IN THE UNDERCOVER POLICING INQUIRY

METROPOLITAN POLICE SERVICE SUBMISSIONS
DATED 23 FEBRUARY 2017
EXTENSION OF TIME/ SDS RESTRICTION ORDERS

Introduction

1. On 15 February 2017, the Chairman issued a note and directions in preparation for a hearing on 5 April 2017. In the note the Chairman identified two matters to be considered at the hearing:
   a. The application for an extension of the period in which the MPS is to provide restriction order applications on behalf of police officers formerly employed by the SDS[1] to 1 October 2017 as set out in the MPS's first letter dated 21 December 2016 ("the extension of time application") and
   b. The MPS invitation to the Inquiry which was made in the following terms in the MPS's second letter dated 21 December 2016: "*In all the circumstances, the Inquiry is respectfully invited to consider whether it may still be fair to all participants for the Inquiry to consider the documents it holds, and invite restriction [order] applications only for those cases it wishes to subject to more considered scrutiny*" ("the MPS invitation").

2. In addition, the Chairman observed that these matters had brought into focus the future timetable for the Inquiry, and has sought the views of the core participants both as to the Inquiry's approach to its work and the principal factors that will determine its rate of progress.

[1] It is relevant to note that this application does not concern the deadline applicable to NPOIU officers, or other officers whose deployments the Inquiry may consider to be relevant and necessary.

3. As is apparent from the 21 December letters, the MPS does not have a 'wish list' of topics the Inquiry should or should not investigate, or of the officers whose deployments or evidence should be subject to scrutiny. The MPS does not make submissions to the Inquiry regarding which officers it should take witness statements from, or which topics of evidence it should investigate, not least because it is fully conscious that the behaviour of some of its officers was a very significant factor in the setting up of the inquiry. The views of the NSCPs on what matters should be the subject of investigation within the time period and resources available to the Inquiry are more important than the views of the MPS.

4. The purpose of these submissions is not to reiterate the contents of the MPS's letters, but to summarise the MPS's position and address the points raised by the Chairman in his note and directions dated 5 April 2017. The concerns of the MPS are practical, and relate to how best to assist the Chairman to fulfil the Terms of Reference fairly and within a reasonable time.

5. The current position is that there are believed to have been 118 undercover officers engaged in the SDS, and a further up to 83 management and 'backroom' staff. To consider whether to apply for a restriction order and, if so advised, make the application, the MPS needs (in summary) to reconstruct the officer's full deployment through available documentation, identify and evaluate sources of risk, and obtain evidence of the impact of disclosure on the officer and his/her family. That application (which may involve consideration of third party interests) will then need to be considered and, if contested, determined by the Chairman. Only after all anonymity applications for SDS officers have been determined will witness statements be taken. Any witness statement will need to be considered for the purposes of any restriction order application over that statement itself (again with the possibility of third party interests coming into play). Depending on the relevance of what is in that statement, the officer may or may not be called by the Inquiry at the evidential hearings.

Extension of Time Application

6. The MPS requests that the deadline for providing Restriction Order applications ('RO applications') from every SDS officer is extended until 1st October 2017.

7. Points made in the 21 December letters are not repeated. To add to the information contained in those letters, the current position is that:
   a. Two risk assessors are now in post (the second commencing work on 16 January 2017 following Inquiry approval). A further two assessors have been identified but the recruitment process (conflict and security checking, notice periods and the like) have not concluded. There are no start dates yet fixed.
   b. The risk assessors will be supported by researchers. Four such researchers are due to start induction and training on 27 February 2017.
   c. From 27 February 2017 a police sergeant will be in place to coordinate and manage the work of the risk assessors.
   d. As at today's date, 14 risk assessments are in progress; and 1 has been completed.
   e. The risk assessors' priorities have largely been dictated by the Inquiry to date. In accordance with requests which have been made by the Inquiry in correspondence, the risk assessments for police Core Participants seeking anonymity are the first priority; the second priority has been to commence assessments for former SDS officers from 1968 onwards.

