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I N D E X

Opening remarks .....1  
Submissions on behalf of the .....2  
    non-state, non-police core  
    participants by MS KAUFMANN

(2.32 pm)

Opening remarks

THE CHAIR: Mr Barr.

MR BARR: Sir, it might help if I just introduce a slightly  
different cast of advocates.

THE CHAIR: Yes.

MR BARR: They are largely the same as this morning.

Changes are that Ms Sikand, who waited patiently all  
morning, is representing Mr Francis on this issue.  
Mr Brandon has now supplemented the Slater & Gordon  
team, leading Ms Woods, and Ms Mannion will be here with  
Mr Payter this afternoon for the Metropolitan Police,  
but we are expecting Mr Hall tomorrow.

THE CHAIR: Yes. I know that Mr Hall has other commitments  
today and I think we have told him that we will not ask  
for substantive submissions from Ms Mannion, save in an  
emergency.

MR BARR: As I understand it, the National Police Chiefs'

1 Council, Sir Robert Francis appeared only this morning  
2 on the Rehabilitation of Offenders Act issue.

3 THE CHAIR: He's still here.

4 MR FRANCIS: I am listening with interest.

5 MR BARR: I don't myself wish to say very much other than to  
6 say that the view of the Inquiry legal team having  
7 considered the further authorities which have been cited  
8 by the various core participants and having conducted  
9 its own legal research to check for any developments in  
10 the law since last year have concluded that there is no  
11 reason for supposing that the ruling on legal principles  
12 that was prepared last year by your predecessor, sir, is  
13 anything other than entirely correct.

14 So it is our submission that the stage we have  
15 reached is of applying those principles to the facts of  
16 individual applications.

17 THE CHAIR: Thank you very much.

18 Ms Kaufmann?

19 Submissions on behalf of the non-state, non-police core  
20 participants by MS KAUFMANN

21 MS KAUFMANN: Sir, we, too, do not for a moment want to  
22 suggest there should be any departure from  
23 Lord Justice Pitchford's ruling on the legal principles.

24 THE CHAIR: No.

25 MS KAUFMANN: But what we do, as I indicated to you earlier,

1 want to do is to have an opportunity to look at what  
2 those principles are and say something at a generic  
3 level about the weight that falls to be given to  
4 different interests favouring openness or favouring  
5 restriction orders, and then to apply those.

6 THE CHAIR: I'm not going to prevent you making submissions  
7 of whatever kind you think that you need to make. But  
8 as you have seen in the statement that I made, the issue  
9 of what should be done in the case of individual  
10 officers is quite time-consuming. I did spend the  
11 substantial part of three days hearing submissions in  
12 relation to the three officers where I have held  
13 a closed hearing and quite a lot of time thereafter  
14 preparing open and closed decisions in consequence.

15 It took, in other words three or four days to do  
16 those three cases.

17 Most of the ones we are now going to deal with  
18 I don't think are of that order of magnitude. Even so,  
19 there is quite a lot to do and I'm very, very anxious to  
20 ensure that we do it rather than debate legal principles  
21 and then leave a rush at the end to do the individual  
22 officers. It would greatly assist me in any event if  
23 you could make your general submissions in relation to  
24 particular officers. I find it easier to grasp when  
25 dealing with concrete facts than in the abstract.

1 MS KAUFMANN: What I was proposing to do is to make the  
2 general submissions and then in light of them apply them  
3 to the individual particular officers, because once made  
4 they will apply to every case and it will massively  
5 speed up each time I look at an individual officer if  
6 I have set out our stall at the beginning and you  
7 understand how we submit the legal principles ruling  
8 falls to be applied in the particular case as a matter  
9 of generality.

10 If you would bear with me --

11 THE CHAIR: Yes.

12 MS KAUFMANN: -- I hope having done it that way you will see  
13 that it actually makes more sense than to pick  
14 a particular individual and look at his particular  
15 circumstances, as opposed to:

16 "This is legal principles ruling, this is what we  
17 draw from it, these are the implications for features  
18 that turn in favour of openness, these are the  
19 implications for features that turn in favour of  
20 restriction. How does that apply to cover names, how  
21 does that apply to real names?"

22 That will be, as it were, a framework that each  
23 individual case can then be looked at?

24 THE CHAIR: If you are prepared to make your submissions on  
25 that basis it is not, really, I think reasonable of me

1 to ask you to change tack at such short notice and

2 I will not do so.

3 But I would ask you please to bear in mind the  
4 need -- imperative need -- to decide each individual  
5 case.

6 MS KAUFMANN: I absolutely do. I will do all I can to make  
7 sure, and I have no doubt it will happen, that there is  
8 enough time to consider those individual cases.

9 I don't intend to be hours on this at all --

10 THE CHAIR: No.

11 MS KAUFMANN: -- but it seems to me it is actually a more  
12 economical way of doing it --

13 THE CHAIR: Okay.

14 MS KAUFMANN: -- because it should be clearer and  
15 structurally more sensible.

16 So, as I say, we do not seek to do anything other  
17 than apply the principles set out in  
18 Lord Justice Pitchford's ruling, but I'm going to ask  
19 that you briefly remind yourself of what those  
20 principles are. It is in volume 7 of the authorities  
21 for the restriction order hearing.

22 THE CHAIR: Right.

23 MS KAUFMANN: So it is the one volume that was prepared in  
24 addition to what was there in 2016.

25 THE CHAIR: Yes, I have it.

1 MS KAUFMANN: If you can first turn to paragraph 12, where  
2 Lord Justice Pitchford identifies at a very high level  
3 the obvious tension between two competing public  
4 interests that arise for consideration in this Inquiry.

5 On the one hand:

6 "The need to examine as publicly as possible  
7 evidence documents and information about undercover  
8 policing, a matter that has attracted widespread public  
9 concern."

10 On one side of the equation there is the public  
11 interest that calls for openness.

12 Second:

13 "The need to keep secret evidence, documents and  
14 information about undercover policing whose disclosure  
15 may cause harm to the public or an individual."

16 That is the starting point. If we then move to  
17 paragraph 68, if I can ask you, sir, to read paragraphs  
18 68 through to 70.

19 THE CHAIR: Yes. (Pause)

20 Yes.

21 MS KAUFMANN: He identifies in 68 five factors that are  
22 served or five separate interests that are served by  
23 openness. Each interest is different but openness  
24 serves the pursuit of that interest in each case.

25 Firstly, there is an instrumental value in openness

1           which is something that you yourself have highlighted  
2           this morning. If you want to get to the truth, you need  
3           the witnesses to come forward who are going to help you  
4           to do so.

5   THE CHAIR: Quite.

6   MS KAUFMANN: But then there are other factors that aren't  
7           just about getting to the truth. Public examination of  
8           wrongdoing by police officers both for the sake of  
9           transparency in an important public service and for the  
10          purposes of identifying victims of wrongdoing, so that  
11          is entirely separate from the instrumental value and is  
12          something that is linked to principles of open justice  
13          and transparency.

14                Public scrutiny of and consequential confidence in  
15          the proceedings of the Inquiry, very important that the  
16          public have confidence in the process of this Inquiry  
17          and as Lord Justice Pitchford said, it must have  
18          confidence in the process of the Inquiry as well as in  
19          the outcome of the Inquiry. Very important factors that  
20          tell in favour of openness.

21                Fairness towards non-police witnesses. That is  
22          separate from the instrumental value that disclosure to  
23          them can play in the Inquiry process and its task of  
24          getting to the truth.

25   THE CHAIR: It is all the same coin; it is merely

1 a different face of it.

2 MS KAUFMANN: Well, it isn't all the same coin. It isn't  
3 all the same coin. These are different public  
4 interests --

5 THE CHAIR: No, no, 1 and 4. I'm not talking about all of  
6 these, but 1 and 4 run together.

7 MS KAUFMANN: Well, fairness is about ensuring that because  
8 of the interest you have at stake, you have a proper  
9 participatory right in the process. Fairness serves the  
10 interest of getting to the truth, but it is a quite  
11 separate matter. So it does have an instrumental value,  
12 of course, and that is in part why principles of  
13 fairness have evolved in administrative law  
14 unquestionably, because it helps the judge or  
15 decision-maker to get to the right answer, but also it  
16 has a quality in and of itself by virtue of the interest  
17 that that individual has at stake. But unquestionably  
18 one serves the other.

19 Then we have the gravity of the subject matter. In  
20 this case, as he identifies, the subject matter is grave  
21 indeed and that calls in and of itself for openness and  
22 accountability.

23 69, we have the factors that tend in favour of  
24 restriction. At this stage, there is no weighing of  
25 these factors. He's simply identifying what they are.

1 Grant of anonymity may encourage witnesses to come  
2 forward.

3 That absolutely so in relation to core participants  
4 and that's one of the reasons that have been recognised.  
5 Grant of anonymity is not something that is going to  
6 necessarily encourage police officers to come forward --

7 THE CHAIR: On the contrary. Those who are outwith the  
8 jurisdiction of the Inquiry, it may be the price that  
9 has to be paid for getting anything out of them.

10 MS KAUFMANN: Well, we will have to see if they are outwith  
11 the jurisdiction that is they are themselves not  
12 undercover police officers.

13 If they are undercover police officers --

14 THE CHAIR: No, no, if they are outside the territory, if  
15 you like, of the United Kingdom.

16 MS KAUFMANN: Outside the territory of the United Kingdom,  
17 yes.

18 THE CHAIR: In which case anonymity may be the price that  
19 has to be paid to get anything out of them.

20 MS KAUFMANN: Well, yes. We will -- again, one would have  
21 to see in the particular circumstances and then there  
22 would have to be a weighing of --

23 THE CHAIR: I entirely agree. All I am doing is pointing  
24 out that it does not only apply to non-police witnesses.

25 MS KAUFMANN: It can apply, yes.

1           So protection of police officers from harm including  
2           physical and psychological harm and intrusion on family  
3           and private life and harassment. Non-police witnesses,  
4           their protection from psychological harm and intrusion  
5           into their private and family life, and prevention of  
6           knowledge of covert policing techniques, absolutely an  
7           interest favouring restriction and then confidentiality  
8           and the expectation of confidentiality.

