

<p>1 Submissions on behalf of the Non-police,1 2 Non-state Core Participant Group by MS KAUFMANN (continued) 3 4 Submissions on behalf of the Elected39 Representatives by MR SQUIRES 5 Submissions on behalf of Peter Francis by85 MR EMMERSON 6 7 Submissions on behalf of the media by115 MR MILLAR 8 Submissions on behalf of the McLibel140 Support Campaign by MS STEEL 9 10 Submissions in reply on behalf of the157 Metropolitan Police Service by MR HALL 11 Submissions in reply on behalf of NCA by168 MR O'CONNOR 12 13 Wednesday, 23 March 2016 (10.00 am) 14 Submissions on behalf of the Non-police, Non-state Core 15 Participant Group by MS KAUFMANN (continued) 16 MS KAUFMANN: So, my Lord, just to start with a very quick 17 recap on yesterday, where the position we had reached, 18 in our submission, was that placing weight on the public 19 interest in the police relying on the "Neither Confirm 20 Nor Deny" stance means, for this Inquiry, placing weight 21 on secrecy across the board as the means to protect the 22 underlying public interests that "Neither Confirm Nor 23 Deny" is there to protect, as opposed to assessing the 24 weight to be attached to those underlying interests. 25 It follows, therefore, that in relation to "Neither Page 1</p>	<p>1 Mr Hall to provide a satisfactory answer as to how this 2 Inquiry is going to be in a position to get to the truth 3 if it follows the Metropolitan Police Service line of 4 blanket secrecy, save in the most exceptional 5 circumstances; that is where identities have already 6 been confirmed. 7 In our submission, if the Inquiry were to work on 8 the basis of blanket secrecy save where identities of 9 officers have already been confirmed, then the only way 10 the Inquiry could get to the truth or -- yes, could get 11 to the truth is if it could rely on police officers to 12 self-disclose. 13 I will come on to why that is the case in a moment, 14 but first I want to address why it is absolutely clear 15 that this Inquiry cannot proceed on the assumption that 16 the police officers will self-disclose. 17 Firstly, none of the abuses that we know about so 18 far came out because of self-disclosure. Some did in 19 relation to Mr Francis, but all the other abuses came 20 out as a result of the efforts of the individual victims 21 of those abuses to uncover them. 22 On the contrary, when it comes to miscarriages of 23 justice, those miscarriages themselves arose precisely 24 because the police failed to discharge their legal 25 obligations to disclose their involvement in the Page 3</p>
<p>1 Confirm Nor Deny", the question for the Inquiry is 2 whether it is going to mirror the police's approach and 3 use blanket secrecy as the means to protect those 4 interests or whether the public interest in applying 5 that sort of an approach is outweighed by other 6 competing interests. 7 The submissions we are going to develop now are to 8 the effect that the competing public interests outweigh 9 very, very substantially any interest in using the 10 "Neither Confirm Nor Deny" approach and that, secondly, 11 in any event, the underlying public interest that 12 "Neither Confirm Nor Deny" and that approach serves to 13 protect will not be harmed if the court does conclude 14 that the other public interests outweigh it. 15 So can we turn to why those competing public 16 interests outweigh any interest giving weight to 17 "Neither Confirm Nor Deny"? 18 Let's start by looking at and answering the question 19 as to why openness is necessary for the Inquiry to be in 20 a position to get to the truth. This was an issue that 21 was touched upon yesterday, Sir, in questions that you 22 asked Mr Hall and it was notable, in my submission, that 23 that discussion did not go particularly far. The reason 24 it didn't go particularly far, in our submission, is 25 that it is very difficult -- we say impossible -- for Page 2</p>	<p>1 circumstances leading to the prosecutions. 2 It is simply fanciful, even with the undertakings 3 that will be given in relation to prosecutions following 4 from any evidence that officers might give -- it is 5 fanciful to suggest that that is going to lead all 6 officers to be open if being open requires them to 7 disclose the fact of wrongdoing. One cannot proceed on 8 the basis that that is likely to happen. 9 If one doesn't proceed on that basis, then 10 a question arises, "Well, will those wrongs be disclosed 11 through documentation?" We know already, particularly 12 in relation to the Special Demonstration Squad, that 13 there is a dearth of documentation. Records were not 14 kept. We also know there has been a process of systemic 15 destruction of records, so we are not going to be able 16 to rely on records to disclose that wrongdoing. 17 So what are we left with? If we start from the 18 premise that we cannot rely upon officers to 19 self-disclose, all that we are left with in terms of 20 getting the truth out of officers is the skill of 21 Counsel to the Inquiry and the skill of you, the Inquiry 22 Chair, in discerning when an officer is lying or hiding. 23 That's what Mr Hall suggested yesterday. 24 Well, that again is a fanciful suggestion, to expect 25 the Inquiry to be able to determine, without the Page 4</p>

<p>1 assistance of contradictory evidence, simply on the 2 demeanour of the witness, whether or not he is or she is 3 telling truth.</p> <p>4 Now the reason we say self-disclosure is the only 5 means of getting at the truth is because, if secret 6 hearings are used, there really is no other mechanism 7 whereby relevant evidence can reliably come before 8 the tribunal. Let's assume for the moment that the 9 victims themselves are prepared to help the Inquiry, are 10 prepared to give evidence, even though they will be shut 11 out from the process in all other respects, whether they 12 give relevant evidence will be an entirely random 13 arbitrary matter.</p> <p>14 For those who know they are victims, they are 15 obviously in the best position to give relevant 16 evidence, but even the evidence they can give will be 17 severely compromised. They simply will not know whether 18 an officer had said something that entirely contradicts 19 what they know to be the truth, but they will not be 20 aware that they need to mention it.</p> <p>21 For those who merely suspect that they were the 22 subject of unlawful or abusive conduct, it is a bit like 23 putting the tail on the donkey when you are blindfolded 24 in a room that's 100 metres square and you have been 25 spun around for 30 seconds. They have no idea</p> <p style="text-align: center;">Page 5</p>	<p>1 the Inquiry is able to identify them through the 2 disclosure that's been made to the Inquiry. As you, 3 Sir, suggested yesterday, that in itself presents 4 insuperable problems. So the Inquiry has found 5 a victim. It goes to the victim. It wants the victim 6 to give relevant evidence, but it will necessarily 7 follow from the victim giving that relevant evidence 8 that the undercover officer will be identifiable. That 9 will be readily to be inferred.</p> <p>10 So the only way to avoid that problem is for the 11 Inquiry not only to approach that victim for that 12 victim's relevant evidence, but to approach a whole load 13 of other individuals who in fact were not spied upon to 14 give completely irrelevant evidence so that, amongst 15 this mass of evidence, it will no longer be possible for 16 an inference to be made as to which one relates to an 17 undercover operation and an undercover operative. 18 That's an impossible position to be in.</p> <p>19 The critical point is, given what we know about the 20 paucity of record-keeping, there are going to be victims 21 out there who the Inquiry will not know are victims and 22 who they themselves will not they are victims unless 23 they know who the undercover officers were who were 24 engaged in undercover operations in the movements to 25 which they belonged.</p> <p style="text-align: center;">Page 7</p>
<p>1 whatsoever what target they should be hitting.</p> <p>2 That is very, very well illustrated by the elected 3 representatives in their submissions, when they 4 discussed the fact that elected representatives have 5 contact with numerous members of the public, and without 6 being told who was spying on them and in what 7 circumstances, they simply, simply, are not going to be 8 able to identify, out of these numerous incidents of 9 which they probably have little memory, which are the 10 critical ones. But that remains true of all the victim 11 groups.</p> <p>12 We adopt also, in relation to the elected 13 representatives' submissions, their account of the sorry 14 story given by the special advocate Martin Chamberlain 15 QC about the way in which, even in circumstances where 16 a control order is being applied for in respect of 17 a particular individual and they have some sense of what 18 the whole issue might be about -- how profoundly 19 compromised the special advocates are in making relevant 20 submissions, hitting successfully targets that can 21 undermine the evidence being given by the state.</p> <p>22 Then turning last to those who don't know they are 23 victims. There are two separate considerations here: 24 the group that, Sir, you identified yesterday; that 25 group of victims who don't know they are victims but who</p> <p style="text-align: center;">Page 6</p>	<p>1 Mr Hall answered these fundamental problems by 2 emphasising the evidence that will be in open. He made 3 the point that there are three officers whose identities 4 have been officially confirmed, Mr Lambert, Mr Kennedy, 5 Mr Boyling, and the evidence of those three officers 6 will be heard in open. The inference to be drawn from 7 his submission is that that will then be sufficient for 8 this Inquiry to discharge its function of getting to the 9 truth. In our submission that is an absurd proposition. 10 Evidence of three individuals in relation to operations 11 that have gone on for the last 50 years is in no sense 12 going to be sufficient to disclose the full picture.</p> <p>13 So, as we say, an inquiry which is premised upon the 14 ability to get to the truth being effectively the 15 self-report of officers cannot rationally be considered 16 to be capable of doing so and, if it seeks to do so, 17 will fundamentally lack credibility. But as we pointed 18 out yesterday, the position is even worse than that 19 because, if the Inquiry proceeded in that way, it would 20 not even have the benefit of the evidence of most of the 21 victims.</p> <p>22 I reiterate: it's not a threat, it's just a fact and 23 it's a fact that needs to be put into the equation. So 24 getting to the truth or being in a position to get to 25 the truth requires openness or a presumption of openness</p> <p style="text-align: center;">Page 8</p>

1 in relation to the identities of officers.
 2 Now how does the imperative to be in a position to
 3 get to the truth have an impact upon public interests
 4 that weigh in favour of openness? That's what I want to
 5 consider next. As I said yesterday, there are a number
 6 of interrelated public interests; public interests which
 7 it is imperative for this Inquiry to serve. It is not
 8 a matter of choice. It is not a matter of interests
 9 that can be compromised for other interests. They
 10 simply have to be served. And each of these public
 11 interests depends for its realisation upon the Inquiry
 12 being in a position to get to the truth.
 13 The Inquiry was set up to get to the bottom of
 14 serious wrongdoings, some of which have been already
 15 disclosed; wrongdoing on the part of an arm of the
 16 state. It raises among other grave concerns -- the
 17 wrongdoing so far identified -- profound questions about
 18 whether the police have strayed beyond their
 19 constitutionally limited role and engaged in
 20 anti-democratic policing of left-wing political beliefs.
 21 I won't repeat all the other grave wrongdoings that have
 22 been identified, but each of those is what this Inquiry
 23 falls to investigate.
 24 From that fact a number of public interests emerge
 25 as being engaged and as being required to be fulfilled.

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1 First, at a general level, the Inquiry is performing
 2 a vital constitutional function of holding the state to
 3 account for serious wrongdoing. That is, as we saw from
 4 the quote, the citation from paragraph 19 in the Mohamed
 5 judgment yesterday, a central aspect of the rule of law.
 6 In discharging that central aspect of the rule of
 7 law, there is a freestanding requirement of openness.
 8 So there is both, in relation to this particular public
 9 interest, a need to get to the truth, but also
 10 a freestanding requirement that doing so be open. So we
 11 have two compelling factors as to why openness is
 12 required.
 13 We can see that that requirement for openness exists
 14 and we saw it in the Mohamed case yesterday, that quote
 15 at paragraph 19. Mr Hall cited the Litvinenko case to
 16 say that, well, there is no public interest in openness,
 17 but that reliance on Litvinenko was missed placed. The
 18 secrecy in that case did not relate to alleged
 19 wrongdoing by the state. That is what we are concerned
 20 with and it is the need to account for wrongdoing that
 21 compels openness.
 22 Also yesterday, and as we have already pointed out,
 23 he was wrong to say that a mere allegation of wrongdoing
 24 is not enough to trigger any requirement of openness.
 25 Mohamed was a case in which there was a mere allegation

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1 of wrongdoing, but in any event we are not dealing with
 2 mere allegations of wrongdoing. The Inquiry was
 3 established because as a matter of established fact
 4 there has been wrongdoing, which makes it even more
 5 compelling that the police are brought to account
 6 openly.
 7 He made the point yesterday that Human Rights Act
 8 claims that there has been an unlawful deployment of
 9 a covert human intelligence source are required under
 10 section 65 of Regulation of Investigatory Powers Act to
 11 be determined by way of a secret hearing. But
 12 common law claims for precisely the same misconduct do
 13 not need to be determined by way of a secret hearing.
 14 To make good that point, that is exactly what the
 15 women -- the eight women who were victims of unlawful
 16 relationships -- that was exactly how they sought to
 17 vindicate their common law rights, by bringing them in
 18 the High Court in the open.
 19 Similarly, if one wanted -- and for similar
 20 reasons -- this Inquiry looking into these allegations
 21 of wrongdoing is not by virtue of the provisions of
 22 Regulation of Investigatory Powers Act required to
 23 operate a blanket of secrecy.
 24 Finally, he drew the distinction between this
 25 Inquiry and a criminal trial. It is no doubt correct

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1 that there are distinctions to be drawn between this
 2 Inquiry and a criminal trial, but the fact that the
 3 processes are not identical does not mean that openness
 4 is not required in the process to be adopted by this
 5 Inquiry, given its function to investigate serious
 6 wrongdoing on the part of the state.
 7 At a more specific level, this Inquiry must be in
 8 a position to restore public confidence in undercover
 9 policing and so to restore the legitimacy of this
 10 investigative technique. Mr Hall's remarks yesterday
 11 that public confidence is not something that this
 12 Inquiry should take into account was truly remarkable,
 13 and certainly not supported by Mr Griffin on behalf of
 14 the Secretary of State nor by us, who pointed out
 15 yesterday that this Inquiry meets both conditions in
 16 section 1 of the Act -- the 2005 Act -- upon which the
 17 power to establish it is conditioned and, in respect of
 18 both those conditions, the causing of public concern
 19 lies at the heart.
 20 So public concern is the reason why this Inquiry has
 21 been established. The restoring of public concern is
 22 a fundamental purpose of the operation of this Inquiry
 23 and its outcome. In order to restore public confidence
 24 but also to restore the confidence of the Secretary of
 25 State, the Inquiry has to be in a position to fulfil its

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1 terms of reference. To do that, it has to be in
 2 a position to get the truth. That's a matter we have
 3 developed fully in our submissions. The points are
 4 obvious and we don't need to repeat them.
 5 Also, in addition to that, the problem is to have
 6 confidence in the process of this Inquiry. It has to
 7 have credibility. Again, that depends upon its ability
 8 to get to the truth.
 9 Finally, as we pointed out yesterday, another key
 10 public interest that this Inquiry has to serve and
 11 achieve, one which the Secretary of State herself
 12 identified, is justice for the victims. If they don't
 13 know they are victims and if they don't know what has
 14 been done to them, they can't possibly have justice.
 15 So there are compelling pragmatic and principled
 16 reasons, reasons which brook no compromise, as to why
 17 this Inquiry must start from a presumption of openness.
 18 It isn't a matter of choice. It must deliver on those
 19 public interests.
 20 So, as I said at the outset yesterday, the victims'
 21 need to know is not a need that stands alone. On the
 22 contrary, their need to know is of critical instrumental
 23 value to this Inquiry. It is the means by which effect
 24 is given. It is the key to unlock the ability of this
 25 Inquiry to meet all those other absolutely central

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1 public interests. For those reasons, "Neither Confirm
 2 Nor Deny" as a means of giving effect to the underlying
 3 public interest is plainly overridden. The two cannot
 4 sit together; this Inquiry discharging its functions and
 5 giving effect to "Neither Confirm Nor Deny".
 6 But in the circumstances of this Inquiry that
 7 doesn't present a problem. It is not a compromise that
 8 is going to have any costs. That is so for the
 9 following reasons: we have to look at what it is that
 10 the "Neither Confirm Nor Deny" stance protects; what are
 11 those underlying interests. We have to ask ourselves
 12 how are they going to be effected if the Inquiry
 13 operates from a presumption of openness.
 14 There are two sets of underlying interests. There
 15 are the particular interests which an "Neither Confirm
 16 Nor Deny" stance in the particular case serves to
 17 protect: harm to the particular undercover officer; harm
 18 to a third party, for example, whose interests may be
 19 affected by disclosure of the identity of that
 20 undercover officer; harm to legitimate methods of
 21 undercover policing; harm through a departure from the
 22 promise of confidentiality given to an individual
 23 officer.
 24 Then there are the wider interests. The wider
 25 interests, as the police have identified, are the

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1 interests in maintaining the confidence of the
 2 undercover police community. That is the confidence of
 3 the present community, but also the confidence of the
 4 future community; making sure that future individuals
 5 within the police service are still prepared to come
 6 forward and offer their services as undercover
 7 operatives. That's obviously vital for the future
 8 prevention and detection of crime and necessary in order
 9 to preserve the future utility of the tool.
 10 A second broader public interest identified by the
 11 NCA is the confidence of the foreign agents with which
 12 they work. So similarly they have to be confident in
 13 the way that this tool operates or confident that
 14 individual agents that they deploy are not going to be
 15 compromised.
 16 Now that latter factor is actually something that
 17 can be put into the individual interests which it
 18 protects, but the wider interest in maintaining the
 19 confidence of our foreign agents in being able to work
 20 with us in undercover operations is part of the general
 21 interest that it protects.
 22 Then there is the Scappaticci problem, which we will
 23 come on to in a moment.
 24 So if we break down each of those and look at each
 25 of those in turn to see how they would be affected if

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1 a presumption of openness operates.
 2 The individual interest: if we look at the list of
 3 individual factors that fall to be weighed in the
 4 balance under section 19, as identified in your list or
 5 as identified in the updated list produced by the
 6 Counsel to the Inquiry team, we can see all the
 7 individual factors that I have identified are set out:
 8 harm to the individual; confidentiality; fairness; risk
 9 to third parties; risk to methods. All of those are
 10 catered for. Section 19 enables this Inquiry to take
 11 them all into account. They fall to be balanced against
 12 other interests, but that's the same as happens in any
 13 court.
 14 So all those individual interests are catered for by
 15 the section 19 power. So what about the wider public
 16 interests: maintaining the future utility of the tool of
 17 undercover policing?
 18 Now, Mr Hall says that a departure from the "Neither
 19 Confirm Nor Deny" stance in this case is going to
 20 undermine the confidence of the Covert Human
 21 Intelligence Source community and degrade the utility of
 22 the tool because nobody is going to come forward. That
 23 is because they have all been promised life-long
 24 confidentiality.
 25 Can I just say, we challenge whether or not they

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1 have all been promised life-long confidentiality. It is
 2 interesting looking at the gisting documents because in
 3 not every gisting document is there a statement to the
 4 effect that that individual was promised life-long
 5 confidentiality and we know from Mr Francis' own
 6 submissions that he doesn't assert he was.
 7 We don't need to have a argument at this stage.
 8 Let's just assume -- let's assume for the moment -- that
 9 they were all promised life-long confidentiality;
 10 promises that were consistent with the way Mr Hall
 11 showed you Regulation of Investigatory Powers Act
 12 operates, with duties on those who are managing and
 13 supervised to make sure that information about Covert
 14 Human Intelligence Source is not publicised; promises
 15 consistent with the health and safety duty that Mr Hall
 16 said the police bear to their undercover officers;
 17 promises which Mr Hall says are mirrored in the
 18 common law. Let's assume they were all given such
 19 promises.
 20 As Mr Hall conceded yesterday, such promises are not
 21 and cannot ever be absolute -- point number 1 -- so
 22 those promises are never ones which entitle the officer
 23 to expect they have absolute secrecy for life because
 24 they know that the police themselves can make
 25 exceptions. The police did it in Mr Boyling's case.

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1 They did it in Mr Kennedy's case. They know that it is
 2 not in their control to withhold that information in all
 3 circumstances because the courts can override their
 4 desire to maintain confidentiality. So it is not
 5 a promise that is absolute.
 6 So that's an incredibly important consideration when
 7 one asks whether disclosure in the circumstances of this
 8 Inquiry is going to undermine their confidence in the
 9 future because their confidence about the future
 10 necessarily entailed the possibility of disclosure. But
 11 when we then look at the circumstances of this Inquiry
 12 and what it will mean in terms of the inferences they
 13 can draw about disclosure in the future, it becomes even
 14 more clear that a rational individual officer is not
 15 going to feel disclosures in this Inquiry are going to
 16 make it more likely that there will be disclosures in
 17 the future.
 18 Why is that? Firstly, because this Inquiry is set
 19 up for a very particular and exceptional purpose, which,
 20 if it is successful, will never be repeated. That is to
 21 look at wrongdoing that has gone on in the past in
 22 relation to undercover policing. It is an entirely
 23 exceptional and very particular circumstance in which
 24 disclosure will be made. It is also disclosure which is
 25 being made precisely because the terms of reference of

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1 this Inquiry cannot otherwise be achieved.
 2 Thirdly, it is disclosure in circumstances where it
 3 will only happen when the Inquiry has itself considered
 4 all the interests that that officer wants to put forward
 5 about why disclosure should not be made in the
 6 section 19 balance.
 7 Disclosure in such exceptional and unique
 8 circumstances will not have any bearing, in our
 9 submission, on whether an officer is prepared to enter
 10 into undercover policing and it won't have any bearing
 11 because an officer cannot rationally conclude from that
 12 that when the police say to him, "We promise to protect
 13 your identity wherever we can", it will not lead him to
 14 conclude that that promise is an empty promise.
 15 Disclosure in the course of this Inquiry will simply
 16 lead him to conclude that that promise is subject to the
 17 possibility of disclosure should another inquiry like
 18 this some time in the future be set up. But another
 19 inquiry like this will only be set up in the future if
 20 the outcome of this Inquiry fails; that is to make sure
 21 that these sorts of things don't happen again and there
 22 is no need for such an inquiry.
 23 We reject the submission of Mr Hall that the
 24 subtleties will be lost on officers as to why
 25 disclosures were made in this particular case. If there

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1 is a fear that the subtleties will be lost, then the
 2 police can explain why disclosures were made in this
 3 case. It is simply absurd to suggest that the
 4 subtleties will be lost.
 5 There are similar arguments or the same arguments in
 6 relation to the impact upon the relations of the police
 7 with foreign partners. Those foreign partners will
 8 reach the same conclusions. The Inquiry has to proceed
 9 on the basis that foreign partners and potential future
 10 undercover officers are rational individuals. That is,
 11 in our submission, an answer to any claim on the part of
 12 the police, that there should be some deference given to
 13 the police's assessment of whether departures from
 14 "Neither Confirm Nor Deny" in the circumstances of this
 15 Inquiry will undermine the future utility of the tool.
 16 There is nothing the police can say by way of
 17 evidence that should cause this Inquiry to reach
 18 a different conclusion because the Inquiry has to base
 19 itself on the assumption that officers are rational
 20 human beings. The implications for a rational human
 21 being of the utility of confidentiality in the future,
 22 despite disclosures in this case, are obvious and clear.
 23 That brings us then on to the need to ensure -- the
 24 "Scappaticci problem", I call it -- that the identities
 25 of those who the Inquiry does decide to protect at some

