to all the relevant material. That's the way you would like it to remain, is it?

MR GRIFFIN: Sir, subject to the overriding requirement of fairness and an approach on a case-by-case basis, where I acknowledge that there may be compelling interests in favour of holding things as openly as possible.

THE CHAIR: Yes, thank you very much.

Ms Kaufmann it is 10 past 3. Now seems to be a good time for a break.

MS KAUFMANN: Very good.

THE CHAIR: I will come back at 25 past.

(3.10 pm)

(A short break)

(3.25 pm)

Submissions on behalf of the non-state , non-police core participants by MS KAUFMANN

MS KAUFMANN: Sir, as you know, I represent -- together with Ms Brander and some 15 or so solicitors -- about between 150 and 200 victims. I want to start by saying something about their need to know. I'm not going to dwell on it because, contrary to what Mr Hall has submitted this morning, the position we take on their being no room for a presumption of secrecy in the conduct of this Inquiry does not rest upon that private

interest that they have in a right to know, but rests, as we shall see, on a panoply of public interests, which all compel this Inquiry towards a presumption of openness.

Starting with their own need to know, some of those victims, those 150 to 200 victims, already know that they are victims of profound abuse of power by members of the [Special Demonstration Squad] and the [National Public Order Intelligence Unit], which has resulted in them being spied upon because of their political beliefs, spied upon because they were seeking to hold the police to account for racist policing, engaged -- the subject and victims of, as you know, long-term intimate relationships which were based upon a profound deception, in some cases involving the fathering of children, failing to disclose their roles in the course of criminal proceedings which resulted in miscarriages of justice. All profound, deeply concerning abuses of power, which some of them know about.

Others are waiting still to find out whether they were the victims of similar abuses or the same abuses. Then there are others -- we don't know how many more -- a whole panoply of others who don't even know at this stage whether they were victims.

All those people, those who know, those who suspect, those who don't even know but they should suspect, have

or would have a pressing need to know what has happened to them; to know how it could possibly have happened to them, whether it was institutionally sanctioned or, if it was not institutionally sanctioned, how on earth it nonetheless happened. That need to know is readily understandable to everybody. It takes just a second to put ourselves in their shoes to feel the compulsion to try to understand how this came about.

It is readily understandable to the Home Secretary because she, when she determined that this Inquiry should be established, made it quite clear that one of the purposes, one of the functions this Inquiry would perform, would be to establish justice for the families and for the victims.

We can see that in volume 6, tab 123, the statement the Home Secretary made in the House of Commons -- or, rather, it was made on her behalf by Mike Penning, the Minister for Policing, on 20 March 2015, in which it was said, page 1:

"The Inquiry will review practices and the use of undercover policing to establish justice for the families and victims and make recommendations for the future so that we can learn from mistakes."

That is important because what that shows -- again contrary to Mr Hall's submissions -- is that even their

own need to know is not a matter of private interest; it is a matter of public interest and public concern, made such by the Home Secretary deciding that this Inquiry should in part serve their need for justice.

The profound impact on their lives -- personal, political, emotional, psychological -- those profound impacts are also why, Sir, you have accorded them status as core participants; not as mere witnesses, but as core participants.

The profound impact upon them is also the reason why fairness requires that they have participatory rights in the process of this Inquiry. It is why section 17 is engaged, which requires you to ensure that fairness is done to them. It is why what is accorded to them as a matter of fairness runs far, far beyond simply giving them the bare rights that a core participant has in the process by virtue of their appointment as such.

The fact that there are different interests that are affected in relation to the different groups of victims, yes, it is important that the Inquiry recognises that there are different interests that are affected, but in relation to each group of victims, what is abundantly clear is the interests that are affected are ones of the utmost importance. To each of them, they are important in and of themselves in terms of democratic freedoms and

fundamental human rights.

So, as you noted, Sir, at the beginning of today's proceedings, this hearing is one which is extremely important for some of the core participants and for my clients it is of the utmost importance because today -- and the outcome of today's proceedings is, in our submission, going to come -- in the outcome will come the determination by you of whether this Inquiry is going to proceed on the basis of a presumption of secrecy, whereby any disclosures of the identities of any of the undercover officers engaged in targeting any of the groups with which they were involved will be a matter of secrecy, save in truly exceptional circumstances, or whether this Inquiry will proceed on a presumption of openness, whereby the identities of officers who targeted groups and individuals will be disclosed unless there are exceptional circumstances, based upon objective evidence that justify on grounds of necessity the withholding of their identities.

As you know, Sir, if this proceeds on the basis of a presumption of secrecy, this is the end for many of the non-state core participants. As we made clear in our submissions, that is not said as a matter of threat, it is simply a statement of fact because they are not prepared, some of them, to prise themselves open, to

re-open wounds, wounds caused by police abuse, wounds perpetrated under a veil of secrecy, in circumstances where the police are again availing themselves of that veil of secrecy, that veil of secrecy being one that has kept them in the dark until now. In those circumstances they simply cannot and will not be prepared to move forward and involve themselves in this Inquiry.