9           Then we have at 70 two factors that don't tell one  
10          way or the other.

11        THE CHAIR: I think 71 doesn't help full stop.

12           Constantly having to empty the court to go into  
13          closed session is not a sensible procedure. If there  
14          are to be closed sessions, and I have held three and  
15          I believe there will be a need for others, they will  
16          have to be done separately.

17        MS KAUFMANN: Yes, but there are ways to work around that.

18        THE CHAIR: Yes.

19        MS KAUFMANN: Can we then move on to paragraph 82 through to  
20          89.

21           If you will just read paragraph 82 and then 87  
22          through to 89, where we can see that in the Kennedy case  
23          Lord Toulson considered the application of the open  
24          justice principle in relation to quasi judicial  
25          inquiries such as this.

1 THE CHAIR: Yes.

2 MS KAUFMANN: At 90 to 91, we can see Lord Justice Pitchford  
3 addressing the subjects of public concern that arise in  
4 relation to this inquiry. Those matters of public  
5 concern it is the task of this Inquiry to examine.

6 THE CHAIR: Yes.

7 MS KAUFMANN: If you, sir, would just briefly look at 90, 91  
8 and then the conclusion at 93.

9 THE CHAIR: Certainly.

10 Yes, I have re-read that. I have obviously read the  
11 whole of this, more than once before.

12 MS KAUFMANN: Exactly. I apologise for taking you to it  
13 again --

14 THE CHAIR: Not at all.

15 MS KAUFMANN: -- but I'm going to make my submissions in the  
16 face of it so I think it is important you have in mind  
17 exactly what I'm going to be referring to.

18 If one then looks at paragraph 100 --

19 THE CHAIR: Can I just make one observation in relation to  
20 paragraph 93?

21 MS KAUFMANN: Yes.

22 THE CHAIR: That paragraph, I think, was drafted to deal  
23 with the submission that was made on behalf of the  
24 police that the Inquiry could get to the truth just as  
25 well by conducting essentially everything in closed

1 proceedings. He was saying, "No, it can't".

2 MS KAUFMANN: Yes.

3 THE CHAIR: I obviously agree with his view.

4 MS KAUFMANN: Yes. And that's clear, your indications that  
5 you will release cover names, save where there is  
6 an issue of risk to life and limb, is obviously moving  
7 on from that and a departure from that.

8 THE CHAIR: Yes.

9 MS KAUFMANN: It nonetheless remains a very important  
10 observation when one looks at disclosure of real names,  
11 which we will come on to, that public confidence in the  
12 Inquiry is an incredibly important value that must be  
13 realised in the course of this Inquiry and in its  
14 outcome.

15 At 100, he deals with wrongdoing and whether or not  
16 a restriction order can cover wrongdoing on the part of  
17 police officers. He concludes there is unlikely to be  
18 any public interest in the concealment of wrongdoing.  
19 And that is an extremely important consideration. But  
20 he does, and there are caveats there, and they are set  
21 out in the remainder of 100, which I would ask you to  
22 look at.

23 THE CHAIR: Yes.

24 MS KAUFMANN: 103 to 104, he deals with the fact that the  
25 chair will see the evidence -- you will see the

1 evidence -- and in contrast to judicial proceedings  
2 where pre-closed material proceedings, such material  
3 would have been withheld, that doesn't lower the  
4 threshold for the imposition of a restriction order.

5 At 105, he deals with the fact that there is going  
6 to be a lot of conflicting evidence, and makes the point  
7 that you yourself have made today:

8 "Where necessary for the fulfilment of the terms of  
9 reference the process of this Inquiry should inability  
10 the Inquiry adequately to test the conflicting evidence  
11 it receives."

12 So again that has two implications.

13 Firstly, those who have conflicting evidence to  
14 give, must know they have conflicting evidence to give,  
15 hence disclosure at the very least of the cover names.

16 Secondly, they must be given the opportunity to put  
17 that evidence into the mix and have it properly tested.

18 107 to 109, he deals here with the importance of  
19 fairness and the important role of the non-state core  
20 participants in relation to the key issues with which  
21 this Inquiry is concerned.

22 Then if you, sir, would just flick through right to  
23 the end of 112, all of which is concerned with  
24 addressing the strong public interest in openness.

25 THE CHAIR: Yes.

1 MS KAUFMANN: So that deals with openness.

2 Then, moving on, one of the major issues in this  
3 hearing before Lord Justice Pitchford was the role of  
4 Neither Confirm Nor Deny, the Metropolitan Police  
5 Service policy of Neither Confirm Nor Deny.

6 THE CHAIR: Neither Confirm Nor Deny, I know he conducted  
7 a thorough analysis of Neither Confirm Nor Deny and  
8 concluded that it might have some weight in some  
9 instances.

10 But the reality is that Neither Confirm Nor Deny has  
11 no part at all to play in Special Demonstration Squad  
12 deployments, where they are to be dealt with publicly  
13 they are confirmed, where they are to be dealt with  
14 entirely in closed, and there will be some, they will  
15 not be confirmed. Neither Confirm Nor Deny in those  
16 circumstances is a pointless exercise.

17 MS KAUFMANN: At paragraph 146, Lord Justice Pitchford for  
18 different reasons effectively comes down to the same  
19 conclusion --

20 THE CHAIR: Yes.

21 MS KAUFMANN: -- that what Neither Confirm Nor Deny protects  
22 can properly be protected by giving weight to, for  
23 example, assessments of risk to the particular officer.  
24 So officers must be protected from a risk to their life  
25 or limb, that is what Neither Confirm Nor Deny does,

1           that is what the Inquiry will do with the imposition of  
2           restriction orders and so forth.

3           So there is no need for a separate inquiry in  
4           relation to Neither Confirm Nor Deny.

5   THE CHAIR: The way in which the Neither Confirm Nor Deny  
6           policy has, as I understand it, been deployed in civil  
7           litigation, simply has no part to play in this Inquiry.

8   MS KAUFMANN: Exactly. I am grateful.

9   THE CHAIR: Forgive me, just so my words are not  
10           misunderstood. I can conceive of circumstances, in  
11           particular in relation to recent, still more in relation  
12           to current deployments, that the Neither Confirm Nor  
13           Deny policy might have a part to play. It is  
14           actually rather more likely that nothing at all will be  
15           said in public about, let's say, a current deployment  
16           and that it will be neither confirmed nor denied that it  
17           is being undertaken.

18   MS KAUFMANN: Yes, but we are looking here at historical  
19           deployments.

20   THE CHAIR: Looking at history, in particular at the Special  
21           Demonstration Squad, I simply cannot see any --

22   MS KAUFMANN: Yes.

23   THE CHAIR: -- at all.

24   MS KAUFMANN: If we can then just move to part 6 of his  
25           ruling where he sets out his conclusions and summary of

1 the findings, A.2 -- that's at page 78 of 85 --

2 THE CHAIR: Yes.

3 MS KAUFMANN: -- sets out the two key principal competing  
4 public interest factors that we have already identified  
5 at paragraph 12 --

6 THE CHAIR: Yes.

7 MS KAUFMANN: -- and that we know in relation to A.2(1)  
8 translate into all sorts of other sub public interest  
9 that openness serves.

10 At A.3:

11 "The principal means available to the Inquiry to  
12 allay public concern in its subject matter, process,  
13 impartiality and fairness is public accessibility to its  
14 proceedings that will in one or more of the following  
15 respects ..."

16 And then he sets out what functions openness will  
17 serve. Then he identifies at 4 the main risk factors  
18 for harm to the police.

19 THE CHAIR: Yes.

20 MS KAUFMANN: And that is damage to effective policing of  
21 the true identity of present or former uncover police  
22 officers, whether directly or indirectly, and to the  
23 operational techniques.

24 If we then move down to A.9:

25 "The practical consequences of a restriction order

1 to the fairness of the Inquiry's proceedings and the  
2 Inquiry's ability to fulfil its terms of reference will  
3 be significant considerations. When all other  
4 components of the public interest are directly opposed  
5 and evenly weighted the Inquiry's duty of fairness to  
6 its participants may be a decisive factor."

7 Then if we turn to C.2.

8 THE CHAIR: I thought you were going to refer me to A.11?

9 MS KAUFMANN: Did I mention A.11?

10 THE CHAIR: I don't think so.

11 MS KAUFMANN: No.

12 Yes:

13 "... unless it is necessary in the countervailing  
14 public interest of the protection of individuals from  
15 harm and/or effective policing."

16 So it has to be -- it is a necessity threshold  
17 because there are compelling interests in favour of  
18 openness that he has identified. So they have to be  
19 outweighed by nothing short of a necessity threshold.

20 If you could then look at C.2, the factors to be  
21 taken into account when personal applications are made.  
22 One of the factors there at 7 is the public interest in  
23 openness, and then a fair balance to be struck between  
24 the public interest and disclosure and the personal  
25 interests of the applicant at 8.

1           Part of the reason for going through all of that is  
2           because Mr Sanders on behalf of a number of the officers  
3           seeks to sideline the importance of openness in relation  
4           to Lord Justice Pitchford's judgment.

5   THE CHAIR: He's made written submissions at least and may  
6           expand upon them orally, I suppose, which were in effect  
7           already dealt with in Lord Justice Pitchford's ruling.

8   MS KAUFMANN: Yes.

9   THE CHAIR: That was one of the things I did not propose to  
10          revisit.

11   MS KAUFMANN: Exactly. He completely fails to recognise  
12          that Lord Justice Pitchford has put to the fore and  
13          entirely on one side of the balance openness. And on  
14          the other side the various factors that will tell  
15          against openness and which will only defeat openness on  
16          the grounds of necessity.

17          So I want to just look at some of those factors  
18          then. But before I do, your indication this morning is  
19          very welcome in relation to cover names. Obviously we  
20          don't argue with your view as to why disclosure of cover  
21          names is something that is central --

22   THE CHAIR: I have indicated that I am minded to put it into  
23          practice in three very difficult cases. Those that  
24          I conducted closed hearings about.

25   MS KAUFMANN: I'm not going to dwell on cover names, but

1 I am then going to look at real names. My submissions  
2 on real names are obviously important because a lot of  
3 the individual cases that we are now concerned with are  
4 ones where you have made a decision to disclose the  
5 cover name but the not the real name.

6 THE CHAIR: You are absolutely right. I am minded to make  
7 a number of decisions of that nature and I invite your  
8 submissions upon them.

