IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON THE PRINCIPLES APPLICABLE TO DISCLOSURE OF DECEASED CHILDREN'S IDENTITIES ON BEHALF OF BARBARA SHAW, GORDON PETERS AND RDCA

A. INTRODUCTION

1. These submissions are made on behalf of Barbara Shaw, Gordon Peters and RDCA[1] in response to the Chairman's directions dated 15 April 2016 and Counsel to the Inquiry (CTI)'s Note dated 17 May 2016.

2. The Chairman has sought submissions upon the following issues: (1) whether the State has a duty to disclose to the parents of a deceased child that the identity of that child was used for police purposes; and (2) if there is a public interest test to be applied, what does it comprise and how is it be measured?

3. After first summarising the position, our submissions are developed in the following structure:
   - B. The context in which these issues arise
   - C. The position of Ms Shaw, Mr Peters and RDCA
   - D. The legal principles applicable to the existence of a duty to disclose
   - E. The public interest test to be applied
   - F. Observations upon related practical matters.

Summary of our Submissions

4. We submit:

   (1) The circumstances do give rise to a free-standing duty to inform parents who wish to receive the information, whether their deceased children's identities were used in the construction of the legends of undercover police officers, without their knowledge or

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[1] Barbara Shaw was designated a Core Participant in the Chairman's Ruling of 21 October 2015: see paragraph 15(c). In the same Ruling, he decided that it was not possible for him to conclude whether Gordon Peters or RDCA had the necessary interest in the subject matter of the Inquiry until preliminary investigation had taken place: see paragraphs 15(a) and (b). In his Recognised Legal Representatives Ruling 6 given on 28 April 2016, the Chairman accepted that Mr Peters and RDCA should be represented in relation to the preliminary issues currently under consideration given their "*close and particular interest in this aspect of the Inquiry's subject matter*": see paragraph 6.

consent. This duty is an instance of the positive obligation on the State to provide an effective and accessible means of enabling an applicant to obtain relevant and appropriate information, which has been recognised as arising in a range of circumstances to which Article 8 of the European Convention on Human Rights ("ECHR") applies[2];

(2) We accept, as set out by CTI at paragraphs 3 – 10 of their Note, that: (a) save for where a restriction order is made, the work of the Inquiry is likely to put in the public domain the use of the identities of many deceased children; and (b) where an application for a restriction order is made, disclosure will be dealt with by the Inquiry through the restriction orders process[3];

(3) However, the existence of a free-standing obligation to provide information is of particular importance in the following situations: (a) where the Inquiry decides that it is unnecessary for its purposes for evidence about the identity of the particular child to be called[4]; and (b) where the child's identity was not used to create an undercover officer's legend (and so will not form part of the evidence of the Inquiry) and the parents seek reassurance to that effect[5];

(4) It is well established that the existence or otherwise of a positive obligation to provide information pursuant to Article 8, is assessed by reference to the fair balance to be struck between the general interests of the community and the competing interests of the individual/s concerned. Thus, this assessment entails an evaluation of the balance of public interest considerations in a manner not dissimilar to the

[2] In this respect we take issue with the conclusion expressed by CTI at paragraphs 22, 52 and 69 of their Note, that there is no such free-standing duty. For the avoidance of doubt: we do not place reliance on an equivalent common law duty, nor do we submit that the obligation we have identified stems from an Article 8 duty to investigate; it is found in an established line of authorities relating to the provision of information.

[3] We do not argue for a confidentiality circle entailing disclosure to a limited group of persons, given the objections to this course identified in the Chairman's earlier Ruling (as referred to at paragraph 13 of CTI's Note).

[4] This scenario is referred to in CTI's note at paragraphs 17, 21 and 51. It may be that it is relatively unlikely to occur for the reasons there given and we certainly welcome the indication given in paragraph 70 as to the Inquiry's likely intentions in terms of hearing evidence from families affected by the use of deceased children's identities. However, how this will work out in practice is not something we (or presumably, the Inquiry) can be sure of at this juncture.

[5] This scenario is discussed in CTI's note at paragraphs 63 – 68. See also our sub-paragraph (7) below.

determinations that the Chairman envisages making when deciding applications for restriction orders[6];

(5) Even if the Chairman does not accept that there is a free-standing duty to provide parents with information about the use of their dead children's identities, the considerations we identify below in relation to Article 8 and in relation to the effectiveness of the Inquiry, should in any event inform section 19(3)(b) assessments of where the balance of the public interest lies when relevant restriction order applications are determined;

(6) In light of the impact of Article 8 in this area, we submit that rather than no presumption as to the families' views operating in circumstances where a restriction order is sought in relation to a cover identity that was derived from a deceased child[7], the parents should be given the opportunity to indicate their wish to know the position before the application is determined[8]. We are mindful of the importance of avoiding any undue delay to the Inquiry's processes and suggest a procedure for doing so below;

(7) In addition and again in light of the impact of Article 8 in this area, we submit that families who have sought information in circumstances where their deceased child was not in fact used to create an undercover legend, should be provided with this reassurance as soon as is reasonably possible. We do not accept that the impact of NCND should be any greater in this context, than the Chairman has identified more generally in his Restrictions Orders Ruling;

(8) For the avoidance of doubt, even without the impact of Article 8 (and subject to the restriction orders regime, as acknowledged above), it is open to the Chairman to take a proactive approach in informing families of the position where their deceased child's identity has been used, or they fear this to have been the case. We would encourage

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[6] As summarised in Part 6 of the Chairman's Restrictions Orders; Legal Principles and Approach Ruling ("the Restriction Orders Ruling").

[7] As CTI propose at paragraph 60 of their Note.

[8] CTI accept that where a family have indicated a wish to be informed, it should properly be taken into account in the balancing exercise: see paragraph 61 of their Note.

this in order to ensure the effectiveness of the Inquiry and to remove doubt and associated distress.

B. THE CONTEXT IN WHICH THESE ISSUES ARISE

The Tactic

5. The practice of undercover officers in the SDS using the identity of deceased children to create their undercover legends has been publicly confirmed both by the Metropolitan Police Service and in the Operation Herne, "*Report 1 - Use of covert identities*": see paragraphs 2.8, 2.9 and 3.1 – 3.6. In the same report Operation Herne indicated that this tactic is no longer used by any police force: see the Conclusions, paragraphs 11.4 and 11.8.

6. As described in the Home Affairs Select Committee Report "*Undercover Policing: Interim Report*", 13 June 2013 this process did "*not just involve borrowing the individual's name, but their date and place of birth and parents' identities and creating a plausible back-story in which the legend grows up and goes to school in the area where the child would have lived"*: see paragraph 20[9].