8. The original window for restriction order applications from 147 former SDS officers by 1 March 2017 was set in August 2016[2]. At this stage, a team of three Operation Motion officers was in place and operational to carry out risk assessments, the work on risk assessing had commenced over a

[2] In contrast to the total of 201 now identified as potentially in scope.

year before, and 19 SDS risk assessments had already been completed, and a further 23 persons had been debriefed for a risk assessment.

9. As is well understood, in September 2016 this model was changed and the MPS has been working to implement a system in which the Inquiry and NSCPs can have greater confidence. It is not a matter of exchanging like for like. New assessors with experience in assessing risk, but who do not have a welfare or any other preexisting relationship with former SDS officers needed to be identified. For reasons dealt with in the 21 December letter, this has not been a simple task. Each candidate has been the subject of consideration by the Inquiry in advance of taking up the post, and in the course of this a number of prospective candidates have been rejected or otherwise unable to take up the post.

10. To cater for the new assessors' (of necessity) lack of standing Special Branch experience, researchers in various areas of police business have also been identified to provide supporting data and information to them. Material necessary to understand each deployment has also had to be collated and provided to the assessors. The assessors themselves are seeking to directly meet each person to be assessed.

11. Against this background, the window put in place under the previous model could not possibly be met, as a result of the delays with risk assessments alone.

12. Other aspects of the process are also complex. For example:
    a. Medical evidence is necessary in some cases. Identifying suitably qualified experts in these areas with the capacity to take on this work has not been straightforward. The MPS has communicated these challenges to the Inquiry throughout, and the Inquiry has considered and approved the CVs of the experts now instructed.
    b. The assembly of information from police records to understand the full career of the person in respect of whom and application is being considered is time-consuming. As the Inquiry knows, the databases

to be searched contain many millions of documents which must be searched, sifted for relevance, read and summarised.

13. At paragraph 7 of the Directions, the Chairman has observed that the MPS submissions in March 2016 referred to the MPS having the expertise and experience to prepare restriction order applications and, as part of that process, assess risk. That is correct. The model being followed is the product of careful consideration and planning. It is a large, complex task drawing on expertise across many disciplines. The fact that it takes and will take a long time to complete a task of this magnitude with the appropriate caution and care[3] is not and should not be read as a lack of expertise, willingness or effort on the part of the MPS to meet deadlines set. The deadline of 1 March for all former SDS officers, nearly 200 persons employed over 5 decades, no matter what role they played or what is known about them, is impossible to meet. An ambitious target date of 1 October is therefore proposed. Because even that target remains ambitious, and will take up a significant proportion of the resources devoted to responding to the Inquiry more generally, MPS also makes the invitation, which is considered in detail below.

The MPS invitation

14. The MPS invitation has been described by the Chairman as a request for a *"change of approach"* by the Inquiry. Whether or not this does amount to a change of approach, the purpose of the invitation is practical: to ensure that time and resources continue to be put into making restriction order applications from those officers whose deployment or evidence the Inquiry is likely to wish to publish or investigate further at a hearing. The MPS has provided and will continue to provide all potentially relevant material to the Inquiry. This may enable the Inquiry to make selections in certain instances, it may not. If selection can be made in this way, it will

[3] This is not only because the MPS is dealing with questions of risk (in some cases very significant risk to individuals or the public interest) but has been invited to to adopt a restrained and measured approach to the making of restriction order applications (as set out in the Draft Restriction Order Protocol).

have the benefit of speeding up preparation for evidential hearings, savings in resources, and fairness to officers. The MPS invitation was for the Inquiry to consider this. Ultimately it is for the Chairman to determine if this approach is a sensible one.

15. If the Inquiry were able to identify an officer whose evidence it did not consider was relevant and necessary[4] to its Terms of Reference, it would not be necessary to go through the lengthy and complex restriction order process for that officer. Even a few instances of this would provide a significant saving and be of benefit to the officers concerned.

16. In fact, there are 20-30 officers who were deployed in the 1970s and 80s. In many cases, their cover names are not found on the documents, so their cover names[5] will only be available if they are asked and remember. Many of them are elderly. Further details can be provided to the Inquiry, and the matter can be further discussed, if the Chairman considers that a more flexible approach may be acceptable in principle. In some cases statements taken by Op Herne are already available. The Inquiry could make a provisional decision as to relevance and necessity, in light of all the evidence available to it including any information already provided by the other Core Participants, and require any restriction order applications accordingly.

