Inquiry legal team's Response to the consultation on Metropolitan Police Service Disclosure and Restriction Protocols

Introduction

1. The Inquiry legal team has been developing a disclosure protocol and a restriction protocol that relate respectively to the process for the disclosure of documents by the Metropolitan Police Service to the Inquiry and the process by which applications for restriction orders will normally be made. A series of drafts has evolved as a result of extensive liaison between members of the Inquiry's legal team and those acting both for the Metropolitan Police Service and those acting for the non-police, non-state core participants. All core participants were consulted on the drafts as they stood in January 2016. The latest drafts were circulated to all core participants and the media on 15 March 2017 for a final consultation. Submissions on the drafts have been received from the Metropolitan Police Service, the represented non-police, non-state core participants, Peter Francis and the National Police Chiefs' Council. This document contains the Inquiry legal team's observations on those responses.

The Metropolitan Police Service's Response

2. The Metropolitan Police Service raises three points. First, they suggest that the current provisions of the protocol that have been incorporated to protect privacy should not be fixed until after the Inquiry has completed its strategic review. Alternatively, they suggest that the protocol may need to change if matters become unworkable: see paragraphs 3-9 of the Metropolitan Police Service submissions. We have always been clear that the protocols will be changed if necessary in the light of experience. We will know what the practical consequences of the process detailed in the protocols are once they are tested in practice. If something in the protocol proves to be unworkable then it will be amended to make it workable or be replaced with a new workable procedure. We see no reason to await the outcome of the strategic review before testing the process in practice. We consider that the preferable course is to put the privacy procedure into practice and, if necessary, to refine it in the light of experience. In fact, the speed and efficacy of the procedure in practice is itself a factor which will be relevant to the strategic review.

3. The Metropolitan Police Service's second point concerns the process for dealing with information that is privileged to a third party. They refer to paragraph 8 of their Note dated 16 May 2016 on the issue of third party legal professional privilege. That Note was addressing an earlier proposal, namely that the Metropolitan Police Service should examine every document for information covered by the legal professional privilege of a third party, and withhold from disclosure to the Inquiry any information that is covered by third party legal professional privilege. The

current draft Disclosure Protocol provides for a different approach, namely that the Metropolitan Police Service provides the material to the Inquiry and the Inquiry legal team checks whether any of it is covered by third party legal professional privilege. We agree that the volume of material which the Inquiry has to process is considerable but that is a challenge which will have to be met. As with all aspects of the protocols their operation in practice will be considered and changes will be made if appropriate.

4. We agree with the Metropolitan Police Service's third point, which is that the word "person" should be substituted for the word "witness" at paragraph 26(iv) of the draft Restriction Protocol.

Non-police, non-state core participants' Response

Response to overarching concerns

5. The non-police, non-state core participants raise what they describe as two overarching concerns. They correctly recognise that their concerns extend beyond the scope of the draft protocols. The first such concern arises from the Inquiry's use of a test of relevance and necessity as set out in the draft protocols. As developed in the non-police, non-state core participants' submissions, this overarching concern has three aspects. First, they make clear that they would like a procedure by which they can express their views about what the Inquiry's broad priorities and the scope of its investigation should be (see paragraph 4(a)). This issue was raised at the hearing on 5 and 6 April 2017. No amendment to the draft protocols is being sought but we take this opportunity to re-state the Inquiry's intention to consult core participants on lists of issues in due course.

6. The second aspect of the non-police, non-state core participants' first overarching concern relates to their wish for material that is not relevant and necessary to the Inquiry's terms of reference to be disseminated to individuals to whom it relates (see paragraph 4(b)). This issue was also raised at the hearing on 5 and 6 April 2017 and, consequently, will be the subject of more developed submissions on behalf of the non-police, non-state core participants due on 31 May 2017. We therefore say nothing further about this issue at this stage.