The views of the Home Affairs Select Committee and the Government

7. In the same report, the Home Affairs Select Committee Report expressed their conclusions in the strongest terms:

> *"4. The practice of "resurrecting" dead children as cover identities for undercover police officers was not only ghoulish and disrespectful, it could potentially have placed bereaved families in real danger of retaliation.* ***The families who have been affected by this deserve an explanation and a full and unambiguous apology from the forces concerned.*** *We would also welcome a clear statement from the Home Secretary that this practice will never be followed in future.* (Paragraph 22)
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> *"5. For the sake of families whose dead infants' identities may have been used as legends, it is imperative that Operation Herne is expedited with all possible haste. It is shocking that the practice of using deceased infant's names was apparently a surprise to senior officers and it is vital that the investigation establish quickly how high up the chain of command this practice was sanctioned ... (Paragraph 26)*

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[9] To similar effect, see the description given by Rob Evans and Paul Lewis in their book "*Undercover: The True Story of Britain's Secret Police*" at page 114: "*They were not just assuming the names of deceased people – they were assuming their entire identities, so they made sure they familiarised themselves with the lives of the people they were pretending to be. That usually meant a visit to the house where the child was born and spent the first few years of their life, to get to know the surroundings*". They go on to describe how officers memorised the names of the child's parents and siblings, as well as other relatives and found ways to work small details into their false back-story. Undercover officer Pete Black (Peter Francis) gives the example of using the actual occupation of the deceased child's father to create a fake, violent persona in order to explain his estrangement from him.

"6. DAC Gallan told us that she first knew of the use of dead children's identities in September 2012, but the parents of that dead child have still not been informed. We cannot understand what is taking so long. ***Families need to hear the truth and they must receive an apology. Once families have been identified they should be notified immediately*** *… (Paragraph 27)*

"9. It cannot be sufficiently emphasised that using the identities of dead children was not only abhorrent, but reflects badly on the police. It must never occur again. (Paragraph 30)."
[Emphasis added]

8. In the Government's response to the Committee's interim Report[10], the Minister of State acknowledged:

> *"The particular distress these allegations will have caused to those individuals who have lost children"*.

9. The Home Secretary and Minister of State expressed themselves "*as astonished and disappointed as the Committee to learn of the allegations*" and provided an unequivocal assurance that the practice would never be followed in future, referencing the evidence to the Committee on 5 February 2013 of Deputy Assistant Commissioner Gallan in which she had made clear that the practice had ceased and could no longer be authorised, as "*the degree of intrusion into the lives of innocent and vulnerable families of deceased children could not be justified"*. At that stage in 2013, the Government anticipated that the Operation Herne investigations would conclude swiftly and emphasised that:

> *"One of the key tasks of the investigation is* ***to ascertain the truth of the recent allegations and, if they are made out, to inform sensitively the families of those deceased children.*** *It is equally important that the investigation be conducted thoroughly so that criminal or disciplinary proceedings can be brought against any individuals found to be culpable."* [Emphasis added]

Public interest considerations

10. These statements provide a clear and (we submit) appropriate recognition of the strong public interest in: (i) the need to undertake an effective and thorough investigation concerning the use of deceased children's identities by undercover officers; (ii) ensuring that the affected families "*hear the truth*"; (iii) ensuring that information regarding the use of their loved one's identities is communicated to concerned families in as sensitive a manner as the situation permits; and (iv) ensuring that affected families receive appropriate apologies.

[10] Letter from Rt Hon Damain Green MP, Minister of State for Policing and Criminal Justice, to Rt Hon Keith Vaz MP, Chair of the Home Affairs Select Committee, 18 June 2013.

11. These Parliamentary and Governmental statements are consonant with the Chairman's acknowledgements of a presumption of openness in the Inquiry so as to allay public concern[11]; the public interest in the identification of victims of wrongdoing[12]; and the specific public concern that he has identified in respect of the widespread and authorised use by undercover police officers of the identities of deceased children.[13]

12. A key part of the Inquiry's Terms of Reference is "to examine the motivation for and the scope of undercover police operations in practice **and their effect upon individuals in particular** and the public in general"[14] [emphasis added]. This, of course, includes the effect upon families where the identities of their deceased children were used in the way described.

13. As we have just noted, the Home Affairs Select Committee, the Home Secretary and Minister of State anticipated a proactive approach to informing families that their deceased child's identity had been used and there is considerable moral and practical force in the Inquiry taking this course[15] for the following reasons:
    i) The proper starting point for the Inquiry's consideration of its responsibilities in this area is the perspective of those families who are concerned that their deceased child's identity has been used;
    ii) Addressing those families' concerns and distress are a significant aspect of the Inquiry's broader responsibility to restore public confidence;
    iii) The Inquiry will likely be assisted by contributions from a broader range of affected families and will gain an improved perspective concerning the scale of the intrusion upon families, their vulnerability and the impact of the wrongdoing;
    iv) Opportunities for accountability, including through the provision of apologies, might otherwise be lost;
    v) Opportunities for those responsible for the malpractice to achieve organisational learning and embedded institutional change through the process of extending apologies to those affected by the malpractice, might be lost; and

[11] Paragraph 82 of the Restrictions Order Ruling
[12] Paragraph 68(2) of the Restrictions Order Ruling
[13] Paragraph 90(1) of the Restrictions Order Ruling
[14] Paragraph 1ii of the Inquiry's Terms of Reference
[15] That is to say, even without consideration of the effect of Article 8 ECHR and the process of the Inquiry's evidence putting material into the public domain, which we go on to discuss.

vi) Affected families who had not been informed would remain at risk of notification outside the remit and control of the Inquiry.

<u>Numbers involved</u>

14. Proactive engagement with affected families is unlikely to prove impracticable. Whilst we note the broad compass of the Inquiry highlighted by CTI in their paragraph 15, the reality is that the numbers involved are likely to be manageable, since in this as in many other aspects of the Inquiry, the focus will be on the activities of SDS and NPOIU undercover officers.

15. As to numbers, as the CTI note identifies, Operation Herne at the time of its first report in July 2013 estimated that 106 covert identities had been identified as having been used by the Special Demonstration Squad (SDS) in its 40-year history.[16] Of that number 42 (40%) were confirmed or were considered highly likely to have used the details of a deceased child.[17] 45 of the covert identities were identified to be totally fictitious.[18] It is known that the National Public Order Intelligence Unit (NPOIU) also used the tactic and the numbers in relation to this remain to be clarified.[19] In consequence of the phasing out of the practice from about 1993 Operation Herne considered it unlikely that the real identify of a child born at any time in the last forty years had been used[20]. In consequence of media reporting of DAC Gallan's evidence to the Home Affairs Select Committee (HASC) on 5 February 2013, Operation Herne received enquiries from fourteen families regarding seventeen children.[21]

C. THE POSITION OF MS SHAW, MR PETERS AND RDCA

16. Although we are mindful that the Inquiry seeks assistance as to the <u>principles</u> of general application and will not be reaching decisions regarding the position of individuals at this juncture, in this section of our submissions we provide brief details of the circumstances of those we represent in order to illustrate the applicability of the legal propositions we then go on to identify and discuss.

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[16] A figure that accords with the estimate provided by Mr Francis' counsel, Ben Emerson QC, in the course of oral argument on 23 March 2016 that there were between 100 and 120 working undercover for the Special Demonstration Squad over the period of its operational lifetime (Transcript 160323 p 90, l 12 – 17).