Sir, you raised the issue that there was an issue of dignity that goes with a situation in which they are forced to give evidence in open before everybody, where the self-same evidence will be given by the police in total secrecy. That's right. There is. There's a major issue of dignity that arises in that situation. So, for them, this is a make-or-break situation.

But in our submission, there is no countervailing reason why their profound need for the truth to come out cannot be met by the process which the Inquiry adopts to the police's evidence. On the contrary, their needs coincide entirely, as I have said, with a panoply of fundamentally important public interest, all of which, in a mutually reinforcing way, call for this Inquiry to operate on a presumption of openness, with no room for secrecy, save as I have said.

What is more -- and this is incredibly important and we will come in detail to it in time -- the particular

circumstances of this Inquiry are such that there is actually no countervailing public interest that calls for it to operate on the basis of a presumption of secrecy.

So we have two factors which interplay: the first is the Inquiry simply cannot function if it is going to operate on a presumption of secrecy; the second is it doesn't, on the basis of any countervailing public interest, need to consider operating on a presumption of secrecy.

Now the key to all of this is the place that [Neither Confirm Nor Deny] should play, if any, in how the Inquiry proceeds. Now, Mr Hall did not talk in great deal about [Neither Confirm Nor Deny], but what he did do, at the beginning of his submissions, was to adopt the submissions that he made in writing. For the reasons we are going to come to, it is our submission that what he is asking the Inquiry to do is to effectively mirror [Neither Confirm Nor Deny]; that is, to give weight to the police practice of consistently neither confirming nor denying any matter related to undercover policing in the way in which the Inquiry approaches the police's evidence. To do that it is requiring the Inquiry to conduct secret hearings wherever [Neither Confirm Nor Deny] would prevail.

The position that the police are inviting the Inquiry to take is in fact to hold that [Neither Confirm Nor Deny] should

prevail in all circumstances, save where they themselves have officially confirmed the identity of an undercover officer. Everything else we hear about it being necessary to weigh other particular public interests in the balance, as we will see, really don't fall to be weighed in the balance at all if, in fact, the Inquiry were to accede to the approach that they invite it to take in relation to [Neither Confirm Nor Deny] because, as we shall see, [Neither Confirm Nor Deny] or the mirroring of the stance of [Neither Confirm Nor Deny] does the job of protecting all those other individual public interests and you don't protect them both; you don't protect them twice. It is an either/or choice. But we will see that.

Perhaps I can explain or try to explain our position by reference to the document that you produced setting out some of the issues for consideration. It's not the document that was produced by Counsel to the Inquiry this morning; it is the document the other parties have been running through this morning and this afternoon, the "Issues for consideration" document.

Question 1 asks, "What are the possible components of the public interest that tend against the making of a restriction order...?"

Question 2, "What are the possible components of the public interest that tend in favour of making

a restriction order...?"

Our position -- I will go through these particular public interests at a later point in time -- is that (ix) in 1, that is, "loss of blanket/absolute [Neither Confirm Nor Deny] protection", does not feature in the balancing exercise under section 19. It plays no part whatsoever.

So when you come to 2, it is also the case that (i), "Protection of unhindered functioning of police investigation as represented by [Neither Confirm Nor Deny]", also does not feature; that is [Neither Confirm Nor Deny] does not play a part in the balancing of whether or not a restriction order should be made. There are other factors that follow that do and we will see why at a later stage.

The reason why we say that 2(i), "The protection of the unhindered functioning of police investigation as represented by [Neither Confirm Nor Deny]plays no part", is precisely because of 1(ix), the "loss of blanket/absolute [Neither Confirm Nor Deny] protection". But we would not put it that way. We don't put it that there has been a loss of the blanket [Neither Confirm Nor Deny] protection; rather we put it in the following way, as I have already indicated: the Inquiry cannot function with weight being given in the balancing exercise to [Neither Confirm Nor Deny] or to the mirroring of [Neither Confirm Nor Deny] and, in any event, there is no need for the Inquiry to proceed on that basis. There is no need to give weight to the public

interest in maintaining [Neither Confirm Nor Deny].

Just to outline why we say there is no need to do that, it is because -- precisely because -- the underlying interests which a consistent application of the [Neither Confirm Nor Deny] stance serve to protect can properly be protected by this Inquiry by other means --

THE CHAIR: May I ask you a supplementary question? Would you say that there is any public interest in maintaining the confidentiality of the identity of undercover police officers?

MS KAUFMANN: Yes, and you will have seen from our submissions -- our written submissions -- that we have identified that public interest as one of the public interests to be weighed in the balance.

THE CHAIR: Yes.

MS KAUFMANN: What we will explain is that the public interest in maintaining [Neither Confirm Nor Deny], that is in the agencies maintaining [Neither Confirm Nor Deny], the agencies that deploy undercover operatives or gather secret intelligence -- the public interest which they discharge when they maintain an [Neither Confirm Nor Deny] stance is precisely the protection of matters such as the identity of officers.

THE CHAIR: Yes.

MS KAUFMANN: That's the important distinction we have to keep in mind.

