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

Wednesday, 23 March 2016

(10.00 am)

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

MS KAUFMANN: So, my Lord, just to start with a very quick recap on yesterday, where the position we had reached, in our submission, was that placing weight on the public interest in the police relying on the [Neither Confirm Nor Deny] stance means, for this Inquiry, placing weight on secrecy across the board as the means to protect the underlying public interests that [Neither Confirm Nor Deny] is there to protect, as opposed to assessing the weight to be attached to those underlying interests.

It follows, therefore, that in relation to [Neither

Confirm Nor Deny], the question for the Inquiry is whether it is going to mirror the police's approach and use blanket secrecy as the means to protect those interests or whether the public interest in applying that sort of an approach is outweighed by other competing interests.

The submissions we are going to develop now are to the effect that the competing public interests outweigh very, very substantially any interest in using the [Neither Confirm Nor Deny] approach and that, secondly, in any event, the underlying public interest that [Neither Confirm Nor Deny] and that approach serves to protect will not be harmed if the court does conclude that the other public interests outweigh it.

So can we turn to why those competing public interests outweigh any interest giving weight to [Neither Confirm Nor Deny]?

Let's start by looking at and answering the question as to why openness is necessary for the Inquiry to be in a position to get to the truth. This was an issue that was touched upon yesterday, Sir, in questions that you asked Mr Hall and it was notable, in my submission, that that discussion did not go particularly far. The reason it didn't go particularly far, in our submission, is that it is very difficult -- we say impossible -- for

Mr Hall to provide a satisfactory answer as to how this Inquiry is going to be in a position to get to the truth if it follows the Metropolitan Police Service line of blanket secrecy, save in the most exceptional circumstances; that is where identities have already been confirmed.

In our submission, if the Inquiry were to work on the basis of blanket secrecy save where identities of officers have already been confirmed, then the only way the Inquiry could get to the truth or -- yes, could get to the truth is if it could rely on police officers to self-disclose.

I will come on to why that is the case in a moment, but first I want to address why it is absolutely clear that this Inquiry cannot proceed on the assumption that the police officers will self-disclose.

Firstly, none of the abuses that we know about so far came out because of self-disclosure. Some did in relation to Mr Francis, but all the other abuses came out as a result of the efforts of the individual victims of those abuses to uncover them.

On the contrary, when it comes to miscarriages of justice, those miscarriages themselves arose precisely because the police failed to discharge their legal obligations to disclose their involvement in the

circumstances leading to the prosecutions.

It is simply fanciful, even with the undertakings that will be given in relation to prosecutions following from any evidence that officers might give -- it is fanciful to suggest that that is going to lead all officers to be open if being open requires them to disclose the fact of wrongdoing. One cannot proceed on the basis that that is likely to happen.

If one doesn't proceed on that basis, then a question arises, "Well, will those wrongs be disclosed through documentation?" We know already, particularly in relation to the Special Demonstration Squad, that there is a dearth of documentation. Records were not kept. We also know there has been a process of systemic destruction of records, so we are not going to be able to rely on records to disclose that wrongdoing.

So what are we left with? If we start from the premise that we cannot rely upon officers to self-disclose, all that we are left with in terms of getting the truth out of officers is the skill of Counsel to the Inquiry and the skill of you, the Inquiry Chair, in discerning when an officer is lying or hiding. That's what Mr Hall suggested yesterday.

Well, that again is a fanciful suggestion, to expect the Inquiry to be able to determine, without the

assistance of contradictory evidence, simply on the demeanour of the witness, whether or not he is or she is telling truth.

Now the reason we say self-disclosure is the only means of getting at the truth is because, if secret hearings are used, there really is no other mechanism whereby relevant evidence can reliably come before the tribunal. Let's assume for the moment that the victims themselves are prepared to help the Inquiry, are prepared to give evidence, even though they will be shut out from the process in all other respects, whether they give relevant evidence will be an entirely random arbitrary matter.

For those who know they are victims, they are obviously in the best position to give relevant evidence, but even the evidence they can give will be severely compromised. They simply will not know whether an officer had said something that entirely contradicts what they know to be the truth, but they will not be aware that they need to mention it.

For those who merely suspect that they were the subject of unlawful or abusive conduct, it is a bit like putting the tail on the donkey when you are blindfolded in a room that's 100 metres square and you have been spun around for 30 seconds. They have no idea

whatsoever what target they should be hitting.

That is very, very well illustrated by the Elected Representatives in their submissions, when they discussed the fact that elected representatives have contact with numerous members of the public, and without being told who was spying on them and in what circumstances, they simply, simply, are not going to be able to identify, out of these numerous incidents of which they probably have little memory, which are the critical ones. But that remains true of all the victim groups.

We adopt also, in relation to the Elected Representatives' submissions, their account of the sorry story given by the special advocate Martin Chamberlain QC about the way in which, even in circumstances where a control order is being applied for in respect of a particular individual and they have some sense of what the whole issue might be about -- how profoundly compromised the special advocates are in making relevant submissions, hitting successfully targets that can undermine the evidence being given by the state.

Then turning last to those who don't know they are victims. There are two separate considerations here: the group that, Sir, you identified yesterday; that group of victims who don't know they are victims but who

the Inquiry is able to identify them through the disclosure that's been made to the Inquiry. As you, Sir, suggested yesterday, that in itself presents insuperable problems. So the Inquiry has found a victim. It goes to the victim. It wants the victim to give relevant evidence, but it will necessarily follow from the victim giving that relevant evidence that the undercover officer will be identifiable. That will be readily to be inferred.

So the only way to avoid that problem is for the Inquiry not only to approach that victim for that victim's relevant evidence, but to approach a whole load of other individuals who in fact were not spied upon to give completely irrelevant evidence so that, amongst this mass of evidence, it will no longer be possible for an inference to be made as to which one relates to an undercover operation and an undercover operative. That's an impossible position to be in.

The critical point is, given what we know about the paucity of record-keeping, there are going to be victims out there who the Inquiry will not know are victims and who they themselves will not they are victims unless they know who the undercover officers were who were engaged in undercover operations in the movements to which they belonged.

Mr Hall answered these fundamental problems by emphasising the evidence that will be in open. He made the point that there are three officers whose identities have been officially confirmed, Mr Lambert, Mr Kennedy, Mr Boyling, and the evidence of those three officers will be heard in open. The inference to be drawn from his submission is that that will then be sufficient for this Inquiry to discharge its function of getting to the truth. In our submission that is an absurd proposition. Evidence of three individuals in relation to operations that have gone on for the last 50 years is in no sense going to be sufficient to disclose the full picture.

So, as we say, an inquiry which is premised upon the ability to get to the truth being effectively the self-report of officers cannot rationally be considered to be capable of doing so and, if it seeks to do so, will fundamentally lack credibility. But as we pointed out yesterday, the position is even worse than that because, if the Inquiry proceeded in that way, it would not even have the benefit of the evidence of most of the victims.

I reiterate: it's not a threat, it's just a fact and it's a fact that needs to be put into the equation. So getting to the truth or being in a position to get to the truth requires openness or a presumption of openness

in relation to the identities of officers.

Now how does the imperative to be in a position to get to the truth have an impact upon public interests that weigh in favour of openness? That's what I want to consider next. As I said yesterday, there are a number of interrelated public interests; public interests which it is imperative for this Inquiry to serve. It is not a matter of choice. It is not a matter of interests that can be compromised for other interests. They simply have to be served. And each of these public interests depends for its realisation upon the Inquiry being in a position to get to the truth.

The Inquiry was set up to get to the bottom of serious wrongdoings, some of which have been already disclosed; wrongdoing on the part of an arm of the state. It raises among other grave concerns -- the wrongdoing so far identified -- profound questions about whether the police have strayed beyond their constitutionally limited role and engaged in anti-democratic policing of left-wing political beliefs. I won't repeat all the other grave wrongdoings that have been identified, but each of those is what this Inquiry falls to investigate.

From that fact a number of public interests emerge as being engaged and as being required to be fulfilled.

First, at a general level, the Inquiry is performing a vital constitutional function of holding the state to account for serious wrongdoing. That is, as we saw from the quote, the citation from paragraph 19 in [Mohamed and CF v Secretary of State for the Home Department [2014] 1 WLR 4240] yesterday, a central aspect of the rule of law.

In discharging that central aspect of the rule of law, there is a freestanding requirement of openness. So there is both, in relation to this particular public interest, a need to get to the truth, but also a freestanding requirement that doing so be open. So we have two compelling factors as to why openness is required.

We can see that that requirement for openness exists and we saw it in the Mohamed case yesterday, that quote at paragraph 19. Mr Hall cited the Litvinenko case to say that, well, there is no public interest in openness, but that reliance on Litvinenko was misplaced. The secrecy in that case did not relate to alleged wrongdoing by the state. That is what we are concerned with and it is the need to account for wrongdoing that compels openness.

Also yesterday, and as we have already pointed out, he was wrong to say that a mere allegation of wrongdoing is not enough to trigger any requirement of openness. Mohamed was a case in which there was a mere allegation

of wrongdoing, but in any event we are not dealing with mere allegations of wrongdoing. The Inquiry was established because as a matter of established fact there has been wrongdoing, which makes it even more compelling that the police are brought to account openly.

He made the point yesterday that Human Rights Act [1998] claims that there has been an unlawful deployment of a Covert Human Intelligence Source are required under section 65 of [the Regulation of Investigatory Powers Act 2000] to be determined by way of a secret hearing. But common law claims for precisely the same misconduct do not need to be determined by way of a secret hearing. To make good that point, that is exactly what the women -- the eight women who were victims of unlawful relationships -- that was exactly how they sought to vindicate their common law rights, by bringing them in the High Court in the open.

Similarly, if one wanted -- and for similar reasons -- this Inquiry looking into these allegations of wrongdoing is not by virtue of the provisions of [the Regulation of Investigatory Powers Act 2000] required to operate a blanket of secrecy.

Finally, he drew the distinction between this Inquiry and a criminal trial. It is no doubt correct

that there are distinctions to be drawn between this Inquiry and a criminal trial, but the fact that the processes are not identical does not mean that openness is not required in the process to be adopted by this Inquiry, given its function to investigate serious wrongdoing on the part of the state.

At a more specific level, this Inquiry must be in a position to restore public confidence in undercover policing and so to restore the legitimacy of this investigative technique. Mr Hall's remarks yesterday that public confidence is not something that this Inquiry should take into account was truly remarkable, and certainly not supported by Mr Griffin on behalf of the Secretary of State nor by us, who pointed out yesterday that this Inquiry meets both conditions in section 1 of the [Inquires Act 2005] upon which the power to establish it is conditioned and, in respect of both those conditions, the causing of public concern lies at the heart.

So public concern is the reason why this Inquiry has been established. The restoring of public concern is a fundamental purpose of the operation of this Inquiry and its outcome. In order to restore public confidence but also to restore the confidence of the Secretary of State, the Inquiry has to be in a position to fulfil its

terms of reference. To do that, it has to be in a position to get the truth. That's a matter we have developed fully in our submissions. The points are obvious and we don't need to repeat them.

Also, in addition to that, the problem is to have confidence in the process of this Inquiry. It has to have credibility. Again, that depends upon its ability to get to the truth.

Finally, as we pointed out yesterday, another key public interest that this Inquiry has to serve and achieve, one which the Secretary of State herself identified, is justice for the victims. If they don't know they are victims and if they don't know what has been done to them, they can't possibly have justice.

So there are compelling pragmatic and principled reasons, reasons which brook no compromise, as to why this Inquiry must start from a presumption of openness. It isn't a matter of choice. It must deliver on those public interests.

So, as I said at the outset yesterday, the victims' need to know is not a need that stands alone. On the contrary, their need to know is of critical instrumental value to this Inquiry. It is the means by which effect is given. It is the key to unlock the ability of this Inquiry to meet all those other absolutely central

public interests. For those reasons, [Neither Confirm Nor Deny] as a means of giving effect to the underlying public interest is plainly overridden. The two cannot sit together; this Inquiry discharging its functions and giving effect to [Neither Confirm Nor Deny].

But in the circumstances of this Inquiry that doesn't present a problem. It is not a compromise that is going to have any costs. That is so for the following reasons: we have to look at what it is that the [Neither Confirm Nor Deny] stance protects; what are those underlying interests. We have to ask ourselves how are they going to be effected if the Inquiry operates from a presumption of openness.

There are two sets of underlying interests. There are the particular interests which [a Neither Confirm Nor Deny] stance in the particular case serves to protect: harm to the particular undercover officer; harm to a third party, for example, whose interests may be affected by disclosure of the identity of that undercover officer; harm to legitimate methods of undercover policing; harm through a departure from the promise of confidentiality given to an individual officer.

Then there are the wider interests. The wider interests, as the police have identified, are the

interests in maintaining the confidence of the undercover police community. That is the confidence of the present community, but also the confidence of the future community; making sure that future individuals within the police service are still prepared to come forward and offer their services as undercover operatives. That's obviously vital for the future prevention and detection of crime and necessary in order to preserve the future utility of the tool.

A second broader public interest identified by the [National Crime Agency] is the confidence of the foreign agents with which they work. So similarly they have to be confident in the way that this tool operates or confident that individual agents that they deploy are not going to be compromised.

Now that latter factor is actually something that can be put into the individual interests which it protects, but the wider interest in maintaining the confidence of our foreign agents in being able to work with us in undercover operations is part of the general interest that it protects.

Then there is the Scappaticci [[2003] NIQB 56] problem, which we will come on to in a moment.

So if we break down each of those and look at each of those in turn to see how they would be affected if

a presumption of openness operates.

The individual interest: if we look at the list of individual factors that fall to be weighed in the balance under section 19, as identified in your list or as identified in the updated list produced by the Counsel to the Inquiry team, we can see all the individual factors that I have identified are set out: harm to the individual; confidentiality; fairness; risk to third parties; risk to methods. All of those are catered for. Section 19 enables this Inquiry to take them all into account. They fall to be balanced against other interests, but that's the same as happens in any court.

So all those individual interests are catered for by the section 19 power. So what about the wider public interests: maintaining the future utility of the tool of undercover policing?

Now, Mr Hall says that a departure from the [Neither Confirm Nor Deny] stance in this case is going to undermine the confidence of the Covert Human Intelligence Source community and degrade the utility of the tool because nobody is going to come forward. That is because they have all been promised life-long confidentiality.

Can I just say, we challenge whether or not they

have all been promised life-long confidentiality. It is interesting looking at the gisteding documents because in not every gisted document is there a statement to the effect that that individual was promised life-long confidentiality and we know from Mr Francis' own submissions that he doesn't assert he was.

We don't need to have an argument at this stage. Let's just assume -- let's assume for the moment -- that they were all promised life-long confidentiality; promises that were consistent with the way Mr Hall showed you [the Regulation of Investigatory Powers Act 2000] operates, with duties on those who are managing and supervised to make sure that information about Covert Human Intelligence Sources is not publicised; promises consistent with the health and safety duty that Mr Hall said the police bear to their undercover officers; promises which Mr Hall says are mirrored in the common law. Let's assume they were all given such promises.

As Mr Hall conceded yesterday, such promises are not and cannot ever be absolute -- point number 1 -- so those promises are never ones which entitle the officer to expect they have absolute secrecy for life because they know that the police themselves can make exceptions. The police did it in Mr Boyling's case.

They did it in Mr Kennedy's case. They know that it is not in their control to withhold that information in all circumstances because the courts can override their desire to maintain confidentiality. So it is not a promise that is absolute.

So that's an incredibly important consideration when one asks whether disclosure in the circumstances of this Inquiry is going to undermine their confidence in the future because their confidence about the future necessarily entailed the possibility of disclosure. But when we then look at the circumstances of this Inquiry and what it will mean in terms of the inferences they can draw about disclosure in the future, it becomes even more clear that a rational individual officer is not going to feel disclosures in this Inquiry are going to make it more likely that there will be disclosures in the future.

Why is that? Firstly, because this Inquiry is set up for a very particular and exceptional purpose, which, if it is successful, will never be repeated. That is to look at wrongdoing that has gone on in the past in relation to undercover policing. It is an entirely exceptional and very particular circumstance in which disclosure will be made. It is also disclosure which is being made precisely because the terms of reference of

this Inquiry cannot otherwise be achieved.

Thirdly, it is disclosure in circumstances where it will only happen when the Inquiry has itself considered all the interests that that officer wants to put forward about why disclosure should not be made in the section 19 balance.

Disclosure in such exceptional and unique circumstances will not have any bearing, in our submission, on whether an officer is prepared to enter into undercover policing and it won't have any bearing because an officer cannot rationally conclude from that that when the police say to him, "We promise to protect your identity wherever we can", it will not lead him to conclude that that promise is an empty promise.

Disclosure in the course of this Inquiry will simply lead him to conclude that that promise is subject to the possibility of disclosure should another inquiry like this some time in the future be set up. But another inquiry like this will only be set up in the future if the outcome of this Inquiry fails; that is to make sure that these sorts of things don't happen again and there is no need for such an inquiry.

We reject the submission of Mr Hall that the subtleties will be lost on officers as to why disclosures were made in this particular case. If there

is a fear that the subtleties will be lost, then the police can explain why disclosures were made in this case. It is simply absurd to suggest that the subtleties will be lost.

There are similar arguments or the same arguments in relation to the impact upon the relations of the police with foreign partners. Those foreign partners will reach the same conclusions. The Inquiry has to proceed on the basis that foreign partners and potential future undercover officers are rational individuals. That is, in our submission, an answer to any claim on the part of the police, that there should be some deference given to the police's assessment of whether departures from [Neither Confirm Nor Deny] in the circumstances of this Inquiry will undermine the future utility of the tool.

There is nothing the police can say by way of evidence that should cause this Inquiry to reach a different conclusion because the Inquiry has to base itself on the assumption that officers are rational human beings. The implications for a rational human being of the utility of confidentiality in the future, despite disclosures in this case, are obvious and clear.

That brings us then on to the need to ensure -- the "Scappaticci problem", I call it -- that the identities of those who the Inquiry does decide to protect at some

stage down the line by way of a restriction order, should it so decide after a section 19 balance, remain protected. What the Inquiry must not let happen is impose it as a restriction order and then something happens in the course of the Inquiry which means that individuals are able to infer that a particular officer has been protected by that restriction order.

In our submission, the Inquiry has ample powers by which to do that. So when a restriction order is imposed, the Inquiry will have knowledge of everybody who is and isn't an undercover police officer. Let's assume the Inquiry does and it will make a restriction order in relation to, say, two particular individuals. But the way to make sure that those particular individuals are not identified is simply to prevent any questions being asked whatsoever about whether somebody is or isn't an undercover police officer.

That means that an individual who happens to hit the right target or would happen to hit the right target if they asked a question will get nowhere and no information will be disclosed because the question simply cannot be asked. So there is a protective bubble by limiting the areas that can be discussed or addressed once restriction orders have been made.

We do make the point that that should not preclude

the Inquiry from being able to investigate and examine whether or not somebody is an undercover police officer that the police have not identified as such. Obviously the Inquiry must proceed on the basis of a general assumption that the police will have disclosed absolutely everybody. But let's imagine a situation where somebody comes back -- somebody comes to the Inquiry and the Inquiry has reason to consider that that individual may in fact have been an undercover police officer. It might, in fact, turn out that the individual was only an informant, as opposed to an undercover police officer. The Inquiry must be able to look into that and investigate it, but it must be able to do so in a way that does not threaten that individual should that individual turn out to be an undercover police officer and should the Inquiry decide that a restriction order is necessary to protect them.

There is a way in which that can be done. So rather than any questions being asked in the course of the Inquiry, there must be a mechanism for an individual to approach the Chair, ask that question, for the Chair then to conduct investigations with the police in relation to it -- all of it will remain secret at that stage -- and for the Chair to make a decision in relation to that individual, is he, is he not, an

undercover police officer, and to decide, if he considers he is an undercover police officer, whether or not to impose a restriction order.

Let's say you do decide to impose a restriction order in that case, then the way to protect that officer is simply to say, at the end of that process, "no disclosure", and then it is not known whether or not there is no disclosure because that individual wasn't a police officer acting undercover or because he was but a restriction order has been imposed.

So there is no Scappaticci problem of confirming somebody's identity once a restriction order has been imposed in their favour.

So, for those reasons, we submit that there is no damage that will flow from this Inquiry not using secrecy as a means to give effect to the underlying public interests that [Neither Confirm Nor Deny]" seeks to protect. There is nothing in fact to put on the other side of the balance from compelling and clearly overriding factors which call for openness.

Can I just put a marker down to say that if, at the end of the day, you do not accept our submissions on this and you do conclude that when the section 19 balancing exercise comes to be undertaken, [Neither Confirm Nor Deny] plays a part, then there will be an

evidential battle to take place at a later stage about whether or not the police in fact have operated a stance of consistently neither confirming nor denying.