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<p>1 stage down the line by way of a restriction order, 2 should it so decide after a section 19 balance, remain 3 protected. What the Inquiry must not let happen is 4 impose it as a restriction order and then something 5 happens in the course of the Inquiry which means that 6 individuals are able to infer that a particular officer 7 has been protected by that restriction order.</p> <p>8 In our submission, the Inquiry has ample powers by 9 which to do that. So when a restriction order is 10 imposed, the Inquiry will have knowledge of everybody 11 who is and isn't an undercover police officer. Let's 12 assume the Inquiry does and it will make a restriction 13 order in relation to, say, two particular individuals. 14 But the way to make sure that those particular 15 individuals are not identified is simply to prevent any 16 questions being asked whatsoever about whether somebody 17 is or isn't an undercover police officer.</p> <p>18 That means that an individual who happens to hit the 19 right target or would happen to hit the right target if 20 they asked a question will get nowhere and no 21 information will be disclosed because the question 22 simply cannot be asked. So there is a protective bubble 23 by limiting the areas that can be discussed or addressed 24 once restriction orders have been made.</p> <p>25 We do make the point that that should not preclude</p> <p style="text-align: center;">Page 21</p>	<p>1 undercover police officer, and to decide, if he 2 considers he is an undercover police officer, whether or 3 not to impose a restriction order.</p> <p>4 Let's say you do decide to impose a restriction 5 order in that case, then the way to protect that officer 6 is simply to say, at the end of that process, "no 7 disclosure", and then it is not known whether or not 8 there is no disclosure because that individual wasn't 9 a police officer acting undercover or because he was but 10 a restriction order has been imposed.</p> <p>11 So there is no Scappaticci problem of confirming 12 somebody's identity once a restriction order has been 13 imposed in their favour.</p> <p>14 So, for those reasons, we submit that there is no 15 damage that will flow from this Inquiry not using 16 secrecy as a means to give effect to the underlying 17 public interests that "Neither Confirm Nor Deny" seeks 18 to protect. There is nothing in fact to put on the 19 other side of the balance from compelling and clearly 20 overriding factors which call for openness.</p> <p>21 Can I just put a marker down to say that if, at the 22 end of the day, you do not accept our submissions on 23 this and you do conclude that when the section 19 24 balancing exercise comes to be undertaken, "Neither 25 Confirm Nor Deny" plays a part, then there will be an</p> <p style="text-align: center;">Page 23</p>
<p>1 the Inquiry from being able to investigate and examine 2 whether or not somebody is an undercover police officer 3 that the police have not identified as such. Obviously 4 the Inquiry must proceed on the basis of a general 5 assumption that the police will have disclosed 6 absolutely everybody. But let's imagine a situation 7 where somebody comes back -- somebody comes to the 8 Inquiry and the Inquiry has reason to consider that that 9 individual may in fact have been an undercover police 10 officer. It might, in fact, turn out that the 11 individual was only an informant, as opposed to an 12 undercover police officer. The Inquiry must be able to 13 look into that and investigate it, but it must be able 14 to do so in a way that does not threaten that individual 15 should that individual turn out to be an undercover 16 police officer and should the Inquiry decide that 17 a restriction order is necessary to protect them.</p> <p>18 There is a way in which that can be done. So rather 19 than any questions being asked in the course of the 20 Inquiry, there must be a mechanism for an individual to 21 approach the Chair, ask that question, for the Chair 22 then to conduct investigations with the police in 23 relation to it -- all of it will remain secret at that 24 stage -- and for the Chair to make a decision in 25 relation to that individual, is he, is he not, an</p> <p style="text-align: center;">Page 22</p>	<p>1 evidential battle to take place at a later stage about 2 whether or not the police in fact have operated a stance 3 of consistently neither confirming nor denying.</p> <p>4 We made brief and passing reference to it in our 5 submissions, when we referred, for example, to the 6 True Spies programme, which I don't know, Sir, whether 7 you have had an opportunity to see. It is three 8 one-hourly documentaries made in the early part of the 9 2000s, in which, with the cooperation of the 10 Metropolitan Police Service, there is a great deal of 11 information given about the way in which the Special 12 Demonstration Squad infiltrated organisations from the 13 1960s and onwards.</p> <p>14 We can see from that a stance being taken which is 15 completely inconsistent with "Neither Confirm Nor Deny". 16 Even having individuals who give evidence about their 17 own activities, give evidence about tactics they 18 deployed -- for example, one of them, who actually was 19 an informant rather than a Special Demonstration Squad 20 officer -- but giving information about the way in which 21 he used sex as a tactic by which to gather intelligence.</p> <p>22 So there will be -- and we gathered in the DIL case 23 that a huge amount of evidence throwing into question 24 whether or not a consistent "Neither Confirm Nor Deny" 25 stance has been taken by the police. That will all have</p> <p style="text-align: center;">Page 24</p>

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1 to be considered. But, as I say, that is for another
 2 day.
 3 Can I turn, then, to the relevant public interests
 4 that fall to be weighed in the section 19 balance?
 5 THE CHAIR: Before you do, can I just check that
 6 I understand your Scappaticci argument?
 7 What you are supposing is that an undercover officer
 8 is giving evidence in public. You say that the way to
 9 avoid the Scappaticci risk is not to permit any question
 10 of that officer as to any of his colleagues. Right.
 11 Okay.
 12 MS KAUFMANN: Yes, and that will have the effect of
 13 protecting anybody that you have decided it is necessary
 14 to protect.
 15 So if we turn, then, to the relevant public
 16 interests under section 19, I proceed on the assumption
 17 that all references to ""Neither Confirm Nor Deny"" are
 18 out; that "Neither Confirm Nor Deny" does not form
 19 a part. I note that in the Counsel to the Inquiry
 20 team's new list yesterday, "Neither Confirm Nor Deny" no
 21 longer figures. But as we will see, there are some --
 22 some -- of the public interest factors that are
 23 identified there that are capable of applying both to
 24 the narrow interests, the individual interests
 25 protecting a particular method, but also capable of

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1 applying to the wider interest. Insofar as they apply
 2 to the wider interests or are capable of applying to the
 3 wider interests, they should not do so if "Neither
 4 Confirm Nor Deny" has no role to play. We will look at
 5 the background a little bit more concretely.
 6 If we could get, actually, both lists out, I think.
 7 That is probably the best way to go for the time being.
 8 So if we look at the list of issues that you prepared.
 9 We are looking at 2 here, so we are looking at the
 10 public interest factors against.
 11 Well, (i) goes on the assumption we are right: any
 12 reference to ""Neither Confirm Nor Deny"" goes.
 13 We have, at (ii), "Fairness to the individual (for
 14 example, confidentiality, fear)".
 15 Now insofar as "confidentiality" there could be read
 16 as meaning the need for officers to remain confident in
 17 offering themselves as Covert Human Intelligence Source
 18 because -- through the promise of confidentiality, then
 19 that is not a factor to be considered at (ii) here --
 20 THE CHAIR: "Fairness to the individual" means "fairness to
 21 the individual", full stop.
 22 MS KAUFMANN: Exactly. Then we come down to, "Harm to the
 23 function of preventing and detecting crime". That is
 24 clearly capable of being read either as harm in
 25 a particular case because a method falls to be disclosed

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1 or it can be read as harm to the function of preventing
 2 and detecting crime because of the degrading impact that
 3 a departure from "Neither Confirm Nor Deny" will have
 4 upon the utility of the tool. That doesn't fall to be
 5 considered at this stage if we are right in the
 6 arguments. It is the narrow particular interest only
 7 that falls to be protected.
 8 When we come to the Counsel to the Inquiry list, the
 9 same can be said of factors 11 to 15 and 17. Insofar as
 10 they could be read as protecting those wider public
 11 interests I discussed, they should not be so read. It
 12 is only insofar as they protect a particular item of
 13 harm, such as a method, or a particular operation, for
 14 example, that is ongoing, that those particular public
 15 interests fall to be read as being capable of being put
 16 in the balance against openness.
 17 Going back to the list and starting with the public
 18 interests against restriction orders. For our purposes,
 19 everything we identify in our paper and everything that
 20 I have made submissions about now as being public
 21 interests that defeat or override any interests in
 22 maintaining "Neither Confirm Nor Deny" obviously remain
 23 public interests to be put into the section 19 balance
 24 under your 1 or under the heading of "Public interest in
 25 favour of openness".

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1 Now, what I'm somewhat concerned about is that, more
 2 in relation to Counsel to the Inquiry team's list of
 3 issues, they are not articulated in a way that really
 4 draws out the overarching public interests that are in
 5 all of our sets of submissions; that is the elected
 6 representatives, the core participants, the non-state
 7 core participants; these interests in accountability,
 8 the rule of law, the restoration of the public interest,
 9 the fulfilling of the terms of reference.
 10 What we have in 1 to 7 really are certain underlying
 11 public interests that serve these overarching public
 12 interests. But in our submission it is very important
 13 that those overarching public interests are specifically
 14 identified on this side of the balance because it is
 15 those public interests which carry so much weight and
 16 they should be spelled out.
 17 Added to those lists -- and this is really an answer
 18 to question (iv) -- should be the public interest of the
 19 press and the public under article 10. We adopt the
 20 submissions that the media are going to make on why that
 21 is a clear public interest and why it is wrong to say
 22 that there is no interest in freedom of expression in
 23 this Inquiry.
 24 There is then a very important public interest that
 25 has been completely left out of account in both lists.

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<p>1 That is the public interest in rectifying miscarriages 2 of justice; the key public interest. As we observe at 3 paragraph 79 of our submissions, an express statutory 4 purpose of this Inquiry is to identify any potential 5 miscarriages of justice. We can see that from the terms 6 of reference at volume 6, tab 124. 7 Sorry, that is at 4. That is at 4, I'm sorry. That 8 is 4 on the Counsel to the Inquiry's list. 9 But it should really be spelled out separately as 10 a key public interest. 11 If we go then back to your list of issues and (vi) 12 and (vii) on that list of issues at 1, so that is 13 "Lesser risk of additional harm after self-disclosure" 14 and "Lesser risk of additional harm after third-party 15 disclosure", obviously not public interest, but factors 16 that are relevant. We agree entirely with your 17 observations yesterday, that it is plainly relevant in 18 considering whether or not to impose a restriction order 19 which are to be imposed for the purposes of preventing 20 specific harms if, as a matter of fact, because of that 21 self-disclosure or because of the third-party 22 disclosure, the imposition of a restriction order is not 23 going to prevent any additional harm. It simply serves 24 no purpose and therefore it will be a fundamentally 25 improper intrusion on all the interests that call for</p> <p style="text-align: center;">Page 29</p>	<p>1 secrecy to protect, for example, national security 2 interests? 3 The El Nashiri case is the best case where this is 4 specifically addressed; a recent case. That is in 5 volume 4, tab 95. Like El Masri, it is another 6 rendition case. 7 If, Sir, you can turn to page 565, paragraph 479, 8 Mr Emmerson, who on this occasion was acting in his 9 capacity as the UN special rapporteur -- 10 THE CHAIR: Can you give me the paragraph again please? 11 MS KAUFMANN: I'm sorry, 479 on page 565. 12 571, sorry. Page 571. I seem to have taken you to 13 the wrong paragraph. It is paragraph -- 14 THE CHAIR: You have taken me to Al Nashiri. I thought you 15 were going to El Masri. 16 MS KAUFMANN: No, I'm not going to El Masri. I'm going to 17 Al Nashiri. If you go to 565, tab 95, at the bottom of 18 page 565, paragraph 479, "UN special rapporteur", that 19 is Mr Emmerson. If you could just read quickly the 20 submissions through to paragraph 479/480, and then 21 I will take you to what the European Court found in 22 relation to those submissions. 23 THE CHAIR: Thank you. 24 MS KAUFMANN: Now can you turn to page 571 and read 25 paragraph 494 --</p> <p style="text-align: center;">Page 31</p>
<p>1 openness. 2 Can I turn very briefly to question (iii)? I'm 3 going to address question (iii) now on the right to the 4 truth under the Convention because, if we are right 5 about that, that is then another public interest to be 6 put into 1 on your list of issues. 7 Everybody was agreed yesterday that there is an 8 investigative obligation under article 3. Case law from 9 Strasbourg, the Grand Chamber decision of El Masri, 10 which we saw at paragraph 19 of the Mohamed case 11 yesterday, makes clear that that investigative 12 obligation is part and parcel of the rule of law, the 13 duty to hold the state to account and to prevent 14 impunity on the part of the state. 15 What is also clear from the case law is that, 16 because of this need for accountability, the right to 17 effective participation, which is part and parcel or is 18 a component of the investigative obligation, is not just 19 a right to the effective participation of the victim, 20 but it is also a right to effective participation on the 21 part of the public more generally. 22 Now the critical question for our purposes is: what 23 has Strasbourg said on the participatory rights of the 24 victim and the public generally where there is a public 25 interest, a competing public interest, in a measure of</p> <p style="text-align: center;">Page 30</p>	<p>1 THE CHAIR: Thank you. 2 MS KAUFMANN: -- and just in passing note 495. They make 3 the point that it is the interest in -- public 4 accountability is an interest in public accountability 5 not just for that of the victim. 6 So from this we can see that there is a presumption 7 of openness and any claim that particular documents 8 should be withheld should be fully justified. That has 9 to be in the particular case. Even where, as with this 10 Inquiry, the proceedings are not adversarial, the 11 article 3 investigative duty entails that those affected 12 by the conduct under investigation must have as much 13 information as possible and, where full disclosure is 14 not possible, alternative means of enabling them to 15 defend their interests must be found. 16 So that is article 3. We don't submit that it adds 17 to what is provided for and what is compelled by the 18 other public interests we have identified in favour of 19 openness, but it is just one more string to that very 20 considerably strong bow. 21 Turning to article 8 and the right to private 22 information held by state authorities. The elected 23 representatives make submissions on that in their own 24 written document. That is at paragraphs 33 to 35 and no 25 doubt will be developed shortly. We adopt those and we</p> <p style="text-align: center;">Page 32</p>

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

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

18 We have put in an authority, the Children's Rights
 19 Alliance. I don't need to take you to it now, it is
 20 volume 6, tab 138. But in our submission this case is
 21 distinguishable from that. That was a case where
 22 children in secure training centres had been subject to
 23 unlawful restraint and it was alleged on their behalf by
 24 the Children's Rights Alliance that there was a duty at
 25 common law and under the Convention to inform those

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

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

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

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

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

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1 Inquiry; similarly with subjective fear.

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

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

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1 to embark upon.

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

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

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

15 So, for example, the way in which the police
 16 themselves have already disclosed methods through the
 17 True Spies programme and otherwise is going to need to
 18 be very carefully evaluated. But also, when methods are
 19 obvious, where they are going to be a necessary part of
 20 any undercover operation, where what is being done is
 21 infiltrating on a long-term basis particular groups,
 22 then there is absolutely no public interest to be served
 23 in protecting obvious methods that everybody as a matter
 24 of inference knows are going on and there will have to
 25

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1 be great, great care in relation to that.
 2 The non-availability of alternative measures, which
 3 is also identified on the list, well that goes to
 4 weight. It's not a public interest in and of itself.
 5 Finally, Sir, one further point which is not on the
 6 list of issues and is not at the moment a matter that
 7 goes to the public interest balance, but it is something
 8 which comes up because we mentioned it and made
 9 reference to it at paragraph 82 of our submissions, and
 10 that was the protection of private information which is
 11 recorded in documents that are going to be disclosed to
 12 the Inquiry. That was addressed in Counsel to the
 13 Inquiry team's response at paragraph 4 of their
 14 response. It is worth just looking at paragraph 82 of
 15 our submissions and paragraph 4 of their response.
 16 Just to make clear, we do accept what is said, that
 17 there has been such a wealth of material and there must
 18 be room for judgment. We accept that and we don't
 19 suggest that every reference to a third party must first
 20 be referred to that person. We were speaking about
 21 private information in paragraph 82, pertaining to the
 22 private lives of the non-state core participants and
 23 other members of the public.
 24 But we do submit that there is going to have to be,
 25 at some point, an attempt to establish some pre-agreed

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1 parameters because there are a number of possible
 2 concerns that could arise; for example, if certain data
 3 is automatically redacted by the Inquiry team, the
 4 individual concerned won't know that the data had been
 5 collected or recorded about them. Similarly, if the
 6 decision is taken that information isn't relevant to the
 7 Inquiry without any reference to the person or persons
 8 who are affected by that information, then its
 9 significance may actually missed.
 10 There are other examples when it is a concern. But
 11 that is a matter for further down the line. But we do
 12 submit that there is going to have to be some work to be
 13 done to make sure that those hundred possible problems
 14 don't arise.
 15 THE CHAIR: You will discuss those, I imagine, with the
 16 Inquiry team.
 17 MS KAUFMANN: Exactly.
 18 (Minute's silence in memory of the victims of Brussels
 19 attacks)
 20 THE CHAIR: I think this is an occasion which should be
 21 observed according to the preference of the individual.
 22 I'm going to leave court. In fact now may be a good
 23 time to take a break and I will come back in
 24 ten minutes.
 25 (11.02 am)

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1 (A short break)
 2 (11.16 am)
 3 THE CHAIR: Ms Kaufmann, I am afraid I was unaware that
 4 there was going to be a public observance so you were
 5 interrupted in mid-flow. I'm sorry about that. The
 6 timing would have been better if it hadn't --
 7 MS KAUFMANN: Not at all. Not at all. In fact, it was not
 8 mid-flow. It was almost at the very, very last drop.
 9 There are just two very short points I want to make,
 10 unless I can assist you further, before I am going
 11 to sit down.
 12 First, just in case it wasn't obvious to you, when
 13 you asked about me how to deal with the Scappaticci
 14 problem and whether it was to prevent any officer being
 15 asked about any other officer, of course he can't be
 16 prevented from being asked about officers whose
 17 identities have already been disclosed, ie officers who
 18 are not the subject of a restriction order, but
 19 I thought that is pretty much an obvious point; only
 20 anybody whose identity has not been disclosed.
 21 The other was just a point that Mr Hall made
 22 yesterday relying on the case of Re Officer L in
 23 relation to fairness to the officers, where he appeared
 24 to suggest that there was really nothing to weigh in the
 25 balance against fairness to the officer; it is

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1 automatically unfair to subject officers to their own
 2 subjective fears being realised or to leave them in
 3 a situation where their confidentiality has been
 4 stripped away.
 5 Of course, it is just as I said; one factor to be
 6 weighed in the balance against all the other factors.
 7 There is no automatic. It was made clear in
 8 Re Officer L that, unless it is necessary to do so, it
 9 is unfair to do that. The question is always: how does
 10 that fare in the balance against all the competing
 11 factors?
 12 So unless I can assist further, Sir, those are our
 13 submissions.
 14 THE CHAIR: Thank you very much.
 15 Mr Squires, I think.
 16 Submissions on behalf of the Elected Representatives by
 17 MR SQUIRES
 18 MR SQUIRES: Sir, I represent five core participants:
 19 Ken Livingstone, Dave Mellor, Sharon Grant, who is the
 20 wife of the late Bernie Grant, Diane Abbott and
 21 Joan Ruddock.
 22 In the case of Diane Abbott, she's a current MP.
 23 The other four are ex-MPs or, in the case of
 24 Sharon Grant, the wife of an ex-MP. They were also all,
 25 at various times, local councillors and, of course, in

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<p>1 the case of Ken Livingstone, was the Mayor of London. 2 So we call them "elected representatives" or "ERs" in 3 our submission. 4 My clients are grateful for the opportunity to make 5 written and oral submissions in relation to restriction 6 orders, which are in addition to those already made by 7 Ms Kaufmann which will not be repeated. 8 Our submissions and the reason that the ERs sought 9 to become involved at this stage is to do with 10 a fundamental question which we say goes to the heart of 11 whether this Public Inquiry, which has such a critical 12 function to play, will be able to discharge its terms of 13 reference. The question is, we say, simply put, whether 14 the MPC are correct in their submission of 12 February 15 that, "In the overwhelming majority of instances, 16 consideration of fairness and the public interest will 17 come down in favour of not disclosing the fact of or 18 detail of an undercover police deployment". 19 Our submission is that, if that is the effect of 20 restriction orders, it would prevent the Inquiry 21 fulfilling its terms of reference and discharging its 22 obligation to meet the public concerns that led it to be 23 set up. 24 As we have set out in our submissions at 25 paragraph 43, our case is, unless the predominant</p> <p style="text-align: center;">Page 41</p>	<p>1 We of course accept that. We were given permission 2 to make submissions on those public interest factors 3 that affected the elected representatives, hence the 4 focus on those, but also we hope that focusing on those 5 gives one example, one concrete example, which we say 6 has to be borne in mind when one is engaging the 7 balancing exercise involved in deciding whether to make 8 our road(?), but also, as we will see shortly, when one 9 can see there is the authorities on open justice because 10 one of the issues there one needs to consider is the 11 seriousness of the allegations of misconduct that are 12 being considered. 13 Sir, I also say this at the outset: our position is 14 that the predominant practice has to be that minimum of 15 disclosure. We accept that there may well be 16 exceptional cases where it's not even possible to 17 indicate to an individual they have been targeted, but 18 that will require compelling individual evidence about 19 that particular deployment and about that particular 20 case. 21 That's where we do say that a submission made by 22 Mr O'Connor yesterday was attacking a straw man. He 23 said that our submission was that the level of public 24 concern is such that any form of closed process will not 25 enable the allaying of concern. That is not our</p> <p style="text-align: center;">Page 43</p>
<p>1 practice of the Inquiry is that there is a minimum of 2 disclosure of the undercover officers' names -- and by 3 that I mean their undercover names -- and the facts and 4 details of their deployment, again the minimum being who 5 was targeted, who authorised them to be targeted and why 6 were the individuals selected, we say, unless that is 7 the predominant practice, the Inquiry will be unable to 8 fulfil the public interest imperatives which led it to 9 be set up. That is, from my clients' perspective, 10 getting to the truth as to whether and, if so how, the 11 police came to target democratically elected politicians 12 in undercover operations potentially -- at least this 13 seems to be the inference we can draw at this stage -- 14 because of their political beliefs and activities and 15 the imperative for the public to have confidence that 16 the Inquiry has got to truth about those matters and 17 that any misconduct or unlawful practice had been 18 exposed and will not be repeated. 19 I should say this at the outset: it was stated in 20 the Counsel to the Inquiry note of yesterday in relation 21 to our submissions that there are other matters of 22 fundamental public importance as well as those raised 23 about what we say are the constitutional and democratic 24 issues relating to the targeting of members of 25 Parliament.</p> <p style="text-align: center;">Page 42</p>	<p>1 submission. Our submission, coming from the opposite 2 side, is near-blanket refusal to indicate who has been 3 targeted, why and in what way will fail to allay the 4 public concern. 5 So we set out in our submissions at paragraphs 7 to 6 13 the basic facts as we currently now know them in 7 relation to undercover operations targeting or involving 8 elected representatives. None of these, as far as we 9 are aware, have been officially confirmed, therefore we 10 are in the position where, if Mr Hall's submissions are 11 correct, nothing will be disclosed or the overwhelming 12 likelihood is nothing will be disclosed as to whether 13 indeed any of these MPs/ERs were targeted. 14 The allegations that emerge -- I should say again, 15 the reason we raise this at that stage is not because of 16 the veracity of those allegations fall to be determined 17 now, but, as I have submitted, because one needs to bear 18 in mind the nature and the context of the allegations 19 which the Inquiry will be examining in order to 20 determine what the public interest is in fulfilling its 21 objectives and its terms of reference and in terms of 22 the requirements of open justice. 23 The allegations that have emerged, initially in 24 relation to Dave Nellist in 2002 and then more generally 25 on 25 March 2015, so shortly after the Inquiry was</p> <p style="text-align: center;">Page 44</p>

11 (Pages 41 to 44)

<p>1 announced, was that 11 MPs were targeted and were 2 targeted at a time that they were Members of Parliament. 3 So that is the five core participants I represent and 4 six others. 5 What is striking about those MPs and what unites 6 them is they were all -- are or have been -- members of 7 the Labour Party, were elected members of the 8 Labour Party in local and central government and 9 critically have at various times and in various ways 10 been associated with the left wing of the Labour Party 11 and other left-wing and trade union politics. 12 Now at least the inference that can be drawn at this 13 stage -- we will see it was drawn in Parliament -- is 14 that these individuals were targeted and information 15 gathered on them because of their politics and political 16 activities. Our submission is that if that is 17 correct -- and that is, of course, what the Inquiry will 18 be examining -- that has constitutional implications of 19 the highest order. 20 So we set out at paragraph 14 what are our four key 21 submissions. I will seek today to make them good. But 22 first: an inquiry should operate openly and in public 23 wherever possible and any departure from that principle 24 should be strictly necessary, clearly justified and 25 a last resort; that is essentially what Ms Kaufmann</p> <p style="text-align: center;">Page 45</p>	<p>1 So turning to the first of our propositions, the 2 presumption of openness: the Inquiry should operate 3 openly and in public wherever possible. Firstly, in 4 relation to the statute itself, the Inquiries Act 2005, 5 we respectfully agree with the submissions of Counsel to 6 the Inquiry at paragraph 25 that the statute itself 7 create a presumption of openness and at paragraph 26, 8 that that presumption is an obvious one. 9 Sir, it may help -- because I have two brief 10 submissions to make on section 19 -- just to pull it up. 11 It is at volume 1, tab 14. 12 Sir, we say the reason that it is entirely obvious 13 that there is a presumption of openness in 14 the Inquiries Act -- and in fact it actually goes 15 further than a presumption of openness; it is 16 a requirement of openness unless particular conditions 17 are satisfied, and the one we are concerned with in 18 19(3) is that it is necessary to the public interest. 19 Everything has to be open unless, for our purposes, that 20 necessity requirement is satisfied. 21 While we have the section open, Sir, you will see at 22 section 19(3)(a) there is also a limb in which 23 restriction orders can be made when they are required by 24 a statutory provision. The reason I mention that is 25 that it is notable that Mr Hall referred you to the</p> <p style="text-align: center;">Page 47</p>
<p>1 calls the "presumption of openness". 2 Secondly, there is a public interest of the highest 3 order in getting to the truth of whether police in the 4 United Kingdom have targeted and indeed may continue to 5 target democratically elected politicians and to 6 maintain secret files on them where they have been 7 targeted because of their political views and political 8 activities. That includes in seeking to hold state 9 institutions such as the police to account because 10 that's a number of them. That is one of the key 11 political activities they were engaged in. 12 The third submission we make is that those public 13 interest imperatives or the public interest imperatives 14 for getting to the truth as to whether that happened and 15 that the public can have confidence that it won't happen 16 again cannot be fulfilled, we say, if, in the 17 overwhelmingly majority of instances, all evidence about 18 the fact and detail of an undercover operation is kept 19 secret; is heard only in secret hearings. 20 Fourth, what we say flows from the above is that 21 restriction orders should not be made where they will 22 prevent the Inquiry from fulfilling its core purpose, 23 both in uncovering the truth about the police's 24 activities and inspiring public confidence -- we will 25 come back to this -- that it has done so.</p> <p style="text-align: center;">Page 46</p>	<p>1 various Regulation of Investigatory Powers Act and other 2 statute provisions, but he does not say that they 3 require you to make a restriction order. 4 What he says about them and what they illustrate is 5 that there is a general public interest in 6 confidentiality of Covert Human Intelligence Sources, 7 which of course is right. But none of that detracts 8 from the clear statutory scheme and the scheme you are 9 required to apply, which is one starts with the 10 presumption of openness unless one can establish 11 necessity. 12 Sir, another point, which I will come to later on, 13 but it may be relevant to go back to section 19, that 14 I wish to make was one of the submissions that Mr Hall 15 made was that the issue of public concern, he says, is 16 relevant to section 1 of the Inquiry, as in when the 17 Inquiry is set up, but it wasn't then clear what he says 18 is irrelevant at this stage or, as somebody said, "Well, 19 it's just one factor that one takes into account". 20 Our submission on that, Sir, is this: the words 21 "public concern" in 4(a) we say must be intended to be 22 read back to section 1, which is the public concerns 23 that led to the setting up of the Inquiry. 24 What (4)(a) is doing -- and we say it is no 25 coincidence -- it is the first mandatory factor that</p> <p style="text-align: center;">Page 48</p>