So far as the police are concerned, [Neither Confirm Nor Deny] performs that function. The question is: do you need to do the same thing in this Inquiry to protect those underlying public interests? In our submission you don't.

So if we come back to this, if we come back to 2(i), the first reason we advance why this Inquiry does not need to attach any weight to the public interest that [Neither Confirm Nor Deny] performed is because it itself can do the job that [Neither Confirm Nor Deny] does. It can do it if we look at (ii) and we ignore (i) and we look at the factors that this Inquiry can take into account in the balancing exercise: fairness to the individual which takes account of confidentiality; harm to the individual, the risk that the individual faces from disclosure.

One of the primary purposes or primary public interests that the [Neither Confirm Nor Deny] stance protects is to ensure that undercover operatives are not put at risk if their identities are disclosed, "harm to the function of detecting and preventing crime", because if you say nothing, you neither confirm nor deny, you don't disclose methods.

So secrecy, the [Neither Confirm Nor Deny] stance, simply serves the job of protecting a number of underlying public interests. Now if this Inquiry can do that, you don't need to have regard to [Neither Confirm Nor Deny]. That's point number 1.

Secondly, there are other aspects of the [Neither Confirm Nor Deny] stance -- and we will come and look in detail on this -- but, for example, the need for a consistent approach that has a particular value which it may be said would be threatened if disclosures are made, but -- and this is where we come to the submissions we made in paragraphs 44 and 49 and we will come to those -- this Inquiry can operate in a way that means that it can, as it were, mirror the consistent approach and therefore again we don't need [Neither Confirm Nor Deny].

Finally --

THE CHAIR: I hope that I have not misled you by phrasing these questions in this way. All that is meant by 1(ix) is that it is undeniable in the current circumstances that there cannot be blanket [Neither Confirm Nor Deny] protection, whether original or mirrored, because in the Operation Herne reports, for example, there is plenty of material placed in the public domain, presumably as a consequence of Operation Herne asking itself the public interest question, which means that it would be ludicrous for anyone to suggest today that nothing at all can be said in public about undercover police officers or undercover policing. So the reason why it is included in paragraph 1(ix) is simply to point out that we are not in the realm of blanket [Neither Confirm Nor Deny].

MS KAUFMANN: Because exceptions have already been made.

THE CHAIR: Yes.

Secondly, the point of paragraph 2(i) is to ask the question: well, does it remain or may it remain at any level as a consideration? That's why the question is asked whether an undercover name or a target should or should not be disclosed. That's all that is meant there.

At what level is the public interest justifying [Neither Confirm Nor Deny] actually going to be protected? For example, would it be against the public interest to name an undercover name? Would it be against the public interest to name a specific target?

MS KAUFMANN: Our position on that is there is no weight to be attached to [Neither Confirm Nor Deny] and so that question, the question of whether or not one -- the question you have posed at 2(i) assumes that a value is to be attached to [Neither Confirm Nor Deny]. It then asks the question of whether or not the interest in protecting or giving weight to [Neither Confirm Nor Deny] can be met by simply giving the undercover name. That's the question that is posed there.

Our submission is that is the wrong question. The starting point is that there is no weight to be given to [Neither Confirm Nor Deny] at all when it comes to section 19. The Inquiry is going to have to make a prior determination about

whether or not it proceeds on a presumption of openness or it proceeds on a presumption of secrecy. Proceeding on a presumption of secrecy is what it means to give weight to [Neither Confirm Nor Deny] in the section 19 exercise and I hope I'm going to be able to explain why that is the case.

If we can turn to what it means to give weight to [Neither Confirm Nor Deny]. We have already started. As I said, it is a tool. As you know, it is a tool which is actually used by the agencies. It is an answer that they give in order to protect a number of underlying public interests which it is well recognised it is in the public interest to protect: the identity of informants, of [Covert Human Intelligence Sources], methods and also the utility of the tool of intelligence gathering, in this instance undercover policing -- protecting all those things.

The way in which they protect all those underlying interests is a very simple way. They neither confirm nor deny. A veil of secrecy is put over all information relating to intelligence-gathering.

What is absolutely central -- central -- to the way in which [Neither Confirm Nor Deny] works, a critical aspect of its efficacy, is that it is applied consistently. So when one talks about not applying blanket [Neither Confirm Nor Deny], there is a big difference between making exceptions in the individual case, which [Neither Confirm Nor Deny] already contemplates -- there will

always be exceptions to this -- but applying the stance of [Neither Confirm Nor Deny] is premised upon its consistent application subject to a few exceptions. The reason why it has to be applied consistently has been identified in In re Scappaticci [2003] NIQB 56. That is tab 49 of volume 2, paragraph 15.

Before we look at this paragraph, obviously by neither confirming or denying in the individual case, one is thereby protecting the particular officer. You are not disclosing that officer's identity; you therefore protect him. But that is not enough. You have to apply it consistently in relation to any question whatsoever about intelligence-gathering for the reasons that are here identified because, if you deny in one case or affirm in another case, it has knock-on implications in other cases and may lead to the identification of officers who are wholly unconnected to the circumstances relating to the Inquiry.