[17] CTI's Note, 17 May 2016

[18] Operation Herne, *Report 1 – Use of covert identities*, paragraph 6.4

[19] Ibid, paragraph 11.7

[20] Ibid, paragraph 5.7

[21] Ibid, page 2

Barbara Shaw

17. Ms Barbara Shaw is now 76 years of age and was bereaved of her fifth child, Rod when she was 32 years of age and Rod was only two days old. On 7 January 1973 Rod died at St George's Hospital in Tooting. The causes of death were pneumonia contributed to by prematurity and respiratory distress syndrome. In the immediate aftermath of her baby's death, Ms Shaw suffered depression and found herself engulfed by sadness. Rod was buried at Streatham Cemetery, Garratt Lane, Tooting. Ms Shaw was not well enough to attend the funeral. Two further children were born to Ms Shaw and Mr Richardson following Rod's death and accordingly, Rod had a total of six siblings. Rod's father, Brian Richardson passed away in 1983. Ms Shaw remarried but was widowed in 2010.

18. In January 2013 Ms Shaw was contacted by Paul Lewis of the *Guardian* newspaper and informed that the identity of her son was believed to have been taken, without her knowledge or consent, and used by a police officer in connection with his undercover role. Mr Lewis informed Ms Shaw that his researches had failed to identify any other "Rod Richardson" who shared her son's birthday. Ms Shaw learned that a "Rod Richardson" had first appeared as an apparent radical, anti-capitalist activist in 2000 based in Nottingham who disappeared 3 years later telling "friends" that he was moving to Australia. This "Rod Richardson" used the date of birth of Ms Shaw's son. Ms Shaw has since come to learn of further features of the officer's wider "legend" established by him following the assumption of her son's identity, including his social behaviour and his purported beliefs and opinions. Thus not only has her son's identity been taken, but it has been mixed or blurred with the creation of a false persona. In consequence of these events Ms Shaw has experienced profound emotional turmoil and anger.

19. At a press conference held on 16 July 2014, Mr Mick Creedon (who leads the Operation Herne investigation) confirmed that the Metropolitan Police Service had apologised for the use of the identity of Rod Richardson. Nonetheless, despite pursuing an official police complaint, Ms Shaw still awaits confirmation that her son's identity was used, an official explanation of the circumstances in which this occurred, an understanding of the extent to which the assumption of his identity without her consent was sanctioned by officers holding senior rank and redress including through the communication of a formal public apology. Ms Shaw would not want police officer(s) to be given responsibility for informing her as to whether or not her child's identity has been used for policing purposes, as such a visit in the area in which she lives would

likely be noticed by neighbours. Further, Ms Shaw's has lost trust in the police through her recent experience and would prefer to be informed by a professional, such as a social worker or counsellor, with relevant training.

Gordon Peters

20. Gordon Peters is now 71 years of age and was bereaved of his second child, Benjamin, when he was 35 years of age and Benjamin was just one week old. Benjamin's early death on 23 September 1979 followed a traumatic birth and an extremely anxious week in which Mr Peters willed his baby's survival notwithstanding the knowledge that survival would entail profound brain damage. Mr Peters and his wife were obliged to formally indicate their agreement to withdraw Benjamin's life support. Mr Peters explains that the grief has stayed with him and will always remain with him. Mr Peters and Benjamin's mother had three further children each of whom also suffered premature and traumatic births but survived. The traumatic bereavement experienced by Mr Peters and his wife contributed to the breakdown of their marriage in 1987. Thoughts of Benjamin and the loss of his potential are frequently experienced by Mr Peters and while the thoughts recede from time to time they resurface in all sorts of different ways.

21. Mr Peters first became aware of the use of deceased children's identities by undercover police officers in about 2011. He was and remains appalled by the practice; he considers it to be a moral distortion and is motivated to ensure an effective investigation and the learning of lessons. On 18 September 2014 Mr Peters wrote to the Metropolitan Police seeking to allay his concerns alternatively for the use of his son's identity to be confirmed. He has not as yet received a meaningful response.

RDCA

22. RDCA is now 66 years of age and was bereaved of her child when he was 15 months old. In April 1971 she was pushing his pushchair across a zebra crossing when a vehicle careered across the road causing his death. RDCA suffered the emotional turmoil of attending an inquest touching upon her baby's death and the finding that he had been unlawfully killed.

23. RDCA's husband subsequently suffered catastrophic injuries in the course of a road traffic accident. This precipitated a nervous breakdown, rendered him incapable of work and on two occasions he has attempted suicide in the hope of reunion with their deceased child. The

publicity in about 2013 surrounding the use of deceased children's identities caused RDCA to ruminate on the possibility that her son's identity had been used. She is appalled by the practice of using deceased children's identities. In July 2013 she wrote to the Commissioner of Police for the Metropolis seeking confirmation as to whether or not her son's identity has been used. RDCA was surprised to learn that the Metropolitan Police were unwilling to confirm the use of her son's identity alternatively to assuage her concerns. The continuing uncertainty makes RDCA feel "*quite sick*". RDCA would not want police officer(s) to be given responsibility for informing her as to whether or not her child's identity has been used for policing purposes, as such a visit in the rural area in which she and her husband live would likely be noticed by neighbours.

D. THE EXISTENCE OF A DUTY TO DISCLOSE

24. As foreshadowed in our earlier summary, we submit that there is a free-standing duty to inform parents who wish to receive the information, whether or not their deceased children's identities were used in the construction of the legends of undercover police officers (without their knowledge or consent). This duty is an instance of the positive obligation on the State to provide an effective and accessible means of enabling an applicant to obtain relevant and appropriate information, which has been recognised as existing in a range of circumstances to which Article 8 of the European Convention on Human Rights ("ECHR") applies.

25. We do not place reliance upon an equivalent free-standing common law obligation and thus do not address the detail of CTI's observations in this regard.[22] However, we do not accept (if the same is suggested) that the enactment of specific domestic legislation, namely the Data Protection Act 1988 and the Freedom of Information Act 2000 in any sense negates the existence of the Article 8 positive obligation that we go on to discuss. The Convention is a "living instrument" and there has been much case law relating to the development of positive obligations over the last two decades.

<u>Victim Status</u>

Relevant breadth of Article 8

26. The Chairman has acknowledged that the concept of private life is for the purposes of Article 8(1) ECHR a wide one "*capable of embracing, subject to reaching a minimum threshold of*

[22] A topic discussed by CTI in paragraphs 24 – 30 of their Note.

seriousness, among other things, personal relations, personal choices, and health and well-being".[23]

27. CTI acknowledges that the use by the State of the identity of a deceased child *"appears likely, subject to the particular facts of any given case, to engage the right to respect for private and family life of close relatives of that child"*.[24] We agree, but submit that Article 8 is inevitably engaged in these circumstances.

28. It is well established that Article 8 is applicable to the collection, storage and use of personal information by State authorities without consent. In *Z v Finland* (1997) 25 EHRR 371 at [95] the Court emphasised that the protection of personal data, including medical data, is of fundamental importance to a person's enjoyment of his right to respect for private and family life. In *Amman v Switzerland* (2000) 30 EHRR 843 at [68] – [70] the Court held that the term "private life" must not be interpreted restrictively and that the storage of data relating to the "private life" of an individual fell within the application of Article 8(1) notwithstanding the defendant's submissions that in that instance the stored information in question contained no sensitive information about the applicant's private life, the applicant had not been inconvenienced and the data had "*in all probability never been consulted by a third party"*. In *Bohlen v Germany* (2015) 53495/09 the Court confirmed that an individual's first name is part of his private (and family) life and found that even if the applicant's name was not uncommon, the facts surrounding its use were capable of identifying him and Article 8 was therefore engaged (although not breached on the particular facts of the case).

