Restriction Orders: Legal Principles and Approach
Ruling

Contents

Part 1

Introduction

1. This Ruling will address the legal principles that must be applied to the process of making decisions under section 19 of the Inquiries Act 2005, namely as to whether and, if so, in what terms the public disclosure of evidence, documents and information received by the Inquiry should be restricted.

2. I have been much assisted by written and oral submissions from the Inquiry's counsel team (to whom I am indebted for taking the lead), and from those representing the Metropolitan Police Service, the National Crime Agency, the National Police Chiefs' Council, the core participant police officers represented by Slater & Gordon, the Home Office, the non-state, non-police core participants whose interests have been collectively represented, 'the Elected Representatives' (Dame Joan Ruddock, Sharon Grant OBE, Ken Livingstone, Diane Abbot MP, and David Nellist), Peter Francis, 'the Media' (Guardian News & Media Ltd, Associated Newspapers Ltd, Independent Print Ltd, Independent Television News Ltd, Sky UK Ltd, Times Newspapers Ltd, and the BBC) and Ms Helen Steel, in person. I have received a witness statement from Mr Paddy McGuinness on behalf of the Cabinet Office on the history and use of government policy in the public interest "neither to confirm nor deny" a fact or state of affairs. I have also received a note from Counsel to the Speaker of the House of Commons assisting me on the issue whether Parliamentary privilege has any role in the consideration of applications under section 19.

3. There is a large measure of agreement as to the legal principles that apply to the decision-making process. What is controversial is the approach that I should adopt to that process and the weight that I should apply to competing and, at first sight, irreconcilable components of the public interest. I have concluded that this issue is central to the ability of the Inquiry properly to fulfil its terms of reference. For that reason the Inquiry has chosen to take an incremental route towards consideration of applications for restriction orders. My purpose has been to ensure that every core participant is aware of the importance of the issues involved in section 19 decisions and is provided with an enhanced opportunity to address them.

4. I shall try to provide a reasonably comprehensive review of the law as it relates to my task and a **Conclusion and Summary of Findings** (commencing at page 78 of this Ruling). The Conclusions and Summary section is not intended to capture all the findings and conclusions I have expressed in the body of my Ruling, which should be

read for its full effect, but to provide a skeleton of my approach to section 19 decisions. In the course of this Ruling I shall not make reference to every argument addressed to me but I will refer to those that I regard as most prominent. Following the publication of my Ruling I shall embark on consideration of the first tranche of applications by core participants for anonymity. It is at that stage that the application of the legal principles identified will bite upon the separate interests of the police and non-police, non-state core participants. It may be that, having considered an application, I shall seek further evidence and/or that, because I want to have a fuller appreciation of the practical consequences of making an order, I shall postpone making decisions. I intend, if necessary, to permit further argument as to the appropriate destination of the public interest and/or human rights balance (both of which I shall explain later in my Ruling) before I embark on the task of making restriction orders. In the meantime, rule 12 of the Inquiry Rules 2006 protects from disclosure any evidence in the hands of the Inquiry as to which an application for a restriction order has been made but not yet determined. As to other evidence and information provided to the Inquiry in respect of which an application for a restriction order is to be made, a request for confidentiality of that material will be granted pending receipt of the application.

The public interest in the Inquiry

5. The Secretary of State for the Home Department has established this Inquiry under the statutory power given to her by section 1 of the Inquiries Act 2005:

> *"**1 Power to establish inquiry***
>
> *(1) A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to [her] that—*
>
> *(a) particular events have caused, or are capable of causing, public concern, or*
>
> *(b) there is public concern that particular events may have occurred."*

6. The public concern that caused the Secretary of State to announce the Inquiry relates to the past conduct and management of undercover police operations and the need to ensure that in future such operations are properly justified, managed and supervised; that the public should have confidence that future undercover police operations will be conducted in compliance with the rule of law and with due respect for the rights of individuals under the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"). The background is explained in the remarks with which the Inquiry was opened on 28 July 2015 (posted on the Inquiry's website).

The power to require production of evidence

7. Section 21(1) - (3) of the Inquiries Act 2005 provides the chairman of an inquiry with the power to require a person to give or provide evidence, and to produce to it documents or any other thing. However, section 21(4) enables the person to whom the chairman's notice is addressed to claim that (a) they are unable to comply or (b) it is not reasonable in all the circumstances to make the requirement. In resolving such a claim, by section 21(5) the chairman must consider the public interest in production of the information in question having regard to its likely importance. Having considered the claim the chairman may, by section 21(4), revoke or vary the notice.

8. However, by section 22(1) a person cannot be required by a notice under section 21 to give, produce or provide any evidence or document if:

> *"(a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or*
>
> *(b) the requirement would be incompatible with a EU obligation."*

The section 22(1)(a) exemption would apply, for example, to documents that are subject to legal professional privilege.

9. Furthermore, section 22(2) provides:

> *"(2) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of* ***public interest immunity*** *apply in relation to an inquiry as they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom".* [Emphasis added]

I shall explain public interest immunity in more detail later in this Ruling but, in short, in civil proceedings it entitles and/or requires the holder of a document to decline to disclose it to a party or parties to the proceedings on the ground that it is in the public interest to preserve its secrecy.

10. The police services and the Home Office are in possession of a considerable quantity of documentary evidence concerning undercover police operations, their personnel, management and supervision. This material is held in secret because of its sensitive nature. It is also of substantial importance to the subject matter of the Inquiry. Had these been civil proceedings the holders of the material would have sought immunity from production for much of it. However, the police services and the Home Office recognise that if the Inquiry is to fulfil its terms of reference it must be provided with all the relevant evidence, documents and information available, whether the material is

held in secret or not. Subject to exceptional circumstances, they do not intend to invoke their power to object to the production of evidence and documents to the Inquiry either on grounds of reasonableness under section 21 or on public interest immunity grounds under section 22 of the Act. All available material will be provided to the Inquiry team and to the Chairman for consideration when reaching conclusions to be included in the report of the Inquiry.

11. While the police services and the Home Office are content to provide the Inquiry with all relevant and available material, they remain anxious that nothing should be publicly disclosed (that is, disclosed to anyone outside the Inquiry team) that would create a real risk of damage to the public interest. Secondly, present and former police officers and some of the core participants and witnesses who may have been affected by undercover police operations will wish to make applications for anonymity and other forms of restriction on disclosure. The means by which both the police services and individuals will seek to prevent disclosure of information is by making applications for **restriction orders** under section 19 of the Inquiries Act 2005. I anticipate that the police services and the Home Office will also be in possession of information about undercover policing owned by the intelligence services which may also be in possession of information relating to undercover police operations of which the Inquiry seeks production. It is therefore likely that the Inquiry will receive objections to production or applications for restriction orders from the intelligence community on public interest grounds. Finally, there may be circumstances in which the Inquiry receives information the nature of which requires the Chairman to consider the making of a restriction order whether or not an application for restriction has been made by the provider.

12. There is an obvious tension between two competing public interests that arise for consideration in this Inquiry:

    (i) the need to examine as publicly as possible evidence, documents and information about undercover policing, a matter that has attracted widespread public concern; and

    (ii) the need to keep secret evidence, documents and information about undercover policing whose disclosure may cause harm to the public or to an individual.

    It is the correct balance to be struck between these two competing public interests that will be central to the Inquiry's consideration whether, and if so in what terms, to impose a restriction order on disclosure of evidence, documents and information under section 19 of the Inquiries Act 2005. The principles that are identified in this Ruling apply to the

public interest balance whatever the identity of the applicant and whether there is an application for a restriction order or not.

13. However, as I shall explain, section 19 is not only concerned with an assessment of the public interest. It will be necessary also to examine the responsibility of the Inquiry towards core participants and witnesses at common law, under section 17(3) of the Inquiries Act 2005, and, by virtue of section 19(3)(a) of the Inquiries Act 2005 and section 6 of the Human Rights Act 1998, under the European Convention on Human Rights.

14. Accordingly, this Ruling will address the following questions:

(i) On what legal principles should the Inquiry act when determining what evidence, documents and information should be made available for public disclosure and what should remain private to the Inquiry team alone; and

(ii) What factors are relevant to the decision-making process?

Part 2

Grounds for making a restriction order

15. Section 19(1) of the Inquiries Act 2005 makes provision for **restrictions** upon (1) the attendance of the public at the inquiry and (2) the disclosure or publication of any evidence or documents provided to the inquiry.

16. By section 19(2) those restrictions may be imposed either by (a) the Minister in a **restriction notice** or (b) the chairman of the inquiry in a **restriction order**. It is not the Secretary of State's intention to issue a restriction notice unless "exceptional" circumstances arise (see paragraph 31 below). She is content that, for the time being at least, I should consider applications for restriction orders from police and non-police applicants.

17. Section 19(3) provides:

> *"(3) A restriction notice or restriction order **must specify only such restrictions**—*
>
> *(a) as are required by any statutory provision, enforceable EU obligation or rule of law, or*
>
> *(b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4)."*
> [Emphasis added]

18. The matters mentioned in section 19(4) to which the Minister or the chairman must have regard "in particular" when considering whether a restriction should be imposed under section 19(3)(b) are:

> *"(a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;*
>
> *(b) any risk of harm or damage that could be avoided or reduced by any such restriction;*
>
> *(c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;*
>
> *(d) the extent to which not imposing any particular restriction would be likely-*
>
> *(i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or*
>
> *(ii) otherwise to result in additional cost (whether to public funds or to witnesses or others)."*

19. For the purpose of section 19(4)(b) a risk of *""harm or damage" includes in particular"* a risk of *"(a) death or injury; (b) damage to national security or international relations; (c) damage to the economic interests of the United Kingdom or any part of the United Kingdom; (d) damage caused by disclosure of commercially sensitive information"* (section 19(5) of the Inquiries Act 2005). The word "injury" in section 19(5)(a) is wide enough to embrace injury that is physical or psychological.

20. By section 20(4) of the Act, a restriction order once imposed may be varied or revoked at any time during the course of the inquiry. Section 20(5) provides that the restrictions, once imposed under section 19, remain in force indefinitely, unless the order specifies a time limit or the order is varied or revoked.

Analysis of section 19(3) and (4)

21. Section 19(3) of the Inquiries Act 2005 contemplates the making of a restriction order in two circumstances: first, under paragraph (a), when it is **required** by statute, enforceable EU obligation or a rule of law **or**, secondly, under paragraph (b), when the **balance** of relevant factors, in particular those set out in subsection (4), shows that the restriction would be conducive to the inquiry fulfilling its terms of reference or is necessary in the public interest.

22. Thus, when a statute, an enforceable EU obligation or a rule of law "requires" it a restriction order *must* be made. When there is no statutory provision or EU obligation or rule of law that requires a restriction order to be made, the Minister or the chairman must decide the application on the balance of relevant factors. The restrictions specified in an order must be "only" those required by statute, an enforceable EU obligation or the rule of law, or are conducive to fulfilment of the terms of reference, or are necessary in the public interest.

23. For the purposes of the Inquiry the term "as are required by any statutory provision" in section 19(3)(a) incorporates the obligations imposed upon a public authority by section 6 of the Human Rights Act 1998 not to act in a manner that is incompatible with rights enjoyed under the European Convention on Human Rights. The term "rule of law" embraces the common law as it applies the principle of fairness to applications by witnesses for anonymity at the Inquiry.

24. An issue of construction arises in section 19(3)(a), namely whether the term "rule of law" also embraces the rules of law relating to **public interest immunity**. As I have noted at paragraph 9 above, section 22(2) of the Inquiries Act 2005 expressly provides that the rules of law *"under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as*

they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom". The words *"permitted or required to be withheld"* are apposite to describe the rule in civil proceedings because, as we shall see, documents withheld on public interest immunity grounds in civil proceedings are withheld from the parties and the trial judge, so that they form no part of the evidence before the court. They are also apposite in their section 22 context because they provide a ground on which the recipient of a section 21 notice can withhold the evidence or documents from the inquiry. The outstanding question is whether section 22(2) is of wider effect, in particular whether public interest immunity is to be treated as a rule of law for the purpose of considering an application under section 19(3)(a) for a restriction order in respect of material that has already been provided to the inquiry without earlier objection.

25. If the Parliamentary intention was that the rules of public interest immunity should be applied exactly as they would in civil litigation, an apparent anomaly would be created. The public interest in disclosure in civil litigation is the need to do public justice between the parties (see paragraph 73 below). But an inquiry under the Inquiries Act 2005 is not an adversarial proceeding in which the objective is the vindication of the parties' rights in law. Furthermore, we have seen that in this Inquiry application of public interest immunity would not mean that the Inquiry would be deprived of relevant evidence. The Inquiry will consider all the relevant evidence whether it is disclosed to the public or not. The objective of the inquiry is to fulfil its terms of reference in inquisitorial conditions. The public interest in disclosure in this Inquiry is not the need to do justice to the parties but the need to ensure public accountability for an inquiry into matters of public interest. It follows that if the rules of law relating to public interest immunity in civil proceedings are to be applied in an inquiry under the Inquiries Act 2005 (whether to a limited or wider extent) they would have to be applied in an adapted form so as accurately to identify the public interest in disclosure.

26. The context in which section 22(2) appears relates not to restriction orders but to objections taken by the recipient to a notice served by the inquiry requiring the provision of evidence or the production of a document under section 21(1). Nonetheless section 22(2) is expressed in terms of general application to an inquiry and not merely to objections taken to an order for production. I do not consider that the use of the word "withheld" in section 22(2) alone signifies an intention to limit its application to objections taken to the production of evidence or documents because, as I have noted, in civil proceedings public interest immunity material is indeed withheld and it is possible that the word "withheld" was used in subsection (2) simply to identify the rule that applies in civil proceedings.

27. The words “rule of law” used in section 19(3)(a) are plainly wide enough to embrace the rules of law relating to public interest immunity. There is no saving provision in section 19(3)(a) to exclude public interest immunity from it.

28. An application for public interest immunity requires the decision-maker to reach a balance of the public interest, sometimes described as a balance of competing public interests. Section 19(3)(b) provides its own public interest test: a restriction order should specify only such restrictions *“as are necessary in the public interest”*. Factors particularly to be considered in a measurement of the public interest are listed in section 19(4) as supplemented by subsection (5), but they are not exhaustive. They are directed to public interest factors that would tend to favour disclosure and non-disclosure respectively. For the most part they identify the very considerations that a chairman or Minister would be considering in a public interest immunity application adapted to the circumstances of an inquiry. One notable exception is the lack of any reference in section 19(5) to the public interest in avoiding damage to the effective prevention and detection of crime but the use of the words “includes in particular” in subsection (5) makes plain that the risk of damage to *any* relevant public interest can (and should) be considered under section 19(3)(b). The effective prevention and detection of crime is a public interest that is commonly measured in public interest immunity applications in both civil and criminal proceedings. It is much wider in scope than the public interest in “national security” which is mentioned in section 19(5). Its omission provides some, but in my view weak, support for a construction of section 19(3)(a) that captures the rules of law relating to public interest immunity within the term “rule of law”, in which case the public interest in the unhindered prevention and detection of crime would be a prominent consideration in appropriate circumstances.

29. I incline to the view, however, that section 22(2) was deliberately placed in its statutory context so as to apply to evidence and documents *withheld* from the inquiry on public interest immunity grounds and that section 19(3)(b) was intended to create a self-contained public interest test to be applied to applications for restriction orders. There would seem to be little, if any, purpose to be served by inserting two separate public interest tests into section 19(3). All the submissions addressed to me treated the public interest in effective policing as a material and important consideration. As I have observed on another occasion (*R (Metropolitan Police Service) v The Chairman of the Inquiry into the Death of Azelle Rodney* [2012] EWHC 2783 Admin at paragraph 38), if section 19(3)(a) was intended to embrace public interest immunity adapted to the requirements of an inquiry, it is difficult to envisage circumstances in which material will be immune from disclosure on public interest grounds and therefore the subject of a restriction order under section 19(3)(a) (a rule of law) that would not also be the

subject of a restriction order under section 19(3)(b) (in the public interest). For this reason it is not necessary for me to reach a concluded view as to the proper construction of section 19(3)(a) read alone or in conjunction with section 22(2).

30. The Metropolitan Police Service is content that I should make decisions about restriction orders by assessing the balance of relevant public interest factors under section 19(3)(b) and (4), whether they are expressly listed in subsections (4) and (5) or not, and no other core participant has expressed a contrary view. In written submissions the Metropolitan Police Service expressed two provisos to this concession: (i) that it should be understood that an application for restriction will be made by the Service as an obligation, in the same way that an application would be made for public interest immunity in the course of litigation and (ii) that due respect is afforded to the expertise of the Service as a public authority assessing the risk of damage that would follow disclosure.[1] The written and oral submissions I have received concentrated on the public interest factors to be considered, including the need to protect effective policing. None of the core participants was concerned with the question whether they were to be factored into an adapted public interest immunity assessment under section 19(3)(a) or into a public interest assessment under section 19(3)(b) and (4). I agree with this approach. I shall, when considering whether to make a restriction order, apply the public interest balance required by section 19(3)(b) just as I would in a public interest immunity assessment and will take account of all the relevant public interest factors as they affect this Inquiry.

31. In his written submissions, Mr Nicholas Griffin QC, on behalf of the Secretary of State, explained the Department's view that "save in exceptional circumstances" the Chairman should make the decision whether and in what terms to make a restriction order. It was not the Secretary of State's intention to issue a restriction notice or to withhold material from the Inquiry on public interest immunity grounds unless exceptional circumstances were to arise.[2]

32. Ms Phillippa Kaufmann QC, on behalf of the non-police, non-state co-operating core participants, joined the Metropolitan Police Service in suggesting that the public interest balance should be assessed against the section 19(3)(b) and (4) criteria. However, in her written submissions it was suggested that, since section 19(3)(b) provides, if read disjunctively, that the terms of a restriction order may specify only such restrictions as are, in the opinion of the chairman or the Minister, conducive to the fulfilment of the inquiry's terms of reference, paragraph (b) of section 19(3) should be construed so as to provide that a restriction should be imposed *only* if it was

[1] Written submissions Metropolitan Police Service, paragraph V.5, pages 16-17
[2] Written submissions Home Office, paragraph 9, pages 2-3

conducive to the fulfilment of the terms of reference.[3] This is not a construction of paragraph (b) that I can accept because it is founded on a linguistic fallacy. Section 19(3)(b) does not just deal with restrictions that the chairman considers are conducive to the fulfilment of the terms of reference: it continues *"**or** to be necessary in the public interest".* Thus, a restriction order must specify only such restrictions as are conducive to the fulfilment of the terms of reference **or** are necessary in the public interest. While the fact that a restriction order would hamper the fulfilment of the terms of reference is material to the public interest assessment it does not follow that it cannot be made **unless** it is conducive to fulfilment of the terms of reference. It may be necessary in the public interest to make the restriction order notwithstanding that the order would not be conducive to fulfilment of the terms of reference.

33. I shall now address construction of the factors to which I must have regard under section 19(3)(b) and (4) when making the public interest assessment. I shall examine their wider implications for the decision-making process later in my Ruling commencing at paragraph 82.

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

34. Mr Jonathan Hall QC, on behalf of the Metropolitan Police Service, discouraged the Inquiry from an overvaluation of public concern as a contributor to the public interest in openness at the Inquiry. He argued that the Secretary of State having given voice to that concern and having established the Inquiry under section 1 of the Inquiries Act 2005, the Inquiry (and I paraphrase) should beware of double counting. Section 19(4) does not mention a scale of public concern. Such public concern as has been expressed has been requited by the Secretary of State's announcement of the Inquiry. No further emphasis of public concern is appropriate. In my opinion the breadth and depth of public concern in the subject matter of an inquiry is a material consideration in an assessment whether a restriction order might inhibit the allaying of that concern. I do, however, accept Mr Hall's further submission that pre-judgement of the subject matter of the Inquiry as an aid to justification for public disclosure is to be avoided.[4]

35. It seems to me that the phrase "allaying of public concern" used in paragraph (a) admits of two separate subjects for public concern, although they may in the end amount to the same thing: first, the ability of an inquiry to instil confidence in the *process* of its work towards reaching conclusions and making recommendations in its report and, secondly, the ability of an inquiry, by reason of its conclusions and

[3] Written submissions non-state, non-spolice core participants, paragraph 91
[4] Transcript of hearing on 22 March 2016, pages 14-15

recommendations, to allay public concern about the *subject matter* of the inquiry. I shall have both these factors in mind when making an assessment of the public interest in allaying public concern.[5]

"(b) any risk of harm or damage that could be avoided or reduced by any such restriction."