So:

"The reasons for adopting and adhering to the [Neither Confirm Nor Deny] policy appear from paragraph 3 of Sir Joseph Pilling's affidavit. 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. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict [Neither Confirm Nor Deny] policy."

"Strict [Neither Confirm Nor Deny] policy" means consistent application across the board.

What is interesting about this case and significant about this case is here Mr Scappaticci was seeking a denial because he was suspected of being an informant and he was saying, "that places me in danger". Even that risk that he was presented with was not sufficient to justify overriding the public interest in maintaining a consistent application of [Neither Confirm Nor Deny] to protect the utility

of the tool and to protect potentially other individuals.

So when we look at [Neither Confirm Nor Deny], we always have to understand that it is not simply neither confirming nor denying in this individual case; giving weight to [Neither Confirm Nor Deny] and to the stance of [Neither Confirm Nor Deny] means giving weight to the need for a consistent blanket of secrecy. That's what it necessarily means.

So if we then have a look -- before we do, I make the point that there are always exceptions to [Neither Confirm Nor Deny]. It is a policy that is applied by the intelligence services -- we say it is applied by them -- and there will be circumstances in which they will make exceptions to that. We know that they have done so, for example in circumstances relating to this Inquiry, they have identified -- confirmed rather -- the identity of Mark Kennedy. That is a departure from the consistent application of [Neither Confirm Nor Deny], but it is an exception. It not an application of the policy. It is a clear departure and exception.

Similarly in relation to Mr Boyling, Jim Boyling, he has been confirmed. That is again a departure from this policy whose integrity depends upon its consistent application. The significance of the departures is that what it shows is that a single departure does not

necessarily mean the whole thing comes tumbling down. One has to ask oneself in the particular circumstances of the case whether a departure or whether a failure to mirror is going to have the effect of undermining the utility of the tool, bringing about some of the threats that the tool is intended to prevent.

Can I turn now to how the courts approach [Neither Confirm Nor Deny] because how the courts approach [Neither Confirm Nor Deny] is not, in our submission -- or does not -- dictate how this Inquiry should approach [Neither Confirm Nor Deny], but it is very important to see what they actually do do.

THE CHAIR: Can I just point out to you a puzzle that I have? I have obviously got it wrong, but I thought you had made two contradictory submissions. One is that there is no weight to be given to [Neither Confirm Nor Deny] in any form in this Inquiry; the other is that you have to look at [Neither Confirm Nor Deny] on the facts of each individual case. To my mind, those propositions are inconsistent.

MS KAUFMANN: No. There is no room in this Inquiry for the Inquiry to say and to put into the section 19 balance the public interest in the police maintaining a "neither confirm nor deny" stance. That is completely different from saying that this Inquiry cannot take account of the underlying public interest that that stance serves to protect.

THE CHAIR: In that case we are on the same wavelength.
MS KAUFMANN: Yes. You are perfectly entitled to do that.
THE CHAIR: Right.
MS KAUFMANN: In fact we say it is your ability to do that, it is your ability to put all of these individual factors into the equation in deciding whether to impose a restriction order, which means that you don't have to have regard to and attach any weight to the fact that the police go about doing this by neither confirming nor denying. You don't have to do that.
THE CHAIR: It is the underlying public interest that always has to be justified --
MS KAUFMANN: They have to be justified.
THE CHAIR: -- when the policy is applied.
MS KAUFMANN: That is why the policy is applied. So the starting point is: why does this policy exist --
THE CHAIR: Which is why I asked the question in the issues note, "At what level of disclosure would the public interest be met?"
MS KAUFMANN: Which public interest?
THE CHAIR: Either of them, in disclosure or against disclosure.
MS KAUFMANN: I think one has to break down what are public interests. The critical point for our purpose is that none of those public interests is the public interest in

maintaining a [Neither Confirm Nor Deny] response --

THE CHAIR: Yes, I understand that.

MS KAUFMANN: -- which is not to say -- we are not hereby saying that there is no public interest in the police maintaining a [Neither Confirm Nor Deny] response. We don't say that for a moment. But what we are saying is that this Inquiry does not have to give weight to it.

So can we look at what the courts do? The starting point is, as the police say, the courts have long, long recognised the utility of the [Neither Confirm Nor Deny] stance, the public interest that it serves, because it is a mechanism for protecting not only national security -- and national security when it comes to the intelligence services whose techniques and operations are under consideration -- but also it protects national security for reasons that relate to the way in which it protects particular interests that need to be protected for the tool to remain useful.

So to break that down, if the intelligence-gathering had been done by the Security Services, then it is being done for the purposes of protecting national security. That's why they operate. The reason an [Neither Confirm Nor Deny] stance is given in relation to any questions about intelligence-gathering by the Security Services is because, by saying nothing, neither confirming nor

denying, the individuals who are gathering that intelligence will be protected; they will remain able to gather the intelligence; the methods they use will be protected; they will remain able to gather the intelligence to protect the national security; the utility of the tool will be maintained because there will be confidence through the application of this policy on the part of those who are gathering intelligence that they will continue to be protected in this way and, therefore, national security will be protected by protecting the intelligence-gathering methods and individuals who are doing it. That's how it works.

