IN THE UNDERCOVER POLICING INQUIRY

MPS SUBMISSIONS DATED 6 NOVEMBER 2017 (ANONYMITY)

Introduction

1. These submissions are filed in accordance with the Chairman's direction of 23 October 2017 at para 5. They respond to the points of principle made on behalf of Guardian News and Media Limited ("GNML"), and to points made by the NPSCPs and others in relation to the "minded to" notes.

GNML's Submissions

2. GNML say that the test to be applied for restriction orders is one of strict necessity (para 3a). The short point is that there is no basis for revisiting the Principles Ruling, which the current Chairman applied in issuing the minded to note of 3 August 2017 (para 20). Indeed previous submissions on behalf of the media (including GNML) dated 14 March 2016 did not propose such a test.

3. GNML's submissions tend to ignore the statutory regime created by the Inquiries Act 2005, and import without consideration of the legal and factual context of this Inquiry, observations made in connection with other proceedings. For example, the position of a former undercover officer whose deployment may or may not figure at all or to any significant degree in the eventual evidential hearings, cannot be equated with the position of a defendant on trial for murder (*In Re S* [2005] 1 AC 593). The Inquiry has <u>not</u> decided to seek anonymity applications from all SDS and NPOIU officers because it will certainly hear from all those officers (see Ruling of 2 May 2017 at paras 167 et seq).

4. The Inquiries Act 2005 regime is different from the regime that applies in ordinary civil or criminal proceedings. The requirement is for the Chairman to *"take such steps as he considers reasonable"* to ensure members of the public are able to attend, or see and hear proceedings; or obtain or view a record of evidence and documents given, produced or provided to the Inquiry (s.18(1)). Restrictions on attendance, disclosure and publication are not limited to those that can be justified on a conventional PII basis. They may be made under either limb in s.19(3), which includes where the Chairman considers a restriction *"to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters in s.19(4)"* which in turn include considerations of confidentiality, delay, efficiency, effectiveness, and additional cost. This has no direct match in ordinary civil or criminal proceedings.

5. The distinctiveness of an inquiry is particularly apparent when the Inquiry performs its investigative and sifting functions. The reason for publishing information such as a cover name in order to enable witnesses to come forward is one thing. The reason for allowing access to hearings concerning deployments which the Chairman has in due course decided merit significant attention, having sifted the evidence obtained by the Inquiry team, is another.

6. As noted in the Principles Ruling (paras 84-9), the distinctive features of an inquiry were the subject of obiter observations by Lord Toulson (with whom Lords Neuberger and Clarke agreed) in *Kennedy v Information Commissioner* [2015] AC 455. Considerations which inform open justice apply to inquiries as they do to the courts, but vary in their application. Indeed, Lord Carnwath, who dissented in the result, observed obiter at para 241 that "*…there is nothing in the Guardian News case, or any other existing authority to support the view that common law principles relating to disclosure of documents in the courts can be transferred directly to inquiries. It must depend on the statutory or other legal framework within which the particular inquiry is established*." Lord Mance (with whom Lords Neuberger and Clarke also agreed) was of like view (para 48, third sentence). It is submitted that it is preferable, like the previous Chairman, to refer to "openness" rather than "open justice", bearing in mind that an inquiry does not determine justice between litigants.

7. GNML submit at para 5c that openness means witnesses will be less likely to exaggerate. However, it may also be the case that providing evidence with some limitations on what can be published permits and encourages witnesses to be more candid than might be the case otherwise, or to be constructive rather than defensive, or give evidence when they might not otherwise be willing to do so: see the discussion at paras 46-47 of *R (oao Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2003] QB 794*;* and at paras 49-50 and 52 of *R(oao Associated Newspapers) v Leveson* [2012] EWHC 57 (Admin). It is clear the position is one which requires consideration on a case-by-case basis, and not mere broad assertion. Similarly, the extent to which non-publication may or may not impede the investigation of the matters which led to the inquiry needs consideration; see *Yalland and Others v Secretary of State for Exiting the European Union* [2017] EWHC 629 (Admin) at paras 39-40 where a similar point was accepted in respect of claimants at potential risk of harm and which applies with particular force to the issue of real names.

8. The proposition that Art10 adds anything to the statutory scheme was rejected in the Principles Ruling at para 204. Given that, as the Supreme Court held in *Kennedy, supra*, Art10 does not provide a right of access to information, or impose an obligation on the state to impart it, it is not at all clear how Art10 can bite at this early stage before a decision has been made on the contents of hearings.