36. The terms of section 19(4)(b) are uncontroversial. Paragraph (b) is directed towards an assessment of the extent to which the imposition of a restriction order would avoid or reduce a risk of ("in particular") (i) physical or psychological harm to any person, (ii) damage to national security or international relations, (iii) damage to the economic interests of the United Kingdom, or any part of it, or (iv) damage caused by disclosure of commercially sensitive information.[6]

37. As I have noted, section 19(5) does not mention the public interest in avoiding or reducing the risk of damage to effective prevention and detection of crime. However, for the reasons I have given it is a prominent public interest in this Inquiry to which I must have due regard. This involves a comparative assessment of the risk of harm or damage with and without the restriction sought. It follows that the extent, if any, to which a present risk of harm or damage will be *increased* unless the restriction order is imposed is a relevant factor in the public interest balance. This, however, is not necessarily a straightforward assessment. The smallest further disclosure might result in a disproportionately high risk of harm or damage.

"(c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry."

38. Paragraph (c) is primarily concerned with information a person is to provide or has already provided to an inquiry that was received by the provider on terms of confidentiality. The Metropolitan Police Service [7] and seven of the Category [C] police officers [8] assert that undercover police officers received an express undertaking from their employers that their true identities and personal details would never be publicly disclosed. If this is so, it follows that among the evidence, documents and information provided to the Inquiry will be material that was received by the police services on terms as to its confidentiality. Amongst the information the officers themselves can impart to the Inquiry is their true and undercover identities, the allocation of their targets and the intelligence they gathered in their undercover roles. Their assertion will

[5] See further paragraph 82 below
[6] See further paragraph 153 below for a consideration of other forms of harm
[7] Written submissions Metropolitan Police Service, paragraph IV.2, pages 13-14
[8] Written submissions by the police officers represented by Slater & Gordon, paragraph 15(3), page 4

be that such matters were the subject of the confidentiality assurances they were given – that they too would not be required to disclose such matters.

39. Whether paragraph (c) is sufficiently widely drawn to capture information acquired by the officers themselves in the course of their undercover work (as opposed to being the subject of confidentiality once in the hands of the police services) may be open to question. In my view it is. However, there can be no doubt that assurances given to the effect that the officers would never be required publicly to reveal the information thus acquired is a material consideration in the public interest balance, whether it is strictly a factor relating to the public interest under paragraph (c) or another aspect of the public interest outside the non-exhaustive list in section 19(4).

40. In his oral submissions Mr Hall QC recognised the need for evidence to support the assertions made of express assurances but relied in addition upon the usual exemption from disclosure of the identity of informers and undercover officers and their activities and the statutory obligations arising under the Regulation of Investigatory Powers Act 2000 to keep such information confidential.[9] This was a submission whose effect was to assert in the alternative an implied assurance or reasonable expectation of confidentiality. However, as Mr Hall QC candidly accepted, the Code of Practice issued under section 71(4) of the Regulation of Investigatory Powers Act 2000 in respect of Covert Human Intelligence Sources (*'CHIS'*) recognises the possibility that disclosure would have to be made in court proceedings.[10]

41. Peter Francis, who is a self-disclosed former undercover police officer with the Special Demonstration Squad, now acknowledged by the Metropolitan Police Service, will say that he received no such assurance from his employers. Mr Emmerson QC, on his behalf, argued that if, contrary to his instructions, an express or implied assurance of confidentiality was given to undercover police officers, it must have been a qualified one. The police had, throughout, a duty of disclosure in civil and criminal litigation. If an undercover officer's participation in activities leading to the alleged commission of a crime was capable of undermining the prosecution case or supporting the case for the defendant, or if the activities of an undercover officer became relevant to issues arising in civil litigation, the decision whether to order disclosure was not for the police but for the trial judge. That decision was outside the control of the police and the undercover officers can be taken to have understood that qualification.[11]

[9] Transcript of hearing on 22 March 2016, pages 17-23
[10] Transcript of hearing on 22 March 2016, page 23; see further paragraph 163 below
[11] Transcript of hearing on 23 March 2016, page 98

42. Confidentiality will be an issue for consideration in section 19 applications for restriction orders. Save for the observations made below,[12] I will not reach conclusions as to express or implied assurances until I am in a position to consider evidence on the subject. However, for the reasons identified by Mr Hall QC and Mr Emmerson QC, I will have to examine the reasonableness of any police officer's assertion that he believed he enjoyed an unqualified guarantee of confidentiality for life. Even if that belief was reasonably held, confidentiality is but one of several material considerations and may not be decisive if the public interest otherwise requires.

"(d) the extent to which not imposing any particular restriction would be likely to (i) cause delay or to impair the efficiency or effectiveness of the inquiry, or (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others)."

43. The factors mentioned in paragraph (d) relate to the effective and cost-effective management of the Inquiry. They did not feature in the submissions made to me. This is not surprising since they are clearly expressed and will arise for consideration only when the grounds of particular applications relying on them are revealed.

Categories of restriction

44. The written submissions and oral argument that I have received lead me to the conclusion that I shall be requested to make restriction orders in the following main categories:

(1) The Metropolitan Police Service, supported by the National Crime Agency and the National Police Chiefs' Council, (probably to be joined by regional police forces and the Home Office) wish to protect from disclosure (i) information that may lead, either alone or in combination with other available material, to the identification of an undercover police officer, past or present; and (ii) information that would tend to undermine the effective prevention and detection of crime, national security and international relations (public interest);[13]

(2) Some police officers who have been engaged in undercover police operations will wish to remain anonymous on the ground that disclosure will undermine a legitimate expectation of confidentiality and/or will create a real and immediate risk of harm to themselves or their families or to the enjoyment of their private and family lives (Articles 2, 3 and 8 of the European Convention on Human Rights); alternatively that their personal circumstances are such that it would be

[12] Paragraph 165 below
[13] Note also paragraph 12 above

unfair to require disclosure (common law and section 17(3) of the Inquiries Act 2005);

(3) Any witness to the Inquiry may seek anonymity on the ground that disclosure would, depending on their personal circumstances, amount to or expose them to degrading treatment, or constitute a disproportionate interference with private or family life (Articles 3 and 8 of the European Convention on Human Rights); alternatively that their personal circumstances are such that it would be unfair to require disclosure (common law and section 17(3) of the Inquiries Act 2005).

The competing expressions of the public interest

45. The Metropolitan Police Service is committed to providing the Inquiry with all the assistance that it can.[14] The Service accepts that a decision as to disclosure requires a balancing exercise "involving considerations of fairness and the public interest". That balance, it is submitted, will "in the overwhelming majority of instances" fall in favour of non-disclosure of "the facts of or the details of an undercover police deployment including but not limited to the identity of the undercover police officer". An important component of the public interest is "the public interest in consistently maintaining the stance of ['Neither Confirm Nor Deny']". There may be a continuing public interest in maintaining official non-disclosure and protection even when a police officer has self-disclosed or has been exposed by a third party.[15] That the Inquiry is investigating wrongdoing is not alone a sufficient reason for exposing individual wrongdoers. The Inquiry should make no pre-judgement of allegations of wrongdoing and should proceed cautiously. The imposition of a restriction order can be reviewed at any stage of the Inquiry under section 20(4) of the Inquiries Act 2005, if necessary.[16] The Metropolitan Police Service submits that the public interest requires that much of the detail of past or current deployments of undercover officers should be considered in the absence of other core participants and the public.[17]

46. The Metropolitan Police Service contends that the harm from which individuals and the public are to be protected is as follows:

"(i) So far as individuals are concerned, undercover police officers and their families are likely to face real harm if anything is disclosed that tends to identify them, and will suffer the unfairness of losing a lifelong expectation that their roles would not be made public; and separately from this

[14] Transcript of hearing on 22 March 2016, page 13
[15] Transcript of hearing on 22 March 2016, pages 57-67
[16] Transcript of hearing on 22 March 2016, pages 67-74
[17] Written submissions Metropolitan Police Service, paragraph 1.2(i)-(iv), page 1

(ii) There is a real risk of damage to the public interest if public disclosures are made, and regard must be had to the bigger picture." [18]

47. Mr Hall QC submitted that the Metropolitan Police Service has a particular expertise in assessing risk to the individual and risk of damage to the public interest that might follow public disclosure. The Inquiry should give due weight to evidence of the risk of harm or damage submitted in support of applications for restriction orders.[19] The imposition of the restrictions proposed would not render the Inquiry a "closed" proceeding. There are four former undercover officers whose identity has been officially acknowledged. At least part of their evidence can be received in public.[20] The Litvinenko inquiry demonstrated that a public inquiry is achievable notwithstanding the need to hear important evidence in private.[21] Mr Hall QC submitted that the role of core participants should not be over-emphasised. The limited rights of core participants are identified in the Inquiries Act 2005 and the Inquiry Rules 2006. These are not proceedings to vindicate the rights of parties to a cause or matter.[22] The duty of fairness in the Inquiry whether applied at common law or under section 17(3) of the Inquiries Act 2005 requires fairness to all participants and not just to non-police participants. Furthermore, the interests of one witness may not be the same as those of another. Each decision must be made according to the facts of the individual application.[23]

48. The core participant police officers represented by Slater & Gordon, known in the Inquiry by 'N' ciphers, agree with and support the submissions made on behalf of the Metropolitan Police Service.[24] They argue that Article 2 of the European Convention on Human Rights should be the starting point for consideration of applications for anonymity. Only if there would be no real and immediate risk to life on exposure of an officer's identity should the Inquiry consider whether, on exposure, there would be a real and immediate risk of Article 3 ill treatment and/or a disproportionate interference with the Article 8 right of respect for private and family life.[25] The police officers accept that the public interest in the openness of the Inquiry is a relevant factor for consideration when assessing Article 8 proportionality and in reaching a conclusion as to the fair treatment of witnesses at common law and under section 17(3) of the

[18] Written submissions Metropolitan Police Service, paragraph I.3, page 2
[19] Paragraph 30 above; transcript oral hearing 22 March 2016, page 82
[20] Transcript of hearing on 22 March 2016, pages 16
[21] Transcript of hearing on 22 March 2016, pages 55-56; see further paragraph 92 below
[22] Transcript of hearing on 22 March 2016, pages 31 and 36
[23] Transcript of hearing on 22 March 2016, pages 50-55
[24] Transcript of hearing on 22 March 2016, pages 109
[25] Open note on legal test to be applied, paragraphs 25-55, pages 6-14

Inquiries Act 2005.[26] They also acknowledge that the public interest balance to be made under section 19(3)(b) of the Act requires measurement of the harm that would be caused respectively by disclosure and non-disclosure.[27]

49. The National Crime Agency supports the position taken by the Metropolitan Police Service. It too is fully committed to the work of the Inquiry.[28] It is submitted that although the terms of section 1 and section 18 of the Inquiries Act 2005 encourage openness in the proceedings of the Inquiry, section 19 explicitly recognises that openness may not be possible when the public interest otherwise requires. The power to receive evidence in private is a statutory exception to the general rule that evidence that is not disclosed is not received.[29] It is argued that the ability of the Inquiry to receive and consider all evidence, whether sensitive or not, tends to lower the threshold for granting a restriction order under section 19 than for granting public interest immunity in civil or criminal proceedings.[30] The National Crime Agency contends that the Inquiry should afford to the Metropolitan Police Service the same respect for their assessment of the harm that might result from disclosure as would a court considering a Minister's certificate in a national security case.[31] The public interest in the application of the policy neither to confirm nor deny should be considered case-by-case. The decision whether to afford any particular weight to the policy cannot be decided at the level of principle or in the abstract.[32]

50. The National Police Chiefs' Council is fully supportive of the aims of the Inquiry. It also adopts Mr Hall QC's submissions on behalf of the Metropolitan Police Service.[33] In her written submissions Ms Fiona Barton QC emphasised the importance of the "Neither Confirm Nor Deny" policy [34] noting that it had received recent judicial recognition at first instance and on appeal to the Court of Appeal in civil litigation.[35] There is "a very strong public interest" in protecting the identity of informants, law enforcement techniques and covert methodology.[36] Undercover police officers are an important public resource. They perform their role in the expectation that their identities will be protected. They are volunteers. Any corrosion of the belief that organisations will

[26] Open note on legal test to be applied, paragraphs 56-70, pages 14-17
[27] Open note on legal test to be applied, paragraphs 71-74, pages 17-19
[28] Written submissions National Crime Agency, paragraph 7 page 2; transcript of oral hearing 22 March 2016, page 94
[29] Written submissions National Crime Agency, paragraphs10-11, pages 3-4
[30] Written submissions National Crime Agency, paragraph 23, page 6; see further paragraph 103 below
[31] Written submissions National Crime Agency, paragraphs 26-28, page 7
[32] Transcript oral hearing 22 March 2016, pages 99-100
[33] Transcript of oral hearing 22 March 2016, pages 106-107
[34] Written submissions National Police Chiefs' Council, paragraphs 20-28, pages 6-10
[35] *DIL and others v Commissioner of the Police for the Metropolis* [2014] EWHC 2184 (QB); *McGartland and another v Secretary of State for the Home Department* [2015] EWCA Civ 686 (CA)
[36] Written submissions National Police Chiefs' Council, paragraph 56, page 16

protect them from disclosure would hinder the ability of the police services to recruit suitable candidates.[37] Undercover officers are at risk from exposure by criminals and terrorists. Modern communications technology makes the risk of exposure all the greater. There are groups whose purpose is specifically to expose undercover officers. Disclosure of the identity of an undercover officer can threaten the well being of the officer and their family and lead to the destruction of relationships among families, friends and communities.[38] Any deviation from the 'Neither Confirm Nor Deny' policy will be seized upon and used to suggest that the public interest does not require such a response. To be effective application of the policy must be consistent.[39]

51. Written submissions made by Mr Nicholas Griffin QC on behalf of the Secretary of State for the Home Department accepted that the measurement of the public interest for and against a restriction order was appropriately to be made under section 19(3)(b). However, in common with the Metropolitan Police Service and the National Crime Agency, the Secretary of State submits that the same weight that ordinarily would be accorded to a Minister's public interest immunity certificate should be accorded to the institutional expertise of the police in making their assessment of the risk of damage to the public interest that might follow disclosure of sensitive information.[40]

52. Mr Griffin QC emphasised the seriousness with which allegations of misconduct in undercover policing have been and are treated by the Secretary of State, who is committed to restoring public confidence in the police "by uncovering the truth of these allegations, and doing so in as open a way as possible". On the other hand applications for restriction orders should be considered "in the context of the overall need to ensure that the ability of the police, and other agencies, to counter crime remains effective."[41]

53. In his oral submissions Mr Griffin QC reminded the Inquiry that the Secretary of State had expressed her "shock and grave concern" at the contents of the reports of Mr Mark Ellison QC into the allegations made by Peter Francis and others. There is, Mr Griffin submitted, a "need for the greatest possible scrutiny into what has taken place" and it is "imperative that public trust and confidence in the police is maintained". In the Secretary of State's view "the public must have confidence that the behaviour described in both the Ellison Review and the Operation Herne reports is not happening

[37] Written submissions National Police Chiefs' Council, paragraphs 33-36, pages 11-12; transcript of oral hearing 22 March 2016, page 108
[38] Written submissions National Police Chiefs' Council, paragraphs 38-44, pages 12-13
[39] Written submissions national Police Chiefs' Council, paragraph 57, page 16
[40] Written submissions Home Office, paragraph 11, page 3
[41] Written submissions Secretary of State, paragraphs 6 and 7, page 2

now and cannot happen in the future".[42] Mr Griffin QC, having considered the implications of the submissions made on behalf of the Metropolitan Police Service, acknowledged that if large tranches of the most significant evidence were received in closed proceedings there would be difficulty in achieving effective participation in the Inquiry by some important non-police witnesses. There is therefore "a high public interest in favour of openness". On the other hand there may in some circumstances be a compelling public interest on the other side of the balance. There will be various measures available to the Inquiry by which "to calibrate potential restrictions from the very minor to the more major".[43]

54. I asked Mr Griffin QC, in the light of his oral submissions, to reconsider the concluding paragraph of his written submissions of 12 February 2016 and to inform me whether the words he then recorded continued to reflect the emphasis he wished to convey. He confirmed that they did:

> "17. In conducting that balance both the interests of public access to inquiry proceedings and information and the need to protect sensitive police techniques should be afforded significant weight. However, where these two competing factors directly oppose one another, *and subject to the overall requirement of fairness*, the public interest in ensuring that police techniques remain effective should outweigh the interest in public access to information given that the Inquiry will have access to all relevant material for the purpose of its conclusions and recommendations." [Emphasis added]

55. It was submitted in writing on behalf of Peter Francis that the public interest balance will be struck by an analysis of (a) the public interest in openness, (b) the extent to which there has already been disclosure, whether self-disclosed, official or otherwise, (c) whether the operational methods used were legitimate, (d) whether the operational methods used are still deployed, and (e) whether or not there are any national security considerations.[44]

56. In his oral submissions, Mr Ben Emmerson QC stated that Mr Francis sought a full and public examination of "the ethics and lawfulness of undercover operations conducted by the Metropolitan Police". He was a "whistle blower" who did not seek to advance any personal interest. He made voluntary disclosure and, in so doing, took the same risks of reprisal and interference with his privacy that would confront any other officer

[42] Transcript of hearing on 22 March 2016, pages 111-112
[43] Transcript of hearing on 22 March 2016, pages 113-114
[44] Written submissions Peter Francis, paragraph 9, page 3

in the Inquiry.[45] Mr Emmerson QC pointed to exigencies that would arise if Mr Francis were to give evidence in open proceedings, as he would unless his evidence was made the subject of a restriction order on the application of the police services. He would be giving evidence about practices that he regarded as unethical or unlawful. He would be covering the same or similar territory as that which the Metropolitan Police Service argued should be covered in private by other officers. If Mr Francis' evidence about these matters were to be disputed, counsel would be unable to put to Mr Francis at an open hearing that which had been or would be said about his evidence in a closed hearing. Mr Francis' evidence would be untested save by contradictory evidence given in closed proceedings. Mr Emmerson QC argued that if the Inquiry was to prefer the evidence of Mr Francis the inevitable inference would be that Mr Francis' evidence had not been reliably contradicted. In that event the purpose of a restriction order in respect of other officers would be defeated. If, on the contrary, the Inquiry was to accept the evidence given in a closed hearing and reject the evidence given by Mr Francis in an open hearing, the Inquiry would be required to explain its decision by reference to evidence it could not disclose. The only evidence publicly available would be the evidence of Mr Francis and the Inquiry would face some difficulty in explaining the reasons for its decision without disclosing at least part of the evidence heard in a closed session.[46]

57. Submissions received on behalf of the 'Elected Representatives' emphasised the strong public interest in the subject matter of the Inquiry that includes allegations that elected representatives were targeted by undercover police operations. The investigation of these allegations should take place as publicly as possible so as to encourage public accountability for the proceedings of the Inquiry and public confidence in its outcome. It was submitted that compelling public interest grounds should be established before the Inquiry considered making an order restricting access to the Inquiry and the evidence it receives. There can be no justification for virtually blanket restrictions on the evidence of undercover operations.[47]

58. In his oral submissions Mr Dan Squires QC identified factors that were common to the Elected Representatives whose interests he represented at the hearing. All of them are or have been members of the Labour Party involved in left wing and trade union politics. Reports about them were made by the Metropolitan Police Service. The inference is that they were targeted for their involvement in left wing causes. If so, the implications are of constitutional significance since they involved interference by the executive in the democratic process, and the issues that arose in the evidence could

