<u>IN THE UNDERCOVER POLICING INQUIRY</u>

For hearing on 22 June 2016

PRINCIPLES RE DECEASED CHILDREN'S IDENTITIES
FURTHER METROPOLITAN POLICE SERVICE SUBMISSIONS
DATED 17 JUNE 2016

Introduction

1. These submissions are drafted further to "Counsel to the Inquiry's further note on the principles applicable to disclosure of deceased children's identities" dated 10 June 2016. In that note, Counsel to the Inquiry posed seven questions. The submissions that follow address each of the questions in turn.

2. In summary, there is little if any difference in substance between the position of the MPS, Counsel to the Inquiry, and the other Core Participants. The MPS recognises the very significant private and public interests in informing parents who may wish to know whether their deceased children's identity was used to create the legend of an undercover police officer. The MPS agrees that where relatives are informed that this should be done with the greatest sensitivity and consideration.

3. The length of these submissions is explained by the MPS's analysis of the legal route where there is some difference in emphasis between the participants, in particular as to the role of Art8. The MPS did not wish the legal position to be determined by default.

Question 1 – Is the Inquiry obliged to disclose a deceased child's identity without first considering whether to make a restriction order?

4. The MPS agrees with Counsel to the Inquiry that the restriction order process set out in section 19 of the Inquiries Act 2005 provides the mechanism for considering whether the cover name of an undercover police officer should be disclosed by the Inquiry.

Question 2 – Does the Human Rights Act 1998, read with Article 8, impose upon the Inquiry, where it knows the answer, and where it receives a request from a close family member, a duty to disclose to that close family member whether or not the identity of the deceased child to whom he or she is related was used by an undercover police officer?

5. The short point is that the Inquiry will determine any request by a close family member as part of fulfilling its terms of reference (which require the Inquiry to consider the issue of children's identities) and having regard to fairness (s17(3)) and the balance of interests relevant to restriction orders (s19). That will involve balancing competing interests, a balancing exercise whose outcome cannot be prejudged.

6. However, if the Inquiry was not already considering whether to make disclosure as part of fulfilling its terms of reference, Art8 and s6 Human Rights Act 1998 would not *require* it to consider disclosure as a matter of freestanding legal duty. The effect of the legal analysis contained in the NSCPs' submissions (agreed to by Counsel to the Inquiry) could be taken as meaning that the Inquiry had a duty arising under Art8 to consider disclosure by virtue of having documents in its possession. If correct, the Inquiry would have a similar duty to consider disclosure of documents in its possession for *other* individuals whose Art8 rights have been engaged by activities of UCOs, and who requested disclosure from the Inquiry. This would have the potential of considerably hampering the ability of the Inquiry to choose what issues should be considered from amongst the documents in its possession, and in what depth. The MPS submits that the Chairman is free to approach the Inquiry with all the freedom of manoeuvre contained in the Inquiries Act and Rules, and is not constrained by a *freestanding* duty arising under Art8.

7. With that introduction, and stressing that the MPS is concerned simply to ensure that the Inquiry acts on the correct legal footing, the following submissions are made.

Victim status

8. The MPS does not dispute that in the circumstances of what has happened the Relatives can be considered as victims for the purpose of s7 HRA 1998. They are therefore entitled to rely on Art8 in any legal proceedings including this Inquiry (s7(1)(b)).

9. The Relatives' submissions and Counsel to the Inquiry cite §31 of *Klass v Germany* (1978) 2 EHRR 214 as authority for the proposition that a person may have victim status even without knowing whether he or she has been affected by intrusive measures. For completeness, the Chairman should be aware that the issue of standing in relation to secret measures has been further addressed and explained recently by the Grand Chamber in *Zakharov v Russia* (Application no.47143/06), 4 December 2015 at §§170 to 171. That decision was applied domestically by the Investigatory Powers Tribunal in the recent decision in *Human Rights Watch & Ors v SoS for the Foreign & Commonwealth Office & Ors* [2016] UKIPTrib15_165-CH. For the avoidance of doubt, the MPS does not suggest that this narrowing of the test affects the standing of the relatives in this Inquiry[1].