We made brief and passing reference to it in our submissions, when we referred, for example, to the True Spies programme, which I don't know, Sir, whether you have had an opportunity to see. It is three one-hourly documentaries made in the early part of the 2000s, in which, with the cooperation of the Metropolitan Police Service, there is a great deal of information given about the way in which the Special Demonstration Squad infiltrated organisations from the 1960s and onwards.

We can see from that a stance being taken which is completely inconsistent with [Neither Confirm Nor Deny]. Even having individuals who give evidence about their own activities, give evidence about tactics they deployed -- for example, one of them, who actually was an informant rather than a Special Demonstration Squad officer -- but giving information about the way in which he used sex as a tactic by which to gather intelligence.

So there will be -- and we gathered in [DIL and Others v Commissioner of Police of the Metropolis [2014] EWHC 2184] that a huge amount of evidence throwing into question whether or not a consistent [Neither Confirm Nor Deny] stance has been taken by the

police. That will all have to be considered. But, as I say, that is for another day.

Can I turn, then, to the relevant public interests that fall to be weighed in the section 19 balance?

THE CHAIR: Before you do, can I just check that I understand your Scappaticci argument?

What you are supposing is that an undercover officer is giving evidence in public. You say that the way to avoid the Scappaticci risk is not to permit any question of that officer as to any of his colleagues. Right. Okay.

MS KAUFMANN: Yes, and that will have the effect of protecting anybody that you have decided it is necessary to protect.

So if we turn, then, to the relevant public interests under section 19, I proceed on the assumption that all references to [Neither Confirm Nor Deny] are out; that [Neither Confirm Nor Deny] does not form a part. I note that in the Counsel to the Inquiry team's new list yesterday, [Neither Confirm Nor Deny] no longer figures. But as we will see, there are some -- some -- of the public interest factors that are identified there that are capable of applying both to the narrow interests, the individual interests protecting a particular method, but also capable of

applying to the wider interest. Insofar as they apply to the wider interests or are capable of applying to the wider interests, they should not do so if [Neither Confirm Nor Deny] has no role to play. We will look at the background a little bit more concretely.

If we could get, actually, both lists out, I think. That is probably the best way to go for the time being. So if we look at the list of issues that you prepared. We are looking at 2 here, so we are looking at the public interest factors against.

Well, (i) goes on the assumption we are right: any reference to "[Neither Confirm Nor Deny]" goes.

We have, at (ii), "Fairness to the individual (for example, confidentiality, fear)".

Now insofar as "confidentiality" there could be read as meaning the need for officers to remain confident in offering themselves as Covert Human Intelligence Sources because -- through the promise of confidentiality, then that is not a factor to be considered at (ii) here --

THE CHAIR: "Fairness to the individual" means "fairness to the individual", full stop.

MS KAUFMANN: Exactly. Then we come down to, "Harm to the function of preventing and detecting crime". That is clearly capable of being read either as harm in a particular case because a method falls to be disclosed

or it can be read as harm to the function of preventing and detecting crime because of the degrading impact that a departure from [Neither Confirm Nor Deny] will have upon the utility of the tool. That doesn't fall to be considered at this stage if we are right in the arguments. It is the narrow particular interest only that falls to be protected.

When we come to the Counsel to the Inquiry list, the same can be said of factors 11 to 15 and 17. Insofar as they could be read as protecting those wider public interests I discussed, they should not be so read. It is only insofar as they protect a particular item of harm, such as a method, or a particular operation, for example, that is ongoing, that those particular public interests fall to be read as being capable of being put in the balance against openness.

Going back to the list and starting with the public interests against restriction orders. For our purposes, everything we identify in our paper and everything that I have made submissions about now as being public interests that defeat or override any interests in maintaining [Neither Confirm Nor Deny] obviously remain public interests to be put into the section 19 balance under your 1 or under the heading of "Public interest in favour of openness".

Now, what I'm somewhat concerned about is that, more in relation to Counsel to the Inquiry team's list of issues, they are not articulated in a way that really draws out the overarching public interests that are in all of our sets of submissions; that is the Elected Representatives, the core participants, the non-state core participants; these interests in accountability, the rule of law, the restoration of the public interest, the fulfilling of the terms of reference.

What we have in 1 to 7 really are certain underlying public interests that serve these overarching public interests. But in our submission it is very important that those overarching public interests are specifically identified on this side of the balance because it is those public interests which carry so much weight and they should be spelled out.

Added to those lists -- and this is really an answer to question (iv) -- should be the public interest of the press and the public under Article 10. We adopt the submissions that the Media are going to make on why that is a clear public interest and why it is wrong to say that there is no interest in freedom of expression in this Inquiry.

There is then a very important public interest that has been completely left out of account in both lists.

That is the public interest in rectifying miscarriages of justice; the key public interest. As we observe at paragraph 79 of our submissions, an express statutory purpose of this Inquiry is to identify any potential miscarriages of justice. We can see that from the terms of reference at volume 6, tab 124.

Sorry, that is at 4. That is at 4, I'm sorry. That is 4 on the Counsel to the Inquiry's list.

But it should really be spelled out separately as a key public interest.

If we go then back to your list of issues and (vi) and (vii) on that list of issues at 1, so that is "Lesser risk of additional harm after self-disclosure" and "Lesser risk of additional harm after third-party disclosure", obviously not public interest, but factors that are relevant. We agree entirely with your observations yesterday, that it is plainly relevant in considering whether or not to impose a restriction order which are to be imposed for the purposes of preventing specific harms if, as a matter of fact, because of that self-disclosure or because of the third-party disclosure, the imposition of a restriction order is not going to prevent any additional harm. It simply serves no purpose and therefore it will be a fundamentally improper intrusion on all the interests that call for

openness.

Can I turn very briefly to question (iii)? I'm going to address question (iii) now on the right to the truth under the [European Convention on Human Rights] because, if we are right about that, that is then another public interest to be put into 1 on your list of issues.

Everybody was agreed yesterday that there is an investigative obligation under Article 3. Case law from Strasbourg, the Grand Chamber decision of [El Masri v Macedonia (2013) 57 EHRR 25],which we saw at paragraph 19 of the Mohamed case yesterday, makes clear that that investigative obligation is part and parcel of the rule of law, the duty to hold the state to account and to prevent impunity on the part of the state.

What is also clear from the case law is that, because of this need for accountability, the right to effective participation, which is part and parcel or is a component of the investigative obligation, is not just a right to the effective participation of the victim, but it is also a right to effective participation on the part of the public more generally.

Now the critical question for our purposes is: what has Strasbourg said on the participatory rights of the victim and the public generally where there is a public interest, a competing public interest, in a measure of

secrecy to protect, for example, national security interests?

[Al Nashiri v Poland (2015) 60 EHRR 16] is the best case where this is specifically addressed; a recent case. That is in volume 4, tab 95. Like El Masri, it is another rendition case.

If, Sir, you can turn to page 565, paragraph 479, Mr Emmerson, who on this occasion was acting in his capacity as the UN special rapporteur --

THE CHAIR: Can you give me the paragraph again please?

MS KAUFMANN: I'm sorry, 479 on page 565.

571, sorry. Page 571. I seem to have taken you to the wrong paragraph. It is paragraph --

THE CHAIR: You have taken me to Al Nashiri. I thought you were going to El Masri.

MS KAUFMANN: No, I'm not going to El Masri. I'm going to Al Nashiri. If you go to 565, tab 95, at the bottom of page 565, paragraph 479, "UN special rapporteur", that is Mr Emmerson. If you could just read quickly the submissions through to paragraph 479/480, and then I will take you to what the European Court found in relation to those submissions.

THE CHAIR: Thank you.

MS KAUFMANN: Now can you turn to page 571 and read paragraph 494 --

THE CHAIR: Thank you.

MS KAUFMANN: -- and just in passing note 495. They make the point that it is the interest in -- public accountability is an interest in public accountability not just for that of the victim.

So from this we can see that there is a presumption of openness and any claim that particular documents should be withheld should be fully justified. That has to be in the particular case. Even where, as with this Inquiry, the proceedings are not adversarial, the Article 3 investigative duty entails that those affected by the conduct under investigation must have as much information as possible and, where full disclosure is not possible, alternative means of enabling them to defend their interests must be found.

So that is Article 3. We don't submit that it adds to what is provided for and what is compelled by the other public interests we have identified in favour of openness, but it is just one more string to that very considerably strong bow.

Turning to Article 8 and the right to private information held by state authorities. The Elected Representatives make submissions on that in their own written document. That is at paragraphs 33 to 35 and no doubt will be developed shortly. We adopt those and we

endorse the submission that this right requires not only disclosure of the information that is held, but where that information has been gathered through an interference with privacy rights, then it also requires disclosure as to how that information was obtained, when and by whom.

Finally, in relation to all the victims, whether they know they are victims or not, I come back to one of the functions that this Inquiry is required to perform, as directed by Theresa May when she established it, and that is to secure justice for the victims, because securing justice for the victims necessarily means, as I have already said, identifying them and acknowledging that a wrong has been done to them. That necessarily means, in the context of this Inquiry, arming them with the relevant information, which means letting them know who they were spied upon and by whom and when.

We have put in an authority, [R (Children's Rights Alliance) v Secretary of State for Justice [2013] 1 WLR 3667]. I don't need to take you to it now, it is volume 6, tab 138. But in our submission this case is distinguishable from that. That was a case where children in secure training centres had been subject to unlawful restraint and it was alleged on their behalf by the Children's Rights Alliance that there was a duty at common law and under the Convention to inform those

children that they had been victims of a Convention breach. The court said, "No, there is no such duty. It doesn't mean here in the Convention and it doesn't arise as a matter of common law".

The distinction between that case and this is that Theresa May has said a function of this Inquiry is to bring justice to those victims and therefore it is a duty that necessarily arises in order to give effect to the terms of reference.

If I turn then to the public interest in favour of restriction orders. Again if we can just turn up both lists. We looked at the need to make sure that those general factors in support of the [Neither Confirm Nor Deny] stance are not brought back into the equation through any of the matters identified on this list.

So far as fairness is concerned, which includes the promise of confidentiality, you have our submissions on confidentiality at paragraph 90, but in addition we do not accept that a promise of confidentiality creates a presumption of secrecy, as Mr Hall said yesterday. The promise of confidentiality is merely one matter to weigh in the balance.

In our submission, it cannot begin, for the reasons we have already outlined, to outweigh the compelling and overriding force of the need for openness in this

Inquiry; similarly with subjective fear.

So far as harm to the individual is concerned -- and that incorporates both a risk to life or a risk to serious ill-treatment which would be capable of engaging Article 3 -- firstly we note that the Counsel to the Inquiry team agree with us that the Inquiry can take into account, in deciding whether to impose a restriction order, competing factors, such as the need to ensure the credibility of this Inquiry and its ability to discharge its terms of reference and restore public confidence, et cetera, et cetera.

It is entitled, therefore, to take into account the power of the police itself to protect and it is also entitled to take into account -- and very important to do so because the police themselves have laid much emphasis on this -- on the efficacy of a restriction order because the police's case is that very successful efforts are being made, have been made, continue to be made, by individuals seeking to out undercover police officers and they will continue to be made. So the Inquiry has to take account of that. Is it going to serve any purpose to impose a restriction order if those individuals are going to be identified separately in any event by those groups because this is not a moral exercise; it is a factual exercise that the Inquiry has

to embark upon.

The other point we make there is it is notable that there is, at the moment, no case where there is a threat to life to any officer. That is extremely significant.

"Harm to the institution", we agree with Mr Hall that harm to the institution is completely irrelevant. It's not a factor that should be taken into account.

As for "Harm to the function of preventing and detecting crime", as we have said, that can only take account of harm through individual -- the need to protect individual particular matters, such as the protection of methods. But it is going to be very important to exercise great care in what methods the Inquiry concludes need protecting.

So, for example, the way in which the police themselves have already disclosed methods through the True Spies programme and otherwise is going to need to be very carefully evaluated. But also, when methods are obvious, where they are going to be a necessary part of any undercover operation, where what is being done is infiltrating on a long-term basis particular groups, then there is absolutely no public interest to be served in protecting obvious methods that everybody as a matter of inference knows are going on and there will have to

be great, great care in relation to that.

The non-availability of alternative measures, which is also identified on the list, well that goes to weight. It's not a public interest in and of itself.

Finally, Sir, one further point which is not on the list of issues and is not at the moment a matter that goes to the public interest balance, but it is something which comes up because we mentioned it and made reference to it at paragraph 82 of our submissions, and that was the protection of private information which is recorded in documents that are going to be disclosed to the Inquiry. That was addressed in Counsel to the Inquiry team's response at paragraph 4 of their response. It is worth just looking at paragraph 82 of our submissions and paragraph 4 of their response.

Just to make clear, we do accept what is said, that there has been such a wealth of material and there must be room for judgment. We accept that and we don't suggest that every reference to a third party must first be referred to that person. We were speaking about private information in paragraph 82, pertaining to the private lives of the non-state core participants and other members of the public.

But we do submit that there is going to have to be, at some point, an attempt to establish some pre-agreed

parameters because there are a number of possible concerns that could arise; for example, if certain data is automatically redacted by the Inquiry team, the individual concerned won't know that the data had been collected or recorded about them. Similarly, if the decision is taken that information isn't relevant to the Inquiry without any reference to the person or persons who are affected by that information, then its significance may actually missed.

There are other examples when it is a concern. But that is a matter for further down the line. But we do submit that there is going to have to be some work to be done to make sure that those hundred possible problems don't arise.

THE CHAIR: You will discuss those, I imagine, with the Inquiry team.

MS KAUFMANN: Exactly.

(Minute's silence in memory of the victims of the attacks in Brussels on 22 March 2016)

THE CHAIR: I think this is an occasion which should be observed according to the preference of the individual. I'm going to leave court. In fact now may be a good time to take a break and I will come back in ten minutes.

(11.02 am)

(A short break)

(11.16 am)

THE CHAIR: Ms Kaufmann, I am afraid I was unaware that there was going to be a public observance so you were interrupted in mid-flow. I'm sorry about that. The timing would have been better if it hadn't --

MS KAUFMANN: Not at all. Not at all. In fact, it was not mid-flow. It was almost at the very, very last drop.

There are just two very short points I want to make, unless I can assist you further, before I am going to sit down.

First, just in case it wasn't obvious to you, when you asked about me how to deal with the Scappaticci problem and whether it was to prevent any officer being asked about any other officer, of course he can't be prevented from being asked about officers whose identities have already been disclosed, i.e. officers who are not the subject of a restriction order, but I thought that is pretty much an obvious point; only anybody whose identity has not been disclosed.

The other was just a point that Mr Hall made yesterday relying on the case of [In re Officer L and others [2007] 1 WLR 2135] in relation to fairness to the officers, where he appeared to suggest that there was really nothing to weigh in the balance against fairness to the officer; it is

automatically unfair to subject officers to their own subjective fears being realised or to leave them in a situation where their confidentiality has been stripped away.

Of course, it is just as I said; one factor to be weighed in the balance against all the other factors. There is no automatic. It was made clear in Re Officer L that, unless it is necessary to do so, it is unfair to do that. The question is always: how does that fare in the balance against all the competing factors?

So unless I can assist further, Sir, those are our submissions.

THE CHAIR: Thank you very much.

Mr Squires, I think.

Submissions on behalf of the Elected Representatives by MR SQUIRES

MR SQUIRES: Sir, I represent five core participants: Ken Livingstone, Dave Nellist, Sharon Grant, who is the wife of the late Bernie Grant, Diane Abbott and Joan Ruddock.

In the case of Diane Abbott, she's a current [Member of Parliament]. The other four are ex-[Members of Parliament] or, in the case of Sharon Grant, the wife of an ex-[Member of Parliament]. They were also all, at various times, local councillors and, of

course, in the case of Ken Livingstone, was the Mayor of London. So we call them "Elected Representatives" or "ERs" in our submission.

My clients are grateful for the opportunity to make written and oral submissions in relation to restriction orders, which are in addition to those already made by Ms Kaufmann which will not be repeated.

Our submissions and the reason that the [Elected Representatives] sought to become involved at this stage is to do with a fundamental question which we say goes to the heart of whether this public Inquiry, which has such a critical function to play, will be able to discharge its terms of reference. The question is, we say, simply put, whether the [Metropolitan Police Service] are correct in their submission of 12 February 2016that, "... in the overwhelming majority of instances... considerations of fairness and the public interest come down in favour of not disclosing the fact of or detail of an undercover police deployment...".

Our submission is that, if that is the effect of restriction orders, it would prevent the Inquiry fulfilling its terms of reference and discharging its obligation to meet the public concerns that led it to be set up.

As we have set out in our submissions at paragraph 43, our case is, unless the predominant

practice of the Inquiry is that there is a minimum of disclosure of the undercover officers' names -- and by that I mean their undercover names -- and the facts and details of their deployment, again the minimum being who was targeted, who authorised them to be targeted and why were the individuals selected, we say, unless that is the predominant practice, the Inquiry will be unable to fulfil the public interest imperatives which led it to be set up. That is, from my clients' perspective, getting to the truth as to whether and, if so how, the police came to target democratically elected politicians in undercover operations potentially -- at least this seems to be the inference we can draw at this stage -- because of their political beliefs and activities and the imperative for the public to have confidence that the Inquiry has got to truth about those matters and that any misconduct or unlawful practice had been exposed and will not be repeated.

I should say this at the outset: it was stated in the Counsel to the Inquiry note of yesterday in relation to our submissions that there are other matters of fundamental public importance as well as those raised about what we say are the constitutional and democratic issues relating to the targeting of Members of Parliament.

We of course accept that. We were given permission to make submissions on those public interest factors that affected the Elected Representatives, hence the focus on those, but also we hope that focusing on those gives one example, one concrete example, which we say has to be borne in mind when one is engaging the balancing exercise involved in deciding whether to make a restriction order but, also, as we will see shortly, when one can see there are the authorities on open justice because one of the issues there one needs to consider is the seriousness of the allegations of misconduct that are being considered.

Sir, I also say this at the outset: our position is that the predominant practice has to be that minimum of disclosure. We accept that there may well be exceptional cases where it's not even possible to indicate to an individual they have been targeted, but that will require compelling individual evidence about that particular deployment and about that particular case.

That's where we do say that a submission made by Mr O'Connor yesterday was attacking a straw man. He said that our submission was that the level of public concern is such that any form of closed process will not enable the allaying of concern. That is not our

submission. Our submission, coming from the opposite side, is near-blanket refusal to indicate who has been targeted, why and in what way will fail to allay the public concern.

So we set out in our submissions at paragraphs 7 to 13 the basic facts as we currently now know them in relation to undercover operations targeting or involving elected representatives. None of these, as far as we are aware, have been officially confirmed, therefore we are in the position where, if Mr Hall's submissions are correct, nothing will be disclosed or the overwhelming likelihood is nothing will be disclosed as to whether indeed any of these [Members of Parliament]/elected representatives] were targeted.

The allegations that emerge -- I should say again, the reason we raise this at that stage is not because of the veracity of those allegations fall to be determined now, but, as I have submitted, because one needs to bear in mind the nature and the context of the allegations which the Inquiry will be examining in order to determine what the public interest is in fulfilling its objectives and its terms of reference and in terms of the requirements of open justice.

The allegations that have emerged, initially in relation to Dave Nellist in 2002 and then more generally on 25 March 2015, so shortly after the Inquiry was

announced, was that eleven [Members of Parliament] were targeted and were targeted at a time that they were Members of Parliament. So that is the five core participants I represent and six others.

What is striking about those [Members of Parliament] and what unites them is they were all -- are or have been -- members of the Labour Party, were elected members of the Labour Party in local and central government and critically have at various times and in various ways been associated with the left wing of the Labour Party and other left-wing and trade union politics.

Now at least the inference that can be drawn at this stage -- we will see it was drawn in Parliament -- is that these individuals were targeted and information gathered on them because of their politics and political activities. Our submission is that if that is correct -- and that is, of course, what the Inquiry will be examining -- that has constitutional implications of the highest order.

So we set out at paragraph 14 what are our four key submissions. I will seek today to make them good. But first: an inquiry should operate openly and in public wherever possible and any departure from that principle should be strictly necessary, clearly justified and a last resort; that is essentially what Ms Kaufmann

calls the "presumption of openness".

Secondly, there is a public interest of the highest order in getting to the truth of whether police in the United Kingdom have targeted and indeed may continue to target democratically elected politicians and to maintain secret files on them where they have been targeted because of their political views and political activities. That includes in seeking to hold state institutions such as the police to account because that's a number of them. That is one of the key political activities they were engaged in.