9 MS KAUFMANN: Yes. So I'm going to deal at a general level  
10 with: why real names? Why the disclosure of real names  
11 serves an instrumental purpose in terms of the Inquiry  
12 getting to the truth.

13 Those reasons are set out and identified in  
14 paragraph 108 of our written submissions. I am just  
15 going to go through them briefly. Our written  
16 submissions are in the submissions bundle at tab 8 and  
17 108 is at page 44.

18 THE CHAIR: Yes.

19 MS KAUFMANN: Firstly, the effectiveness of the Inquiry. So  
20 this again, this ties in with why it is necessary to  
21 disclose cover names.

22 Sorry --

23 THE CHAIR: Give me --

24 MS KAUFMANN: This ties in with why it is necessary to  
25 disclose cover names.

1           Where, for example, a cover name is not known --

2   THE CHAIR:  Yes.  Sorry, I think you are talking about real  
3           names, aren't you?

4   MS KAUFMANN:  Yes, I'm talking about real names, but this  
5           first submission I am going to make ties in with why it  
6           is necessary to disclose cover names - i.e. - there are  
7           circumstances where in order to get to the truth it will  
8           be necessary to disclose a real name.  Take for example  
9           where a cover name is no longer known.  Then unless the  
10          real name is disclosed it will be impossible to get to  
11          the truth.

12          There is one possible alternative, for example in  
13          relation to very old cases, which would be the  
14          disclosure of photographs of the individual officer at  
15          the time or around the time of his deployment.  That  
16          would be one alternative mechanism.  But there has to be  
17          some way in relation to cases where the cover name is  
18          not known for that officer's identity as an undercover  
19          officer to be --

20   THE CHAIR:  I'm going to interrupt here.  I apologise for  
21          doing so, but not very much.  I'm dealing here with  
22          restriction orders in respect of identity.  The decision  
23          in 294 is not to disclose the real name.  That is the  
24          decision which you are seeking to persuade me I should  
25          change when I come to making the final decision.

1 I'm not deciding whether or not the Inquiry should  
2 attempt to obtain photographs of 294 at the time of the  
3 deployment of 294 or from whatever source it might be.

4 In due course, if it is suggested that the Inquiry  
5 should take steps to obtain photographs of 294, I would,  
6 I think, need to be addressed on the powers that I have  
7 to do that. For the moment, I'm rather sceptical about  
8 whether or not I have the power to call upon anybody,  
9 certainly not a member of a family, to produce  
10 photographs to the Inquiry.

11 MS KAUFMANN: If you don't have the power, then that makes  
12 it all the more important that the real name is  
13 revealed. Because then the real name becomes the only  
14 mechanism by which it is possible to tie in that  
15 individual to his or her earlier undercover activities.

16 THE CHAIR: But you won't anyway.

17 MS KAUFMANN: Well, that is not clear. That is not clear.  
18 It is not clear whether as a result of releasing the  
19 real names it won't be possible to trace that individual  
20 and trace that individual back to their activities.  
21 That is absolutely not clear.

22 But the critical point is in respect of such  
23 an individual, unless as with the reasons leading you to  
24 say cover names must be disclosed, unless something is  
25 disclosed that enables that individual to be identified

1 as an undercover officer, it will not be possible to get  
2 to the truth. So we have to tackle it.

3 And if there is no risk to that officer at all, or  
4 if that officer is deceased and there is necessarily no  
5 risk, then there cannot be any justification for not  
6 doing that which is necessary to get to the truth.

7 THE CHAIR: Again, 294 is deceased and the deployment was  
8 a very long time ago.

9 MS KAUFMANN: That is absolutely right. But we are looking  
10 at deployments that arose in the Special Demonstration  
11 Squad later in time, where we know there was -- whether  
12 individual practices or we believe a strong culture --  
13 of misconduct involving sexual relations, intimate  
14 sexual relations with individuals.

15 Now what is important is to understand how that  
16 culture arose. When did it start? And those cases that  
17 arose a very, very long time ago are of no less interest  
18 to this Inquiry in trying to understand how this  
19 situation came about than the more recent cases. And he  
20 is deceased, he is not at risk, but unless and until we  
21 know who he is, it is impossible to know whether or not  
22 he or any other officers who were undercover at that  
23 time, were engaging in similar practices.

24 Another matter we know, for example, is that we know  
25 from Peter Francis that all the officers who started

1           undercover as undercover officers, that that pool of  
2           officers was the sole pool from which management within  
3           the Special Demonstration Squad derived.

4   THE CHAIR:   That may have been true at a particular moment  
5           in time, it was not true throughout.

6   MS KAUFMANN:   But whether it was true throughout or not, it  
7           is clearly a significant feature of the Special  
8           Demonstration Squad that it was true at some or other  
9           times.

10           So insofar as individuals -- we don't know this  
11           because we have not been informed -- were under cover at  
12           one point as officers and later rose in the ranks and  
13           became managers, then it becomes all the more important  
14           that their activities are understood, because they feed  
15           into the culture and the management style that later  
16           became part of the later operations of the Special  
17           Demonstration Squad.

18           But the critical point here is you accept cover  
19           names have to be disclosed in order for us to get to the  
20           truth. That is no less true of the older operations  
21           than it is of the more recent operations.

22   THE CHAIR:   I entirely agree. Where a cover name is known  
23           in relation to an operation whenever it occurred, it  
24           ought in principle to be disclosed. I wholly agree.

25   MS KAUFMANN:   So then, when the cover name is not known and

1           therefore that is not the mechanism by which you can  
2           then get to the truth, the only other mechanism is the  
3           real name. And there is just as pressing a need to  
4           disclose the real name in those circumstances as there  
5           are in the circumstances where the cover name is to be  
6           disclosed. It is no different.

7           The question then is what falls to be put into the  
8           balance on the other side. I will come to that, but my  
9           primary --

10   THE CHAIR: Are we now perforce looking at an individual  
11           officer's case as I hoped we would, or are we going  
12           to --

13   MS KAUFMANN: We are not. Because I'm going to set out in  
14           my submission what are the weights to be given to all  
15           the other factors.

16           At the moment I want to address the instrumental  
17           reason as to why real names rather than cover names are  
18           or can be required for the --

19   THE CHAIR: Firstly, where no cover name is known, the only  
20           means of finding out who the officer may have been is  
21           the real name?

22   MS KAUFMANN: Exactly, exactly.

23           Then we have whistle blowers, which is dealt with at  
24           paragraph 108 E, and the example given in relation to  
25           HN86.

1 THE CHAIR: Yes, hang on a moment.

2 Yes.

3 MS KAUFMANN: Absolutely central to your investigation in  
4 relation to the infiltration of the Lawrence family and  
5 the justice groups that were operating there, as well as  
6 the justice groups more generally campaigning in respect  
7 of the death of their loved ones, is the issue of race.  
8 It is absolutely central.

9 The Inquiry needs to get to the bottom of that. The  
10 Inquiry needs to get to the bottom of the attitudes of  
11 the particular officers that were involved. Whistle  
12 blowing is important in relation to that. It applies in  
13 its most obvious form in relation to those issues where  
14 race comes to the fore, but not only where race comes to  
15 the fore. Equally we are dealing with women, who  
16 because they are women, have been abused. So it applies  
17 equally in relation to men who have abusive attitudes or  
18 behaviours towards women, which could have continued in  
19 all manner of other roles in policing after they were in  
20 the Special Demonstration Squad, and again  
21 whistle-blowing is important in relation to them.

22 THE CHAIR: Forgive me a moment. I readily accept that  
23 attitudes to race and to women are an important aspect  
24 of the Inquiry that I'm undertaking. What I don't at  
25 the moment understand is why publishing the real names

1 of those who may have been the subject of  
2 whistle-blowing facilitates that.

3 MS KAUFMANN: No, you are misunderstanding the position.

4 THE CHAIR: I am.

5 MS KAUFMANN: So we have Officer X. Officer X was  
6 an undercover officer for however long. He finishes his  
7 deployment, he moves out of the Special Demonstration  
8 Squad, he goes into another role within the police force  
9 in his real name, because of course his cover name will  
10 never be used outside of his Special Demonstration Squad  
11 deployment.

12 His operations and activities in his real name may  
13 provide instances of when he has behaved in a racist  
14 way, when he has behaved in an abusive way. Unless his  
15 real name is known, none of that will come to light.

16 THE CHAIR: Forgive me, so this is a retrospective exercise  
17 that you look at what has happened on other occasions  
18 outside the Special Demonstration Squad to see whether  
19 or not during his or her time in the Special  
20 Demonstration Squad he or she displayed a racist  
21 attitude and, in the case of a man, an attitude which  
22 was disrespectful of women?

23 MS KAUFMANN: Precisely that.

24 What is likely to happen, sir, when the police  
25 officers give their evidence? Are they likely to come

1 look and say yes, we did this, we misbehaved, we are  
2 racist? No, they are not.

3 You are going to have to satisfy yourself on the  
4 basis of all the evidence that you hear as to whether or  
5 not you are dealing with an issue that is in part  
6 explained by racism on the part of officers or  
7 an abusive attitude towards women.

8 Obviously evidence about how they conduct themselves  
9 elsewhere is going to have a bearing.

10 If we were dealing with civil proceedings as opposed  
11 to criminal proceedings, then mere relevance would be  
12 sufficient for that material to come into your  
13 consideration and be admitted, and there is no reason  
14 why a different standard should apply here. If it is  
15 relevant then you should be able to take it into account  
16 and balance it amongst all the other evidence and  
17 considerations in the way you consider most appropriate.

18 So, yes, it is plainly relevant, but it will only  
19 come to light if the real names are given.

20 And we cannot gainsay whether or not an officer has  
21 engaged in wrongdoing, we are not in a position to do  
22 that. That is what this Inquiry is going to be looking  
23 into.

24 THE CHAIR: I am beginning to wonder what effective purpose  
25 would be served by exploring the careers post Special

1 Demonstration Squad of the 171 people who were part of  
2 it, to discover whether or not they conducted themselves  
3 inappropriately during that period with the Special  
4 Demonstration Squad.

5 The expansion of the scope of the Inquiry is in  
6 principle enormous. Its achievability, I think,  
7 diminishes in proportion to the extent to which it has  
8 expanded.