10. The question still arises as to the manner in which the relatives might rely upon Art8 for the purposes of s7. The NSCPs submit (§4.1) that the circumstances give rise to a freestanding- duty to inform the parents who wish to receive the information, whether their deceased children's identities were used. It is assumed that the NSCPs are submitting that the Inquiry is under that duty; and

[1] The determination of victim status is of course separate from the question of whether Art8 might require the disclosure of information. In *Klass* itself, when considering the substance of the complaints, the Strasbourg Court did not in fact conclude that a failure to notify those subject to surveillance measures once the measures had ended was a breach of Article 8 if notification would undermine the efficacy of the measures (§58). This was despite the fact that they were entitled to be considered as "victims".

that failure to comply with that duty would result in the Inquiry acting in a way contrary to s6 HRA 1998.

Positive obligations

11. Article 8 ECHR imposes an obligation on signatory states to refrain from interfering with the private and family lives of individuals within their jurisdiction. This is a negative obligation. However, the Strasbourg Court has also recognised that positive obligations may arise in certain given situations. It is well-established that there is no general principle of positive obligations arising under the Convention from which individual instances of an obligation can be derived.[2] As the authorities considered demonstrate, the recognition of such obligations is intensely fact-specific.

12. The Strasbourg authorities relied upon by the NSCPs demonstrate that compliance with Art8 may in particular circumstances give rise to a positive obligation to take steps to protect the rights covered by that article. However it is important to be clear as to what those positive steps may be. Do they comprise:

    (a) a duty on a particular public body to actually disclose that information **irrespective** of other competing interests? Or
    (b) a duty on contracting ECHR states to put in place a **mechanism** for fairly determining access to information?

13. When evaluating compliance with positive (as with negative) obligations arising under Art8, the Strasbourg Court has held that regard must be had to the fair balance to be struck between competing interests of the individual and of the community as a whole; that states enjoy a margin of appreciation as to the means of compliance; and that what is central to compliance is ensuring a legal framework exists that allows different legitimate interests involved to be taken

[2] See *Plattform Arzte fur das Leben v Austria* (1991) 13 EHRR 204, at §31, cited by the Court of Appeal in *Regina (Children's Rights Alliance for England) v Secretary of State for Justice (Equality and Human Rights Commission intervening)* [2013] EWCA Civ 34; [2013] 1 WLR.

into account adequately and in accordance with the obligations deriving from the Convention: *A v Ireland* (2011) 53 EHRR 13, Grand Chamber, at §§247-9.

14. It can readily be seen that a positive duty framed as in (a) above would be inconsistent with the above.

15. The authorities do recognise that in some circumstances (although not in all – see *Klass*, *supra*, at §58) a duty framed as in (b) does arise. It is submitted that the questions answered in the Strasbourg authorities can be broken down as follows:

    (i) Does the state have a procedure or mechanism in place to process requests for information in a particular area, and thereafter to balance the competing interests of individuals and the state in relation to the disclosure sought (see *Gaskin, Roche, Odievre* and *Godelli, Szulc*)?
    (ii) If so, does the state have reasons for withholding/delaying access to the information sought (see *McGinley, Guerra*)?
    (iii) If so, are the reasons invoked by the state in favour of withholding the information[3] sufficiently compelling (see *KH*)?
    (iv) If not, does the state have an effective and accessible procedure for granting access to the information sought (see *McGinley*)?

16. Dealing with mechanisms of compliance, and noting the point about flexibility in the means of compliance, the UK could demonstrate compliance with any positive duty by pointing to the Data Protection Act 1998[4] or the Freedom of Information Act 2000 (or to some other applicable mechanism; in *McGinley* the Pension Appeal Tribunal appeal rules were sufficient to discharge the obligation). The NSCPs state at §25 that the existence of such domestic legislation does not *negate* the existence of a positive duty. That is correct, but such legislation may *satisfy* a positive duty. It follows that if, for whatever reason the issue of children's identities did not fall to be considered by the

[3] *KH* was concerned with making *photocopies* of information that the state had been prepared to disclose. There was a blanket ban against making copies.
[4] As it did in *MG v UK* (2003) 36 EHRR 3 (see §31).