[45] Transcript of hearing on 23 March 2016, page 86
[46] Transcript of hearing on 23 March 2016, pages 91-92; see further paragraph 111 below
[47] Written submissions 'Elected Representatives', paragraph 14

not properly or realistically be resolved in proceedings held in private.[48] Unless they were made aware of the circumstances the politicians could make no useful contribution to the issues as to whether their activities had been monitored by undercover operations and, if so, whether there could be any justification for those operations.[49]

59. The non-police, non-state group of co-operating core participants argue that the dominating public interest consideration is the fulfilment of the Inquiry's task according to its terms of reference. If the evidence were to be heard in closed sessions the Inquiry would be largely dependent upon self-disclosure by the police.[50] Core participants and putative witnesses could take no meaningful part in the Inquiry unless at least the undercover names of police officers were revealed.[51] If the Inquiry were to be held largely in closed proceedings public accountability would be seriously compromised.[52]

60. In her oral submissions Ms Phillippa Kaufmann QC emphasised the Inquiry's task of getting to the truth. For example, a public apology had been made to eight women who had been the victims of abusive relationships formed with undercover police officers.[53] There are other people who are yet to be informed whether they were also in intimate relationships with undercover police officers. Fairness requires that they should be afforded the opportunity to take an effective part in the Inquiry. They have a need to know. That could not happen if the circumstances in which the suspected undercover officers carried out their undercover roles were not disclosed.[54] As a matter of fact many or all of the core participants represented by Ms Kaufmann QC would not be prepared willingly to co-operate with an Inquiry held largely in secret. In Ms Kaufmann QC's submission the compelling personal need to know of many of the core participants was entirely consonant with the public interest in getting to the truth in a public inquiry.[55]

61. In Ms Kaufmann QC's submission the Inquiry must decide whether it should proceed to make decisions from a presumption of secrecy or from a presumption of openness. If the Inquiry proceeds from a presumption of openness then substantial grounds would be required to weight the public interest balance in favour of secrecy. Having

[48] Transcript of hearing on 23 March 2016, pages 45-46; 66-67
[49] Transcript of hearing on 23 March 2016, pages 78-81; written submissions, paragraphs 32-36, pages 10-12; see further paragraph 198 below
[50] Written submissions non-police, non-state core participants, paragraphs 9-18, pages 4-7
[51] Written submissions non-police, non-state core participants, paragraphs 66-67, pages 24-25
[52] Written submissions non-police, non-state core participants, paragraphs 73-75, pages 28-29
[53] In *DIL and others v Commissioner of the Police for the Metropolis*
[54] Transcript of hearing on 22 March 2016, pages 116-118; transcript 23 March 2016, pages 4-8
[55] Transcript of hearing on 22 March 2016, pages 119-120

adopted the presumption of openness the policy justification for the blanket 'Neither Confirm Nor Deny' policy was removed and no weight could be attached to it. What was left was the balancing of the remaining public interest grounds on which the 'Neither Confirm Nor Deny' policy had to be justified.[56] In this argument Ms Kaufmann QC was joined by Mr Emmerson QC. As he put it, exceptions to the policy have already been made by the Metropolitan Police Service. There is no longer a public interest in the consistent application of 'Neither Confirm Nor Deny' in the undercover policing context. The policy consistently to neither to confirm nor deny, of itself, is a mere husk. Only the underlying public interest grounds have substance.[57]

62. Ms Kaufmann QC doubted Mr Hall QC's identification of a risk that police officers would lose confidence in the ability of the police services to protect them from exposure, resulting in a loss of capacity to field sufficient numbers of suitable undercover officers. It must, she suggested, be obvious to any reasonable observer that the circumstances of the Inquiry and its work are exceptional if not unique. No reasonable person would infer from a presumption of openness *by the Inquiry* that the police or the state had abandoned its policy of confidentiality towards undercover police officers.[58]

63. Furthermore, a presumption of openness will not necessarily tend towards harmful disclosure of officers whose identities are legitimately protected by restriction orders (the *Scappaticci* problem: see paragraph 117 below). The Inquiry need only order that no question shall be asked of any witness that would tend to identify such a person. That will not inhibit the Inquiry itself from investigating whether a person was an undercover police officer and, if appropriate, making a restriction order in their case.[59]

64. Ms Helen Steel, representing the interests of the McLibel Support Campaign, addressed me in person. Ms Steel's purpose was to demonstrate that the flag of the 'Neither Confirm Nor Deny' policy was, in her experience, waved for reasons of convenience and not of principle.[60] When The Times newspaper, on 19 December 2010, published an article about the activities of Mark Kennedy, it claimed that the Nottinghamshire Police had confirmed that he was a Metropolitan Police officer; the Metropolitan Police also confirmed his role as an undercover officer. In apparent acknowledgement of assertions made in the Guardian newspaper in early January

[56] Transcript of hearing on 22 March 2016, pages 125-154
[57] Transcript of hearing on 23 March 2016, pages 98-101; see further paragraph 147 below
[58] Transcript of hearing on 23 March 2016, pages 17-20; see further paragraph 156 below
[59] Transcript of hearing on 23 March 2016, pages 21-25
[60] The metaphor is borrowed from the judgment of Lord Justice Maurice Kay in *Mohammed and another v Secretary of State for the Home Department* [2014] EWCA Civ 559, [2014] 1 WLR 4240 at paragraph 20 (see paragraph 114 below)

2011 the Metropolitan Police Service confirmed that Jim Boyling had been "restricted from duty" pending investigation of newspaper allegations into his undercover conduct. DIL, one of the claimants in an action brought against the Commissioner of Police for the Metropolis, was interviewed in March 2011 in Ms Steel's presence by the Professional Standards Directorate. Mr Boyling's identity was confirmed. At no time during this period did the police rely on the 'Neither Confirm Nor Deny' policy. Eventually, six months after the eight claimants had delivered their letter before action, the Directorate confirmed the identity of Mr Kennedy but declined to respond to the allegations made about other officers. On 25 June 2012 the police purported to apply the 'Neither Confirm Nor Deny' policy to *all* officers named in the *DIL and others* allegations. There has, since, been no attempt to apply the policy to Bob Lambert who allegedly assisted in the production of a leaflet about McDonalds that resulted in their libel action against Ms Steel and others.[61]

65. As to the techniques of undercover policing, Ms Steel pointed out that as long ago as 2002 the BBC, with the assistance of the Metropolitan Police Service, broadcast three programmes in the series "True Spies" whose purpose was to make public the nature of the work of the Special Demonstration Squad, including some of their methods and targets.[62]

66. Ms Steel argued that public condemnation is not something that can be avoided by those accused and convicted of sexual crimes against women. She asks whether undercover officers accused of abusive relationships with women should in principle be entitled to such protection. She does not submit that in general the true identities of undercover officers should be revealed; but that in some circumstances disclosure of true identities would be justified, particularly where the officers proceeded to take managerial responsibility for undercover officers and operations. In Ms Steel's view all the undercover names should be revealed if the Inquiry is to get to the truth of undercover policing.[63]

67. The Inquiry has received written and oral submissions from interested media organisations that emphasise the importance of the principle of open justice, the strong public interest in the subject matter of the Inquiry, the democratic importance of discussion of matters of national interest, and the role of the media as public watchdog in the Inquiry's proceedings. They argue that Article 10 of the European Convention on Human Rights should be the starting point for consideration of justification for

[61] Transcript of hearing on 23 March 2016, pages 145-153; Ms Steel has since provided to the Inquiry copies of the correspondence to which was referring during her submissions
[62] Transcript of hearing on 23 March 2016, page 155
[63] Transcript of hearing on 23 March 2016, pages 157-158

restrictions on open justice. The media assert a presumptive right of access to that which the Inquiry receives[64] and seeks representation in the further process by which restriction orders will be considered by the Inquiry.[65]

68. Having analysed the written submissions received by the Inquiry, Counsel to the Inquiry prepared for the oral hearing on 22 March 2016 a provisional list of factors telling for and against disclosure of sensitive information about undercover police officers and undercover police operations which I shall paraphrase. The following public interest factors **in favour of openness** may include:

    (1) The tendency of open evidence to attract the attention of those with relevant information to impart to the Inquiry and encourage their participation in it;

    (2) Public examination of wrongdoing by police officers both for the sake of transparency in an important public service and for the purpose of identifying victims of wrongdoing;

    (3) Public scrutiny of and consequential confidence in the proceedings of the Inquiry;

    (4) Fairness towards non-police witnesses by providing them with the opportunity to respond to police evidence;

    (5) The gravity of the subject matter expressed in public concern: maintenance of the rule of law (possible miscarriages of justice); the role of the police in a free and democratic society (targeting of politicians and protestors); racial attitudes in the police services (targeting of racial justice campaigns including the Lawrence campaign and the subsequent Macpherson Inquiry); attitudes to women by the police services (deceitful intimate relationships with women); accountable management and regulation of a technique of policing secretive by its nature.

69. The public interest factors **in favour of restriction** may include:

    (1) Grant of anonymity may encourage witnesses to come forward;

    (2) Protection of police officers and their families from harm, including physical and psychological harm, intrusion into private and family life and harassment;

    (3) Protection of non-police witnesses from psychological harm and intrusion into private and family life;

[64] Transcript of hearing on 23 March 2016, pages 128-131
[65] Written submissions Media, paragraphs 5-38, pages 2-13

(4) Prevention of knowledge of covert policing techniques reaching existing or future targets;

(5) Respect for an expectation of confidentiality by undercover police officers, in the interests of fairness, confidence among the work force and recruitment.

70. Factors that in my view may tell in favour **either of openness or restriction** depending upon the precise circumstances include:

(1) Repeated movement between public and private hearings;

(2) Encouragement of witnesses to give frank and uninhibited evidence.

Part 3

Public interest immunity principles

71. I have written at paragraph 29 above that it is unnecessary to resolve whether section 19(3)(a) of the Inquiries Act 2005 embraces the rules of law relating to public interest immunity because I shall adopt the public interest assessment invited by section 19(3)(b) as appropriate to the circumstances of the present Inquiry. Nonetheless a public interest immunity assessment is usually the occasion on which public interest decisions about disclosure have been examined and explained. I therefore intend to explore the public interest immunity cases for statements of the principles that apply to the public interest balance. They are relevant to the section 19(3)(b) decision-making process.

What is public interest immunity?

72. In civil and criminal litigation there exists an obligation upon each of the parties, and on occasions upon third parties, to make disclosure of documents or things that are relevant to the dispute. The holder of the material should resist disclosure if it would be contrary to the public interest to disclose it. There are two components of the public interest at stake: (i) the due administration of justice according to the relevant evidence and (ii) the need to keep secret documents or things whose disclosure would damage the public interest. To the extent that the judge rules that the material should not be disclosed it is said to be immune from disclosure – hence "public interest immunity".

73. The application of the public interest immunity rule in civil litigation in England and Wales was considered in depth by the Supreme Court in *Al Rawi and others v. Security Service and others (JUSTICE and others intervening)* [2011] UKSC 34, [2012] 1 AC 531, for example at paragraphs 140-146, per Lord Clarke of Stone-cum-Ebony JSC.[66] It is a principle of the common law that parties should have disclosure of and be permitted to adduce evidence relevant to the issues between them. Immunity from disclosure is an exception when the public interest in withholding evidence outweighs the public interest in the due administration of justice. The immunity is usually sought by a department of Government. The Minister will provide a certificate identifying the

[66] The issue in *Al Rawi* was whether the High Court had jurisdiction at common law to order a closed material procedure (in which undisclosed evidence is received by the judge in evidence with the assistance of special advocates) in substitution for a conventional *ex parte* public interest immunity assessment. The Supreme Court held that it did not. The Justice and Security Act 2013 has since created that jurisdiction for cases in which material is withheld in the interests of national security.

documents in question and explaining the public interest grounds on which immunity from production is sought. It is not the Minister but the judge who makes the ultimate decision whether the balance of the public interest requires disclosure or non-disclosure. However, appropriate respect will be afforded to the opinion of the Minister who has the resources with which to assess the risk of damage to a national interest that a judge does not. The judge has a range of means by which to ensure that justice is done, notwithstanding that some information is withheld from the trial, such as permitting limited redaction or providing an acceptable gist of information contained in the documents or excluding the public, but not the parties, from the courtroom while the evidence is received.[67] If the balance of the public interest requires that material should be withheld from disclosure neither party can rely on it in the proceedings and the judge cannot receive it in evidence. In a case of extreme sensitivity the result may be that the issue between the parties cannot be tried at all (as in *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786, CA[68]) and the action must struck out or stayed.

74. The public interest in withholding evidence in the hands of the police frequently arises for consideration in criminal proceedings. Lord Bingham of Cornhill explained the appropriate working of an application for public interest immunity at a criminal trial in *R v H and others* [2004] UKHL 3, [2004] 2 AC 134 at paragraphs 18-19 and 35-37 (see also Criminal Procedure Rules 2014 rules 22.1 - 22.3). Section 3(6) of the Criminal Procedure and Investigations Act 1996 exempts from disclosure in criminal proceedings, and provides that there must not be disclosed, any material in respect of which a court has ruled on the application of the prosecutor that it would not be in the public interest to disclose. Material is eligible for disclosure, subject to public interest immunity, if it is relevant and it is capable of weakening the case for the prosecution or strengthening the case of the defendant. Again the decision whether relevant material must be disclosed is one for the trial judge. The application for consideration of public interest immunity is made by the prosecutor. Unless the material concerns national security it is not usually accompanied by a Ministerial certificate. The competing components of the public interest are (i) the fundamental requirement of a fair trial of a criminal charge and (ii) the public interest in keeping secret information whose disclosure would be harmful to the public interest. When relevant information must be withheld the trial judge will have a range of means by which to ensure that the fairness

[67] Under the current Civil Procedure Rules rule 31.5 the parties must themselves seek to agree a proposal for disclosure that meets the overriding objective and the court may make an order confining disclosure to what is "necessary to deal with the case justly" and proportionately.
[68] See paragraph 143 below. To the Inquiry's knowledge there has been no other occasion on which the court has ruled that by reason of public interest considerations the issue between the parties was incapable of trial.

of the trial is preserved, such as disclosure of a gist of the material, redaction of sensitive information or formal admissions of fact by the prosecution. If, in the final analysis, a trial cannot fairly be held without disclosure of sensitive information, the trial judge will order disclosure, at which point the prosecutor will have to decide whether to make disclosure or abandon the prosecution.

For what police material is public interest immunity likely to be sought?

75. Material usually held by the police and treated as sensitive and therefore likely to be the subject of a claim for public interest immunity was the subject of a Code of Practice issued under Part II of the Criminal Procedure and Investigations Act 1996. The list includes: material given in confidence; material relating to the identity or activities of informers or undercover officers or witnesses or other persons supplying information to the police who may be in danger if their identities are revealed; material revealing, either directly or indirectly, techniques and methods relied on by a police officer in the course of a criminal investigation, for example covert surveillance techniques, or other methods of detecting crime.

76. It has long been a rule of law that a public prosecutor may not be asked to disclose the name of an informant unless that course is necessary to ensure the fairness of a criminal trial.[69] The public interest at stake is the unhindered prevention and detection of crime. If informers were liable to be publicly exposed they might be at risk of harm and as a consequence the supply of necessary information would dry up.[70]

The need for a judicial balance

77. In *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 1 AC 274 the claimant Wiley, in support of his claim against the police for damages, sought access to documents generated by the Police Complaints Authority during an investigation into his complaint against the police. Access was refused. The claimant then sought from the defendant an undertaking that he would not use documents in that class for the purpose of defending the civil claim. At first instance Mr Justice Popplewell held that the refusal of the Chief Constable to give the undertaking sought was unlawful because (i) the class of documents to which he wanted access were exempt from disclosure and (ii) the parties should be required to conduct the litigation on equal and not unequal terms. The House of Lords held that public interest immunity did not apply to the documents as a class and for that reason the undertaking had been sought on a misunderstanding as to the law. Whether public interest immunity applied to any

[69] *Marks v Beyfus* (1890) 25 QBD 494
[70] *R v Mayers* [2009] 1 WLR 1915 per Lord Judge, Chief Justice, at paragraphs 32 and 33

particular document was a decision for the trial judge carrying out a public interest balancing exercise.

78. In *R (WV) v Crown Prosecution Service* [2011] EWHC 2480 (Admin) the Administrative Court (Lord Justice Thomas and Mr Justice Kenneth Parker) was faced with an extreme example of the competing components of the public interest and their proper resolution. The claimant had given information to the police about serious crimes. In the subsequent criminal prosecution a Crown Prosecutor decided that the information provided, including the identity of the informer, should be disclosed to the defence because it was capable of weakening the case for the prosecution or strengthening the case for one or more of the defendants. The trial judge declined to interfere with the prosecutor's decision. The claimant applied to the Administrative Court for judicial review of the decision reached by the prosecutor to make disclosure. The prosecutor's decision was quashed. The information had been given by the claimant and received by the police in the expectation of confidentiality. If it were to be disclosed the claimant's life would be placed at serious risk. The trial judge should have taken responsibility for the public interest immunity decision and not deferred to the judgement of the prosecutor. If upon striking the balance between the public interests engaged the judge concluded that the information must be disclosed the prosecutor would have to consider whether the prosecution could proceed.

79. In a judgment with which Mr Justice Kenneth Parker agreed Lord Justice Thomas explained that the public interest in protecting the claimant from disclosure lay in (i) protecting his life, (ii) respecting his confidentiality, and (iii) preserving the flow of information about serious crime. The ultimate duty of weighing that interest against the need to ensure the due administration of justice lay with the trial judge and not with the Crown Prosecution Service. As to the importance of confidentiality Lord Justice Thomas said, at paragraph 29(v):

> *"(v) In my judgment it is of the highest importance to public confidence in the administration of justice, that where the interests of justice require that an express or implied undertaking of confidence as to the identity of an informant or other provider of information has to be broken, unless there is informed consent from the informant/provider, the decision to break it is a decision of a judge. Those who provide information in such circumstances have a right to that independent safeguard."*

How is the public interest balance to be struck in a statutory inquiry?

80. The chairman of a public inquiry is not a trial judge as in civil or criminal proceedings. But the effect of section 19(3) of the Inquiries Act 2005 is that either the Minister or the chairman of the inquiry has the responsibility of measuring and balancing the components of the public interest when reaching a decision as to whether sensitive material should or should not be disclosed. In either case the decision to make a restriction order is susceptible to challenge in the courts.

81. I have already examined legal construction of the factors for consideration under section 19(3)(b), (4) and (5) of the Inquiries Act 2005. I am now going to examine in more detail the factors that arise in the context of the present Inquiry.

Factors relevant to the section 19(3)(b) public interest balance

(a) The extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern

(i) Presumption of openness

82. The process by which a statutory inquiry examines matters of public concern should, by virtue of the public dimension of its work, be as open as possible. Section 18(1) of the Inquiries Act 2005 makes provision for access by the public to the proceedings of the inquiry. This is the starting point. Subject to the terms of any restriction order or restriction notice made under section 19 of the Act the chairman must take reasonable steps to enable members of the public (i) to attend the inquiry or to see and hear a simultaneous transmission of its proceedings, and (ii) to obtain or view a record of evidence, including documents provided to the inquiry.[71] The policy of the Act towards the openness of an inquiry's proceedings is further revealed by the terms of section 19(4)(a). The premise behind the words *"the extent to which any restriction...might inhibit the allaying of public concern"* is that public proceedings will tend to contribute towards the allaying of public concern, while private proceedings will tend to inhibit that process. The whole point of an inquiry under the Inquiries Act 2005 is to allay the public concern that caused the Secretary of State to institute the inquiry using her powers under section 1.