9 MS KAUFMANN: That is to assume that you will be in 171  
10 cases or however many there are looking at that --

11 THE CHAIR: No, but you want the real names of all 171  
12 officers, full stop?

13 MS KAUFMANN: So that if individuals have evidence to come  
14 forward with they can, but that is not to assume that  
15 you are going to be having 171 officers being subject to  
16 huge amounts of evidence about their conduct afterwards.

17 First question: is it relevant? If there is  
18 evidence on the part of officers after their deployment  
19 that they have behaved in certain ways, it is relevant.  
20 You yourself were talking earlier about a pattern of  
21 behaviour disclosed by convictions. It is no different.  
22 It may disclose a pattern of behaviour, a disposition,  
23 a particular bias or bigotry.

24 It is relevant. The next question is: is it going  
25 to be manageable for you to look at it? As I say, it is

1 going to be very unlikely that if you release all 171  
2 names you are going to get 4,000 police officers coming  
3 along in relation to each officer saying in respect of  
4 that officer they did X, Y, Z, W and F, such that the  
5 Inquiry will expand in this way. But what is entirely  
6 possible is you will get some evidence that will be  
7 very, very helpful to you in your deliberations in  
8 trying to find out who is telling the truth about what  
9 the officers did or didn't do in their deployment.

10 THE CHAIR: So the interest in favour of disclosing the real  
11 name here is the possibility that evidence about their  
12 post Special Demonstration Squad deployment might  
13 produce something which would inform the view of the  
14 Inquiry about what they did during their Special  
15 Demonstration Squad time?

16 MS KAUFMANN: Exactly. That is no different to why  
17 disclosure of the cover names is necessary, because the  
18 disclosure of an officer's cover name may produce  
19 evidence that that officer engaged in inappropriate  
20 behaviour when he was undercover. We don't know whether  
21 all of the officers did.

22 THE CHAIR: Hold on, think about it a moment. The  
23 disclosure of a cover name will indicate to a limited  
24 class of people that they were dealing with someone  
25 quite a long time ago who was operating under false

1 covers. That may well prompt evidence from them. They  
2 are interested in the subject, they call about it and it  
3 is what the Inquiry is looking into. But it is quite  
4 a different order of magnitude to say in relation to the  
5 post Special Demonstration Squad careers of 171 officers  
6 that something might turn up which is informative about  
7 their time in the Special Demonstration Squad.

8 Don't you see, the two weights are very different?

9 MS KAUFMANN: With respect, I don't see the difference. The  
10 issues are issues for this Inquiry. They are  
11 identifiable, they are known. Therefore the question is  
12 going to be: has this officer either engaged under his  
13 undercover identity in wrongdoing, or, in addition --  
14 and in addition has he engaged in similar patterned  
15 behaviour thereafter?

16 THE CHAIR: There is a difference in the two things. May  
17 I put it more simply than I have done so far.

18 In one, the first, we are asking what did he or she  
19 do?

20 In the second we are asking what did he or she do  
21 after belonging to the Special Demonstration Squad,  
22 which might tell us what their view was when they were  
23 doing what they did.

24 The two are radically different things.

25 MS KAUFMANN: Again, I question, why are they radically

1 different? As human beings our propensities are pretty  
2 well fixed and if an officer was engaged in racist  
3 behaviour after his deployment the likelihood is -- or  
4 it would certainly be relevant evidence from which you  
5 would be entitled to infer that when witness core  
6 participant A is telling you that that officer behaved  
7 in a particular way during the course of their  
8 operations, that they were displaying similar racist  
9 behaviours.

10 Or when you are trying to understand why certain  
11 decisions were taken and whether there was a racist  
12 motive, evidence of blatant racism later in their life  
13 is clearly going to have a bearing and be relevant to  
14 you when you are trying to understand why the deployment  
15 was settled upon or so forth.

16 There will be many explanations that you will be  
17 presented with as to why particular things happened in  
18 relation to Lawrence or whatever, but critical for you  
19 is going to be was this done because of institutional or  
20 overt racism?

21 And behaviour that displays racism, whether before  
22 or after, is plainly going to be of real significance in  
23 your understanding of the motives at the time.

24 THE CHAIR: I can readily understand where somebody has  
25 decided that, let us say, a black justice campaign

1           should be infiltrated. That person's motive is clearly  
2           going to come under close scrutiny and I can see that in  
3           relation to that person it may well arise that his or  
4           her later career needs to be examined.

5           But I think those cases are likely to be  
6           self-identifying, because it is they who will have made  
7           the decisions. To require every one of the officers, the  
8           great majority of whom will have had nothing to do with  
9           black justice campaigns or anything to do with  
10          circumstances which might give rise to a feeling that  
11          something had been done for a racial motive, to expose  
12          all of them in their real names is (a) not useful and  
13          (b) may well not be fair depending on the individual's  
14          circumstances.

15 MS KAUFMANN: We will come on to fairness in a moment, but  
16          it is not, as I say, just in relation to racist  
17          policing. It is also in relation to attitudes to women,  
18          which is just as important, and we don't know at the  
19          moment how many police officers were involved when  
20          undercover in such intimate relationships, we simply  
21          don't know.

22 THE CHAIR: I completely agree that the attitude of managers  
23          to the deployment of male officers in circumstances  
24          where they would come into contact with women and may  
25          form intimate relationships of a deceitful nature, that

1           what they said and thought at the time is something that  
2           the Inquiry has to try to get to the bottom of.  And  
3           there is some evidence about that already and there will  
4           be more, I do not doubt.

5           But how is the deployment of, let us say a manager,  
6           into the ports division of SO12 going to assist anybody?  
7           Or into counter terrorism, SO13 as was.  How is that  
8           going to assist anybody?

9  MS KAUFMANN:  What is going to assist is if a female officer  
10           who was working with that male officer in SO13  
11           experienced some similar abuse towards her.  Or if  
12           a female member of the public experienced similar abuse  
13           from that particular male officer.  That is what is  
14           going to enlighten us.  We just do not know.  But what  
15           I do submit is you are not likely to get an absolutely  
16           huge amount of material, but what you might get is  
17           relevant material which will assist.

18           That is something to put in the balance as an  
19           instrumental reason favouring openness.

20  THE CHAIR:  So you don't anticipate a huge amount of  
21           material, but some which will be relevant?

22  MS KAUFMANN:  Yes.  The very fact that you are liable to  
23           have material -- which may be relevant -- is itself  
24           a factor in favour of openness, an instrumental factor  
25           in favour of openness.

1           That is whistle-blowing.

2           Then we have career progression in and outside the  
3           force. This addresses the extent to which officers  
4           involved in wrongdoing progressed through the ranks.  
5           That is plainly a matter that is going to be of public  
6           interest.

7   THE CHAIR: It may be, but what does it have to do with the  
8           terms of reference?

9   MS KAUFMANN: Because -- well, one of points made by  
10           Mr Sanders is that this is outside the terms of  
11           reference, but in our submission that is not right  
12           because the terms of reference require you to, "Identify  
13           and assess the adequacy of the statutory policy and  
14           judicial regulation of undercover policing".

15           If that or any of it was inadequate, that may be why  
16           it is that an individual officer manages to progress  
17           through the ranks despite the fact that they have  
18           engaged in serious misconduct whilst they have been an  
19           undercover officer.

20           So it does, in our submission, fall within the terms  
21           of reference. It is important that you know about such  
22           rising through the ranks in order that you can address  
23           what needs to happen to make sure that that doesn't  
24           happen again in the future, whether that be by  
25           regulation, policy or what other ...

1 THE CHAIR: Hold on, if what has gone on in the Special  
2 Demonstration Squad is wrong and people had not been  
3 disciplined for it or put at a disadvantage in their  
4 future career, that is something which I can identify in  
5 the report and one hopes if anyone pays any attention to  
6 what I say, if I do make a recommendation about it, some  
7 attention will be paid to it.

8 How does it help me fulfil the terms of reference to  
9 look at the future careers of all these officers?

10 MS KAUFMANN: No, as I have said, it is if you identify that  
11 not only did things go wrong, but that in addition to  
12 that, individuals then rose through the ranks of the  
13 police force. Then that is identifying a further  
14 feature of something that has gone wrong. Not only that  
15 this all happened in the first place, but that actually  
16 mechanisms were not in place to pick it up and to stop  
17 those progressions.

18 That is plainly relevant to your terms of reference.

19 THE CHAIR: I think everybody knows that what went on within  
20 the Special Demonstration Squad was not widely  
21 broadcast.

22 Your assumption, I think, is based upon the premise  
23 that police career progression will be founded upon  
24 a detailed knowledge of what took place in an outfit  
25 that was not broadly known about.

1 MS KAUFMANN: We are not just dealing with the Special  
2 Demonstration Squad. We are dealing with the National  
3 Public Order Intelligence Unit, we are dealing with the  
4 unit where despite the introduction of Regulation of  
5 Investigatory Powers Act, all the safeguards under  
6 Regulation of Investigatory Powers Act in place to  
7 ensure that human rights were respected, despite all of  
8 that, Mark Kennedy, we know, did what he did. Other  
9 officers have been identified who also, despite the  
10 application of Regulation of Investigatory Powers Act,  
11 did what they did. We are not just dealing with  
12 a situation in which the Special Demonstration Squad's  
13 activities are --

14 THE CHAIR: They were not promoted, they left.

15 MS KAUFMANN: What we don't know is what happened to other  
16 officers. It is as though we already know the full  
17 situation. We don't know the full situation. We don't  
18 know what is going to come out.

19 THE CHAIR: I entirely agree, but this strikes me as being  
20 purely speculative, with respect, and unlikely to assist  
21 in getting to the truth about core matters.

22 MS KAUFMANN: In our submission it is not speculative, it is  
23 a critical part of your Inquiry to understand why those  
24 mistakes did not work, if they did not work, such that  
25 officers were promoted and to make sure that that

1 doesn't happen again in the future.

2 Again, in relation to officers that leave the force  
3 and undertake new jobs and new roles and new activities  
4 including in relation to private investigating, what  
5 mechanisms were put in place to make sure that those  
6 officers did not use or disclose information that they  
7 had acquired when they were undercover police officers,  
8 abuse those positions using similar techniques to those  
9 they used when they were undercover. All those issues  
10 are ones that this Inquiry should be looking at.