The third submission we make is that those public interest imperatives or the public interest imperatives for getting to the truth as to whether that happened and that the public can have confidence that it won't happen again cannot be fulfilled, we say, if, in the overwhelmingly majority of instances, all evidence about the fact and detail of an undercover operation is kept secret; is heard only in secret hearings.

Fourth, what we say flows from the above is that restriction orders should not be made where they will prevent the Inquiry from fulfilling its core purpose, both in uncovering the truth about the police's activities and inspiring public confidence -- we will come back to this -- that it has done so.

So turning to the first of our propositions, the presumption of openness: the Inquiry should operate openly and in public wherever possible. Firstly, in relation to the statute itself, the Inquiries Act 2005, we respectfully agree with the submissions of Counsel to the Inquiry at paragraph 25 that the statute itself create a presumption of openness and at paragraph 26, that that presumption is an obvious one.

Sir, it may help -- because I have two brief submissions to make on section 19 -- just to pull it up. It is at volume 1, tab 14.

Sir, we say the reason that it is entirely obvious that there is a presumption of openness in the [Inquiries Act 2005] -- and in fact it actually goes further than a presumption of openness; it is a requirement of openness unless particular conditions are satisfied, and the one we are concerned with in 19(3) is that it is necessary to the public interest. Everything has to be open unless, for our purposes, that necessity requirement is satisfied.

While we have the section open, Sir, you will see at section 19(3)(a) there is also a limb in which restriction orders can be made when they are required by a statutory provision. The reason I mention that is that it is notable that Mr Hall referred you to the

various [Regulation of Investigatory Powers Act 2000] and other statute provisions, but he does not say that they require you to make a restriction order.

What he says about them and what they illustrate is that there is a general public interest in confidentiality of Covert Human Intelligence Sources, which of course is right. But none of that detracts from the clear statutory scheme and the scheme you are required to apply, which is one starts with the presumption of openness unless one can establish necessity.

Sir, another point, which I will come to later on, but it may be relevant to go back to section 19, that I wish to make was one of the submissions that Mr Hall made was that the issue of public concern, he says, is relevant to section 1 of the [Inquiries Act 2005], as in when the Inquiry is set up, but it wasn't then clear what he says is irrelevant at this stage or, as somebody said, "Well, it's just one factor that one takes into account".

Our submission on that, Sir, is this: the words "public concern" in [section 19](4)(a) we say must be intended to be read back to section 1, which is the public concerns that led to the setting up of the Inquiry.

What [section 19](4)(a) is doing -- and we say it is no coincidence -- it is the first mandatory factor that

must be considered when doing the public interest balance under [section 19](3)(b), having regard in particular to the matters mentioned in section [19 (4)(a)]:

"...the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern...".

We say entirely unsurprisingly that one of the critical factors that needs to be borne in mind is -- the first one on that list -- is this going to prevent me or is this going to prevent the Inquiry meeting a public concern that led to the Inquiry being set up, and that is, of course, the same public concern that is referred to in section 1.

The requirement of openness does not, however, just come from the fact that this is a public inquiry which is conducted under the [Inquiries Act 2005]. It also comes, we submit, from the tasks that this Inquiry is undertaking. That is the investigation of allegations of serious misconduct by state agents. Our submission is that when dealing with an investigation of that kind, there is a strong presumption of openness and open consideration of evidence which is a critical aspect of the rule of law and of democratic accountability.

We relied, between paragraphs 18 and 31 of our submissions, on a series of different authorities to seek to make that proposition

good: the Binyam Mohamed case in the Divisional Court [[2009] 1 WLR 2653] and the Court of Appeal [[2010] 3 WLR 554]; Al Rawi [[2012] 1 AC 531]; the Mohamed and CF control order/[Terrorism Investigation and Prevention Measures] case [[2014] 1 WLR 4240]; El Masri [(2013) 57 EHRR 25]; and Amin [[2004] 1 AC 653]. Now in response to those submissions, Mr Hall said these were adversarial cases concerned with vindicating individual rights. They were concerned, he said, with situations in which [Public Interest Immunity] applications were being considered, the effect of which would have been the material was not considered by anyone at all.

He sought, specifically referring to Al Rawi, to distinguish the present framework, which here he says that there's a statutory mechanism which will enable you, the Inquiry, to consider everything. A very similar submission was made by Ms Barton about the authorities we rely on. Therefore, they say, they don't assist.

We respectfully say that those submissions are simply wrong. None of the cases, in fact, concern vindicating private rights in which there was an issue about [Public Interest Immunity] and material being withheld from the court as well as from the public. As you will see, what they were concerned with is precisely the issue here, which is whether it is good enough for evidence of state misconduct to be disclosed to a judge, but not made

public.

We will see that the exact submissions that were made by Mr Hall and by Ms Barton, that in those circumstances there isn't a concern about openness, were made in Al Rawi, they were made in Mohamed CF and they were rejected.

The reason they were rejected is because what these cases were concerned with was not the vindication of private rights, but the importance of making public acts of state misconduct as an aspect of the rule of law of democratic accountability and instilling confidence that justice is seen to be done. That is precisely, we say, the same considerations that apply to this Inquiry. Indeed, as I will come on to in a moment, we say a fortiori because that is the very purpose of this Inquiry.

So, Sir, if I can take you briefly to those authorities. The first we cite is the Binyam Mohamed case in the Divisional Court. This is at volume 1, tab 22.

The reason I say this case is not a private rights case is that the claim began as a Norwich Pharmacal application by an inmate at Guantanamo Bay, who wanted the UK to provide information to his legal team in the USA which suggested that evidence that he had given had

been extracted by torture.

By the time he got -- Sir, as you observed yesterday, there is a series of different Binyam Mohamed cases. By the time he got to this stage, the only issue was about the publication of seven paragraphs of the Divisional Court's judgment which had been provided -- so it had been considered by the court -- it had been provided to the Foreign Office and to special advocates. But the question arose whether the Secretary of State could withhold the publication of those seven paragraphs which he considered were damaging and particularly damaging to the relationship between the UK and the USA. So the only issue at this stage was one about openness, and openness in the context of allegations of state misconduct.

As I turn to paragraphs 40 and 41, the judgment of Lord Justice Thomas, you will see the heading there, "Public justice, the rule of law, free speech and democratic accountability" --

THE CHAIR: I am not with you yet.

MR SQUIRES: Sorry, Sir.

THE CHAIR: I think I'm looking at a later judgment.

MR SQUIRES: Paragraph 22. It should be page 2672.

THE CHAIR: Yes, I have it.

MR SQUIRES: You see the heading there, "Public justice, the

rule of law, free speech, democratic accountability".

The general rationale for hearings being in public: safeguard against inappropriate judicial behaviour; ensure public confidence in the system of the administration of justice.

And two further ones -- it may be helpful just to read those, 41 and 42.

THE CHAIR: Yes.

MR SQUIRES: It is at 46 -- this ends a passage on the importance of public debate about matters in this case about possible UK -- complicit or UK knowledge of US mistreatment of detainees.

THE CHAIR: I think the matter of particular interest in this country is whether state agents in the UK were implicated.

MR SQUIRES: Yes, it was -- what they knew about it, whether they provided questions, et cetera.

So what one gets there is exposing state misconduct openly is a critical public interest and a key element of the rule of law and democratic accountability. Second, the more serious the alleged misconduct, the greater the public interest imperative in matters being dealt with in open.

So then turning to the Court of Appeal's judgment, which you have at volume 5, tab 108.

The Court of Appeal in fact reached -- as you will see, Lord Clarke says they had rather a different view on the facts but, in fact, by that time it had become, academic because, in fact, the salient paragraphs had been published by a US judge.

Paragraph 182, in the judgment of Lord Neuberger, he makes point there and this is -- Mr Hall mischaracterised our submission as being that if there is wrongdoing, you can never withhold any evidence. Lord Neuberger recognised that that is not the case, but what he says at paragraph 184 is that for that to be outweighed -- sorry, for the need to disclose misconduct or the need to have openness where there are allegations of misconduct -- this is at the bottom of the page over on to the next page -- requires some consideration at the very top end of importance.

There is a further feature, a further linked feature, which is in the judgment of Lord Judge at paragraph 44, which is about the deference that is given -- this is in the context specifically of a [Public Interest Immunity] application, so where the Secretary of State has issued a certificate saying that particular disclosure would harm national security. What Lord Judge says at the bottom of that paragraph, 44, is that usually that's a decision for the executive, but not, he says, if the

conclusion is the executive is acting unlawfully. This is even when one has a [Public Interest Immunity] certificate.

Finally, Sir, in the judgment of Lord Judge at paragraph 39, he makes again the same point that was made in the Divisional Court, but it's not just about open processes and being able to scrutinise the courts, important though that is, but -- and this is the last three or four lines:

"Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged."

So one of the points made by Mr Hall was, "Well, these were cases where there might be a difference where there is misconduct actually found", which would apply to the Mohamed case.

So what we will see if we can turn next to Al Rawi was that they apply equally in cases of alleged misconduct because that's the position in Al Rawi, where we see that Lord Justice Thomas' specific analysis is endorses by Lord Clarke in the Supreme Court.

Al Rawi you have at volume 1, tab 19. Sir, the other point about Al Rawi -- again, I am sure the facts

are familiar -- these are the damages claims brought by those complaining of rendition in which it is said UK authorities were complicit. So at this stage simply they were making allegations. The issue here was whether the court could create a closed-material process.

What is critical for our purposes is their Lordships' discussion of the limits of a closed-material process. So not a case in which information is withheld from everybody, but precisely the situation which is said will happen here, which is that the court will get to see in principle everything, but will consider it in closed hearings.

So the parts of Lord Clarke's speech we rely on at paragraphs 183 and 184 -- so there he specifically endorses the two passages from Lord Justice Thomas' judgment that I took you to, paragraphs 41 and 46, and he interprets, at the end of 184, what was decided in Mohamed as being that:

"... the rule of law and the democratic requirement that governments be held to account mean that the case for disclosure will always be very strong in cases involving [and we underline this word] alleged misconduct on the part of the state and, secondly, the more serious the alleged misconduct on the part of the

state, the more compelling the national security reasons must be to tip the balance against disclosure."

So this is even in a national security context you need particularly compelling reasons for stronger -- for the more serious alleged misconduct.

Sir, there are two other passages from Al Rawi. The first is from Lord Brown's speech at paragraph 83. This is a key point again, which is really key for this Inquiry, about public confidence and indeed public confidence if it transpires that the Inquiry finds limited evidence of misconduct.

The point that Lord Brown makes here, if one sees from letter B:

"A closed procedure [so material only heard by the court] in the present context means that claims concerning allegations of complicity, torture and the like by UK Intelligence Services abroad would be heard in proceedings from which the claimants were excluded with secret defences they could not see, secret evidence they could not challenge, and secret judgments withheld from them and from the public for all time."

So that's the position that is being endorsed here in relation to specific allegations. He then quotes from the Court of Appeal's judgment:

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

So the final paragraph that we rely on here is from Lord Kerr's judgment at 93. This precisely answers the submission made by Mr Hall, and he made it in particular in relation to the article by Martin Chamberlain which we had relied upon, that it is difficult to challenge reliability and credibility, a point we will come back to. He said, "Not a problem here". His submission was, "You are going to be hearing from the undercover officers themselves. You and your team will be able to test their reliability, their credibility".

If one looks at paragraph 93, one sees Lord Kerr's answer to that. You see he describes exactly the same

submission:

"The defendants' second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive - for what, the defendants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties?"

He then goes on to explain the central fallacy in that argument. He says this at H:

"To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead."

He explains:

"However astute and assiduous the judge... the peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable."

As we will come on to, we say that applies equally to the Inquiry and to the ability to test evidence and indeed for evidence not to be positively misleading if it can't be tested.

So those are our submissions on the rule of law and state misconduct.

A second submission we make, which is at 26 to 28 of our representations, is that we say that a process considering allegations of state misconduct will not be a fair one if the state gives a blanket [Neither Confirm Nor Deny] response to the allegations and the entirety of the state's response to the allegations are heard in secret.

It's not a fair process, as we will see from the Mohamed CF case, not because there is, as Mr Hall says, an accused or a type of accused, but because the public cannot have confidence in the outcome of that sort. So it ties to the point you put to Mr Hall yesterday about accountability. It is also about the accountability of this Inquiry and that the public can have confidence in its conclusions.

So you were taken to Mohamed and CF by Ms Kaufmann yesterday. There were a couple of passages I wanted to highlight that she didn't take you to, if I may. It's at volume 2, tab 52.

The context here in many ways, though factually very different, has a direct analogue to the position that the Metropolitan Police Service say should be taken, which is: allegations were made of misconduct in order to amount an abuse of process argument about what had happened to the two individuals in Somaliland, and the

Secretary of State -- again similar to what the police say ought to apply here in the vast majority of cases -- said, "Well, I'm not going to tell you anything at all about my case or what happened in Somaliland is. I'm not going to confirm or deny anything".

The High Court saw all of that evidence, found there was no abuse of process, but provided no reason for that. So the passages to highlight that you weren't taken to are paragraph 15. You will see very similar submissions or a number of similar submissions to the one made by Mr Hall.

First he submits, at [Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269], the idea that you have a minimum disclosure only applies to allegations against a person. So it is the accusation. It is being accused that entitles you to it; not when you are making allegations of misconduct.

Secondly, again it is the same submission: well it is all okay because there is a closed-material procedure and you will be adequately protected because the court would not countenance abuse of process, so even if it all happens behind closed doors, that is okay.

Thirdly this:

"... the Secretary of State, when dealing with serious allegations made by suspected terrorists, ought not to be put in the position of having to elect between

disclosing the essence of the case ..." -- which she said and the court accepted wasn't in the public interest, the High Court accepted -- and not being able to continue to impose a control order/Terrorism Investigation and Prevention Measure.

This was in the context -- you see Mr Eadie for the Secretary of State, "... emphasised the seriousness of unappealed findings of national security risk" against one of them, MAM, Mohamed, they were described as an “overwhelming” national security risk in relation to his involvement in terrorism.

You will see how Lord Justice Maurice Kay deals with those arguments at the bottom of the next paragraph.

Just above E: "The existence of the statutory closed material procedure had the effect of limiting the obligation of disclosing to” MAM and CF “and of permitting much of the detail to be dealt with only in a closed judgment. However, that does not give rise to tolerance, in relation to a potentially dispositive issue, of the total withholding of the Secretary of State's case to collusion and mistreatment or the total confinement of the reasons for rejecting the Appellants’ case on those issues to the closed judgment." He then deals with the submissions being made by the Secretary of State. This is at 17G: "It would be no answer in those situations to say that there is sufficient protection in the duty of candour to the court. Nor is it an answer that, in the present case,” MAM and CF “, in the instigation of the abuse

of process application, have had every opportunity to set out their positive case on abuse when they know nothing of the Secretary of State's case on collusion and mistreatment and nothing of the judicial reasoning which resulted in the rejection of their case."

Of course our case is a fortiori because in our case we can't even put forward -- my clients we will come on to in a moment -- cannot put forward a positive case at all as to what happened to them because they have no idea.

Here it was said that, "Even if you can, that's not good enough where you don't know what the response is. Here you are not even in that position".

Then you have the paragraph that Ms Kaufmann took you to. The critical point there is that the reason all of this is not acceptable is public confidence in adherence to the rule of law.

This is the accountability of this Inquiry. This is a quote from AF (No 3):

"...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."

Sir, a third strand of authorities which we say point again -- they all point in the same direction about public confidence and the rule of law -- are the

Article 2/Article 3 cases. Let me just take you to one paragraph in the judgment of Amin. This is at volume 6, tab 134.

This is about the nature of an inquiry required into the racist murder of an inmate in Feltham, a racist murder by his cellmate. The key passage is paragraph 31. It is often quoted about the purposes of an Article 2- or 3-compliant investigation. It is at 31E:

"The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

We say exactly the same purposes and imperatives are served by this public Inquiry. The reason that's important is it is wrong to say, we submit, as Mr Hall did, that it is enough to have accountability to conclusions made public. It is not enough to have lessons learned in public; the wrong is also to expose misconduct and ensure that it is brought to public

notice; ensure the full facts are brought to light.

So Ms Kaufmann has referred you to El Masri and we refer to it as well, paragraph 192. It makes clear that that scrutiny is a key element of the rule of law.

So all these authorities, we say, point in exactly the same direction, which is that where serious allegations of state misconduct are made, there is a strong presumption that that misconduct or the evidence of that misconduct will be heard in public.

So we say that those principles, rather than any distinction between those cases and the present inquiry, which Mr Hall sought to draw, in fact assist our argument because Binyam Mohamed, for example, the allegation of misconduct came out in proceedings which weren't -- that was not their purpose. The purpose was to assist Mr Mohamed get evidence to avoid the risk of the death penalty, but once the misconduct was seen, the court had an obligation to make it public.

In our case, the very purpose of this Inquiry is to instil public confidence, to ensure truth is brought to light, and so we say all of those principles apply a fortiori here.

So that was my first proposition. The second, which we set out at 37 to 45, is the overwhelming importance, we say, of the issues that this Inquiry is required to

examine. We make those submissions, as I say, from the perspective of the Elected Representatives.

Our submission is this: if the police -- and we entirely accept there is an "if", but it is what needs to be examined -- in the United Kingdom had been secretly targeting and maintaining files on democratically elected politicians because of those politicians' political views and activities, that is fundamentally incompatible with a proper functioning of a democracy and inconsistent with a proper relationship between an elected legislature and the police within our constitutional scheme.

There is, therefore, we say, an overwhelming imperative that the Inquiry, whether through the imposition of restriction orders being made or otherwise, is not impeded from fulfilling the task of getting to the truth of whether that happened, why it happened and to ensure there is public confidence that it will never happen again.

There are two distinct but related constitutional issues at stake. The first is the supremacy of Parliament in particular and the executive should do nothing to interfere with the ability of [Members of Parliament] freely and represent their constituents unimpeded by the executive.

The second and linked point is that it is critical to a democracy that the police are politically neutral and democratically accountable.

So we set out at 39 to 41 of our submissions some issues surrounding Parliamentary privilege. We had the helpful intervention from the Counsel to the Speaker of the House [of Commons]. I won't repeat any of those submissions here. No doubt these will be issues which will need to be considered in further detail later on by this Inquiry if it is going to consider what the legality is of targeting [Members of Parliament], if indeed that occurred.

In essence, the Parliamentary privilege is -- Article 9 of the Bill of Rights provides that nothing, no statement made in Parliament, can be impeached; restrictions on the ability of civil arrest in relation to Members of Parliament.

One can see how subjecting Members of Parliament to secret surveillance by undercover officers -- and we don't, of course, know how this occurred, if it did occur -- was it people masquerading as constituents? Was it people turning up at meetings? Was it even, at worse, officers infiltrating [Members of Parliament's] offices? One can see obvious concerns and obviously constitutional implications not just in terms of how constituents who understand that that might have occurred -- how they will now feel in the future in

terms of the chilling effect of going to their [Member of Parliament], particularly to talk about issues involving the police. Of course an even greater concern or an equally great concern, if undercover officers were in any way involved in [Members of Parliament's] offices in terms of assisting Members of Parliament on campaigns or making decision about what to say or what not to say in Parliament.

We say that the concerns go significantly beyond the limited issues of Parliamentary privilege. Sir, if I may take you -- you saw very briefly -- Ms Kaufmann took you to the Parliamentary debate, in which the Minister for Policing for the Secretary of State explained the purpose of the Inquiry. That was the debate in which -- it was shortly after the allegations had come out of Members of Parliament being targeted.

So what we will see -- if I can take that vein, that illustrates most clearly what the public concern as expressed by Members of Parliament was. We will also see how it was entirely accepted by the Minister and indeed it was said to be the reason or one of the reasons -- because the Inquiry had been set up -- one of the key things the Inquiry would look at.

The third thing the debate shows, which we say is particularly important for consideration of restriction orders, is that we will see from the debate that the

Minister, the Policing Minister, evidently regarded -- certainly the Members of Parliament regarded as critical and the Policing Minister reflected their concerns that there would be disclosure and -- not complete disclosure, we will see, and nor are we asking necessarily for complete disclosure, but certainly it is recognised, we will see from debate, that in answering the public concern, we say entirely unsurprisingly, the Members of Parliament wanted to know whether they were targeted -- again the very basic information -- where they were targeted, who authorised it, what information was gathered. We will see that the Policing Minister repeatedly assured them that he would do his best to ensure that as much was disclosed as possible.

We say, entirely unsurprisingly, as a way of meeting the public concern that that information has to come out. So if I can just flag up the various passages. I won't read them all out.

It is volume 6, tab 123. As I say, this is to make good both the submission about the constitutional importance raised repeatedly by Members of Parliament and indeed Members of Parliament from both parties -- I think that should be all three -- there is a [Liberal Democrat] as well.