The tests for victim status

29. Pursuant to Article 34 ECHR, the person in question must show that they were "directly affected" by the measure complained of in order to have sufficient standing to lodge an application or else that they come within a recognised category of "indirect victims": see the recent discussion by the Grand Chamber in *Valentin Campeanu v Romania* (App No. 47848/08, unrep. 2014) [96]–[100][25]. In the present instance it is submitted that the affected families (families where the child's identity was used) are both direct and indirect victims within Article

[23] Restriction Orders Ruling, paragraph 180
[24] CTI's Note at paragraph 34
[25] Cited in CTI's Note at paragraph 34.

34; and that the concerned families (families who were not in fact victims of original infringements, but fear this to have been the case) are direct victims.

Direct victim status

30. In the situations we are concerned with potentially extensive personal details relating not only to the deceased child's identity, but his date and place of birth, the date and cause of his death, the names and occupations of his parents and other family members[26] have been stored, used and communicated without the subjects' knowledge or consent and in circumstances where it may reasonably be inferred that they would have been shocked and distressed to learn of the same. The scale of intrusion is heightened by the fact that it occurred in the context of one of the most difficult and personal events to bear, namely a bereaved family's grief over the untimely death of a child. Added to this, since the tactic has been exposed, families have suffered considerable anguish over the uncertainty of knowing whether or not their deceased child's identity was used in this way and, if so, why this was done.[27] Furthermore, as set out above at paragraph 7 above, the Home Affairs Select Committee has expressed concern that affected families could have been put unwittingly at risk of reprisals.[28]

31. That families are unable to know at this stage, whether their deceased child's identity was used by undercover officers, is no bar to their being accorded victim status. Direct victim status has been recognised in relation to those who allege that their rights have been violated but who are unable to demonstrate with certainty that their rights were *in fact* violated. In *Klass v Germany* (1979-80) 2 EHRR 214 the European Court of Human Rights (ECtHR) at [33] addressed the issue in the context of lawyers who alleged that their post and telephone calls had been covertly intercepted but who were not in a position to demonstrate that the interference had in fact occurred because of the secrecy involved. The Court observed:

> *"The question arises in the present proceedings whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court's view, the effectiveness (l'efJet utile) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set*

[26] See paragraph 6 above.
[27] As shown by the summaries set out at paragraphs 17 to 23 above, in relation to those we represent.
[28] Albeit we stress this was said in the context of the use of such identities by officers infiltrating organised crime and terrorist gangs: see paragraph 21 of the Committee's *Undercover Policing: Interim Report*.

> *up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.*
>
> *"The Court therefore accepts that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.*"

32. In *Elberte v Latvia* (2015) 61243/08 the applicant, whose consent was not sought prior to the removal of tissue from her dead husband's body, was recognised as a direct victim in respect of an Article 8 breach arising from the lack of clarity in the relevant domestic law regarding the operation of consent arrangements and in respect of Article 3 arising from the emotional suffering she endured in consequence.

Indirect victim status

33. The Court has recognised indirect victims of human rights infringement in a range of situations most frequently in respect of the close family members, such as parents, of a person whose death or disappearance is alleged to engage the responsibility of the State: see for example, *Van Colle v The United Kingdom (*2013) 56 EHRR 23 at [86].

34. In *R v Secretary of State for the Home Department, ex parte Holub* [2001] 1 WLR 1359 at [14], a case concerning access to education for a child - Luiza, brought by her parents, Tuckey LJ observed:

> *"The Secretary of State does not take the point that Luiza is the only victim of the unlawful Act alleged and is not a party to the proceedings: HRA section 7. This point was not fully argued but if we had had to decide it we think that the parents of a minor whose human rights have been breached do have the standing to complain under section 7."*

<u>The Applicability of Article 8</u>

35. In setting out our submissions on victim status in the preceding section of this document, we have explained why the Article 8 rights to respect for private life and family life apply both to the use of the identities of deceased children in the construction of undercover officers' legends and to families' concerns that have arisen from this.[29]

[29] See paragraph 30 above, in particular.

36. Our review of the relevant Strasbourg Article 8 case law below, shows a series of instances where a positive obligation on the State to inform the applicant was recognised in respect of material relating to private and/or family life, where access to the same was sought and its provision could allay the applicant's ongoing fears and/or enable them to seek effective redress.

A positive obligation to provide information inherent in the rights guaranteed by Article 8

37. Whilst Article 8 involves primarily a negative obligation to protect the individual against arbitrary interference by public authorities; Strasbourg has recognised time and again that there may be positive obligations upon States inherent in an effective respect for private and/or family life. In determining whether or not such a positive obligation in fact exists, in circumstances where Article 8 is applicable, the Court has regard to the fair balance to be struck between the general interest of the community and the competing interests of the individual/s concerned ("the positive obligation principle"). This principle is repeatedly identified and applied in the cases discussed in paragraph 43 below.

38. The duty to provide information arises from the existence of a sufficient connection between the information sought and the substantive right. Where the obligation arises, Strasbourg has repeatedly stated that it requires the provision of an effective and accessible procedure enabling the applicant/s to have access to all relevant and appropriate information.

39. We submit that these cases amount to a well formed set of principles that have not been doubted or departed from (whether or not the obligation has been found to arise in particular instances where the principles has been applied).[30] Further, that the Court has applied those principles in a substantial number and range of cases, such that there is a clear and consistent line of authority.

40. Further, the cases we go on to discuss cannot be distinguished from our clients' position (and that of similarly placed families) on the basis that they were concerned with an ongoing / potential negative interference with Article 8 rights, as opposed to a historical such violation; a distinction that CTI appear to suggest at paragraph 36 of their Note. As will be seen from that discussion, most of the instances where a positive duty has been recognised have

[30] CTI's Note suggests (at paragraphs 38 and 49 in particular), that there is a lack of clear and consistent principle in this area.

concerned a historical context and the obligation has been recognised to assuage or confirm current anxieties about past conduct that could or may have infringed Article 8. This is also the position in relation to the deceased children's families.

41. In advancing our submissions in this area we are, of course, mindful of paragraphs 194 – 199 of the Chairman's Restriction Orders Ruling. However, we note that those observations were made in the context of his consideration of the extent of a "positive *investigative* obligation" (emphasis added). Our submission is placed squarely in the context of the line of Strasbourg authority relating to a positive obligation to disclose information sought by an applicant in circumstances engaging Article 8. As such, we do not specifically seek to re-advance the point considered by the Chairman at paragraph 198 of that Ruling, namely whether there is by virtue of Article 8 "*an obligation on the Inquiry to locate all those whose private lives may have been touched by undercover policing*". In so far as we make reference to authorities that were examined in that Ruling, we do so in the context of the submissions we advance at this juncture and in order to respond to material points that CTI have discussed in their Note.