17. To take a hypothetical example, X, Y and Z are former SDS officers. Each is retired from the MPS. No paper records of the deployments remain, having been weeded in accordance with then existing protocols several decades ago. No accounts before the Inquiry suggest wrongdoing on the parts of X, Y or Z. X has a fairly good memory of the deployment; Y has little or no memory of the deployment as a result of age; Z has a limited memory of the deployment and has mobility issues which will make

[4] See Ruling 14 July 2016, at para 35(7): The starting point for the Inquiry is that "relevant and necessary evidence" will be admitted and made public.

[5] In the early stages of the SDS it is understood that officers may have used multiple cover names, some for very brief periods of time.

attending an Inquiry hearing very difficult. It may be perfectly fair, and not detract from the Terms of Reference, for the Inquiry to decide that it will admit the evidence of X as relevant and necessary but not admit the evidence of Y and Z, which may or may not be relevant, on the basis that it is not necessary. If that decision is made consideration and preparation of full restriction order applications over the identities of Y and Z will not be required; and work which is at least burdensome and potentially distressing will be avoided. The relevance and necessity of the details of Y and Z's deployments can be kept under review.

18. The MPS recognises that there may be issues of practicality, and of principle, as to why the Inquiry considers that all SDS officers' identities should go through the full restriction order application process at this stage. The Chairman may well consider that in all the circumstances it is better to publish all the names of SDS officers that can fairly be published; to seek responses from the NSCPs and the general public (in the same way that the Inquiry has sought responses by its Notice published on 2 November 2016); and only at that stage make decisions on necessity and relevance. In that case, the MPS invitation need be taken no further. However the MPS submits that a more flexible approach is worthy of consideration.

Terms of Reference

19. At para 9 of his directions, the Chairman required the MPS to address the question whether, and if so, how, the Inquiry can fulfil its terms of reference in relation to the SDS without pursuing its present approach, 'which is to seek the evidence of every surviving officer so employed'.

20. The ToRs published on 16 July 2015 provide, the MPS submit, significant flexibility to the Chairman in deciding what to investigate, both at the preliminary evidence gathering stage, and at evidential hearings. The ToRs expressly make it clear that what they describe as the "Method" – which documents to examine and review, which oral and written evidence to receive, is as the Chairman shall judge appropriate. So long as the

ToRs are satisfied, the Chairman also has the statutory flexibility found in s17 Inquiries Act 2005.

21. The ToRs specify matters that must be considered as well as the generality of undercover policing in England and Wales by police forces in England and Wales since 1968. These matters which must be considered are the operations of the SDS and NPOIU, targeting of political and social justice campaigners, awareness of HM Government, and the disclosure of undercover operations in criminal proceedings. Because of the need to make recommendations for future policing, present undercover policing must also be investigated, with all the sensitivities involved. However, the ToRs must be construed reasonably, particularly in light of the original 3-year deadline for reporting. For example, as the Chairman has stated in Core Participant Ruling no.12 at para 11, there is no requirement for the Inquiry to examine the detail of every undercover police operation against every campaigning or protest group that has existed since 1968. That would not have been feasible in the original 3-year deadline. Some selection is inevitable and necessary.

22. Subject to those observations, the MPS makes no submissions on what officers or deployments or topics should be selected for investigation (nor does or will the MPS make any suggestion as to what ought not be scrutinised).