<p>1 must be considered when doing the public interest 2 balance under (3)(b), having regard in particular to the 3 matters mentioned in section (4), (4)(a): 4 "The extent to which any restriction or attempt to 5 ...(Reading to the words)... might inhibit the allaying 6 of public concern." 7 We say entirely unsurprisingly that one of the 8 critical factors that needs to be borne in mind is -- 9 the first one on that list -- is this going to prevent 10 me or is this going to prevent the Inquiry meeting 11 a public concern that led to the Inquiry being set up, 12 and that is, of course, the same public concern that is 13 referred to in section 1. 14 The requirement of openness does not, however, just 15 come from the fact that this is a public inquiry which 16 is conducted under the Inquiries Act. It also comes, we 17 submit, from the tasks that this Inquiry is undertaking. 18 That is the investigation of allegations of serious 19 misconduct by state agents. Our submission is that when 20 dealing with an investigation of that kind, there is 21 a strong presumption of openness and open consideration 22 of evidence which is a critical aspect of the rule of 23 law and of democratic accountability. 24 We relied, between paragraphs 18 and 31 of our 25 submissions, on a series of different authorities to Page 49</p>	<p>1 public. 2 We will see that the exact submissions that were 3 made by Mr Hall and by Ms Barton, that in those 4 circumstances there isn't a concern about openness, were 5 made in Al Rawi, they were made in Mohamed CF and they 6 were rejected. 7 The reason they were rejected is because what these 8 cases were concerned with was not the vindication of 9 private rights, but the importance of making public acts 10 of state misconduct as an aspect of the rule of law of 11 democratic accountability and instilling confidence that 12 justice is seen to be done. That is precisely, we say, 13 the same considerations that apply to this Inquiry. 14 Indeed, as I will come on to in a moment, we say 15 a fortiori because that is the very purpose of this 16 Inquiry. 17 So, Sir, if I can take you briefly to those 18 authorities. The first we cite is the Binyam Mohamed 19 case in the Divisional Court. This is at volume 1, 20 tab 22. 21 The reason I say this case is not a private rights 22 case is that the claim began as a Norwich Pharmacal 23 application by an inmate at Guantanamo Bay, who wanted 24 the UK to provide information to his legal team in the 25 US which suggested that evidence that he had given had Page 51</p>
<p>1 seek to make that proposition good: the Binyam Mohamed 2 case in the Divisional Court and the Court of Appeal; 3 Al Rawi; the Mohamed and CF control order T-Pim case; 4 El Masri; and Amin. 5 Now in response to those submissions, Mr Hall said 6 these were adversarial cases concerned with vindicating 7 individual rights. They were concerned, he said, with 8 situations in which PII applications were being 9 considered, the effect of which would have been the 10 material was not considered by anyone at all. 11 He sought, specifically referring to Al Rawi, to 12 distinguish the present framework, which here he says 13 that there's a statutory mechanism which will enable 14 you, the Inquiry, to consider everything. A very 15 similar submission was made by Ms Barton about the 16 authorities we rely on. Therefore, they say, they don't 17 assist. 18 We respectfully say that those submissions are 19 simply wrong. None of the cases, in fact, concern 20 vindicating private rights in which there was an issue 21 about PII and material being withheld from the court as 22 well as from the public. As you will see, what they 23 were concerned with is precisely the issue here, which 24 is whether it is good enough for evidence of state 25 misconduct to be disclosed to a judge, but not made Page 50</p>	<p>1 been extracted by torture. 2 By the time he got -- Sir, as you observed 3 yesterday, there is a series of different Binyam Mohamed 4 cases. By the time he got to this stage, the only issue 5 was about the publication of seven paragraphs of the 6 Divisional Court's judgment which had been provided -- 7 so it had been considered by the court -- it had been 8 provided to the Foreign Office and to special advocates. 9 But the question arose whether the Secretary of State 10 could withhold the publication of those seven paragraphs 11 which he considered were damaging and particularly 12 damaging to the relationship between the UK and the US. 13 So the only issue at this stage was one about openness, 14 and openness in the context of allegations of state 15 misconduct. 16 As I turn to paragraphs 40 and 41, the judgment of 17 Lord Justice Thomas, you will see the heading there, 18 "Public justice, the rule of law, free speech and 19 democratic accountability" -- 20 THE CHAIR: I am not with you yet. 21 MR SQUIRES: Sorry, Sir. 22 THE CHAIR: I think I'm looking at a later judgment. 23 MR SQUIRES: Paragraph 22. It should be page 2672. 24 THE CHAIR: Yes, I have it. 25 MR SQUIRES: You see the heading there, "Public justice, the Page 52</p>

1 rule of law, free speech, democratic accountability".
 2 The general rationale for hearings being in public:
 3 safeguard against inappropriate judicial behaviour;
 4 ensure public confidence in the system of the
 5 administration of justice.
 6 And two further ones -- it may be helpful just to
 7 read those, 41 and 42.
 8 THE CHAIR: Yes.
 9 MR SQUIRES: It is at 46 -- this ends a passage on the
 10 importance of public debate about matters in this case
 11 about possible UK -- complicit or UK knowledge of
 12 US mistreatment of detainees.
 13 THE CHAIR: I think the matter of particular interest in
 14 this country is whether state agents in the UK were
 15 implicated.
 16 MR SQUIRES: Yes, it was -- what they knew about it, whether
 17 they provided questions, et cetera.
 18 So what one gets there is exposing state misconduct
 19 openly is a critical public interest and a key element
 20 of the rule of law and democratic accountability.
 21 Second, the more serious the alleged misconduct, the
 22 greater the public interest imperative in matters being
 23 dealt with in open.
 24 So then turning to the Court of Appeal's judgment,
 25 which you have at volume 5, tab 108.

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1 The Court of Appeal in fact reached -- as you will
 2 see, Lord Clarke says they had rather a different view
 3 on the facts but, in fact, by that time it had become,
 4 academic because, in fact, the salient paragraphs had
 5 been published by a US judge.
 6 Paragraph 182, in the judgment of Lord Neuberger, he
 7 makes point there and this is -- Mr Hall
 8 mischaracterised our submission as being that if there
 9 is wrongdoing, you can never withhold any evidence.
 10 Lord Neuberger recognised that that is not the case, but
 11 what he says at paragraph 184 is that for that to be
 12 outweighed -- sorry, for the need to disclose misconduct
 13 or the need to have openness where there are allegations
 14 of misconduct -- this is at the bottom of the page over
 15 on to the next page -- requires some consideration at
 16 the very top end of importance.
 17 There is a further feature, a further linked
 18 feature, which is in the judgment of Lord Judge at
 19 paragraph 44, which is about the deference that is
 20 given -- this is in the context specifically of a PII
 21 application, so where the Secretary of State has issued
 22 a certificate saying that particular disclosure would
 23 harm national security. What Lord Judge says at the
 24 bottom of that paragraph, 44, is that usually that's
 25 a decision for the executive, but not, he says, if the

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1 conclusion is the executive is acting unlawfully. This
 2 is even when one has a PII certificate.
 3 Finally, Sir, in the judgment of Lord Judge at
 4 paragraph 39, he makes again the same point that was
 5 made in the Divisional Court, but it's not just about
 6 open processes and being able to scrutinise the courts,
 7 important though that is, but -- and this is the last
 8 three or four lines:
 9 "Ultimately it supports the rule of law itself.
 10 Where the court is satisfied that the executive has
 11 misconducted itself or acted...(Reading to the
 12 words)... misconduct by others, all these strands,
 13 democratic accountability, freedom of expression and the
 14 rule of law are closely engaged."
 15 So one of the points made by Mr Hall was, "Well,
 16 these were cases where there might be a difference where
 17 there is misconduct actually found", which would apply
 18 to the Mohamed case.
 19 So what we will see if we can turn next to Al Rawi
 20 was that they apply equally in cases of alleged
 21 misconduct because that's the position in Al Rawi, where
 22 we see that Lord Justice Thomas' specific analysis is
 23 endorsed by Lord Clarke in the Supreme Court.
 24 Al Rawi you have at volume 1, tab 19. Sir, the
 25 other point about Al Rawi -- again, I am sure the facts

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1 are familiar -- these are the damages claims brought by
 2 those complaining of rendition in which it is said UK
 3 authorities were complicit. So at this stage simply
 4 they were making allegations. The issue here was
 5 whether the court could create a closed-material
 6 process.
 7 What is critical for our purposes is their
 8 Lordships' discussion of the limits of a closed-material
 9 process. So not a case in which information is withheld
 10 from everybody, but precisely the situation which is
 11 said will happen here, which is that the court will get
 12 to see in principle everything, but will consider it in
 13 closed hearings.
 14 So the parts of Lord Clarke's speech we rely on at
 15 paragraphs 183 and 184 -- so there he specifically
 16 endorses the two passages from Lord Justice Thomas'
 17 judgment that I took you to, paragraphs 41 and 46, and
 18 he interprets, at the end of 184, what was decided in
 19 Mohamed as being that:
 20 "... the rule of law and the democratic requirement
 21 that the government must be held to account means that
 22 the case for disclosure will always be very strong in
 23 cases involving [and we underline this word] alleged
 24 misconduct on the part of the state, and, secondly, the
 25 more serious the alleged misconduct on the part of the

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<p>1 state, the more compelling the national security reason 2 must be to tip the balance against disclosure." 3 So this is even in a national security context you 4 need particularly compelling reasons for stronger -- for 5 the more serious alleged misconduct. 6 Sir, there are two other passages from Al Rawi. The 7 first is from Lord Brown's speech at paragraph 83. This 8 is a key point again, which is really key for this 9 Inquiry, about public confidence and indeed public 10 confidence if it transpires that the Inquiry finds 11 limited evidence of misconduct. 12 The point that Lord Brown makes here, if one sees 13 from letter B: 14 "A closed procedure [so material only heard by the 15 court] in the present context means that claims 16 concerning allegations of complicity in torture and the 17 like by UK intelligence services abroad will be heard in 18 proceedings in which the claimants are excluded 19 ...(Reading to the words)... with secret defence they 20 could not see, secret evidence they could not challenge 21 and secret judgments withheld from them and from the 22 public for all time." 23 So that's the position that is being endorsed here 24 in relation to specific allegations. He then quotes 25 from the Court of Appeal's judgment: Page 57</p>	<p>1 submission: 2 "The defendant's second arm proceeds on the premise 3 that placing before a judge all relevant material is in 4 every instant preferable to having to withhold 5 potentially pivotal evidence. This proposition is 6 deceptively attractive for what the defendants imply 7 ...(Reading to the words)... could be fairer than an 8 independent arbiter having access to all the evidence 9 germane to the dispute between the parties." 10 He then goes on to explain the central fallacy in 11 that argument. He says this at H: 12 "To be truly valuable, evidence must be capable of 13 withstanding challenge. I go further. Evidence which 14 has been insulated from challenge may positively 15 mislead." 16 He explains: 17 "However astute and assiduous the judge, the peril 18 that such a procedure presents to the fair trial of 19 contentious litigation is both obvious and undeniable." 20 As we will come on to, we say that applies equally 21 to the Inquiry and to the ability to test evidence and 22 indeed for evidence not to be positively misleading if 23 it can't be tested. 24 So those are our submissions on the rule of law and 25 state misconduct. Page 59</p>
<p>1 "If the court was to conclude after a hearing much 2 of which has been in closed session attended by the 3 defendants but not the claimants or the public 4 ...(Reading to the words)... that for reasons some of 5 which were to be found in a closed judgment was 6 available to the defendants but not the claimants or 7 public, then the claim should be dismissed. There is 8 a substantial risk the defendants would not be 9 vindicated or justice would not be seen to have been 10 done, the outcome is likely to be a Pyrrhic victory for 11 the defendants whose reputation will be damaged by such 12 a process but the damage to the reputation of the court 13 would in all probability be even greater." 14 So the final paragraph that we rely on here is from 15 Lord Kerr's judgment at 93. This precisely answers the 16 submission made by Mr Hall, and he made it in particular 17 in relation to the article by Martin Chamberlain which 18 we had relied upon, that it is difficult to challenge 19 reliability and credibility, a point we will come back 20 to. He said, "Not a problem here". His submission was, 21 "You are going to be hearing from the undercover 22 officers themselves. You and your team will be able to 23 test their reliability, their credibility". 24 If one looks at paragraph 93, one sees Lord Kerr's 25 answer to that. You see he describes exactly the same Page 58</p>	<p>1 A second submission we make, which is at 26 to 28 of 2 our representations, is that we say that a process 3 considering allegations of state misconduct will not be 4 a fair one if the state gives a blanket "Neither Confirm 5 Nor Deny" response to the allegations and the entirety 6 of the state's response to the allegations are heard in 7 secret. 8 It's not a fair process, as we will see from the 9 Mohamed CF case, not because there is, as Mr Hall says, 10 an accused or a type of accused, but because the public 11 cannot have confidence in the outcome of that sort. So 12 it ties to the point you put to Mr Hall yesterday about 13 accountability. It is also about the accountability of 14 this Inquiry and that the public can have confidence in 15 its conclusions. 16 So you were taken to Mohamed and CF by Ms Kaufmann 17 yesterday. There were a couple of passages I wanted to 18 highlight that she didn't take you to, if I may. It's 19 at volume 2, tab 52. 20 The context here in many ways, though factually very 21 different, has a direct analogue to the position that 22 the Metropolitan Police Service say should be taken, 23 which is: allegations were made of misconduct in order 24 to amount an abuse of process argument about what had 25 happened to the two individuals in Somaliland, and the Page 60</p>

15 (Pages 57 to 60)

<p>1 Secretary of State -- again similar to what the police 2 say ought to apply here in the vast majority of cases -- 3 said, "Well, I'm not going to tell you anything at all 4 about my case or what happened in Somaliland is. I'm 5 not going to confirm or deny anything". 6 The High Court saw all of that evidence, found there 7 was no abuse of process, but provided no reason for 8 that. So the passages to highlight that you weren't 9 taken to are paragraph 15. You will see very similar 10 submissions or a number of similar submissions to the 11 one made by Mr Hall. 12 First he submits, at AF No 3, the idea that you have 13 a minimum disclosure only applies to allegations against 14 a person. So it is the accusation. It is being accused 15 that entitles you to it; not when you are making 16 allegations of misconduct. 17 Secondly, again it is the same submission: well it 18 is all okay because there is a closed-material procedure 19 and you will be adequately protected because the court 20 would not countenance abuse of process, so even if it 21 all happens behind closed doors, that is okay. 22 Thirdly this: 23 "The Secretary of State when dealing with serious 24 allegations made by suspected terrorists ought not to be 25 put in the position of having to elect between</p> <p style="text-align: center;">Page 61</p>	<p>1 of process applications have every opportunity to set 2 out their positive case on abuse when they know nothing 3 of the Secretary of State's case on collusion and 4 mistreatment and nothing of the judicial reasoning which 5 results in the rejection of their case." 6 Of course our case is a fortiori because in our case 7 we can't even put forward -- my clients we will come on 8 to in a moment -- cannot put forward a positive case at 9 all as to what happened to them because they have no 10 idea. 11 Here it was said that, "Even if you can, that's not 12 good enough where you don't know what the response is. 13 Here you are not even in that position". 14 Then you have the paragraph that Ms Kaufmann took 15 you to. The critical point there is that the reason all 16 of this is not acceptable is public confidence in 17 adherence to the rule of law. 18 This is the accountability of this Inquiry. This is 19 a quote from AF No 3: 20 "If the wider public are to have confidence in the 21 justice system, they need to be able to see the justice 22 done rather than being asked to take it on trust." 23 Sir, a third strand of authorities which we say 24 point again -- they all point in the same direction 25 about public confidence and the rule of law -- are the</p> <p style="text-align: center;">Page 63</p>
<p>1 disclosing the essence of the case ...", which she said 2 and the court accepted wasn't in the public interest -- 3 the High Court accepted, "... and not being able to 4 continue to impose a control order T-Pim ..." 5 This was in the context -- you see Mr Eady for the 6 Secretary of State, "... emphasised the series of 7 unappealed findings of national security risk" against 8 one of them, MAM, Mohamed, they were described as an 9 overwhelming national security risk in relation to his 10 involvement in terrorism. 11 You will see how Lord Justice Maurice Kay deals with 12 those arguments at the bottom of the next paragraph. 13 Just above E: 14 "The existence of a statutory closed material 15 procedure had the effect of limiting the obligation of 16 disclosing to MAM and CF and ...(Reading to the 17 words)... of the Secretary of State's case to collusion 18 and mistreatment, or the total compliance with the 19 reasons to a closed judgment." 20 He then deals with the submissions being made by the 21 Secretary of State. This is at 17G: 22 "It would be no answer in those situations to say 23 that there is sufficient protection in the duty of 24 candour to the court nor is it an answer that in the 25 present case MAM and CF in the instigation of the abuse</p> <p style="text-align: center;">Page 62</p>	<p>1 article 2/article 3 cases. Let me just take you to one 2 paragraph in the judgment of Amin. This is at volume 6, 3 tab 134. 4 This is about the nature of an inquiry required into 5 the racist murder of an inmate in Feltham, a racist 6 murder by his cellmate. The key passage is 7 paragraph 31. It is often quoted about the purposes of 8 an article 2- or 3-compliant investigation. It is at 9 31E: 10 "The purpose of such investigation is clear, to 11 ensure as far as possible the full facts are brought to 12 light, that culpable and disgraceful conduct is exposed 13 and brought to public notice, the suspicion of 14 deliberate wrongdoing if unjustified is allayed, that 15 dangerous practice and procedures are rectified and 16 those who have lost their relatives may at least have 17 the satisfaction of knowing that lessons learnt from his 18 death may save the lives of others." 19 We say exactly the same purposes and imperatives are 20 served by this Public Inquiry. The reason that's 21 important is it is wrong to say, we submit, as Mr Hall 22 did, that it is enough to have accountability to 23 conclusions made public. It is not enough to have 24 lessons learned in public; the wrong is also to expose 25 misconduct and ensure that it is brought to public</p> <p style="text-align: center;">Page 64</p>

<p>1 notice; ensure the full facts are brought to light. 2 So Ms Kaufmann has referred you to El Masri and we 3 refer to it as well, paragraph 192. It makes clear that 4 that scrutiny is a key element of the rule of law. 5 So all these authorities, we say, point in exactly 6 the same direction, which is that where serious 7 allegations of state misconduct are made, there is 8 a strong presumption that that misconduct or the 9 evidence of that misconduct will be heard in public. 10 So we say that those principles, rather than any 11 distinction between those cases and the present inquiry, 12 which Mr Hall sought to draw, in fact assist our 13 argument because Binyam Mohamed, for example, the 14 allegation of misconduct came out in proceedings which 15 weren't -- that was not their purpose. The purpose was 16 to assist Mr Mohamed get evidence to avoid the risk of 17 the death penalty, but once the misconduct was seen, the 18 court had an obligation to make it public. 19 In our case, the very purpose of this Inquiry is to 20 instill public confidence, to ensure truth is brought to 21 light, and so we say all of those principles apply 22 a fortiori here. 23 So that was my first proposition. The second, which 24 we set out at 37 to 45, is the overwhelming importance, 25 we say, of the issues that this Inquiry is required to</p> <p style="text-align: center;">Page 65</p>	<p>1 The second and linked point is that it is critical 2 to a democracy that the police are politically neutral 3 and democratically accountable. 4 So we set out at 39 to 41 of our submissions some 5 issues surrounding parliamentary privilege. We had the 6 helpful intervention from the counsel of the Speaker of 7 the House. I won't repeat any of those submissions 8 here. No doubt these will be issues which will need to 9 be considered in further detail later on by this Inquiry 10 if it is going to consider what the legality is of 11 targeting MPs, if indeed that occurred. 12 In essence, the parliamentary privilege is -- 13 article 9 of the Bill of Rights provides that nothing, 14 no statement made in Parliament, can be impeached; 15 restrictions on the ability of civil arrest in relation 16 to Members of Parliament. 17 One can see how subjecting MPs to secret 18 surveillance by undercover officers -- and we don't, of 19 course, know how this occurred, if it did occur. Was it 20 people masquerading as constituents? Was it people 21 turning up at meetings? Was it even, at worse, officers 22 infiltrating MPs' offices? One can see obvious concerns 23 and obviously constitutional implications not just in 24 terms of how constituents who understand that that might 25 have occurred -- how they will now feel in the future in</p> <p style="text-align: center;">Page 67</p>
<p>1 examine. We make those submissions, as I say, from the 2 perspective of the elected representatives. 3 Our submission is this: if the police -- and we 4 entirely accept there is an "if", but it is what needs 5 to be examined -- in the United Kingdom had been 6 secretly targeting and maintaining files on 7 democratically elected politicians because of those 8 politicians' political views and activities, that is 9 fundamentally incompatible with a proper functioning of 10 a democracy and inconsistent with a proper relationship 11 between an elected legislature and the police within our 12 constitutional scheme. 13 There is, therefore, we say, an overwhelming 14 imperative that the Inquiry, whether through the 15 imposition of restriction orders being made or 16 otherwise, is not impeded from fulfilling the task of 17 getting to the truth of whether that happened, why it 18 happened and to ensure there is public confidence that 19 it will never happen again. 20 There are two distinct but related constitutional 21 issues at stake. The first is the supremacy of 22 Parliament in particular and the executive should do 23 nothing to interfere with the ability of MPs to speak 24 freely and represent their constituents unimpeded by the 25 executive.</p> <p style="text-align: center;">Page 66</p>	<p>1 terms of the chilling effect of going to their MP, 2 particularly to talk about issues involving the police. 3 Of course an even greater concern or an equally great 4 concern, if undercover officers were in any way involved 5 in MPs' offices in terms of assisting MPs on campaigns 6 or making decision about what to say or what not to say 7 in Parliament. 8 We say that the concerns go significantly beyond the 9 limited issues of parliamentary privilege. Sir, if 10 I may take you -- you saw very briefly -- Ms Kaufmann 11 took you to the parliamentary debate, in which the 12 Minister for Policing for the Secretary of State 13 explained the purpose of the Inquiry. That was the 14 debate in which -- it was shortly after the allegations 15 had come out of MPs being targeted. 16 So what we will see -- if I can take that vein, that 17 illustrates most clearly what the public concern as 18 expressed by MPs was. We will also see how it was 19 entirely accepted by the minister and indeed it was said 20 to be the reason or one of the reasons -- because the 21 Inquiry had been set up -- one of the key things the 22 Inquiry would look at. 23 The third thing the debate shows, which we say is 24 particularly important for consideration of restriction 25 orders, is that we will see from the debate that the</p> <p style="text-align: center;">Page 68</p>