11 We know for example that Mark Kennedy when he left  
12 the police force went on and started doing some private  
13 investigation.

14 What was he doing? What checks and balances were in  
15 place to stop him abusing all the confidential  
16 information he had and all the techniques he had in  
17 these new posts?

18 Again, if you don't have the real names of officers,  
19 you don't know, because of course they will not be using  
20 their cover name once they move on. Then you are not  
21 going to be able to get to that information either.

22 THE CHAIR: I'm not sure that is true in all cases, but  
23 never mind.

24 I really am not inquiring into wrongdoing outside  
25 the Special Demonstration Squad, the National Public

1           Order Intelligence Unit and any other police undercover  
2           activity.

3   MS KAUFMANN:  So those are the instrumental reasons for real  
4           names, but even if we don't look at the instrumental  
5           reasons for disclosing real names, then there are,  
6           nonetheless, very strong public interest factors  
7           weighing in favour of disclosing those real names.  
8           Irrespective of any instrumental value.

9           The first point that I remind you of is  
10          paragraph 203 of the May 2017 ruling of  
11          Lord Justice Pitchford, which is in 142 of volume 7.  He  
12          says:

13          "I have the same dislike for a presumption that  
14          a real identity will not be disclosed in the absence of  
15          exceptional circumstances as I do for a presumption that  
16          a cover name will be disclosed in the absence of  
17          compelling circumstances to the contrary."

18          So the starting point is there is no presumption  
19          that real names will not be disclosed.  You have to, in  
20          the case of real names, conduct a proper balance.

21          Now when it comes to that balance, one of the  
22          factors that one has to put into the equation are the  
23          article 10 rights of the media.  What's in a real name?  
24          Well an awful lot is in a real name and an awful lot has  
25          been said about that by the courts as to what is in

1 a real name, and I don't need to repeat that.

2 Accountability. This is particularly strong, the  
3 need for accountability, in relation to any officer  
4 where there is already evidence of wrongdoing. For  
5 example HN58 and his managerial role in relation to the  
6 Lawrence inquiry.

7 THE CHAIR: That is putting it at this stage a little high.  
8 He has managerial responsibility for important  
9 decisions, exactly what happened and whether or not what  
10 he did amounted to wrongdoing is a matter for later  
11 determination.

12 MS KAUFMANN: So just because we are dealing with real  
13 names, we do not start by presuming that those real  
14 names will not be disclosed. There are still compelling  
15 interests that call for openness. So we have to weigh  
16 in the balance all the factor that fall to be considered  
17 against openness.

18 The primary consideration put forward on behalf of  
19 the officers is the promise of confidentiality. Now in  
20 our submission, the promise of confidentiality is of  
21 very limited weight in the context of this Inquiry.

22 THE CHAIR: If you are promised confidentiality before you  
23 undertake a dangerous assignment. It assumes very great  
24 weight. If you are promised confidentiality in relation  
25 to an assignment that creates no risk to you and you go

1           on and misbehave, it has no weight. It all depends on  
2           the circumstances --

3 MS KAUFMANN: It does. But in my submission there are some  
4           key circumstances that apply to all the officers in this  
5           case. That means the weight that falls to be attached  
6           to confidentiality is very low. Firstly --

7 THE CHAIR: It all depends, you can't make absolute  
8           statements.

9 MS KAUFMANN: Sir, I am going to make some absolute  
10          statements. You may disagree with them.

11 THE CHAIR: I am so sorry, of course you can. I will not  
12          necessarily accept them is --

13 MS KAUFMANN: You may well not accept them --

14 THE CHAIR: I should have phrased it better.

15 MS KAUFMANN: Firstly, none of the officers were guaranteed  
16          in absolute terms confidentiality, that is absolutely  
17          clear now. Some were not guaranteed confidentially at  
18          all, at most they can plead an implied promise of  
19          confidentiality but even in those circumstances it was  
20          qualified and it was qualified in ways made absolutely  
21          clear by the Cairo statement, the generic statement at  
22          tab 5, to the effect that they could never expect  
23          confidentiality where disclosure was required as  
24          a matter of law or judicial process.

25                 Now, I accept that those officers would not have

1 expected that this would be the judicial process in  
2 which that disclosure would fall to be made. They would  
3 never have expected that. Because nobody would have  
4 ever expected this Inquiry to have to take place because  
5 of the evidence of wrongdoing which has emerged.

6 But nonetheless that qualification extends to this  
7 process. They never expected confidentiality where the  
8 law required disclosure. Even for the circumstances of  
9 this case, therefore, one starts from the premise: do we  
10 require disclosure? Does the interest in openness  
11 require that we disclose?

12 That's the starting point. If in fact disclosure is  
13 required in the course of these proceedings, then the  
14 promise of confidentiality is actually not in any sense  
15 frustrated. It is entirely respected.

16 Second, the promise of confidentiality, like *Neither*  
17 *Confirm Nor Deny*, actually serves a particular purpose.  
18 It wasn't just given for no reason. It was given in  
19 order to assure the officers that they would be  
20 protected from any threats that they might face as  
21 a result of disclosure of their identities. But this  
22 Inquiry has the powers to do this just that, quite apart  
23 from respecting their confidentiality. As you have made  
24 clear, if there is a threat to the life or limb of an  
25 officer, you will not make disclosure. So the interest

1 in maintaining their confidentiality will be served by  
2 that particular power that you have.

3 And it will be served by whatever balance you decide  
4 to reach in respect of all the other factors that tell  
5 against disclosure. So actually there is nothing that  
6 the promise of confidentiality even if there was one  
7 adds that is not already catered for by your powers to  
8 take into account all the underlying countervailing  
9 interests against disclosure that the officers might put  
10 forward.

11 So that is why we submit that there really is  
12 actually nothing that is of substance in respect of  
13 promises of confidentiality. So we submit it is  
14 profoundly wrong, as Mr Sanders suggests, to start from  
15 the position that a promise of confidentiality is of  
16 such strength and quality that nothing short of  
17 a serious allegation of wrongdoing can defeat it.

18 That is completely the wrong starting point.  
19 Whether or not there has been wrongdoing is neither here  
20 nor there for the purposes of looking at the promise of  
21 confidentiality.

22 Another issue that has been put forward as a reason  
23 not to disclose real names is the impact on recruitment  
24 and retention. Now this may apply in some cases or  
25 others, but this is a general submission in relation to

1           that.

2           Firstly, and perhaps most importantly, as  
3           Lord Justice Pitchford himself said, this case is wholly  
4           exceptional. If disclosure is made in this case, in  
5           this Inquiry, of officers' real names, any future  
6           officer or any future individual who is thinking about  
7           whether to become an undercover officer is not  
8           rationally going to conclude, "My identity is going to  
9           be blown, it is likely to be blown", because of any  
10          disclosures in this Inquiry.

11          Because the whole purpose of this Inquiry is to  
12          identify what has gone wrong historically with  
13          undercover policing and make sure that that doesn't  
14          happen again.

15          In other words, we are not looking in the future to  
16          the likelihood of anything like this taking place again.  
17          In fact if this Inquiry does the job it should do, then  
18          we can say with almost certainty, no, we are not going  
19          to be dealing with another public inquiry into  
20          undercover policing in the foreseeable future.

21          So any officer or individual who is thinking of  
22          going into undercover policing will know that that  
23          standard promise of confidentiality, which will continue  
24          to be given subject to disclosure and judicial  
25          proceedings, is not going to be liable to lead to the

1 disclosure of their identities.

2 So in our submission, absent some very compelling  
3 evidence which we don't know about, having been  
4 presented to the Inquiry to show that in fact undercover  
5 police officers are drying up, the fact of disclosure in  
6 these proceedings is simply not going to have --

7 THE CHAIR: I think it is asserted that that is happening.

8 Just as I have seen it in other circumstances asserted  
9 that the frequent inquiries and disciplinary proceedings  
10 where firearms have been deployed by police officers has  
11 led to a shortage of volunteers for the firearms squad.

12 MS KAUFMANN: An assertion is in our submission simply not  
13 good enough. You would need to have compelling evidence  
14 which would demonstrate not only a very significant drop  
15 off in numbers but also a connection between that drop  
16 off and this Inquiry and the risk of disclosure.

17 THE CHAIR: The implication appears to be -- it is one which  
18 you may not entirely be happy with -- is that if there  
19 is such evidence and it is as a matter of proof or  
20 common sense tied to the fact of the Inquiry and the  
21 revelations occurring during it, then it rather becomes  
22 a factor in favour of confidentiality.

23 MS KAUFMANN: I am sorry?

24 THE CHAIR: If in fact there is evidence that the numbers of  
25 people volunteering for undercover work in police forces

1           nationally is declining, and if it can be tied to the  
2           occurrence of this Inquiry, then contrary to what you  
3           suggest it rather appears as if the promise of  
4           confidentiality is important.

5 MS KAUFMANN: That's why I said you will need evidence that  
6           demonstrates --

7 THE CHAIR: If there is, and I warn you that there might be,  
8           then the conclusion which is implicit in your  
9           submissions is that promise of confidentiality begins to  
10          achieve a weight that it didn't have before.

11 MS KAUFMANN: If that evidence is sound evidence that  
12          demonstrates both the drop off, so that they can't get  
13          sufficient officers to do undercover work, and that it  
14          is linked to fears of disclosure arising from this  
15          Inquiry, then rationally that is a factor that weighs in  
16          favour of confidentiality, yes.

17                If ...

18 THE CHAIR: Yes.

19 MS KAUFMANN: But putting that aside, the two key interests  
20          that both confidentiality and Neither Confirm Nor Deny  
21          seek to protect, safety of the officers and damage to  
22          the use of undercover investigative techniques, are all  
23          ones that can be catered for by your ability to look at  
24          in the individual case a particular risk to a police  
25          officer, in the individual case, a particular risk in

1 relation to the erosion of the utility of a technique  
2 from disclosure of a particular document or whatever.

3 Those are all factors that you can look at  
4 irrespective of having to give any additional weight to  
5 either Neither Confirm Nor Deny or confidentiality.