7. The third aspect of the non-police, non-state core participants' first overarching concern is their wish to be involved in the process of identifying which Metropolitan Police Service documents are relevant and necessary (paragraph 4(c)). As we have stated at paragraph 5 above, it is the Inquiry's intention to consult core participants on lists of issues in due course, which will help with the identification of relevant and necessary documents. The Inquiry will also be approaching non-police, non-state core participants for witness statements in due course. Factual evidence in those witness statements might lead the Inquiry to seek further documents or to amend decisions on relevance and necessity.

8. The second overarching issue raised by the non-police, non-state core participants concerns privacy. They suggest that guidelines should be established setting out considerations that will guide the making of restriction orders. The purpose of the draft protocols is to set out the process by which privacy issues will be addressed. Insofar as specific comments are made in relation to the current wording, we respond below. However, the protocol is not directed at the substantive determination of any specific privacy issue. We envisage that guidance as to the substantive approach that will be taken by the Chairman will be generated by his decisions on individual applications for privacy restrictions. We do not consider that producing generalised guidance in advance, without any specific factual context, will be of particular assistance.

9. We turn now to evaluate the specific comments made in relation to the wording of the draft protocols. In a number of instances the non-police, non-state core participants' observations are ones which have been made and responded to previously. However, for ease of reference, we respond to them all below.

Response to specific comments on the Draft Disclosure Protocol

10. The non-police, non-state core participants' first specific comment on the Draft Disclosure Protocol concerns the extent to which the Metropolitan Police Service has consented to members of the Inquiry team being given access to the locations where potentially relevant documents are being stored. This arrangement is voluntary and the Metropolitan Police Service considers requests for access to their premises and documents in situ on a case by case basis. The Inquiry's recent request to inspect certain documents at the Counter Terrorism Policing - National Operations Command to which we referred at paragraph 28 of our supplementary note for the hearing on 5 April 2017 has met with a positive response and arrangements will be made to inspect certain documents there in situ. In view of the fact that the Metropolitan Police Service is co-operating and that the Inquiry has been able to secure the access which it wishes to have, the Inquiry legal team considers that the current arrangements are satisfactory.

11. The second specific comment concerns paragraph 17 of the Draft Disclosure Protocol and the circumstances in which the Inquiry will seek a signed disclosure statement and, if documents which have been requested cannot be produced, the circumstances in which the Inquiry will require the Metropolitan Police Service to establish who last had the documents. In relation to both of these issues, the drafts use the word "may" and the non-police, non-state core participants invite the Inquiry to use the word "will" instead. In relation to disclosure statements, the Inquiry will seek these when necessary but not as a default position. The minimum requirement when disclosing documents to the Inquiry under the protocol is a written explanation of the methodology which has been used (see paragraph 16 of the Draft Disclosure Protocol). A signed statement is a more onerous requirement which will only be

imposed where it is necessary to do so. We are content, for the avoidance of doubt, to use the word "will" in the first sentence because it is still clear from that sentence that a statement will only be sought when necessary. For consistency, we are also content to use the word "will" in the final sentence of paragraph 17. However, in this sentence that will also require the addition of words to explain that the Inquiry will only put the Metropolitan Police Service to the time, trouble and expense of investigating who last had a document which cannot be produced where it is necessary to do so. We bear in mind that in some instances the circumstances will be such that it is unnecessary (for example, where it is clear why the documents are no longer available and the circumstances are not suspicious).

12. The non-police, non-state core participants seek the imposition of a more demanding timetable for the procedure at paragraphs 19 and 20 of the Draft Disclosure Protocol under which the Metropolitan Police Service must seek an extension of time if it cannot meet a deadline set by the Inquiry. Although the non-police, non-state core participants are right to identify that there have been delays in complying with the Inquiry's rule 9 requests for disclosure of documents the causes of those delays will not, in our view, be addressed by the amendments proposed. The Inquiry is now closely monitoring the Metropolitan Police Service's compliance with rule 9 requests for documents through a system of fortnightly written updates, an approach which is a more active method of managing compliance.