<p>1 minister, the Policing Minister, evidently regarded --</p> <p>2 certainly the MPs regarded as critical and the</p> <p>3 Policing Minister reflected their concerns that there</p> <p>4 would be disclosure and -- not complete disclosure, we</p> <p>5 will see, and nor are we asking necessarily for complete</p> <p>6 disclosure, but certainly it is recognised, we will see</p> <p>7 from debate, that in answering the public concern, we</p> <p>8 say entirely unsurprisingly, the MPs wanted to know</p> <p>9 whether they were targeted -- again the very basic</p> <p>10 information -- where they were targeted, who authorised</p> <p>11 it, what information was gathered. We will see that the</p> <p>12 Policing Minister repeatedly assured them that he would</p> <p>13 do his best to ensure that as much was disclosed as</p> <p>14 possible.</p> <p>15 We say, entirely unsurprisingly, as a way of meeting</p> <p>16 the public concern that that information has to come</p> <p>17 out. So if I can just flag up the various passages.</p> <p>18 I won't read them all out.</p> <p>19 It is volume 6, tab 123. As I say, this is to make</p> <p>20 good both the submission about the constitutional</p> <p>21 importance raised repeatedly by MPs and indeed MPs from</p> <p>22 both parties -- I think that should be all three. There</p> <p>23 is a Lib Dem as well.</p> <p>24 So you will see the opening which -- Ms Kaufmann</p> <p>25 took you to, I think, the second paragraph -- if you</p> <p style="text-align: center;">Page 69</p>	<p>1 this inquiry."</p> <p>2 So you then see Jack Dromey at the bottom of the</p> <p>3 page. His expressions are concerned in the third</p> <p>4 paragraph:</p> <p>5 "The affront to democracy, to the sovereignty and</p> <p>6 independence of this house ...(Reading to the</p> <p>7 words)...it is also an affront to the vital principle</p> <p>8 the breach of which can be very serious indeed, of</p> <p>9 confidentiality between a Member of Parliament and those</p> <p>10 he or she represents ... This inquiry must be extended</p> <p>11 to look at the allegations."</p> <p>12 Again, Mike Penning agrees.</p> <p>13 So then, over the page -- this is column 1584 -- you</p> <p>14 see Harriet Harman, who was one of the MPs allegedly</p> <p>15 spied upon, expressing concern that she was targeted</p> <p>16 possibly for other work that she says was essential for</p> <p>17 democracy: campaigning for the rights of women and</p> <p>18 workers and the right to demonstrate. She then asks:</p> <p>19 "I want him to assure me that the government will</p> <p>20 let me see a full copy of my file."</p> <p>21 Then we see this from Mike Penning, last sentence:</p> <p>22 "I will make sure that as much as can be released is</p> <p>23 released. I give that assurance to the right honourable</p> <p>24 and learned lady because I will write to her ..."</p> <p>25 You then see concerns from Tony Baldry,</p> <p style="text-align: center;">Page 71</p>
<p>1 look at the first paragraph of the Minister for</p> <p>2 Policing, Mike Penning, where he makes clear what -- the</p> <p>3 purposes of this Inquiry, which is "... to improve the</p> <p>4 public confidence in undercover work. We must ensure</p> <p>5 that there is no repeat of these ..." -- what he</p> <p>6 describes as "serious historic failings among the</p> <p>7 police".</p> <p>8 There was then a debate begun by Peter Hain, then</p> <p>9 MP. He sets out -- you will see on that first page --</p> <p>10 the list of the 11 MPs who it was said had been</p> <p>11 targeted. Then, over the page, first you see -- at the</p> <p>12 very bottom of that page you will see this repeated:</p> <p>13 "Will the Home Office or the police disclose all</p> <p>14 relevant information and ...(Reading to the words)... to</p> <p>15 each of the MPs affected a completely individual</p> <p>16 personal registry file."</p> <p>17 He then expresses his concerns that:</p> <p>18 "That files were active at least ten years while you</p> <p>19 were an MP raises fundamental questions about</p> <p>20 parliamentary sovereignty and privilege."</p> <p>21 You will see the answer from Mike Penning:</p> <p>22 "The right honourable gentlemen has put his point</p> <p>23 ...(Reading to the words)... it is important this</p> <p>24 country has confidence in the way the police operate and</p> <p>25 that is exactly why the Home Secretary has instigated</p> <p style="text-align: center;">Page 70</p>	<p>1 a Conservative MP:</p> <p>2 "It is vital to have confidence as do our</p> <p>3 constituents in the integrity of the policy ...(Reading</p> <p>4 to the words)... and that every part of every police</p> <p>5 force needs to be democratically accountable."</p> <p>6 Then, over the page, Joan Ruddock, who is one of the</p> <p>7 core participants I represent today. You see she again</p> <p>8 asks:</p> <p>9 "How is it that surveillance was carried out on me</p> <p>10 all this time. I want to know and to get the minister</p> <p>11 to understand ...(Reading to the words)... who</p> <p>12 authorised the surveillance and on what ground was it</p> <p>13 authorised. He needs to answer these questions."</p> <p>14 We see what the answer is -- Mike Penning says:</p> <p>15 "That is exactly why the Inquiry is being put in</p> <p>16 place."</p> <p>17 You will see again in an answer to Jeremy Corbyn,</p> <p>18 who is another one of the MPs allegedly under</p> <p>19 surveillance:</p> <p>20 "Again I can ensure that as much information as</p> <p>21 possible is passed to current and past Members of</p> <p>22 Parliament but I cannot give a guarantee."</p> <p>23 So then another point that is raised by</p> <p>24 Jack Straw -- again another one of the MPs alleged to be</p> <p>25 the subject of surveillance -- what he says:</p> <p style="text-align: center;">Page 72</p>

18 (Pages 69 to 72)

1 "If the allegation is correct we have an
 2 extraordinary situation where I as Home Secretary and
 3 from 1997 to 2,000, the Police Authority for the Met
 4 Police, not only knew nothing about what appears to have
 5 been going on within the Metropolitan Police but may
 6 also have been subject to unlawful surveillance as Home
 7 Secretary."
 8 Of course we say that may well have been the case --
 9 we don't know -- we know there were allegations that
 10 Ken Livingstone was spied upon. If he was in spied upon
 11 when he was Mayor of London, then again he was in
 12 a position of democratic accountability for the
 13 Metropolitan Police.
 14 So if not only for Jack Straw, did he not know what
 15 the police were doing, but in fact they themselves were
 16 subject to surveillance, one can obviously see the
 17 fundamental questions about democratic accountability
 18 and the role of the police that that raises.
 19 Then if you see Mike Penning's answer at 1587:
 20 "I thank the right honourable gentlemen [this is
 21 Jack Straw] ...(Reading to the words)... for the tone of
 22 his comments. He knows from his experience to difficult
 23 it is and to realise that he was in the dark about the
 24 authorisation which has taken place. That is exactly
 25 what this Inquiry has to consider.

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1 Lord Justice Pitchford must have full access."
 2 Finally, in terms of the MPs, as I say, Diana Abbot,
 3 over the page is again one of the core participants
 4 I represent. She explains the concern that she was
 5 targeted, for example, for her role in the
 6 Stephen Lawrence campaign.
 7 "I'm clear in my mind that surveillance could not
 8 have happened without authorisation at a very senior
 9 level ...(Reading to the words)... Above all I feel I'm
 10 entitled to an unredacted copy of my file."
 11 Again the answer is:
 12 "I will do everything I can to make sure that the
 13 documents are released."
 14 What is striking about that is nowhere is it said to
 15 Parliament by the Minister for Police, "Well, of course
 16 none of this can ever be released". Quite the contrary.
 17 He gives repeated assurance, and it is unsurprising,
 18 when one hears the concerns directly, that if you want
 19 people to have confidence that the matter is being
 20 investigated, there has to be a minimum of disclosure.
 21 It doesn't mean that complete unredacted files would be
 22 released and Mike Penning does not give that assurance,
 23 but at the very least to know, "Was I targeted?", "Who
 24 authorised it?" and "Why was I targeted?", and as I say
 25 that is the assurance he repeatedly gives.

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1 THE CHAIR: Mr Squires, it's not clear whether the minister
 2 was talking about a disclosure directly to the elected
 3 representatives or a disclosure through a process which
 4 was going to take place in this Inquiry. As a matter of
 5 fact, has there been any direct disclosure to the
 6 elected representatives?
 7 MR SQUIRES: Not in relation to four of the core
 8 participants and none from the Home Office.
 9 I understand in relation to Sharon Grant some sort of
 10 limited gist was provided by the Metropolitan Police of
 11 the file held about Bernie Grant.
 12 THE CHAIR: Yes, that's a different matter.
 13 But here the minister is talking about trying to
 14 ensure that as much as can be revealed to them will be
 15 revealed to them. I wondered whether anything had
 16 happened directly between the department and those
 17 politicians.
 18 MR SQUIRES: No. Our understanding and the way we read the
 19 speeches is that is being left to the Inquiry. That
 20 will ultimately be a question for the Inquiry to decide,
 21 how much information because -- no -- the -- I think in
 22 a couple of points he says, I think in response to one
 23 of them -- I think it's Joan Ruddock -- that is exactly
 24 why the Inquiry has been put in place. So our reading
 25 of it is that -- not that MPs should have special

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1 treatment in that sense because they were -- I think
 2 this point actually was made by Jeremy Corbyn and
 3 answered by Mike Penning.
 4 Jeremy Corbyn said, "Why should it be just MPs who
 5 are able to raise this and get access ...", and this is
 6 at 1586. The response is from Mike Penning:
 7 "Members of Parliament can stand in this House and
 8 ask questions but many other victims cannot and that is
 9 why the inquiry has been put in place. I will do
 10 everything I can to ensure that as much information as
 11 possible is passed to current and past Members of
 12 Parliament but I cannot give a guarantee."
 13 Because we have not been provided with any of this
 14 information by the Home Office, it is entirely -- and we
 15 say quite sensibly -- for the Inquiry to decide what
 16 can -- whether everything can be disclosed or whether
 17 something should be withheld.
 18 We do say what is important is -- we say
 19 unsurprisingly -- that these assurances were given when
 20 these sorts of serious concerns were raised.
 21 Sir, as we say, the reason we raise them and they
 22 were raised in Parliament, not because the Inquiry can
 23 now decide or is being asked to decide whether they were
 24 true, but simply because if -- if it is the case -- that
 25 these 11 MPs and maybe others were being targeted

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<p>1 because of their political views and their political 2 activities, because, for example, someone in the police 3 disagreed with those political views and political 4 activities, it is difficult, we say, to exaggerate the 5 constitutional significance of that, and particularly if 6 it is the case that MPs, or indeed the Mayor of London, 7 was being spied upon when they were the democratically 8 accountable -- well, in the case of the Home Secretary, 9 Jack Straw -- democratically accountable body for the 10 same police force.</p> <p>11 We also, of course, don't know how elected 12 representatives were targeted. Again, it will be 13 a critical question that needs to emerge, particularly 14 it they are to play any part in this Inquiry. Was it 15 people masquerading as constituents? As I say, was it 16 people infiltrating their offices? Also to say why. 17 Was it just their politics?</p> <p>18 There is some suggestion I know that Sharon Grant 19 made that it was Bernie Grant's association in 20 particular with members of particular ethnic origins or 21 campaigns associated with particular ethnic origins; 22 again a matter of real concern.</p> <p>23 So that's the second broad heading.</p> <p>24 The third -- I can take this more briefly, largely 25 because many of these submissions were made by</p> <p style="text-align: center;">Page 77</p>	<p>1 is that, as Ms Kaufmann said, they are going to have 2 absolutely no idea who was targeting them, in what way, 3 for what reasons, and that is going to make it 4 impossible for them to helpfully participate in this 5 Inquiry.</p> <p>6 That has a series of different consequences. One is 7 that one of the terms of the Inquiry is to investigate 8 the impact of undercover policing upon those affected. 9 Certainly in the case of the elected representatives 10 that is going to be simply impossible.</p> <p>11 It is also very difficult to see how the elected 12 representatives are going to be able to assist with 13 points of principle; for example the issue of 14 parliamentary privilege. If it is not going to be said 15 whether any of them were in fact targeted and in what 16 way, it is almost impossible to see how we can make 17 legal suspicions that are going to assist the Inquiry.</p> <p>18 But perhaps most fundamentally it is going to make 19 it impossible, we say, for the Inquiry to be satisfied 20 that it has got to the truth of what happened, and 21 perhaps more important or equally important, for the 22 public to have confidence that it has got to the truth 23 of what happened.</p> <p>24 Ms Kaufmann made submissions to you about the 25 unlikelihood of a complete self-disclosure by officers</p> <p style="text-align: center;">Page 79</p>
<p>1 Ms Kaufmann -- is the ability of the Inquiry to fulfil 2 its terms of reference and to investigate what we say 3 are these pressing matters, if, as the MPC submits, 4 virtually all of the evidence as to actual undercover 5 operations is heard in secret. By "investigate", 6 "examine", I mean the whole set of different concerns 7 this Inquiry will have: getting to the truth, instilling 8 public confidence that the Inquiry has got the truth and 9 instilling public confidence as to what will happen in 10 the future.</p> <p>11 As I have already submitted -- we don't need to go 12 back to section 19 -- the Inquiry allaying public 13 concerns is a key question and we say a question of real 14 importance when one is conducting the balancing 15 exercise.</p> <p>16 Sir, you will recall that 19(4)(i) refers to 17 a mandatory consideration of whether a restriction order 18 would inhibit the allaying of public concerns, so 19 inhibit the Inquiry from performing its function. We 20 say if the imposition of a restriction order would 21 prevent the Inquiry meeting the public concern, then 22 plainly we say it should not be made.</p> <p>23 The reason we say it will make it impossible, 24 certainly from the perspective of the elected 25 representatives, for the Inquiry to fulfil its function</p> <p style="text-align: center;">Page 78</p>	<p>1 and also the impossibility, with the best will in the 2 world, of the Inquiry without being able to hear 3 countervailing evidence to be able to decide whether 4 individual officers -- this is the point made by 5 Lord Kerr in Al Rawi -- if an officer for example said 6 "Well, the reason I targeted MP X was not his politics, 7 but because I witnessed him at a meeting urging 8 protesters to violence", suppose that's a lie, it is 9 simply going to be possible for the Inquiry to know 10 whether it is or not without the MP at least being able 11 to say "I was not at that meeting", or "there are X 12 number of people who were there who can say it wasn't 13 true"; or if there aren't complete accounts of the 14 nature of the target, it is said by an officer, "Well, 15 my targeting of MP Y was limited to hearing her speak in 16 opening meetings, that is where I gathered this 17 information from", again if that is not true it is 18 impossible to see how the Inquiry is going to know that.</p> <p>19 We have seen that the way Mr Penning, the 20 Police Minister, has described the purpose of the 21 Inquiry was "... to restore public confidence because 22 a tiny minority of the police have fundamentally let 23 down the people of this country". We don't know how 24 small the minority was, but to suggest that those same 25 Metropolitan Police Officers can now suddenly be trusted</p> <p style="text-align: center;">Page 80</p>

1 to give full, candid and accurate accounts, we
 2 respectfully endorse Ms Kaufmann's submissions that that
 3 is fanciful.
 4 That, of course, links -- it is not only the
 5 Inquiry's ability to get to the truth, but the public
 6 confidence in their ability to get to the truth.
 7 You have already seen from the authorities that we
 8 rely on -- Mohammed CC(?), it is also referred to in
 9 El Masri, et cetera -- that that is a key concern.
 10 Again it is impossible to see how the public could be
 11 confident that the truth has come out when all the
 12 evidence of specific operations that haven't been
 13 confirmed -- as I say, they haven't in the case of the
 14 MPs -- is heard in private.
 15 Finally, briefly, on our fourth head, which is the
 16 approach to restriction orders, we agree with
 17 Ms Kaufmann and say that the "Neither Confirm Nor Deny"
 18 has no role to play. We make just this one additional
 19 submission: as Ms Kaufmann said and as is clear from
 20 Counsel to the Inquiry in their note at 94, "Neither
 21 Confirm Nor Deny" is not a rule of law or a legal
 22 principle. It is a particular tactic and it is a tactic
 23 which has one very specific purpose, which is to avoid
 24 drawing inferences from different answers being given.
 25 THE CHAIR: It is a response in support of a public interest

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1 which has to be identified.
 2 MR SQUIRES: That's correct. But we say it is a further
 3 one. It is particularly about inferences because
 4 otherwise one could say, well, even if -- the reason one
 5 has it is, even if there is no public interest
 6 concern --
 7 THE CHAIR: It depends on the circumstances, whether the
 8 reason for applying the policy is to prevent inferences
 9 being drawn. Scappaticci was a particularly striking
 10 example of that kind of application of the policy.
 11 MR SQUIRES: Sir, that's right, but that -- as I say, we
 12 simply endorse Ms Kaufmann's submissions on why that
 13 doesn't apply in this particular context -- in the
 14 context of the Inquiry and the answers it is able to
 15 give.
 16 The reason we say it is concerned particularly with
 17 inferences is because otherwise one is dealing with --
 18 because one is then dealing with the fact of
 19 a case-by-case analysis, unless one is concerned about
 20 having to give the same answer in all cases whatever the
 21 public interest.
 22 So our second submission under this heading concerns
 23 what was said about wrongdoing and unlawfulness. One of
 24 the -- the Metropolitan Police Service correctly
 25 accept -- this is at (vii) of their submissions -- that

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1 secrecy of the kind they are asking for cannot apply to
 2 an illegitimate method that is not and will not be used.
 3 We say that is absolutely right to make that concession,
 4 that you cannot ask for that information to be withheld
 5 from the public.
 6 What Mr Hall went on to submit is that it would be
 7 wrong, he said, to pretend that the work of the Special
 8 Demonstration Squad was in itself illegitimate. What he
 9 suggested was that there may have been specific examples
 10 of policing which were inappropriate, but he said the
 11 general policing of those believed to be violent was
 12 justified.
 13 So we don't say anything about that submission
 14 generally, but our submission -- and we set it out in
 15 our written grounds -- is that the police targeting of
 16 democratically elected representatives in undercover
 17 operations, where they are selected because of their
 18 politics, is never, we say, a legitimate police tactic.
 19 Now it may be that the police disagree with that,
 20 but that will be our submission. One of the
 21 difficulties with the blanket approach being proposed by
 22 the police is that you will have to make that decision
 23 in the abstract across the board and now, and we say
 24 that's unworkable. So that's a practical reason, we
 25 say, why the approach has to be specific to a particular

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1 operation, a particular set of concerns.
 2 One of the issues we would ask the Inquiry to
 3 consider, obviously with Counsel to the Inquiry
 4 initially, is: does this appear to be a tactic that is
 5 never lawful? As I say, we will be making that
 6 submission in relation to the elected representatives.
 7 Sir, the final point under this heading is this: the
 8 elected representatives are well aware and are happy in
 9 public to say they are well aware of the importance of
 10 the work the police perform. That includes undercover
 11 operations and also in the public interest in an
 12 effective and respected police force. Critical,
 13 however, to the police effectiveness, we say, is their
 14 accountability and, perhaps even more important or
 15 equally importantly, the public confidence in their
 16 impartiality and their adherence to the rule of law.
 17 That needs to include people from all parts of the
 18 political spectrum who it is vital can have confidence
 19 that the police enforce the criminal law in a way that
 20 is politically neutral and impartial.
 21 Our position is that it will be impossible for the
 22 Inquiry to get to the truth of what happened in
 23 undercover operations over the past decades, restore
 24 public confidence and ensure that in the future the
 25 police are democratically accountable if virtually all

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<p>1 of the evidence of police deployment is withheld from 2 the public and those affected.</p> <p>3 We do accept that if that means some increased 4 expenditure by the Police Service and even some 5 short-term alterations in their current operations -- if 6 that is needed for this Inquiry to be able to get to the 7 truth of what happened and restore public confidence, we 8 respectfully say so be it.</p> <p>9 Sir, just finally on the positive disclosure 10 obligations under article 8, it appears actually there 11 is very little between us and certainly Mr Hall about 12 that. I think he accepted that the Inquiry itself, as 13 a public authority, has to balance the rights of 14 individuals to find out information about themselves and 15 he accepted that, if it is private information that is 16 important to a person understanding elements of their 17 identity, it will need to be shown entirely separate 18 from any issues about openness that it is necessary to 19 withhold that information.</p> <p>20 That would apply, of course, for example, if there's 21 indications about sexual relationships that people have 22 engaged in, but also for the elected representatives, if 23 someone they thought they trusted and knew turned out to 24 be an undercover officer -- and one can see that is an 25 important part of understanding what has happened to</p> <p style="text-align: center;">Page 85</p>	<p>1 the hearing has progressed -- some of the points that 2 have arisen, indicating where he aligns himself with 3 which parties and what points he makes in addition to 4 those which have already been made.</p> <p>5 Sir, Mr Francis' interest is in securing a full and 6 public examination of the ethics and lawfulness of 7 undercover operations conducted by the 8 Metropolitan Police, in which he himself played a part, 9 and to do what he can to assist you to secure 10 accountability for those whose rights may have been 11 infringed in the course of those operations.</p> <p>12 As the only undercover police officer to have blown 13 the whistle, if I can use that expression, and as 14 therefore the only whistle-blower amongst the 15 core participants, he is not here in any sense to 16 advance his own personal interests, but to provide you, 17 Sir, with all of the information that he is able to in 18 order to enable you to fulfil your terms of reference.</p> <p>19 So when he made voluntary disclosure of his own role 20 and of the role of others in undercover policing 21 operations, Mr Francis faced the same risks of reprisal 22 and interference with his privacy and so forth as the 23 Metropolitan Police Service asserts on behalf of other 24 undercover police officers in this Inquiry.</p> <p>25 Indeed, in his case, the risk was arguably greater</p> <p style="text-align: center;">Page 87</p>
<p>1 them over the past decade, that they know that -- that 2 has to be balanced against the ordinary article 8(2) 3 considerations.</p> <p>4 As I say -- I think again the parties agree -- it is 5 unlikely that that is going to lead to particularly 6 different outcomes, but that's because we say such is 7 the imperative for open disclosure that we have already 8 been dealing with that it should come out in any event. 9 But that's a further distinct consideration for this 10 Inquiry as a public authority.</p> <p>11 Sir, unless I can assist further.</p> <p>12 THE CHAIR: Thank you very much.</p> <p>13 Mr Emmerson, I think.</p> <p>14 Submissions on behalf of Peter Francis by MR EMMERSON</p> <p>15 MR EMMERSON: Sir, I represent Peter Francis.</p> <p>16 We are going to be relatively brief. Essentially 17 the structure of what I say is first of all to make one 18 or two observations about Mr Francis' own position, both 19 in terms of what it is he is seeking out of this 20 Inquiry, but also, more specifically, the rather unusual 21 position he is in amongst the core participants and what 22 impact that has on some of the issues that you are 23 having to consider today.</p> <p>24 Then just to run through what sounds like a bit of 25 a laundry list now at the end of the hearing -- or as</p> <p style="text-align: center;">Page 86</p>	<p>1 as he made his disclosures without the protection from 2 prosecution under the Official Secrets Act. It may in 3 due course emerge from the arguments on undertakings.</p> <p>4 He made the personal choice to disclose what he now 5 considers to have been unethical, unlawful and 6 inadequately supervised undercover policing tactics, 7 incompatible with the democratic rights of the targets 8 and contrary to the rule of law. As you are aware, Sir, 9 his disclosures in part prompted the public concerns 10 that led to the establishment of this Inquiry.</p> <p>11 As Mr Squires has pointed out in the passages he's 12 taken you to from Hansard, it was the allegations made 13 by Mr Francis which alerted the elected representatives, 14 both those who are core participants and others, to the 15 fact that they had been the subject of surveillance and 16 he's also the source of other allegations of equal or 17 perhaps even greater gravity.</p> <p>18 Sir, he is in a unique position among the core 19 participants. The police and the state parties are 20 between them in possession of all of the relevant 21 information as to persons and methods, and I use that 22 expression "persons and methods" as shorthand for the 23 public interests which are sought to be protected by 24 "Neither Confirm Nor Deny" in these applications. They 25 have either made or indicated that they intend to make</p> <p style="text-align: center;">Page 88</p>