Inquiry, the Inquiry would not fall under a freestanding legal duty arising from Art8 to evaluate requests for disclosure from material in its possession.

17. In some instances and on the particular facts the Strasbourg Court has held that insufficient reasons have been shown for withholding information. Whether, when considering the balancing exercise, the interests of a particular individual, whose Art8 rights are engaged, will tip the balance in favour of disclosure will depend upon the particular facts and all the other interests involved (which may include the Art8 rights of others).

<u>Advertising</u>

18. The MPS acknowledges Counsel to the Inquiry's concern (at §14) to ensure that there is a mechanism in place to enable close family members of deceased children to make known to the Inquiry that they would like to be informed whether their deceased child's identity was used by an undercover police officer.

19. The MPS notes that this concern does not follow from any obligation that arises under any investigative or positive obligation under Article 8, but is a practical step in accordance with the Chairman's duty to act fairly and to fulfil the Terms of Reference.

20. The MPS observes that several families have already made themselves known to the Inquiry as a result of the issue being publicised in the media. Following the first reporting about the issue on 3 February 2013, Operation Herne established two dedicated telephone numbers to receive telephone enquiries from concerned members of the public. Two additional suitably trained individuals were assigned to staff the telephones out of Operation Herne office hours. The existence of the hotline was publicised in the national media. The hotline was officially open on 9 and 10 February 2013. In total, 23 families have

contacted Operation Herne either via the hotline or by other means subsequently. [5]

21. The MPS visited each of the concerned families and sent a letter dated 18 December 2014 to all families, including Gordon Peters and Barbara Shaw. The letter referred to the Commissioner's apology for the tactic. Subsequently, and as is detailed further below, the MPS wrote to the families who contacted the MPS and provided them with the response to a Freedom of Information Act request on this subject.

22. There will undoubtedly be significant media interest in the issue ahead of and following the forthcoming principles hearing. This will provide another opportunity for families who wish to make themselves known to the Inquiry to do so.

23. Any form of advertising is a matter for the Inquiry, but one possibility is a notice on the Inquiry website directed at concerned family members that takes into account the practical observations expressed at §14 of Counsel to the Inquiry's further note.

Question 3 – When is the Inquiry likely to conclude that prima facie evidence that a deceased child's identity was used to build the legend of an undercover police officer is both relevant and necessary to the Inquiry's work?

24. The MPS agree with Counsel to the Inquiry that every use of a deceased child's identity of which the Inquiry receives evidence should in practice be considered relevant and necessary to the Inquiry's work. As set out above this arises from the Inquiry's fulfilment of its terms of reference rather than a freestanding obligation under Art8.

---

[5] Operation Herne Report 1 – Use of covert identities, p.2, noted *"fourteen (14) families regarding seventeen (17) children"* had approached Operation Herne at the time of publication (16 July 2013).

Question 4 – Can a generalised assumption safely be made, when considering whether to make a restriction order, as to whether close family members would wish to be informed that their deceased child's identity had been used to be build the legend of an undercover police officer?

25. The MPS agrees with Counsel to the Inquiry that no presumptions can be made as to whether an otherwise unaware close family member would want to know or not.