So, equally, we accept that when the police make an [Neither Confirm Nor Deny] response in relation to their undercover activities, while it may not protect national security because what they are doing does not protect national security save in some circumstances, it will protect the prevention of crime because, by protecting the individuals who are involved in gathering intelligence to prevent crime, they are thereby protecting the prevention of crime by protecting the methods and so forth.

So we readily accept that the courts have and do recognise that there is a public interest in the

intelligence services and in the police deploying an [Neither Confirm Nor Deny] substance -- that is a consistent Neither Confirm Nor Deny" stance -- to protect those underlying interests. So that's the starting point. There is a public interest in giving effect to the [Neither Confirm Nor Deny] stance.

So when the case comes before the court, the question for them is what do they do when the police or the intelligence services say, "We rely upon our stance of neither confirming nor denying in relation to this particular piece of evidence". What the courts say in that situation has been most recently articulated by the Court of Appeal in the case of [Mohamed and CF v Secretary of State for the Home Department [2014] 1 WLR 4240], which is at tab 52, I hope, in the same volume, volume 2.

So the facts of this case were that two individuals had been detained in Somalia. They had been brought back to the United Kingdom, where they had been put under control orders and [Terrorism Investigation and Prevention Measures], and they sought to challenge the decision to put them under the control orders and under the [Terrorism Investigation and Prevention Measures] on the basis that their capture and removal back to the United Kingdom had been an abuse of power. It had effectively --

THE CHAIR: I was a member of the court that considered the leave application.

MS KAUFMANN: The leave application. So you will remember, then, the circumstances. They wanted to argue that this

is an abuse of power, and the whole of the government's evidence relating to whether or not there was an abuse of power in getting them back to England was heard in a closed material procedure.

So it is actually a situation in which there was representation on their part -- so it wasn't just a situation in which that was considered completely in private -- there was representation by the special advocates. The court -- it is worth just looking at paragraph 16 to see how the court looked at or identified what it is that the court was saying they had to address here.

We can see there is reference to [R v Mullen [2000] QB 520] and that case, like [R v Horseferry Road Magistrates' Court, ex p Bennett [1994] 1 AC 42], is a case where criminal proceedings were stopped on the basis that a person was brought before the court on the basis of a similar abuse of process.

So if we then turn over to paragraph 19, there was reference and reliance on [El Masri v Macedonia (2013) 57 EHRR 25]which we will come to, which was a case referred to in our submissions dealing with an extraordinary rendition by the United States of America, a case decided by the Grand Chamber of the European Court of Human Rights. Reliance had been placed on some of the observations made by the Grand Chamber and this was criticised by the

Secretary of State.

Lord Justice Maurice Kay said this:

"The express inclusion of the criteria of maintaining public confidence in adherence to the rule of law is apt."

That is something that was included in the El Masri case.

"It reflects what Lord Phillips said in AF number 3. Indeed, 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."

So this is a case in which there are only allegations of wrongdoing at this stage. This is important because Mr Hall said earlier that where there are only allegations of wrongdoing, there is no need for the court to determine those allegations according to an open process. That is precisely what there was here, only allegations.

Lord Justice Maurice Kay cites the importance of the rule of law and the importance of the public having confidence in the justice system and seeing that justice is being done and not just taking the court's word for it.

He then goes on to state at paragraph 20 how the

court should approach, in the face of that key public interest, the countervailing public interest in the court giving effect or allowing the police to rely upon and give effect to their stance of [Neither Confirm Nor Deny]. They say:

"Lurking just below the surface of a case such as this is the governmental policy of neither confirm nor deny, to which reference is made. I do not doubt there are circumstances in which the court should respect it."

That is right. The courts have long said it pursues a legitimate and important public interest.

"However, it is not a legal principle and indeed it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity. It is not simply a matter of a government department to litigation hoisting the [Neither Confirm Nor Deny] flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so.

"In the present case I do not consider that the Claimants or the public can be denied all knowledge of the extent to which their factual or legal case on collusion and mistreatment was accepted or rejected. Such a total denial offends justice and propriety. It is for these fundamental reasons that I consider that

the principal ground of appeal is made out."

So what we see there is that the court brings into account a competing public interest, in that instance the rule of law, the need for justice to be done openly, particularly when one is looking at wrongdoing, an allegation of wrongdoing on the part of the state, and one weighs it -- this is the critical point, Sir -- not against the underlying public interests that [Neither Confirm Nor Deny] protects, but against the public interest in the police maintaining a consistent [Neither Confirm Nor Deny] stance; that is against the public interest in them continuing to use that mechanism as a means of protecting the underlying public interest.

That is what "giving weight to [Neither Confirm Nor Deny] " means. It is asking this Inquiry to put into the balance the public interest in a consistent [Neither Confirm Nor Deny] stance as the means to protect the underlying public interests. If the court gives weight to that, then all the other underlying public interests that are on the paragraph 2 side of the balance are incorporated. It is that public interest in secrecy that falls to be weighed against absolutely everything else and that alone.