So you will see the opening which -- Ms Kaufmann took you to, I think, the second paragraph -- if you

look at the first paragraph of the Minister for Policing, Mike Penning, where he makes clear what -- the purposes of this Inquiry, which is "To improve the public's confidence in undercover work, we must ensure that there is no repeat of these ..." -- what he describes as "serious historic failings in undercover policing".

There was then a debate begun by Peter Hain, then Member of Parliament. He sets out -- you will see on that first page -- the list of the 11 Members of Parliament who it was said has been targeted. Then, over the page, first you see -- at the very bottom of that page you will see this repeated:

"Will the Home Office order the police to disclose all relevant information, and to each of the [Members of Parliament] affected, our complete individual personal registry files?"

He then expresses his concerns that:

"...that these files were still active at least 10 years while we were [Members of Parliament] raises fundamental questions about parliamentary sovereignty and privilege."

You will see the answer from Mike Penning:

"The right hon. Gentlemen has put his point to the House very well. It is important that the country has confidence in the way the police operate, and that is exactly why the Home Secretary has instigated

the inquiry."

So you then see Jack Dromey at the bottom of the page. His expressions are concerned in the third paragraph:

"an affront to parliamentary democracy - to the sovereignty and independence of this House.
It is also an affront to the vital principle, the breach of which can be very serious indeed, of confidentiality between a Member of Parliament and those he or she represents ... Lord Justice Pitchford's inquiry must be extended to look into the allegations..."

Again, Mike Penning agrees.

So then, over the page -- this is column 1584 -- you see Harriet Harman, who was one of the Members of Parliament allegedly spied upon, expressing concern that she was targeted possibly for other work that she says was essential for democracy: campaigning for the rights of women and workers and the right to demonstrate. She then asks:

"I want him to assure me that the Government will let me see a full copy of my file."

Then we see this from Mike Penning, last sentence:

"I will make sure that as much as can be released is released. I give that assurance to the right hon. and learned Lady and I will write to her."

You then see concerns from Tony Baldry,

a Conservative [Member of Parliament]:

"... all of us need to have confidence, as do our constituents, in the integrity of the police, and that every part of every police force needs to be democratically accountable..."

Then, over the page, Joan Ruddock, who is one of the core participants I represent today. You see she again asks:

"How is it that surveillance was carried out on me for all that time. I want to know and to get the Minister to understand: who authorised that surveillance, and on what ground was it authorised? He needs to answer those questions..."

We see what the answer is -- Mike Penning says:

"That is exactly why the Inquiry is being put in place..."

You will see again in an answer to Jeremy Corbyn, who is another one of the [Members of Parliament] allegedly under surveillance:

"... I will do everything I can to ensure that as much information as possible is passed to current and past Members of Parliament, but I cannot give a guarantee..."

So then another point that is raised by Jack Straw -- again another one of the [Members of Parliament] alleged to be the subject of surveillance -- what he says:

"....if the allegations are correct, we have an extraordinary situation where I as Home Secretary, and from 1997 to 2000 the police authority for the Metropolitan Police, not only knew nothing about what appears to have been going on within the Metropolitan police, but may also have been subject to unlawful surveillance as Home Secretary?"

Of course we say that may well have been the case -- we don't know -- we know there were allegations that Ken Livingstone was spied upon. If he was in spied upon when he was Mayor of London, then again he was in a position of democratic accountability for the Metropolitan Police.

So if not only for Jack Straw, did he not know what the police were doing, but in fact they themselves were subject to surveillance, one can obviously see the fundamental questions about democratic accountability and the role of the police that that raises.

Then if you see Mike Penning's answer at 1587:

"I thank the right hon. Gentlemen" -- [this is Jack Straw] -- "for the tone of his comments. He knows from his experience how difficult it is, and to realise that he was in the dark about authorisations that have taken place - that is exactly what the inquiry has to consider.

Lord Justice Pitchford must have full access..."

Finally, in terms of the Members of Parliament, as I say, Diane Abbot, over the page, is again one of the core participants I represent. She explains the concern that she was targeted, for example, for her role in the Stephen Lawrence campaign.

"I am clear in my mind that that surveillance could not have happened without authorisation at a very senior level, and I want to know who authorised it and on what grounds. Above all I feel I am entitled to an unredacted copy of my file."

Again the answer is:

"I will do everything I can to make sure that the documents are released."

What is striking about that is nowhere is it said to Parliament by the Minister for Police, "Well, of course none of this can ever be released". Quite the contrary. He gives repeated assurance, and it is unsurprising, when one hears the concerns directly, that if you want people to have confidence that the matter is being investigated, there has to be a minimum of disclosure. It doesn't mean that complete unredacted files would be released and Mike Penning does not give that assurance, but at the very least to know, "Was I targeted?", "Who authorised it?" and "Why was I targeted?", and as I say that is the assurance he repeatedly gives.

THE CHAIR: Mr Squires, it's not clear whether the Minister was talking about a disclosure directly to the Elected Representatives or a disclosure through a process which was going to take place in this Inquiry. As a matter of fact, has there been any direct disclosure to the Elected Representatives?

MR SQUIRES: Not in relation to four of the core participants and none from the Home Office.

I understand in relation to Sharon Grant some sort of limited gist was provided by the Metropolitan Police of the file held about Bernie Grant.

THE CHAIR: Yes, that's a different matter.

But here the Minister is talking about trying to ensure that as much as can be revealed to them will be revealed to them. I wondered whether anything had happened directly between the department and those politicians.

MR SQUIRES: No. Our understanding and the way we read the speeches is that is being left to the Inquiry. That will ultimately be a question for the Inquiry to decide, how much information because -- no -- the -- I think in a couple of points he says, I think in response to one of them -- I think it's [Dame] Joan Ruddock -- that is exactly why the Inquiry has been put in place. So our reading of it is that -- not that [Members of Parliament] should have special

treatment in that sense because they were -- I think this point actually was made by Jeremy Corbyn and answered by Mike Penning.

Jeremy Corbyn said, 'Why should it be just [Members of Parliament] who are able to raise this and get access?', and this is at 1586. The response is from Mike Penning:

"Members of Parliament can stand in this House and ask a question, but many other victims cannot and that is why the inquiry is in place. I will do everything I can to ensure that as much information as possible is passed to current and past Members of Parliament, but I cannot give a guarantee..."

Because we have not been provided with any of this information by the Home Office, it is entirely -- and we say quite sensibly -- for the Inquiry to decide what can -- whether everything can be disclosed or whether something should be withheld.

We do say what is important is -- we say unsurprisingly -- that these assurances were given when these sorts of serious concerns were raised.

Sir, as we say, the reason we raise them and they were raised in Parliament, not because the Inquiry can now decide or is being asked to decide whether they were true, but simply because if -- if it is the case -- that these 11 [Members of Parliament] and maybe others were being

targeted because of their political views and their political activities, because, for example, someone in the police disagreed with those political views and political activities, it is difficult, we say, to exaggerate the constitutional significance of that, and particularly if it is the case that [Members of Parliament], or indeed the Mayor of London, was being spied upon when they were the democratically accountable -- well, in the case of the Home Secretary, Jack Straw -- democratically accountable body for the same police force.

We also, of course, don't know how elected representatives were targeted. Again, it will be a critical question that needs to emerge, particularly it they are to play any part in this Inquiry. Was it people masquerading as constituents? As I say, was it people infiltrating their offices? Also to say why. Was it just their politics?

There is some suggestion I know that Sharon Grant made that it was Bernie Grant's association in particular with members of particular ethnic origins or campaigns associated with particular ethnic origins; again a matter of real concern.

So that's the second broad heading.

The third -- I can take this more briefly, largely because many of these submissions were made by

Ms Kaufmann -- is the ability of the Inquiry to fulfil its terms of reference and to investigate what we say are these pressing matters, if, as the Metropolitan Police Service submits, virtually all of the evidence as to actual undercover operations is heard in secret. By "investigate", "examine", I mean the whole set of different concerns this Inquiry will have: getting to the truth, instilling public confidence that the Inquiry has got the truth and instilling public confidence as to what will happen in the future.

As I have already submitted -- we don't need to go back to section 19 -- the Inquiry allaying public concerns is a key question and we say a question of real importance when one is conducting the balancing exercise.

Sir, you will recall that 19(4)(a) refers to a mandatory consideration of whether a restriction order would inhibit the allaying of public concerns, so inhibit the Inquiry from performing its function. We say if the imposition of a restriction order would prevent the Inquiry meeting the public concern, then plainly we say it should not be made.

The reason we say it will make it impossible, certainly from the perspective of the Elected Representatives, for the Inquiry to fulfil its function

is that, as Ms Kaufmann said, they are going to have absolutely no idea who was targeting them, in what way, for what reasons, and that is going to make it impossible for them to helpfully participate in this Inquiry.

That has a series of different consequences. One is that one of the terms of the Inquiry is to investigate the impact of undercover policing upon those affected. Certainly in the case of the Elected Representatives that is going to be simply impossible.

It is also very difficult to see how the Elected Representatives are going to be able to assist with points of principle; for example the issue of Parliamentary privilege. If it is not going to be said whether any of them were in fact targeted and in what way, it is almost impossible to see how we can make legal submissions that are going to assist the Inquiry.

But perhaps most fundamentally it is going to make it impossible, we say, for the Inquiry to be satisfied that it has got to the truth of what happened, and perhaps more important or equally important, for the public to have confidence that it has got to the truth of what happened.

Ms Kaufmann made submissions to you about the unlikelihood of a complete self-disclosure by officers

and also the impossibility, with the best will in the world, of the Inquiry without being able to hear countervailing evidence to be able to decide whether individual officers -- this is the point made by Lord Kerr in Al Rawi -- if an officer for example said "Well, the reason I targeted [Member of Parliament] X was not his politics, but because I witnessed him at a meeting urging protesters to violence", suppose that's a lie, it is simply going to be possible for the Inquiry to know whether it is or not without the [Member of Parliament] at least being able to say "I was not at that meeting", or "there are X number of people who were there who can say it wasn't true"; or if there aren't complete accounts of the nature of the target, it is said by an officer, "Well, my targeting of [Member of Parliament] Y was limited to hearing her speak in opening meetings, that is where I gathered this information from", again if that is not true it is impossible to see how the Inquiry is going to know that.

We have seen that the way Mr Penning, the Police Minister, has described the purpose of the Inquiry was to restore public confidence because a “tiny minority” of the police have “fundamentally let down the people of this country". We don't know how small the minority was, but to suggest that those same Metropolitan Police officers can now suddenly be trusted

to give full, candid and accurate accounts, we respectfully endorse Ms Kaufmann's submissions that that is fanciful.

That, of course, links -- it is not only the Inquiry's ability to get to the truth, but the public confidence in their ability to get to the truth.

You have already seen from the authorities that we rely on -- Mohammed and CF, it is also referred to in El Masri, et cetera -- that that is a key concern. Again it is impossible to see how the public could be confident that the truth has come out when all the evidence of specific operations that haven't been confirmed -- as I say, they haven't in the case of the Members of Parliament -- is heard in private.

Finally, briefly, on our fourth head, which is the approach to restriction orders, we agree with Ms Kaufmann and say that the [Neither Confirm Nor Deny] has no role to play. We make just this one additional submission: as Ms Kaufmann said and as is clear from Counsel to the Inquiry in their note at 94, [Neither Confirm Nor Deny] is not a rule of law or a legal principle. It is a particular tactic and it is a tactic which has one very specific purpose, which is to avoid drawing inferences from different answers being given.

THE CHAIR: It is a response in support of a public interest

which has to be identified.

MR SQUIRES: That's correct. But we say it is a further one. It is particularly about inferences because otherwise one could say, well, even if -- the reason one has it is, even if there is no public interest concern --

THE CHAIR: It depends on the circumstances, whether the reason for applying the policy is to prevent inferences being drawn. Scappaticci was a particularly striking example of that kind of application of the policy.

MR SQUIRES: Sir, that's right, but that -- as I say, we simply endorse Ms Kaufmann's submissions on why that doesn't apply in this particular context -- in the context of the Inquiry and the answers it is able to give.

The reason we say it is concerned particularly with inferences is because otherwise one is dealing with -- because one is then dealing with the fact of a case-by-case analysis, unless one is concerned about having to give the same answer in all cases whatever the public interest.

So our second submission under this heading concerns what was said about wrongdoing and unlawfulness. One of the -- the Metropolitan Police Service correctly accept -- this is at (VII) of their submissions -- that

secrecy of the kind they are asking for cannot apply to an illegitimate method that is not and will not be used. We say that is absolutely right to make that concession, that you cannot ask for that information to be withheld from the public.

What Mr Hall went on to submit is that it would be wrong, he said, to pretend that the work of the Special Demonstration Squad was in itself illegitimate. What he suggested was that there may have been specific examples of policing which were inappropriate, but he said the general policing of those believed to be violent was justified.

So we don't say anything about that submission generally, but our submission -- and we set it out in our written grounds -- is that the police targeting of democratically elected representatives in undercover operations, where they are selected because of their politics, is never, we say, a legitimate police tactic.

Now it may be that the police disagree with that, but that will be our submission. One of the difficulties with the blanket approach being proposed by the police is that you will have to make that decision in the abstract across the board and now, and we say that's unworkable. So that's a practical reason, we say, why the approach has to be specific to a particular

operation, a particular set of concerns.

One of the issues we would ask the Inquiry to consider, obviously with Counsel to the Inquiry initially, is: does this appear to be a tactic that is never lawful? As I say, we will be making that submission in relation to the Elected Representatives.

Sir, the final point under this heading is this: the Elected Representatives are well aware and are happy in public to say they are well aware of the importance of the work the police perform. That includes undercover operations and also in the public interest in an effective and respected police force. Critical, however, to the police effectiveness, we say, is their accountability and, perhaps even more important or equally importantly, the public confidence in their impartiality and their adherence to the rule of law.

That needs to include people from all parts of the political spectrum who it is vital can have confidence that the police enforce the criminal law in a way that is politically neutral and impartial.

Our position is that it will be impossible for the Inquiry to get to the truth of what happened in undercover operations over the past decades, restore public confidence and ensure that in the future the police are democratically accountable if virtually all

of the evidence of police deployment is withheld from the public and those affected.

We do accept that if that means some increased expenditure by the police service and even some short-term alterations in their current operations -- if that is needed for this Inquiry to be able to get to the truth of what happened and restore public confidence, we respectfully say so be it.

Sir, just finally on the positive disclosure obligations under Article 8, it appears actually there is very little between us and certainly Mr Hall about that. I think he accepted that the Inquiry itself, as a public authority, has to balance the rights of individuals to find out information about themselves and he accepted that, if it is private information that is important to a person understanding elements of their identity, it will need to be shown entirely separate from any issues about openness that it is necessary to withhold that information.

That would apply, of course, for example, if there's indications about sexual relationships that people have engaged in, but also for the Elected Representatives, if someone they thought they trusted and knew turned out to be an undercover officer -- and one can see that is an important part of understanding what has happened to

them over the past decade, that they know that -- that has to be balanced against the ordinary Article 8(2) considerations.

As I say -- I think again the parties agree -- it is unlikely that that is going to lead to particularly different outcomes, but that's because we say such is the imperative for open disclosure that we have already been dealing with that it should come out in any event. But that's a further distinct consideration for this Inquiry as a public authority.

Sir, unless I can assist further.

THE CHAIR: Thank you very much.

Mr Emmerson, I think.

Submissions on behalf of Peter Francis by MR EMMERSON

MR EMMERSON: Sir, I represent Peter Francis.

We are going to be relatively brief. Essentially the structure of what I say is first of all to make one or two observations about Mr Francis' own position, both in terms of what it is he is seeking out of this Inquiry, but also, more specifically, the rather unusual position he is in amongst the core participants and what impact that has on some of the issues that you are having to consider today.

Then just to run through what sounds like a bit of a laundry list now at the end of the hearing -- or as

the hearing has progressed -- some of the points that have arisen, indicating where he aligns himself with which parties and what points he makes in addition to those which have already been made.

Sir, Mr Francis' interest is in securing a full and public examination of the ethics and lawfulness of undercover operations conducted by the Metropolitan Police Service, in which he himself played a part, and to do what he can to assist you to secure accountability for those whose rights may have been infringed in the course of those operations.

As the only undercover police officer to have blown the whistle, if I can use that expression, and as therefore the only whistle-blower amongst the core participants, he is not here in any sense to advance his own personal interests, but to provide you, Sir, with all of the information that he is able to in order to enable you to fulfil your terms of reference.

So when he made voluntary disclosure of his own role and of the role of others in undercover policing operations, Mr Francis faced the same risks of reprisal and interference with his privacy and so forth as the Metropolitan Police Service asserts on behalf of other undercover police officers in this Inquiry.

Indeed, in his case, the risk was arguably greater

as he made his disclosures without the protection from prosecution under the Official Secrets Act [1989]. It may in due course emerge from the arguments on undertakings.

He made the personal choice to disclose what he now considers to have been unethical, unlawful and inadequately supervised undercover policing tactics, incompatible with the democratic rights of the targets and contrary to the rule of law. As you are aware, Sir, his disclosures in part prompted the public concerns that led to the establishment of this Inquiry.

As Mr Squires has pointed out in the passages he's taken you to from Hansard, it was the allegations made by Mr Francis which alerted the Elected Representatives, both those who are core participants and others, to the fact that they had been the subject of surveillance and he's also the source of other allegations of equal or perhaps even greater gravity.

Sir, he is in a unique position among the core participants. The police and the state parties are between them in possession of all of the relevant information as to persons and methods, and I use that expression "persons and methods" as shorthand for the public interests which are sought to be protected by [Neither Confirm Nor Deny] in these applications. They have either made or indicated that they intend to make

applications for restriction orders, including, in the case of the Metropolitan Police Service, orders for all operational evidence to be heard in private.

The non-state parties on the opposite side of the secrecy chasm have none of the relevant information and are seeking its disclosure by resisting the restriction order applications. They necessarily have to do this from a position where the only information they have available to them is that which is in the public domain emanating from Peter Francis and others.

For his part, sitting between those two positions, Mr Francis has a great deal of information available to him about covert operations, only some of which is in the public domain. He is expecting in due course to be asked to give evidence about those operation details and at least so far there has been no application for a restriction order to require any part of the testimony he may give to be heard in closed session.

If that remains the position, then the Inquiry will be hearing at least some open evidence about operational methods from Mr Francis, subject, of course, Sir, to your directions.

During his submissions yesterday, Mr Hall sought to make a virtue of this. He said to you that in addition to Mr Francis, there were three other officers from

either the Special Demonstration Squad or the National Public Order Intelligence Unit where it would be unrealistic for the Metropolitan Police Service now to seek to insist upon [Neither Confirm Nor Deny]. The consequence, he said, was since it couldn't be justified to seek a restriction in respect of those witnesses or to seek to assert [Neither Confirm Nor Deny], it followed that their roles, their actions, their welfare and their deployment -- his words from yesterday -- would all be the subject of open evidence.

Two points, if I may, just to put that submission into perspective. Making the best estimate he can and based on the number of officers who were in the field at any one time, Mr Francis estimates that there were between 100 and 120 officers working undercover for the Special Demonstration Squad over the period of its operational lifetime. Obviously some of them may be dead, others may have no relevant evidence whatsoever to give, but it gives some indication of the extent to which the suggestion of four individuals might be able to give evidence in open and therefore satisfy to some degree the need for public scrutiny of the Special Demonstration Squad and its operations -- in our submission it has to be seen in that perspective.

Sir, it is, in our submission, difficult to see --

if one posits the position of Peter Francis testifying before you and at this point I try to ground some of the issues in the practical realities -- it is difficult to see what will be gained in operational terms by any assistance on the part of the Metropolitan Police Service that the corresponding evidence to Mr Francis' be given in closed session.

So if the position is that Mr Francis, for example, alleges that an operation took place at a particular date and a particular time and that from the information available to him it was utterly unjustified and unlawful, there has to be some opportunity for the Metropolitan Police Service to answer that. Are they to answer that in open or are they to answer it in closed? Clearly they are not asserting at present, at least, that his evidence would need to be closed, but there is no suggestion, as I understand it, that the answer to it would necessarily be in open.

If it is in closed, then it raises a very curious dilemma because at the end of the hearing you are going to need to decide whether or not what he's told you about that operation is true. You will obviously need to take into account what you have heard in closed as much as in open and if, having heard the evidence in closed, you conclude that what Mr Francis says is true,

then obviously that will be reflected in a composite finding based on open and closed evidence together, but the inference will be, of course, that the closed evidence supported the evidence.