Practical issues affecting progress from this point

23. In response to the Chairman's request for observations, the MPS draws attention to the following (additional) practical matters which are relevant to the progress of the Inquiry, in no particular order:

    a. The process of redacting relevant and necessary documents (for example, relating to the deployment of N14/Jim Boyling) has proven to be time consuming and difficult. This is a specialist area of policing, and whether or not a particular piece of information regarding an undercover policing deployment will or will not risk damage to an

individual or to the public interest (including apparently inconsequential information) requires a great deal of thought and consultation, and may in due course require input from a variety of other police forces and agencies. Decisions on anonymity will not necessarily resolve the question of whether or not a restriction order should be granted over particular information relating to a deployment (as the experience of the N14 documents shows). Focussed decisions on what is necessary and relevant will enable restriction order decisions to be made in as timely a manner as possible.

b. Possible exclusion of relevant and necessary evidence under the Rehabilitation of Offenders Act 1974, an issue raised by the Inquiry legal team. If there are any other significant legal issues, it would be sensible to identify these as soon as possible so that the Chairman can consider them, if necessary in light of submissions from the Core Participants.

c. Absence of final Protocols. There is a draft Disclosure Protocol; a draft Restriction Protocol; and the Inquiry legal team made reference in May 2016 to (but has not published) a Witness Statement Protocol. The Inquiry is invited to publish and finalise all protocols. This enables process issues – that might delay or complicate the evidence gathering process, or the eventual hearing of evidence – to be teased out.

d. The evidence gathering process proceeding by stages. It is understood that in some instances NSCPs will not be asked for their evidence until disclosure (subject to any restriction orders) has been made of police documents and statements. The justification for this is understood, but it does have the effect of pushing back the time by which the Inquiry will have gathered all documents relating to a particular deployment or incident, and therefore the point at which decisions can be made about which matters should be the subject of oral hearings, and consideration be given to the practical and legal issues that are bound to arise in

connection with those hearings. It may at least in some cases be worth arranging for the simultaneous gathering of evidence.

e. List of issues. Although the Inquiry has expressly identified certain matters that it presently intends to investigate in its various rulings, rule 9 requests, and correspondence[6], and has implicitly done so by designating Core Participants, it may be sensible for the Inquiry to draw up a provisional list of issues.

f. The sensitivity of documents obtained by the Inquiry. The effect that this sensitivity has on transferring, storing and processing documents should not be underestimated. For example, any IT systems created for the purpose of the Inquiry have to be very secure and housed securely; documents need to be transferred in accordance with their protective markings; and existing MPS information systems can only be accessed by conflict-free MPS officers and staff with the appropriate level of clearance.

g. Risk assessment where an officer has been deployed in multiple force areas or in very sensitive deployments. As the MPS has indicated in correspondence, there is a difficulty in carrying out risk assessments where the relevant information is held across different forces or public bodies. It is not clear how complete coordination is to be achieved across all forces, and whether this is capable of being achieved via the NPCC as a central clearing house, or through individual liaison between forces. It may be helpful for all the forces or their representatives to discuss this as soon as possible with the Inquiry legal team to identify the most sensible way forward.

[6] For example, Mark Kennedy (CP Ruling 21 October 2015 at para 27); industrial blacklisting (CP Ruling 21 October 2015 at para 33); Fire Brigades Union and NUM (CP Ruling 21 October 2015 at para 35); deceased children's identities (Ruling 14 July 2016 at para 52); every SDS officer (Directions 15 February 2017 at para 9); every NPOIU officer (correspondence with forces).

h. IT. Irrespective of sensitivity issues, there is a need to ensure that at all stages going forward the MPS's technology capabilities are consistent with the Inquiry's requirements using the platform Relativity. The Inquiry wrote to the MPS yesterday (22 February 2017) and the MPS will respond shortly in correspondence, but believes that any current issues can be resolved to the satisfaction of the Inquiry.

i. Representation of officers. The MPS has been in detailed correspondence with the Inquiry as to whether or not current or former MPS officers can and should be given their own legal representation, by the MPS itself or by an external legal firm. It is right that any stage current or former MPS officers are entitled to say that they wish to seek their own representation, and the MPS agrees with the Inquiry that current or former officers should be able to make an informed decision on this. It may be that if the Inquiry identifies those officers who are likely to be subject to scrutiny by the Inquiry, or the topics which the Inquiry intends to identify as being relevant and necessary, more informed decisions can be taken. Whilst there are significant practical and funding issues concerning legal representation, the MPS agrees that those must be capable of resolution given the various sources of funding available (including the Inquiry's own sources) if officers do wish to have their own legal representation.

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AMY MANNION

23 FEBRUARY 2017