We can see that the court is not balancing any other underlying public interests when it undertakes these balancing exercises where the [Neither Confirm Nor Deny] flag is waved from

the DIL case, which is in volume 3, tab 60.

So, in this case, this relates to a number, as you know, Sir, of the core non-state core participants who had relationships, deceitful relationships, with undercover police officers, and when they brought their claim in the High Court for damages for a number of torts that arose from the having of those relationships, the Commissioner responded to the pleading -- the particulars of claim -- with a Neither Confirm Nor Deny defence.

So he relied upon the legitimate stance of neither confirm nor deny to say, "I'm not going to say anything. I'm not going to say anything about the identity of the police officers; I'm not going to say anything about whether or not they were police officers; I'm not going to say anything", and he said nothing.

So we went to the court and said, "Well, that's just not right. [Neither Confirm Nor Deny] has to be outweighed in the circumstances of this case for a number of reasons". What the court then did is it examined whether or not there were public interests that outweighed the public interest, which it took and accepted -- the court started -- you will see the court reviewed a lot of authorities in which effectively the courts have upheld the [Neither Confirm Nor Deny] stance as serving a legitimate public interest

and concluded therefore that there is a public interest in allowing the police to rely upon it and asked itself whether or not that was outweighed in the circumstances of the case.

Now at paragraph 45 you can see the conclusions that it came to. In relation to Jim Sutton -- that is Jim Boyling -- it looked at what had happened on the part of the police in relation to his identity and concluded that in fact there had actually been official confirmation by the police of his identity. In those circumstances, they said, "Well, you can't rely on [Neither Confirm Nor Deny] where you yourself have officially confirmed his identity", which is a matter of common sense. If you have officially confirmed something, you can't, as it were, seek to put the genie back in the bottle by neither confirming nor denying it. It is out; you have confirmed it. So [Neither Confirm Nor Deny] has no part to play there. No public interest. It is obviously defeated.

The same with Bob Robinson, which is Bob Lambert, paragraph 46.

But in the case of Mark Cassidy and John Barker or John Dines and Mark Jenner, the court looked at what had already entered the public domain -- and there was masses in the public domain about both of them -- but what had not happened in their cases was that there had

not been official confirmation. In those circumstances the court upheld the reliance upon [Neither Confirm Nor Deny].

It held -- it implicitly held -- that the arguments that we have put forward that the public interest in the claimant's rights of access to the court did not outweigh the public interest in allowing the police to give effect to its policy of [Neither Confirm Nor Deny].

But, again, what we don't get in this case is any attempt to weigh the underlying interests that [Neither Confirm Nor Deny] serves to protect. The only question for the court was: does the public interest in the right of access to the court outweigh the public interest in allowing the police to rely upon their [Neither Confirm Nor Deny] response? The answer was "no". Without official confirmation, the other factors did not outweigh.

In the McGartland case, volume 2, tab 50, this was a case where Mr McGartland was an [Irish Republican Army] informant. He had provided information to the [Royal Ulster Constabulary] and his cover had been blown. He was taken over to mainland Britain, protected for about nine years or so, and then he was tracked down and shot six times, with the result that he then needed to be protected all over again, given a new identity, moved, and his claim arose out of alleged failures on the part of the Security Service, who had overtaken responsibility for his protection, to provide him with

medical treatment and to provide him with subsistence in order that he could live once again in hiding.

Again, the response to his claim was a blanket [Neither Confirm Nor Deny] response, so they neither confirmed nor denied in their defence whether he was an undercover or was an informant who had provided valuable intelligence to the [Royal Ulster Constabulary] and the Security Services. The consequence of that Neither Confirm Nor Deny response was that they then wanted the entire case to be heard in secret.

This challenge that was considered by the Court of Appeal was a challenge which was brought by Mr McGartland, who wanted the court first to consider whether or not the intelligence services were entitled to rely upon [Neither Confirm Nor Deny]. Now, there was no challenge in that case to the legitimacy of the intelligence services using [Neither Confirm Nor Deny] as a way to protect the intelligence-gathering tool of informants -- of using informants. The challenge was purely on the basis that in fact it couldn't be invoked in the circumstances of his case because they had already officially confirmed his identity or because his self-disclosures were such that, in the circumstances of his case, where it was he that was bringing the claim and he had self-disclosed, there was no purpose to be served by the [Neither Confirm Nor Deny] response.

I'm not going to take you, Sir, to any passages

because there aren't any in particular to take you to, but the point about this case is yet again the court did not engage in any exercise of looking at the underlying interests that [Neither Confirm Nor Deny] serves to protect, but simply asked itself: is the public interest -- the acknowledged public interest that there is -- in giving effect to the intelligence service's reliance on [Neither Confirm Nor Deny] as a tool to protect intelligence-gathering outweighed in this case? The answer was, "No, it's not, because there has not been official confirmation".

There may be -- there may be, they found -- even if he himself has self-disclosed, there may be, in the course of determining this claim, a need to look at matters such as methods whereby intelligence-gathering is conducted and we don't know that yet, so, no, it's not outweighed. So that's the way the court approaches it.