42. We also respectfully emphasise that as the assessment of whether there is a positive obligation to inform entails an evaluation of the "fair balance" between the relevant interests of the community and the individual/s involved, there is appropriate scope for public interest considerations to be taken into account at this juncture. As can be seen from the cases discussed below, this has included issues around medical confidentiality and national security. Thus, the potential existence of public interest considerations against disclosure in the present instance is not a basis upon which to distinguish this line of authority; rather the application of these principles allows for these to be taken into account.

<u>Cases supporting the existence of a positive duty to provide information</u>

43. A positive obligation to provide information under Article 8 has been recognised in the following Strasbourg cases (amongst others):

vii) *McGinley & Egan* v *United Kingdom* 1998 27 EHRR 1 concerned the withholding of documents regarding the applicants' exposure to radiation at Christmas Island in 1958. The Court noted that the applicants were left in doubt as to whether or not they had been exposed to radiation at levels engendering risk to their health and observed:

> *"The issue of access to information which could either have allayed the applicants' fear in this respect, or enabled them to assess the danger to which they had been*

> *exposed, was sufficiently closely linked to their private and family lives, within the meaning of Article 8 as to raise an issue under that provision."* [97]

The Court further noted that the complaint was not that the United Kingdom had "interfered" with the applicants' right to respect for their private or family lives rather the applicants complained of an *"alleged failure to allow the applicants access to information"*. The Court identified that a relevant positive obligation could arise as follows:

> "*Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life. In determining whether or not such a positive obligation exists, the Court will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual, or individuals, concerned."* [98]

The Court concluded that given the applicants' interest in obtaining access to the material in question and the apparent absence of a countervailing public interest in retaining it, a positive obligation under Article 8 arose [101]. It required *"an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information"* [101].[31]

viii) In *Gaskin v United Kingdom* (1989) 12 EHRR 36 the Court required the authorities to take steps to release the applicant's foster care records to him, which were held to be of special importance to his private life [36 – 37]. The positive obligation principle was referred to and applied [42]. The positive obligation within Article 8 was held to encompass the applicant's *"vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development*" [49]. Thus, the obligation to provide disclosure arose to enable the applicant to understand past events and potentially to facilitate a claim for negligence against the relevant local authority in relation to his early years [11] and [14]. Whilst the applicant was experiencing ongoing distress; the purpose of attaining the information was no more or less historical than the situations currently under consideration.

[31] The Court went on to find that there had been no violation of this obligation, given the Tribunal Rules applying to the Pensions Appeal Tribunal, provided a procedure that enabled the applicants to access such documents as did exist [99] and [102].

ix) *Roche v United Kingdom* (2006) 42 EHRR 30 concerned the applicant's potential exposure to mustard and nerve gas in the course of tests at Porton Down in the 1960s. The Court considered it unnecessary to resolve the dispute as to whether the applicant had in fact participated [155]. It concluded that Article 8 was applicable in relation to the information sought by the applicant:

> "*The Court considers that the issue of access to information, which could either have allayed the applicant's fears or enabled him to assess the danger to which he had been exposed, was sufficiently closely linked to his private life within the meaning of Art.8 as to raise an issue under that provision. It is not necessary to examine whether the case also gives rise to a separate issue under the family life aspect of this Article. It follows that Art.8 is applicable."* [155 – 156]

Relying upon *Gaskin* and upon *McGinley,* the Court re-stated the positive obligation principle [157] and concluded that a positive obligation to provide "*an effective and accessible procedure*" enabling the applicant to have access to "*all relevant and appropriate information*" applied [162] and had been violated [167] – [169]. The Court also made plain that neither *McGinley* nor *Gaskin* implied that a disclosure procedure linked to litigation could, as a matter of principle, fulfill the positive obligation of disclosure to an individual who has *"consistently pursued such disclosure independently of any litigation*" [165].

x) *Guerra and Others v Italy* (1998) 26 EHRR 357 concerned the failure of the State to inform local residents in Manfredonia of hazards posed by a private chemical factory located in sufficient proximity to their homes for them to be effected by its toxic emissions. The applicants complained, among other things, that their right to respect for family life under Article 8 had been infringed as a result of the authorities' failure to provide them with the information about the risks and how to proceed in the event of a major accident. The Court held unanimously that Article 8 of the Convention was applicable and had been infringed. Article 8 was found to be applicable by reason of the effect of the toxic emissions on the applicant's right to family life [57] and breached by reason of the national authorities' failure to take the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life [58]. This was not a case which concerned the State's interference with the applicants' private or family life but one which concerned the State's obligation to secure those rights. The specific failure that the Court found in this regard was its failure to share relevant information:

> *"In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the*

risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.

"The Court holds, therefore, that the respondent State did not fulfill its obligation to secure the applicant's right to respect for their private and family life, in breach of Article 8 of the Convention." [60]

xi) *Godelli v. Italy* (2012) 33783/09 concerned the confidentiality of information relating to a child's birth and the inability of a person abandoned by her mother to obtain non-identifying information about her birth family. The Court held that "*the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests.*" [52]. The Court further noted at [56]:

"Whilst it is true that the applicant, who is now sixty-nine years old, has been able to develop her personality even in the absence of certainty as to the identity of her birth mother, it must be acknowledged that an individual's interests in discovering his or her parentage does not disappear with age, quite the reverse. Moreover, the applicant has shown a genuine interest in ascertaining her mother's identity, since she has tried to obtain conclusive information on the subject. Such conduct implies mental and psychological suffering, even if this has not been medically attested (see Jaggi v Switzerland 2006 58657/00 at [40]).

The Court held that there had been a violation of Article 8 since the Italian legislation, in cases where the mother had opted not to disclose her identity, did not allow a child who had not been formally recognised at birth and was subsequently adopted, to request either non-identifying information about his or her origins or the disclosure of the birth mother's identity with the latter's consent, which did not strike a fair balance between the interests at stake. This was therefore another example of the positive obligation applying to the provision of information relating to the applicant's past, in order to ease or allay current anxiety.

xii) *Odievre v France* (2004) 38 EHRR 43 also concerned an applicant, now an adult, who had been adopted at birth and who wanted to find out about her personal history in circumstances where her birth mother had asked for the information to be kept confidential. In light of the French authorities' approach, the Court concluded that a violation had not occurred. However, the Court did re-state the positive obligation principle [40] and confirmed the existence of a positive obligation to adopt measures designed to secure respect for private life including in receiving information necessary to know and understand an applicant's childhood development [40] – [42].

xiii) *KH v Slovakia* (2009) 49 EHRR 34 concerned eight women who had sought access to and to take copies of their medical notes as they believed they had been sterilised without their consent in the course of earlier treatment at the relevant hospitals. They sought the information for the purposes of potential damages claims, rather than in relation to any ongoing/prospective negative violation of their rights. Article 8 was found to be applicable to the exercise of their right of effective access to information concerning their health and reproductive status [44]. The Court re-stated the principles identified above and summarised the previous case law relating to the existence of a positive obligation to inform [45 – 47]. The Court held that for the exercise of the right under Article 8 to be practical and effective *"such positive obligations should extend, in particular cases like the present one where personal data are concerned, to the making available to the data subject of copies of his or her data files"* [47]. By the time of the Court's judgment a legislative change in Slovakia had made explicit provision for the possibility of patients obtaining copies of their medical records but the Court observed "*that legislative change, although welcomed, cannot affect the position in the case under consideration"* [57].

xiv) *Szulc v Poland* (2013) 57 EHRR 5 concerned an applicant who was seeking access to documents held by the former communist secret services in the belief that she had wrongly been identified as a collaborator. The applicability of Article 8 was uncontroversial with the Court noting that *"the storing of information relating to an individual's private life in a secret register and the release of such information comes within the scope of Article 8"* [81]. The Court confirmed the existence of positive obligations to provide an "*effective and accessible procedure*" to facilitate the applicant's access to records that had been held about her by a totalitarian regime so that she might contest her classification [87] and the failure to do so had amounted to a violation [94]. At [84] – [86] the Court re-stated the relevant principles and summarised this line of cases.