The converse is equally the case. If your finding was that the allegation made by Mr Francis turns out not to be true or not to be as he put it, then that must be based -- the inference will be -- on what you have heard in closed session. In other words, the very fact of this Inquiry and the way it would conduct its operations would necessarily, in that instance, destroy the [Neither Confirm Nor Deny] principle because by the finding that you would make in relation to a conflict or a potential reliability issue, you would, in effect, be revealing that which was in closed. It would be very difficult to avoid it.

That being the case, one starts to see a loose thread in the way in which the Metropolitan Police Service submissions are put because if it is the case for Peter Francis and for Bob Lambert and for the other two officers who have been identified, then the question is: what in principle is different about other undercover officers?

If in principle the way that the Inquiry is going to have to operate is not to issue a restriction order in

relation to the evidence answering Peter Francis, then why are other undercover officers -- unless there are exceptional circumstances -- why are they in a fundamentally different position?

I appreciate that one is looking two steps ahead of the practicalities that will need to be grappled with when the time comes, but in a sense, as you have indicated with some of the examples that you have given in the course of argument over the last day or so, it is difficult to look at these issues of principle without understanding the implications that they have for the operation of the Inquiry.

You gave the example of a layperson who did not know they had been the subject of surveillance, doing their best in the witness box to explain their experiences in circumstances where others in court, including yourself, were aware of detailed material that couldn't be put to them. In a sense this is the inverse of that because we would have a police officer or, rather, a former police officer in the witness box, but where it may well be that a case that is being put in closed is against him, is designed to undermine or contradict his testimony, but it wouldn't be possible for that to be put to him.

So, in real terms, the only practical solution -- indeed the only fair and principled solution -- is for

the open and closed evidence relative to what Peter Francis has to say to be heard in open. Indeed, given the way that Mr Hall put it to you that that was trumpeted as a significant virtue of openness, one would at this point in time at least expect the Metropolitan Police Service to support that approach. But what we say simply is that, once one has reached that position -- and I'm going to come to [Neither Confirm Nor Deny] in more general terms in a moment or two -- but then once one has reached that position, you, obviously, are going to want to ensure that the way in which the Inquiry hears evidence is consistent, is fair and has a principle justification between one case and another.

Since we know that there will be cases where open justice in practical terms must prevail, then one needs a very firm reason for considering that there is different approach fundamentally in every other case.

If I just turn briefly to the identity of undercover officers. Mr Francis has not so far disclosed and has no intention of disclosing -- subject, of course, to directions from you, Sir -- the identity of other undercover officers, that's to say the true identity of other undercover officers, and he has not argued for the disclosure of this in his submissions for today's

hearing.

The real identity and particulars of any officer may or may not become relevant in particular circumstances in particular applications, but he makes no generic submissions on that.

Having regard to the risks that he himself took when he went public, he does ask me to make it clear that he finds it very difficult to understand why the assumed undercover names should not be disclosed.

There are two elements to that. First of all, the mosaic principle. We would ask you, Sir, to look critically at assertions that there are risks of mosaic identification and not simply to accept at face value that the disclosure of an identity -- which after all was intended to protect the individual from disclosure and from their true identity being known -- that the disclosure that a particular individual was an undercover officer by the name of John Bloggs, that that is something which would imperil the safety -- and I put it that way because, although privacy is in the balance, in a sense one's focal point in the first instance is on safety of the undercover officers themselves or of their families.

On the other side of that balance, self-evidently, not knowing the fact that a particular individual with

whom one was associated -- perhaps a Parliamentary agent in the example given just a few minutes ago -- not knowing that that person was in fact an undercover officer renders the participation of the target in these proceedings effectively pointless. It is going to be, in practical terms, impossible if that information is not made available.

So we do -- and Mr Francis does -- strongly urge you, Sir, to take the approach with great care, great caution, the notion that that in itself carries a significant risk. Indeed it would have such a detrimental effect on the conduct of the Inquiry, it would be difficult to see how that could easily be overcome.

Mr Francis aligns himself with the submission of the Counsel to the Inquiry that the nature of the public concern within the meaning of section 1 [of the Inquiries Act 2005] that has led to the establishment of the Inquiry will have an important impact on the question of openness. Some inquiries can more readily get at the truth and allay public concern where important evidence is subject to a restriction order and even heard in closed session.

So the Litvinenko Inquiry, which was touched on yesterday, is an example. There the material in question went to whether or not Russian state officials

were complicit in the murder of a British citizen in London. There was no question of British public officials being implicated, either by action or inaction, in any wrongdoing by the time the public Inquiry began. That issue was simply not one of those that were up for consideration.

That being the case, there was no question of the sort of conflict of interest issue that arises where the body which is responsible for asserting Public Interest Immunity is itself the body that is the subject of allegations of wrongdoing. Here, whilst the applications were made on behalf of individuals, the wrongdoing ultimately that is alleged is the wrongdoing of the Metropolitan Police Service itself.

This is not, in our submission, the sort of inquiry in which closed evidence can be heard without that level of damage to the public interest. We say, Sir, that it is right for you to have regard to the fact that the focus of this Inquiry is unethical and unlawful undercover policing practices, continued over decades, which allegedly subverted democratic principles of the rule of law.

Can I turn to the question of [Neither Confirm Nor Deny] now and do it briefly because essentially we adopt the position that has been taken by Ms Kaufmann in

outline.

THE CHAIR: Mr Emmerson, are you going to be longer than five minutes?

MR EMMERSON: A little longer.

THE CHAIR: I think we will rise now as we have had a longer morning and resume again at 2 o'clock.

(1. 00 pm)

(The short adjournment)

(2.00 pm)

MR EMMERSON: May I just say a word or two about [Neither Confirm Nor Deny]? As you will be aware, Mr Francis' case is that, as an undercover officer himself, he was never given a life-long assurance of confidentiality, nor briefed on the existence or meaning of the policy of [Neither Confirm Nor Deny]. Indeed, as I think it has become clear during the course of argument, had any briefing been given to any police officer at any time, it would have to have been along the following lines -- if I can emphasise this. I'm just going to come back to it in just a moment -- it would have to have been, 'Subject to any decision of any court, we will neither confirm nor deny your participation as an undercover police officer'. It cannot ever have been anything more than that.

The reason I emphasise that is just to say we --

Mr Francis -- aligns himself with the broad thrust of the submission made by Ms Kaufmann. As we understand that submission, it basically runs as follows: [Neither Confirm Nor Deny] cannot be absolute because exceptions are made. The issue, therefore, is as to the width of any exception. In the context of an inquiry under the [Inquiries Act 2005], section 19 gives you all the tools you need to look at the substantive merits which are ordinarily housed within a[Neither Confirm Nor Deny] policy. Again, I call them, for crude over-simplicity, "persons and methods".

So the question becomes: given that you have those tools available to you to conduct individuated considerations on a case-by-case basis in relation to the prevention of crime and so forth, what role is there, if any, left for what I might call the husk of [Neither Confirm Nor Deny] and does it have any independent life in the decision-making that you have to take under section 19 [of the Inquiries Act 2005]? Does it adumbrate at all?

There are often endless categorical debates about whether a particular thing in a particular context exists but has no weight or doesn't exist at all. I want to just look at the possibility that it exists but has little or no weight.

The difficulty with [Neither Confirm Nor Deny] is

that it is not really an individuated consideration at all. Indeed, it is a consideration which is difficult to individuate because, by its nature, if it has any independent value, its value is as a policy of never confirming or denying, subject to the exceptions which we have touched upon.

So if it is going into the balance over and above the merits of persons and methods, then it needs to go into the balance, obviously, as a policy that applies without distinction because that's the nature and value of the policy. That being the case, it is easy to see why people are sensitive about the suggestion that it should even be on your list because it is difficult for those following --

THE CHAIR: Let me give you an example.

MR EMMERSON: Yes.

THE CHAIR: The application of the policy depends on the question. If I ask Mr Hall whether, as a technique of policing, the Metropolitan Police Service employed undercover officers, he would answer that question "Yes" because it is common sense. If I asked him whether he had an undercover officer by the name of Mr X, he would say "I'm not going to confirm or deny".

The application of the policy, as I suggest, depends on the level of the question and the harm that you are

attempting to avoid. I am afraid at the moment I can't see it as an all-or-nothing application. The husk you speak of may still contain a lot of seed. It depends on the question. But in the end, does it matter because I have to reach an assessment as to what the public interest is and that's what [Neither Confirm Nor Deny] in any form is about and only about.

MR EMMERSON: Exactly. Exactly. It may be, Sir, that -- perhaps the husk analogy is not perfect, but the seeds that you are referring to would be seeds that you were entitled to and would take into account in a section 19 exercise.

THE CHAIR: Yes.

MR EMMERSON: The question is, once that has happened and you have taken all of those factors into account in the statutory balancing exercise, is there anything left of [Neither Confirm Nor Deny] at all?

THE CHAIR: You mean as of itself --

MR EMMERSON: As of itself as a policy.

THE CHAIR: -- does it have a worth as of itself?

MR EMMERSON: As of itself as a policy.

THE CHAIR: My view is that it depends what the question is.

MR EMMERSON: My submission is that there are two ways of looking at it. Either it falls off the equation altogether or, if it remains in, it is of no weight.

I will just explain why. First of all, we rely on the words of Mr Griffin yesterday in outlining the Secretary of State's position, not because it is a submission to you, but because it reflects the public concern that she identified as being the section 1 concern which in itself, as we saw in Mr Squires' submissions, is built within the section 19 considerations: to what extent would the order inhibit the ability of the Inquiry to address the issues of public concern?

Those issues of public concern, which Mr Griffin very helpfully outlined yesterday from his client, were shock and grave concern for the matters that emerged from the Ellison Review, a commitment to the greatest public scrutiny being required and a commitment to restoring public confidence, exposing wrongdoing in as public a way as possible.

Those are strong words. They reflect what the public concern was in the establishment of the Inquiry. So that is the first reason. We say the husk in itself, something that actually carries no weight in your evaluative exercise, ought to be put to one side.

THE CHAIR: Mr Squires gave me another example this morning. At least, he was submitting, those who may have been affected need to know the undercover names of the

officer or whether they were targeted and, if so, in what circumstances. That's a different question from whether the true identity of the individual officer should be revealed. Then comes the question of mosaic identification, which is a matter of fact I will have to consider.

MR EMMERSON: Yes.

THE CHAIR: In the end, if there is evidence that the true identity would be revealed merely by disclosing the undercover name of a police officer, I will have to make the balance in that knowledge.

MR EMMERSON: Yes. And will I submit, if I may say so, formidably difficult judgments ahead --

THE CHAIR: How nice of you to sympathise.

MR EMMERSON: As I think it through -- just to take that example, the immediate response would be, if there is a mosaic identification -- and that's why I said to you earlier on that that really needs to be critically examined because it is always asserted and it is easy to assert because it is always based on possibilities. I think what I wanted to get across was, because so much depends on it, it will be critical to look at whether there really is a demonstrable risk.

Assume that there is. The next immediate response would be to say, "All right. Well, don't disclose the

identity of the officer, give him a further pseudonym for the purposes of these proceedings, A2". Then there will be an argument that says, "Yes, but if they can see his face, they will know who he was and they will able to link it up to the pseudonym he used at the time, so 'A2' won't work, so you will have to screen him as well and have voice distortion". So you are left back with the way you started, with a Parliamentarian who doesn't know whether his agent was or was not an agent.

The moment they know who it is and can identify and give you a useful response and say, "That person did this to me", "Oh, you mean the man I had a relationship with for three months, that in fact was an undercover police officer" -- the moment that is an opportunity available to them, there is a risk of identification.

That's why, in a sense, this Inquiry is a paradigm of some of the challenges where -- I don't mean to put it bluntly -- but it is going to be essential to be unusually, perhaps in an unprecedented way, robust in responding to these type of [Neither Confirm Nor Deny] mosaic allegations because, at the end of the day, they are easy to make but not critically easy to examine.

It called to mind the general principle -- and we have seen it marbled throughout some of authorities -- that at least with the services, where they advise

Ministers and Ministers issue certificates, the courts will be slow to second-guess risk assessments on national security grounds, partly because the assessment of national security is a specialist exercise, partly because it depends on the assessment of piecemeal intelligence, partly because it is based on advice to Ministers and partly because Ministers enjoy democratic responsibility and accountability. None of those considerations apply here.

This is something which has been adopted by the Metropolitan Police Service and is being deployed here with the effect -- and I don't say "intention" -- but with the effect of shielding from public scrutiny the very thing that this Inquiry was set up to examine. I think one has to just confront that really at the heart of the problem.

So one reason for treating the husk, if I may say so, as just that is that we know what the Home Secretary understood the public interest to be when she set this Inquiry up. It is a rare thing to set up a public inquiry to look into secret methods, but that's what the Secretary of State did. As we now know, she was very clear in why she was doing it and what she intended. That is the public interest, in our submission, which causes a need for a very robust approach if one is going

to be able to meet that objective.

Trying to reconcile the irreconcilable -- and they are not necessarily irreconcilable, these things -- but faced with the submission that they are irreconcilable, you have arguments from one side of the room which say, "Just close the shutters then". But there are routes through and they have been, I think, demonstrably set out by the submissions that you have already heard.

I just add this: what is the damage to the remaining [Neither Confirm Nor Deny]? We hypothesise the case of a particular application and you have taken account of the risk to the individual, you have taken account of the risk to the prevention and detection of crime, persons and methods, and you have decided that, on balance, the evidence is so critical to an important public interest that that individual, all other things being equal, ought to be revealed to the extent of their undercover identity because in a way that is the fulcrum issue in this hearing and in the Inquiry for it to do its job.

What then is one left with? One is left with a policy which says we don't -- even if on all the merits you conclude disclosure should be given, the fact of the policy ought in itself to weigh in the opposite direction because the moment we start allowing

exceptions, the policy will break down. That's the whole argument that is always used. That's what underlies [Neither Confirm Nor Deny], that it must be applied in every case.

But it is demonstrably wrong to make that submission because the policy would remain entirely unaffected because the policy, as I said a few minutes ago, has to be, "Unless ordered by a court to do so, we will not disclose your identity and we will neither confirm nor deny that you are an undercover officer". But it is those mediating words at the outset which get lost in many of these submissions.

You had to take Mr Hall to the relevant passages in the code of practice and say, "Does it say here anything about what they are told to get the concession?" Well, of course they know it is not absolute. But the critical thing is that it is not absolute because a court stands above a police force, and if a court orders its disclosure, then disclosed it must be. So that policy remains. There is no damage to that policy. You will have taken account of all the merits considerations and you will have cast away the husk because there is nothing left in it.

So we do say that Ms Kaufmann is right to say that, if you set sail with [Neither Confirm Nor Deny] as your

compass or in any way a part of your kit, the outcome is that you have to try to apply, shoehorn, a policy, the very purpose of which is to admit of no exceptions, into a situation where you are making individuated balancing calculations and where you may well take the view that disclosure is appropriate.

So we would respectfully invite you to say that [Neither Confirm Nor Deny] plays no part in the decision-making process. It is not even a factor to take account of because you will have taken account of the factors that it takes account of and nothing else is left and the policy stands. If it has ever been understood by police officers as somehow not including the exception of a court order, then that is the responsibility of the Metropolitan Police Service.

If they do understand that, then they will readily understand that the size of a court order -- that is to say the amount of information that it releases -- will depend on the circumstances. It is accepted on that side of the room that there will be cases where a court orders the disclosure of the identity of an undercover officer or other information protected.

That may be the case where the issue arises -- criminal trial, on appeal, civil proceedings, what have you -- in relation to a particular case and therefore it

is relatively confined. The Metropolitan Police Service can live with that because, as Mr Hall says, it is just a small exception. This is a bigger exception because it is an inquiry looking at undercover policing, but's still an exception which ought to be very well understood in the Metropolitan Police Service. It is actually quite difficult to see how the matter can be put in any other way.

Anyway, those are our submissions on [Neither Confirm Nor Deny].

I will touch on a couple of things, if I may, very, very briefly. Wrongdoing -- or I should say "alleged wrongdoing": you have been taken to DIL, Binyam Mohamed, Al Rawi and the authorities that are summarised at my learned friends Mr Squires' and Mr Stoate's skeleton argument at paragraphs 18 and following, all of which set out the principle, which is as old as the hills really, that public interest immunity doesn't attach to wrongdoing because there is no confidence in iniquity.

Whilst you are told that it would be wrong for you to prejudge allegations of wrongdoing -- and of course the Inquiry would not prejudge allegations of wrongdoing -- Mr Hall is very frank in saying that he doesn't shy away from the police wrongdoing that he says is bound to be revealed by the Inquiry. So he doesn't

seem to have any trouble concluding that it is inevitable that this Inquiry will reveal police wrongdoing.

We know that the Home Secretary's conclusions on the Herne and Ellison reports reflect provisional views as far as -- at least as far as you are concerned, provisional views -- and Mr Francis himself will give evidence of crimes committed, widespread unethical behaviour, a tolerance at a very high level and systematic misuse.

The criteria, we submit, are well satisfied for an approach which accords very limited weight, unless there is a strong or indeed overwhelming countervailing public interest consideration.

Self-disclosure: that, of course, again is an issue which touches on Mr Francis in particular. The essential submission made on behalf of the Metropolitan Police Service is that it would be wrong for you to force them to confirm self-disclosures because that might cause additional harm either to the undercover officer themselves or potentially to their family.

We would respectfully submit that that requires very careful analysis. Again, I put this from the point of view of a man who has self-disclosed. Where you have an individual who chooses, who elects, to disclose

himself as an undercover police officer, one has to look very carefully at how -- materially how, not general and vague assertions -- but how that confirmation could have the effect of significantly altering the risk balance.

There could be circumstances -- I'm not suggesting that it could not happen -- there might be circumstances where an individual is linked to an ongoing police investigation, for example, or to another individual who is potentially at very serious risk of reprisals. But there would need to be a very clear analytical framework or pathway to get to the conclusion that there would be additional harm.

If that is suggested, then obviously it is a question of identifying the weight of that harm in order to determine whether it is sufficient to justify a restriction order.

Staleness: I have used that as a shorthand term to refer to applications to keep secret methods that are either no longer in use or not current. The fact is that, as far as the Special Demonstration Squad is concerned, the unit with which Mr Francis was involved, it was disbanded eight years ago and began operations in 1968. So much of what it has done over the years is very old indeed.

Whilst some emphasis has been placed by the

Metropolitan Police Service on the formalities put in place by [the Regulation of Investigatory Powers Act 2000] and the system for regulating Covert Human Intelligence Sources, that of course clips only the tail-end of the period of the operation of the Special Demonstration Squad.

Now, we are not in a position -- although Mr Francis sits behind me and will be in a position, if there are any questions that you have on these issues, to give instructions to me to make submissions to you on them -- but we are not in the position to give you chapter and verse at this stage on whether operational techniques that were in use are such as to have fallen into disuse. But some of these so-called techniques don't amount to very much.

I mean, operational techniques -- I'm not revealing anything very secret here or secret at all -- operational techniques involve, you know, adopting a false name, adopting a false persona, adopting a false job, having a handler, having relatively irregular meetings. We are not talking about sophisticated [Government Communications Headquarters]-style methodology.

I think that is important to bear in mind when you are faced with questions about policing methods, but Mr O'Connor says -- and I am sure he's right -- that an investigation several years ago could, he says, involve

techniques that are still in use. I'm not in a position to gainsay that that's the case. If it is put in that way, I have to accept that that is a legitimate proposition, not least, I think, because some of the methods are pretty rudimentary.

We would say it is a minimum prerequisite for you to include the protection of methods as a factor on any individuated evaluation if the position suggested by Mr O'Connor is in fact found to be the case; in other words, that there is a specific -- not a non-specific, not a general -- not an obvious technique -- but something specific that wouldn't be guessed at or known that is still in use; the old-fashioned trade-craft talk. So there is something about it that is still in use so that it could be a continuing threat to policing.

If that is not satisfied, then we would say it doesn't fall into the equation at all. If it is satisfied, that's where the balancing exercise then needs to be performed. So we note that the question of currency isn't specifically adumbrated on your list of considerations and we would invite you, whether under the "Other" heading or otherwise, to give that separate and individual consideration.

Lastly, if I may, Article 3 and Article 8 procedural obligations and disclosure. I'm going to take this very

briefly, if I may. You have been taken by Ms Kaufmann to Al Nashiri. I will not take you to it again, but may I just give you the reference? Bundle 4, tab 95, page 571, paragraphs 494 and 495.

In essence, the language used -- and I hesitate to describe this as a principle of law at this stage because the courts are increasingly speaking of the right to truth -- it is in reality something culled from a combination of investigative obligations and accountability duties, but one which recognises that the outcome of accountability obligations does not just affect the individuals, but may in certain circumstances be a matter of interest to the public at large. You might think that that is not saying very much more than that it is a matter of public interest, which is precisely what the Inquiry is set up to direct.