Now I want to turn to the police case and the police case as set out in their documents, as opposed to what Mr Hall has been asking the court to do today, because Mr Hall today appears to have suggested to the court that in each case in which the court is going to consider a restriction order, it will have to look at all the factors to be weighed into the balance. He didn't mention until the very end [Neither Confirm Nor Deny], but he appeared

to accept that the court should put into the balance the harm to the individual, the promise of confidentiality, all these matters that the [Neither Confirm Nor Deny] stance is intended to protect, as well as [Neither Confirm Nor Deny]. For the reasons given, we say that's the wrong approach.

If one examines what is in the written submissions, it becomes clear that what the police are really contending for is that this Inquiry should give decisive weight to the public interest in allowing the police to maintain an [Neither Confirm Nor Deny] stance. We can see this because, if we could turn to their submissions which are in tab 2, they start with:

'In general we agree [paragraph I.2 (i) on page 1] with Counsel to the Inquiry's submissions that "in general the question of what to disclose requires a balancing exercise involving considerations of fairness and the public interest"'. However [this is the critical passage]: "... it is likely that in the overwhelming majority of instances, the [Metropolitan Police Service] will be submitting that considerations of fairness and the public interest come down in favour of not disclosing the fact of or details of the undercover police deployment including, but not limited to, the identity..."

Then this paragraph:

"In considering the public interest balance, the

public interest in consistently maintaining the stance of Neither Confirm Nor Deny is very high indeed."

In fact we can see from what they say they will be asking for that it is not very high indeed; it is decisive. We see at (iv) what this leads to, this very high value to be attached to that interest:

"In practice the [Metropolitan Police Service] will be applying for much of the detail of past or current deployments to be considered in the absence of other Core Participants and of the general public. The [Metropolitan Police Service] wishes to be clear about this at the outset. Where reference is made below to "the public", that should be taken as including the Core Participants."

I.e. when it comes to hearing anything about what the officers were doing, who those officers are, that's all going to be done in secret. We can see that again at page 27 at paragraph VI.1.

So first of all we get:

"The nature of the restriction orders... sought... will depend on the particular facts. It is important to make clear that anonymity is not the sole restriction for which the [Metropolitan Police Service] will be applying. Counsel to the Inquiry set out a range of measures which may be required. The measures for which the [Metropolitan Police Service] will contend are those which, with no more restriction on public

access than can be justified: Ensure that no material is disclosed by the [Metropolitan Police Service] or the Inquiry, whether documentary, in the course of oral evidence, or during submissions, that confirms any matter that could lead to the identification of a[n undercover officer] ..."

Then:

"Ensure[s] that no material is disclosed that puts others at risk of harm ..."

And then, "... no material... that could damage the public interest (principally, in the prevention and detection of crime...)... ", and so forth.

Then at the bottom:

"The above will apply save where UCOs have been officially confirmed, or where there is an illegitimate method that is not and never will be used."

The critical point about that is that that is not referable to a balancing of any of the public interests that are listed in paragraph 2 of the list of issues at (ii) onwards.

It is not dependent on whether there is a list of harm to those individuals. The only cases where, according to the police, a police officer can be identified is where the police themselves have already officially confirmed the identity.

So it doesn't matter one jot whether or not, in relation to that particular police officer, no harm will come to him. That's not relevant to the exercise. This request or the setting out here of what will be requested is set out on the basis that [Neither Confirm Nor Deny] -- that is the need for a consistent veil of secrecy -- is what prevails above anything else and that is the only thing that really needs to be put into the balance.

THE CHAIR: The justification Mr Hall gave is at paragraph I.3.

MS KAUFMANN: Yes, it's the regard to the bigger picture. That's what [Neither Confirm Nor Deny] is doing. It is the whole regard to the bigger picture. It doesn't depend, as he says here, on the risk of harm that they as individuals will face. That is not the basis upon which they are going to be seeking restriction orders in relation to every single officer, save when his identity has already been disclosed.

So, for example, let's take an officer who has not been officially confirmed, John Dines. Let's take John Dines as an example of an officer whose identity has not yet been officially confirmed. I don't know whether you are aware, Sir, but last week Helen Steel tracked John Dines down in Australia. The fact that she tracked John Dines down in Australia was broadcast

across the world -- broadcast very, very widely on national television here and written up extensively in the newspapers. In fact, John Dines is on camera talking to her. That is out there. It is not an official confirmation. It's a self-disclosure. He apologised on camera for what he had done.

The police will have it that there should not be any disclosure in relation to him. This Inquiry should not officially confirm or require him to confirm that he was an undercover police officer. That has nothing to do with the risk that he faces --

THE CHAIR: Let's put it another way. You say, if they do, the only justification that they could plead is the consistent application of [Neither Confirm Nor Deny] --

MS KAUFMANN: Exactly.

THE CHAIR: -- that there is not an underlying public interest to protect in that particular case.

MS KAUFMANN: No. Exactly.

THE CHAIR: Good.