44. In paragraph 41 of their Note, CTI recognise that *MacMahon's Application* [2012] NIQB 93 is an example of a positive obligation to provide information arising under Article 8 so as to avoid significantly exacerbating the applicant's feelings of distress and anguish. The case concerned, among other things, the failure of the Public Prosecution Service in Northern Ireland to consult with a deceased's close relative and inform her about its decision to discontinue prosecution of those arguably responsible for her former partner's death in contravention of its own

guidance documents.[32] Having identified the relevant principles at [3 – 9] and noted the ECtHR's insistence upon rights protected by the Convention being *effective* rights [19], Treacy J held at [23]:

> *"The right to respect for physical and psychological integrity is included in Article 8. In the case of victims, in my judgment, this requires the state to desist from conduct which would, as here, significantly exacerbate the applicant's understandable feelings of distress and anguish. In my view this is incompatible with the positive obligation inherent an effective respect for private and family life and accordingly I find that Article 8 has been breached*."

45. Assistance can also be drawn from the Court's consideration of the applicability of Article 8 to situations in which removal of human tissue has been undertaken without consent in circumstances which led to a violation of Article 3. *Elberte v Latvia* 61243/08 ECHR 2015 (which we also refer to at paragraph 32 above in relation to victim status) concerned the removal of tissue from the body of the applicant's deceased husband without her knowledge or consent and the emotional suffering she experienced in consequence. The applicant complained, among other things, that she was left in a state of uncertainty regarding the circumstances of the removal of tissue from her husband. She had learned of the fact of the tissue removal when, two years after her husband's death, a criminal investigation was launched in Latvia into allegations of wide-scale illegal removal of organs and tissues from cadavers but she did not learn the nature and amount of the tissue removed until some five years later when she received the Government's observations in response to her case before the Court. The Court found that there had been a violation of the negative duties protected by Article 8 in terms of the lack of clarity in the relevant domestic law regarding the operation of the consent requirement and the absence of legal safeguards against arbitrariness [111] – [117].

46. The starting point for the Court's analysis was that the applicant was not informed about the removal of her husband's tissue when it was carried out. The Court noted that the applicant had faced a *"long period of uncertainty, anguish and distress in not knowing what organs or tissues had been removed from her husband's body, and in what manner and for what purpose this had been done"* [139]. Her rights as the closest relative had not been respected and she was faced with conflicting views on the part of the domestic authorities as to the scope of the obligations enshrined in national law which contributed to her feelings of helplessness in the

[32] See *MacMahon's Application* [2012] NIQB 60

face of the breach of her personal rights relating to a very sensitive aspect of her private life [140 - 141].

47. On the particular facts of that case - including the special field of organ and tissue transplantation - the failure to inform the applicant contributed to a finding that her rights under Article 3 of the Convention had been breached. We do not at this stage contend that the circumstances of the families currently under consideration achieves the severity threshold to amount to an Article 3 violation[33] but the authority is instructive regarding the prominence and importance that Strasbourg attaches to the obtaining of consent and the provision of information to vulnerable, bereaved families.

<u>The Children's Rights Alliance case</u>

48. We respectfully disagree with CTI's analysis that the *R (Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34 case: (i) answers the question whether a free-standing duty of disclosure of the kind we have identified arises under Article 8 in the instant circumstances; (ii) answers it in the negative; and (iii) is "*far more closely analogous*" with the position in relation to the parents of a deceased child than the case law we have discussed in the preceding section of this document.[34]

49. The *Children's Rights Alliance* case was concerned with a separate and distinct duty; specifically, the State's obligation not to impede access to justice. The Court of Appeal concluded that there was no implicit duty upon the Secretary of State within that broader duty to actively seek out and inform individuals of their potential civil claims against the State and/or private contractors engaged by the State. At [31] – [32] Laws LJ summarised the applicant's proposition and his view of it:

> "*He would have the court accept that the case turns entirely on its own facts. But his submission entails a particular (and striking) view of the scope of the common law's insistence on access to justice. It means that at least in some circumstances a potential defendant to a civil suit must declare himself as such. If there is any force in such a proposition, we cannot in my judgment presume that it is uniquely applicable in this case.*
>
> "*…Apart from anything else, the imposition of such a duty on a private litigant would be repugnant to the common law's adversarial system of justice; and if it were expressed as a duty owed in private law, it would be alien to every other such duty:*

[33] Although it is conceivable that this could be the position in relation to a particular instance, if serious consequential psychological harm has been suffered.

[34] See in particular paragraph 36 of CTI's Note.

> *not vouched by agreement, nor by the neighbour principle, nor the avoidance of harm to person, property or reputation. It would be like a colour not known on the spectrum*."

50. Laws LJ (with whom the other members of the Court agreed), concluded that the imposition of such a duty would be *"discordant with the common law's adversarial system of justice"* [37]. He went on to acknowledge that *"there is a wide range of circumstances in which the state will be required both to seek and to provide information, and that such obligations may arise in the context of different Convention rights, notable articles 2, 3 and 8"* [54] but that the duties to inform identified in the European jurisprudence were each examples of failures to provide "*factual information*" [55].[35] As the children upon whom the force had been used in the secure training centres ("STC") had experienced the assaults they were already aware of them; there was *"no reason to suppose that a trainee seeking information about his or her time in a STC should be denied it"*; and the notification sought related not to any fact or event but to "*the legal quality of acts done to trainees*" [55], the Court declined to find the existence of the duty that had been contended.

51. Thus the *Children's Rights Alliance* case is distinct from the circumstances currently under consideration, which are much closer to the line of authorities we have discussed at paragraphs 43 – 47 above, in each of the following respects, namely: (i) the nature of the obligation relied upon; (ii) whether the provision of factual information or notification of legal entitlements was in issue; (iii) whether the obligation was asserted in the context of adversarial litigation; (iv) whether the information in question was otherwise available to those affected; and (v) whether provision of the information was sought by those who claimed an entitlement to receive it.

<u>A duty to investigate</u>

52. As we foreshadowed in our earlier summary of these submissions, we do not place reliance upon a duty *to investigate* arising from a past Article 8 violation. Thus *Craxi v Italy* (No 2) (2004) 38 EHRR 47, which is discussed in paragraphs 43 – 49 of CTI's Note, is not in point.

