IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

NOTICE OF SUPPLEMENTARY SUBMISSIONS
ON BEHALF OF HN321, HN330, HN333 AND HN343
IN SUPPORT OF MPS RESTRICTION ORDER APPLICATIONS

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1. Introduction

1.1 This document is filed on behalf of the above former members of the MPS Special Operations Squad / Special Demonstration Squad ("SDS") as represented by Mark Spanton and Anna Peacock within the MPS Directorate of Legal Services acting in their capacities as independent "Designated Lawyers" ("the DL").

1.2 This document gives preliminary, advance notice of but, for the reasons set out below, does not develop additional submissions in support of the MPS restriction order ("RO") applications made in respect of HN321, HN330, HN333 and HN343 (see part 2 below). In the event that the Inquiry is minded to grant those applications, it will not be necessary to develop these additional submissions in connection with these individuals. However, the submissions themselves will be relevant in connection with other DL clients and so the requests below for further information and materials will stand in any event.

1.3 The DL first raised the need for additional submissions with the Inquiry in their letter relating to HN343 dated 06/07/17 and confirmed that they would endeavour to file further submissions by 4pm today in their email dated 12/07/17 and letter dated 13/07/17.

1.4 This document also gives notice of the fact that HN333 seeks an RO in respect of his cover name as well as his real name (see part 3 below) and confirms HN343's request that he be given an opportunity to consider and comment on the revised MPS risk assessment relating to him before the Inquiry determines the RO application in his case (see part 4 below).

2. Expectations of confidentiality

2.1 It is submitted that:

(1) the public interest and the conduct and express and implied assurances and undertakings of the MPS have given rise to very strong obligations and expectations of confidentiality owed to and enforceable by the former undercover officers ("UCOs") within the SDS, including HN321, HN330, HN333 and HN343;

(2) as a matter of public law, the Inquiry is obliged to respect and may not lawfully frustrate those obligations absent the consent of the individual concerned or, at the very least, some *prima facie* evidence of serious misconduct or wrongdoing on his or her part in the course of his or her work as a UCO;

(3) the above applies as a matter of fairness and under the Human Rights Act 1998 ("HRA"), s.6 and the Inquiries Act 2005, ss.19(3)(b) and (4)(b)-(c) and 22.

2.2 In this regard, it is recognised that the relevant obligations are not absolute or unqualified, but it is submitted that this does not mean that they are therefore susceptible to, or may be treated as simply one factor within, a "public interest balancing exercise" (*cf.* the Inquiry's *Restriction Orders: Legal Principles and Approach Ruling* dated 03/05/16, paras 41-42 and 165). In particular, the proposition that "every police officer is aware of the supremacy of a judicial decision on disclosure should the officer find that his activities have become relevant to a civil or criminal trial" is question-begging and does not begin to answer whether and when such disclosure might follow or could reasonably be expected.

2.3 The confidentiality of information about the identities of confidential police sources, including both civilian informants and UCOs, and the very strong public interest in its protection are well-established in a number of contexts:

(1) The general law of confidence at common law and in equity

The law protects the identities of confidential police sources through the causes of action of breach of confidence (*Attorney General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 (HL)) and misuse of private information (*Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457). In both cases, this protection is not subject to being overridden by a simple balancing exercise, it applies and must be respected unless a different outcome is necessary:

(a) in the case of breach of confidence, obligations of confidence may yield to the defence of iniquity or in cases where "disclosure is required in the public interest", albeit that publication to the world will rarely be "required" (see *Attorney General v Guardian Newspapers Ltd (No. 2)*, per Lord Goff at pp.282F-283B);

(b) in the case of misuse of private information, the protection may yield to the countervailing Convention rights of others (*In Re s (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, per Lord Steyn at [17]).

(2) Public interest immunity ("PII")

In *DIL v Commissioner of Police of the Metropolis* [2014] EWHC 2184 (QB), Bean J reviewed a number of authorities establishing the very strong public interest in protecting the identities of confidential police sources including both civilian informants and UCOs (at [25]-[36] and [39(1)] and see also the earlier decisions of *R v Hardy* (1794) 24 St Tr 199, at cols 808-819 and *Home v Bentinck* (1820) 2 Brod & B 130, per Dallas CJ at p.162). This public interest is an interest of "the State as a whole" and not just of the police or the government and, accordingly, it is not forfeited or overridden by misconduct on the part of the latter (*R (Mohamed) v Foreign Secretary* [2009] EWHC 152 (Admin), [2009] 1 WLR 2653 (DC), per Thomas LJ at [32]).