6 THE CHAIR: I have already told you that Neither Confirm Nor  
7 Deny is in the waste paper basket.

8 Confidentiality, you are beginning to get it out of  
9 the waste paper basket and put it into a position where  
10 it acquires greater prominence. I wonder whether you  
11 really intend that. Clearly you can't do.

12 But the promise of confidentiality is obviously  
13 conditional. Frankly it doesn't matter whether it is  
14 implied or expressed.

15 I doubt -- and I have not heard Mr Sanders on this  
16 yet and I was rather hoping to avoid these generalised  
17 submissions, but if it comes to it, I doubt that the  
18 promise of confidentiality is ever going to play a major  
19 part, save in circumstances where it supports other  
20 considerations like the risk of safety or, possibly in  
21 the case of some now elderly people, the disturbance to  
22 their remaining years.

23 But it all depends on the circumstances.

24 MS KAUFMANN: I agree.

25 Then other factors put forward to be weighed into

1 the balance, before we get to the risk of physical harm,  
2 are factors such as embarrassment or reputational damage  
3 arising from being linked to undercover policing at  
4 a time when there is in some sections of the press and  
5 media a negative view being taken in relation to its  
6 historical operations.

7 In our submission those factors where there is  
8 nothing more than that -- we are not talking about  
9 harassment, we are simply talking about a situation in  
10 which in some quarters an individual may be held in poor  
11 regard by virtue of the simple fact that they were an  
12 undercover police officer. In our submission those  
13 factors simply do not begin to weigh in the balance  
14 against the public interest factors.

15 THE CHAIR: Why in principle can they not play a part?

16 MS KAUFMANN: Because of the factors that tell in favour of  
17 openness, the strength of those factors.

18 THE CHAIR: You are not saying they can't, you are saying they  
19 don't in practice?

20 MS KAUFMANN: We are saying given the interests at stake  
21 here, given the interests at stake that favour openness,  
22 all of which I took you to, and given the weight to be  
23 attached to those, a concern about being held in poor  
24 regard by sections of the media because you were or your  
25 husband was an undercover officer do not begin to defeat

1 the public interest in individuals being named in the  
2 course of this Inquiry who were engaged as undercover  
3 police officers.

4 Just as there will be some people who take the view  
5 that their activities are a cause for criticism, the  
6 very fact that they were an undercover police officer,  
7 there will be many, many people who will take the view  
8 that they are to be praised for the work they did. But  
9 the very simply fact of just being held in opprobrium by  
10 some groups is in our submission absolutely no basis  
11 upon which to defeat the public interest in the media  
12 being able to report as fully as possible, the public  
13 interest of the public having confidence that this  
14 process is being conducted as openly as is possible so  
15 that confidence can be had in its process and outcome.

16 THE CHAIR: As I understand it, your submission is not that  
17 it is not a factor at all. But that it is one which in  
18 any case should be held to be of little weight?

19 MS KAUFMANN: It is plainly a factor. It was identified as  
20 a factor. It rationally is a factor because it is part  
21 of the article 8 interests of those officers or their  
22 families of course. Yes, this is why I am making the  
23 submissions I am at a general level now, because this is  
24 something that applies to all the cases.

25 Yes, it is our submission that it is not capable on

1           its own of being a factor that could outweigh the  
2           general interest in openness.

3   THE CHAIR: Right. That is a principled submission. It is  
4           not "it all depends on the circumstances"?

5   MS KAUFMANN: No.

6   THE CHAIR: It is a submission that factors such as  
7           embarrassment, a wish not to be disturbed, a wish to be  
8           left in peace, although factors cannot outweigh the  
9           factors that favour publication of the real name?

10   MS KAUFMANN: Absolutely. And that if factors such as  
11           those, which at the moment it would appear from your  
12           minded to position, if factors such as those are capable  
13           of outweighing the public interest in openness, then in  
14           our submission it is very clear that you are operating  
15           contrary to what Lord Justice Pitchford identified at  
16           paragraph 203 of his May ruling.

17           A presumption -- and a very, very strong one in fact it  
18           would seem to us an almost unalterable presumption in  
19           favour of not disclosing real names. Those factors will  
20           always outweigh.

21           We have a situation in which -- and we will come  
22           to it -- we have a deceased undercover police officer  
23           and we have a very, very low risk of any intrusion at  
24           all in relation to the wife and family and yet your view  
25           is real name not to be disclosed.

1 THE CHAIR: May I defend myself? First, this is a minded to  
2 note. It is not, as you have seen by my indication of  
3 an alternative possibility in the case of HN58,  
4 a decision.

5 I have indicated what on the material I have  
6 considered so far, not including your submissions, what  
7 I am minded to do -- not including your oral  
8 submissions, I have read your written ones of course.

9 Secondly, to say that I have somehow arrived at  
10 a presumption that the real name will not be disclosed  
11 is not right. I have indicated in the statement that  
12 I made this morning that in the case of deployed  
13 undercover officers I expected that the application of  
14 Lord Justice Pitchford's principles would produce that  
15 outcome in most cases.

16 But that is very different from saying I start from  
17 a presumption, I don't.

18 MS KAUFMANN: I am glad to hear that from you, sir.

19 But our position remains that, 1, there should be no  
20 presumption and, 2, there are certain balances that can  
21 be struck at the outset, and where the issue is one of  
22 interest on the part of the press or some criticism in  
23 the press, or by individuals on the internet, of the  
24 fact that somebody was an undercover police officer,  
25 that cannot, simply cannot, outweigh the interest in

1           openness that arises from the seriousness of the issues  
2           that are to be explored in the course of this Inquiry,  
3           the interest in assuring the public have confidence in  
4           it. The interests of the press in being able to report  
5           meaningfully. There is important in a name and these  
6           sorts of factors simply are not capable of weighing  
7           contrary in the balance.

8           Can we move up the scale then to situations where  
9           there is a concern about something more invasive, more  
10          intrusive? So, for example, that there may be serious  
11          expressions of opprobrium and allegations of wrongdoing  
12          being made against a particular officer, or a particular  
13          officer being confronted by individuals who feel angry  
14          in respect of allegations of misconduct that have  
15          arisen.

16          Firstly, thus far the only people who have been in  
17          any way directly confronted have been individuals  
18          against whom serious allegations of wrongdoing are made.

19          So where an individual simply was an undercover  
20          police officer but there are no allegations of serious  
21          wrongdoing. There is no evidence, that we know of, to  
22          show that those individuals have been the target of that  
23          kind of negative confrontation at all.

24          So when it comes to assessing the likelihood of an  
25          individual being subject to that kind of behaviour, in

1           our submission the right starting point is it's not  
2           going to happen unless that individual is somebody who  
3           once their cover name is revealed is going to have been  
4           identified as somebody who is alleged to have engaged in  
5           serious wrongdoing.

6           If that is the case and there are allegations  
7           against that individual that they have engaged in  
8           serious wrongdoing, then in our submission there is  
9           nothing wrong with that person being confronted by their  
10          behaviour. There is something wrong with that person  
11          being subjected to violence, unquestionably. There is  
12          something wrong with somebody being subjected to any  
13          greater risk obviously, but for that person to be  
14          subjected to a confrontation with somebody who has been  
15          profoundly deceived and hurt and -- well, you have seen,  
16          you have read some of the accounts of the women. Things  
17          that have happened to them which have had the most  
18          profound consequences for decades in their life. For  
19          them to be confronted by that, why not?

20        THE CHAIR: You can't, I think, have been listening.

21          If something of that kind has occurred, I have  
22          acknowledged, I repeat, that those people have  
23          a compelling right to know the real name of the  
24          individual who has interacted with them. In that  
25          balance, the fact that that individual may, once his or

1 her name has been disclosed, be exposed to unfavourable  
2 criticism or even a degree of confrontation will count  
3 for nothing.

4 MS KAUFMANN: I have not misunderstood you. I have well  
5 understood you, but I am now dealing with the question  
6 whether or not you require the disclosure of real names.  
7 One of the arguments against that is that people will be  
8 subjected to harassment. Officers are relying upon what  
9 happened to Mr Boyling, what happened to Mr Lambert.  
10 I am making two points here.

11 Firstly, what happened to Mr Boyling and Mr Lambert  
12 happened because of the alleged wrongdoing. So you  
13 cannot translate from what happened to them what will  
14 happen to an officer against whom there is no allegation  
15 of wrongdoing.

16 Point 1 --

17 THE CHAIR: Forgive me, you cannot reasonably extrapolate  
18 from those two instances that those are the only  
19 circumstances and the only risk that face an officer  
20 whose real name is disclosed.

21 MS KAUFMANN: I absolutely accept that. That falls then to  
22 be dealt with where there is evidence that they face  
23 more serious risks, and that is something that can be  
24 catered for. I am dealing with the situation where all  
25 an officer can come along and put forward -- as has

1           happened with many of these officers -- is, "I am  
2           concerned that I am going to be harassed in the way that  
3           Jim Boyling was harassed and Bob Lambert were harassed".

4           If there were other reasons and there is other  
5           evidence to suggest that they face a particular risk,  
6           that is an entirely different matter.

7           My submissions now are: if what I'm saying is  
8           dependant on what happened to Bob Lambert and  
9           Jim Boyling, then those are not reasons not to disclose  
10          their real name. Because in the case of Bob Lambert and  
11          Jim Boyling these things happened because of the serious  
12          allegations of wrongdoing. Hence, if in fact the  
13          officers who want to be corrected were themselves  
14          engaged in wrongdoing and the disclosure of the cover  
15          name is going to bring that out, and the disclosure of  
16          their real name is going to mean that they can be  
17          confronted, then so be it for the reasons that you have  
18          already given.

19          If those officers are not subject to wrongdoing  
20          allegations, then nothing that happened to Bob Lambert  
21          and nothing that happened to Jim Boyling should give  
22          them and should give you concern that they will be  
23          treated in the same way. Because there is simply no  
24          evidence that that happens.

25          Individuals who have hurt and betrayed those upon

1           whom they spied understandably have given rise to huge  
2           concern and a desire to find out the truth and confront.  
3           There is no evidence whatsoever that individuals who  
4           have not done wrong to others have been put into the  
5           same situation. So that's why we submit that reliance  
6           upon Bob Lambert and Jim Boyling's situation, again that  
7           sort of harassment should not be a reason to impose  
8           a restriction order. So that is another point of  
9           general principle that we make.