83. However, the obligation upon the chairman of an inquiry to ensure that the proceedings, the evidence and the documents provided to it are publicly accessible is

[71] But by section 18(2) of the Act no recording can be made whose effect would be to enable a person to see or hear anything that is prohibited by a notice given under section 19.

expressly subject to the terms of any restriction order made under section 19. It has been observed, correctly, that the language of sections 18 and 19 of the Act permits the holding of a statutory inquiry wholly in private. Paragraph 38 of the Explanatory Notes to the Inquiries Act 2005 recognises this possibility:

> *"There may be circumstances in which part or all of an inquiry must be held in private..."*

An inquiry held under the Inquiries Act 2005 wholly in private would be an exceptional event, but where, for example, the subject matter was national security and defence capability the need for secrecy would be well understood by the public that had expressed its concern. It seems to me that, similarly, the public would well understand that there will be some information provided to this Inquiry about the identity and activities of undercover officers, particularly in the field of serious crime and terrorist offences, whose disclosure would be so damaging to the public interest that it cannot be disclosed.

84. In *Kennedy v The Charity Commission* [2014] UKSC 20, [2015] 1 AC 455 the Supreme Court made important observations as to the application of the common law principle of open justice to the proceedings of a quasi-judicial inquiry. The issue in the appeal was whether the absolute exemption in section 32(2)(a) of the Freedom of Information Act 2000 from the disclosure obligations provided by the Act to a public authority carrying out an inquiry should be read down under section 3 of the Human Rights Act 1998 so as to accommodate the appellant's right to receive information under Article 10 of the European Convention on Human Rights. The appellant argued that his Article 10 rights included a right of access to information held by the Charity Commission following its inquiry into the 'charitable' activity of Mr George Galloway MP. The majority of the Supreme Court Justices (Lord Mance, Lord Neuberger, Lord Clarke, Lord Toulson and Lord Sumption) held (Lord Wilson and Lord Carnwath dissenting) that section 32(2)(a) did, as a matter of statutory construction, provide the Charity Commission with an absolute exemption from the disclosure requirements of the Freedom of Information Act 2000 in respect of the documents and information received in the course of its inquiry.

85. However, in the majority view that exemption did not mean that section 32(2)(a) had to be read down so as to deprive it of its intended meaning. This was because, first, Article 10 did not give a right to production of information by the state; secondly, and in any event, the appellant could seek information from the Charity Commission on ordinary common law open justice and public interest principles that were preserved by section 78 of the Freedom of Information Act 2000 (i.e saving for existing powers).

Having examined the statutory scheme the majority concluded that there was in relation to the proceedings of the Charity Commission a common law presumption in favour of openness. Lord Mance took the view that there was a strong public interest in favour of the (limited) disclosure sought by Mr Kennedy *"except so far as the public interest in disclosure is demonstrably outweighed by any countervailing arguments that may be advanced"*.[72]

86. As to an inquiry held under the Inquiries Act 2005 Lord Mance noted the specific regime provided by sections 18 and 19 of the Act [73] that enabled a statutory inquiry to make orders as to the disclosure and non-disclosure of information held by the inquiry.[74] The scheme of the Inquiries Act 2005 was *"deliberately different from"* that which applied under the Freedom of Information Act 2000.

87. Lord Toulson made the following observations about the open justice principle as it applied to quasi-judicial inquiries in general:

> *"124. The considerations which underlie the open justice principle in relation to judicial proceedings apply also to those charged by Parliament with responsibility for conducting quasi-judicial inquiries and hearings. How is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?*
>
> *125. The application of the open justice principle may vary considerably according to the nature and subject matter of the inquiry. A statutory inquiry may not necessarily involve a hearing. It may, for example, be conducted through interviews or on paper or both. It may involve information or evidence being given in confidence. The subject matter may be of much greater public interest or importance in some cases than in others. These are all valid considerations but, as I say, they go to the application and not the existence of the principle."*

88. Lord Toulson pointed out that the statute under which the inquiry is authorised may go into greater or lesser detail as to the manner in which it should be conducted. In relation to inquiries held under the Inquiries Act 2005 he continued:

> *"128 ....The Inquiries Act 2005 contains detailed provisions about the conduct of an inquiry under that Act. Other Acts which provide for inquiries may be less*

[72] Paragraph 49
[73] Paragraphs 32-33
[74] At paragraph 31 Lord Mance also noted that in relation to inquiries held under The Inquiries Act 2005 section 18(3) provided that when on completion of the inquiry the inquiry's documents had been handed to a public authority (under rule 18(1)(b) of the Inquiry Rules 2005) the exemption in section 32(2) of the Freedom of Information Act 2000 would not apply.

detailed. To the extent that an enactment contains provisions about the disclosure of documents or information, such provisions have the force of law. But to the extent that Parliament has not done so, it must be for the statutory body to decide questions of disclosure, subject to the supervision of the court.

129. The power of disclosure of information about a statutory inquiry by the responsible public authority must be exercised in the public interest. It is not therefore necessary to look for a particular statutory requirement of disclosure. Rather, the question in any particular case is whether there is good reason for not allowing public access to information which would provide enlightenment about the process of the inquiry and reasons for the outcome of the inquiry."

89. Lord Neuberger and Lord Clarke agreed with the judgments of both Lord Mance and Lord Toulson. The majority of the Supreme Court Justices were agreed that while the Charities Act 1993 did not create a statutory obligation or regime for disclosure, the Commission was required to make disclosure on ordinary public interest principles. They were no less favourable to the case for disclosure to Mr Kennedy than would have been Mr Kennedy's Article 10 rights had Article 10(1) created an obligation to make disclosure subject to the qualifications of Article 10(2). An inquiry held under the Inquiries Act 2005 had the responsibilities as to disclosure to the public reposed in it by sections 18 and 19 of the Act. As we have seen section 18 identifies the starting point as one of openness and accessibility, in conformity with the common law presumption of open justice, subject to the making of a restriction order or restriction notice under section 19.

(ii) Subjects for public concern

90. The following non-exhaustive list of subjects for public concern arise from the **alleged** conduct of undercover police operations by the Metropolitan Police Service:

(1) Widespread and authorised use by undercover officers of the names of real children, since deceased, without the permission of their next of kin, to create undercover identities;[75]

(2) With tacit managerial approval undercover officers entered into deceitful and therefore abusive long term intimate relationships;[76]

(3) Undercover officers infiltrated "black justice campaigns";[77]

[75] Herne Report 1, Use of Covert Identities, July 2013
[76] Herne Report 2, Allegations of Peter Francis, March 2014, paragraph 16.2; *DIL and others v Commissioner of Police for the Metropolis*, statement of apology by Assistant Commissioner Martin Hewitt, 20 November 2015

(4) Officers gave evidence in criminal proceedings in an undercover identity not disclosed to the court;[78]

(5) Undercover officers provided information for inclusion in an employers' blacklist;[79]

(6) Undercover officers provided personal information about the family of Stephen Lawrence, deceased;[80]

(7) An undercover officer gave a secret and undisclosed briefing to the Metropolitan Police Lawrence Review Team;[81]

(8) The Metropolitan Police Service deployed an undercover officer to report on the activities of the parents of Stephen Lawrence;[82]

(9) The Metropolitan Police Service used an undercover operation to acquire personal and confidential information about Duwayne Brooks OBE;[83]

(10) The Metropolitan Police Service failed, in the due administration of justice, to make disclosure of undercover activities to Crown prosecutors;[84]

(11) Undercover officers reported on the activities of elected politicians;[85]

(12) Undercover officers reported on the activities of trades unions.[86]

91. There is a broader public concern about the targeting of groups active in social, political, justice and environmental causes. The ostensible justification for targeting these groups was the need to obtain intelligence about planned public disorder and crime. The Inquiry will need to examine the information gathered in the course of these operations; it will wish to discover how and for what purposes this information was processed and distributed in order to test whether the original authorisation for targeting was justified by previous and subsequent events.

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[77] Herne Report 2 Allegations of Peter Francis March 2014, paragraph 18
[78] Herne Report 2 Allegations of Peter Francis March 2014, paragraph 19
[79] Herne Report 2 Allegations of Peter Francis March 2014, paragraph 20
[80] Herne Report 2 Allegations of Peter Francis March 2014, paragraph 21; Stephen Lawrence Independent Review Summary of Findings HC1094 March 2014, paragraph 4.1, page 22
[81] Stephen Lawrence Independent Review Summary of Findings HC 1094 March 2014, paragraph 4.1, pages 23-27; paragraph 4.3, page 30; paragraph 4.4, page 31; paragraph 4.5, page 32
[82] Stephen Lawrence Independent Review Summary of Findings HC 1094 March 2014, paragraph 4.2, pages 27-30
[83] Stephen Lawrence Independent Review Summary of Findings HC 1094 March 2014, paragraph 5.2, pages 36-37
[84] Ellison Review of Possible Miscarriages of Justice HC291 July 2015, pages 15-16; 26-30
[85] Peter Francis to Guardian newspaper 25 March 2015; BBC True Spies November 2002; Undercover, Rob Evans, page 134
[86] Peter Francis to Guardian newspaper 23 March 2015

92. Undercover policing is a subject of much sensitivity. In my estimation the public well understands why it is a necessary tool for use in police investigation and the prevention of crime, and the reasons for secrecy in its deployment. However, the public reposes trust in the police services to ensure that undercover police operations are fully justified and that the activities of undercover officers are planned, monitored, managed and supervised so as to ensure that the rights of others are properly respected and that a powerful weapon in the hands of the police services is not misused. I accept Mr Hall QC's submission that an inquiry into matters of public concern can be held in public although important parts of the evidence, as in the Litvinenko Inquiry, are heard in private. In the Litvinenko Inquiry, however, the Inquiry received the bulk of the evidence in public hearings. The evidence received in closed hearings went primarily not to the identity of Mr Litvinenko's killers but to the ultimate responsibility of the Russian state.

93. Having regard to the expressions of public concern already made by the Secretary of State and by elected representatives in the House of Commons about the subject matter of this Inquiry it seems to me doubtful that the public's concern will be allayed by an investigation held largely in closed proceedings from which the public and non-police core participants are excluded.[87]

(iii) The exposure of wrongdoing

94. Where the state seeks to prevent disclosure of sensitive information, it is material to the balance of the public interest that the information relates to alleged wrongdoing by agents of the state. In *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin), [2009] 1 WLR 2653, the issue before the Divisional Court was whether there should be restored to the Court's earlier judgment a provisionally redacted summary or gist of reports made by the United States Government to the United Kingdom Government. The redacted paragraph summarised the conditions in which the claimant had been held while in the custody of the United States. The claimant had sought and obtained disclosure of the underlying documents from the Security Service in support of his defence to prospective criminal proceedings in the United States of America.[88] They were supportive of the claimant's case that his confession of involvement in Al-Qaida activities had been obtained under

[87] Secretary of State's statement to the House of Commons 6 March 2014; Secretary of State's written statement to the House of Commons 12 March 2015; Urgent question to Minister of State (Home Office, Policing, Criminal Justice and Victims) and exchanges House of Commons 26 March 2015

[88] Later, in *R (Omar) v. Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118 the Court of Appeal held that the jurisdiction to give disclosure to the claimant had not been available under the *Norwich Pharmacal* [1974] AC 133 principle, but the point had not been taken on behalf of the Secretary of State and, in any event, the Court's judgment on publication of its judgment was unaffected (see *R (Maya Evans) v Secretary of State for Defence* [2013] EWHC 3068 (Admin).

torture or cruel, inhuman or degrading treatment with the knowledge or complicity of agents of the United Kingdom Government. The Secretary of State sought public interest immunity for the summary, ultimately at the behest of the United States Government which claimed "control" of the information, since it had been provided by the United States to the United Kingdom in confidence. The Court received submissions from the claimant, the Special Advocates who represented the claimant's interests in closed proceedings, the Secretary of State and the media.

95. The Court accepted that when deciding whether to make public disclosure of its summary it should perform a balancing exercise of the nature described by Lord Woolf in *R v Chief Constable of the West Midlands, ex p Wiley* [1995] 1 AC 274 (approved in *Al Rawi*, see paragraphs 73 above). In other words, it was for the Court to weigh the public interest considerations that applied to the question what should or should not be disclosed to the public, giving due weight to the opinion of the Secretary of State for Foreign and Commonwealth Affairs as to the risk of damage to the national interest that would be caused by disclosure. The Court considered:

(i) The principle of open justice, the rule of law and democratic accountability;

(ii) National security and international relations; and

(iii) The adequacy of other means by which to protect the claimant's interest in disclosure.

96. The Court identified a weighty public interest in exposing to public debate and accountability the possibility of serious wrongdoing by agents of the state, in that case alleged complicity in behaviour towards the claimant that contravened a fundamental human right of constitutional importance in the United Kingdom. It is to be noted that the information as to which the Court identified a public interest in disclosure was not the identification of the individuals involved but the alleged complicity or knowledge of state agents as to the conditions in which the claimant was being held. Furthermore, the issue as to whether disclosure should be made arose not at the hearing but at the conclusion of the hearing and concerned the proper contents of the court's judgment. When necessary the court had held a closed material hearing from which the public and the claimant (whose interests were represented by special advocates) had been excluded. In the result the Court upheld the Secretary of State's public interest immunity certificate on the ground that the risk of serious damage to the national interest that would be caused by disclosure outweighed all other countervailing considerations. The degree of harm would be exceptional: it would affect the United

Kingdom's ability to share with the United States intelligence material concerning terrorism.[89]

97. In *DIL, TEB, RAB and others v Commissioner of Police of the Metropolis* [2014] EWHC 2184 (QB) the claimants were among those I have designated as core participants in the Inquiry. They claimed damages against the defendant as the employer of undercover police officers who, it was alleged, had engaged in intimate and deceptive relationships with the claimants. In his Defence to the claims the Commissioner expressly declined to plead to the allegation that the men were undercover police officers or to the alleged behaviour. He was applying the policy neither to confirm nor deny that any person was an undercover police officer taking part in any particular undercover activity. The claimants applied to Mr Justice Bean (now Lord Justice Bean) for an order requiring the Commissioner to plead to the allegations made.

98. The judge noted that there were general and specific allegations made by the claimants. The general allegation was that officers when members of the Special Demonstration Squad had, in the course of their employment and with the authorisation or acquiescence of their employer, engaged in long term sexual relationships with the claimants while using a false identity. The judge did not accept that there remained in 2014, six years after the Special Demonstration Squad had been disbanded, a legitimate public interest to be served by refusing to confirm or deny the general allegation. The judge noted that it was agreed that if the alleged conduct took place it was inappropriate and had ceased. To the extent that the Commissioner was seeking to protect an operational method it was an admittedly illegitimate method that did not deserve protection from disclosure. The judge required the Commissioner to admit or deny that the *practice* had taken place.

99. As to the identity of the officers pleaded in the Particulars of Claim the judge ruled that the Commissioner should plead to the allegations made against those officers who had been officially confirmed as undercover officers, namely "Jim Sutton" and "Bob Robinson". He declined to make a similar order in respect of two other alleged undercover officers who had not been publicly acknowledged and had not publicly self-disclosed. There remained a legitimate public interest in protecting the identity of those

[89] Subsequently the Administrative Court reversed its decision upon being informed of a change of circumstances. The Secretary of State appealed to the Court of Appeal. The majority in the Court of Appeal would have allowed the appeal (upholding the Secretary of State's opinion as to the importance of the 'control' principle) had it not been that the sensitive information to whose public disclosure the Secretary of State objected had since been aired in public and published in a judgment after a trial in the United States without further comment by the Government. Having regard to these intervening events the appeal against the order for the removal of the redaction from the Administrative Court's judgment was dismissed: [2010] EWCA Civ 65, [2011] QB 218.

officers from official confirmation or denial. In their cases the judge observed that it was likely that if the evidence given by the claimants went unchallenged it would be accepted.[90]

100. I conclude that, to the extent that the subject matter of an application for a restriction order includes evidence of wrongdoing by police officers, there is unlikely to be any public interest in its concealment. However, I also accept that (i) the Inquiry should beware of pre-judgement of the effect of the material in respect of which a restriction on disclosure is sought, save where it is admitted or is plain on its face, (ii) the fact alone that police officers may have engaged while undercover in discreditable behaviour does not imply that they must be taken to have lost the shield of confidentiality altogether, (iii) whether the prevailing public interest is in disclosure of any particular material will depend upon an assessment of the risk of harm or damage upon disclosure of *that* material and a balance with the countervailing public interest in openness, and (iv) a cautious approach may be appropriate in the first instance.

(iv) Public accountability, process and fairness

101. I have summarised the approach to claims for public interest immunity in civil and criminal cases partly to acknowledge the weight of an argument addressed to me on behalf of the police services. Unlike the judge in a civil trial or the jury in a criminal trial the Chairman of this Inquiry, who is the decision-maker, *will* receive the evidence, documents and information, wider disclosure of which may be prohibited by a restriction order. The Metropolitan Police Service submits that most of the evidence received from police officers should be received in closed sessions when the non-police, non-state core participants and the public would be excluded from the hearing. Having received the "closed" evidence the Chairman would be entitled and, indeed, bound to have regard to it when reaching conclusions of fact and opinion within the terms of reference. It would be necessary in due course to refer to such evidence in a private (or "closed") report to the Secretary of State, but the Secretary of State would be able to assess the merits of the report as a whole based upon all the material available and not just the publicly disclosed parts of it.

102. In this regard, as Chairman, I am in a similar procedural position to that of the Investigatory Powers Tribunal. However, unlike the Investigatory Powers Tribunal my role is inquisitorial. I am seeking information and not responding to a complaint. Furthermore, this Inquiry has been ordered to investigate a matter of widespread

[90] Before the hearing the defendant had withdrawn an application to strike out the claims on the ground that (as in *Carnduff v Rock*) on public interest grounds the issue could not be tried.

public concern. The Inquiry is not starting out wholly in ignorance.[91] In the nature of things closed hearings of most of the relevant evidence would tend to undermine the objective of the Inquiry to allay the concerns of *the public* even if the conclusions and recommendations of the Inquiry were useful to the sponsoring department of Government.

103. When striking the balance between two conflicting public interests – openness at a statutory inquiry on the one hand and preservation of the secrecy of sensitive information on the other – I shall have to consider whether the publicly expressed objectives of the Inquiry to get to the truth, to expose wrongdoing, if any, and to make recommendations for reform can be achieved without disclosure of sensitive material. That I will receive and consider the undisclosed evidence will be a material consideration. However, I do not accept the argument that the Inquiry's receipt of the evidence lowers the public interest threshold for a restriction order. I do not accept it because the public interest case for disclosure is different in a statutory inquiry than it is in litigation. The public interest must be balanced in its own factual and legal context and without preconception based on a different factual and legal context.

104. While the evidence can be considered by the Inquiry whether it is received in a closed hearing or in public, there remains the difficult question whether the *process* adopted by the Inquiry could win the confidence of the public if most of the evidence was received in private. In my view, this consideration goes directly to the issue as to whether a restriction order would have the effect of inhibiting the allaying of public concern in the subject matter of the Inquiry in one or other or both of two ways: first, privacy would tend to damage public confidence in the Inquiry's ability to get at the truth and, secondly, unpublished and untested evidence would tend to increase speculation about the reliability and impartiality of the Inquiry process.

105. I have emphasised the word "alleged" in paragraph 90 because I anticipate that there will be several instances in the course of the Inquiry when the facts are disputed, either as between police witnesses or between police witnesses and non-police witnesses. The Herne and Ellison reviews were conducted in private. Their findings were made public subject to the use of ciphers and generalisations for the protection of sensitive information. Several of the allegations to which I have made reference in paragraph 90 remained unresolved because the conflicting evidence was untested. It seems to me that, where necessary for the fulfilment of the terms of reference, the process of this Inquiry should enable the Inquiry adequately to test the conflicting evidence it receives.

[91] See paragraph 90 above

106. Section 17(3) of the Inquiries Act 2005 provides:

> *"(3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act fairly and with regard also to the need to avoid unnecessary cost (whether to public funds or to witnesses or to others)."*

107. In the present context I am concerned with the duty to act fairly. The non-police, non-state core participants do not have a personal interest to serve in the Inquiry as would litigants in a civil trial: I will not be adjudicating upon their rights in law. However, in contributing to the objective of seeking the truth they undoubtedly have an interest in the vindication of their evidence. Since the non-police, non-state core participants believe that they were the targets of undercover policing their common interest is likely to be a conclusion by the Inquiry that (i) they were targeted or were the subject of report and (ii) the targeting or reporting to which they were subjected was an unjustifiable or insufficiently justifiable intrusion into their private lives.