13. A number of comments relating to paragraph 21 of the Draft Disclosure Protocol have been raised. The non-police, non-state core participants seek the imposition of a requirement on the Metropolitan Police Service to notify the Inquiry without delay of its intention to use any of the exceptions to the usual requirement to disclose documents in un-redacted format. We do not consider that this is necessary since this aspect of the system has been functioning satisfactorily to date: i.e. problems have not arisen because of delays invoking the exceptions.

14. There is a specific request to clarify paragraph 21(c) - disclosure prevented by an enactment - but we consider this to be an appropriate form of words and do not consider that there is a need to try and specify exhaustively at this stage which statutes might be relied upon[1]. There is also a request to specify the procedure which will be followed if the Metropolitan Police Service invokes the exception provided under paragraph 21(d) – other objection. We do not consider that it is necessary to do this. The sub-paragraph is clear that in the event of an impasse the Chairman can issue a section 21 notice requiring production of the information in question. If the Metropolitan Police Service then wished to maintain its objection it would have to apply pursuant to section 21(4) of the Inquiries Act 2005 to set the notice aside. If and when such an application is made, the Chairman can decide the appropriate procedure by which the application should be determined.

[1] See *Public Inquiries*, Beer QC, Oxford, at page 183, footnote 22 for examples of statutes which are potentially capable of rendering a person unable to comply with a request to disclose information.

15. The Inquiry legal team notes with gratitude the offer to assist tracing any members of groups already represented by non-police, non-state core participant recognised legal representatives should that be necessary for the purposes related to legal professional privilege described at paragraph 29 of the Draft Disclosure Protocol.

16. The proposals which the non-police, non-state core participants make at paragraph 13 of their response, about paragraphs 31-33 of the Draft Disclosure Protocol relate to relevance and necessity and are closely related to the overarching concern ventilated at paragraph 4 of their response. We have addressed this concern at paragraphs 5-7 above.

Response to specific comments on the Draft Restrictions Protocol

17. At paragraphs 15-16 of their response, the non-police, non-state core participants make two observations about the use of generic grounds, evidence and submissions to make the process of applications for restriction orders more efficient. The first observation relates to the use of broad categories in the open grounds and sub-categories in the closed grounds. The Inquiry will ensure that open and closed material is separated so that material is only withheld where there is a proper justification for doing so. However, it is inevitable that in some cases there will be limits to how much information can be made public. The second observation concerns timings. It is taking some time for the Metropolitan Police Service to produce satisfactory generic documents for use in the restrictions order process. This is in part because the Metropolitan Police Service, National Police Chiefs' Council and the National Crime Agency are working on a joint set of generic documents, which will be more useful and efficient in the long term. The Inquiry legal team is following their progress, setting step-by-step deadlines, and has provided practical guidance as to the format which will best facilitate the process. However, the Inquiry will not delay the restrictions orders applications process in order to wait for these documents to be finalised. Until they are available applications for restriction orders must be made on a bespoke basis.

18. At paragraph 17 of their response, the non-police, non-state core participants advocate adding an additional sub paragraph to paragraph 21 of the Draft Restrictions Protocol which would have the effect of automatically ignoring any restriction order application made in relation to information which is already in the public domain to whatever extent. We do not agree this proposal because, although previous publication of a piece of information is a highly relevant factor, and one which will usually weigh heavily against the making of a restriction order, it is not right that prior publication must automatically be determinative of an application for a restriction order in every case.

19. Paragraph 18 of the non-police, non-state core participants' response asserts that the threshold test for the engagement of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is mis-stated. They

argue that all information about an identifiable individual that has been systematically collected and stored by the state engages that individual's Article 8 rights. We do not accept that the threshold test for an interference with Article 8 rights in the context of publication generally is mis-stated. However, we agree that all information about an identifiable individual that has been systematically collected and stored by the state does engage that person's Article 8 rights. Consequently, we propose to supplement paragraph 26 of the Draft Restriction Protocol to make that clear. We also proceed on the basis that any publication by the Inquiry of such information so stored by a police force will be an interference which must be justified. At paragraph 19 of their response, the non-police, non-state core participants suggest that the procedure at paragraph 27 of the Draft Restrictions Protocol should be modified so that the last three digits of post codes and the last four digits of telephone numbers should be left un-redacted. We can see no adequate justification for this approach since what is being referred to at this point in the Draft restriction Protocol are irrelevant and unnecessary addresses and telephone numbers.