10           So what that really leaves is risk of physical harm  
11           and serious article 8 interference. Or I should say in  
12           relation to concerns that family members have about  
13           disclosure and the impact it will have upon them, we of  
14           course recognise that family members are caught up in  
15           this entirely innocently, but our submission again is as  
16           a matter of principle their understandable desire not to  
17           be caught up in and be caused upset by these allegations  
18           coming into the public domain is not a justification for  
19           a restriction order.

20           Take, for example, an officer who has been engaged  
21           in intimate sexual relations whilst undercover, who as  
22           a consequence has completely betrayed his partner in so  
23           doing, the disclosure of which is obviously going to  
24           give rise to very serious upset on the part of the  
25           partner, well, we understand that. The position is that

1           that cannot override the public importance of those  
2           individuals being named.

3           As you will have seen in our submissions we do draw  
4           an analogy between what is going on recently in the  
5           public at large in relation to the Weinstein allegations  
6           and allegations that are coming out left, right and  
7           centre about sexual abuse by public figures. It is  
8           a cost of course to all their families but the public  
9           interest in these people being held to account overrides  
10          that and that is our position, again as a matter of  
11          general principle.

12          So then we come to the position in relation to cases  
13          where it is alleged that the individual will be at risk  
14          of physical harm or serious article 8 interference.

15          By that I mean that there will be a risk through  
16          disclosure of their real name of  
17          psychological/psychiatric harm.

18          Now where disclosure would put somebody's life or  
19          limb at risk and engage articles 2 and 3 of the  
20          Convention, where that is the case then it is accepted  
21          that would be a basis upon which a restriction order  
22          would properly be imposed of.

23          But precisely because of that, the cogency of the  
24          evidence is critical. The question of whether there are  
25          alternative means to protect the individual is also

1 critical --

2 THE CHAIR: I was going to ask you what those might be.

3 MS KAUFMANN: What the alternative means might be?

4 THE CHAIR: Yes.

5 MS KAUFMANN: I think that is going to vary with the

6 circumstances. I'm not able myself necessarily to say.

7 The most extreme situation would be that somebody is

8 going to have to go into a witness protection programme.

9 Other less extreme situations may involve officers being

10 moved or so forth. But I mean unless one knows the

11 nature of the risk and the circumstances of the risk

12 then it is impossible to know how it can be managed.

13 But certainly those factors must be included.

14 But for our purposes, and we can't gainsay that, we

15 are never going to be told about that, but what we do

16 submit is that is something that has to be taken into

17 account. And --

18 THE CHAIR: How would such measures protect against serious

19 psychiatric harm?

20 MS KAUFMANN: No, I'm talking here about physical harm.

21 Psychiatric harm, that is an entirely different

22 matter and therefore again the question --

23 THE CHAIR: Are you saying that in relation to those

24 individuals and groups which did and may still do pose

25 a risk to the life and limb of an officer, that these

1           measures should be taken in preference to keeping the  
2           real and cover name of the officer secret?

3   MS KAUFMANN:  What I submit is it ultimately has to be  
4           a balance.  As I say, I don't know what the measures  
5           are.  If the measures are as extreme as putting somebody  
6           on a witness protection programme, then it would be open  
7           to you to decide which way to go in relation to that.

8           That would depend upon how important that individual  
9           officer is in relation to the Inquiry.

10           There are all sorts of factors to be taken into  
11           account, but given that non-disclosure of cover name,  
12           non-disclosure of real name means necessarily that  
13           really it is going to be impossible to get to the bottom  
14           of that officer's activities, because nobody can come  
15           forward, then it has to be an in-the-round assessment by  
16           you looking at how important that evidence is overall to  
17           the matters that you have to look into and make findings  
18           about.

19           Now it may be, for example, that at the beginning of  
20           the Inquiry you are unable to say that that particular  
21           officer's position was of central importance.  It may be  
22           things come out in the course of the Inquiry that lead  
23           you to understand that actually this officer's role was  
24           a lot more significant than I had understood, and at  
25           that stage you might revisit where the balance lies.  So

1           you might at that stage --

2   THE CHAIR:  Forgive me, it almost certainly would have  
3           nothing to do with the significance of the role of the  
4           officer.  You appear to be getting close to submitting  
5           that if the officer's role is significant then even in  
6           cases in which there is a risk of life or limb, witness  
7           protection measures should be taken in preference to  
8           concealing the name of the officer.

9   MS KAUFMANN:  No, what I have just submitted is at the start  
10           of the Inquiry you may consider the balance clearly  
11           comes down in favour of restriction order, but the  
12           Inquiry may move down the substantive track and you come  
13           to understand something about this officer's role which  
14           makes you think, "We need to get to the truth of his  
15           role and we can't do it unless there is disclosure".  At  
16           which stage you may decide to revisit the balance, at  
17           that stage.

18           None of us can gainsay the circumstances, but it is  
19           possible you might consider some way down the line,  
20           "Actually, in relation to this officer, I think we  
21           should look at alternative measures".  They are very  
22           extreme but the alternative is very extreme.

23   THE CHAIR:  At the moment I'm only concerned with whether or  
24           not to make restriction orders.  That's what these  
25           hearings are about.

1 MS KAUFMANN: Yes.

2 THE CHAIR: Not what might happen later on under my powers  
3 under section 20(4).

4 We have shorthand writers who have a hard task, and  
5 I have been asked that if we are going to go beyond 4.00  
6 they need a break.

7 Now if your general submissions are now about to be  
8 concluded then I will rise now and go on to your  
9 specific submissions tomorrow morning.

10 MS KAUFMANN: I have a little bit more, because I want to --

11 THE CHAIR: This is slightly what I feared.

12 MS KAUFMANN: I want to look into the process by which you  
13 look at these critical questions of risk to self, either  
14 by virtue of the individual psychiatric state or risk  
15 arising from third parties and how you assess that,  
16 given its central role in the way the Inquiry moves  
17 forward. Because if restriction orders are imposed then  
18 we know the material can't come out and I want to look  
19 at disclosure.

20 I hear what you said this morning, and I hear your  
21 plea that everybody step back as it were from seeking  
22 more disclosure in relation to this exercise. I am  
23 afraid I'm not going to do that. I'm going to be doing  
24 quite the reverse and submitting that if you are going  
25 to do this process fairly and in a way that gets the

1 answer right, you need to do more by way of disclosure.  
2 And I would like the opportunity to make those  
3 submissions and make them good. And then we can get on  
4 to the individual cases, which aren't going to then take  
5 an inordinately long time because I have set out our  
6 stall in relation to those.

7 THE CHAIR: You have had since about slightly after 2.30,  
8 I make no complaint about it your submissions are  
9 principled and interesting. But there are others who  
10 may have submissions to make and in particular they have  
11 different principles to expand. Very much what I feared  
12 would happen is happening. We are devoting an enormous  
13 amount of time and effort not to deciding individual  
14 restriction orders but to questions of grand principle.

15 MS KAUFMANN: Well those principles inform the restriction  
16 orders. You have asked me what is your principal  
17 position. I have informed you what is our principal  
18 position in relation to a number of the factors that  
19 then fall to be put into the balance in the individual  
20 cases.

21 THE CHAIR: You very helpfully tell me that. How much  
22 longer do you need?

23 MS KAUFMANN: I need probably about another half an hour  
24 maximum.

25 THE CHAIR: We will rise then for five minutes to enable the

1 shorthand writer to have a break and we will continue  
2 until you finish.

3 (4.06 pm)

4 (A short break)

5 (4.10 pm)

6 THE CHAIR: Yes.

7 Yes, Ms Kaufmann, I'm sorry, I was waiting for you  
8 to restart.

9 MS KAUFMANN: I am sorry.

10 THE CHAIR: No, no.

11 MS KAUFMANN: I was coming to look at the two considerations  
12 of risk of harm from others or in relation to one's  
13 psychological state or the officer's own psychological  
14 state.

15 That as these factors are ones which are capable of  
16 leading to a restriction order that is going to  
17 potentially involve non-disclosure of real and cover  
18 names. So real names in any case where there is no  
19 mosaic effect but real and cover names where you  
20 consider that even disclosure of the cover name will  
21 lead to the identification of the real name, then we are  
22 dealing with a situation where the potential outcome is  
23 that in respect of that particular officer's activities  
24 it will be impossible to really get to the truth,  
25 because of the necessity for a restriction order.

1           These are the cases where the most anxious scrutiny  
2           is plainly going to be required and where the evidence  
3           therefore has to be at its most cogent and compelling,  
4           such that you can safely rely upon it to draw the  
5           conclusion which will have such a negative impact upon  
6           your ability to get to the truth.

7           I just want to outline the concerns we have in  
8           relation to the evidence that we have had so far,  
9           because of course it may well be that we or our clients  
10          have a lot of useful things to say in relation to the  
11          risk assessments. What we want to ensure is that  
12          insofar as we do have useful things to say, we are given  
13          that opportunity whenever it is possible and appropriate  
14          to do so.

15          Before I come on to that, I just want to say  
16          something about the generic risk assessments that you  
17          have been presented with. So, for example, you have  
18          been presented with an assessment in tab 1 of the  
19          generic materials. It is the risk assessment briefing  
20          note. If we turn to page 13 we can see that the groups  
21          at the first bullet point at paragraph 5.3, there is an  
22          identification of groups being obviously relevant and  
23          significant in assessing risk, because there is a far  
24          more physical and psychological risk in infiltrating  
25          certain extreme right wing or Irish groups more recently

1           when compared with, say, the Socialist Workers Party,  
2           et cetera.

3           At 8.3 and 8.4 there is again a reference to Irish  
4           groups.

5           At 10.1 there is a reference to:

6           "Despite the Special Demonstration Squad closing in  
7           2008, there remains a very real physical risk for  
8           officers who were deployed in a number of groups,  
9           including extreme left wing groups such as Red Action or  
10          Anti-Fascist Action ..."

11          And then there are Irish groups and extreme right  
12          wing groups. We would just caution the Inquiry before  
13          it relies upon this sort of evidence without any  
14          foundation supporting these assertions of risk, because,  
15          for example, Mark Kennedy was involved in Anti-Fascist  
16          Action and his identity has been known about for some  
17          very, very considerable time and therefore there is  
18          material -- real material and real evidence -- that the  
19          Inquiry can get its hands on which can inform the risk  
20          assessment. That is officers who were involved in such  
21          groups and whose identity has been disclosed, and it is  
22          important that those steps are taken.