(3) Negligence

It is also well-established that police forces assume responsibility for and (unusually) owe a common law duty of care to their confidential sources and that this duty requires the protection of their identities and information about them (*Swinney v Chief Constable of Northumbria (No.1)* [1997] QB 464 (CA), *Swinney v Chief Constable of Northumbria (No.2)* (1999) 11 Admin LR 811 and *An Informer v A Chief Constable* [2012] EWCA Civ 197, [2013] QB 579).

(4) Convention rights

HRA, s.6 may oblige public authorities, such as courts, to take positive steps to protect individuals, including by refraining from, and preventing the publication or disclosure of, information about them where this would be incompatible with Convention rights under ECHR, arts 2-3 (*Venables v News Group Newspapers Ltd* [2001] Fam 430, *In re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135 and *In re Times Newspapers Ltd* [2008] EWCA Crim 2396, [2009] 1 WLR 1015) and/or art.8 (*X (formerly known as Mary Bell) v O'Brien* [2003] EWHC 1101 (QB)). In this regard, it is important to note that in the case of *Officer L* the police officers in question were not UCOs and did not have any freestanding expectations of anonymity and in the more comparable case of *Times Newspapers Ltd* the accused members of the special forces were given anonymity notwithstanding that they were charged with criminal offences, i.e. there was at least a *prima facie* case of wrongdoing against them.

2.4 So far as concerns the extent to which UCOs such as HN321, HN330, HN333 and HN343 undertaking a non-evidential, intelligence-only role within the SDS might - before, during or after his or her service - have reasonably expected the public avowal or disclosure of that service and/or his or her identity:

(1) Criminal proceedings

the clear expectation and indeed practice was that UCO identities and roles were protected either by individuals appearing as defendants or witnesses "in role" (irrespective of the propriety of this approach) or by the making of a claim for PII or, failing this, the abandonment of any prosecution as envisaged in *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531, per Lord Mance at [102] and per Lord Clarke at [154];

(2) Civil proceedings

similarly, the individual UCOs would have anticipated the protection of their identities and roles in civil proceedings through settlement, the making of a PII claim and/or an application for anonymity and screening or, failing this, the imposition of a stay on the grounds elaborated in *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786.

2.5 Furthermore, and in any event, the relevant expectations of anonymity and confidentiality are even stronger in the context of an inquisitorial public inquiry such as this, by comparison with adversarial litigation in the ordinary courts of the above kind:

(1) Criminal and civil litigation may only proceed *inter partes* and on the basis of specific allegations of past or threatened breach of duty and therefore cannot involve the speculative publication of names with a view to inviting or "soliciting" allegations of wrongdoing from members of the public (see *Counsel to the Inquiry's Note for the Hearing on 5 April 2017* dated 02/03/17, para.38). Such "fishing expeditions" are impermissible in and cannot arise before the ordinary courts.

(2) In the context of this Inquiry, there are no countervailing common law or Convention rights which can be said to be engaged or to be capable of favouring disclosure:

(a) the preservation of UCO anonymity would not impact on the art.6 rights of any third parties, including the non-state, non-police core participants, as these are not engaged (see the analysis in *Counsel to the Inquiry's Note on the Rehabilitation of Offenders Act 1974 and its Impact on the Inquiry's Work* dated 01/03/17, paras 44-55);

(b) neither would it impact on the art.10 rights of any third parties (*Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455, per Lord Mance at [48], per Lord Toulson at [124]-[125] and per Lord Carnwath at [238], *R (Persey) v Environment Secretary* [2002] EWHC 371 (Admin), [2003] QB 794 (DC), per Simon Brown LJ at [48] and [52]-[53] and *R (Howard) v Health Secretary* [2002] EWHC 396 (Admin), [2003] QB 830, per Scott Baker J at [103]-[105]).

2.6 The SDS UCOs undertook work on behalf of the State and in the interests of society as a whole which was stressful and dangerous and which had a profound and permanent life-changing impact on them, their families and their histories. They did this on the understanding that both sides would keep this secret and most if not all of them would not have done it otherwise. Undertaking this work has also had important consequences for the individuals concerned in terms of their interactions with others and the need to preserve their personal security and avoid publicity.

2.7 It is not now open to any part of the State (including the Inquiry) retrospectively to change the basis on which these individuals undertook this work absent some very good, evidence-based, case-specific reason for doing so. This would not be done in the case of serving or former members of the intelligence services or the special forces or their civilian covert human intelligence sources and it should not be done in the case of the SDS. A generalised desire to "solicit" or fish for allegations of wrongdoing (or to allay related public concerns) can never be sufficient for these purposes otherwise no potential police UCO or source could be given a meaningful assurance of confidentiality. Similarly, a change

of opinion on the part of the State or the public as to whether the work itself or the way in which it was carried out were justified and proportionate also cannot absolve it from observing the obligations and expectations the State chose to create.