20. At paragraph 20 of their response the non-police, non-state core participants seek an explanation as to why it would be necessary to show documents which engage their Article 8 rights to a state core participant or witness prior to those documents being shown to the individual concerned (as is contemplated in paragraph 30 of the Draft Restrictions Protocol). The Inquiry legal team is mindful of the fact that the recognised legal representatives of the non-police, non-state core participant have argued that their clients should not be required to provide a witness statement until they have been provided with documents and a witness statement has been taken from any undercover police officer whose conduct has affected them. Although the Inquiry has made clear in response that it will approach the order in which it seeks evidence on a case by case basis there will be some cases in which the officer is approached for a witness statement first. In such a case the officer will need to be shown the documents which are necessary for him or her to make a witness statement: for example, the documents which he or she made, saw, or might have seen whilst serving as an undercover police officer and in relation to which the Inquiry wishes to obtain the officer's evidence[2]. Documents may also be provided to an officer by the Metropolitan Police Service for the purposes of facilitating an application for anonymity or by the Inquiry for the purposes of assisting with the determination of such an application.

21. At paragraph 21 of their submissions the non-police, non-state core participants invite a dialogue about the joint disclosure of private information to multiple non-state persons in order to afford them an opportunity to consider whether they wish to make an application for a restriction order (see paragraph 31 of the Draft

[2] Alternatively, the Metropolitan Police Service is likely to need to provide documents to Metropolitan Police Service witnesses in order for them to be able to respond to the Inquiry's request for a witness statement.

Restrictions Protocol). The Inquiry legal team will be happy to discuss this issue further when it arises in practice. At this stage, it might assist to provide two examples. The Inquiry would expect an intelligence report which simply lists the names of persons who attended a meeting to be disclosed to the affected non-police, non-state core participants in the list without disguising from each of them the names of the others who were recorded as having been at the same meeting. The Inquiry would not expect to disclose an intelligence report which contained sensitive personal information about one person to another person if it was not clear that the other person already knew that piece of information.

22. The Inquiry legal team has reviewed paragraph 26(iii) and (iv) of the Draft Restrictions Protocol and concluded that the words “readily contactable” should be replaced with a proportionality test based on all circumstances (which will, of course, include how readily contactable a person is). We again note with gratitude the offer of assistance with tracing members of groups whose members are already represented at the Inquiry. The availability of that assistance will be taken into account when assessing the proportionality of contacting a person in relation to privacy issues.

23. The non-police, non-state core participants wish to be notified when the Inquiry imposes restrictions of its own motion with sufficient information to be able to decide whether to challenge that restriction (paragraph 35 of their response). When documents are circulated to core participants, the fact of a restriction order and the generic ground for the restriction will be circulated with the documents whether the restrictions have been imposed by the Inquiry of its own motion or as the result of an application by a third party. Only in exceptional circumstances might it be necessary to withhold the fact of a restriction order: for example, where to publish the fact that something has been restricted would itself undermine the purpose of the restriction order in question.

24. The Inquiry legal team would be content to amend the default deadline for the non-police, non-state core participants to apply to vary a restriction order (as sought at paragraph 24 of their response). It is emphasised that these deadlines and the default deadlines imposed on the Metropolitan Police Service referred to by the non-police, non-state core participants in paragraph 24 of their response are just that: default positions. The Inquiry anticipates that it will have to alter these default timings from time to time according to the volume of work and the urgency of the prevailing circumstances. The Inquiry will, as always, be guided by what is fair and reasonable in all of the circumstances.