MS KAUFMANN: So we can't get away from the fact that they are placing tremendous reliance upon the consistent application of [Neither Confirm Nor Deny].

The same is true of the National Crime Agency in their submissions. If you turn to tab 3 and to paragraph 31 --

THE CHAIR: Are we in the authorities bundle?

MS KAUFMANN: No, I'm sorry, the submissions bundle.

THE CHAIR: All right.

MS KAUFMANN: This is the submissions of the National Crime Agency. At paragraph 31 of those submissions, page 8:

"First, [Counsel to the Inquiry] are of course right to state that each application for a restriction order, including those raising [Neither Confirm Nor Deny] issues, must be considered on their own facts. However, the undoubted need to consider any such application on its individual merits does not alter the fact that many of the issues relating to [Neither Confirm Nor Deny] are of a general nature and cannot be confined to a particular case."

Further down the paragraph:

"But, as the evidence and submissions served by the [Metropolitan Police Service] demonstrate, the damage potentially caused by that one disclosure may go much wider than that."

Three lines down:

"The disclosure may also have an incrementally damaging effect on the ability of law enforcement agencies to recruit and retain undercover officers and informants. One of the purposes of the [Neither Confirm Nor Deny] policy is to prevent this type of contagion. Therefore, whilst the Chairman will of course consider each case on its

merits, he will need to reach conclusions about the wider implications of departures from [Neither Confirm Nor Deny] , which he must then apply in individual cases."

So here you have to give special weight to [Neither Confirm Nor Deny] for these particular reasons and it's not just about looking at the underlying interests that [Neither Confirm Nor Deny] serves to protect.

Can we turn back to the issues document just for a couple of minutes?

THE CHAIR: Yes.

MS KAUFMANN: Well, I would if I could find it. Let me explain by reference to this what our submissions are which I'm then going to develop.

If we look at 1, all the issues identified in 1 -- put but aside the (ix), "Loss of blanket/absolute [Neither Confirm Nor Deny] protection", but all those public interests which I'm going to articulate slightly differently are ones which in our submission mean no weight can be given to the public interest in allowing the police to rely on [Neither Confirm Nor Deny]. That is on mirroring [Neither Confirm Nor Deny] in the course of this hearing. That is consistently applying secrecy.

Now just like the public in applying [Neither Confirm Nor Deny], just like that, all the factors there are factors of general application. They are factors that go towards what this Inquiry needs to do and needs to achieve. So the balance of those factors against giving any weight to

[Neither Confirm Nor Deny] have to be put against the balance in favour of allowing weight to be attached to [Neither Confirm Nor Deny] now, at the outset. There has to be a decision now: are those factors which point to a requirement for openness, are they decisive or is the weight and the public interest in allowing the police to maintain this stance of secrecy -- is that what is going to carry the day?

Both of those translate effectively as, "Is there going to be a presumption of openness in the way we move forward or is there going to be a presumption of secrecy?", because if weight is given to [Neither Confirm Nor Deny], we can see from the way the courts approach it that the starting point is that there is a legitimate interest in maintaining secrecy in this Inquiry. The question then is: is it outweighed by any particular factor?

If one starts from the position that there is a presumption of openness, then the question becomes: do any of the factors in (ii) through to (vii) or so -- do they, in the particular circumstances of the case, mean that there should in fact be a restriction order imposed? I.e., openness is the starting point. You then need to strictly justify a closed hearing or any form of restriction order by reference to considerations of fairness, by reference to considerations of confidentiality, by reference to considerations of risks

to the particular individual or, if what is in issue is the disclosure of methods, by reference to the risk of disclosure of methods and the damage that would be done if such methods were to be disclosed.

But it is an exercise which assumes or presumes or proceeds from a position that everything should be open and then requires specific justification. Giving weight to [Neither Confirm Nor Deny] proceeds from the assumption that you need secrecy and you need to justify in the particular and individual case some sort of departure. They are two very, very different -- obviously -- starting points.

The implication of having to carry out this balance at this stage and decide whether this Inquiry proceeds on a presumption of openness or a presumption of secrecy is that, if we are right that it proceeds on the basis of a presumption of openness, then there is simply nothing to put in the balance under (ii) in relation to [Neither Confirm Nor Deny] because it will have been decided by the Inquiry that it doesn't actually have a role to play in this Inquiry. That is why we made our submission that Counsel to the Inquiry are wrong or were wrong in their original submissions to say that [Neither Confirm Nor Deny] is one of those factors to be considered in the section 19 balance.

Now tomorrow I will move on to focus on why we say this Inquiry simply cannot proceed on the basis of the

presumption of secrecy and why, in addition, in the particular circumstances of this Inquiry, there is actually no public interest or need for that presumption of secrecy in any event to play any role.

THE CHAIR: Would it cause anyone difficulty if we started at 10 tomorrow, now that we all know where we are going and where we are all sitting? 10 o'clock seems to me a good idea.

All right then. 10 o'clock tomorrow. Thank you.

(4.33 pm)

(The Inquiry adjourned until 10.00 am,
Wednesday, 23 March 2016)