<p>1 applications for restriction orders, including, in the 2 case of the Metropolitan Police Service, orders for all 3 operational evidence to be heard in private. 4 The non-state parties on the opposite side of the 5 secrecy chasm have none of the relevant information and 6 are seeking its disclosure by resisting the restriction 7 order applications. They necessarily have to do this 8 from a position where the only information they have 9 available to them is that which is in the public domain 10 emanating from Peter Francis and others. 11 For his part, sitting between those two positions, 12 Mr Francis has a great deal of information available to 13 him about covert operations, only some of which is in 14 the public domain. He is expecting in due course to be 15 asked to give evidence about those operation details and 16 at least so far there has been no application for 17 a restriction order to require any part of the testimony 18 he may give to be heard in closed session. 19 If that remains the position, then the Inquiry will 20 be hearing at least some open evidence about operational 21 methods from Mr Francis, subject, of course, Sir, to 22 your directions. 23 During his submissions yesterday, Mr Hall sought to 24 make a virtue of this. He said to you that in addition 25 to Mr Francis, there were three other officers from</p> <p style="text-align: center;">Page 89</p>	<p>1 if one posits the position of Peter Francis testifying 2 before you and at this point I try to ground some of the 3 issues in the practical realities -- it is difficult to 4 see what will be gained in operational terms by any 5 assistance on the part of the Metropolitan Police that 6 the corresponding evidence to Mr Francis' be given in 7 closed session. 8 So if the position is that Mr Francis, for example, 9 alleges that an operation took place at a particular 10 date and a particular time and that from the information 11 available to him it was utterly unjustified and 12 unlawful, there has to be some opportunity for the 13 Metropolitan Police Service to answer that. Are they to 14 answer that in open or are they to answer it in closed? 15 Clearly they are not asserting at present, at least, 16 that his evidence would need to be closed, but there is 17 no suggestion, as I understand it, that the answer to it 18 would necessarily be in open. 19 If it is in closed, then it raises a very curious 20 dilemma because at the end of the hearing you are going 21 to need to decide whether or not what he's told you 22 about that operation is true. You will obviously need 23 to take into account what you have heard in closed as 24 much as in open and if, having heard the evidence in 25 closed, you conclude that what Mr Francis says is true,</p> <p style="text-align: center;">Page 91</p>
<p>1 either the Special Demonstration Squad or the National 2 Public Order Intelligence Unit where it would be 3 unrealistic for the Metropolitan Police Service now to 4 seek to insist upon "Neither Confirm Nor Deny". The 5 consequence, he said, was since it couldn't be justified 6 to seek a restriction in respect of those witnesses or 7 to seek to assert "Neither Confirm Nor Deny", it 8 followed that their roles, their actions, their welfare 9 and their deployment -- his words from yesterday -- 10 would all be the subject of open evidence. 11 Two points, if I may, just to put that submission 12 into perspective. Making the best estimate he can and 13 based on the number of officers who were in the field at 14 any one time, Mr Francis estimates that there were 15 between 100 and 120 officers working undercover for the 16 Special Demonstration Squad over the period of its 17 operational lifetime. Obviously some of them may be 18 dead, others may have no relevant evidence whatsoever to 19 give, but it gives some indication of the extent to 20 which the suggestion of four individuals might be able 21 to give evidence in open and therefore satisfy to some 22 degree the need for public scrutiny of the Special 23 Demonstration Squad and its operations -- in our 24 submission it has to be seen in that perspective. 25 Sir, it is, in our submission, difficult to see --</p> <p style="text-align: center;">Page 90</p>	<p>1 then obviously that will be reflected in a composite 2 finding based on open and closed evidence together, but 3 the inference will be, of course, that the closed 4 evidence supported the evidence. 5 The converse is equally the case. If your finding 6 was that the allegation made by Mr Francis turns out not 7 to be true or not to be as he put it, then that must be 8 based -- the inference will be -- on what you have heard 9 in closed session. In other words, the very fact of 10 this Inquiry and the way it would conduct its operations 11 would necessarily, in that instance, destroy the 12 "Neither Confirm Nor Deny" principle because by the 13 finding that you would make in relation to a conflict or 14 a potential reliability issue, you would, in effect, be 15 revealing that which was in closed. It would be very 16 difficult to avoid it. 17 That being the case, one starts to see a loose 18 thread in the way in which the Metropolitan Police 19 Service submissions are put because if it is the case 20 for Peter Francis and for Bob Lambert and for the other 21 two officers who have been identified, then the question 22 is: what in principle is different about other 23 undercover officers? 24 If in principle the way that the Inquiry is going to 25 have to operate is not to issue a restriction order in</p> <p style="text-align: center;">Page 92</p>

<p>1 relation to the evidence answering Peter Francis, then 2 why are other undercover officers -- unless there are 3 exceptional circumstances -- why are they in 4 a fundamentally different position? 5 I appreciate that one is looking two steps ahead of 6 the practicalities that will need to be grappled with 7 when the time comes, but in a sense, as you have 8 indicated with some of the examples that you have given 9 in the course of argument over the last day or so, it is 10 difficult to look at these issues of principle without 11 understanding the implications that they have for the 12 operation of the Inquiry. 13 You gave the example of a layperson who did not know 14 they had been the subject of surveillance, doing their 15 best in the witness box to explain their experiences in 16 circumstances where others in court, including yourself, 17 were aware of detailed material that couldn't be put to 18 them. In a sense this is the inverse of that because we 19 would have a police officer or, rather, a former police 20 officer in the witness box, but where it may well be 21 that a case that is being put in closed is against him, 22 is designed to undermine or contradict his testimony, 23 but it wouldn't be possible for that to be put to him. 24 So, in real terms, the only practical solution -- 25 indeed the only fair and principled solution -- is for</p> <p style="text-align: center;">Page 93</p>	<p>1 hearing. 2 The real identity and particulars of any officer may 3 or may not become relevant in particular circumstances 4 in particular applications, but he makes no generic 5 submissions on that. 6 Having regard to the risks that he himself took when 7 he went public, he does ask me to make it clear that he 8 finds it very difficult to understand why the assumed 9 undercover names should not be disclosed. 10 There are two elements to that. First of all, the 11 mosaic principle. We would ask you, Sir, to look 12 critically at assertions that there are risks of mosaic 13 identification and not simply to accept at face value 14 that the disclosure of an identity -- which after all 15 was intended to protect the individual from disclosure 16 and from their true identity being known -- that the 17 disclosure that a particular individual was an 18 undercover officer by the name of John Bloggs, that that 19 is something which would imperil the safety -- and I put 20 it that way because, although privacy is in the balance, 21 in a sense one's focal point in the first instance is on 22 safety of the undercover officers themselves or of their 23 families. 24 On the other side of that balance, self-evidently, 25 not knowing the fact that a particular individual with</p> <p style="text-align: center;">Page 95</p>
<p>1 the open and closed evidence relative to what 2 Peter Francis has to say to be heard in open. Indeed, 3 given the way that Mr Hall put it to you that that was 4 trumpeted as a significant virtue of openness, one would 5 at this point in time at least expect the 6 Metropolitan Police Service to support that approach. 7 But what we say simply is that, once one has reached 8 that position -- and I'm going to come to "Neither 9 Confirm Nor Deny" in more general terms in a moment or 10 two -- but then once one has reached that position, you, 11 obviously, are going to want to ensure that the way in 12 which the Inquiry hears evidence is consistent, is fair 13 and has a principle justification between one case and 14 another. 15 Since we know that there will be cases where open 16 justice in practical terms must prevail, then one needs 17 a very firm reason for considering that there is 18 different approach fundamentally in every other case. 19 If I just turn briefly to the identity of undercover 20 officers. Mr Francis has not so far disclosed and has 21 no intention of disclosing -- subject, of course, to 22 directions from you, Sir -- the identity of other 23 undercover officers, that's to say the true identity of 24 other undercover officers, and he has not argued for the 25 disclosure of this in his submissions for today's</p> <p style="text-align: center;">Page 94</p>	<p>1 whom one was associated -- perhaps a parliamentary agent 2 in the example given just a few minutes ago -- not 3 knowing that that person was in fact an undercover 4 officer renders the participating of the target in these 5 proceedings effectively pointless. It is going to be, 6 in practical terms, impossible if that information is 7 not made available. 8 So we do -- and Mr Francis does -- strongly urge 9 you, Sir, to take the approach with great care, great 10 caution, the notion that that in itself carries 11 a significant risk. Indeed it would have such 12 a detrimental effect on the conduct of the Inquiry, it 13 would be difficult to see how that could easily be 14 overcome. 15 Mr Francis aligns himself with the submission of the 16 Counsel to the Inquiry that the nature of the public 17 concern within the meaning of section 1 that has led to 18 the establishment of the Inquiry will have an important 19 impact on the question of openness. Some inquiries can 20 more readily get at the truth and allay public concern 21 where important evidence is subject to a restriction 22 order and even heard in closed session. 23 So the Litvinenko Inquiry, which was touched on 24 yesterday, is an example. There the material in 25 question went to whether or not Russian state officials</p> <p style="text-align: center;">Page 96</p>

<p>1 were complicit in the murder of a British citizen in 2 London. There was no question of British public 3 officials being implicated, either by action or 4 inaction, in any wrongdoing by the time the Public 5 Inquiry began. That issue was simply not one of those 6 that were up for consideration.</p> <p>7 That being the case, there was no question of the 8 sort of conflict of interest issue that arises where the 9 body which is responsible for asserting public interest 10 immunity is itself the body that is the subject of 11 allegations of wrongdoing. Here, whilst the 12 applications were made on behalf of individuals, the 13 wrongdoing ultimately that is alleged is the wrongdoing 14 of the Metropolitan Police Service itself.</p> <p>15 This is not, in our submission, the sort of inquiry 16 in which closed evidence can be heard without that level 17 of damage to the public interest. We say, Sir, that it 18 is right for you to have regard to the fact that the 19 focus of this Inquiry is unethical and unlawful 20 undercover policing practices, continued over decades, 21 which allegedly subverted democratic principles of the 22 rule of law.</p> <p>23 Can I turn to the question of "Neither Confirm Nor 24 Deny" now and do it briefly because essentially we adopt 25 the position that has been taken by Ms Kaufmann in</p> <p style="text-align: center;">Page 97</p>	<p>1 Mr Francis -- aligns himself with the broad thrust of 2 the submission made by Ms Kaufmann. As we understand 3 that submission, it basically runs as follows: "Neither 4 Confirm Nor Deny" cannot be absolute because exceptions 5 are made. The issue, therefore, is as to the width of 6 any exception. In the context of an inquiry under the 7 2005 Act, section 19 gives you all the tools you need to 8 look at the substantive merits which are ordinarily 9 housed within an "Neither Confirm Nor Deny" policy. 10 Again, I call them, for crude over-simplicity, "persons 11 and methods".</p> <p>12 So the question becomes: given that you have those 13 tools available to you to conduct individuated 14 considerations on a case-by-case basis in relation to 15 the prevention of crime and so forth, what role is 16 there, if any, left for what I might call the husk of 17 "Neither Confirm Nor Deny" and does it have any 18 independent life in the decision-making that you have to 19 take under section 19? Does it adumbrate at all?</p> <p>20 There are often endless categorical debates about 21 whether a particular thing in a particular context 22 exists but has no weight or doesn't exist at all. 23 I want to just look at the possibility that it exists 24 but has little or no weight.</p> <p>25 The difficulty with "Neither Confirm Nor Deny" is</p> <p style="text-align: center;">Page 99</p>
<p>1 outline.</p> <p>2 THE CHAIR: Mr Emmerson, are you going to be longer than 3 five minutes?</p> <p>4 MR EMMERSON: A little longer.</p> <p>5 THE CHAIR: I think we will rise now as we have had a longer 6 morning and resume again at 2 o'clock. 7 (1.00 pm) 8 (The short adjournment) 9 (2.00 pm)</p> <p>10 MR EMMERSON: May I just say a word or two about "Neither 11 Confirm Nor Deny"? As you will be aware, Mr Francis' 12 case is that, as an undercover officer himself, he was 13 never given a life-long assurance of confidentiality, 14 nor briefed on the existence or meaning of the policy of 15 "Neither Confirm Nor Deny". Indeed, as I think it has 16 become clear during the course of argument, had any 17 briefing been given to any police officer at any time, 18 it would have to have been along the following lines -- 19 if I can emphasise this. I'm just going to come back 20 to it in just a moment -- it would have to have been, 21 "Subject to any decision of any court, we will neither 22 confirm nor deny your participation as an undercover 23 police officer". It cannot ever have been anything more 24 than that.</p> <p>25 The reason I emphasise that is just to say we --</p> <p style="text-align: center;">Page 98</p>	<p>1 that it is not really an individuated consideration at 2 all. Indeed, it is a consideration which is difficult 3 to individuate because, by its nature, if it has any 4 independent value, its value is as a policy of never 5 confirming or denying, subject to the exceptions which 6 we have touched upon.</p> <p>7 So if it is going into the balance over and above 8 the merits of persons and methods, then it needs to go 9 into the balance, obviously, as a policy that applies 10 without distinction because that's the nature and value 11 of the policy. That being the case, it is easy to see 12 why people are sensitive about the suggestion that it 13 should even be on your list because it is difficult for 14 those following --</p> <p>15 THE CHAIR: Let me give you an example.</p> <p>16 MR EMMERSON: Yes.</p> <p>17 THE CHAIR: The application of the policy depends on the 18 question. If I ask Mr Hall whether, as a technique of 19 policing, the Metropolitan Police Service employed 20 undercover officers, he would answer that question "Yes" 21 because it is common sense. If I asked him whether he 22 had an undercover officer by the name of Mr X, he would 23 say "I'm not going to confirm or deny".</p> <p>24 The application of the policy, as I suggest, depends 25 on the level of the question and the harm that you are</p> <p style="text-align: center;">Page 100</p>

1 attempting to avoid. I am afraid at the moment I can't
 2 see it as an all-or-nothing application. The husk you
 3 speak of may still contain a lot of seed. It depends on
 4 the question. But in the end, does it matter because
 5 I have to reach an assessment as to what the public
 6 interest is and that's what "Neither Confirm Nor Deny"
 7 in any form is about and only about.
 8 MR EMMERSON: Exactly. Exactly. It may be, Sir, that --
 9 perhaps the husk analogy is not perfect, but the seeds
 10 that you are referring to would be seeds that you were
 11 entitled to and would take into account in a section 19
 12 exercise.
 13 THE CHAIR: Yes.
 14 MR EMMERSON: The question is, once that has happened and
 15 you have taken all of those factors into account in the
 16 statutory balancing exercise, is there anything left of
 17 "Neither Confirm Nor Deny" at all?
 18 THE CHAIR: You mean as of itself --
 19 MR EMMERSON: As of itself as a policy.
 20 THE CHAIR: -- does it have a worth as of itself?
 21 MR EMMERSON: As of itself as a policy.
 22 THE CHAIR: My view is that it depends what the question is.
 23 MR EMMERSON: My submission is that there are two ways of
 24 looking at it. Either it falls off the equation
 25 altogether or, if it remains in, it is of no weight.

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1 I will just explain why. First of all, we rely on
 2 the words of Mr Griffin yesterday in outlining the
 3 Secretary of State's position, not because it is
 4 a submission to you, but because it reflects the public
 5 concern that she identified as being the section 1
 6 concern which in itself, as we saw in Mr Squires'
 7 submissions, is built within the section 19
 8 considerations: to what extent would the order inhibit
 9 the ability of the Inquiry to address the issues of
 10 public concern?
 11 Those issues of public concern, which Mr Griffin
 12 very helpfully outlined yesterday from his client, were
 13 shock and grave concern for the matters that emerged
 14 from the Ellison Review, a commitment to the greatest
 15 public scrutiny being required and a commitment to
 16 restoring public confidence, exposing wrongdoing in as
 17 public a way as possible.
 18 Those are strong words. They reflect what the
 19 public concern was in the establishment of the Inquiry.
 20 So that is the first reason. We say the husk in itself,
 21 something that actually carries no weight in your
 22 evaluative exercise, ought to be put to one side.
 23 THE CHAIR: Mr Squires gave me another example this morning.
 24 At least, he was submitting, those who may have been
 25 affected need to know the undercover names of the

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1 officer or whether they were targeted and, if so, in
 2 what circumstances. That's a different question from
 3 whether the true identity of the individual officer
 4 should be revealed. Then comes the question of mosaic
 5 identification, which is a matter of fact I will have to
 6 consider.
 7 MR EMMERSON: Yes.
 8 THE CHAIR: In the end, if there is evidence that the true
 9 identity would be revealed merely by disclosing the
 10 undercover name of a police officer, I will have to make
 11 the balance in that knowledge.
 12 MR EMMERSON: Yes. And will I submit, if I may say so,
 13 formidably difficult judgments ahead --
 14 THE CHAIR: How nice of you to sympathise.
 15 MR EMMERSON: As I think it through -- just to take that
 16 example, the immediate response would be, if there is
 17 a mosaic identification -- and that's why I said to you
 18 earlier on that that really needs to be critically
 19 examined because it is always asserted and it is easy to
 20 assert because it is always based on possibilities.
 21 I think what I wanted to get across was, because so much
 22 depends on it, it will be critical to look at whether
 23 there really is a demonstrable risk.
 24 Assume that there is. The next immediate response
 25 would be to say, "All right. Well, don't disclose the

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1 identity of the officer, give him a further pseudonym
 2 for the purposes of these proceedings, A2". Then there
 3 will be an argument that says, "Yes, but if they can see
 4 his face, they will know who he was and they will be able
 5 to link it up to the pseudonym he used at the time, so
 6 'A2' won't work, so you will have to screen him as well
 7 and have voice distortion". So you are left back with
 8 the way you started, with a Parliamentarian who doesn't
 9 know whether his agent was or was not an agent.
 10 The moment they know who it is and can identify and
 11 give you a useful response and say, "That person did
 12 this to me", "Oh, you mean the man I had a relationship
 13 with for three months, that in fact was an undercover
 14 police officer" -- the moment that is an opportunity
 15 available to them, there is a risk of identification.
 16 That's why, in a sense, this Inquiry is a paradigm
 17 of some of the challenges where -- I don't mean to put
 18 it bluntly -- but it is going to be essential to be
 19 unusually, perhaps in an unprecedented way, robust in
 20 responding to these type of "Neither Confirm Nor Deny"
 21 mosaic allegations because, at the end of the day, they
 22 are easy to make but not critically easy to examine.
 23 It called to mind the general principle -- and we
 24 have seen it marbled throughout some of authorities --
 25 that at least with the services, where they advise

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<p>1 ministers and ministers issue certificates, the courts 2 will be slow to second-guess risk assessments on 3 national security grounds, partly because the assessment 4 of national security is a specialist exercise, partly 5 because it depends on the assessment of piecemeal 6 intelligence, partly because it is based on advice to 7 ministers and partly because ministers enjoy democratic 8 responsibility and accountability. None of those 9 considerations apply here.</p> <p>10 This is something which has been adopted by the 11 Metropolitan Police and is being deployed here with the 12 effect -- and I don't say "intention" -- but with the 13 effect of shielding from public scrutiny the very thing 14 that this Inquiry was set up to examine. I think one 15 has to just confront that really at the heart of the 16 problem.</p> <p>17 So one reason for treating the husk, if I may say 18 so, as just that is that we know what the Home Secretary 19 understood the public interest to be when she set this 20 Inquiry up. It is a rare thing to set up a public 21 inquiry to look into secret methods, but that's what the 22 Secretary of State did. As we now know, she was very 23 clear in why she was doing it and what she intended. 24 That is the public interest, in our submission, which 25 causes a need for a very robust approach if one is going</p> <p style="text-align: center;">Page 105</p>	<p>1 exceptions, the policy will break down. That's the 2 whole argument that is always used. That's what 3 underlies "Neither Confirm Nor Deny", that it must be 4 applied in every case.</p> <p>5 But it is demonstrably wrong to make that submission 6 because the policy would remain entirely unaffected 7 because the policy, as I said a few minutes ago, has to 8 be, "Unless ordered by a court to do so, we will not 9 disclose your identity and we will neither confirm nor 10 deny that you are an undercover officer". But it is 11 those mediating words at the outset which get lost in 12 many of these submissions.</p> <p>13 You had to take Mr Hall to the relevant passages in 14 the code of practice and says, "Does it say here 15 anything about what they are told to get the 16 concession?" Well, of course they know it is not 17 absolute. But the critical thing is that it is not 18 absolute because a court stands above a police force, 19 and if a court orders its disclosure, then disclosed it 20 must be. So that policy remains. There is no damage to 21 that policy. You will have taken account of all the 22 merits considerations and you will have cast away the 23 husk because there is nothing left in it.</p> <p>24 So we do say that Ms Kaufmann is right to say that, 25 if you set sail with "Neither Confirm Nor Deny" as your</p> <p style="text-align: center;">Page 107</p>
<p>1 to be able to meet that objective.</p> <p>2 Trying to reconcile the irreconcilable -- and they 3 are not necessarily irreconcilable, these things -- but 4 faced with the submission that they are irreconcilable, 5 you have arguments from one side of the room which say, 6 "Just close the shutters then". But there are routes 7 through and they have been, I think, demonstrably set 8 out by the submissions that you have already heard.</p> <p>9 I just add this: what is the damage to the remaining 10 "Neither Confirm Nor Deny"? We hypothesise the case of 11 a particular application and you have taken account of 12 the risk to the individual, you have taken account of 13 the risk to the prevention and detection of crime, 14 persons and methods, and you have decided that, on 15 balance, the evidence is so critical to an important 16 public interest that that individual, all other things 17 being equal, ought to be revealed to the extent of their 18 undercover identity because in a way that is the fulcrum 19 issue in this hearing and in the Inquiry for it to do 20 its job.</p> <p>21 What then is one left with? One is left with 22 a policy which says we don't -- even if on all the 23 merits you conclude disclosure should be given, the fact 24 of the policy ought in itself to weigh in the opposite 25 direction because the moment we start allowing</p> <p style="text-align: center;">Page 106</p>	<p>1 compass or in any way a part of your kit, the outcome is 2 that you have to try to apply, shoehorn, a policy, the 3 very purpose of which is to admit of no exceptions, into 4 a situation where you are making individuated balancing 5 calculations and where you may well take the view that 6 disclosure is appropriate.</p> <p>7 So we would respectfully invite you to say that 8 "Neither Confirm Nor Deny" plays no part in the 9 decision-making process. It is not even a factor to 10 take account of because you will have taken account of 11 the factors that it takes account of and nothing else is 12 left and the policy stands. If it has ever been 13 understood by police officers as somehow not including 14 the exception of a court order, then that is the 15 responsibility of the Metropolitan Police Service.</p> <p>16 If they do understand that, then they will readily 17 understand that the size of a court order -- that is to 18 say the amount of information that it releases -- will 19 depend on the circumstances. It is accepted on that 20 side of the room that there will be cases where a court 21 orders the disclosure of the identity of an undercover 22 officer or other information protected.</p> <p>23 That may be the case where the issue arises -- 24 criminal trial, on appeal, civil proceedings, what have 25 you -- in relation to a particular case and therefore it</p> <p style="text-align: center;">Page 108</p>

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

9 Anyway, those are our submissions on "Neither
 10 Confirm Nor Deny".

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

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

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

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

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

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

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

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

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

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

17 Staleness: I have used that as a shorthand term to
 18 refer to applications to keep secret methods that are
 19 either no longer in use or not current. The fact is
 20 that, as far as the Special Demonstration Squad is
 21 concerned, the unit with which Mr Francis was involved,
 22 it was disbanded eight years ago and began operations in
 23 1968. So much of what it has done over the years is
 24 very old indeed.

25 Whilst some emphasis has been placed by the

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1 Metropolitan Police on the formalities put in place by
 2 Regulation of Investigatory Powers Act in 2000 and the
 3 system for regulating covert human intelligence sources,
 4 that of course clips only the tail-end of the period of
 5 the operation of the Special Demonstration Squad.

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

15 I mean, operational techniques -- I'm not revealing
 16 anything very secret here or secret at all --
 17 operational techniques involve, you know, adopting
 18 a false name, adopting a false persona, adopting a false
 19 job, having a handler, having relatively irregular
 20 meetings. We are not talking about sophisticated
 21 GCHQ-style methodology.

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

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1 techniques that are still in use. I'm not in a position
 2 to gainsay that that's the case. If it is put in that
 3 way, I have to accept that that is a legitimate
 4 proposition, not least, I think, because some of the
 5 methods are pretty rudimentary.
 6 We would say it is a minimum prerequisite for you to
 7 include the protection of methods as a factor on any
 8 individuated evaluation if the position suggested by
 9 Mr O'Connor is in fact found to be the case; in other
 10 words, that there is a specific -- not a non-specific,
 11 not a general -- not an obvious technique -- but
 12 something specific that wouldn't be guessed at or known
 13 that is still in use; the old-fashioned trade-craft
 14 talk. So there is something about it that is still in
 15 use so that it could be a continuing threat to policing.
 16 If that is not satisfied, then we would say it
 17 doesn't fall into the equation at all. If it is
 18 satisfied, that's where the balancing exercise then
 19 needs to be performed. So we note that the question of
 20 currency isn't specifically adumbrated on your list of
 21 considerations and we would invite you, whether under
 22 the "Other" heading or otherwise, to give that separate
 23 and individual consideration.
 24 Lastly, if I may, article 3 and article 8 procedural
 25 obligations and disclosure. I'm going to take this very

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1 briefly, if I may. You have been taken by Ms Kaufmann
 2 to Al Nashiri. I will not take you to it again, but may
 3 I just give you the reference? Bundle 4, tab 95,
 4 page 571, paragraphs 494 and 495.
 5 In essence, the language used -- and I hesitate to
 6 describe this as a principle of law at this stage
 7 because the courts are increasingly speaking of the
 8 right to truth -- it is in reality something culled from
 9 a combination of investigative obligations and
 10 accountability duties, but one which recognises that the
 11 outcome of accountability obligations does not just
 12 affect the individuals, but may in certain circumstances
 13 be a matter of interest to the public at large. You
 14 might think that that is not saying very much more than
 15 that it is a matter of public interest, which is
 16 precisely what the Inquiry is set up to direct.
 17 But the reason the authorities are important -- and
 18 the other one is to revisit, if I may, without taking it
 19 out, volume 1, tab 19, Al Rawi. In fact, would you
 20 mind, can I just check whether Mr Squires took you to
 21 paragraph 83?
 22 He did. Then please don't take it out again. There
 23 is a passage there in the judgment of Lord Brown in
 24 which he referred to "A-type disclosure" and the
 25 difficulties of proceeding without A-type disclosure.