Peter Francis

25. Three issues are raised on behalf of Peter Francis. First, in relation to the Draft Disclosure Protocol, Mr Francis seeks an amendment of the standard which must be met in relation to the preservation of documents. At paragraph 7 of the draft

Disclosure Protocol the Metropolitan Police Service has agreed to take all reasonably practicable steps to preserve information which may be of relevance to the Inquiry. Mr Francis argues that the standard should be absolute and that the Metropolitan Police Service must preserve all information which may be of relevance to the Inquiry. There are a number of reasons why the Inquiry legal team considers that the current wording is apt. The starting point is the statutory framework. Section 35 of the Inquiries Act 2005 creates specific criminal offences which relate to the preservation of evidence. Section 35(2) states that:

> "*A person is guilty of an offence if during the course of an inquiry he does anything that is intended to have the effect of (a) distorting or otherwise altering any evidence, document or other thing that is given, produced or provided to the inquiry panel, or (b) preventing any evidence, document or other thing from being given, produced or provided to the inquiry panel."* (emphasis added).

26. Section 35(3) provides that:

> *"A person is guilty of an offence if during the course of an inquiry (a) he intentionally suppresses or conceals a document that is, and that he knows or believes to be, a relevant document, or (b) he intentionally alters or destroys any such document. For the purposes of this subsection a document is a "relevant document" if it is likely that the inquiry panel would (if aware of its existence) wish to be provided with it."* (emphasis added).

27. The first point is that the above offences are not affected by the Draft Disclosure Protocol and anyone who commits such an offence is liable to prosecution.

28. The second point is that the Draft Disclosure Protocol goes further than the statutory protections and provides a mechanism to guard against not just deliberate but also the inadvertent destruction of potentially relevant documents. The offences above are confined to cases of knowing or intentional destruction of, or interference with relevant evidence. The requirement to take all reasonably practicable steps to preserve potentially relevant information is not so confined.

29. The third point is the requirement to preserve potentially relevant material, so far as is reasonably practicable, is a high one. Practicable means possible and a possible protective step will be reasonable so long as it is proportionate. An absolute standard would require disproportionate steps to be taken.

30. The fourth point is that it is impossible at this point in the Inquiry for anyone to identify precisely the scope of what is potentially relevant material. There is a great deal of material which is obviously related to undercover policing and is therefore potentially relevant. There can be no suggestion that it would not be reasonably practicable to identify and preserve such material. It must therefore be preserved under the standard at paragraph 7 of the current Draft Disclosure Protocol. That

much is straightforward. However, there may be material the relevance of which only becomes apparent as the Inquiry proceeds (for example evidence going to a specific factual issue which has yet to emerge). It would be impossible for the Metropolitan Police Service to identify such material at this stage and it can only be expected to preserve material which might at this stage foreseeably be of relevance to the Inquiry. There is a great deal of material which is not on its face connected to undercover policing but which is of actual or potential relevance to the Inquiry. For example intelligence reports based on the product of undercover policing but which have been deliberately sanitised to disguise the source. The Metropolitan Police Service must actively take all reasonably practicable steps to identify and preserve material such as this which is in fact connected to the work of the Inquiry even where that is not immediately apparent. A practical example is the suspension of routine destruction of intelligence reports by the Metropolitan Police Service's Intelligence Management and Operations Support team.

31. The fifth point is that the Metropolitan Police Service is the subject of legal requirements not to keep information longer than is necessary. The applicable obligations are those provided by the Data Protection Act 1998, and the Human Rights Act 1998 read with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Where information is obviously of potential relevance to the Inquiry, the position is clear: that information must be preserved and the above statutes do not prevent preservation because preservation is obviously necessary. Where a repository of information might contain potentially relevant information but that information is not on its face identifiable as potentially relevant to the Inquiry, the position is more complicated. The Inquiry is content with the approach which is being taken which is for the Metropolitan Police Service to preserve such repositories of document until the Inquiry can identify the information within them which it needs. Where categories of documents appear to be wholly unconnected to undercover policing and the potential for a document within the category to be relevant is entirely speculative the Inquiry does not consider that the preservation of such categories of documents could be justified and the competing legal requirements of timely destruction take precedence. The imposition of an absolute standard of preservation would require such categories of documents to be preserved just in case. We do not consider that a requirement for the suspension of the destruction of all police records for the life of the Inquiry would be lawful.