108. Mr Hall QC submitted that some evidence could be received in public from the four undercover officers who had been publicly acknowledged; accordingly, that the statutory inquiry would in significant measure be a public inquiry. There is reason to doubt this assertion. Mr Emmerson QC was instructed by Peter Francis that during the lifetime of the Special Demonstration Squad (c.1968-2008) over 100 officers were employed undercover.[92] If this is the case, a public hearing of some of the evidence of four of them in module 1 of the Inquiry would not seem calculated to have the appearance of openness.

109. Those core participants and witnesses who believe they were targeted and/or were the subject of report must, it is submitted, have access to the evidence of the undercover officers who targeted and/or reported on them. I accept that if core participants and witnesses do not have access to information that directly affects them, their ability meaningfully to contribute to the resolution of important issues in the Inquiry may be compromised. I anticipate that those issues may include (i) the adequacy of the justification for targeting, (ii) the effect upon them of the making of a relationship by an undercover officer for the purpose of acquiring information and (iii) the effect upon them of the breaking of a relationship upon withdrawal of the officer from the field. My reference to "a relationship" is not confined to intimate relationships. For the purposes of the Inquiry an undercover police officer is an officer who was a "Covert Human Intelligence Source" within the meaning of section 26(8) of the Regulation of Investigatory Powers Act 2000 whether before or after the commencement of that Act.

[92] Transcript of hearing on 23 March 2016, page 90

A Covert Human Intelligence Source is a person who *"establishes or maintains a personal or other relationship"* for the covert purpose of obtaining, providing access to or disclosing information so obtained.[93]

110. I accept that if I were to order that undercover names and target groups should not be disclosed unless they have already received official confirmation there would be a chilling effect upon the work of the Inquiry. The terms of reference require me to examine "the scope of undercover police operations in practice and their effect upon individuals in particular and the public in general" and to investigate the "purpose, extent and effect" of undercover police operations, including the targeting of political and social justice campaigners. As I have observed, the Inquiry will receive all the evidence available to show what groups were targeted and upon whom reports were made. The Inquiry can use that information in its attempt to locate significant witnesses. However, without disclosure to witnesses of the fact of an undercover operation and/or the officer's undercover name the Inquiry would be unable to discuss with them the reason why they were targeted or made the subject of report or the effect upon them of the relationship made. When this eventuality was put to Mr Hall QC in argument he accepted that the Inquiry might be left with only the police side of the story. This would be the necessary consequence of the public interest in protecting undercover officers from disclosure.[94]

111. The police services do not confine their submissions as to disclosure and restriction to the identity of officers and groups. They argue that much of the evidence relating to historical deployments of undercover officers should be considered in the absence of other core participants and of the general public.[95] There are individuals and groups whose purpose is to identify and expose undercover police officers. The power and reach of modern communication is such that the marshalling of disparate strands of information contributes to the process of identification. This is called the "mosaic" or "jigsaw" effect. The Metropolitan Police Service will seek restriction upon "information that could when pieced together with other information lead to the identification of individuals or techniques".[96] Mr Hall QC does not baulk at the prospect that core participants, suspecting their exposure to undercover policing, would give evidence in open hearings while the undercover police officer to whose activity they were in fact exposed, but whose undercover role could not be disclosed, would give evidence in parallel closed hearings.[97] The effect upon the Inquiry's proceedings would be

[93] Terms of reference, paragraph 6
[94] Transcript of hearing on 22 March 2016, pages 46-47
[95] Written submissions Metropolitan Police Service, paragraph I(iv), page 1
[96] Written submissions Metropolitan Police Service, paragraph VI.2, page 27
[97] Transcript of hearing on 22 March 2016, pages 47-49

startling. The officer, the police services, the Inquiry's legal team and I would know whether the person described by the witness was indeed an undercover officer but the witness would not. The witness would be expected to give evidence on a hypothesis as to their relationship with a person who, so far as the witness was concerned, may or may not have been an undercover officer. In my view, there may well be circumstances in which this process would demean and be unfair to the witness.[98]

112. The requirement that I should act fairly towards those affected by an inquiry into undercover policing (both police officers and members of the public) is a consideration material to the issue whether disclosure or partial disclosure should be made so as to give proper access to the Inquiry. I accept Mr Griffin's submission that when all other components of the public interest are directly opposed and evenly weighted the Inquiry's duty of fairness to its participants may be a decisive factor. I will need to examine with particular care evidence in support of an argument that virtually *any* information about an undercover officer or an undercover operation would lead to an unacceptable risk of identification of that officer and, for that reason, an unacceptable risk of harm to the officer and/or his family.

(b) any risk of harm or damage that could be avoided or reduced by any such restriction

(i) "Neither Confirm Nor Deny" ('NCND')

113. Mr Paddy McGuinness is a Deputy National Security Adviser in the National Security Secretariat at the Cabinet Office. At the request of the Inquiry Mr McGuiness made a witness statement dated 13 January 2016. At paragraph 6 he said:

> *"The NCND principle is a mechanism used to protect sensitive information and applies where secrecy is necessary in the public interest; and where this mechanism avoids the risks of damage that a confirmation or denial would create."*

114. Mr McGuiness' statement does not specifically address the deployment of the "mechanism" of 'Neither Confirm Nor Deny' by the police services. Mr McGuinness explains 'Neither Confirm Nor Deny' in its national security context although the reasoning is consistent whatever the context in which it is employed. He drew attention at paragraph 19 of his statement to the published advice of the Information Commissioner that:

[98] Transcript of hearing on 22 March 2016, page 48

"A neither confirm nor deny response is more likely to be needed for very specific requests than for more general or wide ranging requests."

115. When asked to respond to a request for information or, where duty would otherwise require disclosure of information, the state or a state agency may decline to provide it on public interest grounds. As in *DIL and others* (see paragraph 97 above) the police response is neither to confirm nor deny the existence of a fact or state of affairs. The response 'Neither Confirm Nor Deny' was described by Lord Justice Maurice Kay in *Mohamed and another v Secretary of State for the Home Department* [2014] EWCA Civ 559, [2014] 1 WLR 4240 as the application of policy (paragraph 20). He continued:

> *"20 ...[I]t is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so..."*

116. 'Neither Confirm Nor Deny' does not therefore have a life of its own. It is simply a statement of refusal to make disclosure one way or the other on public interest grounds. The more consistently it is applied the greater the protection it affords. The public interest claimed must be justified and, if challenged, requires a judicial decision as to whether it should prevail over any competing public interest in disclosure. As the Information Commissioner advised, whether the public interest requires application of 'Neither Confirm Nor Deny' policy may well be determined by the nature and level of particularity of the disclosure sought. To use an example in the Inquiry context: at the lowest end of the scale of particularity, no public interest would be damaged by disclosure of the fact that undercover policing by the Special Demonstration Squad was in general directed against the risk of public disorder (a fact now in the public domain), while, at the higher end of the scale grievous damage might be caused to the public interest by disclosure of the identity and personal details of an undercover officer employed to infiltrate a group of terrorists.

117. The reach of 'Neither Confirm Nor Deny' in the wider public interest can in some circumstances be surprisingly long. In *Re: Freddie Scappaticci's Application* [2003] NIQB 56 the applicant sought judicial review in the High Court of Northern Ireland of a decision made by the Minister of State at the Northern Ireland Office. The Minister had declined to confirm or deny press allegations that Mr Scappaticci was an undercover agent for the Government commonly referred to as "Stakeknife" *(sic)*. In his application to the Minister Mr Scappaticci pointed out that media allegations were accompanied by

assertions that the source of the information was Whitehall or the Security Service. He claimed that the Minister was uniquely placed to know the truth of the allegations. There was, he said, a clear threat to his life and he maintained that the Minister had a duty under Article 2 of the European Convention on Human Rights to respond. The Minister reviewed her decision and the refusal to respond was maintained.

118. The application for judicial review was heard before the Chief Justice of Northern Ireland, Lord Carswell (as he was then), who accepted the evidence of Sir Joseph Pilling KCB, the Permanent Under-Secretary of State in the Northern Ireland Office. In his affidavit Sir Joseph explained:

> *"3. The Government has a long established policy in respect of the identification of agents....The policy involves the principle that the identity of agents is neither confirmed nor denied....as...*
>
> - *to confirm that a person is an agent would place that person in immediate and obvious danger;*
> - *to deny that a person is an agent may place another person in immediate and obvious danger; and*
> - *to comment either way in one case raises a clear inference [if] the Government refuses to comment in another case that it has something to hide in that [other] case, i.e. the inference will be that the individual in that [other] case is an agent, and he may be subject to reprisals (and his life may be at risk) as a result. It is only by maintaining the NCND policy so far as possible across the whole range of cases that this risk can be avoided."*

  [Square bracketed words added]

119. Sir Joseph went on to accept the possibility of exceptions:

> *"4. It has been accepted within Government that the policy referred to above does not automatically trump every request for a comment on the identity of agents: it may be departed from in a particular case if there is an overriding reason to do so. However, the effectiveness of the policy is undermined if it is not applied consistently: the longer term consequences of any departure from the policy are properly taken into account. Those consequences are described in paragraph 3 above (third bullet point). Given the importance of the rights of agents (including their right to life under Article 2 of the European Convention on Human Rights) which will be jeopardised if the NCND policy is departed from in anything other than the most exceptional circumstances, the Minister (and Government*

generally) attached greater weight to the desirability of maintaining the consistent application of the policy."

120. Chief Justice Carswell held that the application of the policy in Mr Scappaticci's case was justified for the reasons the Minister had given and that she had not by applying it to the facts of Mr Scappaticci's case unlawfully fettered her discretion.

121. The particular public interest which the Minister in *Re: Scappaticci's Application* was seeking to preserve by the application of the 'Neither Confirm Nor Deny' policy was the protection of agents of Government, and others, from the risk of death or injury that might follow confirmation or denial, inference or speculation. The wider public interest was recognised by Chief Justice Carswell as follows:

> *"[15] ....If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy."*

122. Since the 'Neither Confirm Nor Deny' response is justifiable only on the public interest grounds that support it, the information in respect of which it may be employed is as varied as the particular public interest it seeks to protect. It is used most commonly to protect national security and to preserve the ability of the police to prevent and detect crime.

123. In *R (Manzapour) v. Secretary of State for the Home Department* [2014] EWHC 1086 (Admin) the evidence was that the Secretary of State applied a blanket policy neither to confirm nor deny whether an extradition request had been made in respect of a person normally resident in the United Kingdom. The justification for the policy, upheld by the Administrative Court, was the risk that if the Secretary of State responded affirmatively to such requests the subject of the request would use the information to frustrate its purpose.

(ii) "Exceptions" to "Neither Confirm Nor Deny"

124. The evidence given in *Re: Scappaticci's Application* recognised the possibility of exceptions to a rigid application of the policy depending upon the circumstances of the case. There have been occasions when either the holder of the information or the

court or tribunal adjudicating upon it has found that the public interest in disclosure should prevail despite the fact that the more consistent or blanket the application of the policy the more effective it is likely to be.

125. In *Baker v Secretary of State for the Home Department* [2001] UKHRR 1275 Mr Baker had applied under section 7 of the Data Protection Act 1998, to the Director General of the Security Service (MI5) to inspect any data about him that was held by the Service. The Director relied on a certificate issued by the Secretary of State for the Home Department exempting the Security Service from compliance with section 7 on the grounds of national security. This was, the parties agreed, a certificate issued with the intention of upholding the policy neither to confirm nor deny whether personal information about a person was held by the Security Service. Mr Baker appealed to the Information Tribunal (Sir Anthony Evans, Michael Beloff QC and James Goudie QC). Section 28(5) of the Data Protection Act 1998 empowered the Tribunal to quash the certificate if it found on judicial review grounds that the Minister did not have reasonable grounds for issuing it. The Tribunal found that Mr Baker's right to respect for his private life under Article 8 of the European Convention on Human Rights was engaged. The issue before the Tribunal was, therefore, whether the Minister had acted reasonably and proportionately in pursuit of a legitimate aim. The Tribunal held that the terms of the certificate went well beyond what was required in the interests of national security because it had the effect of absolving the Security Service from consideration of the question whether it held information that could be disclosed without damage to national security. In other words, the justification for application of the 'Neither Confirm Nor Deny' policy would depend on the circumstances. Blanket application was not necessarily justified even in a national security context.

126. When national security demands it the Security Service will, in general, neither confirm nor deny that information is held about any individual. Counsel for the Secretary of State had advanced to the Information Tribunal circumstances in which some disclosure might be made as an exception to the 'Neither Confirm Nor Deny' policy. In its judgment the Tribunal said:

"*Admitted exceptions*

33. There are some well established circumstances in which the Service does acknowledge that information has been collected and is still held. Sometimes the information may be released. These circumstances, as Mr Burnett QC put it in his oral submissions to us, can be grouped together as cases where the person concerned already knows 'conclusively' that there is information held upon him. Another situation which can arise is where the Service itself

decides that acknowledgement should be made, and even that the information should be published, because that is seen as assisting the public interest. This too becomes a case of "official confirmation" that the information is held. These and similar cases, Mr Burnett QC submits, are "well recognised exceptions" to the policy of answering requests with some variant of the formula NCND. They are dictated by common sense.

34. This group of cases (which is not closed) includes:

(a) Members or former members of agencies who know that data are held.

(b) Individuals who are subject to removal from the United Kingdom on grounds of national security who have become conclusively aware of Security Service interest in them.

(c) Those involved in criminal proceedings who have become aware of Security Service interest in them.

(d) Others in whom the Security Service interest has been publicly confirmed in [Court or other] proceedings.

We shall call these the "admitted exceptions" to the NCND policy."

127. Since it was the Secretary of State's policy to consider the public interest in disclosure on a case by case basis, the issue of a certificate giving blanket exemption went much further than was justified.[99] To my mind the circumstances and context in which disclosure is made may properly be described not as exceptions to a policy but the application of the policy. In each case an assessment of the public interest is made. Disclosure is made only when in the particular circumstances of the case the level of the risk of harm that may follow the particular disclosure sought is sufficiently low that the public interest in disclosure can prevail.[100] This seems to have been the process that led to the following examples of disclosure for which I am grateful to the Inquiry's counsel team.

128. In their written submissions (dated 19 February 2013) upon the issue of public interest immunity to Sir Robert Owen, then the Assistant Coroner at the Inquest into the death of Alexander Litvinenko, counsel to the inquest drew attention to three significant

[99] The Secretary of State for Foreign and Commonwealth Affairs subsequently issued a revised certificate whose terms were upheld by the Information Tribunal upon Mr Baker's further complaint. The Tribunal gave no additional reasons for its decision thus upholding the principle of the 'Neither Confirm Nor Deny' policy (see witness statement of Paddy McGuinness paragraphs 28 and 29)

[100] This is the view of Mr McGuinness expressed in his witness statement on behalf of the Cabinet Office (see witness statement paragraph 33)

examples of a decision by the Security Service or the Secret Intelligence Service to make disclosure in the public interest of information that ordinarily would have prompted a response neither to confirm nor deny:

(a) In 2008, at the Inquest into the deaths of Diana, Princess of Wales and Dodi al Fayed, the Director of Operations for the Secret Intelligence Service, Sir Richard Dearlove, gave evidence in rebuttal of speculative allegations that MI6 may have been implicated in the deaths. He explained his reasons as follows:

> *"When matters of let's say grave public concern arise, rare exceptions of policy are made, and obviously, in this particular instance in this court, I think one can understand why an exception is being made....There are various occasions when there is a strong demand for a public statement, and in the particular context, whether it might be a Parliamentary inquiry or let's say a court of law, an exception is made, but making an exception does not indicate an abandonment of the principle, which I think has been very valuable in, as it were, defending the integrity and the interests of the intelligence and security community."*

(b) In 2012 the Chair of the House of Commons Foreign Affairs Committee wrote to the Secretary of State for Foreign Affairs seeking clarification in response to media speculation that Mr Nigel Heywood may, before his death, have been employed by MI6 as an agent. Exceptionally the Secretary of State replied that Mr Heywood had not been employed by the British Government in any capacity.

(c) In 2012, at the Inquest into the death of Gareth Williams witnesses from the Secret Intelligence Service and GCHQ gave evidence as to the nature of Mr Williams' employment by GCHQ on secondment to SIS at the time of his death.

129. It was argued by counsel to the Litvinenko Inquest that the circumstances common to all three of these occasions were (i) the existence of a formal investigation into or intense public interest in a high profile death and (ii) "grave concern" or "intense interest" in the matter at hand or "strong demand" for a public statement.

130. In *Belhadj and others v. Security Service and others* [2015] UKIPTrib 13_132-H the claimants complained to the Investigatory Powers Tribunal that the respondents had carried out unlawful interception of their communications. The Security Service admitted that at the material times its regime for interception and handling of legally privileged material had been in breach of Article 8(2) of the European Convention on Human Rights. The remaining issues for decision included whether the Security Service had as a matter of fact unlawfully intercepted and handled communications in respect of which the claimants enjoyed legal professional privilege. That issue was

resolved in a closed hearing. The respondent argued that the Tribunal should make no "determination" at all; alternatively, if the Tribunal ruled in favour of a claimant no reasons should be given in an open judgement since to do so may put at risk national security in a way that the policy neither to confirm nor deny was designed to prevent.

131. Section 68(4) of the Regulation of Investigatory Powers Act 2000 required the Tribunal to provide the complainant with a notice of its determination that *"shall be confined, as the case may be,"* to either a statement that the Tribunal had made a determination in his favour or a statement that no determination had been made in his favour.

132. In *AKJ and others v. Commissioner of Police for the Metropolis and another* [2013] EWHC 32 (QB) at paragraphs 101 - 102 Mr Justice Tugendhat explained, *obiter*, the reason for the section 68(4) requirement. The 'Neither Confirm Nor Deny' policy was being transposed to the Investigatory Powers Tribunal. Complainants who have committed or are planning to commit criminal offences will wish to know whether they are being targeted by law enforcement authorities. If they could make this discovery by the simple expedient of making a complaint to the police or to the Tribunal the efficacy of any investigation could be put at risk. In an alleged interception case, a notice of determination in the complainant's favour will signify that interception by a public authority has taken place and that it was unlawful. On the other hand, notice that no determination has been made in the complainant's favour will signify either that there has been no interception at all or that there has been an interception by a private contractor or that there has been a lawful interception by a public authority.

133. Rule 13 of the Investigatory Powers Tribunal Rules 2000 provides that, subject to rule 6(1), the Tribunal should provide the successful claimant with *"a summary of"* its determination *"including any findings of fact".*

134. Rule 6(1) imposes a duty on the Tribunal not to make disclosure to an extent or in a manner that would be contrary to the public interest or prejudicial to national security or the continued functioning of the Intelligence Services.

135. The purpose of section 68(4) of the Act read together with rules 13 and 6 of the Rules is to my mind reasonably clear. There is a strong public interest that a successful complainant and the public should know that an unlawful interception has taken place subject to the need to restrict disclosure of reasons in protection of the public interest, national security or the continued functioning of the Intelligence Services. However, the public interest in preserving effective investigation requires that no unsuccessful claimant should be provided with the means of defeating an investigation. These provisions strike a public interest balance: in the case of a successful complainant

blanket application of the 'Neither Confirm Nor Deny' policy gives way, to a limited degree, to the requirements of open justice; in the case of an unsuccessful complainant, however, he would be unable to draw an inference as to whether his communications had been intercepted or not.

136. In *Belhadj and others* the Tribunal rejected the respondents' argument that no determination should be made and/or notified to the claimants in order to preserve the blanket 'Neither Confirm Nor Deny' policy. If that argument was accepted the public would be left unaware whether in the case of any particular claimant (i) there had been an interception, or (ii) there had been a lawful interception, or (iii) there had been an unlawful interception. That was contrary to the public interest and was liable to damage public confidence in the Tribunal. The successful claimant was entitled to a notice of determination under section 68(4) of the Act subject to the requirements of rule 6(1) and the Tribunal drafted its determination accordingly.