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1 By "A-type disclosure" he is, I think, referring to
 2 disclosure of the sort that was held to be necessary by
 3 the European Court of Human Rights in A v
 4 United Kingdom, which is the Strasbourg limb of the
 5 Belmarsh litigation. There the Strasbourg Court held
 6 that closed evidence procedures could be potentially
 7 fair in national security cases, but only if the person
 8 affected was given a core irreducible minimum of
 9 disclosure to enable her or him to understand the case
 10 they had to meet and to give instructions to the special
 11 advocate.
 12 This was touched upon by Mr O'Connor yesterday. He
 13 said, "This is article 6. It has nothing to do with
 14 article 3 or article 8. It is pure article 6 and there
 15 is no case in this jurisdiction or any other that's
 16 taken that form of words and put it into the
 17 investigative obligation in article 3".
 18 That may be right in terms of authority, but the
 19 proposition is self-evidently correct, isn't it, that it
 20 must be part of article 3 because the obligation of
 21 investigation in article 3, which at least, so far as
 22 some of these applicants are concerned, you are arguably
 23 engaged in, requires the state authorities to ensure the
 24 participation of the affected person, the victim or
 25 their next of kin, to the extent consistent with the

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1 public interest. Obviously there will be limits, but to
 2 say that there will be limits as to the degree of
 3 effective participation does not follow that there will
 4 be absolute non-participation. There must be some
 5 degree of effective participation.
 6 Well, if there must be some degree of effective
 7 participation, then there must be an irreducible minimum
 8 duty of disclosure. The two go hand in hand. But what
 9 is the core irreducible minimum, of course, is
 10 a different question.
 11 I did pause to think, if that proposition is right,
 12 does it follow that really, as Counsel to the Inquiry
 13 suggested yesterday, it doesn't really add anything.
 14 Quite often it is tempting with Convention arguments, as
 15 I have done in another context a moment ago, to submit
 16 that they don't really make any difference because you
 17 have a piece of legislation which is designed to balance
 18 the relevant interests and the power to do so in the
 19 broadest way possible.
 20 But in this instance there is one respect in which,
 21 in our submission, it does make a difference. That is
 22 on the question which seems so central, which is the
 23 disclosure of the undercover identity of UCOS, because
 24 if, as we have demonstrated a little while ago, that is
 25 allowed to become, through mosaic identification and

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<p>1 "Neither Confirm Nor Deny" and so on, the thing that 2 causes this Inquiry to be unable to do its job in 3 public, if those behind me and to my left are not able 4 to know if there was infiltration of their constituency 5 offices, their organisations, their homes, their beds, 6 by undercover police officers, they are not going to be 7 able to participate in any effective way at all. So to 8 that extent the core irreducible minimum must be -- and 9 this is the issue -- the identity, the undercover 10 identity, of the officers concerned. 11 Those are my submissions. Thank you. 12 THE CHAIR: Thank you, Mr Emmerson. 13 Mr Millar. 14 Submissions on behalf of the media by MR MILLAR 15 MR MILLAR: Sir, we appear on behalf of the seven national 16 newspaper groups, the news broadcasters mentioned in 17 paragraph 1 of our submissions and also the 18 Press Association, who are not mentioned in our 19 submissions. 20 We are very grateful for the opportunity to be heard 21 and we are conscious of the relatively late hour. Our 22 written submissions are at tab 11 in the Inquiry's file 23 of written submissions and we will take them as read and 24 try not to repeat, but simply to enhance. 25 I wish to begin, if I may, by placing these</p> <p style="text-align: center;">Page 117</p>	<p>1 corruption, prejudice and inefficiency. Administrators, 2 judges, arbitrators, persons conducting inquiries and 3 investigations depend on it, likewise, the press, NGOs 4 and individuals concerned to report on issues of public 5 interest. Unwillingness to disclose information may 6 arise through habits of secrecy or reasons of 7 self-protection, but information can be genuinely 8 private, confidential or sensitive and these interests 9 merit respect in their own right and in the case of 10 those who depend on information to fulfil their 11 functions because this may not otherwise be forthcoming. 12 These competing considerations and the balance between 13 them lie behind the issues on this appeal." 14 This paragraph could have been written with this 15 hearing in mind. 16 The role of the journalist, where there is a mass of 17 information, as there will be at this Inquiry, is to 18 monitor it, identify what is of public interest, extract 19 that and curate it into a digestible form which will 20 interest the public, and then deliver it up to the 21 public in the form of the key points for discussion and 22 debate. This is the journalist in his or her familiar 23 public watchdog role and it has often been said by our 24 judges that the journalist, in a courtroom at any rate, 25 is the eyes and ears of the public.</p> <p style="text-align: center;">Page 119</p>
<p>1 proceedings and the media's position in relation to them 2 in a wider context. The first duty of the media is to 3 scrutinise the exercise of power by the state. It is 4 incumbent on journalists to pass information and ideas 5 about the activities of the state to the public in the 6 public interest. All of this is well understood both at 7 common law and under the Convention. It is therefore 8 important for journalists to have access to information 9 about how the state is operating. 10 This was recognised by Lord Mance in the Kennedy 11 case, which is at tab 71. I want to read the first 12 paragraph of his speech to you and then I will try to 13 avoid taking you to authority after that, if at all 14 possible. 15 Lord Mance says this at paragraph 1 of his judgment: 16 "Information is the key to sound decision-making and 17 to accountability ..." 18 THE CHAIR: Which volume, please? 19 MR MILLAR: Volume 3, sir. 20 THE CHAIR: Yes. Tab ...? 21 MR MILLAR: Tab 71. It is internal page 488, paragraph 1. 22 THE CHAIR: Thank you. 23 MR MILLAR: "Information is the key to sound decision-making 24 to accountability and development. It underpins 25 democracy and assists in combating poverty, oppression,</p> <p style="text-align: center;">Page 118</p>	<p>1 So although we appear on behalf of the media 2 organisations mentioned in our written submissions, both 3 in constitutional theory and in practice, we are here 4 also representing the interests of the public to receive 5 information acquired by this Inquiry. 6 In the past the state, especially its executive 7 branch -- less so its legislative and judicial 8 branches -- has been highly secretive. In his 1989 book 9 on Whitehall, the contemporary historian, 10 Professor Peter Hennessy, famously described state 11 secrecy as being as much a part of the British landscape 12 as the Cotswolds. 13 But there is now a range of approaches in our 14 democratic system to the disclosure of official 15 information. At one end the system is effectively 16 closed. Here the Official Secrets Act 1989 operates, 17 and journalists, as with the revelations about the 18 activities of undercover officers that have led to this 19 Inquiry, have to rely heavily on whistle-blowers or good 20 luck if they are to be able to learn of and publicise 21 misconduct by those acting on behalf of the state. 22 The other end of the range is disclosure of 23 information by the state which is voluntary, perhaps 24 even enthusiastic; for example, briefings by departments 25 when they want publicity about what they are doing. In</p> <p style="text-align: center;">Page 120</p>

1 the middle lie other regimes through which state
 2 information may be disclosed to journalists, such as
 3 Freedom of Information Act 2000.
 4 It is important to appreciate, we would suggest,
 5 that the Public Inquiries Act 2005 is one of these
 6 regimes. It is, however, very different from Freedom of
 7 Information Act. In the Freedom of Information Act
 8 there is the schedule of standing public authorities,
 9 permanent public authorities; as you will know, Sir,
 10 a very long list.
 11 The contours of their disclosure obligations to the
 12 public and the press in relation to any information they
 13 may hold are defined in minute detail in the Act. The
 14 circumstances in which the 2005 Act operates are of
 15 course very different. There is a targeted
 16 investigation undertaken by an ad hoc, not a standing,
 17 public body. Moreover, this is a quasi-judicial body.
 18 In some cases, as here, a judge may be seconded to lead
 19 the Inquiry. Although it is not a court, it operates
 20 much more like a court than, for example, a local
 21 authority or a regulatory body or a government
 22 department, as anyone who has sat in this room in the
 23 High Court for the last two days can testify.
 24 The information it acquires and holds is not its own
 25 information, nor is it held exclusively for its own
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1 purposes. This is a very different statutory and
 2 factual context to that under which Freedom of
 3 Information Act operates. This becomes important when
 4 we consider journalistic rights of access to the
 5 information it holds, whether under common law or under
 6 article 10 or simply under the 2005 Act regime itself.
 7 One reason, of course, why the judiciary has
 8 historically been regarded as less secretive than the
 9 executive is its strong promotion and development of
 10 common law principles of open justice. These principles
 11 have developed apace in recent years, so that, for
 12 example, there is now a presumptive right for the press
 13 and public to access documents considered by the court,
 14 both criminal and civil courts, and even if those
 15 documents are not read out in public in court.
 16 In the case of Kennedy, the Supreme Court has now
 17 identified a broader constitutional principle of
 18 openness that might apply to all public bodies, but
 19 certainly on the face of Kennedy applies to statutory
 20 regulatory bodies; a point I will return to in a second.
 21 So we would suggest that at the highly abstract
 22 level at which we are presently operating at this
 23 hearing, two key questions for this Inquiry are now:
 24 one, where does the 2005 Inquiries Act lie within this
 25 range of approaches to disclosure of official
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1 information? Two, how much official information should
 2 be disclosed at this Inquiry, given this Inquiry's terms
 3 of reference?
 4 The answer to the first more general question we say
 5 is or should be obvious. The 2005 Act is well towards
 6 the end of the range that favours, indeed requires, wide
 7 public disclosure of the information required or created
 8 by the Inquiry processes. In statutory terms, this is
 9 because firstly an inquiry can be set up where it
 10 appears to the minister that there is public concern
 11 about certain events. That is section 1; secondly,
 12 because the Inquiry has very strong powers to get in all
 13 the relevant evidence, section 21; thirdly, because the
 14 relevant information it acquires is presumed to be
 15 publicly available, section 18.
 16 The restrictions on public and therefore press
 17 access are only permissible if required by law under
 18 section 19(3)(b) or deemed conducive to the Inquiry
 19 fulfilling its terms of reference or necessary in the
 20 public interest, 19(3)(b).
 21 It is also obvious because of the development of the
 22 concerns that lead to public inquiries being set up.
 23 The way in which these develop may differ, but as you
 24 may know, Sir, a distinguished House of Lords committee
 25 conducted post-legislative scrutiny of the Act in
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1 2013/2014. It is a valuable report and well worth
 2 reading.
 3 Importantly, it noted at paragraph 56 that:
 4 "It is generally when concern has arisen about
 5 'lesser investigation' that previous inquiries have been
 6 initiated. Where it is the established regulatory or
 7 investigatory body which itself is seen to have failed,
 8 there is really no way that public concern can be
 9 allayed short of an inquiry."
 10 This inquiry is of this common type, described at
 11 paragraph 56 in the House of Lords' committee report.
 12 Here there have been lesser investigations, by which
 13 I mean no disrespect. I simply mean with less powers
 14 which are less wide-reaching and less public. These
 15 were mentioned by you in your opening remarks. They
 16 include Ellison, Operation Herne and Taylor and arguably
 17 also those undertaken by the civil and criminal courts
 18 in various forms. Reports of some of those cases appear
 19 in our authorities bundles.
 20 We would suggest the answer to the second question,
 21 how much official information should be disclosed given
 22 this Inquiry's terms of reference, should also by now be
 23 obvious. There is a system, if I can describe it as
 24 that, for regulating undercover policing. The
 25 following, amongst others, play a role in the system:
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<p>1 the provisions of Regulation of Investigatory Powers 2 Act; the IPT, where complaints are made about conduct 3 authorised under part 2; the conduct rules of our 4 disciplined and hierarchical police service, especially, 5 we would suggest, those requiring officers to act with 6 integrity; the IPCC, where matters are referred to 7 meriting investigation; and Her Majesty's Inspectorate 8 of Constabulary.</p> <p>9 These would seem to have failed in relation to the 10 events leading to this Inquiry. The result was misuse 11 of some of the most potent and potentially harmful 12 powers of the state. At the heart of the Inquiry is the 13 question of how and why state agents involved in 14 undercover policing could misconduct themselves to the 15 extent already revealed; also how the undercover tactic 16 has been used in other cases and whether it has been 17 properly regulated in other cases.</p> <p>18 To allay public concern about these matters, 19 comprehensive disclosure to the public and the press is 20 required. It will not suffice to have a largely closed 21 and, to the press and therefore the public, a bland and 22 featureless inquiry. The Inquiry will lack credibility 23 and is likely to be seen as a cover-up of a cover-up. 24 The coverage in the press will be limited.</p> <p>25 It is true, as Lord Mance observed in the passage in Page 125</p>	<p>1 This Inquiry, faced with requests to restrict public 2 disclosure of information, will, we would respectfully 3 suggest, be astute to bear in mind at all times that 4 where the state has misconducted itself, there will 5 always be people and institutions who stand to lose face 6 and reputation when the truth is being sought through 7 investigation. They may seek to avoid embarrassment and 8 damage to reputation by pleading public interest in 9 secrecy. It is part of the Inquiry's role to spot this 10 happening in relation to the information it holds and to 11 ensure that the attempt does not succeed.</p> <p>12 I turn now to the position of the press wanting 13 access to the information of the Inquiry. There is 14 an issue about whether European Convention on Human 15 Rights article 10 gives a right to the press which is 16 engaged when the Inquiry is considering a restriction 17 order. Article 10, of course, is a qualified right, so 18 whenever we talk about "a right under article 10", it is 19 a presumptive right, not an absolute one. But it is 20 a right nonetheless. It has to be displaced on valid 21 grounds if it is to be denied.</p> <p>22 Now, it is true that on the Leander and Gaskin line 23 of authorities in Strasbourg, to which you were referred 24 yesterday, there is no general public right of access or 25 press right of access to information which public Page 127</p>
<p>1 paragraph 1 in Kennedy that we just looked at, that 2 information can be "genuinely private, confidential or 3 sensitive" and that these interests themselves merit 4 respect. These countervailing interests -- 5 countervailing to the interests that demand disclosure 6 to the public and the press -- are catered for in the 7 2005 Act regime by the possibility of restriction orders 8 under section 19(2).</p> <p>9 I will make some very limited comments about these 10 countervailing interests in the last part of these 11 submissions because they have been exhaustively covered 12 by the arguments you have already heard. But 13 Lord Mance's immediately preceding observation must 14 always be borne in mind in this process. It is perhaps 15 equally important. I will remind you of what he said: 16 "Unwillingness to disclose information may arise 17 through habits of secrecy or reasons of 18 self-protection."</p> <p>19 A similar point was put rather more bluntly by 20 two of the consultees in the effective 21 Inquiries Consultation which preceded the 2005 Act. 22 They are recorded in the resulting DCA report, which is 23 in your bundle tab 69, as saying: 24 "National security should not be used as an excuse 25 for covering up politically embarrassing information." Page 126</p>	<p>1 authority wants to withhold under article 10.</p> <p>2 Although article 10 speaks of a right to receive and 3 impart information and ideas, Strasbourg has not yet 4 interpreted this as meaning that there is such a general 5 principle, though it is true to say that this approach 6 has come under some question in recent years in 7 Strasbourg, not least of all from the post-Communist 8 countries in the east, which experienced state secrecy 9 in its most extreme forms.</p> <p>10 When the press seeks access to information that 11 comes before a court or a tribunal, that is an entirely 12 different matter. Here very different principles apply. 13 We in this country would use the language of "open 14 justice" to describe them. Under article 10, Strasbourg 15 speaks of the duty of the press to inform the public 16 about the court proceedings.</p> <p>17 So on this issue, "Is article 10 engaged?", as 18 I said a moment ago, the particular factual and 19 statutory context of this Inquiry in which the press 20 seeks access to the public information becomes 21 all-important.</p> <p>22 We have explained at paragraphs 15 to 20 in our 23 written submissions why the present factual and 24 statutory context gives the press presumptive right 25 under article 10 to access the information acquired by Page 128</p>

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

8 This is not a case where the press is seeking to
 9 rely on article 10 rights to bolster an argument for
 10 disclosure of information which is held for its own
 11 purposes by a standing public authority under fire.
 12 That is what, in Sugar(?), the member of the public who
 13 was trying to get access to the document held by the
 14 BBC, was doing; it is what the journalist was trying to
 15 do in Kennedy.

16 The reasoning in those cases in the Supreme Court as
 17 to whether there was a presumptive right under
 18 article 10 to access the information sought has no
 19 application here. You must approach this issue fresh in
 20 light of the particular statutory and factual context in
 21 this case. Here, the reasoning of the Court of Appeal
 22 in the case of A v Independent News and Media must
 23 apply.

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

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

8 There had been an earlier decision of the Commission
 9 in Strasbourg, in a case called Atkinson v
 10 United Kingdom, where a similar issue arose at the
 11 Old Bailey, where the doors were closed to a sentencing
 12 exercise where a brown envelope had been passed to the
 13 judge. The journalist was standing outside the door and
 14 wanted to get in to access the information in the closed
 15 hearing. The Commission in that case said it probably
 16 is engaged in this situation, but the point didn't need
 17 to be decided.

18 If you go back to read the decision of the Court of
 19 Appeal in A v Independent News and Media, you will see
 20 that the court -- a very strong court with the President
 21 of the Family Division, the Master of the Rolls and the
 22 Lord Chief Justice -- drew on Atkinson v UK and recent
 23 Strasbourg authorities and said that the reason the
 24 journalist wanted to get through the doors into the
 25 court of protection was because there was already

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

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

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

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1 having a presumptive right to access the information,
 2 whether under article 10 or under our own common law
 3 constitutional principles or, rather less grandly,
 4 simply by statutory implication, looking at the wording
 5 of the legislation in issue, the 2005 Act.

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

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

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

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<p>1 the performance of its functions or meeting any of its 2 objectives, section 1(c)(ii). 3 So you had a statutory framework under the 4 Charities Commission which the Supreme Court looked at, 5 rather like you are looking at the framework under the 6 2005 Act, to answer the question, "Should the journalist 7 have a presumptive right of information and access to 8 this information?" Lord Mance, with whom 9 Lords Neuberger, Clarke, Sumption and Toulson agreed on 10 this point, said that the journalist in effect had such 11 a common law right when the Act was carefully read and 12 one understood the statutory functions and 13 responsibilities of the Commission under the 14 legislation. 15 You would need to read paragraphs 49 and 50 to pick 16 up those points in the judgment of Lord Mance. What 17 Lord Mance said was that the engagement of article 10, 18 even if it was assumed that article 10 was engaged in 19 favour of the journalist in that situation and the 20 application of its methodology under article 10(2) would 21 involve exactly the same considerations and the outcome 22 would be no more likely to lead to any outcome more 23 favourable to Mr Kennedy's viewpoint. 24 In other words, he and the court were saying that 25 the journalists' desire to have the information</p> <p style="text-align: center;">Page 133</p>	<p>1 [required by law] or considered conducive to the Inquiry 2 fulfilling its terms of reference or to be necessary in 3 the public interest ...", having regard to the matters 4 mentioned in 4. 5 These threshold tests are, as one would expect, all 6 in very strong terms. "Required in subsection A" means 7 what it says, not that there is law, for example, under 8 the Convention, which can be invoked to argue for 9 a restriction, but that the restriction is required when 10 the facts are applied to that law. So does "necessary 11 in the public interest". That means what it says. As 12 I shall mention in a moment, the public interest must be 13 identified clearly and the necessity must be established 14 by evidence. 15 "Conducive", we accept, on its face is slightly more 16 flexible, but also more problematic. The Inquiry may 17 have, on the one hand, the party or witness saying it 18 cannot or will not give evidence freely or with 19 confidence if not offered this form of protection; on 20 the other hand, the concern being expressed about the 21 need for an open inquiry to allay the public concerns. 22 The Inquiry may have to resist the temptation to accede 23 to the former suggestion at the expense of the latter 24 interest. 25 In practice, the grounds for an application said to</p> <p style="text-align: center;">Page 135</p>
<p>1 disclosed to him would be matched -- the application of 2 the law that would determine whether he got the 3 information would be matched at common law in exactly 4 the same terms as if article 10 was engaged. So we have 5 our second route to the press' right to this 6 information, which is common law. 7 As I say, you could also imply it from the words of 8 the statute. It is a strong presumptive right, we would 9 say on behalf of the journalists, to access the 10 information in the present situation. It is rooted in 11 the reasons why the Inquiry exists, the information 12 that's being acquired by the Inquiry, the corresponding 13 public interest in the information being disclosed, the 14 role of the press as a public watchdog, acquiring such 15 information and passing it to the public, and the 16 statutory words with which we are all very familiar. 17 So lastly I just want to say a few words about when 18 there might be a sufficiently strong countervailing 19 interest to override the presumption of disclosure. 20 Parliament has provided a pointer as to what is to be 21 regarded as a sufficiently strong countervailing 22 interest by reference to the restrictions that may be 23 ordered, see section 19(3). This contains limiting 24 words on the Inquiry's power to restrict access. These 25 are "... only such restrictions as are required by law</p> <p style="text-align: center;">Page 134</p>	<p>1 cross one or more of these generic thresholds will, we 2 suggest, fall under one or more of Lord Mance's three 3 headings, the three countervailing interests. We agree 4 with the non-state non-police core participants and 5 Mr Francis that the state policy of "Neither Confirm Nor 6 Deny" has no independent role to play in this process. 7 It is for the Inquiry to decide for or against 8 particular restrictions on disclosure of information in 9 the possession of the Inquiry on the merits and on the 10 evidence that is placed before it. 11 The first heading is, "Private information". One 12 might say, "Private or personal information". Certainly 13 the state and this Inquiry has to act compatibly with 14 privacy rights, but some care is needed here. The first 15 question is whether the right to privacy under article 8 16 is engaged at all. 17 As we pointed out in our written submissions at 18 paragraphs 29 to 31, disclosure of information about how 19 a public official conducts him or herself does not 20 necessarily engage the article 8 right, even if it 21 causes some damage to that person's reputation. There 22 has to be a direct effect on the person's private and 23 family life; see the references to the recent judgments 24 of Mr Justice Warby in the Yeo case at tab 112, 25 paragraphs 143 and 144.</p> <p style="text-align: center;">Page 136</p>

<p>1 Whether the right is engaged is a matter of 2 evidence. So are issues as to the strength or the 3 weight of the privacy right if it is engaged. At each 4 stage the evidence has to be carefully considered and 5 an assessment made about what impact disclosure of the 6 information in issue will have on the person's private 7 family life. This has to be balanced against the 8 arguments against the possible restriction order.</p> <p>9 We would commend to you the reasoning of Lord Rodger 10 in the Guardian case at tab 82. He did that exercise in 11 a case where a claimant contended that naming him as 12 someone who the Treasury suspected of facilitating 13 terrorism was incompatible with his article 8 rights. 14 The court had anonymised him and the press was asserting 15 its article 10 right to know and publish his identity.</p> <p>16 At paragraphs 58 and following, the analysis is 17 instructive because it shows the need for more than 18 speculative evidence and it recognises that, when 19 information available to the press to report judicial 20 proceedings is stripped of the names of those involved 21 and other information that adds context and colour, the 22 report is unlikely to be read. That's paragraph 63. It 23 may not be published or published prominently. 24 A passage from the leading authority of Re S at the 25 speech of Lord Steyn is cited to that effect.</p> <p style="text-align: center;">Page 137</p>	<p>1 is likely to be contentious under this heading is 2 government-generated confidential information. Some of 3 this happens to be confidential by statute under RIBA, 4 rather than through practice, but this makes no 5 difference to the point I'm about to make.</p> <p>6 Here it has been conclusively established at 7 common law, since the Spycatcher case which we put in 8 the bundle, in the late 1980s, that the law of 9 confidence operates differently. The government must 10 establish a sufficient public interest in 11 non-disclosure, rather than the other way round.</p> <p>12 We would refer you to the well-known passage in 13 Lord Goff's speech in the Spycatcher, which is now 14 tab 140 in your bundle, at page 283C to E.</p> <p>15 The 2005 Act achieves the same effect as our 16 common law of confidence in relation to public 17 information because the public authorities are 18 disclosing the confidential information to you, but 19 asking you to keep it confidential, they say because 20 there is sufficient public interest. It is important to 21 bear in mind how our common law has operated in this 22 area since Spycatcher for the reasons which underlie 23 common law.</p> <p>24 Prior accessibility to the information on its own is 25 not regarded as a sufficient test of whether the</p> <p style="text-align: center;">Page 139</p>
<p>1 This is an important issue for this Inquiry. It may 2 end up simply not being reported on at all because, to 3 put it bluntly there may be worthy but there will not be 4 newsworthy information emerging from it.</p> <p>5 The conclusions at paragraph 73 and 75 are 6 important. In this situation -- I won't take you to 7 them. I will just give you the reference -- as in the 8 Guardian case, the press would not be wanting to report 9 some aspect of the individual's private life, a tabloid 10 article, where there is intrusion into somebody's 11 personal and private life, because that of itself is of 12 interest.</p> <p>13 Here we are talking about the private lives and the 14 professional lives of police officers. The availability 15 of the information to the public would unquestionably 16 contribute to a debate of public interest.</p> <p>17 In practice we suggest that most applications of 18 this sort, that is relating to personal or private 19 information, will have to be made out if at all in the 20 territory of articles 2 or 3; in other words that some 21 sort of risk of that type of harm to physical integrity 22 is shown. They will have to be made out on the evidence 23 or fail.</p> <p>24 The second heading is "Confidential information". 25 It is important to emphasise that the information that</p> <p style="text-align: center;">Page 138</p>	<p>1 information should be protected by a judge. If the only 2 vice of the information if published is, in the famous 3 words of Mr Justice Mason in the High Court of Australia 4 in 1980, that it enables the public to discuss, review 5 and criticise government action, this is not enough. 6 There must be more and it must be compelling.</p> <p>7 Finally, Lord Mance spoke of "sensitive 8 information". We will take this as meaning information 9 that, if disclosed, damages national security since the 10 protection of information, disclosure of which may 11 damage national security, has traditionally been dealt 12 with separately from disclosure of other state 13 confidential information. It is also a distinct 14 legitimate aim under article 10(2) to protect 15 information that damages national security.</p> <p>16 There is a temptation to defer to assertion by the 17 state here, asserting that disclosure will damage 18 national security, rather than require proper evidence 19 demonstrating that this is the case. We say the latter 20 is always necessary and we can do no better than the 21 words of Lord Scarman in the Sarah Tisdall case, Defence 22 Secretary v Guardian Newspapers in 1984, which we put 23 into your bundle, I think, at tab 139.</p> <p>24 Evidence is required of the sort that can persuade 25 a judge to reach a judgment that the disclosure to the</p> <p style="text-align: center;">Page 140</p>