32. The second point raised on behalf of Mr Francis concerns the wording of paragraph 34 of the Draft Disclosure Protocol. He suggests that the word "should" be replaced with "must". We accept this suggestion because that is the sense in which the word "should" is being used. On reviewing this paragraph, we also consider that it is possible to be more precise about which documents it relates to: the original versions of documents etc. which have been copied to the Inquiry. The obligation to preserve potentially relevant documents before they are provided to the Inquiry is dealt with earlier in the Draft Disclosure Protocol at paragraph 7.

33. Mr Francis' third point concerns paragraph 37 of the Draft Restriction Protocol, which concerns the timing and extent of disclosure of documents once they have been through the restrictions order applications process. He submits that all core participants should see all documents in confidence at an early stage. We do not agree that this will necessarily be the case and the protocol is deliberately worded to permit the Inquiry flexibility in this regard. There are a very large number of core participants and the Inquiry has very wide ranging terms of reference. For example, it is not obvious that a core participant who was, or may have been, affected by an undercover police officer from the National Public Order Intelligence Unit in the 21st century needs advance sight of documents relating to the undercover deployments of documents relating to, say, Special Operations Squad officers in the late 1960s or early 1970s. The Inquiry's current working assumption is that core participants will be shown in confidence the documents necessary for them to produce a witness statement when the Inquiry approaches them for a witness statement. They will then be provided with the documents relevant and necessary to the section of Module One which is relevant to them in time to prepare for the hearing, a process which will then be repeated in Module Two.

National Police Chiefs' Council

34. Three broad submissions are made on behalf of the National Police Chiefs' Council. The first concerns when restriction order applications are made. The default position is that the applications for restriction orders should be made once the Inquiry has indicated that information is relevant and necessary. This is usually going to be the most efficient approach. If, however, it is obvious that information is going to be relevant and necessary there is the option, if it will not cause delay, to submit the information together with any applications for restriction orders. For example the Inquiry may be able to indicate, when requesting information, that it will definitely be relevant and necessary; it will therefore accelerate the process by requesting that any applications for restriction orders are provided to the Inquiry at the same time as the information. We do not consider that paragraph 14 of the current Draft Restrictions Protocol requires any amendment.

35. The National Police Chiefs' Council's second submission concerns legal professional privilege. It amounts to an indication that the National Police Chiefs' Council considers that, when the protocol is applied to them, the option to provide information which is legally professionally privileged to the chief constables of regional police forces, on the understanding that the privilege is not thereby waived, as described under paragraph 27 of the Draft Disclosure Protocol, is likely to be a useful facility. We agree and are grateful for the indication.

36. The third broad submission made by the National Police Chiefs' Council concerns third party interests. Concern is expressed that the 14 day minimum period between the determination of an application for a restriction order and publication of material

which the Chairman has ruled against the applicant, in favour of publication, may be insufficient see (paragraphs 21(iv) and 51 of the Draft Restrictions Protocol). The period of 14 days has been adopted to reflect section 38 of the Inquiries Act 2005: it corresponds to the truncated time limit for making of a claim for judicial review provided for by section 38. So far as applications made by state bodies are concerned, the scheme of the protocol is to enable all state bodies with an interest in restricting publication of a document to apply for a restriction order either directly or jointly with the Metropolitan Police Service before the document is published any more widely. When the protocol is applied to the National Police Chiefs' Council if it transpires that particular documents need to be shown to a particular police force for this purpose then the Inquiry will have no objection to that occurring.

37. More generally, we note the National Police Chiefs' Council's cautionary words about the volume of potentially relevant materially held by Operation Elter and the relatively early stage of Operation Elter's own work. The Inquiry legal team intends to continue to liaise with the National Police Chiefs' Council on an ongoing basis to ensure that the disclosure and redaction process is efficient and effective. As we have already stated earlier in this document, if amendments need to be made to the protocols to optimise the process in the light of experience, then that will be done.

26 May 2017