But the reason the authorities are important -- and the other one is to revisit, if I may, without taking it out, volume 1, tab 19, Al Rawi. In fact, would you mind, can I just check whether Mr Squires took you to paragraph 83?

He did. Then please don't take it out again. There is a passage there in the judgment of Lord Brown in which he referred to "A-type disclosure" and the difficulties of proceeding without A-type disclosure.

By "A-type disclosure" he is, I think, referring to disclosure of the sort that was held to be necessary by the European Court of Human Rights in A v United Kingdom, which is the Strasbourg limb of the Belmarsh litigation. There the Strasbourg Court held that closed evidence procedures could be potentially fair in national security cases, but only if the person affected was given a core irreducible minimum of disclosure to enable her or him to understand the case they had to meet and to give instructions to the special advocate.

This was touched upon by Mr O'Connor yesterday. He said, "This is Article 6. It has nothing to do with Article 3 or Article 8. It is pure Article 6 and there is no case in this jurisdiction or any other that's taken that form of words and put it into the investigative obligation in Article 3".

That may be right in terms of authority, but the proposition is self-evidently correct, isn't it, that it must be part of Article 3 because the obligation of investigation in Article 3, which at least, so far as some of these applicants are concerned, you are arguably engaged in, requires the state authorities to ensure the participation of the affected person, the victim or their next of kin, to the extent consistent with the

public interest. Obviously there will be limits, but to say that there will be limits as to the degree of effective participation does not follow that there will be absolute non-participation. There must be some degree of effective participation.

Well, if there must be some degree of effective participation, then there must be an irreducible minimum duty of disclosure. The two go hand in hand. But what is the core irreducible minimum, of course, is a different question.

I did pause to think, if that proposition is right, does it follow that really, as Counsel to the Inquiry suggested yesterday, it doesn't really add anything. Quite often it is tempting with Convention arguments, as I have done in another context a moment ago, to submit that they don't really make any difference because you have a piece of legislation which is designed to balance the relevant interests and the power to do so in the broadest way possible.

But in this instance there is one respect in which, in our submission, it does make a difference. That is on the question which seems so central, which is the disclosure of the undercover identity of [undercover officers], because if, as we have demonstrated a little while ago, that is allowed to become, through mosaic identification and

[Neither Confirm Nor Deny] and so on, the thing that causes this Inquiry to be unable to do its job in public, if those behind me and to my left are not able to know if there was infiltration of their constituency offices, their organisations, their homes, their beds, by undercover police officers, they are not going to be able to participate in any effective way at all. So to that extent the core irreducible minimum must be -- and this is the issue -- the identity, the undercover identity, of the officers concerned.

Those are my submissions. Thank you.

THE CHAIR: Thank you, Mr Emmerson.

Mr Millar.

Submissions on behalf of the Media by MR MILLAR

MR MILLAR: Sir, we appear on behalf of the seven national newspaper groups, the news broadcasters mentioned in paragraph 1 of our submissions and also the Press Association, who are not mentioned in our submissions.

We are very grateful for the opportunity to be heard and we are conscious of the relatively late hour. Our written submissions are at tab 11 in the Inquiry's file of written submissions and we will take them as read and try not to repeat, but simply to enhance.

I wish to begin, if I may, by placing these

proceedings and the media's position in relation to them in a wider context. The first duty of the media is to scrutinise the exercise of power by the state. It is incumbent on journalists to pass information and ideas about the activities of the state to the public in the public interest. All of this is well understood both at common law and under the Convention. It is therefore important for journalists to have access to information about how the state is operating.

This was recognised by Lord Mance in the Kennedy case [[2015] AC 455], which is at tab 71. I want to read the first paragraph of his speech to you and then I will try to avoid taking you to authority after that, if at all possible.

Lord Mance says this at paragraph 1 of his judgment:

"Information is the key to sound decision-making, to accountability ..."

THE CHAIR: Which volume, please?

MR MILLAR: Volume 3, sir.

THE CHAIR: Yes. Tab ...?

MR MILLAR: Tab 71. It is internal page 488, paragraph 1.

THE CHAIR: Thank you.

MR MILLAR: "Information is the key to sound decisionmaking, to accountability and development; it underpins democracy and assists in combating poverty, oppression,

corruption, prejudice and inefficiency. Administrators, judges, arbitrators, an persons conducting inquiries and investigations depend on it; likewise, the press, [Non Governmental Organisations]and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise be forthcoming. These competing considerations, and the balance between them, lie behind the issues on this appeal."

This paragraph could have been written with this hearing in mind.

The role of the journalist, where there is a mass of information, as there will be at this Inquiry, is to monitor it, identify what is of public interest, extract that and curate it into a digestible form which will interest the public, and then deliver it up to the public in the form of the key points for discussion and debate. This is the journalist in his or her familiar public watchdog role and it has often been said by our judges that the journalist, in a courtroom at any rate, is the eyes and ears of the public.

So although we appear on behalf of the media organisations mentioned in our written submissions, both in constitutional theory and in practice, we are here also representing the interests of the public to receive information acquired by this Inquiry.

In the past the state, especially its executive branch -- less so its legislative and judicial branches -- has been highly secretive. In his 1989 book on Whitehall, the contemporary historian, Professor Peter Hennessy, famously described state secrecy as being as much a part of the British landscape as the Cotswolds.

But there is now a range of approaches in our democratic system to the disclosure of official information. At one end the system is effectively closed. Here the Official Secrets Act 1989 operates, and journalists, as with the revelations about the activities of undercover officers that have led to this Inquiry, have to rely heavily on whistle-blowers or good luck if they are to be able to learn of and publicise misconduct by those acting on behalf of the state.

The other end of the range is disclosure of information by the state which is voluntary, perhaps even enthusiastic; for example, briefings by departments when they want publicity about what they are doing. In

the middle lie other regimes through which state information may be disclosed to journalists, such as Freedom of Information Act 2000.

It is important to appreciate, we would suggest, that the Inquiries Act 2005 is one of these regimes. It is, however, very different from [the Freedom of Information Act]. In [the Freedom of Information Act 2000] there is the schedule of standing public authorities, permanent public authorities; as you will know, Sir, a very long list.

The contours of their disclosure obligations to the public and the press in relation to any information they may hold are defined in minute detail in the Act. The circumstances in which the [Inquiries Act 2005] operates are of course very different. There is a targeted investigation undertaken by an ad hoc, not a standing, public body. Moreover, this is a quasi-judicial body. In some cases, as here, a judge may be seconded to lead the Inquiry. Although it is not a court, it operates much more like a court than, for example, a local authority or a regulatory body or a government department, as anyone who has sat in this room in the High Court for the last two days can testify.

The information it acquires and holds is not its own information, nor is it held exclusively for its own

purposes. This is a very different statutory and factual context to that under which [the Freedom of Information Act 2000] operates. This becomes important when we consider journalistic rights of access to the information it holds, whether under common law or under Article 10 or simply under the [Inquiries Act 2005] regime itself.

One reason, of course, why the judiciary has historically been regarded as less secretive than the executive is its strong promotion and development of common law principles of open justice. These principles have developed apace in recent years, so that, for example, there is now a presumptive right for the press and public to access documents considered by the court, both criminal and civil courts, and even if those documents are not read out in public in court.

In the case of Kennedy, the Supreme Court has now identified a broader constitutional principle of openness that might apply to all public bodies, but certainly on the face of Kennedy applies to statutory regulatory bodies; a point I will return to in a second.

So we would suggest that at the highly abstract level at which we are presently operating at this hearing, two key questions for this Inquiry are now: one, where does the [Inquiries Act 2005] lie within this range of approaches to disclosure of official

information? Two, how much official information should be disclosed at this Inquiry, given this Inquiry's terms of reference?

The answer to the first more general question we say is or should be obvious. The [Inquires Act 2005] is well towards the end of the range that favours, indeed requires, wide public disclosure of the information required or created by the Inquiry processes. In statutory terms, this is because firstly an inquiry can be set up where it appears to the Minister that there is public concern about certain events. That is section 1; secondly, because the Inquiry has very strong powers to get in all the relevant evidence, section 21; thirdly, because the relevant information it acquires is presumed to be publicly available, section 18.

The restrictions on public and therefore press access are only permissible if required by law under section 19(3)(b) or deemed conducive to the Inquiry fulfilling its terms of reference or necessary in the public interest, 19(3)(b).

It is also obvious because of the development of the concerns that lead to public inquiries being set up. The way in which these develop may differ, but as you may know, Sir, a distinguished House of Lords committee conducted post-legislative scrutiny of the Act in

2013/2014. It is a valuable report and well worth reading.

Importantly, it noted at paragraph 56 that:

"It is generally when concern has arisen about a 'lesser investigation' that previous inquiries have been initiated. Where it is the established regulatory or investigatory body which itself is seen to have failed, there is really no way that public concern can be allayed short of an inquiry."

This inquiry is of this common type, described at paragraph 56 in the House of Lords' committee report. Here there have been lesser investigations, by which I mean no disrespect. I simply mean with less powers which are less wide-reaching and less public. These were mentioned by you in your opening remarks. They include Ellison, Operation Herne and Taylor and arguably also those undertaken by the civil and criminal courts in various forms. Reports of some of those cases appear in our authorities bundles.

We would suggest the answer to the second question, how much official information should be disclosed given this Inquiry's terms of reference, should also by now be obvious. There is a system, if I can describe it as that, for regulating undercover policing. The following, amongst others, play a role in the system:

the provisions of [the Regulation of Investigatory Powers Act 2000]; the [Investigatory Powers Tribunal], where complaints are made about conduct authorised under Part II; the conduct rules of our disciplined and hierarchical police service, especially, we would suggest, those requiring officers to act with integrity; the [Independent Police Complaints Commission], where matters are referred to meriting investigation; and Her Majesty's Inspectorate of Constabulary.

These would seem to have failed in relation to the events leading to this Inquiry. The result was misuse of some of the most potent and potentially harmful powers of the state. At the heart of the Inquiry is the question of how and why state agents involved in undercover policing could misconduct themselves to the extent already revealed; also how the undercover tactic has been used in other cases and whether it has been properly regulated in other cases.

To allay public concern about these matters, comprehensive disclosure to the public and the press is required. It will not suffice to have a largely closed and, to the press and therefore the public, a bland and featureless inquiry. The Inquiry will lack credibility and is likely to be seen as a cover-up of a cover-up. The coverage in the press will be limited.

It is true, as Lord Mance observed in the passage in

paragraph 1 in Kennedy that we just looked at, that information can be "genuinely private, confidential or sensitive" and that these interests themselves merit respect. These countervailing interests -- countervailing to the interests that demand disclosure to the public and the press -- are catered for in the [Inquiries Act 2005] regime by the possibility of restriction orders under section 19(2).

I will make some very limited comments about these countervailing interests in the last part of these submissions because they have been exhaustively covered by the arguments you have already heard. But Lord Mance's immediately preceding observation must always be borne in mind in this process. It is perhaps equally important. I will remind you of what he said:

"Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection."

A similar point was put rather more bluntly by two of the consultees in the Effective Inquiries consultation which preceded the [Inquiries Act 2005]. They are recorded in the resulting [Department for Constitutional Affairs] report, which is in your bundle tab 69, as saying:

"...national security should not be used as an excuse for covering up politically embarrassing information."

This Inquiry, faced with requests to restrict public disclosure of information, will, we would respectfully suggest, be astute to bear in mind at all times that where the state has misconducted itself, there will always be people and institutions who stand to lose face and reputation when the truth is being sought through investigation. They may seek to avoid embarrassment and damage to reputation by pleading public interest in secrecy. It is part of the Inquiry's role to spot this happening in relation to the information it holds and to ensure that the attempt does not succeed.

I turn now to the position of the press wanting access to the information of the Inquiry. There is an issue about whether [Article 10 of the European Convention on Human Rights] gives a right to the press which is engaged when the Inquiry is considering a restriction order. Article 10, of course, is a qualified right, so whenever we talk about "a right under Article 10", it is a presumptive right, not an absolute one. But it is a right nonetheless. It has to be displaced on valid grounds if it is to be denied.

Now, it is true that on the Leander and Gaskin [(1989) 12 EHRR 36] line of authorities in Strasbourg, to which you were referred yesterday, there is no general public right of access or press right of access to information which public

authority wants to withhold under Article 10.

Although Article 10 speaks of a right to receive and impart information and ideas, Strasbourg has not yet interpreted this as meaning that there is such a general principle, though it is true to say that this approach has come under some question in recent years in Strasbourg, not least of all from the post-Communist countries in the east, which experienced state secrecy in its most extreme forms.

When the press seeks access to information that comes before a court or a tribunal, that is an entirely different matter. Here very different principles apply. We in this country would use the language of "open justice" to describe them. Under Article 10, Strasbourg speaks of the duty of the press to inform the public about the court proceedings.

So on this issue, "Is Article 10 engaged?", as I said a moment ago, the particular factual and statutory context of this Inquiry in which the press seeks access to the public information becomes all-important.

We have explained at paragraphs 15 to 20 in our written submissions why the present factual and statutory context gives the press presumptive right under Article 10 to access the information acquired by

the Inquiry. It is that information that we are talking about. It is the information that you, Sir, and your team have got in, as I put it earlier on, as part of the information before the Inquiry. I'm not talking here about information that resides with the Metropolitan Police Service or with the Home Office. It has come into your possession and control.

This is not a case where the press is seeking to rely on Article 10 rights to bolster an argument for disclosure of information which is held for its own purposes by a standing public authority under fire. That is what, in [British Broadcasting Corporation v Sugar (No 2) [2012] 1 WLR 439], the member of the public who was trying to get access to the document held by the BBC, was doing; it is what the journalist was trying to do in Kennedy.

The reasoning in those cases in the Supreme Court as to whether there was a presumptive right under Article 10 to access the information sought has no application here. You must approach this issue fresh in light of the particular statutory and factual context in this case. Here, the reasoning of the Court of Appeal in the case of [A v Independent News and Media [2010] 1 WLR 2262] must apply.

That was a case where the doors were closed to a journalist who wanted to get access to the court of

protection and a slightly arcane issue arose as to whether Article 10 was engaged at the point at which the journalist expressed a wish to get through the closed doors and acquire the information that was being made available in the private hearing or not. The Court of Appeal said it was engaged at the point the journalist was trying to get through closed doors.

There had been an earlier decision of the Commission in Strasbourg, in a case called [Atkinson v United Kingdom (1990) 67 DR 244], where a similar issue arose at the Old Bailey, where the doors were closed to a sentencing exercise where a brown envelope had been passed to the judge. The journalist was standing outside the door and wanted to get in to access the information in the closed hearing. The Commission in that case said it probably is engaged in this situation, but the point didn't need to be decided.

If you go back to read the decision of the Court of Appeal in [A v Independent News and Media [2010] 1 WLR 2262], you will see that the court -- a very strong court with the President of the Family Division, the Master of the Rolls and the Lord Chief Justice -- drew on [Atkinson v United Kingdom (1990) 67 DR 244] and recent Strasbourg authorities and said that the reason the journalist wanted to get through the doors into the court of protection was because there was already

information in the public domain which was of public interest which could be added to by what was heard behind closed doors, and because the journalist wanted access for the purposes of reporting on judicial proceedings, therefore Article 10 was engaged. You can see that at paragraph 47 in the decision.

So that is why Article 10 applies here. This is a quasi-judicial public inquiry. These are therefore, in broad terms, judicial proceedings. The press wants to access all of the information in the possession of the Inquiry because of what is already in the public domain. That is what makes it a matter of public interest and newsworthy, the matters that led to the setting up of the Inquiry in the first place, and it wants to report on those matters in the public interest; in other words, the situation is no different from Atkinson and it is no different from A v Independent. But it is very different from Sugar and Kennedy. That, with respect, is where the Metropolitan Police Service and perhaps Counsel to the Inquiry have misunderstood the position.

But it is clear from Kennedy that the Article 10 that you have formulated is only one possible formulation of what is a much, much wider issue; namely should the journalist in this situation be regarded as

having a presumptive right to access the information, whether under Article 10 or under our own common law constitutional principles or, rather less grandly, simply by statutory implication, looking at the wording of the legislation in issue, the [Inquiries Act 2005].

In Kennedy, the Supreme Court was looking at disclosure of information to a journalist by a regulator, not a public inquiry. The regulator was the Charity Commission. The legislation did not contain presumption of disclosure of the sort we see here for an inquiry under the [Inquires Act 2005]. There was nothing of that sort, nothing like section 18. The journalist, to put it shortly, had to approach the Charity Commission and ask for the information. It was about an investigation being conducted by the Commission. But the Charities Act 1993 does require the Commission to increase public trust and confidence in charities and to enhance the accountability of charities to the public interest.

I will not take you to the passages in the judgment that set out the statutory provisions that were relevant in that case. As you know the authority is at tab 71, the statutory provisions are summarised at page 495 and the key provision there is section 1(b)(iii).

The Act also required the Commission to obtain, evaluate and disseminate information in connection with

the performance of its functions or meeting any of its objectives, section 1(c)(ii).

So you had a statutory framework under the Charities Commission which the Supreme Court looked at, rather like you are looking at the framework under the [Inquires Act 2005], to answer the question, "Should the journalist have a presumptive right of information and access to this information?" Lord Mance, with whom Lords Neuberger, Clarke, Sumption and Toulson agreed on this point, said that the journalist in effect had such a common law right when the Act was carefully read and one understood the statutory functions and responsibilities of the Commission under the legislation.

You would need to read paragraphs 49 and 50 to pick up those points in the judgment of Lord Mance. What Lord Mance said was that the engagement of Article 10, even if it was assumed that Article 10 was engaged in favour of the journalist in that situation and the application of its methodology under Article 10(2) would involve exactly the same considerations and the outcome would be no more likely to lead to any outcome more favourable to Mr Kennedy's viewpoint.

In other words, he and the court were saying that the journalists' desire to have the information

disclosed to him would be matched -- the application of the law that would determine whether he got the information would be matched at common law in exactly the same terms as if Article 10 was engaged. So we have our second route to the press' right to this information, which is common law.

As I say, you could also imply it from the words of the statute. It is a strong presumptive right, we would say on behalf of the journalists, to access the information in the present situation. It is rooted in the reasons why the Inquiry exists, the information that's being acquired by the Inquiry, the corresponding public interest in the information being disclosed, the role of the press as a public watchdog, acquiring such information and passing it to the public, and the statutory words with which we are all very familiar.

So lastly I just want to say a few words about when there might be a sufficiently strong countervailing interest to override the presumption of disclosure. Parliament has provided a pointer as to what is to be regarded as a sufficiently strong countervailing interest by reference to the restrictions that may be ordered, see section 19(3) [of the Inquires Act 2005]. This contains limiting words on the Inquiry's power to restrict access. These are only such restrictions as are required by law

or considered to be “conducive to the Iiquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in 4.”

These threshold tests are, as one would expect, all in very strong terms. ’Required in subsection (a)A’ means what it says, not that there is law, for example, under the Convention, which can be invoked to argue for a restriction, but that the restriction is required when the facts are applied to that law. So does "necessary in the public interest". That means what it says. As I shall mention in a moment, the public interest must be identified clearly and the necessity must be established by evidence.

"Conducive", we accept, on its face is slightly more flexible, but also more problematic. The Inquiry may have, on the one hand, the party or witness saying it cannot or will not give evidence freely or with confidence if not offered this form of protection; on the other hand, the concern being expressed about the need for an open inquiry to allay the public concerns. The Inquiry may have to resist the temptation to accede to the former suggestion at the expense of the latter interest.

In practice, the grounds for an application said to

cross one or more of these generic thresholds will, we suggest, fall under one or more of Lord Mance's three headings, the three countervailing interests. We agree with the non-state non-police core participants and Mr Francis that the state policy of [Neither Confirm Nor Deny] has no independent role to play in this process. It is for the Inquiry to decide for or against particular restrictions on disclosure of information in the possession of the Inquiry on the merits and on the evidence that is placed before it.

The first heading is, "Private information". One might say, "Private or personal information". Certainly the state and this Inquiry has to act compatibly with privacy rights, but some care is needed here. The first question is whether the right to privacy under Article 8 is engaged at all.

As we pointed out in our written submissions at paragraphs 29 to 31, disclosure of information about how a public official conducts him or herself does not necessarily engage the Article 8 right, even if it causes some damage to that person's reputation. There has to be a direct effect on the person's private and family life; see the references to the recent judgments of Mr Justice Warby in [Yeo v Times Newspapers Ltd [2015] EWHC 3375 (QB)] at tab 112, paragraphs 143 and 144.