<p>1 press or the public of the information will in fact 2 damage national security.</p> <p>3 So those are our submissions. At 37 to 38 in our 4 written submissions we have raised the issue of whether 5 the Inquiry might adopt a practice by which the media is 6 given an opportunity to make informed submissions where 7 consideration is being given to restrictions on 8 disclosure of the information of high and legitimate 9 public interest. We appreciate it would not be possible 10 to do this with every withheld or redacted document, 11 every particular piece of information. But you will 12 know if we do not when we are in this territory and we 13 would want to be heard at that point if there is such 14 information being withheld and we would like to be heard 15 on an informed basis.</p> <p>16 There is no absolute right to be heard in the press 17 in that situation, but in the recent BBC case in the 18 Supreme Court, as we mentioned in our written 19 submissions, it was recognised that the duty of fairness 20 of the court or a public inquiry to the press requires 21 an effective opportunity to be heard when being denied 22 access to information it wants to report or the 23 possibility of reporting. Similarly, in <i>Strasbourg in</i> 24 <i>Carney(?) v UK</i>, there is clear authority that the press 25 must have an effective remedy for its article 10 right</p> <p style="text-align: center;">Page 141</p>	<p>1 grant of appeal notice which refers to public interest.</p> <p>2 THE CHAIR: If you have a copy, please hand it up. (Handed)</p> <p>3 MS STEEL: I just also wanted to start by saying that 4 throughout all the legal proceedings that I have been 5 involved with, where the police have asserted neither 6 confirm nor deny, they have never offered any 7 documentary evidence of their so-called policy on 8 "Neither Confirm Nor Deny", of how it is applied or how 9 any exceptions to it are decided. That is actually 10 despite an order from Master Leslie in August 2013 that 11 they should provide that documentary evidence. Instead, 12 they provided statements, but there is no documents that 13 have ever been provided about this so-called "Neither 14 Confirm Nor Deny" policy.</p> <p>15 So I just wanted to start really with a brief 16 history about what I know of neither confirm nor deny in 17 relation to the Special Demonstration Squad and other 18 political policing units. I will not comment on what 19 the situation is with the wider Security Services or 20 with the National Crime Agency position, except to say 21 that I have seen newspaper reports of undercover 22 officers giving evidence in criminal trials which are 23 open to the public. So it does seem that it is only the 24 political policing units which are seeking total secrecy 25 about everything they do.</p> <p style="text-align: center;">Page 143</p>
<p>1 where it is reporting, at any rate, court proceedings.</p> <p>2 So there are strong arguments for giving the press 3 the opportunity to be heard if the information is 4 important enough and the court is considering 5 withholding it. We would ask you and invite you to bear 6 that in mind as you get to what Mr Emmerson described as 7 the "very difficult decisions" you have to take in 8 future in this Inquiry when you take them.</p> <p>9 Sir, those are our submissions.</p> <p>10 THE CHAIR: Thank you, Mr Millar.</p> <p>11 Is Helen Steel here? Would you like to come 12 forward, please? We will make you a place.</p> <p>13 Submissions on behalf of the McLibel Support Campaign by 14 MS STEEL</p> <p>15 MS STEEL: Thank you. I wanted to make a submission on 16 behalf of the McLibel Support Campaign. The first thing 17 I wanted to do actually was just because there has been 18 considerable reference to it, is -- to the case of <i>DIL</i>, 19 is just to let you know that, as a litigant in person, 20 I actually appealed that decision and I was granted 21 leave to appeal. The grant of leave to appeal noted the 22 public interest in the appeal being heard, but the case 23 then ended up being settled with a public apology for 24 the serious human rights abuses and so the appeal was 25 never heard. In case it is useful, I have a copy of the</p> <p style="text-align: center;">Page 142</p>	<p>1 I think it is also worth bearing in mind in relation 2 to the issues raised that the main concern of this 3 Inquiry is political undercover policing, which is 4 different to general undercover policing in that the 5 intention is not to obtain evidence for prosecution; it 6 is to obtain intelligence on political movements.</p> <p>7 The result of that is that while general undercover 8 operations are subject to a certain amount of outside 9 legal scrutiny as a result of the requirements for due 10 process and fair trials, political undercover policing 11 has never been subjected to outside scrutiny until now.</p> <p>12 I want to start with why we are here at all. We are 13 not here because the police unearthed evidence of bad 14 practice within these political policing units and were 15 so concerned that they brought it to the attention of 16 the Home Secretary. We are here because of the bravery 17 of Peter Francis coming forward to blow the whistle on 18 the deeply alarming, abusive and undemocratic practice 19 of the Special Demonstration Squad and we are here 20 because of the detective work of women who were deceived 21 into relationships with undercover police officers and 22 who, despite the wall of secrecy around these secretive 23 political policing units, managed to reveal the true 24 identities of our former partners and expose these and 25 other abusive practices to the wider world. I think it</p> <p style="text-align: center;">Page 144</p>

1 is important to bear that context in mind when listening
 2 to the police assert that you can hear their evidence in
 3 secret and still get to the truth.
 4 So going back to the history of political undercover
 5 policing and neither confirm nor deny, these revelations
 6 started to unravel, really, on 19 December 2010, when
 7 The Times newspaper wrote an article about
 8 Mark Kennedy's seven years' undercover in the
 9 environmental movement.
 10 The story had already broken on the internet, on
 11 alternative news websites, including Indymedia(?), and
 12 The Times reported on his involvement in the planned
 13 invasion of Ratcliffe-on-Soar Power Station, which had
 14 resulted in a number of protesters being convicted.
 15 It was reported that his real identity was
 16 Mark Kennedy, but that he was known while undercover as
 17 "Mark Stone". The article then continued:
 18 "Last week two police forces confirmed Stone's
 19 status to the Sunday Times. 'The individual is a Met
 20 officer', said Nottinghamshire Police. 'He is an
 21 undercover officer', said the Metropolitan Police, 'so
 22 we can't say more'.
 23 So on the face of it, it took nothing more than
 24 Mark Kennedy's identity being revealed on the internet
 25 for the Metropolitan Police to confirm that he was an

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1 undercover police officer. The police actually
 2 confirmed his identity long before he was officially
 3 named in the appeal judgment in July 2011 or in the HMRC
 4 report in 2012. The police also publicly confirmed Jim
 5 Boyling as a police officer via the media on 21 January
 6 2011. The week after the DIL story of her relationship
 7 with Jim Boyling first appeared in the national press,
 8 the Guardian newspaper reported that Jim Boyling had
 9 been suspended from duty pending an investigation into
 10 his professional conduct. It said that, "In a statement
 11 the Metropolitan Police said a serving specialist
 12 operations detective constable has been restricted from
 13 duty as part of an investigation following allegations
 14 reported in a national newspaper", and a similar report
 15 was carried on the BBC.
 16 There was not just the confirmation in the media.
 17 DIL or, as she's known in this Inquiry, Rosa got in
 18 contact with me in late 2010 in relation to her former
 19 partner, Jim Boyling, who I had known as "Jim Sutton",
 20 when he was infiltrating "Reclaim the streets". I was
 21 with her when she was interviewed in March 2011 by the
 22 Department of Professional Standards, who were
 23 investigating the conduct of Jim Boyling.
 24 Her account was absolutely harrowing and, at the end
 25 of it, the police officers apologised on behalf of the

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1 Metropolitan Police. At no point in that interview did
 2 they mention "neither confirm nor deny". On the
 3 contrary, they confirmed that Jim was a serving police
 4 officer. They also named Jim Boyling and referred to
 5 him as a serving officer in correspondence sent relating
 6 to that interview and potential disciplinary issues
 7 arising from it from February 2011 until June 2012.
 8 If you want to see any of that correspondence, it
 9 can be made available to show that he was named and they
 10 were not applying neither confirm nor deny.
 11 They also provided a copy of their terms of
 12 reference to their investigation, which clearly states
 13 that they were investigating DC Jim Boyling.
 14 Then moving on to our court case, with DIL and six
 15 other women I went on to bring a case against the
 16 Metropolitan Police Service, arising from having been
 17 deceived into relationships with these undercover
 18 officers. That case involved eight women and
 19 relationships with five different undercover police
 20 officers, spanning a period of around about 25 years,
 21 and the case incorporates both the AKJ and the DIL
 22 judgments that have been referred to at this hearing.
 23 In that case, the first time the police asserted
 24 a policy of neither confirm nor deny was in a letter
 25 dated 25 June 2012, some six months after the initial

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1 letter before claim and only after considerable
 2 correspondence between the parties, which had included
 3 admitting that Mark Kennedy was an undercover officer
 4 and making a series of conflicting statements about
 5 sexual relationships while undercover.
 6 If there really was a longstanding and active
 7 Metropolitan Police Service policy of neither confirm
 8 nor deny, you would assume that the immediate response
 9 on receipt of the letter before claim in December 2011
 10 would have been to assert such a policy straightaway.
 11 In fact, in relation to the Mark Kennedy claims, the
 12 Metropolitan Police letters had absolutely no hint of
 13 a policy of "Neither Confirm Nor Deny". In a letter
 14 dated 10 February 2012, they stated:
 15 "If it assists, I can confirm Mark Kennedy was
 16 a Metropolitan Police officer and did not serve with any
 17 other force. He left the Metropolitan Police Service in
 18 March 2010."
 19 It then goes on to state that the Commissioner is
 20 not vicariously liable in respect of Mr Kennedy's sexual
 21 conduct, as described in the letters of claim.
 22 In a letter of 14 March 2012, the force solicitor
 23 stated:
 24 "I confirm that during most of the entire period
 25 from July 2003 to February 2010, Mark Kennedy was

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<p>1 authorised under Regulation of Investigatory Powers Act 2 to engage in conduct of the sort described in 3 section 26(8) of Regulation of Investigatory Powers Act. 4 He was lawfully deployed in relation to certain groups 5 to provide timely and good-quality pre-emptive 6 intelligence in relation to pre-planned activities of 7 those groups. The authorisation extended to 8 participation in minor criminal activity." 9 There was then further correspondence in which the 10 Metropolitan Police Service was quite open about Mark 11 Kennedy's identity as an undercover police officer. It 12 was not actually until November 2012 that the 13 Metropolitan Police Service first raised "Neither 14 Confirm Nor Deny" in relation to the AKJ case in their 15 application to strike out the claim on the basis that 16 "Neither Confirm Nor Deny" meant that they could not 17 defend themselves. That is the Carnduff argument. By 18 that time they had obviously confirmed his identity so 19 it was all a bit late. 20 Then, moving on to how the so-called "Neither 21 Confirm Nor Deny" policy relates to the Department of 22 Professional Standards, as I mentioned, the first time 23 that the police asserted a policy of neither confirm nor 24 deny in relation to the DIL claims was in June 2012. 25 That came two weeks after the first mention of "Neither Page 149</p>	<p>1 letter of 16 April explains that the Directorate of 2 Professional Standards (Police) was seeking legal advice 3 as to whether or not they could disclose that 4 information to us. 5 On 11 June 2012, the Directorate of Professional 6 Standards (Police) sent an email regarding the 7 progression of my complaint and asking to interview me 8 in relation to the allegations about breaches of legal 9 privilege and Bob Lambert's involvement in the creation 10 of the leak that resulted in the McLibel action. 11 In that same letter, even though they have named 12 Bob Lambert and asked me to give a statement in relation 13 to him, they state: 14 "In answer to your questions surrounding John Barker 15 and Mark Cassidy, the current position of the 16 Metropolitan Police Service is to maintain its neither 17 confirm nor deny stance in accordance with established 18 policy." 19 That letter on 11 June 2012 was the first time that 20 the police mentioned "Neither Confirm Nor Deny" to us. 21 At that point, though, since Bob Lambert was named 22 in that same letter, it appeared that it was only in 23 relation to John Barker and Mark Cassidy that they were 24 asserting neither confirm nor deny. It was only two 25 weeks later on 25 June, when they extended that to all Page 151</p>
<p>1 Confirm Nor Deny" at all from any police source which 2 was in a letter from the Directorate of Professional 3 Standards (Police). 4 Until that point, the Directorate of Professional 5 Standards (Police) had openly discussed the 6 investigation against Jim Boyling, but they were also 7 asking for statements from myself and the other women in 8 relation to the issues raised in the particulars of our 9 claim. That included issues relating to the McLibel 10 Support Campaign. 11 A letter that was from them, dated 16 April 2012, 12 confirmed progress in relation to the investigation into 13 DC Boyling and then went on to seek clarification 14 relating to whether or not I wanted to make a formal 15 complaint to the Directorate of Professional Standards 16 (Police) of matters that were outlined in our letters 17 before claim regarding the involvement of undercover 18 officers in the McLibel case. 19 During previous discussions we had requested 20 information relating to what action the Directorate of 21 Professional Standards (Police) was able to take if 22 undercover officers were no longer employed by the 23 Metropolitan Police Service and, as a result, we had 24 requested confirmation as to whether John Barker and 25 Mark Cassidy were still serving police officers. The Page 150</p>	<p>1 the officers in the DIL case, that "Neither Confirm Nor 2 Deny" became the standard response to every request for 3 information or compliance with the court proceedings, 4 even though there had already been official 5 acknowledgement that both Lambert and Boyling had been 6 undercover officers. It was absolutely clear at that 7 point that they were going to use "Neither Confirm Nor 8 Deny" to create a wall of silence about these 9 relationships. 10 Moving on to other evidence relevant to neither 11 confirm nor deny about Bob Lambert. When I originally 12 met with DIL, she informed me that while she was married 13 to Jim Boyling, he had revealed that Bob Lambert and my 14 former partner, John, had both been police spies in the 15 groups that I had been involved with. 16 It took some time to identify that Bob Lambert had 17 been Bob Robinson, who infiltrated London Greenpeace in 18 the mid-1980s. But after that we felt it was important 19 to expose his past role, which we did when he spoke at 20 a public meeting about racism in the headquarters of the 21 Trade Union Congress on 15 October 2011. 22 If necessary, footage is available of that incident 23 which confirms that no violence either took place or was 24 threatened and that Bob Lambert hurried away, refusing 25 to make any comment. But two weeks later, on 24 October Page 152</p>

<p>1 2011, he issued a public statement to Spinwatch, which 2 was an organisation which he had worked with in the 3 past, and to the Guardian, in which he admitted, "As 4 part of my cover story so as to gain the necessary 5 credibility to become involved in serious crime, I first 6 built a reputation as a committed member of London 7 Greenpeace, a peaceful campaigning group". 8 That statement contrasts sharply with the attempt to 9 smear the group that is made in his current statement 10 for the purposes of applying for a restriction order in 11 connection with this Inquiry, but it also confirms his 12 role as an undercover officer. 13 He has subsequently gone on to comment extensively 14 in the media about his time in the Special Demonstration 15 Squad, the relationships that he had, the fact that 16 a child was born as a result of one of those 17 relationships and the fact that he was involved in 18 writing the London Greenpeace anti-McDonalds leaflet 19 that became the subject of the McLibel case. 20 Now you would think that, if "Neither Confirm Nor 21 Deny" had always been an Metropolitan Police Service 22 policy, that Bob Lambert, who had supervised Special 23 Demonstration Squad officers at one point, would have 24 known about that and adhered to it. But it is not just 25 Bob Lambert. We then go on to the Commissioner of the</p> <p style="text-align: center;">Page 153</p>	<p>1 already been referred to, so I'm not going to say 2 anything at length, is the True Spies television series. 3 In 2002, the BBC broadcasted three programmes as part of 4 a series called "True Spies" which were entirely focused 5 on the work of the Special Demonstration Squad. As I am 6 sure you have heard, the programme was made with the 7 support and assistance of the Metropolitan Police 8 Service. While no individual officer's identity is 9 disclosed, undercover officers speak extensively to the 10 camera about their work. They talk about the groups 11 they infiltrated and the methods used. There are 12 significant details of the undercover operations 13 actually carried out. I would urge you to watch 14 True Spies so that you can see just how much of their 15 tactics they discussed and yet how the 16 Metropolitan Police now claim they can't talk about 17 those same tactics. 18 I submit that they were perfectly happy to reveal 19 their methods and the groups that they were spying on 20 when it suited them for PR purposes and that the reason 21 they want to bring in "Neither Confirm Nor Deny" is that 22 actually just to cover up serious human rights abuses. 23 It is being used as a shield for the police from any 24 form of accountability and to avoid any proper scrutiny 25 of their actions to cover up illegal and immoral</p> <p style="text-align: center;">Page 155</p>
<p>1 Metropolitan Police, Bernard Hogan-Howe. 2 You would think that this is someone who would stick 3 to "Neither Confirm Nor Deny" if it truly was a policy 4 adopted by the Metropolitan Police. But, no, at 5 a public meeting of the Metropolitan Police Authority on 6 27 October 2011, he confirmed that Jim Sutton was under 7 investigation as a serving officer. 8 Is it really credible that, if there was an "Neither 9 Confirm Nor Deny" policy in place, the Commissioner 10 himself would not know about it and not adhered to it? 11 The transcript of those proceedings is available, it can 12 be checked, and you will see that he answers questions 13 about Jim Boyling. 14 So is it really credible that there was an "Neither 15 Confirm Nor Deny" policy in place at that point or is it 16 more likely, as I would submit, that "Neither Confirm 17 Nor Deny" was suddenly adopted in June 2012, when the 18 Metropolitan Police Service wanted a wall to hide behind 19 after they realised that they could no longer write 20 these relationships off as a result of rogue officers 21 and that, in fact, there was clear evidence of multiple 22 abusive relationships that could only have arisen 23 through systemic failings and institutional sexism. 24 The final and key piece of the jigsaw concerning the 25 truth about neither confirm nor deny, which I know has</p> <p style="text-align: center;">Page 154</p>	<p>1 activities of political undercover police officers and 2 prevent them coming to light. 3 There was a lot of talk yesterday about the police 4 rights to privacy, but there was nothing at all from the 5 police about the rights of core participants who were 6 spied on. It took me 24 years to get acknowledgment of 7 wrongdoing from the Metropolitan Police and from 8 John Barker, my former partner. Other core participants 9 should not have to wait that long, nor should they have 10 to risk never finding out the truth and being left with 11 permanent doubt about who people really were in their 12 lives. 13 We know that the McLibel Support Campaign was 14 infiltrated by John Dines and indeed that Bob Lambert 15 was involved in writing the leaflet that led to the case 16 and we know that information was shared between the 17 Metropolitan Police and private corporations, private 18 investigators and McDonalds that enabled the writs to be 19 served, but what we don't know is any of the detail 20 behind that. We need to know how and why that was 21 allowed to happen in order to prevent those kind of 22 abuses from happening again. 23 It is insulting in the extreme that, despite the 24 apology, the police are still seeking to neither confirm 25 nor deny John Dines. It is also farcical in light of my</p> <p style="text-align: center;">Page 156</p>

1 meeting with him last week and his apology to me. But
 2 it was not just insulting to me. It is insulting for
 3 everybody who has had their privacy invaded to be told
 4 that they can't know the truth about the wrongdoing that
 5 was done against them because the privacy of those who
 6 carried out that abuse has to be protected.
 7 I just also wanted to say that, you know, they seem
 8 to also be seeking unique rights in that they seem to
 9 think that they should have the right to no social
 10 ostracisation, which is something that nobody else who
 11 is accused of wrongdoing gets any form of protection
 12 from. Nobody else who is accused of something has their
 13 name covered up on the grounds that they might be
 14 socially ostracised.
 15 So finally, I wanted to submit that, even if there
 16 had been a genuine "Neither Confirm Nor Deny" policy,
 17 there is absolutely no justification for a blanket
 18 protection of all officers, given the level of human
 19 rights abuses that we have been subjected to as core
 20 participants. I cannot see why officers who have
 21 grossly abused the fundamental human rights of others
 22 should have a permanent shield preventing scrutiny of
 23 their actions and I would say that it is not in the
 24 public interest for officers to think that they will be
 25 protected no matter what they do.

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1 The McLibel Support Campaign supports the
 2 core participants' call for all the cover names to be
 3 released so that the truth can be heard. We have not
 4 called for all the real names of officers to be
 5 released, although I think that there may be individual
 6 circumstances where that is appropriate, especially
 7 where those officers went on to become supervisors or
 8 line managers or are now in positions of responsibility,
 9 but I'm assuming that that would be done on a more
 10 individualised basis. However, I do believe that all of
 11 the cover names should be disclosed so that the truth
 12 can be achieved.
 13 I also believe that to ensure the Inquiry is as
 14 comprehensive as possible, the police need to release
 15 a full list of all the organisations that were targeted.
 16 There is no reason for secrecy on this. Various groups
 17 were named in True Spies, so why is it that they can't
 18 be named now?
 19 The reason for wanting maximum transparency and
 20 disclosure is a political one. Without the names of
 21 undercover officers who targeted each group, it is
 22 impossible to start to assess the whole impact of their
 23 surveillance or the extent of the abuses committed.
 24 Without full disclosure, we won't get to the full truth
 25 and we can't ensure that preventative measures are put

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1 in place to stop these abuses happening again.
 2 These were very, very serious human rights abuses
 3 committed by this unit, including article 3 abuses. We
 4 want to stop them happening again. That is our purpose
 5 in taking part in this Inquiry and that is the real
 6 public interest that requires that there must be
 7 openness and transparency.
 8 Thank you.
 9 THE CHAIR: Ms Steel, as you know, there is going to be
 10 a transcript of your address to me which I'm going to
 11 ask the Inquiry team to read.
 12 At the conclusion of that, it may be that we will
 13 want to make contact about this correspondence.
 14 MS STEEL: Okay, yes.
 15 THE CHAIR: Thank you very much.
 16 MR EMMERSON: Sir, may I add one matter -- I'm sorry to
 17 speak out of turn -- in the light of what Ms Steel has
 18 raised, I have been instructed to bring to your
 19 attention that, in connection with the True Spies
 20 documentary that Ms Steel placed some emphasis on,
 21 I have some correspondence from the Metropolitan Police
 22 to Mr Francis encouraging his and other officers'
 23 participation in the programme. So I will make that
 24 available to Counsel to the Inquiry and to the other
 25 parties.