9. It follows that, even if it was appropriate to do so, GNML's submissions do not provide a basis for reassessing the conclusions in the Principles Ruling.

Minded to Notes

10. The MPS makes its applications, and these submissions, based upon the totality of the material relied upon, whether or not published by the Inquiry on its website.

HN58

11. The MPS agrees that the possibility, if achievable, of splitting N58's identity as manager and identity as undercover officer should be explored, and notes that there is to be a closed hearing in due course.

HN68

12. The MPS originally applied that HN68's real and cover name should be subject to restriction. The Chairman is not minded to restrict HN68's cover name; the MPS does not challenge this view. The application in respect of HN68's real name is maintained.

13. In short, there is a high public interest in maintaining the confidentiality of those who carry out UC work (as demonstrated, for example by the CHIS Code of Conduct). Officers and their families bear a considerable burden in undertaking this secret work, and as is clear from the case of HN68 (see views of HN68's surviving spouse), had expectations that their secret work would be kept confidential. Confidentiality is not a trump card but the way of resolving the balance was set out in the Principles Ruling at para 166: "…*I consider that while an expectation of confidentiality is both a material and weighty consideration it is not likely, except in unusual circumstances, to make the difference between disclosure and non-disclosure if disclosure is necessary in the fair pursuit of fulfilment of the Inquiry's terms of reference*." Disclosure of HN68's real name is not necessary in the fair pursuit of fulfilment of the Inquiry's terms of reference.

14. There is insufficient basis to conclude that publication of HN68's real name, or speculative circulation of a photograph, would bring forward witnesses with experience of HN68's management role in the SDS who the Inquiry would not anyway be able to identify and approach, to justify the harm. It has already been accepted that the Inquiry should be wary of prejudgment (Principles Ruling, para 100); it would be no less unfair to HN68 to expose HN68's real identity on the off-chance that something may come up to discredit HN68. Any reference to the 'rights of others' as bearing on the interests of openness must be viewed in this context.

HN104

15. The MPS acknowledges the desire of deceived women to find out the real names of officers with whom they had relationships.

16. The MPS notes that the NPSCPs have been invited by the Chairman to reconsider their opposition to this real name application in light of the personal (not State) interests involved.

HN123

17. The MPS does not advance any risk of harm to itself as an institution.

18. There are undoubtedly public interest factors in favour of disclosure of HN123's cover name. However, on balance, restriction is justified because of the risk of harm to HN123 who has been diagnosed as suffering from significant mental health conditions.

HN294

19. This is a good example of the Inquiry inviting an anonymity application not because HN294's deployment, which took place nearly 50 years ago, is likely to figure in evidential hearings, but because it has decided to process through former SDS officers as a class. The public interest in openness viz a viz HN294's

identity, let alone real identity, cannot be equated with the public interest in openness that applies when the Inquiry has in due course decided which matters to consider in evidential hearings.

20. Added to that, no cover name is known. His former spouse is a frail 85-year old. The family was assured that they would be kept "safe and private" (family member email). The balance described in the Principles Ruling at para 166 falls in favour of restriction of HN294's real name.

HN297

21. The same general points are made as above.

HN321

22. The Chairman is not minded to restrict HN321's cover name; the MPS does not challenge this view. The MPS application in respect of HN321's real identity is maintained. The general points above are repeated.

HN326

23. The general points above are repeated.

HN329

24. The MPS application is maintained. This is a brief, superficial deployment carried out more than 50 years ago. The general points above are repeated.

HN330

25. The MPS maintains its application over HN330's real name, and the above general points are repeated. Until recently the MPS was not aware of any cover identity – as a result of very recent information the position is now unclear and work is being done to identify whether a cover name exists and if so, whether or not an application over that cover name is required.

HN333

26. The MPS maintains its application to restrict HN333's real name and the general points above are repeated. The MPS notes that HN333 is making an application in respect of HN333's cover identity and notes the Chairman's observations regarding the particular risk that arises in HN333's case. These are matters for HN333's lawyers to advance and the MPS is not in a position to make submissions on that aspect.

HN343

27. The MPS application is maintained in respect of HN343's real name, and the above general points are repeated.

HN81, HN16 and HN26

28. The MPS does not challenge the decision of the Chairman to release the cover identity of HN81. The MPS's maintains that the balance in relation to HN81's real name comes down in favour of non-disclosure in light of the risk to HN81's mental health and the risk of interference with HN81's private life. No submissions are made here in respect of HN16 and HN26.

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AMY MANNION

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