Whether the right is engaged is a matter of evidence. So are issues as to the strength or the weight of the privacy right if it is engaged. At each stage the evidence has to be carefully considered and an assessment made about what impact disclosure of the information in issue will have on the person's private family life. This has to be balanced against the arguments against the possible restriction order.

We would commend to you the reasoning of Lord Rodger in [In re Guardian News and Media Ltd [2010] 2 AC 697] at tab 82. He did that exercise in a case where a claimant contended that naming him as someone who the Treasury suspected of facilitating terrorism was incompatible with his Article 8 rights. The court had anonymised him and the press was asserting its Article 10 right to know and publish his identity.

At paragraphs 58 and following, the analysis is instructive because it shows the need for more than speculative evidence and it recognises that, when information available to the press to report judicial proceedings is stripped of the names of those involved and other information that adds context and colour, the report is unlikely to be read. That's paragraph 63. It may not be published or published prominently. A passage from the leading authority of Re S at the speech of Lord Steyn is cited to that effect.

This is an important issue for this Inquiry. It may end up simply not being reported on at all because, to put it bluntly there may be worthy but there will not be newsworthy information emerging from it.

The conclusions at paragraph 73 and 75 are important. In this situation -- I won't take you to them. I will just give you the reference -- as in the Guardian case, the press would not be wanting to report some aspect of the individual's private life, a tabloid article, where there is intrusion into somebody's personal and private life, because that of itself is of interest.

Here we are talking about the private lives and the professional lives of police officers. The availability of the information to the public would unquestionably contribute to a debate of public interest.

In practice we suggest that most applications of this sort, that is relating to personal or private information, will have to be made out if at all in the territory of Articles 2 or 3; in other words that some sort of risk of that type of harm to physical integrity is shown. They will have to be made out on the evidence or fail.

The second heading is "Confidential information". It is important to emphasise that the information that

is likely to be contentious under this heading is government-generated confidential information. Some of this happens to be confidential by statute under [the Regulation of Investigatory Powers Act 2000],rather than through practice, but this makes no difference to the point I'm about to make.

Here it has been conclusively established at common law, since the Spycatcher case [Attorney-General v Observer [1990] 1 AC 109] which we put in the bundle, in the late 1980s, that the law of confidence operates differently. The government must establish a sufficient public interest in non-disclosure, rather than the other way round.

We would refer you to the well-known passage in Lord Goff's speech in the Spycatcher, which is now tab 140 in your bundle, at page 283C to E.

The [Inquiries Act 2005] achieves the same effect as our common law of confidence in relation to public information because the public authorities are disclosing the confidential information to you, but asking you to keep it confidential, they say because there is sufficient public interest. It is important to bear in mind how our common law has operated in this area since Spycatcher for the reasons which underlie common law.

Prior accessibility to the information on its own is not regarded as a sufficient test of whether the

information should be protected by a judge. If the only vice of the information if published is, in the famous words of Mr Justice Mason in the High Court of Australia in 1980, that it enables the public to discuss, review and criticise government action, this is not enough. There must be more and it must be compelling.

Finally, Lord Mance spoke of "sensitive information". We will take this as meaning information that, if disclosed, damages national security since the protection of information, disclosure of which may damage national security, has traditionally been dealt with separately from disclosure of other state confidential information. It is also a distinct legitimate aim under Article 10(2) to protect information that damages national security.

There is a temptation to defer to assertion by the state here, asserting that disclosure will damage national security, rather than require proper evidence demonstrating that this is the case. We say the latter is always necessary and we can do no better than the words of Lord Scarman in the Sarah Tisdall case, [Secretary of State for Defence v Guardian [1985] 1 AC 339], which we put into your bundle, I think, at tab 139.

Evidence is required of the sort that can persuade a judge to reach a judgment that the disclosure to the

press or the public of the information will in fact damage national security.

So those are our submissions. At 37 to 38 in our written submissions we have raised the issue of whether the Inquiry might adopt a practice by which the media is given an opportunity to make informed submissions where consideration is being given to restrictions on disclosure of the information of high and legitimate public interest. We appreciate it would not be possible to do this with every withheld or redacted document, every particular piece of information. But you will know if we do not when we are in this territory and we would want to be heard at that point if there is such information being withheld and we would like to be heard on an informed basis.

There is no absolute right to be heard in the press in that situation, but in [A v BBC (Scotland) [2015] AC 588] in the Supreme Court, as we mentioned in our written submissions, it was recognised that the duty of fairness of the court or a public inquiry to the press requires an effective opportunity to be heard when being denied access to information it wants to report or the possibility of reporting. Similarly, in Strasbourg in [Mackay v United Kingdom (2010) 53 EHRR 19] there is clear authority that the press must have an effective remedy for its Article 10 right

where it is reporting, at any rate, court proceedings.

So there are strong arguments for giving the press the opportunity to be heard if the information is important enough and the court is considering withholding it. We would ask you and invite you to bear that in mind as you get to what Mr Emmerson described as the "very difficult decisions" you have to take in future in this Inquiry when you take them.

Sir, those are our submissions.

THE CHAIR: Thank you, Mr Millar.

Is Helen Steel here? Would you like to come forward, please? We will make you a place.

Submissions on behalf of the McLibel Support Campaign by MS STEEL

MS STEEL: Thank you. I wanted to make a submission on behalf of the McLibel Support Campaign. The first thing I wanted to do actually was just because there has been considerable reference to it, is -- to the case of DIL, is just to let you know that, as a litigant in person, I actually appealed that decision and I was granted leave to appeal. The grant of leave to appeal noted the public interest in the appeal being heard, but the case then ended up being settled with a public apology for the serious human rights abuses and so the appeal was never heard. In case it is useful, I have a copy of the

grant of appeal notice which refers to public interest.

THE CHAIR: If you have a copy, please hand it up. (Handed)

MS STEEL: I just also wanted to start by saying that throughout all the legal proceedings that I have been involved with, where the police have asserted Neither Confirm Nor Deny, they have never offered any documentary evidence of their so-called policy on [Neither Confirm Nor Deny], of how it is applied or how any exceptions to it are decided. That is actually despite an order from Master Leslie in August 2013 that they should provide that documentary evidence. Instead, they provided statements, but there is no documents that have ever been provided about this so-called [Neither Confirm Nor Deny] policy.

So I just wanted to start really with a brief history about what I know of Neither Confirm Nor Deny in relation to the Special Demonstration Squad and other political policing units. I will not comment on what the situation is with the wider Security Services or with the National Crime Agency position, except to say that I have seen newspaper reports of undercover officers giving evidence in criminal trials which are open to the public. So it does seem that it is only the political policing units which are seeking total secrecy about everything they do.

I think it is also worth bearing in mind in relation to the issues raised that the main concern of this Inquiry is political undercover policing, which is different to general undercover policing in that the intention is not to obtain evidence for prosecution; it is to obtain intelligence on political movements.

The result of that is that while general undercover operations are subject to a certain amount of outside legal scrutiny as a result of the requirements for due process and fair trials, political undercover policing has never been subjected to outside scrutiny until now.

I want to start with why we are here at all. We are not here because the police unearthed evidence of bad practice within these political policing units and were so concerned that they brought it to the attention of the Home Secretary. We are here because of the bravery of Peter Francis coming forward to blow the whistle on the deeply alarming, abusive and undemocratic practice of the Special Demonstration Squad and we are here because of the detective work of women who were deceived into relationships with undercover police officers and who, despite the wall of secrecy around these secretive political policing units, managed to reveal the true identities of our former partners and expose these and other abusive practices to the wider world. I think it

is important to bear that context in mind when listening to the police assert that you can hear their evidence in secret and still get to the truth.

So going back to the history of political undercover policing and Neither Confirm Nor Deny, these revelations started to unravel, really, on 19 December 2010, when The Times newspaper wrote an article about Mark Kennedy's seven years' undercover in the environmental movement.

The story had already broken on the internet, on alternative news websites, including Indymedia, and The Times reported on his involvement in the planned invasion of Ratcliffe-on-Soar Power Station, which had resulted in a number of protesters being convicted.

It was reported that his real identity was Mark Kennedy, but that he was known while undercover as "Mark Stone". The article then continued:

"Last week two police forces confirmed Stone's status to the Sunday Times. 'The individual is a Met officer', said Nottinghamshire Police. 'He is an undercover officer', said the Metropolitan Police, 'so we can't say more'."

So on the face of it, it took nothing more than Mark Kennedy's identity being revealed on the internet for the Metropolitan Police Service to confirm that he was an

undercover police officer. The police actually confirmed his identity long before he was officially named in the appeal judgment in July 2011 or in the Her Majesty's Inspectorate of Constabulary report in 2012. The police also publicly confirmed Jim Boyling as a police officer via the media on 21 January 2011. The week after the DIL story of her relationship with Jim Boyling first appeared in the national press, the Guardian newspaper reported that Jim Boyling had been suspended from duty pending an investigation into his professional conduct. It said that, "In a statement the Metropolitan Police said a serving specialist operations detective constable has been restricted from duty as part of an investigation following allegations reported in a national newspaper", and a similar report was carried on the BBC.

There was not just the confirmation in the media. DIL or, as she's known in this Inquiry, Rosa, got in contact with me in late 2010 in relation to her former partner, Jim Boyling, who I had known as "Jim Sutton", when he was infiltrating Reclaim the Streets. I was with her when she was interviewed in March 2011 by the Department of Professional Standards, who were investigating the conduct of Jim Boyling.

Her account was absolutely harrowing and, at the end of it, the police officers apologised on behalf of the

Metropolitan Police. At no point in that interview did they mention [Neither Confirm Nor Deny]. On the contrary, they confirmed that Jim was a serving police officer. They also named Jim Boyling and referred to him as a serving officer in correspondence sent relating to that interview and potential disciplinary issues arising from it from February 2011 until June 2012.

If you want to see any of that correspondence, it can be made available to show that he was named and they were not applying Neither Confirm Nor Deny.

They also provided a copy of their terms of reference to their investigation, which clearly states that they were investigating DC Jim Boyling.

Then moving on to our court case, with DIL and six other women I went on to bring a case against the Metropolitan Police Service, arising from having been deceived into relationships with these undercover officers. That case involved eight women and relationships with five different undercover police officers, spanning a period of around about 25 years, and the case incorporates both the AKJ [[2013] 1 WLR 2734] and the DIL judgments that have been referred to at this hearing.

In that case, the first time the police asserted a policy of [Neither Confirm Nor Deny] was in a letter dated 25 June 2012, some six months after the initial

Letter Before Claim and only after considerable correspondence between the parties, which had included admitting that Mark Kennedy was an undercover officer and making a series of conflicting statements about sexual relationships while undercover.

If there really was a longstanding and active Metropolitan Police Service policy of [Nneither Confirm Nor Deny], you would assume that the immediate response on receipt of the Letter Before Claim in December 2011 would have been to assert such a policy straightaway.

In fact, in relation to the Mark Kennedy claims, the Metropolitan Police Service letters had absolutely no hint of a policy of [Neither Confirm Nor Deny]. In a letter dated 10 February 2012, they stated:

"If it assists, I can confirm Mark Kennedy was a Metropolitan Police officer and did not serve with any other force. He left the Metropolitan Police Service in March 2010."

It then goes on to state that the Commissioner is not vicariously liable in respect of Mr Kennedy's sexual conduct, as described in the Letters of Claim.

In a letter of 14 March 2012, the force solicitor stated:

"I confirm that during most of the entire period from July 2003 to February 2010, Mark Kennedy was

authorised under [the Regulation of Investigatory Powers Act 2000] to engage in conduct of the sort described in section 26(8) of [the Regulation of Investigatory Powers Act 2000]. He was lawfully deployed in relation to certain groups to provide timely and good-quality pre-emptive intelligence in relation to pre-planned activities of those groups. The authorisation extended to participation in minor criminal activity."

There was then further correspondence in which the Metropolitan Police Service was quite open about Mark Kennedy's identity as an undercover police officer. It was not actually until November 2012 that the Metropolitan Police Service first raised "Neither Confirm Nor Deny" in relation to the AKJ case in their application to strike out the claim on the basis that "Neither Confirm Nor Deny" meant that they could not defend themselves. That is the Carnduff argument. By that time they had obviously confirmed his identity so it was all a bit late.

Then, moving on to how the so-called [Neither Confirm Nor Deny] policy relates to the Department of Professional Standards, as I mentioned, the first time that the police asserted a policy of [Neither Confirm Nor Deny] in relation to the DIL claims was in June 2012. That came two weeks after the first mention of [Neither

Confirm Nor Deny] at all from any police source which was in a letter from the Directorate of Professional Standards.

Until that point, the Directorate of Professional Standards had openly discussed the investigation against Jim Boyling, but they were also asking for statements from myself and the other women in relation to the issues raised in the particulars of our claim. That included issues relating to the McLibel Support Campaign.

A letter that was from them, dated 16 April 2012, confirmed progress in relation to the investigation into [Detective Constable] Boyling and then went on to seek clarification relating to whether or not I wanted to make a formal complaint to the Directorate of Professional Standards of matters that were outlined in our letters before claim regarding the involvement of undercover officers in the McLibel case.

During previous discussions we had requested information relating to what action the Directorate of Professional Standards was able to take if undercover officers were no longer employed by the Metropolitan Police Service and, as a result, we had requested confirmation as to whether John Barker and Mark Cassidy were still serving police officers. The

letter of 16 April explains that the Directorate of Professional Standards was seeking legal advice as to whether or not they could disclose that information to us.

On 11 June 2012, the Directorate of Professional Standards sent an email regarding the progression of my complaint and asking to interview me in relation to the allegations about breaches of legal privilege and Bob Lambert's involvement in the creation of the leak that resulted in the McLibel action.

In that same letter, even though they have named Bob Lambert and asked me to give a statement in relation to him, they state:

"In answer to your questions surrounding John Barker and Mark Cassidy, the current position of the Metropolitan Police Service is to maintain its Neither Confirm Nor Deny stance in accordance with established policy."

That letter on 11 June 2012 was the first time that the police mentioned [Neither Confirm Nor Deny] to us.

At that point, though, since Bob Lambert was named in that same letter, it appeared that it was only in relation to John Barker and Mark Cassidy that they were asserting [Neither Confirm Nor Deny]. It was only two weeks later on 25 June, when they extended that to all

the officers in the DIL case, that [Neither Confirm Nor Deny] became the standard response to every request for information or compliance with the court proceedings, even though there had already been official acknowledgement that both Lambert and Boyling had been undercover officers. It was absolutely clear at that point that they were going to use [Neither Confirm Nor Deny] to create a wall of silence about these relationships.

Moving on to other evidence relevant to [Neither Confirm Nor Deny about Bob Lambert. When I originally met with DIL, she informed me that while she was married to Jim Boyling, he had revealed that Bob Lambert and my former partner, John, had both been police spies in the groups that I had been involved with.

It took some time to identify that Bob Lambert had been Bob Robinson, who infiltrated London Greenpeace in the mid-1980s. But after that we felt it was important to expose his past role, which we did when he spoke at a public meeting about racism in the headquarters of the Trade Union Congress on 15 October 2011.

If necessary, footage is available of that incident which confirms that no violence either took place or was threatened and that Bob Lambert hurried away, refusing to make any comment. But two weeks later, on 24 October

2011, he issued a public statement to Spinwatch, which was an organisation which he had worked with in the past, and to the Guardian, in which he admitted, "As part of my cover story so as to gain the necessary credibility to become involved in serious crime, I first built a reputation as a committed member of London Greenpeace, a peaceful campaigning group".

That statement contrasts sharply with the attempt to smear the group that is made in his current statement for the purposes of applying for a restriction order in connection with this Inquiry, but it also confirms his role as an undercover officer.

He has subsequently gone on to comment extensively in the media about his time in the Special Demonstration Squad, the relationships that he had, the fact that a child was born as a result of one of those relationships and the fact that he was involved in writing the London Greenpeace anti-McDonalds leaflet that became the subject of the McLibel case.

Now you would think that, if [Neither Confirm Nor Deny] had always been a [Metropolitan Police Service] policy, that Bob Lambert, who had supervised Special Demonstration Squad officers at one point, would have known about that and adhered to it. But it is not just Bob Lambert. We then go on to the Commissioner of the

Metropolitan Police, Bernard Hogan-Howe.

You would think that this is someone who would stick to [Neither Confirm Nor Deny] if it truly was a policy adopted by the Metropolitan Police. But, no, at a public meeting of the Metropolitan Police Authority on 27 October 2011, he confirmed that Jim Sutton was under investigation as a serving officer.

Is it really credible that, if there was a[Neither Confirm Nor Deny] policy in place, the Commissioner himself would not know about it and not adhered to it? The transcript of those proceedings is available, it can be checked, and you will see that he answers questions about Jim Boyling.

So is it really credible that there was a[Neither Confirm Nor Deny] policy in place at that point or is it more likely, as I would submit, that [Neither Confirm Nor Deny] was suddenly adopted in June 2012, when the Metropolitan Police Service wanted a wall to hide behind after they realised that they could no longer write these relationships off as a result of rogue officers and that, in fact, there was clear evidence of multiple abusive relationships that could only have arisen through systemic failings and institutional sexism.

The final and key piece of the jigsaw concerning the truth about [Neither Confirm Nor Deny], which I know has

already been referred to, so I'm not going to say anything at length, is the True Spies television series. In 2002, the BBC broadcasted three programmes as part of a series called "True Spies" which were entirely focused on the work of the Special Demonstration Squad. As I am sure you have heard, the programme was made with the support and assistance of the Metropolitan Police Service. While no individual officer's identity is disclosed, undercover officers speak extensively to the camera about their work. They talk about the groups they infiltrated and the methods used. There are significant details of the undercover operations actually carried out. I would urge you to watch True Spies so that you can see just how much of their tactics they discussed and yet how the Metropolitan Police now claim they can't talk about those same tactics.

I submit that they were perfectly happy to reveal their methods and the groups that they were spying on when it suited them for [public relations] purposes and that the reason they want to bring in [Neither Confirm Nor Deny] is that actually just to cover up serious human rights abuses. It is being used as a shield for the police from any form of accountability and to avoid any proper scrutiny of their actions to cover up illegal and immoral

activities of political undercover police officers and prevent them coming to light.

There was a lot of talk yesterday about the police rights to privacy, but there was nothing at all from the police about the rights of core participants who were spied on. It took me 24 years to get acknowledgment of wrongdoing from the Metropolitan Police and from John Barker, my former partner. Other core participants should not have to wait that long, nor should they have to risk never finding out the truth and being left with permanent doubt about who people really were in their lives.

We know that the McLibel Support Campaign was infiltrated by John Dines and indeed that Bob Lambert was involved in writing the leaflet that led to the case and we know that information was shared between the Metropolitan Police and private corporations, private investigators and McDonalds that enabled the writs to be served, but what we don't know is any of the detail behind that. We need to know how and why that was allowed to happen in order to prevent those kind of abuses from happening again.

It is insulting in the extreme that, despite the apology, the police are still seeking to neither confirm nor deny John Dines. It is also farcical in light of my

meeting with him last week and his apology to me. But it was not just insulting to me. It is insulting for everybody who has had their privacy invaded to be told that they can't know the truth about the wrongdoing that was done against them because the privacy of those who carried out that abuse has to be protected.

I just also wanted to say that, you know, they seem to also be seeking unique rights in that they seem to think that they should have the right to no social ostracisation, which is something that nobody else who is accused of wrongdoing gets any form of protection from. Nobody else who is accused of something has their name covered up on the grounds that they might be socially ostracised.

So finally, I wanted to submit that, even if there had been a genuine [Neither Confirm Nor Deny] policy, there is absolutely no justification for a blanket protection of all officers, given the level of human rights abuses that we have been subjected to as core participants. I cannot see why officers who have grossly abused the fundamental human rights of others should have a permanent shield preventing scrutiny of their actions and I would say that it is not in the public interest for officers to think that they will be protected no matter what they do.

The McLibel Support Campaign supports the core participants' call for all the cover names to be released so that the truth can be heard. We have not called for all the real names of officers to be released, although I think that there may be individual circumstances where that is appropriate, especially where those officers went on to become supervisors or line managers or are now in positions of responsibility, but I'm assuming that that would be done on a more individualised basis. However, I do believe that all of the cover names should be disclosed so that the truth can be achieved.

I also believe that to ensure the Inquiry is as comprehensive as possible, the police need to release a full list of all the organisations that were targeted. There is no reason for secrecy on this. Various groups were named in True Spies, so why is it that they can't be named now?

The reason for wanting maximum transparency and disclosure is a political one. Without the names of undercover officers who targeted each group, it is impossible to start to assess the whole impact of their surveillance or the extent of the abuses committed. Without full disclosure, we won't get to the full truth and we can't ensure that preventative measures are put

in place to stop these abuses happening again.