[35] Thus, far from throwing doubt on the Strasbourg case law we place reliance on, Laws LJ accepted such cases indicated that a requirement to provide factual information could arise pursuant to Article 8 [55]. His reference to "*in order to secure the effectiveness of a Convention right*", meant no more than the duty arose from the obligations inherent in Article 8; he was not there adumbrating a distinction between ongoing and historical violations, which none of the Strasbourg cases draw for these purposes.

53. The *Craxi* case did not concern an applicant attempting to rely on Article 8 to obtain information pertaining to private or family life. The applicant complained of a negative interference with his Article 8 rights, namely that the Italian authorities had permitted the release into the public domain of telephone interceptions of a private nature. The Court identified a positive obligation on the part of the national authorities to undertake an effective inquiry into the disclosure of private material that had taken place, in order (where appropriate) to punish those responsible and to explain how the release had occurred [74 – 75]. The partly dissenting opinion of Judge Zagrebelsky, emphasised by CTI, did not address the clear and consistent line of authority referenced above concerning positive obligations inherent in Article 8 to inform victims, but rather the investigative obligation contended for in the majority judgment. It would appear that the dissenting judge's concern was to avoid extending the procedural obligations to carry out an effective investigation under Articles 2 and 3 of the Convention to historical violations of Article 8 [O-122]. Those preoccupations are immaterial for present purposes. This Inquiry has been established to undertake an effective investigation of matters of the gravest public concern including the practice of adopting the identities of deceased children. This Inquiry's remit will inevitably entail consideration of historical and current breaches of Article 8. The quite separate issue under consideration here, we submit, is whether there is a duty to inform concerned individuals.

54. For that reason we do not consider that the minority opinion in *Craxi* has a material bearing upon the matters in issue and nor does the other feature highlighted by CTI, namely that the reasoning in *Craxi* has not been adopted wholeheartedly in subsequent Strasbourg cases.

<u>Application of Article 8 positive obligation to provide information to parents of deceased children</u>

55. In summary and drawing on the aspects we have discussed earlier (without repeating them), a free-standing positive obligation under Article 8 to disclose to parents whether and if so in what circumstances their deceased children's identities were used in the creation of undercover officers' legends arises from the following[36]:

    (i) The gross and shocking invasion of their own rights to respect for private and family life and the right to private life of their deceased child/the currently undetermined prospect that such violations occurred;

    (ii) That this occurred in a context of such profound personal sensitivity, namely the

[36] For the avoidance of doubt, we do not concede that each of these elements need be present in every instance for the duty to arise; we are identifying the set of circumstances that are likely to bear on this question.

death of a child;

(iii) That the same occurred without the knowledge or consent of the parents or the same being sought;

(iv) Their current anxiety and distress arising from the uncertainty as to whether their children's identity was used in this way and, if so, the lack of any explanation as to how and why this was done;

(v) Their attempts to and desire to obtain this information; and

(vi) The absence of other routes to obtaining this information. In so far as it may be said that the normal workings of this Inquiry will provide that route; as we have acknowledged in the earlier summary of our submissions, information relating to the use of particular deceased children's identities may enter the public domain via the process of evidence given at the Inquiry, but as we observe there, this is by no means certain in relation to each such concerned family, even in the absence of a restriction order being made: see paragraph 4(3). Furthermore, as we discuss at paragraph 65 below, if restriction order applications are considered before the wishes of such families are known, they may be precluded from any meaningful involvement in the Inquiry. The Strasbourg cases we have discussed require the provision of an "effective and accessible" procedure where the obligation to inform applies.

E. THE PUBLIC INTEREST TEST TO BE APPLIED

The public interest in relation to Article 8

56. We have already acknowledged (at paragraph 42 above) that the "fair balance" approach to assessing when positive obligations arise under Article 8 permits public interest considerations to be taken into account.

57. Whilst we accept that the "fair balance" consideration may include features that are said to militate against disclosure, we emphasise:

(i) The powerful features we have listed in paragraph 55 above as germane to the existence of the duty to disclose. Further, we submit that they should carry a particular weight, as they have been highlighted in the context of such duties arising in the Strasbourg cases we have discussed;

(ii) Whilst those features relate to the families' interests in receiving the information, there are also very strong wider public interest considerations that point in favour of disclosure, in terms of public accountability and the effectiveness of the Inquiry (and we return to these in the context of restriction orders at paragraph 59 - 62 below);

(iii) The proposed disclosure relates only to undercover officers' fake personas (as opposed to their real identities);

(iv) There can be no risk of jeopardising a sensitive police operational tactic, as its existence has already been publicly acknowledged, it is no longer in use and has not been used for some considerable time.[37] Moreover, in light of the unequivocal public statements set out above, there is no risk of pre-judgment – it is not contentious that the identities of deceased children were used without the authority of their next of kin and should not have been;

(v) NCND has not been consistently applied by the police in this area on any view. The tactic of using deceased children's identities to create officers' legends was revealed in the 2002 "*True Spies*" BBC documentary.[38] Mick Creedon confirmed at a press conference held on 16 July 2014 that the Metropolitan Police Service had apologised for using the identity of Rod Richardson[39]; and

(vi) Whilst we have not placed emphasis upon the risk of reprisals being carried out against families where the identity of their deceased child was used by undercover officers, as flagged by the Home Affairs Select Committee, given the context in which this was said to arise (paragraph 30, above), we do however observe that if and in so far as it is asserted that particular disclosures would put officers or former officers at a risk of physical harm, the equivalent risks could be faced by the unwitting families, who would be better able to address any such risk if they were made aware of matters that have so far been wholly kept from them.

<u>The Public Interest in relation to Restriction Orders</u>

58. As CTI say at paragraph 55 of their Note, where a restriction order is sought in relation to the disclosure of an officer's false identity derived from a deceased child, the public interest factors identified by the Chairman in his Restriction Orders Ruling will be applicable.

59. It is unnecessary to rehearse those factors in any detail, but we emphasise the importance to be attached to openness; assuaging public concern; enabling the Inquiry's terms of reference

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[37] See Bean J's rejection of any public interest in withholding disclosure of historical operational methods and/or illegitimate or arguably illegitimate operational methods in *DIL, TEB, RAB and others v Commissioner of Police for the Metropolis* [2014] EWHC 2184 (QB) at [42] and also paragraph 3.3 of the Operation Herne, *Report 1* which refers to a manual entry dated June 1995 as the first evidence of the cessation of the practice.

[38] See Operation Herne, *Report 1 – Use of covert identities* at paragraph 2.9.

[39] See paragraph 40 of the Chairman's Core Participants Ruling, 21 October 2015.

to be fulfilled; establishing wrongdoing; and achieving public accountability, as the Chairman has already recognised. We submit these features are all strongly reinforced by the particular context we have set out at Section B above pertaining to the use of deceased children's identities (see paragraphs 5 to 13).

60. As foreshadowed in our earlier summary of our submissions, we contend that all of the features we prayed in aid: (i) in support of a free-standing duty to inform arising under Article 8 and (ii) in relation to the determination of the public interest in respect of an Article 8 duty, are also relevant to an assessment of the public interest balance when determining applications for restriction orders relating to undercover identities taken from deceased children.