137. The civil case of *Chief Constable of Greater Manchester Police v. McNally* [2002] EWCA Civ 14, [2002] 2 Cr App R 37 (CA) provides a helpful illustration of the need to carry out a public interest balance according to the specific circumstances of the case. Mr McNally was charged with the murder of Stephen Yates. The prosecution relied on the evidence of, amongst others, the witnesses McDaid and Hartley. By the time of trial McDaid and Hartley had disowned their witness statements. The only evidence that implicated Mr McNally was identification by an eyewitness that was not wholly satisfactory. The trial judge withdrew the case from the jury and a not guilty verdict was entered. Mr McNally subsequently brought a claim for damages against the police for wrongful arrest, false imprisonment and malicious prosecution. He relied on the evidence of McDaid and Hartley that they had signed false witness statements implicating him under threat from the police that, if they did not, they would themselves be charged with offences.

138. The Chief Constable's case was that no such threats had been made. During the course of cross examination of McDaid on behalf of the Chief Constable, counsel explored possible explanations for McDaid's decision to resile from his witness statement. McDaid was asked whether he had received threats from a man referred to as "X" to induce him to do so. McDaid replied that on the contrary one of the deceased's friends had made threats to the effect that he, McDaid, should give false evidence implicating Mr McNally. He had turned to X for help in dealing with those threats. Counsel for Mr McNally subsequently sought from the Chief Constable disclosure of whether X was a police informer. The Chief Constable applied to the judge, Mrs Justice Rafferty (now Lady Justice Rafferty), for public interest immunity in respect of that information. The judge concluded that the status of X could have a

decisive influence on the outcome of the claim. If X was indeed a police informer it was highly unlikely that, as counsel had suggested, he would have used threats to a prosecution witness to procure the withdrawal of McDaid's statement. Without disclosure the jury may be misled. The judge ordered the Chief Constable to disclose whether X was a police informer.

139. The Chief Constable mounted an interlocutory appeal from the judge's decision to the Court of Appeal. Counsel for the Chief Constable relied on the long established immunity from disclosure of the identity of a police informer and the consistent application of the 'Neither Confirm Nor Deny' policy. Lord Justice Auld, with whom the other members of the Court agreed, carried out a review of the authorities and noted that where competing public interests were involved, it was for the court to weigh them. It was no longer the case that disclosure could be required only to ensure that a defendant was not wrongfully convicted of a criminal offence. The judge had been entitled to balance the conflicting aspects of the public interest. She had weighed the relevant factors, including that Mr McNally himself believed that X was a police informer. The relevance of this observation seems to have been that assessment of any *additional* risk of harm to X that might be caused by disclosure was a material consideration in the balancing exercise. This is an example of an occasion when application of a strong 'Neither Confirm Nor Deny' policy in the protection of informants had to give way to the need to ensure the due administration of justice in a civil trial. It did not thereby fatally undermine the 'Neither Confirm Nor Deny' policy towards naming informers. The policy has been applied on innumerable occasions since.

140. The public interest represented by non-disclosure of the existence of an informer was examined by the Court of Appeal in unusual circumstances in *Savage v Chief Constable of Hampshire* [1997] 1 WLR 1061. The claimant sought to recover from the Chief Constable sums that he claimed were due to him under an oral agreement made between himself, as informer, and a chief inspector of the Hampshire constabulary, as his handler. The claim was struck out as being frivolous, vexatious and an abuse of the process of the court. It required the claimant, against the public interest, to assert in open court that he was a police informer. He could not be permitted to advance that case. The Court of Appeal held that the judge had been wrong in law.

141. Lord Justice Judge (later Chief Justice of England and Wales) gave a judgment with which the court agreed. He said, at page 1067D:

> *"In my judgment, it follows from both these lines of authority* [101] *that, if a police informer wishes personally to sacrifice his own anonymity, he is not precluded from doing so by the automatic application of the principle of public interest immunity at the behest of the relevant police authority. This follows, not from waiver of privilege attaching personally to the informer, but from the disappearance of the primary justification for the claim for public interest immunity."*

142. The primary justification for immunity from disclosure of the names of informers is the need to protect the informer from harm and, by that means, to encourage others with relevant information. Lord Justice Judge made further observations upon the wider public interest engaged separately from the need to protect the personal interest of the informer. He continued:

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

The court recognised, however, that when the action reached the discovery of documents phase, it was likely that public interest considerations would need to be reconsidered.

143. A similar problem was faced by the Court of Appeal in *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786. However, there was in *Carnduff* a significant additional fact that led the majority to rule that the claim should be struck out. The claimant sought payment for information provided to the police while he was an informer, asserting that his information had led to the arrest and conviction of a gang of drugs suppliers. In their Defence to the claim the Chief Constable of West Midlands Police and Inspector Rock admitted that the claimant was a paid police informer and that he

[101] *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274 per Lord Woolf at page 299, approving *Hehir v Commissioner of Police for the Metropolis* [1982] 1 WLR 715

had supplied information about the drugs suppliers. However, they denied that the information provided by the claimant played any significant part in the arrest or conviction of the criminals. That denial would have required a detailed examination in court of the internal workings of a police investigation. Lord Justice Laws and Lord Justice Jonathan Parker held that in contrast to the facts in *Savage* it would be impossible to litigate the particular issues that arose on the pleadings in *Carnduff's* case without putting into the public domain information about judgements made in a police investigation and the techniques of policing it was strongly in the public interest to protect.

144. In *Al-Fawwaz v. Secretary of State for the Home Department* [2015] EWHC 166 (Admin), at paragraphs 78 and 79, Lord Justice Burnett drew attention to the fact sensitive nature of the exercise of balancing one aspect of the public interest against another. In a deportation appeal by Abu Qatada (Mohamed Othman) to the Special Immigration Appeals Commission the appellant had sought and obtained permission to rely on the contents of his three interviews with MI5 officers. Whether disclosure took place voluntarily or under an order of the Commission is unclear. Either way, Lord Justice Burnett observed, this is an example of the flexibility of approach to the 'Neither Confirm Nor Deny' policy requiring consideration of the particular circumstances and the legal context of the request for disclosure. For this reason the decision in that case gave no assistance as to whether the Secretary of State's adherence to the 'Neither Confirm Nor Deny' policy in Mr Al-Fawwaz's case was appropriate.

145. It might be thought that there is a paradox inherent in the justification for the 'Neither Confirm Nor Deny' policy on the one hand and its use on the other. It is frequently advanced and justified on the ground that *any* exception will undermine its effectiveness (e.g. in *Re Scappaticci*) while it is frequently the subject of exceptions. In fact there is no paradox because it does not in all circumstances depend on blanket application for its effectiveness. I respectfully concur with the view of Lord Justice Burnett that the application of the policy is considered in its particular circumstances and within the legal context of the case. It is applied if it serves a public interest that outweighs the countervailing public interest in disclosure.

146. I do not accept the argument advanced by Ms Kaufmann QC and Mr Emmerson QC that exceptions already made to the 'Neither Confirm Nor Deny' policy concerning undercover police operations have the effect of depriving the policy of public interest value altogether. That is because, as Lord Justice Burnett, Mr McGuinness and the Information Commissioner have explained, the utility of the policy is likely to depend on the nature of the information whose secrecy it is sought to protect and the precise

factual and legal context in which application of the policy is sought. It does not always depend upon blanket application for effectiveness.[102] However, I do not think that I need to be concerned with the logical or legal purity of the competing positions of the police services and the non-police, non-state core participants on this issue because all are agreed that it is the weight of the underlying public interest in the protection of information from disclosure that matters rather than the utility of the policy itself. As I shall attempt to illustrate below, whether and to what extent and in respect of what information disclosure should be restricted will depend on the sensitivity of the information for which protection is sought, the prominence of the countervailing public interest and a careful measurement of the harm that would follow respectively disclosure and non-disclosure.

(iii) Measurement of the risk of harm or damage

147. The exercise of balancing the respective components of the public interest must take place, as it seems to me, at both a general and a specific level. It requires not only an assessment of the general weight to be afforded to the public interests engaged but also a measurement of the harm or damage that would or might result from disclosure, on the one hand, and non-disclosure on the other.

148. The approach of decision-makers to the 'Neither Confirm Nor Deny' policy exemplifies the importance of this measurement. In some contexts the more blanket the ability neither to confirm nor deny a specific state of affairs (e.g. that a person is a police officer or an informer or that a request for extradition has been received or that an interception has taken place), the more limited scope there is for inference and speculation leading to a risk of harm to an individual and the public interest. This was explained by Sir Joseph Pilling KCB in his evidence to the High Court of Northern Ireland in *Re: Freddie Scappaticci's Application* (paragraphs 118 - 119 above).

149. On the other hand, the absolute or blanket application of the 'Neither Confirm Nor Deny' policy has had to give way in the face of weightier public interest considerations in several circumstances (e.g. where its application would defy common sense – see paragraph 126 above, or where the public demand for accountability requires a response – see paragraph 128 above, or in the interests of public justice – see paragraph 137 above). In other words, the decision-maker has assessed that in the circumstances harm to the public interest in relinquishing a blanket refusal to respond is outweighed by the harm that would be caused by its application. While an exception made to the policy may have the effect of weakening its effect, it does not follow that

[102] See, for example, *DIL and others v Commissioner of Police for the Metropolis* [2014] EWHC 2184 (QB) at paragraphs 39 and 44-47

making the exception will cause significant damage to the public interest. Desirability and necessity are two different things.

150. This does not mean that once the decision is reached that some disclosure must be made the disclosure of everything must follow. What is disclosed must depend upon a measurement of the harm that would or might follow at each level of disclosure. On one side of the line no disclosure could be made to Mr Scappaticci because the information sought was so specific and any disclosure risked fatal harm to an individual or damage to the fight against terrorism. On the other side of the line a person may be told that personal information is held but not what that personal information is or who or what was the source. Some disclosure of sensitive information may be made in order to satisfy a compelling public interest (e.g. at the inquests of Diana, Princess of Wales and Gareth Williams – see paragraph 128 above) but the disclosure made will be the minimum required to meet the demands of that public interest while avoiding damage to the countervailing public interest from wider and unnecessary disclosure.

151. It is at the specific level of assessment of the risk of harm to competing components of the public interest that the dilemma for the decision-maker is at its most acute. In *McNally's* case (paragraphs 137 –139 above) the trial judge was presented with the stark choice between, on the one hand, the risk of misleading the jury and, on the other, the risk of harm to X personally and to the flow of information to the police generally.

152. Accordingly, when considering whether to make an order restricting disclosure of *any relevant particular piece of information* on public interest grounds I will be required to:

(1) identify the public interest in non-disclosure;

(2) assess the risk and level of harm to the public interest that would follow disclosure of *that* information;

(3) identify the public interest in disclosure;

(4) assess the risk and level of harm to the public interest that would follow non-disclosure of *that* information.

(5) make in respect of *that* information a fact sensitive assessment of the position at which the public interest balance should rest.

(iv) Risk of what harm, what damage?

153. The "risk of harm" contemplated "in particular" by section 19(4)(b) and (5)(a) of the Inquiries Act 2005 is a risk of death or injury, psychological or physical. The "risk of

damage" within contemplation in this Inquiry is to the effective prevention and detection of crime, although there are also likely to be some restrictions sought to avoid or reduce a risk of damage to national security.

154. A risk of physical harm may arise if the true identity of an undercover officer is exposed, either directly or indirectly (by the ability to piece together fragments of information that complete the jigsaw or mosaic) and the target of the undercover officer's operation seeks retribution for a perceived betrayal. A risk of psychological injury may arise if, for example, a former undercover officer in fragile psychological health was to be exposed to harassment by those formerly targeted, or threatened with the disclosure of their identity in public proceedings. Furthermore, it seems to me that the term "harm" in section 19(4)(b), when read together with the phrase "includes in particular" in section 19(5), is wide enough to embrace any form of harm and not just harm amounting to physical or psychological injury. For example, interference with the right to respect for private and family life of sufficient seriousness to engage Article 8 of the European Convention on Human Rights would, in my view, qualify as harm within the meaning of section 19(4)(b). That a consequence of not making a restriction order would be harassment of a witness and their family is a matter material to the public interest balance that would need to be weighed with the countervailing public interest in disclosure, just as, when considering an individual's application for anonymity on Article 8 grounds, the decision maker would be required to examine whether the interference was necessary and proportionate in pursuit of a legitimate Article 8(2) objective.

155. There are two routes by which the Metropolitan Police Service anticipates the public interest in the effective prevention and detection of crime may be damaged. The first is that public knowledge of a decision to disclose, directly or indirectly, the identities of undercover officers creates a risk that police officers will lose confidence in the willingness or ability of their employers to protect them from the risk of exposure. This will, in turn, discourage suitably qualified officers from seeking work in an undercover role. There are circumstances in which undercover work is essential to the investigation or prevention of serious crime. Thus, the capacity of the police services to perform their statutory function effectively would be put at risk. If this is the assertion made in support of applications I will require evidence and not mere anecdote. It seems to me that it will be obvious to police officers in general that (i) the Metropolitan Police Service has taken the steps available to protect their identities, (ii) only such disclosure as is necessary in the public interest will be contemplated by the Inquiry and (iii) the advent of and terms of reference for this Inquiry are unique.

156. The second route to damage to the public interest is that public knowledge of the techniques of undercover policing will enable those who are criminal targets to take preventative measures or assist to expose undercover officers authorised to target them. In either case the effective prevention and detection of crime would be compromised. I would not regard a technique as worthy of non-disclosure if it was no more than a common sense precaution inherent in a covert activity. The police services will also need to have in mind that much of the activities and routine management of the Special Demonstration Squad are already in the public domain by virtue of their discussion in the Herne and Ellison reports.

157. In their submissions the core participants concentrated on the risks attendant on disclosure of the true identity of undercover officers. There may be some officers in respect of whom it will be possible to withhold a true identity while disclosing the undercover name by which they worked. However, there are at least two possible reservations to this hope. First, the revelation of an undercover name may have the effect of exposing an officer's true identity; secondly, the officer may have targeted more than one individual or group. While they would be in no personal danger from one, they may be in extreme danger from another, so that an undercover identity may have to be concealed altogether so as to protect the officer from the activities of a single possible source of harm.

158. In each application it seems probable that I will be required to assess the evidence available to me as to the risk of harm or damage attending each level of disclosure, for example: true identity, undercover identity, dates of service, targets, intelligence gathered.

159. As I have observed the assessment to be made under section 19(4)(b) is a comparative one; it requires me to examine the question as to how far a risk of harm or damage could be *avoided* or *reduced* by the making of a restriction order. In my view it will be material to the assessment of avoidance or reduction of a risk of harm or damage whether an officer has already self-disclosed or been exposed by third parties even where there has been no public acknowledgement by the police services. I would need evidence to make good an assertion that while there would be no appreciable risk of personal harm to the officer on disclosure by the Inquiry, there would nevertheless remain an appreciable risk of damage to the public interest in the effective prevention and detection of crime.

160. When assessing a risk of harm or damage I will need to have in mind all possible means of protecting a witness from harm and the public interest from damage. There are various ways in which the interests of an officer can be protected other than by

hearing evidence in closed hearings. Some of them are available to the Inquiry, such as screening; others are available to the police services.

161. I accept the invitation by the police services and the Home Office to treat with due respect the risk assessments made by those who are expert in policing and the risks attendant on the exposure of identities and police operations. However, this acceptance does not mean that I shall accept every expression of opinion offered to me, particularly when the opinion is offered at the level of generality. In the end I have the responsibility of assessing the public interest balance for and against restriction. That will involve critical assessment of evidence. I have tried to indicate the type of evidence I shall need and my provisional approach to the issues in the preceding paragraphs. If I think evidence is missing or sketchy I shall err on the side of caution and give the applicant an opportunity to make good the omission.

(c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry

162. The Metropolitan Police Service acknowledges that individuals who have been affected by undercover police operations "are likely to have a strong desire to know the full truth" and it is conceded that "in some cases…that desire may be of real and legitimate weight".[103] However, the Service relies upon the long-standing countervailing public interest in protecting undercover officers from identification. I have already referred to the common law protection of informers and undercover officers and the police assertion as to assurances of confidentiality or, in the alternative, implied assurances or a legitimate expectation of confidentiality.

163. I have also been referred to the statutory recognition of the importance of confidentiality in the Regulation of Investigatory Powers Act 2000. I note the care with which information about Covert Human Intelligence Sources must be treated in order to conform to the requirements of section 29 of that Act. The Covert Human Intelligence Sources Code of Practice issued by affirmative resolution of both Houses of Parliament under section 71(4) of the Act requires that records kept by public authorities must preserve the confidentiality of a Covert Human Intelligence Sourceand prevent disclosure of their identity and the information they provide. Any complaint that the activities of a Covert Human Intelligence Source have interfered unlawfully with the human rights of the complainant may be made under section 65 of the Act to the Investigatory Powers Tribunal which, in common with this Inquiry, has power to hear

[103] Written submissions Metropolitan Police Service, paragraph 1.5(i), page 2

evidence in a closed hearing from which the complainant and the public may be excluded.

164. As to the confidentiality of records concerning a Covert Human Intelligence Source, paragraph 6.14 of the Code of Practice issued in December 2014, expressly acknowledges the possibility of a requirement to make disclosure to a court as follows:

> *"6.14…Before authorising the use or conduct of a CHIS, the authorising officer should ensure that a risk assessment is carried out to determine the risk to the CHIS of any tasking and the likely consequences should the role of the CHIS become known. The ongoing security and welfare of the CHIS, after the cancellation of the authorisation, should also be considered at the outset. Also, consideration should be given to the management of any requirement to disclose information tending to reveal the existence or identity of a CHIS to, or in, Court."*

165. I have indicated that in my view section 19(4)(c) is couched in terms wide enough to embrace within the ring of confidentiality information and evidence that will be provided by undercover officers to the Inquiry and not just the confidentiality of information given to the police services that they will provide to the Inquiry in documentary form. Even if it is not, an express or implied assurance of confidentiality is plainly material to the public interest balance.[104] Subject to evidence I may receive, it seems to me likely that undercover officers will have embarked on their roles with a strong expectation that their employers would do everything that they properly could to protect them from public exposure. Since the activities of the Special Demonstration Squad were directed towards the collection of intelligence rather than evidence Special Demonstration Squad officers would not routinely expect to be exposed to court proceedings. However, I am inclined to accept the submission made to me by Mr Emmerson QC that any assurance or understanding, even in the case of a Special Demonstration Squad officer, must have been qualified and could not have been absolute, for the very good reason that every police officer is aware of the supremacy of a judicial decision on disclosure should the officer find that his activities have become relevant to a civil or criminal trial. This reservation will apply with particular force to officers whose undercover activity was conducted for the purpose of acquiring evidence.

166. The public interest against which the expectation of confidentiality has to be measured is an exceptional one – the need to investigate as openly as possible the activities, management and justification for these very undercover police operations so as to

[104] Paragraph 39 above

allay public concern. I consider that while an expectation of confidentiality is both a material and weighty consideration it is not likely, except in unusual circumstances, to make the difference between disclosure and non-disclosure if disclosure is necessary in the fair pursuit of fulfilment of the Inquiry's terms of reference.

Limited circle of disclosure

167. I have made reference to the breadth of information for which the police services will seek immunity from disclosure and I have identified the possible consequences for the Inquiry of a restriction order in such terms. One pragmatic solution might be disclosure to a limited circle of interested persons. That might enable the Inquiry to make disclosure of relevant sensitive information to a prospective witness on terms as to confidentiality.