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1 THE CHAIR: Thank you very much.
 2 Mr Hall?
 3 Submissions in reply on behalf of the Metropolitan Police
 4 Service by MR HALL
 5 MR HALL: Sir, I'm going to reply, briefly, if I may, to
 6 observations by Ms Kaufmann, Mr Squires and Mr Millar.
 7 I will be brief.
 8 "Neither Confirm Nor Deny", we say that you cannot
 9 say at this stage that the interests of consistency have
 10 no weight. There are two arguments really raised
 11 against us. One is that, because some Special
 12 Demonstration Squad officers have been officially
 13 confirmed, therefore "Neither Confirm Nor Deny" cannot
 14 apply. The answer to that is see what happened in DIL.
 15 Mr Justice Bean, as he was, upheld "Neither Confirm Nor
 16 Deny" for the two remaining officers, notwithstanding
 17 the fact that two others had been officially confirmed
 18 in his judgment. The reference there is tab 6,
 19 paragraph 47.
 20 Secondly, it is said that you can protect the
 21 underlying interest that "Neither Confirm Nor Deny"
 22 seeks to protect by some other means. Sometimes that is
 23 right, but sometimes it is not right. I gave a concrete
 24 example earlier in my submissions about the
 25 infiltrations of X and Y and the need to have

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<p>1 a consistent response even when there is no individual 2 harm in relation to one of the infiltrations. You have 3 the evidence of Mr McGuinness, so that cannot be 4 discounted.</p> <p>5 I perhaps invite you -- I don't need to take you 6 to it -- in fact I will take you to it if I may. It is 7 McGartland, tab 50, where a similar attempt was made -- 8 Sir, this is in volume 2 of your authorities -- 9 a similar attempt was made to knock out "Neither Confirm 10 Nor Deny" at a preliminary stage, which was rejected by 11 the Court of Appeal.</p> <p>12 I know you looked at McGartland, but the two 13 passages we have not looked at, paragraph 6, behind 14 tab 50, the central question on the appeal is whether 15 the judge was wrong not to decide the "Neither Confirm 16 Nor Deny" issue before deciding whether to make 17 a section 6 declaration under the Justice and Security 18 Act.</p> <p>19 "It is submitted on the claimant's behalf that the 20 "Neither Confirm Nor Deny" issue could and should have 21 been resolved on the material before the judge and that, 22 if it had been resolved in the claimant's favour, it 23 would have led to a requirement for the defendant to 24 plead a full open defence, which would in turn have 25 enabled the court to form a proper assessment as to</p> <p style="text-align: center;">Page 161</p>	<p>1 MR HALL: Yes, and the way of looking it up here is the 2 same. You will look at the restriction order 3 application, you will see whether "Neither Confirm Nor 4 Deny" and the need to keep consistency is a valid 5 consideration on the facts and you will have regard to 6 whatever open and closed evidence is put before you.</p> <p>7 So, Sir, that's all we say about "Neither Confirm 8 Nor Deny". Can I then deal with effective participation 9 by unknown victims?</p> <p>10 One needs to consider what is meant in practice by 11 the submission that Ms Kaufmann made. The practical 12 consequence is that there must be disclosure of every 13 officer in case there has been wrongdoing, as 14 I understand the practical consequences. That would be, 15 we say, obviously unfair. It would apply to every 16 undercover officer that you are going to have to 17 consider, not just those in the Special Demonstration 18 Squad, not just those who infiltrated the extreme left, 19 but those who infiltrated the extreme right.</p> <p>20 As you know, we say that the better way to approach 21 this issue -- which is an issue, I agree -- is stage by 22 stage. Can I make the practical observation that if 23 there is or was targeting on any particular individual, 24 that is likely to have created reporting because the 25 point of targeting is to create reporting.</p> <p style="text-align: center;">Page 163</p>
<p>1 whether the conditions for a section 6 declaration were 2 truly made out."</p> <p>3 So that was the issue. Then the way that the court 4 ultimately dealt with it is at paragraph 45 in the 5 judgment of Lord Justice Richards.</p> <p>6 Lord Justice Richards said this -- so having rejected 7 the submissions, he said:</p> <p>8 "This all goes to show that the "Neither Confirm Nor 9 Deny" issue, although open to argument, as Mr Eady 10 conceded, is less clear-cut than Ms Kaufmann suggested 11 in her submissions. There are moreover strong reasons 12 to believe it could not be decided with consideration of 13 a full closed defence and the related closed material 14 relied upon by the Secretary of State in defence of the 15 substantive claim."</p> <p>16 I make the parallel point that the "Neither Confirm 17 Nor Deny" issue here is not as clear-cut as Ms Kaufmann 18 would have you believe and it is a matter which should 19 be resolved on the facts of a particular concrete 20 example.</p> <p>21 So, Sir, we say --</p> <p>22 THE CHAIR: But McGartland was rather special on its facts 23 because effectively Ms Kaufmann was arguing that it 24 could be decided in open court and the judge said, 25 "I had better see closed".</p> <p style="text-align: center;">Page 162</p>	<p>1 So this is a case in which the presence or absence 2 of documents showing reporting and therefore targeting 3 is likely to be indicative of whether there was in fact 4 targeting. So we say you can look at the documents that 5 are produced to you and then form a judgment as to 6 whether there are categories of people about whom you 7 ought to know more.</p> <p>8 Then, Sir, turning to the question of effective 9 participation by the current core participants, all of 10 whom Ms Kaufmann described as "victims", again it is 11 necessary to look at the practical consequences, 12 I think, of what she is saying. The consequence is 13 that, wherever a person alleges that they are a victim 14 of undercover policing, for example they have been 15 reported on by an undercover police officer, then they 16 are entitled to require the Inquiry to disclose if there 17 was any officer who in fact interacted with them. That 18 would be true whether it is an undercover officer in 19 1968 or 2016. If that really is what the non-state 20 participants are saying, then we say that would be an 21 unlawful approach because it would be an unfair one and 22 also note that that sort of approach would be bound to 23 damage the recruitment and retention and confidence of 24 current and future Covert Human Intelligence Sources and 25 undercover officers.</p> <p style="text-align: center;">Page 164</p>

<p>1 The suggestion that you should effectively discount 2 even the possibility that what this Inquiry does should 3 harm future retention and recruitment at this stage we 4 say is obviously wrong. It must depend upon the 5 evidence you have. We will in due course look at the 6 evidence of, for example, Witness Cairo on this point. 7 Sir, finally on her submissions, the rule of law has 8 been raised as a point that weighs strongly in favour of 9 disclosure. Our submission is that the rule of law is 10 to follow the law set out in the Inquiries Act. That is 11 a law or a rule of law that permits restrictions to be 12 made in a proper case. 13 I'm going to take you, if I may, to the case of 14 RB (Algeria), which is at tab 72, which you will find in 15 volume 3. 16 Sir, RB concerned the use of closed-material 17 procedures. At paragraph 230, Lord Hope effectively 18 looked at the rule of law issue in this context. 19 Sir, page 255 at the bottom, paragraph 230, 20 Lord Hope says this: 21 "There remains, however, the question of whether the 22 use of closed material fails to meet the minimum 23 standards of procedural fairness that is to be expected 24 of any such tribunal in a democratic society." 25 It is at the bottom of that page. So raising Page 165</p>	<p>1 Lord Justice Thomas -- I will just give you the 2 references, sir. It is tab 22 at paragraph 41 -- 3 referred to a prima facie case of wrongdoing. In the 4 Court of Appeal -- I will take you, if I may, to the 5 judgment. It is in volume 5 and it is tab 108, Sir, 6 paragraph 39 in the judgment of Lord Judge, the Lord 7 Chief Justice. Picking up the letter C, ultimately it 8 supports the rule of law itself. Then this is the 9 sentence which has been cited, but it is important to 10 look at all the words that are used: 11 "Where the court is satisfied that the executive 12 misconduct itself were ...(Reading to the words)... 13 acting so as to facilitate misconduct by others all 14 these strands, democratic accountability, freedom of 15 expression and the rule of law are closely engaged." 16 Plainly the use of the word "satisfied" is 17 deliberate. 18 In the judgment of Lord Neuberger, paragraph 184: 19 "In the light of all these points I have no doubt 20 there is a substantial and very strong public interest 21 as a matter of principle in having the redacted 22 paragraphs published. In a case where a judgment has 23 been given there is a significant public interest in the 24 whole judgment being published ...(Reading to the 25 words)... and it is undesirable the executive should be Page 167</p>
<p>1 effectively the rule of law point. Then: 2 "The procedure for SIAC is governed by the 1997 Act 3 and by the rules that have been made under section 5." 4 I don't need to read out the next bit, which just 5 refers to those rules. Then picking it up five lines 6 on: 7 "These procedures are intended to provide a fair 8 balance between the need to protect the public interest 9 and the need to provide the applicant with a fair 10 hearing. As Mr Tan QC for the Secretary of State 11 pointed out it is inherent that in any forum in which 12 sensitive evidence might be relevant some adjustment 13 will have to be made to normal procedures." 14 So the rule of law is not subverted by following the 15 procedure that Parliament has provided for. 16 So then turning to the two arguments made by 17 Mr Squires, he referred you to the Binyam Mohamed case. 18 Sir, as he rightly noted, Binyam Mohamed was about what 19 should be published of the court's judgment; in other 20 words, it concerned what findings should be made public. 21 It wasn't about what disclosure should be made during 22 the fact-finding exercise. 23 It is absolutely essential to look at what the 24 judges said about whether a mere allegation is 25 sufficient. First of all, in the Divisional Court, Page 166</p>	<p>1 seen to dictate to the judiciary what can and cannot go 2 into an open judgment of the court." 3 Then this: 4 "Where the judgment is concerned with such 5 a fundamental and topical an issue as the mistreatment 6 of detainees and where it reveals involvement or worse 7 on the part of the UK government and the mistreatment of 8 a UK resident, there can be no doubt that the public 9 interest is at the very top end of importance." 10 Again we would submit that the word "reveals" is 11 important, so a finding rather than simply an 12 allegation. 13 So, Sir, that is all I was going to say about that 14 line of authorities. Can I turn then to the question of 15 where your accountability -- the accountability of the 16 Inquiry, a point that has been raised. The proposition 17 is that, however thoroughly you, the Inquiry, do your 18 work, that the public will not have confidence unless 19 the process is public. 20 Sir, I accept and I acknowledge that this is 21 an issue of difficulty which is bound to weigh. 22 Ultimately this is one of those situations in which the 23 Inquiry will just have to shoulder any brick bats that 24 are thrown to it, but it will do so safe in the 25 knowledge that it is acting independently and fairly, Page 168</p>

<p>1 according to a statute that permits closed hearings 2 where justified.</p> <p>3 It was entirely open to Parliament to enact a sort 4 of super-inquiry which required that everything should 5 be heard openly whatever the cost. Parliament didn't do 6 so. Ultimately the duty of yourself, as chairman, is to 7 apply the Inquiries Act, rather than being driven by 8 concerns which are difficult to judge about perceptions 9 of accountability.</p> <p>10 Turning finally to Mr Millar's submissions. He 11 referred to the Spycatcher case. Can I just remind you, 12 Sir, that that was a case where the media already had 13 the information that they wanted to publish in this 14 country. It was not a case in which the authorities 15 were being required to officially confirm anything, so 16 it is distinguishable, as is the reasoning.</p> <p>17 I will just give you the reference. Lord Keith's 18 judgment in the passage at 256D to F, where his Lordship 19 distinguished between disclosure by an intelligence 20 officer on the one hand and disclosure by a third party 21 who has received information such as a newspaper.</p> <p>22 Here, where one is talking about official 23 confirmation by the authorities, we say that the 24 confidentiality starting point was struck by Regulation 25 of Investigatory Powers Act.</p> <p style="text-align: center;">Page 169</p>	<p>1 THE CHAIR: Thank you very much.</p> <p>2 Yes, Mr O'Connor.</p> <p>3 Submissions in reply on behalf of National Crime Agency by 4 MR O'CONNOR</p> <p>5 MR O'CONNOR: Sir, I'm grateful. The single point on which 6 I wished to reply was the question of the impact on 7 disclosure of the investigative obligations under 8 articles 3 and 8, a matter on which you were addressed 9 by Ms Kaufmann and Mr Emmerson. It is issue number 3 on 10 the issues for consideration circulated before this 11 hearing.</p> <p>12 Sir, the first point to make is that this is of 13 course not a principle that is spelt out in the Act. It 14 is a principle which emerges, if at all, from the 15 jurisprudence of the European Convention.</p> <p>16 Secondly, although the issue as drafted in the list 17 of issues refers to articles 3 and 8, Ms Kaufmann 18 addressed you purely on the question of article 3 and 19 also the case to which she took you -- which I will take 20 you back to briefly in a moment if I may -- also related 21 only to article 3. So in that regard we would submit 22 that of course the question of whether article 3 is 23 engaged will be fact-specific.</p> <p>24 It is very early days in these proceedings to say 25 anything with confidence about the facts. But what we</p> <p style="text-align: center;">Page 171</p>
<p>1 Sir, those are my reply submissions.</p> <p>2 THE CHAIR: Thank you very much.</p> <p>3 I'm not minded to listen to a succession of replies 4 which are to the same effect.</p> <p>5 MR O'CONNOR: Sir, may I boldly request simply to reply on 6 one discrete point which Mr Hall has not covered.</p> <p>7 THE CHAIR: We have not given the transcribers a rest this 8 afternoon yet, Mr O'Connor, so we will do it now.</p> <p>9 We will come back in ten minutes.</p> <p>10 (3.54 pm)</p> <p>11 (A short break)</p> <p>12 (4.21 pm)</p> <p>13 THE CHAIR: Mr Barr, why have I been out of the room for 14 half an hour, rather than ten minutes?</p> <p>15 MR BARR: Sir, thank you very much for the extra time. The 16 reason was I was approached by one of the core 17 participants who had some issues which he wanted to 18 raise, I understand, on behalf of a large number of the 19 core participants. They concerned matters which are not 20 the issues which you are dealing with today. They are 21 to deal with matters of representation and venue. We 22 have had some discussions and I have advised the core 23 participant that the correct forum and channel to raise 24 these issues is via a letter from their recognised legal 25 representative.</p> <p style="text-align: center;">Page 170</p>	<p>1 would simply say is that, at the lowest, it cannot be 2 assumed that article 3 will be engaged in all of the 3 factual circumstances that you will be investigating.</p> <p>4 So the third point is that even where article 3 or 5 article 8 are engaged in their investigative factor, the 6 important practical question for your purposes is 7 whether that investigative duty will make a difference 8 in the disclosure decisions that you have to make, given 9 all the other overlapping issues that are in play.</p> <p>10 When I made my submissions yesterday, I submitted 11 that the Convention case law under these articles is 12 only likely to make a difference to your decision if it 13 establishes a mandatory minimum of disclosure such as to 14 override security and confidentiality considerations.</p> <p>15 So if there is such a principle, that of course 16 would make potentially a significant decision to your 17 exercise because all of the submissions that you have 18 received in the past two days have been premised on the 19 assumption that the task you have to undertake is 20 a balance between competing interests. If, in fact, 21 there is, as well as that balance, a minimum level of 22 disclosure to which some or all of the core participants 23 are entitled, then the exercise would need to be 24 recalibrated to that extent.</p> <p>25 Sir, Ms Kaufmann took you to the case of Al Nashiri</p> <p style="text-align: center;">Page 172</p>

<p>1 to make good the proposition that there is indeed 2 a minimum level of disclosure required under article 3. 3 We submit that in fact the case is not authority for 4 that proposition and I will ask you to go back to it, if 5 I may. It is in bundle 4 of the authorities at tab 95. 6 Sir, the first passage that Ms Kaufmann took you to 7 is at paragraph 480 of the judgment, page 566 of the 8 report. You see about halfway through paragraph 480 9 a subparagraph starting "Thirdly ...", which records 10 a submission made by Mr Emmerson in those proceedings, 11 which essentially asserted the existence of a minimum 12 level of disclosure. 13 The reference was to A v United Kingdom, which was 14 the article 6 case -- article 5(4) and article 6 case -- 15 which established a minimum level of disclosure in those 16 cases. 17 You can see the reference there to "an essential 18 gist of the material should be disclosed sufficiently 19 for the victim to participate fully in the Inquiry". So 20 that was the submission that asserted that there ought 21 to be a minimum level of disclosure. 22 The second passage that you were taken to was at 23 paragraph 494, which is the court's ruling on the issue. 24 We submit that the passage which is most important is 25 that which starts again about halfway down:</p> <p style="text-align: center;">Page 173</p>	<p>1 difficulties of this court should be counterbalanced in 2 such a way that a party can effectively defend its 3 interests." 4 So, as Ms Kaufmann sees, there is then a footnote, 5 at footnote 266, to the A case. In my submission there 6 is a significance in the fact that that footnote appears 7 at the end of that sentence and not the sentence before 8 it, because A, of course, also dealt with the question 9 of special advocates and the like. 10 What one, in my submission, sees there is the 11 reference to counter-balancing procedural protection 12 being put in place where there are closed proceedings, 13 but it is not related to the prior question of what 14 should be in those closed proceedings and, more 15 importantly, what must be in the open proceedings. 16 THE CHAIR: Do we have A in the bundles? 17 MR O'CONNOR: Sir, I am afraid not -- 18 THE CHAIR: The specific reference is to paragraphs 216 to 19 218, so I can read that to myself. 20 MR O'CONNOR: You can, Sir. I am afraid it's not in the 21 bundle. 22 Just to complete this point, there is a 23 binary question: is the test a core irreducible minimum 24 or isn't it? I have made the submissions that we submit 25 on this case, which has been submitted to you as the</p> <p style="text-align: center;">Page 175</p>
<p>1 "It is to be recalled that, even if there is 2 a strong public interest in maintaining the secrecy of 3 sources of information or material, in particular in 4 cases involving the fight against terrorism ..." 5 And these are the critical words, sir: 6 "... it is essential that as much information as 7 possible about allegations and evidence should be 8 disclosed to the parties in the proceedings without 9 compromising national security." 10 So we submit that it is clear from that ruling that 11 the court there are rejecting the submission that there 12 should be a core irreducible minimum level of disclosure 13 that overrides any security considerations. 14 MS KAUFMANN: Sir, I hate to interrupt, but could you just 15 read the next line and the reference to A? 16 MR O'CONNOR: I was about to come to the next sentence, if 17 I may. 18 But, Sir, in that sentence which I'm referring to, 19 which is the one where they deal with the test to be 20 applied at the disclosure stage, the language that is 21 used is the language of a balance and not a core 22 irreducible minimum. 23 They then go on -- and I was about to come to 24 this -- to say: 25 "Where full disclosure is not possible the</p> <p style="text-align: center;">Page 174</p>	<p>1 high point of the Strasbourg jurisprudence, it is not 2 made out. 3 You will be familiar, of course, with the other 4 principle which states that domestic courts -- and we 5 submit for these purposes an inquiry is in the same 6 position -- should not outpace the Strasbourg 7 jurisprudence. But we submit that if you were to rule 8 that there is a core requirement, that is precisely what 9 you would be doing. 10 Sir, in his submissions I think it is fair to say 11 that Mr Emmerson came close to conceding that there was 12 not in fact any Strasbourg case law which made clear 13 that there was an irreducible minimum level of 14 disclosure. In those circumstances, we submit that you 15 should not approach the matter on that basis. 16 Sir, I'm grateful. Those are our submissions. 17 THE CHAIR: Anybody else on the police or state side? 18 Then, Mr Barr, is there anything you wish to add? 19 MR BARR: No, thank you, Sir. 20 THE CHAIR: If I may say so, the oral submissions have been 21 of the same admirable quality as the written 22 submissions. What has assisted me, for obvious reasons, 23 is the commentary by one side of the argument on the 24 written submissions of the other. You have not made my 25 ultimate task any easier, but simply elucidated it.</p> <p style="text-align: center;">Page 176</p>

<p>1 Thank you very much.</p> <p>2 Before we part today, can I raise the question of</p> <p>3 costs awards? You know that the current costs awards</p> <p>4 are covering the period up to the 31st of this month.</p> <p>5 Clearly the preliminary issues are going to take us</p> <p>6 longer than that. So what I'm going to do is to extend</p> <p>7 the chronological period until 31 May. In the meantime,</p> <p>8 we will consider what we need to do next with regard to</p> <p>9 making fresh costs awards.</p> <p>10 All right. Thank you very much.</p> <p>11 Ms Kaufmann?</p> <p>12 MS KAUFMANN: Sir, I really hesitate to get up, but you did</p> <p>13 say when we started that if any issues arose -- I think</p> <p>14 you said within correspondence actually -- when we were</p> <p>15 talking about the order of play, that a non-state core</p> <p>16 participant felt it necessary to say something about in</p> <p>17 relation to the submissions of the other parties in</p> <p>18 reply, you would potentially indulge us and hear from</p> <p>19 us.</p> <p>20 I just have one very short point on which I would</p> <p>21 ask your indulgence --</p> <p>22 THE CHAIR: Yes.</p> <p>23 MS KAUFMANN: -- that I might address with you. It actually</p> <p>24 came up in an exchange which you had with Mr Emmerson.</p> <p>25 I would be grateful if I could seek both some</p> <p style="text-align: center;">Page 177</p>	<p>1 that "Neither Confirm Nor Deny" might play --</p> <p>2 THE CHAIR: There might be.</p> <p>3 MS KAUFMANN: -- in the --</p> <p>4 THE CHAIR: That's what Mr Justice Bean said in DIL. There</p> <p>5 remains a legitimate public interest in not requiring</p> <p>6 the defendant to confirm or deny in respect of those</p> <p>7 allegations which are not already in the public domain</p> <p>8 as official.</p> <p>9 MS KAUFMANN: Yes.</p> <p>10 THE CHAIR: There is a concrete example of "Neither Confirm</p> <p>11 Nor Deny" being lost in respect of the absolute or</p> <p>12 blanket coverage which may represent a particular public</p> <p>13 interest, the Scappaticci public interest, but</p> <p>14 nevertheless it had a role to play at a different level</p> <p>15 of questioning. That's all. That is why I asked</p> <p>16 whether the public interest in disclosure might be</p> <p>17 sufficiently represented by the disclosure of an</p> <p>18 undercover name or target or whether that was beyond the</p> <p>19 pale.</p> <p>20 MS KAUFMANN: Given the interest in "Neither Confirm Nor</p> <p>21 Deny"?</p> <p>22 THE CHAIR: Yes.</p> <p>23 MS KAUFMANN: This rather takes us back to the point that in</p> <p>24 DIL the only question that Mr Justice Bean was</p> <p>25 considering at that point in time is whether or not the</p> <p style="text-align: center;">Page 179</p>
<p>1 clarification and then briefly respond to that exchange.</p> <p>2 You and Mr Emmerson were discussing the husk of</p> <p>3 "Neither Confirm Nor Deny" that remains after all the</p> <p>4 individuated interests have been taken into account in</p> <p>5 the section 19 balancing exercise. Mr Emmerson was</p> <p>6 seeking to persuade you that there is nothing left, no</p> <p>7 weight to be given to the husk. You said that depends</p> <p>8 upon the issue that arises.</p> <p>9 THE CHAIR: "It depends on the question" is what I said.</p> <p>10 MS KAUFMANN: That's right, the question. You gave the</p> <p>11 question as, "What if you have a situation where</p> <p>12 revealing a cover name could lead, through the mosaic</p> <p>13 effect, to the identification -- the real identity of</p> <p>14 the undercover officer?"</p> <p>15 I scratched my head at that point and wondered what</p> <p>16 you meant by that. Then, with the assistance of</p> <p>17 Ms Brander, she has clarified for me not only what you</p> <p>18 meant, but I think what you meant by paragraph 2(i) of</p> <p>19 your list of issues. I apologise for being so slow on</p> <p>20 the uptake. Having been so slow, can I just confirm</p> <p>21 that this is what you meant and then just say something</p> <p>22 very briefly in response?</p> <p>23 THE CHAIR: All right.</p> <p>24 MS KAUFMANN: So, question: did you mean in paragraph 2(i)</p> <p>25 of your list of issues that there is a residual function</p> <p style="text-align: center;">Page 178</p>	<p>1 underlying public interest that "Neither Confirm Nor</p> <p>2 Deny" serves to protect should be protected by the</p> <p>3 "Neither Confirm Nor Deny" response or whether or not</p> <p>4 the fact of official confirmation in those cases meant</p> <p>5 that it had no function to serve. What he concluded was</p> <p>6 in those cases there had been official confirmation in</p> <p>7 relation to two individuals and therefore you couldn't</p> <p>8 say that there was any weight that ought to be given to</p> <p>9 "Neither Confirm Nor Deny" because there had already</p> <p>10 been confirmation.</p> <p>11 But in relation to those cases where he said, "Well,</p> <p>12 there has not yet been any official confirmation of</p> <p>13 these other officers' identities and therefore this</p> <p>14 legitimate tactic that the police deploy of "Neither</p> <p>15 Confirm Nor Deny" still has a function to play", that's</p> <p>16 what he concluded. But that is a situation where he was</p> <p>17 not engaged in and didn't have the power to exercise</p> <p>18 those individuated risk assessments.</p> <p>19 THE CHAIR: He was not carrying out the same exercise that</p> <p>20 I am.</p> <p>21 MS KAUFMANN: Exactly. So the question then becomes, given</p> <p>22 that you are carrying out this exercise under</p> <p>23 section 19, which looks at all the individuated</p> <p>24 interests, what room is there left to use "Neither</p> <p>25 Confirm Nor Deny" to do the same job? That's the</p> <p style="text-align: center;">Page 180</p>

<p>1 question. Our submission is, well, there's no room left 2 for -- 3 THE CHAIR: I think you asked me the same question 4 yesterday. 5 MS KAUFMANN: I'm still left not understanding, given the 6 response, why the DIL case provides -- 7 THE CHAIR: If we don't understand one another, that's my 8 fault, but I will put it in writing. 9 MS KAUFMANN: I'm grateful. 10 THE CHAIR: Thank you all very much. 11 (4.35 pm) 12 (The Inquiry adjourned) 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 181</p>	

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