

## IN THE UNDERCOVER POLICING INQUIRY

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### NOTE OF GUARDIAN NEWS AND MEDIA LIMITED for restriction order hearing on 21<sup>st</sup> – 22<sup>nd</sup> November 2017

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1. This note is provided on behalf of Guardian News and Media Limited (“GNM”) in response to further submissions lodged by the Metropolitan Police Service (“MPS”), the designated lawyers, and others, on 6<sup>th</sup> November 2017.
2. Contrary to the suggestion in the further submissions, GNM does not seek to revisit the Principles Ruling. Rather:
  - a. GNM seeks to apply the Principles Ruling, which the MPS and others seek to misconstrue. The Principles Ruling is clear that the starting point in this Inquiry should be openness;<sup>1</sup>
  - b. GNM does not seek to ignore the statutory scheme. Properly understood, the statutory scheme implies a presumption of openness;<sup>2</sup>
  - c. The suggestion that open justice does not apply to this Inquiry (or applies with less force)<sup>3</sup> is wrong in principle. In *Kennedy v Charity Commission* [2015] 1 AC 455, Lord Toulson held at §124 that: “*The considerations which underlie the open justice principle in relation to judicial proceedings apply also to those charged by Parliament with responsibility for conducting quasi-judicial inquiries and hearings. How is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?*”<sup>4</sup> The previous Chair cited and approved this dictum (at §87), and went on to dismiss the suggestion that

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<sup>1</sup> Principles Ruling, at §§82-89.

<sup>2</sup> Contrary to the suggestion in the MPS submissions, 6<sup>th</sup> November 2017, at §3. GNM addressed the statutory scheme in its 14<sup>th</sup> March 2016 submissions, at §6, and in its 4<sup>th</sup> October 2017 submissions, at §4. GNM’s submissions were largely adopted by the previous Chair, in the Principles Ruling, at §§82-83.

<sup>3</sup> NPCC submissions, at §§8-9; designated lawyer submissions, at §§3.3-3.5; and loosely argued in the MPS submissions, at §6.

<sup>4</sup> Cited and applied by the previous Chair in the Principles Ruling, at §87.

the procedure in this Inquiry, whereby the Chair receives the evidence, “lowers the public interest threshold for a restriction order” (§103);

- d. Contrary to the designated lawyers’ suggestion,<sup>5</sup> GNM’s position is consistent with inquest case law. In inquests, as in this Inquiry, there is a prohibition on determining civil and criminal liability<sup>6</sup> and a requirement to act fairly towards witnesses.<sup>7</sup> In inquests, as in this Inquiry, open justice is a “powerful imperative” and a “fundamental principle”.<sup>8</sup> In inquests, as in this Inquiry, any anonymity order “requires cogent justification”;<sup>9</sup>
  - e. There is a particular need for open justice in this context, given the overwhelming public concern at the conduct of undercover officers.<sup>10</sup> This creates an additional need to demonstrate clearly that the Inquiry is impartial and fair. The process of the Inquiry should win the confidence of the public and restriction orders inhibit the allaying of public concern.<sup>11</sup>
3. GNM recognises, of course, that the application of the open justice principle is fact-sensitive and requires a balancing exercise. Nevertheless, it remains concerned that the “*Minded To*” notes do not sufficiently reflect the principles set out above; in particular the presumption of openness and the need to allay public concern.
  4. GNM supports the submissions of the non-state, non-police core participants and of Peter Francis as regards the application of these principles to the individual cases before the Inquiry.

JUDE BUNTING  
Doughty Street Chambers  
20<sup>th</sup> November 2017

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<sup>5</sup> Designated lawyers’ submissions, at §3.5.

<sup>6</sup> Coroners and Justice Act 2009, s.10(2); s.2(1) Inquiries Act 2005.

<sup>7</sup> *Re Officer L* [2007] 1 LR 2135, at §22; s.17(3) Inquiries Act 2005.

<sup>8</sup> *R (T) v HM Senior Coroner for West Yorkshire* [2017] EWCA Civ 318, at §§56-64; Chief Coroner’s Guidance No. 25, “*Coroners and the Media*”, at §3.

<sup>9</sup> *T*, at §59. This is consistent with the authority cited by the designated lawyers (*R v Bedfordshire Coroner, ex p Local Sunday Newspapers* [2000] 164 JP 283) refers to open justice as a “fundamental principle” and stresses that: “Departure from that general rule must be an exception and such exception must be regarded strictly.”

<sup>10</sup> Principles Ruling, at §§90-93.

<sup>11</sup> Principles Ruling, at §104