These were very, very serious human rights abuses committed by this unit, including Article 3 abuses. We want to stop them happening again. That is our purpose in taking part in this Inquiry and that is the real public interest that requires that there must be openness and transparency.

Thank you.

THE CHAIR: Ms Steel, as you know, there is going to be a transcript of your address to me which I'm going to ask the Inquiry team to read.

At the conclusion of that, it may be that we will want to make contact about this correspondence.

MS STEEL: Okay, yes.

THE CHAIR: Thank you very much.

MR EMMERSON: Sir, may I add one matter -- I'm sorry to speak out of turn -- in the light of what Ms Steel has raised, I have been instructed to bring to your attention that, in connection with the True Spies documentary that Ms Steel placed some emphasis on, I have some correspondence from the Metropolitan Police Service to Mr Francis encouraging his and other officers' participation in the programme. So I will make that available to Counsel to the Inquiry and to the other parties.

THE CHAIR: Thank you very much.

Mr Hall?

Submissions in reply on behalf of the Metropolitan Police Service by MR HALL

MR HALL: Sir, I'm going to reply, briefly, if I may, to observations by Ms Kaufmann, Mr Squires and Mr Millar. I will be brief.

[Neither Confirm Nor Deny], we say that you cannot say at this stage that the interests of consistency have no weight. There are two arguments really raised against us. One is that, because some Special Demonstration Squad officers have been officially confirmed, therefore [Neither Confirm Nor Deny] cannot apply. The answer to that is see what happened in DIL. Mr Justice Bean, as he was, upheld [Neither Confirm Nor Deny] for the two remaining officers, notwithstanding the fact that two others had been officially confirmed in his judgment. The reference there is tab 6, paragraph 47.

Secondly, it is said that you can protect the underlying interest that [Neither Confirm Nor Deny] seeks to protect by some other means. Sometimes that is right, but sometimes it is not right. I gave a concrete example earlier in my submissions about the infiltrations of X and Y and the need to have

a consistent response even when there is no individual harm in relation to one of the infiltrations. You have the evidence of Mr McGuinness, so that cannot be discounted.

I perhaps invite you -- I don't need to take you to it -- in fact I will take you to it if I may. It is [McGartland and another v Secretary of State for the Home Department [2015] EWCA Civ 686], tab 50, where a similar attempt was made – Sir, this is in volume 2 of your authorities --a similar attempt was made to knock out [Neither Confirm Nor Deny] at a preliminary stage, which was rejected by the Court of Appeal.

I know you looked at McGartland, but the two passages we have not looked at, paragraph 6, behind tab 50, the central question on the appeal is whether the judge was wrong not to decide the [Neither Confirm Nor Deny] issue before deciding whether to make a section 6 declaration under the Justice and Security Act [2013].

"It is submitted on the Claimants' behalf that the [Neither Confirm Nor Deny] issue could and should have been resolved on the material before the judge and that if it had been resolved in the Claimants' favour, it would have led to a requirement for the Defendant to plead a full open defence, which in turn would have enabled the court to form a proper assessment as to

whether the conditions for a s 6 declaration were truly made out."

So that was the issue. Then the way that the court ultimately dealt with it is at paragraph 45 in the judgment of Lord Justice Richards.

Lord Justice Richards said this -- so having rejected the submissions, he said:

"This all goes to show that the [Neither Confirm Nor Deny] issue, although open to argument (as Mr Eadie conceded), is less clear-cut than Ms Kaufmann suggested in her submissions. There are, moreover, strong reasons to believe it could not be decided without consideration of a full closed defence and the related closed material relied on by the Secretary of State in defence of the substantive claim."

I make the parallel point that the [Neither Confirm Nor Deny] issue here is not as clear-cut as Ms Kaufmann would have you believe and it is a matter which should be resolved on the facts of a particular concrete example.

So, Sir, we say --

THE CHAIR: But McGartland was rather special on its facts because effectively Ms Kaufmann was arguing that it could be decided in open court and the judge said, "I had better see closed".

MR HALL: Yes, and the way of looking it up here is the same. You will look at the restriction order application, you will see whether [Neither Confirm Nor Deny] and the need to keep consistency is a valid consideration on the facts and you will have regard to whatever open and closed evidence is put before you.

So, Sir, that's all we say about [Neither Confirm Nor Deny]. Can I then deal with effective participation by unknown victims?

One needs to consider what is meant in practice by the submission that Ms Kaufmann made. The practical consequence is that there must be disclosure of every officer in case there has been wrongdoing, as I understand the practical consequences. That would be, we say, obviously unfair. It would apply to every undercover officer that you are going to have to consider, not just those in the Special Demonstration Squad, not just those who infiltrated the extreme left, but those who infiltrated the extreme right.

As you know, we say that the better way to approach this issue -- which is an issue, I agree -- is stage by stage. Can I make the practical observation that if there is or was targeting on any particular individual, that is likely to have created reporting because the point of targeting is to create reporting.

So this is a case in which the presence or absence of documents showing reporting and therefore targeting is likely to be indicative of whether there was in fact targeting. So we say you can look at the documents that are produced to you and then form a judgment as to whether there are categories of people about whom you ought to know more.

Then, Sir, turning to the question of effective participation by the current core participants, all of whom Ms Kaufmann described as "victims", again it is necessary to look at the practical consequences, I think, of what she is saying. The consequence is that, wherever a person alleges that they are a victim of undercover policing, for example they have been reported on by an undercover police officer, then they are entitled to require the Inquiry to disclose if there was any officer who in fact interacted with them. That would be true whether it is an undercover officer in 1968 or 2016. If that really is what the non-state participants are saying, then we say that would be an unlawful approach because it would be an unfair one and also note that that sort of approach would be bound to damage the recruitment and retention and confidence of current and future Covert Human Intelligence Sources and undercover officers.

The suggestion that you should effectively discount even the possibility that what this Inquiry does should harm future retention and recruitment at this stage we say is obviously wrong. It must depend upon the evidence you have. We will in due course look at the evidence of, for example, Witness Cairo on this point.

Sir, finally on her submissions, the rule of law has been raised as a point that weighs strongly in favour of disclosure. Our submission is that the rule of law is to follow the law set out in the Inquiries Act 2005. That is a law or a rule of law that permits restrictions to be made in a proper case.

I'm going to take you, if I may, to the case of [RB(Algeria) v Secretary of State for the Home Department [2010] 2 AC 110], which is at tab 72, which you will find in volume 3.

Sir, RB concerned the use of closed-material procedures. At paragraph 230, Lord Hope effectively looked at the rule of law issue in this context.

Sir, page 255 at the bottom, paragraph 230, Lord Hope says this:

"There remains however the question of whether the use of closed material fails to meet the minimum standards of procedural fairness that is to be expected of any such tribunal in a democratic society."

It is at the bottom of that page. So raising

effectively the rule of law point. Then:

"Procedure before SIAC is governed by the 1997 Act and by the rules that have been made under section 5."

I don't need to read out the next bit, which just refers to those rules. Then picking it up five lines on:

"These procedures are intended to provide a fair balance between the need to protect the public interest and the need to provide the applicant with a fair hearing. As Mr Tam QC for the Secretary of State pointed out, it is inherent that in any forum in which sensitive evidence might be relevant some adjustment will have to be made to normal procedures."

So the rule of law is not subverted by following the procedure that Parliament has provided for.

So then turning to the two arguments made by Mr Squires, he referred you to the Binyam Mohamed case. Sir, as he rightly noted, Binyam Mohamed was about what should be published of the court's judgment; in other words, it concerned what findings should be made public. It wasn't about what disclosure should be made during the fact-finding exercise.

It is absolutely essential to look at what the judges said about whether a mere allegation is sufficient. First of all, in the Divisional Court,

Lord Justice Thomas -- I will just give you the references, sir. It is tab 22 at paragraph 41 -- referred to a prima facie case of wrongdoing. In the Court of Appeal -- I will take you, if I may, to the judgment. It is in volume 5 and it is tab 108, Sir, paragraph 39 in the judgment of Lord Judge, the Lord Chief Justice. Picking up the letter C, ultimately it supports the rule of law itself. Then this is the sentence which has been cited, but it is important to look at all the words that are used:

"Where the court is satisfied that the executive has misconducted itself, or
acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged."

Plainly the use of the word "satisfied" is deliberate.

In the judgment of Lord Neuberger, paragraph 184:

"In the light of all these points, I have no doubt that there is a substantial and very strong public interest, as a matter of principle, in having the redacted paragraphs published. In any case where a judgment has been given, there is a significant public interest in the whole judgment being published,
and it is undesirable that the executive should be

seen to dictate to the judiciary what can and cannot go into an open judgment of the court."

Then this:

"Where the judgment is concerned with such a fundamental and topical an issue as the mistreatment of detainees, and where it reveals involvement - or worse - on the part of the UK government in the mistreatment of a UK resident, there can be no doubt that the public interest is at the very top end of importance."

Again we would submit that the word "reveals" is important, so a finding rather than simply an allegation.

So, Sir, that is all I was going to say about that line of authorities. Can I turn then to the question of where your accountability -- the accountability of the Inquiry, a point that has been raised. The proposition is that, however thoroughly you, the Inquiry, do your work, that the public will not have confidence unless the process is public.

Sir, I accept and I acknowledge that this is an issue of difficulty which is bound to weigh. Ultimately this is one of those situations in which the Inquiry will just have to shoulder any brick bats that are thrown to it, but it will do so safe in the knowledge that it is acting independently and fairly,

according to a statute that permits closed hearings where justified.

It was entirely open to Parliament to enact a sort of super-inquiry which required that everything should be heard openly whatever the cost. Parliament didn't do so. Ultimately the duty of yourself, as chairman, is to apply the Inquiries Act 2005, rather than being driven by concerns which are difficult to judge about perceptions of accountability.

Turning finally to Mr Millar's submissions. He referred to the Spycatcher case. Can I just remind you, Sir, that that was a case where the media already had the information that they wanted to publish in this country. It was not a case in which the authorities were being required to officially confirm anything, so it is distinguishable, as is the reasoning.

I will just give you the reference. Lord Keith's judgment in the passage at 256D to F, where his Lordship distinguished between disclosure by an intelligence officer on the one hand and disclosure by a third party who has received information such as a newspaper.

Here, where one is talking about official confirmation by the authorities, we say that the confidentiality starting point was struck by [the Regulation of Investigatory Powers Act 2000].

Sir, those are my reply submissions.

THE CHAIR: Thank you very much.

I'm not minded to listen to a succession of replies which are to the same effect.

MR O'CONNOR: Sir, may I boldly request simply to reply on one discrete point which Mr Hall has not covered.

THE CHAIR: We have not given the transcribers a rest this afternoon yet, Mr O'Connor, so we will do it now.

We will come back in ten minutes.

(3.54 pm)

(A short break)

(4.21 pm)

THE CHAIR: Mr Barr, why have I been out of the room for half an hour, rather than ten minutes?

MR BARR: Sir, thank you very much for the extra time. The reason was I was approached by one of the core participants who had some issues which he wanted to raise, I understand, on behalf of a large number of the core participants. They concerned matters which are not the issues which you are dealing with today. They are to deal with matters of representation and venue. We have had some discussions and I have advised the core participant that the correct forum and channel to raise these issues is via a letter from their recognised legal representative.

THE CHAIR: Thank you very much.

Yes, Mr O'Connor.

Submissions in reply on behalf of National Crime Agency by

MR O'CONNOR

MR O'CONNOR: Sir, I'm grateful. The single point on which I wished to reply was the question of the impact on disclosure of the investigative obligations under Articles 3 and 8, a matter on which you were addressed by Ms Kaufmann and Mr Emmerson. It is issue number 3 on the issues for consideration circulated before this hearing.

Sir, the first point to make is that this is of course not a principle that is spelt out in the [Inquires Act 2005]. It is a principle which emerges, if at all, from the jurisprudence of the [European Convention on Human Rights].

Secondly, although the issue as drafted in the list of issues refers to Articles 3 and 8, Ms Kaufmann addressed you purely on the question of Article 3 and also the case to which she took you -- which I will take you back to briefly in a moment if I may -- also related only to Article 3. So in that regard we would submit that of course the question of whether Article 3 is engaged will be fact-specific.

It is very early days in these proceedings to say anything with confidence about the facts. But what we

would simply say is that, at the lowest, it cannot be assumed that Article 3 will be engaged in all of the factual circumstances that you will be investigating.

So the third point is that even where Article 3 or Article 8 are engaged in their investigative factor, the important practical question for your purposes is whether that investigative duty will make a difference in the disclosure decisions that you have to make, given all the other overlapping issues that are in play.

When I made my submissions yesterday, I submitted that the Convention case law under these Articles is only likely to make a difference to your decision if it establishes a mandatory minimum of disclosure such as to override security and confidentiality considerations.

So if there is such a principle, that of course would make potentially a significant decision to your exercise because all of the submissions that you have received in the past two days have been premised on the assumption that the task you have to undertake is a balance between competing interests. If, in fact, there is, as well as that balance, a minimum level of disclosure to which some or all of the core participants are entitled, then the exercise would need to be recalibrated to that extent.

Sir, Ms Kaufmann took you to the case of Al Nashiri

to make good the proposition that there is indeed a minimum level of disclosure required under Article 3. We submit that in fact the case is not authority for that proposition and I will ask you to go back to it, if I may. It is in bundle 4 of the authorities at tab 95.

Sir, the first passage that Ms Kaufmann took you to is at paragraph 480 of the judgment, page 566 of the report. You see about halfway through paragraph 480 a subparagraph starting "Thirdly ...", which records a submission made by Mr Emmerson in those proceedings, which essentially asserted the existence of a minimum level of disclosure.

The reference was to A v United Kingdom, which was the Article 6 case -- Article 5(4) and Article 6 case -- which established a minimum level of disclosure in those cases.

You can see the reference there to "an essential gist of the material should be disclosed sufficiently for the victim to participate fully in the Inquiry". So that was the submission that asserted that there ought to be a minimum level of disclosure.

The second passage that you were taken to was at paragraph 494, which is the court's ruling on the issue. We submit that the passage which is most important is that which starts again about halfway down:

"It is to be recalled that even if there is a strong public interest in maintaining the secrecy of sources of information or material, in particular in cases involving the fight against terrorism ..."

And these are the critical words, sir:

"... it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security."

So we submit that it is clear from that ruling that the court there are rejecting the submission that there should be a core irreducible minimum level of disclosure that overrides any security considerations.

MS KAUFMANN: Sir, I hate to interrupt, but could you just read the next line and the reference to A?

MR O'CONNOR: I was about to come to the next sentence, if I may.

But, Sir, in that sentence which I'm referring to, which is the one where they deal with the test to be applied at the disclosure stage, the language that is used is the language of a balance and not a core irreducible minimum.

They then go on -- and I was about to come to this -- to say:

"Where full disclosure is not possible, the

difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests."

So, as Ms Kaufmann sees, there is then a footnote, at footnote 266, to the A case. In my submission there is a significance in the fact that that footnote appears at the end of that sentence and not the sentence before it, because A, of course, also dealt with the question of special advocates and the like.

What one, in my submission, sees there is the reference to counter-balancing procedural protection being put in place where there are closed proceedings, but it is not related to the prior question of what should be in those closed proceedings and, more importantly, what must be in the open proceedings.

THE CHAIR: Do we have A in the bundles?

MR O'CONNOR: Sir, I am afraid not --

THE CHAIR: The specific reference is to paragraphs 216 to 218, so I can read that to myself.

MR O'CONNOR: You can, Sir. I am afraid it's not in the bundle.

Just to complete this point, there is a binary question: is the test a core irreducible minimum or isn't it? I have made the submissions that we submit on this case, which has been submitted to you as the

high point of the Strasbourg jurisprudence, it is not made out.

You will be familiar, of course, with the other principle which states that domestic courts -- and we submit for these purposes an inquiry is in the same position -- should not outpace the Strasbourg jurisprudence. But we submit that if you were to rule that there is a core requirement, that is precisely what you would be doing.

Sir, in his submissions I think it is fair to say that Mr Emmerson came close to conceding that there was not in fact any Strasbourg case law which made clear that there was an irreducible minimum level of disclosure. In those circumstances, we submit that you should not approach the matter on that basis.

Sir, I'm grateful. Those are our submissions.

THE CHAIR: Anybody else on the police or state side?

Then, Mr Barr, is there anything you wish to add?

MR BARR: No, thank you, Sir.

THE CHAIR: If I may say so, the oral submissions have been of the same admirable quality as the written submissions. What has assisted me, for obvious reasons, is the commentary by one side of the argument on the written submissions of the other. You have not made my ultimate task any easier, but simply elucidated it.

Thank you very much.

Before we part today, can I raise the question of costs awards? You know that the current costs awards are covering the period up to the 31st of this month. Clearly the preliminary issues are going to take us longer than that. So what I'm going to do is to extend the chronological period until 31 May. In the meantime, we will consider what we need to do next with regard to making fresh costs awards.

All right. Thank you very much.

Ms Kaufmann?

MS KAUFMANN: Sir, I really hesitate to get up, but you did say when we started that if any issues arose -- I think you said within correspondence actually -- when we were talking about the order of play, that a non-state core participant felt it necessary to say something about in relation to the submissions of the other parties in reply, you would potentially indulge us and hear from us.

I just have one very short point on which I would ask your indulgence --

THE CHAIR: Yes.

MS KAUFMANN: -- that I might address with you. It actually came up in an exchange which you had with Mr Emmerson. I would be grateful if I could seek both some

clarification and then briefly respond to that exchange.

You and Mr Emmerson were discussing the husk of [Neither Confirm Nor Deny] that remains after all the individuated interests have been taken into account in the section 19 balancing exercise. Mr Emmerson was seeking to persuade you that there is nothing left, no weight to be given to the husk. You said that depends upon the issue that arises.

THE CHAIR: "It depends on the question" is what I said.

MS KAUFMANN: That's right, the question. You gave the question as, "What if you have a situation where revealing a cover name could lead, through the mosaic effect, to the identification -- the real identity of the undercover officer?"

I scratched my head at that point and wondered what you meant by that. Then, with the assistance of Ms Brander, she has clarified for me not only what you meant, but I think what you meant by paragraph 2(i) of your list of issues. I apologise for being so slow on the uptake. Having been so slow, can I just confirm that this is what you meant and then just say something very briefly in response?

THE CHAIR: All right.

MS KAUFMANN: So, question: did you mean in paragraph 2(i) of your list of issues that there is a residual function

that [Neither Confirm Nor Deny] might play --

THE CHAIR: There might be.

MS KAUFMANN: -- in the --

THE CHAIR: That's what Mr Justice Bean said in DIL. There remains a legitimate public interest in not requiring the defendant to confirm or deny in respect of those allegations which are not already in the public domain as official.

MS KAUFMANN: Yes.

THE CHAIR: There is a concrete example of [Neither Confirm Nor Deny] being lost in respect of the absolute or blanket coverage which may represent a particular public interest, the Scappaticci public interest, but nevertheless it had a role to play at a different level of questioning. That's all. That is why I asked whether the public interest in disclosure might be sufficiently represented by the disclosure of an undercover name or target or whether that was beyond the pale.

MS KAUFMANN: Given the interest in [Neither Confirm Nor Deny]?

THE CHAIR: Yes.

MS KAUFMANN: This rather takes us back to the point that in DIL the only question that Mr Justice Bean was considering at that point in time is whether or not the

underlying public interest that Neither Confirm Nor Deny] serves to protect should be protected by the [Neither Confirm Nor Deny] response or whether or not the fact of official confirmation in those cases meant that it had no function to serve. What he concluded was in those cases there had been official confirmation in relation to two individuals and therefore you couldn't say that there was any weight that ought to be given to [Neither Confirm Nor Deny] because there had already been confirmation.

But in relation to those cases where he said, "Well, there has not yet been any official confirmation of these other officers' identities and therefore this legitimate tactic that the police deploy of [Neither Confirm Nor Deny] still has a function to play", that's what he concluded. But that is a situation where he was not engaged in and didn't have the power to exercise those individuated risk assessments.

THE CHAIR: He was not carrying out the same exercise that I am.

MS KAUFMANN: Exactly. So the question then becomes, given that you are carrying out this exercise under section 19, which looks at all the individuated interests, what room is there left to use [Neither Confirm Nor Deny] to do the same job? That's the

question. Our submission is, well, there's no room left for --

THE CHAIR: I think you asked me the same question yesterday.

MS KAUFMANN: I'm still left not understanding, given the response, why the DIL case provides --

THE CHAIR: If we don't understand one another, that's my fault, but I will put it in writing.

MS KAUFMANN: I'm grateful.

THE CHAIR: Thank you all very much.

(4.35 pm)

(The Inquiry adjourned)