168. Such a solution was offered by the claimants in *McGartland and another v Secretary of State for the Home Department* [2014] EWHC 2248 (QB). Mr Justice Mitting declined to approve a 'confidentiality circle' and his decision was upheld on appeal ([2015] EWCA Civ 686). The sensitive material in issue included details of arrangements made by the state to protect the well-being of agents and informers at risk of exposure. The proposal made was that the sensitive material could be considered by the parties and the Court in a **private** hearing rather than a **closed** hearing from which the claimants would be excluded. The sensitivity of the material was such that the proposal would have required leading counsel, junior counsel, the second claimant and a solicitor to be subjected to the developed vetting process. The claimant argued that since he had been an agent of the state he could be trusted with the information. The judge observed, at paragraph 4 of his judgment:

> *"4. .... There are a number of problems with this suggestion: the process of vetting is highly intrusive and would take months; the second claimant, whose mental health is said to be fragile, might not welcome such intrusions; and if the defendant considered that the first claimant could not be trusted with such information, someone, presumably a judge, would have to determine whether or not he could be. That would be likely to require oral evidence and it would require material, which may be sensitive material .... to be considered. That would require a section 6 [of the Justice and Security Act 2013] declaration [that the proceedings are proceedings in which a closed material application may be made to the court] in itself. Such a procedure is cumbersome and may well be unattainable. In any event, it would not satisfy the defendant's proper insistence upon keeping such techniques closely guarded within the intelligence community."* [Bracketed words added]

169. Similar observations as to practicability were made in *Re: an Application for Judicial Review by the Next of Kin of Gerard Donaghy (Deceased)* (unreported judgment of 8 May 2002) in relation to the suggestion that up to 127 members of victims' families might be vetted to enable them to observe the evidence of anonymous witnesses in the Bloody Sunday Inquiry. In *AHK and others v Secretary of State for the Home Department* [2013] EWHC Mr Justice Ouseley drew attention to the risk of inadvertent disclosure to others, the risk of an unattributable 'leak' and the exigencies of the vetting process to select those who would be within the circle of confidentiality and those who would not.

170. In my view it is unrealistic to suppose that disclosure to a limited circle would answer the practical problem faced by the Inquiry. If, for example, the Inquiry traced witnesses with a view to disclosing the cover name of an undercover officer it would have no advance knowledge whether the witness would be prepared to receive information on terms of confidentiality. Even if the witness undertook to keep the information confidential the Inquiry could not guarantee that the confidentiality would be kept or that inadvertent disclosure would not be made. If a leak did take place, given the constant interest in exposure of undercover police officers it would be virtually impossible to trace its source. It seems to me that in general I should proceed on the basis that disclosure of any sensitive fact to anyone outside the Inquiry team will amount to disclosure to the public.

171. This generality may not apply to specific situations in which the police officer and the putative witness have the same interest in maintaining his or her anonymity. Such circumstances might arise when the witnesses are two or more police officers giving evidence about the same subject or when the witnesses are the officer and their spouse or partner or former spouse or partner. In these circumstances it is possible that the sensitive information could be shared in the confident expectation that it would not be further disseminated. The evidence would be heard in **private** during which only those privy to the information would be present, including the witnesses with a common interest in anonymity. In **closed** proceedings, however, no person would be admitted to the hearing outside the Inquiry team and the police services. The suitability of a private rather than a closed hearing will need consideration in these and any other possible circumstances on a case-by-case basis and in consultation with those affected.[105]

[105] It is probable that before oral hearings the Inquiry will prepare and distribute, on terms of confidentiality pending the hearing, **non-sensitive** material in order to facilitate preparation by witnesses. This is a separate and conventional procedure that is unaffected by the observations made in paragraphs 170 and 171.

Part 4

Statutory provision - human rights

172. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. By section 6(2) a public authority includes a person certain of whose functions are of a public nature. The chairman of an inquiry under the Inquiries Act 2005 is such a person. The chairman may not act in a way that is incompatible with a right under the European Convention on Human Rights. Those rights that are material to the applications for restriction orders I will have to consider arise under Articles 2, 3, 8 and 10 of the Convention.

Articles 2 and 3 of the European Convention on Human Rights

173. Article 2 of the European Convention on Human Rights requires that everyone's right to life shall be protected by law; Article 3 provides that no-one shall be subjected to torture, or to inhuman or degrading treatment or punishment. I am primarily concerned with the positive obligation on the state to preserve life and to protect those within its jurisdiction from torture or inhuman or degrading treatment. The principles to be applied to applications for anonymity in the context of a statutory inquiry were considered by the House of Lords in *In re Officer L and Others* [2007] UKHL 36, [2007] 1 WLR 2135. Robert Hamill died from injuries received in a violent incident that took place in Portadown, County Armagh on 27 April 1997. The public concern was that police officers on duty nearby failed to intervene to prevent the attack on Mr Hamill. An inquiry was ordered under section 44 of the Police (Northern Ireland) Act 1998; it was subsequently converted to an inquiry under the Inquiries Act 2005. Several police officers were notified that they were required to give evidence at the Inquiry and sought orders that they should give evidence anonymously. The Inquiry declined to make the orders and the decisions were successfully challenged in judicial review proceedings in Northern Ireland. The Northern Ireland Court of Appeal dismissed the Inquiry's appeal and the Inquiry appealed to the House of Lords. The House reviewed the obligations on the Inquiry arising under both Article 2 and the common law.

174. In an opinion with which the other members of the House agreed, Lord Carswell identified the component parts of the obligations on the state and the threshold test to be met under Article 2. First, the state must *"take appropriate steps to safeguard the*

lives of those within its jurisdiction".[106] Secondly, when the authorities know or ought to know of *"a real and immediate risk to the life of an identified individual"* there is a positive obligation on the state to take reasonable preventative measures.[107] Thirdly, the "real" risk to which the European Court of Human Rights referred is one that is objectively verified and an "immediate" risk is one that is present and continuing.[108] Fourthly, the threshold for a "real and immediate risk" is constant and not variable according to the type of act contemplated. Fifthly, the subjective fear of the applicant is no part of the test, although it might be evidentially relevant in identifying the risk.[109]

175. Lord Carswell referred to the requirement that in the event of a real and immediate risk to life the state must take *reasonable* preventative measures. This is not, he said, an absolute standard but one that reflects the principle of proportionality, *"striking a fair balance between the general rights of the community and the personal rights of the individual"*. Drawing attention to two previous decisions of the Court of Appeal of Northern Ireland Lord Carswell inclined to the view, without deciding the question, that countervailing factors relating to the public interest, such as the need to restore public confidence or maintain the credibility of an inquiry, might be relevant to the question whether the steps taken by the inquiry, if any, were reasonable. He did not think that the measurement of reasonableness needed to be confined to questions of practicability alone.[110] It seems to me, with respect, that it would have to be a very compelling public interest that prevented a statutory inquiry from imposing a restriction whose effect would be to avoid or reduce a real and immediate threat to life by exposure of a witness' identity.

176. Since Articles 2 and 3 are both unqualified in their terms it seems to follow that the threshold test for each of them should be the same. This was the conclusion of Sir William Gage in the Baha Mousa Inquiry and no contrary submission has been made to me. I therefore accept that the threshold under Article 3 is one of objectively verified immediate risk of torture, or inhuman or degrading treatment.

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[106] *Osman v United Kingdom* [1998] 29 EHRR 245 at paragraph 115
[107] *Osman v United Kingdom (supra)* at paragraph 116
[108] *In re Officer L and Others* [2007] 1 WLR 2135 at paragraph 20
[109] *In re Officer L and Others (supra)* at paragraph 20
[110] *In re Officer L and Others (supra)* at paragraph 21. In *An application by the Next of Kin of Gerard Donaghy* [2002] NICA 25A the Court of Appeal of Northern Ireland had upheld a ruling by Mr Justice Kerr that when a Tribunal of Inquiry had to weigh the substantive Article 2 right to life of police witnesses against the procedural rights of the next of kin who wished to see the officers give evidence, the substantive rights of the witnesses must prevail. The Tribunal's decision to permit screening from all save the Tribunal and legal representatives was upheld. In *Meehan's Application for Judicial Review* [2003] NICA 34 Lord Carswell, then Chief Justice of Northern Ireland, delivering the judgment of the Court of Appeal said at paragraph 18 that once a real and immediate risk to life had been established and means were available to reduce the risk the decision maker should ask whether "there are cogent reasons in the public interest why" it should not adopt the means available.

Article 8 of the European Convention on Human Rights

177. Article 8 provides:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

178. At common law the default position is that witnesses in judicial proceedings, whether civil or criminal, give evidence in public using their true identity. That is an expression of the common law that judicial proceedings should be publicly accessible and that the defendant or other party is entitled to confront their accuser.[111] Rule 39.2(4) of the Civil Procedure Rules 1998 now enables the court in civil proceedings to make an order prohibiting disclosure if it considers non-disclosure necessary in order to protect the interests of a party or witness. In criminal proceedings an order for anonymity may now be made under section 86 – 93 of the Coroners and Justice Act 2009 in specific and limited circumstances.

179. The House of Lords has approved the receipt of anonymous evidence in the proceedings of an inquest. In *R v. Davis* [2008] 1 AC 1128 (HL) at paragraph 21 Lord Bingham explained:

> *"21. The House has approved the admission of anonymous written statements by a coroner conducting an inquest: see* R v HM Attorney-General for Northern Ireland, Ex p Devine *[1992] 1 WLR 262. But, as Lord Lane CJ pointed out in the transcript of his judgment of the court in* R v South London Coroner, Ex p Thompson*, reported in part at (1982) 126 SJ 625, an inquest is an inquisitorial process of investigation, quite unlike a criminal trial; there is no indictment, no prosecution, no defence, no trial; the procedures and rules of evidence suitable for a trial are unsuitable for an inquest: see* R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson *[1995] QB 1, 17. Above all, there is no accused liable to be convicted and punished in that proceeding."*

180. The concept of private life is for the purposes of Article 8(1) of the European Convention on Human Rights a wide one, capable of embracing, subject to reaching a

[111] *Scott v Scott* [1913] AC 417 (HL) at paragraph 437; *R v Davis* [2008] 1 AC 1128 (HL) at paragraph 5

minimum threshold of seriousness, professional and personal relations, personal choices and development, and health and well-being. There is, on the face of it, no interference with the private or family life of a witness by making public that witness' name in a court, tribunal or inquiry. But where the disclosure of the witness' name and personal circumstances would expose the witness to significant harm in the enjoyment of their private or family life there may be an obligation upon a public authority, under Article 8(2), to take preventative measures.

181. In *R (Associated Newspapers Limited) v The Right Honourable Lord Justice Leveson (as Chairman of the Leveson Inquiry)* [2012] EWHC 57 (Admin) the Administrative Court (Lord Justice Toulson, Mr Justice Sweeney and Mrs Justice Sharp) upheld the decision of the Chairman to receive evidence anonymously since that was the only means by which to receive from some journalists, who were fearful of career blight, evidence of malpractice in the newspaper industry. The Administrative Court accepted the Chairman's judgement that it was better to receive the evidence anonymously than not to receive it at all. Measures could be taken by the Chairman to ensure that newspaper proprietors were given the opportunity to challenge the evidence in general. The Chairman had indicated that he would not use the anonymous evidence to support findings in respect of any particular newspaper. It was therefore not established that the Chairman's decision would act unfairly to the claimants. The restriction order was conducive to the fulfilment of the inquiry's terms of reference under section 19(3)(b) and was fair to the participants in the inquiry for the purpose of section 17(3) of the Inquiries Act 2005.

182. Whether the measures amounting to interference with the private and family life of the witness are "necessary" for the purpose of Article 8(2) requires an analysis of (i) the objective of the interference, (ii) the rational connection between the measures and the objective, (ii) whether the measures go no further than necessary in pursuit of the objective and (iv) whether a fair balance has been struck between the rights of the witness and the public interest.

183. In the field of criminal law the overwhelming public interest is in the fair trial of the accused. Thus, only in clearly defined circumstances when the fairness of the trial is safeguarded does the Coroners and Justice Act 2009 permit the trial judge to order that a witness can give evidence anonymously. In a civil trial the true identity of a witness will almost never be unknown to the parties to the proceedings even if the court makes an order restricting wider publication. Usually at stake is the balance to be struck between the common law presumption of openness of judicial proceedings and the rights of the press under Article 10 of the European Convention of Human Rights on the one hand, and the Article 8 rights of a party or witness on the other.

184. In *Re Application by Guardian News and Media Limited and others* [2010] UKSC 1, [2010] 2 AC 697 the Supreme Court examined the increasing practice of granting anonymity to parties under CPR rule 39.2(4) without rigorous examination of the merits of the application. The applicants had been designated by the Treasury, under Terrorism Orders in Council of 2006 and 2009, as persons who were reasonably suspected of facilitating acts of terrorism. Those designations enabled the Treasury to make freezing orders against the assets of the applicants without judicial consideration. The applicants succeeded in their challenge to the lawfulness of the Orders in the Administrative Court. The Treasury was successful in part on appeal to the Court of Appeal and both sides appealed to the Supreme Court.

185. The applicant Youssef (formerly called in the proceedings HAY) was an Egyptian national. Publication of his name would, he asserted, place himself and his family at risk of retribution by the authorities in Egypt. However, he had been named in a press release, had been the subject of articles in the press, and had brought proceedings resisting deportation against the Home Office in his own name. The Supreme Court held that the application for anonymity was without merit.

186. The applicant Marteen (formerly called in the proceedings M) lived with his ex-wife and children. He feared that exposure of the fact that he had been designated a suspect in terrorist activity would lead to loss of contact with his children and his local Muslim community. Exposure would lead to serious reputational damage without the opportunity to protect it by challenging the merits of the order made by the Treasury. There was, however, very limited evidence available to the Supreme Court to make good the applicant's fears. As to reputational damage the Court was not prepared to decide the issue on the assumption that the reader could rationally equate a reasonable suspicion of involvement with proof of involvement in terrorist activity. If that was right there would be no reports naming persons charged with offences.

187. Lord Rodger, giving the unanimous judgment of the Court, examined the history of court reporting and noted the limited exceptions to full reporting recognised over time, particularly in the field of matrimonial and children cases. He then turned to Article 8 and recognised that protection took place in two forms: the use of ciphers in court documents and judgments, and orders addressed to the public and media restricting the right to report. As to the latter Lord Rodger pointed out that this was one of the ways in which the United Kingdom fulfilled its positive obligation under Article 8 to secure that other individuals respected an applicant's private and family life. The right of the press to make reports of the proceedings, and the names of the applicants if otherwise known to them, was limited only by a restriction imposed by an order of the court which must be satisfied that it was required under Article 10(2) as necessary in a

democratic society "for the protection of the reputation or rights of others", including rights enjoyed under Article 8.

188. Adapting Lord Hoffmann's common law formulation in *Campbell v MGN Limited* [2004] UKHL 22, [2004] 2 AC 457, at paragraphs 55 and 56, of the balance to be struck between the right of the press to report matters of public interest and the individual's right to protect personal information, Lord Rodger posed the following question at paragraph 52 of *Re: Guardian News and Media Ltd*:

> *"[W]hether there is sufficient public interest in publishing a report of the proceedings which identifies [the applicant] to justify any resulting curtailment of his right and his family's right to respect for their private and family life."*

189. Article 8 and Article 10 are both qualified rights in respect of which a balance of interests was required. Lord Rodger proceeded to examine the risk of harm to the applicant that would be caused by exposure (Article 8) and the risk of harm to the public interest in being deprived of knowledge of the identity of persons who had been made the subject of freezing orders (Article 10). He concluded that the public interest in disclosure was a "powerful" one that justified the limited curtailment of the applicant Marteen's Article 8 rights qualified in Article 8(2).

190. By way of contrast, in *Secretary of State for the Home Department v AP (No 2)* [2010] UKSC 26, [2010] 1 WLR 1652 the Supreme Court was examining the lawfulness of a control order made under the Prevention of Terrorism Act 2005. The control order had been overtaken by events. In 2009 the Secretary of State had revoked the order and made a decision to deport the applicant on national security grounds. The applicant appealed to the Special Immigration and Asylum Commission and he was granted bail with conditions pending appeal. In a unanimous judgment delivered by Lord Rodger the Supreme Court continued the anonymity order that had been in place since his application to the Administrative Court for leave to proceed to judicial review.

191. The Court found that there was a real risk of harm to the applicant in the form of racist abuse and violence should it become known in the town where he was required to live as a condition of his bail that he had formerly been the subject of a control order and was now the subject of a deportation order on grounds related to terrorism. The application was supported by medical evidence as to the *"significant and constant challenge to [AP's] psychological and emotional integrity"*. The Court held that the public interest in receiving a full report of the proceedings under Article 10 (about which no submissions had been received from the media organisations) had to give

way to the need to protect AP from the risk of violence (Article 3) and the need to preserve the right of respect for AP's private and family life (Article 8).

192. In my view, there is no legal controversy in the identification of the issue to be resolved in an application for anonymity on Article 8 grounds. Furthermore, as I have said at paragraph 154 above, I have significant room for judgement in this area under section 19(3)(b) and section 19(4)(a) and (b) of the Inquiries Act 2005. The term "harm or damage" in section 19(4)(b) is, by virtue of the use of the words "in particular" in subsection (5), wide enough to embrace a risk of harm by interference with rights of privacy. Subject to countervailing public interest considerations, and the fairness to others of granting anonymity to a witness, it also seems to me that under section 19 (4)(d)(i) I am afforded a wide margin of discretion in assessing the means by which to achieve efficiency and effectiveness in the Inquiry.

193. I will have to reach a decision according to the evidence in support of each application. Although the statutory assessment of the public interest and of what is conducive to the inquiry fulfilling its terms of reference under section 19(3)(b) of the Inquiries Act 2005 may well overlap with an assessment of proportionality under Article 8(2), it seems to me that when they do I must, nonetheless, carry out a separate Article 8 assessment by reason of the statutory duty imposed on me by section 19(3)(a) of the Inquiries Act 2005 read with section 6 of the Human Rights Act 1998.

Article 8 – a positive investigative obligation?

194. The non-police, non-state core participants argue that this Inquiry has been instituted to investigate, among other things, allegations of gross interference by the police services with the right of respect for privacy whether under the common law or under Article 8 of the European Convention on Human Rights. It is submitted, relying on the decisions of the European Court of Human Rights in *El-Masri v The Former Yugoslav Republic of Macedonia* [2012] ECHR 2067, [2013] 57 EHRR 25 (Grand Chamber) and *Husayn (Abu Zubaydah) v Poland* [2014] ECHR 834 (Fourth Section) (both cases of inter-territorial rendition by the Central Intelligence Agency), that Article 1 of the Convention requires member states to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Accordingly, when serious breaches of the human rights of individuals come to the attention of the state there is a positive obligation to investigate.[112] That investigation must be effective, which implies that the

[112] The existence of a positive obligation to investigate known breaches by the state of its Article 8 obligations was acknowledged without analysis by the First Section of the European Court of Human Rights in *Craxi v Italy (No 2)* [2004] 38 EHRR 47 at paragraph 75. In *RB v Hungary* (Appn. No. 64602/12, Judgment 12 April 2016) at paragraph 81 the First Section found that while there may be, depending on the circumstances, a positive obligation to adopt measures to secure respect for private life, Contracting States

individuals whose rights have been affected should have the means to participate effectively.

195. As to the sharing of secret information received in the course of the investigation the court in *Husayn v Poland* said:

> *"488. As explained above in relation to Poland's non-observance of Article 38 of the Convention [co-operation with the European Court of Human Rights], the Court has taken note of the fact that the investigation may involve national-security issues (see paragraph 360 above). However, this does not mean that reliance on confidentiality or secrecy gives the investigating authorities complete discretion in refusing disclosure of material to the victim or the public.*
>
> *It is to be recalled that even if there is a strong public interest in maintaining the secrecy of sources of information or material, in particular in cases involving the fight against terrorism, it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests (see, mutatis mutandis,* A. and Others v. the United Kingdom *[GC], no. 3455/05, §§ 216-218, ECHR 2009).*
>
> *489. Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.*
>
> *An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory (see* Anguelova v. Bulgaria*, no. 38361/97, § 140, ECHR 2002-IV;* Al-

enjoyed a wide measure of appreciation in determining appropriate steps. At paragraphs 90 and 91 the court held that in the absence of any domestic law prohibiting racial harassment short of violence the state was in contravention of its positive obligation to secure the applicant's right under Article 8 of respect for her private life.