26. Counsel to the Inquiry noted that evidence would be required to support any inference that a close family member would want to be informed in every case. On this point, it may assist the Chairman to be aware of the approach of another inquiry to an analogous situation. The Redfern Inquiry into human tissue analysis in UK nuclear facilities published on 16 November 2010 noted:

"Had the families discovered, at the time or even years later, that their relatives' bodies had been treated in this fashion, many would have been shocked, distressed and justifiably outraged. Most families would not even have wondered whether their relative might have been the subject of such research. To this day, nearly all remain ignorant of the fact that the studies included analysis of their relative's organs. The Inquiry has in accordance with recommended practice, taken no steps to notify any relative and has merely responded to request for information."[6]

27. A footnote at the end of that passage noted the evidential basis for the decision not to seek out unaware relatives:

"Brazier M, Organ retention and return: problems of consent, *Journal of Medical Ethics*, 2003, 29: 30–3. *"A final question was raised about how to return organs which were taken a long time ago and which the family had no idea had been retained. The* [Retained Organs] *Commission advises that unless families*

[6] §§90-91, Vol. 1.

contact you, the best policy is to remain silent. Some hospitals and coroners have not done this and have proactively and independently contacted families. The result has been a lot of heartache."

Question 5 – Should any decision on a restriction order be provisional pending notification of close family members?

28. The MPS agree with Counsel to the Inquiry's response to this question.

Question 6 – Where the information does not have to be restricted, who should inform close family members that their deceased child's identity was used to build the legend of an undercover police officer?

29. The MPS recognise the valuable contribution made in the Relatives' submissions and by Counsel to the Inquiry on this point. The MPS agrees that families should be informed in a sensitive and unobtrusive manner. The suggestion of using the services of an independent counsellor is accepted by the MPS as one that may best manage the needs of families, as long as they have the relevant skills and understanding of the issues. Clearly, any personal apology must be made by the MPS, where it is the responsible force, and it may be that the offer of an apology by a senior officer of the MPS, at a time and place convenient to the relatives, can be extended by an independent counsellor.

30. A distinction can be drawn between request cases and those family members who have not approached the Inquiry, but who, subject to restriction order applications, may be forewarned of publication by the Inquiry. In the former case, the Inquiry will be able to liaise with individuals directly as to how they wish to be informed and a tailored, individual response may be possible. The MPS will continue to co-operate with the Inquiry to establish the best means of informing families who have not contacted the Inquiry.

31. The MPS would raise a discrete point as to which 'close family members' disclosure should be made. Plainly in request cases the Inquiry can assess whether those who contact it are eligible for disclosure.

32. As indicated in the MPS' submissions on this issue dated 27 May 2016, the MPS has begun a scoping exercise to identify those relatives who may be affected by this issue. Given the passage of time since the use of the tactic by the SDS noted by Operation Herne, the initial exercise has demonstrated practical difficulties in identifying any close family members beyond parents. As a result, in the case of families who have not contacted the Inquiry, it may only prove practically possible to identify and forewarn parents, rather than wider family members. The MPS will continue to co-operate with the Inquiry in relation to the ongoing scoping exercise and specifically in relation to this issue.

Question 7 – Where a close family member of a deceased child wishes to know whether or not that deceased child's identity was used by an undercover police officer, and the answer to that question is no, can the Inquiry simply inform them of that fact?

33. The MPS agrees with Counsel to the Inquiry for the reasons given that the Inquiry cannot simply inform families in these circumstances and that any decision on this matter should be reserved until the overall factual position is known. The MPS observes that wherever possible relatives' concerns should be allayed.

34. The MPS also agrees that there may be a workable solution to the issue, but this cannot be determined until the overall factual position is known. In that regard, and in relation to the practical suggestion made at §29 of Counsel to the Inquiry's further note, it has already been possible to offer comfort to some families of deceased children whose identities were not used by the release of information pursuant to a Freedom of Information Act request.

35. In particular, on 27 February 2013, Duncan Hames MP made a request for the ages of the deceased children whose identities were used by the MPS to create

covert identities. The request did not ask for the number of identities used at each age or any other information about the children such as the year they died. The SDS used the identities of children who had died at all ages except 2, 3 and 15.

36. On 22 December 2014, the age ranges were published by the MPS. At the same time the MPS wrote to the families who had made enquiries to Operation Herne and provided them with the age ranges. The publication of the age range confirmed to a constituent of Mr Hames MP that his deceased child's identity had not been used.

JONATHAN HALL QC

ADAM PAYTER

6KBW College Hill

London, EC4R 2RP

17 June 2016