61. Furthermore, we are in specific agreement with the features identified by CTI at paragraph 62 of their Note as being of particular relevance to a consideration of such applications, namely: (i) that evidence as to the effect upon the families of the practice is unlikely to be available if the families are not informed and the Inquiry would be assisted by hearing such evidence; and (ii) families are likely to feel demeaned if their evidence is sought without confirming or refuting their suspicions.

62. For the avoidance of doubt, we also submit that consideration of a restriction order involving the use of a deceased child's identity does not entail any particular features that would militate in *favour* of the imposition of such an order.

63. We then turn to deal with two specific issues flagged by CTI's Note.

<u>Whether a presumption should be made as to families' views</u>

64. CTI rightly acknowledge at paragraph 61 of their Note, that where families have made contact with the Inquiry or the police, it can safely be presumed that they want to be informed whether their deceased child's identity was used by police[40] and that this wish should be taken into account by the Chairman in the balancing exercise.

[40] Indeed a number of families have indicated this in terms, including our three clients and those families who contacted Operation Herne (see paragraphs 15, 19, 21 & 23 above).

65. However: (i) given that this feature is rightly acknowledged to be a relevant one to be weighed in the balance when identifying where the public interest lies; (ii) given the context we have already described in Section B; (iii) given the importance Article 8 attaches to the opportunity to access information where the circumstances engage its protection (as discussed above); and (iv) given that if a restriction order is made the families who have not thus far made contact with police/the Inquiry, will lose all opportunity to access information relating to the misuse of this tactic in respect of their loved one; we submit that rather than the Inquiry proceeding to determine restriction order applications on the basis that no assumption can be made about whether the family would wish to be provided with the information[41], steps can and should be taken to give families a specific opportunity to indicate, if it be the case, that they want to know if their deceased child's identity was used.

66. We deal with the practicalities of achieving this within an expeditious timescale in the next section of this document.

Providing reassurance to families where their child's identity was not used

67. We have already explained the likely importance of providing this information by using the examples of our clients. We also pray in aid the context we have earlier described and the material we have identified in our submissions concerning Article 8.

68. For all these reasons we submit that it is incumbent upon the Inquiry to enable this process to occur as soon as is reasonably possible.

69. We do not accept that NCND considerations have any greater role to play in this area than in any other evidential context that the Inquiry is concerned with. For all the reasons identified by the Chairman in his Restriction Orders Ruling, NCND is, at best, a factor to be taken into account where supported by particular concerns, along with all the other important public interest aspects that are there acknowledged.

70. We submit that there is no warrant for giving any greater role to NCND considerations in this context, if and in so far as this is suggested in paragraphs 66 – 68 of CTI's Note. Indeed, the Article 8 considerations that we have discussed at some length above, strongly militate against this.

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[41] As proposed by CTI at paragraphs 58 – 60 of their Note.

71. Inevitably, unless every application for a restriction order is unsuccessful, there will be instances during the Inquiry when evidence is made public in relation to a particular event or series of events, but comparable evidence is not made public in relation to other events; the sheer fact that this might prompt a degree of speculation cannot possibly be a secure basis or even a relevant consideration for assessing the approach to openness to be taken in any particular instance. Furthermore, as regards the particular set of circumstances under consideration, it is entirely feasible that the Inquiry will work through the mass of evidence and events that it is to deal with in a sequential manner, such that it would be quite unremarkable if reassurance could be provided to a particular family/families, but not to others, by certain dates. Thus this differential would not lead to an "unavoidable inference" of the kind referred to in CTI's paragraph 66.

F. OBSERVATIONS UPON RELATED PRACTICAL MATTERS

Where a restriction order is sought

72. We agree that applications for restriction orders involving or potentially involving the use of deceased children's identities should include the information referred to in paragraph 70 b) of CTI's Note.

Ascertaining the views of families

73. As set out at paragraphs 64 – 65 above, we propose that rather than it being accepted that a family's views cannot be ascertained until disclosure is made, so that no assumption is made about the wishes of the family when a relevant restriction order application is determined[42], families are given the opportunity to indicate to the Inquiry if they want to know whether their deceased child's identity was used by police.

74. The sheer fact that such contact has not been made with the Inquiry / police thus far, does not in our submission lead to the inference that the family does not want to receive this information. Such indications have not thus far been invited by the Inquiry (as opposed to applications for Core Participant status, where prescribed criteria have to be met) and a family who has followed the issue, might well assume from the contents of the report of the Home Affairs Select Committee that we quoted earlier, that they would be contacted in any event.

[42] Paragraph 71c), CTI's Note

75. Such indications could be invited, for example, by advertisement / announcement, giving a relatively short period of time in which to respond. The text could refer to circumstances such as the likely period in question[43] in order to avoid speculative inquiries from those who could not conceivably be involved in the use of the tactic under consideration.

Means of notifying families

76. This issue is raised by CTI at paragraphs 11 – 12 of their Note, in relation to informing families in advance if evidence relating to the use of their deceased relative's identity is to enter the public domain. We agree that sensitive advanced notification is appropriate, for the reasons there given. Furthermore, it is important that a structured process is adopted so that families do not learn of such matters in a haphazard, accidental or uncontrolled way.

77. For reasons that will be apparent from our earlier submissions, we suggest that the practicalities of notifying families will also arise in relation to the discharge of any accepted free-standing duty to inform them and in the context of providing reassurance to those families who have expressed concern, but where their relative's identity was not in fact used.

78. We agree that in such circumstances steps must be taken to identify and contact any remaining relatives prior to the disclosure or publication of any information from which the personal details of that child might be ascertained. As a matter of principle, those families must be informed in advance and care taken to identify all surviving close relatives of the deceased child including step parents, birth and adoptive parents, and siblings.

79. We acknowledge that it is the police who are best equipped to undertake the identification and tracing of the surviving close relatives, subject to the oversight of the Inquiry but we do not agree that the responsibility for informing those relatives should necessarily be placed with police officers; given the centrality of the police role in the institutional wrongdoing, communication by this means may heighten distress and anxiety. Whilst the selection of an alternative is ultimately a matter for the Inquiry, if the force of this point is accepted; the police are not alone in being trained and experienced in the communication of distressing news. Such expertise is held by various non-police bodies including those in various roles in the NHS.

[43] For example, a statement that it is unlikely that the real identify of a child born at any time in the last forty years had been used - see paragraph 15 above

80. Whilst the police are the body in a position to proffer an apology for the unwarranted use of this tactic and the consequential invasion of privacy and shock and distress, the circumstances and means by which the necessary formal apology might appropriately be offered is a matter that requires careful and sensitive handling if it is to prove meaningful. Subject to the relevant family's preference in any given instance, it is likely that it should be extended by an officer of senior rank. Whether the apology should be extended in writing, in person or through a combination of both are matters upon which the views of individual families should be sought. It is routine in these circumstances for the precise form of words, content and method of delivery to be agreed in advance. A false step in the process will likely deprive the apology of meaning and an unannounced arrival of a police officer on the door step proffering an apology is highly likely to be a one such false step.

81. In any event we suggest that notification of families should be accompanied by reliable information concerning the background facts, the Inquiry and the public statements regarding the abandonment of the practice. For the reasons indicated at paragraph 15, the numbers of families involved are unlikely to be extensive.

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1 June 2016