Skeini and Others*, cited above, § 167 and* El-Masri*, cited above, §§191-192).”* [Square bracketed words added to paragraph 488]

196. These observations apply to any investigation of human rights abuses and not just to litigation between parties. The Secretary of State has instituted this statutory Inquiry to investigate, among other things, allegations of abuse of privacy and she accepts the need to permit effective participation subject to “the overall need to ensure that the ability of the police, and other agencies, to counter crime remains effective”.[113] In my view, the foregoing citation from *Husayn v Poland* demonstrates that the public interest considerations that contribute to decisions whether, in England and Wales, to impose restrictions on disclosure under section 19 of the Inquiries Act 2005 are the same as those identified in the European Court of Human Rights. They include the recognition of the public interests in protecting sensitive information, in public scrutiny of the inquiry’s proceedings and in ensuring, through the application of the fairness principle, effective participation by those touched by the issues arising in the inquiry.

197. Mr Squires QC, supported by Ms Kaufmann QC, raised an argument founded upon the decisions of the European Court of Human Rights in *Gaskin v United Kingdom* [1989] 12 EHHRR 36 and *Roche v United Kingdom* [2006] 42 EHRR 30 to the effect that the applicants were entitled to access records held by public authorities that were relevant, respectively, to their childhood development and physical health. The state had a positive obligation to provide an effective and accessible procedure by which to ensure effective respect for private and family life. [114] From this position the argument develops that the state has a positive obligation to make disclosure of police records received by the Inquiry when they relate to interference by the state with an individual’s right of respect for private and family life. Ms Kaufmann QC sought to distinguish *R (Children’s Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34, [2013] 1 WLR 3667 in which the Court of Appeal rejected the proposition that, either at common law or under Articles 3, 6 or 8, the state, either as tortfeasor or in public law, owed a duty to find victims of its possible wrongdoing for the purpose of providing them with access to redress. The state’s constitutional duty was, on the contrary, a negative one, namely not to place obstacles in the way of access to justice. Here, Ms Kaufmann QC submitted, the position is different because the state has instituted a statutory inquiry into the very matters said to constitute interference with the right of respect for private and family life of individuals both known and presently unknown to the inquiry. Both Mr Squires QC and Ms Kaufmann QC submitted that, once the investigation has commenced, the presumption must be that

[113] Written submissions Home Office, paragraph 7, page 2
[114] Written submissions Elected Representatives paragraphs 32-36; transcript of hearing on 23 March 2016, 32-34

disclosure will be made for the purpose of providing justice to unknown victims and effective participation to known victims.

198. As I have said at paragraphs 82 - 112 above there is a strong public interest in the openness of the Inquiry's process and proceedings. One of the factors that informs the public interest is the Inquiry's obligation to fulfil its terms of reference and, therefore, its ability to locate witnesses to significant events. However, the Inquiry's terms of reference are carefully drawn. It is not the obligation of the Inquiry to locate all those whose private lives may have been touched by undercover policing. It is not the obligation of the Inquiry to pursue every possible avenue of inquiry. Paragraphs 8 and 9 of the terms of reference provide the Chairman with a wide discretion as to what is necessary in pursuit of the Inquiry's objectives. I do not take the view that the Inquiry has a *duty* to make disclosure to the public of information merely on the ground that it touches Article 8 rights. Still less do I conclude that the principles applied in *Gaskin* and *Roche* are transferable to the Inquiry. Had the disclosure sought in those cases involved material it would have been against public interest to disclose, the European Court of Human Rights would have been examining a different question, namely whether the withholding of information was justified and proportionate under Article 8(2). I am concerned with an assessment of the balance of the public interests engaged and the proportionality of a decision to impose or to withhold a restriction.

199. For these reasons I do not consider that the discrete arguments addressed to me on this further strand of Strasbourg reasoning as to positive Article 8 obligations add anything to those founded on the *El-Masri* line of authority.

Article 10 of the European Convention on Human Rights

200. The majority view in *Kennedy v The Charity Commission* [2014] UKSC 20, [2015] 1 AC 455 was that, given the unsatisfactory state of conflicting decisions in the Sections and Grand Chamber of the European Court of Human Rights, the statements of principle made by the Grand Chamber as to the limits of Article 10 should be regarded as representing the currently authoritative Strasbourg pronouncement: there is no positive right under Article 10 to access information held by the state, nor any obligation on the state to impart it.[115] Furthermore, the media does not have a right of access to inquiry proceedings properly held in private.[116] Even if the contrary was the correct conclusion Article 10 is a qualified right. It provides:

[115] *Kennedy v The Charity Commission (supra)* at paragraphs 1, 61-94; 143-148
[116] *R Persey and others v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [2003] QB 794 at paragraphs 48-59; *R (Howard) v Secretary of State Health* [2002] EWHC 396 (Admin), [2003] QB 830 at paragraph 110

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

201. I invited and have received the written and oral submissions from the Media represented by Mr Gavin Millar QC and Mr Ben Silverstone. The Media emphasise the importance of the open justice principle and the judicial pronouncements in *R (E) v Chairman of the Inquiry into the Death of Azelle Rodney* [2012] EWHC 563 (Amin) and *Kennedy (supra)* as to the need to achieve as public an inquiry as possible. The Media urged that hearings open to the public will subject the evidence to proper scrutiny and lead to appropriate lines of enquiry.

202. The Media contend that Article 10 is the appropriate starting point for an examination of the requisite standard of participation by the public and by the media. There is a high public interest in the subject matter of the Inquiry. Informed scrutiny and debate on a matter of such general public importance depends upon access to the facts of which the public has a right to be informed.[117]

203. It is argued that the Inquiry should reach decisions under section 19 of the Inquiries Act 2005 using a case-by-case approach. It will need to be persuaded by evidence that a restriction is required. In performing a balance of interests, assessing the legitimate objective and examining the proportionality of means, the question whether disclosure would result in additional harm when information is already in the public domain is a relevant consideration.[118]

204. In this Inquiry the main issue in deciding whether to make an order restricting disclosure under section 19 of the Inquiries Act 2005 will be as to where the public

[117] *Voskuil v Netherlands* [2007] ECHR 965, [2008] EMLR 465 at paragraphs 70-72
[118] As in the Spycatcher case: *Observer and Guardian v United Kingdom* [1991] ECHR 49, [1991] 14 EHRR 153 at paragraphs 66-70

interest balance is to rest. In my view, the approach required by section 19 would lead to no different result than is required by an examination under Article 10(2) of the necessity for restriction for the prevention of disorder or crime and/or for the protection of the rights of others. I have considered at paragraphs 82 and following the factors that inform the public interest in openness and accessibility following from sections 18 and 19 of the Inquiry Act 2005. It does not seem to me that Article 10 adds a dimension to the public interest in openness and accessibility that is not already inherent in the statutory scheme. Article 10 walks hand in hand with the statutory provisions and the common law. The position of the media as the public's eyes and ears is dependent on and complementary of the public's interest in being informed.

205. The Media, in its capacity as public watchdog, seeks access to the process by which the Chairman considers and rules upon individual applications for restriction orders so that submissions, if any, can be received before the order is made.[119] Furthermore, the Media seeks access on terms of confidentiality to closed material submitted in support of applications for restriction. It is said that support for the latter request can be derived from the decisions of the Court of Appeal Criminal Division in *Guardian News and Media Limited and others v Incedal and another* [2014] EWCA Crim 1861, [2015] 1 Cr App R 4 and *Guardian News and Media Limited and others* [2016] EWCA Crim 11.

206. Erol Incedal was charged with terrorist offences. The prosecution sought a trial *in camera* relying on Ministerial certificates to the effect that evidence given in public would be prejudicial to national security. The prosecution, recognising the significance of the impact of an *in camera* hearing on the principle of open justice, suggested that a small number of "accredited journalists" chosen by the media should be permitted to sit in during the major part (but not all) of the trial on condition that they did not report the proceedings. Mr Justice Nicol granted the application for a trial held *in camera* but declined to permit the attendance of the media representatives on the grounds of practicality. On appeal to the Court of Appeal ([2014] EWCA Crim 1861) the Court varied the orders made by Mr Justice Nicol and held that the trial judge should have acceded to the request to admit the press to part of the *in camera* hearings on conditions of confidentiality. While the proceedings could not be reported contemporaneously the need for secrecy would be reviewed at the conclusion of the trial and, in any event, the media could act in the role of public watchdog at the trial.

207. At the conclusion of the trial Mr Justice Nicol was asked to carry out a review of the order restricting publication. He declined to lift the restriction. The further appeal of the media to the Court of Appeal ([2016] EWCA Crim 11) was dismissed. The Court, at

[119] Relying on *A v British Broadcasting Corporation (Scotland)* [2014] UKSC 25, [2015] AC 588 at paragraphs 66-67

paragraphs 67-69, roundly disapproved of the order permitting journalists to observe the hearings *in camera* in light of the trial judge's experience that the satisfactory progress of the trial was constantly interrupted.

208. It does not seem to me that the experience of the court of trial in Mr Incedal's case is a promising foundation for the Media's current application. I note, firstly, that the application in *Incedal* would not have been made at all unless the Secretary of State for the Home Department and the Secretary of State for Foreign and Commonwealth Affairs had not suggested it. Secondly, the application was made in the context of proceedings it was anticipated would be held almost wholly *in camera.* Thirdly, the purpose to be served by the attendance of the media was to hear the evidence given at the trial *in camera*, not to inform submissions on behalf of the media as to the reasons why evidence should not be heard *in camera.* Finally, and in any event, I am not persuaded that during the course of a lengthy inquiry there is a sufficient guarantee that inadvertent disclosure would not take place notwithstanding the goodwill and integrity of the selected media representatives.

209. I do not consider it appropriate even on terms of confidentiality to expose evidence provided to the Inquiry in private to the scrutiny of the media. I can see no arguable basis for giving to the media rights of access not enjoyed either by the public in general or core participants in particular.

Part 5

Common law duty of fairness to witnesses – anonymity

210. Section 17(3) of the Inquiries Act 2005 requires the chairman of an inquiry to act fairly. I agree with counsel to the Inquiry that there is no reason to think that in the context of applications for restriction orders there is any difference between the standard of fairness to be applied under section 17(3) and at common law. In *Re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135 (see also paragraph 173 above) the House of Lords, first considered the application of Article 2 of the European Convention of Human Rights and then the application of the common law principle of fairness to witnesses, since that was the appropriate order in which to consider the grounds for the applications for anonymity. The House agreed that in treating witnesses fairly their subjective fears that harm would result without an order for anonymity *was* a factor for consideration, even if their fears were not objectively sound, particularly if their fears were having an adverse impact on health. I recognise, therefore, that when selecting the *means* by which to secure an established right to protection under Article 2 or Article 3, the Inquiry will need also to consider the applicant's subjective fears as an admissible component of the fairness test.

211. The common law test has been considered in other Northern Ireland cases.[120] What is required is a measurement of the public interest in the openness of the Inquiry, the nature, content and importance of the evidence, the contribution if any that identification of the witness would make to public confidence in the Inquiry, and the nature of the personal interests of the witness, including the actual or perceived risk of harm to that witness. It seems to me that this is a further example of the need to measure the importance of the public interest in the circumstances of the application and to assess the respective risks of harm were the application to be granted or refused.

[120] Notably *Re A and others' Application for Judicial Review (Nelson Witnesses)* [2009] NICA 6; *Re: Witnesses A, B, C, K and N's Application for Judicial Review* [2007] NIQB 30; and *Re an Application for Judicial Review by the Next of Kin of Gerard Donaghy* (unreported)

Part 6

Conclusions and Summary of Findings

A. The public interest balance under section 19(3)(b)

A.1 Decisions whether to make a restriction order under section 19 of the Inquiries Act 2005 that depend on a balance of the public interest will be made under section 19(3)(b) taking account of relevant public interest factors whether they are specifically mentioned in section 19(4) or (5) or not.

A.2 The principal competing public interest factors for consideration under section 19(3)(b) of the Inquiries Act 2005 are:

(1) the need to allay public concern about the subject matter, process, impartiality and fairness of the Inquiry; and

(2) the need to avoid or reduce a risk of harm to serving and former police officers and the need to avoid or reduce a risk of damage to effective policing.

A.3 The principal means available to the Inquiry to allay public concern in its subject matter, process, impartiality and fairness is public accessibility to its proceedings that will in one or more of the following respects:

(1) facilitate the investigative process;

(2) respect the different interests of witnesses and encourage effective participation;

(3) inform the public and the media about its proceedings;

(4) permit public debate about matters of national interest;

(5) achieve public accountability for police services; and

(6) provide transparency for the conclusions and recommendations of the Inquiry.

A.4 The main risk factors for harm to police officers and damage to effective policing is disclosure of (i) the true identity of present or former undercover police officers whether directly or indirectly and (ii) the operational techniques of undercover police operations.

A.5 In assessing whether a risk of harm would be avoided or reduced by making a restriction order under section 19(3)(b) of the Inquiries Act 2005, the term “harm” will be construed widely so as to embrace interference with private life. However, the greater the risk and the more severe the harm the weightier will be the public interest in taking steps to avoid or reduce it.

A.6 In assessing whether a risk of harm to an individual or damage to effective policing would be avoided or reduced by making a restriction order under section 19(3)(b) of the Inquiries Act 2005, an assessment of any pre-existing risk caused by self-disclosure or third party disclosure and alternative methods available to avoid or reduce a risk of harm or damage will be material considerations.

A.7 In assessing whether a risk of harm to an individual or damage to effective policing would be avoided or reduced by making a restriction order under section 19(3)(b) of the Inquiries Act 2005, reliance on the policy neither to confirm nor deny a fact or state of affairs will be a material consideration but the weight, if any, to be afforded to it will depend upon the precise risk of harm or damage its application seeks to avoid or reduce.

A.8 In assessing a risk of harm or damage under section 19(3)(b) and (4) an expectation of confidentiality will be a material consideration but the weight, if any, to be attached to such an expectation will require examination as to whether it was an expectation of unqualified protection and, if so, whether such an expectation was reasonable in the circumstances.

A.9 The practical consequences of a restriction order to the fairness of the Inquiry’s proceedings and the Inquiry’s ability to fulfil its terms of reference will be significant considerations. When all other components of the public interest are directly opposed and evenly weighted the Inquiry’s duty of fairness to its participants may be a decisive factor.

A.10 Where the risk of harm considered in a public interest assessment is interference with an individuals’ right of respect for private and family life, a separate Article 8 assessment will be made under section 19(3)(a) of the Inquiries Act 2005.

A.11 The starting point is that no restriction order will be made, in the public interest of openness in the Inquiry and its proceedings, unless it is necessary in the countervailing public interest of the protection of individuals from harm and/or effective policing.

A.12 It is not possible to state at the level of principle or generality where the public interest balance will rest. The Chairman will approach evaluation on a case-by-case basis according to the nature and quality of evidence received in support of the application.

B. Applications made in the public interest

B.1 Assessment of the extent to which a restriction order would avoid or reduce a risk of harm to a police officer will require examination of evidence and/or argument, as appropriate, as to:

(1) any source of possible harm;

(2) the nature of any possible harm including breach of confidentiality;

(3) the identification of those who may be harmed;

(4) any medical evidence on which an officer relies;

(5) the existence and quantification of any pre-existing risk of harm, including a risk caused by self-disclosure or third party exposure or partial exposure;

(6) the existence and quantification of any additional risk of harm that a restriction order would avoid or reduce;

(7) means other than a restriction order that may be available to avoid or reduce a risk of harm;

(8) whether those means would, without the restriction order, avoid the risk or the extent to which those means would, without the restriction order, reduce the risk.

B.2 Assessment of the extent to which a restriction order would avoid or reduce a risk of damage to effective policing will require examination of evidence and/or argument, as appropriate, as to:

(1) the degree of and reasons for the sensitivity of the material, including a breach of confidentiality;

(2) the causative link between disclosure and damage;

(3) the existence and quantification of any pre-existing risk of damage, including a risk caused by previous public disclosure; and

(4) means other than a restriction order that may be available to avoid or reduce a risk of damage;

(5) whether those means would, without a restriction order, avoid the risk or the extent to which those means would, without the restriction order, reduce the risk.

B.3 When considering whether to make an order restricting disclosure of *any relevant particular piece of information* on public interest grounds the Chairman will:

(1) identify the public interest in non-disclosure;

(2) assess the risk and level of harm to the public interest that would follow disclosure of *that* information;

(3) identify the public interest in disclosure;

(4) assess the risk and level of harm to the public interest that would follow non-disclosure of *that* information;

(5) make in respect of the information concerned a fact sensitive assessment of the position at which the public interest balance should rest.

C. Personal applications

C.1 Evidence that a restriction order is required in order to avoid or reduce a real and immediate threat of death or serious injury will be the first consideration as to whether a restriction order should be made, in order to comply with section 19(3)(a) of the Inquiries Act 2005, section 6 of the Human Rights Act 1998 and Article 2 and Article 3 of the European Convention of Human Rights.

C.2 On receiving an application for a restriction order to avoid or reduce a risk or perceived risk of death or injury relying on the fairness principle at common law or under section 17(3) of the Inquiries Act 2005, or relying on section 19(3)(b) of the Inquiries Act 2005, the Chairman will examine evidence and/or argument, as appropriate, as to:

(1) the nature and gravity of the risk;

(2) the nature and gravity of any perception of risk on which the applicant relies;

(3) any medical evidence on which the applicant relies;

(4) the nature and sensitivity of the information that the applicant seeks to protect from disclosure;

(5) the status of the applicant in the Inquiry and the importance of the evidence the applicant is to provide;

(6) the availability of alternative means of avoiding or reducing the risk;

(7) the public interest in openness identified in paragraph A.3 above;

(8) the fair balance to be struck between the public interest in disclosure and the personal interests of the applicant.

C.3 Where a restriction order is sought to avoid or reduce a risk of harm to the applicant from interference with their private and/or family life whether pursuant to section 19(3)(a) of the Inquiries Act 2005, section 6 of the Human Rights Act 1998 and Article 8 of the European Convention on Human Rights, or pursuant to section 19(3)(b) of the Inquiries Act 2005, or on the fairness principle at common law or under section 17(3) of the Inquiries Act 2005, the Chairman will examine evidence and/or argument, as appropriate, as to:

(1) the degree and gravity of interference with private and family life disclosure would be likely to cause;

(2) any medical evidence on which the applicant relies;

(3) the nature and sensitivity of the information that the applicant seeks to protect from disclosure;

(4) the status of the applicant in the Inquiry and the importance of the evidence that the applicant will provide;

(5) the terms of and grounds for any existing order for anonymity or other restriction granted by a court;

(6) the availability of alternative means of avoiding or reducing the risk;

(7) whether the interference is “necessary” in the public interest identified in paragraph A.3 above;

(8) the proportionality of the interference by disclosure in pursuit of the legitimate objective.

C.4 An expectation of confidentiality relied on by a police officer applicant will be a material consideration in an assessment of the issues arising in paragraphs C.2 and C.3 above. The weight, if any, to be attached to such an expectation requires examination as to whether it was an expectation of unqualified protection and, if so, whether such an expectation was reasonable in the circumstances.

D. In any circumstances

D.1 The Inquiry does not intend in any circumstances to publish personal information that is not relevant to the issues arising in the Inquiry, such as home or professional addresses, telephone numbers, family details, or medical history.

D.2 The means available to the Inquiry to protect from disclosure material that is restricted by a restriction order include:

(1) Withholding, redacting or gisting documents;

(2) Protecting a person from identification by:

(i) use of a cipher

(ii) taking evidence from a witness who is screened from view;

(iii) voice modulation;

(iv) prohibiting the publication of a name, address or personal details or a photograph or other pictorial representation of the witness, or any other information that may lead to the identification of the witness;

(v) receiving evidence from witnesses wholly or partly in private by the exclusion of the public or of individuals from the hearing.

D.3 The Inquiry will take the steps necessary to ensure that the interests of vulnerable witnesses are properly respected.