2.8 In terms of the kind of serious misconduct or wrongdoing which might justify the avowal or publication of a former UCOs identity or role, it is submitted that this would have to be at the extreme end of the spectrum. Confidentiality cannot be offered to would-be State informants on the basis that it will be waived in the event of an allegation of wrongdoing otherwise no-one would agree to become a covert human intelligence source. Indeed, the Inquiry's *Restriction Orders: Legal Principles and Approach Ruling* dated 03/05/16, para.100 rightly recognises that wrongdoing will not necessarily justify the loss of anonymity.

2.9 In the cases of HN321, HN330, HN333 and HN343:

(1) three of them were deployed as SDS UCOs for a matter of months in the late 1960s and one of them was deployed as such for 3½ years in the early 1970s;

(2) none of them used a cover name based on the identity of a deceased child;

(3) none of them engaged in a sexual or intimate relationship in his cover identity;

(4) none of them is alleged to have been guilty of any wrongdoing of the kind referred to in the Inquiry's *Restriction Orders: Legal Principles and Approach Ruling* dated 03/05/16, para.90;

(5) no such allegations have been made in connection with the work of the SDS in the late 1960s / early 1970s;

(6) none of them has published or disclosed information about their undercover work.

2.10 The Inquiry's *Restriction Orders: Legal Principles and Approach Ruling* dated 03/05/16, paras 161 and 165 confirm its intention to consider carefully the evidence relating to assurances of confidentiality given to SDS UCOs and to err on the side of caution where this is missing or sketchy. The Inquiry's *Risk Assessments: Note to Core Participants*" dated 20/10/16, para.22 also refers to it having "already received evidence of possible damage to the capacity of the police service to prevent and detect crime caused by disclosure of confidential sources".

2.11 It is accepted that detailed evidence as to these matters would be needed for them to be properly determined. In order to develop the submissions outlined above, the DL consider that they need sight of the evidence referred to above and any other evidence obtained by the Inquiry as to:

(1) the assurances and undertakings of confidentiality and anonymity given to police UCOs and their resultant expectations and understandings;

(2) the likely consequences of non-observance of the above in the context of this Inquiry for the future recruitment and retention of police UCOs and other covert human intelligence sources.

2.12 The DL have asked the MPS about the availability of such evidence and have been referred to para.7 of their application for an RO in respect of "Cairo" dated 30/06/16 (referring to a "closed" witness statement by Cairo dated 12/02/16, amended 28/06/16 which has not been disclosed). The MPS also confirmed the existence of witness statements by Alan Pughsley and Jon Boutcher as the serving and former chairs respectively of the Undercover Working Group and referred the DL to the NPCC for copies of these (see the DL's letter to the Inquiry dated 13/07/17). It would appear likely that the MPS and/or NPCC have also disclosed relevant primary materials relating to these matters to the Inquiry.

2.13 In the circumstances, the DL should be grateful if the Inquiry could please confirm what primary and secondary materials it has obtained as to the above matters and provide copies of the same so that more detailed submissions can be developed thereon (see also the DL's letter to the Inquiry dated 13/07/17 enclosing a copy letter from the MPS dated 11/07/17).

3. HN333

3.1 As set out above, HN333 supports the MPS application for an RO in respect of his real name, but also submits that, in order for this effectively to protect his identity, it should extend to his cover name and the name of his target group:

(1) HN333 was entitled to and did expect that his real name, his cover name and the fact of his undercover deployment against the group in question would all be kept secret;

(2) HN333's target group was small and comprised no more than [redacted] people at any one time;

(3) it is unlikely that many other members of the group will have departed and lost all contact with it in the same way as HN333;

(4) some of the members of the group are also likely to have died in the intervening 50 years;

(5) publication by the Inquiry of HN333's cover name or target group, in circumstances confirming that he remains alive, will make his identification by surviving members who remember that name or HN333 relatively easy, particularly if they are also able to exclude other members they know to have died;

(6) if none of the surviving members of the group remembers HN333 or his cover name, there would be no point publishing these details because they could not elicit relevant evidence within the Inquiry's terms of reference.

3.2 The DL will file a further impact statement on behalf of HN333 confirming the above as soon as possible and are happy to file a supplementary application notice if that would assist.

4. HN343

4.1 The DL's letter to the Inquiry dated 10/07/17 confirmed HN343's cover name and target group and that this information had been passed to the MPS so that they may review and revise their risk assessment. As mentioned in the DL's letter to the Inquiry dated 13/07/17, HN343 requests an opportunity to consider and comment upon the revised risk assessment before the Inquiry determines the MPS application for an RO in respect of his identity.

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