23          Then, for example, a general statement "Irish  
24          groups". We don't know which groups they are, but we do  
25          know, for example, that Rick Gibson, for example, was

1 involved in Troops Out, and we deal with that at  
2 paragraph 80 of our submissions. It is not a situation  
3 where again there is any clear evidence that there is  
4 any risk arising from a group such as Troops Out.

5 So we would submit there has to be a great deal of  
6 care involved in relying upon these generalised risk  
7 assessments.

8 Another reason to be very cautious about what is  
9 being said in terms of risk can be seen from the  
10 statements that we do have from, for example,  
11 Bob Lambert and Jim Boyling. Those are in the generic  
12 submissions at 19 and 20.

13 I don't need to go to those, but these have been  
14 relied upon as showing that the officers were subjected  
15 to threats and so forth, whereas when one actually looks  
16 at the statements there is no evidence whatsoever that  
17 there were any physical threats posed to those  
18 particular officers, as opposed to a group of angry  
19 people in relation to Mr Lambert expressing their anger.

20 In relation to Mr Boyling, you will have seen the  
21 statement that we provided to you which responds to the  
22 part of his statement at tab 20 --

23 THE CHAIR: Has that statement now been redacted, if  
24 necessary --

25 MS KAUFMANN: No, it hasn't.

1 THE CHAIR: -- for general distribution?

2 MS KAUFMANN: No, it hasn't. So I'm not going to refer to  
3 its contents at this stage. It will be redacted  
4 afterwards, but I know that you have had an opportunity  
5 to read it.

6 THE CHAIR: Yes, I have.

7 MS KAUFMANN: And you will see a very, very different  
8 account given of the meeting that is described by  
9 Jim Boyling. It is just an instance of where specific  
10 allegations that are relied upon to inform a risk  
11 assessment, if left alone, can disclose a very distorted  
12 picture and the importance of your having an opportunity  
13 to understand a fuller picture and come to a more  
14 informed view as to what the circumstances were that are  
15 said to give rise to the particular risk.

16 THE CHAIR: It will come as no surprise, I hope, to you,  
17 that even though beforehand I had only read the  
18 statement of Boyling, I was not impressed that he or  
19 anyone in a similar situation to him faced anything that  
20 was objectionable from Mr Healey(?), whose name I think  
21 is in the public domain anyway, so that's why I have  
22 mentioned it.

23 Although I welcome the statement which I have seen,  
24 it doesn't in any way alter the decisions that I have  
25 made or am minded to make about other people.

1 MS KAUFMANN: Yes. It was an instance of where something  
2 was said that we were able to respond to.

3 THE CHAIR: Certainly.

4 MS KAUFMANN: It was a disclosure that enabled us to put  
5 a different side of the picture and we simply served it  
6 to illustrate how important that can be.

7 THE CHAIR: I readily understand it. Having read the  
8 statement, I have found it of interest and I have no  
9 reason to disbelieve its contents. But this is to  
10 elevate a small example in relation to a case that I'm  
11 not actually considering, because the name of the man is  
12 in the public domain already, into a general proposition  
13 that may not be entirely justified.

14 MS KAUFMANN: Sir, you will understand that we have no  
15 idea --

16 THE CHAIR: Of course.

17 MS KAUFMANN: -- because we have thus far had no disclosure  
18 which lets us know, for example, in relation to officers  
19 that you are currently considering in the current batch  
20 what groups they infiltrated and therefore whether we do  
21 have something we might say in relation to the risk  
22 assessment. We simply don't know. There may be  
23 officers who are infiltrating groups who have absolutely  
24 nothing to do with my clients, but we don't know that so  
25 all we can do, as it were, is feel around in the dark

1           and try and hit the right target.

2   THE CHAIR: I understand that. That would be thoroughly  
3           unsatisfactory were we in the substantive phase. At  
4           this stage of the Inquiry it may simply be that it is  
5           not possible to do a Rolls Royce job because we have to  
6           operate on the basis of what can be produced to me for  
7           me to consider, rather than on the basis of a full  
8           investigation into all the facts. That is the job of  
9           the substantive part of the Inquiry.

10   MS KAUFMANN: Process feeds into substance, sir. If you get  
11           it wrong and you impose restriction orders which prevent  
12           us and you from getting to the truth, then that will  
13           have a very damaging effect upon the substantive part of  
14           the Inquiry. And that is why --

15   THE CHAIR: Sorry, I agree wholeheartedly with that. You,  
16           I think, acknowledge that I will have seen in relation  
17           to individuals far more than you can possibly know or be  
18           told at this stage in the proceedings.

19           I have to ask for a degree of trust about decisions  
20           of a kind that I cannot fully reveal the reasons for.

21           Secondly, a point I have made already and I'm bound  
22           to repeat it, I repeat it now, if this Inquiry is to  
23           make progress so as to be able to report in a reasonable  
24           time then pragmatic decisions have to be made.

25   MS KAUFMANN: Yes. I do appreciate that.

1           Sir, you will appreciate that so far as a degree of  
2           trust is concerned, that is something that is going to  
3           be very difficult to simply ask for from my client base,  
4           because they, I am afraid, have been so deceived already  
5           by the state, as they see it, that it is simply  
6           unrealistic to ask them to trust and --

7   THE CHAIR:  Forgive me.  I understand that.  And I know  
8           perfectly well that I have to earn of trust of as many  
9           people as I can that I will conduct this Inquiry  
10          thoroughly and fairly.  I can only, in the end,  
11          demonstrate that by decisions and eventually the report.

12          I can't satisfy everybody all of the time, I am  
13          fully aware of that.

14   MS KAUFMANN:  Insofar as any of your decisions about  
15          restriction orders concern allegations of risk arising  
16          from the conduct of any of my clients -- past conduct  
17          and the future risk that they pose -- and insofar as  
18          disclosure about any aspects or features of their past  
19          conduct are being relied upon as giving rise to a future  
20          risk, and insofar as disclosure of those is not going to  
21          lead to the identification of the particular officer,  
22          then to earn their trust but also to deal with this  
23          fairly you need to disclose as much as possible of that  
24          material.  So that, just as we were able to in the case  
25          of Mr Healey, they can make representations about it and

1           they can say and explain or contradict the allegations  
2           that are being made.

3           We don't know, because we haven't been told, what  
4           groups these individual officers infiltrated, but if  
5           they did infiltrate our groups and if disclosure is not  
6           going to jeopardise the officers, then they should be  
7           told. We do not accept for a moment that in every case  
8           disclosure of the group that was infiltrated and that  
9           poses a future risk or disclosure of any particular  
10          allegations upon which you are being invited to make  
11          that assessment of risk are based is going to  
12          automatically lead to the identification of a particular  
13          officer.

14 THE CHAIR: I can do that in way which I think your  
15          non-state core participants would find profoundly  
16          unattractive and I think would be probably wrong in  
17          principle, which is to say simply, "We are interested in  
18          these groups ..." I think you know the numbers but not  
19          perhaps all of the identities of all of the groups, I'm  
20          not entirely sure what has been made public but we could  
21          make public a list of all of those groups or at any rate  
22          the great majority of groups and say:

23                 "Please, let me know anything about the activities  
24                 of those groups, past and current, and whether they pose  
25                 or might pose a risk to anybody who had infiltrated

1           them."

2           I might be inundated by a whole lot of material,  
3           I suspect I would not be, but I might be, and I would be  
4           asking people to speak blind. I'm not minded to do  
5           that. I think they need to be told what the Inquiry  
6           needs to hear from them before inviting them to make  
7           general statements to the Inquiry.

8 MS KAUFMANN: We are confusing substance with process again.

9           At this stage if you have information which is  
10          relevant to your risk assessment, relevant to your  
11          decision about whether you are going to shut down this  
12          aspect of the Inquiry because you will protect the  
13          identity of the officer, a critical decision -- one of  
14          process but one which will affect substance and outcome.  
15          If you are going to do that, on the basis of evidence of  
16          risk that our clients can answer to, if given an  
17          opportunity, then unless to give them that opportunity  
18          will put at risk the officer who is seeking protection,  
19          that is it will disclose the identity and defeat the  
20          purpose of the application for a restriction order, then  
21          you should do it. In fairness to them but also in  
22          furtherance of the interests of this Inquiry, whose  
23          interests are served by you getting to the truth and not  
24          by you shutting down an avenue towards the truth by  
25          imposing a restriction order when the evidence does not

1 justify it.

2 So I understand your concerns, you have come into  
3 this already way down the line but actually this aspect  
4 of the process is one of the most important. Because it  
5 is at this stage that we know what evidence you are  
6 going to be able to hear to get to the truth later. So  
7 I do insist that we need far more material if it is  
8 disclosable to us than we have had to date.

9 Also, when it comes to the psychological condition  
10 of a particular officer, we do not accept that we can be  
11 told absolutely nothing whatsoever about their state of  
12 mind. We could be given a gist so that we can make some  
13 representations. There is no reason why we can't be  
14 given a gist about the particular state of mind of an  
15 officer, the particular risks. When we come to the  
16 individual applications I will show you that we know  
17 nothing, we can't make any meaningful representations  
18 whatsoever.

19 If that officer is an officer that we are concerned  
20 with, who infiltrated our groups, we should have an  
21 opportunity to say something.

22 THE CHAIR: So what do I have to do? I have to conduct  
23 a risk assessment provisionally on the basis of what  
24 I am told by and on behalf of the officer. Then filter  
25 it so as to see what can be said to the public at large,

1           and then invite submissions on that and then, and only  
2           then, make decisions about restriction orders?

3   MS KAUFMANN:   Yes.

4   THE CHAIR:   In which decade do you wish this Inquiry to  
5           report?  That is not a facetious question.

6   MS KAUFMANN:   If this Inquiry is going to get to the truth,  
7           it is going to have to engage in a fair process that  
8           enables it to reach the right decision on these  
9           restriction order cases.

10           Now some are going to be much easier than others.  
11           There are going to be many cases unquestionably where we  
12           are not dealing with a situation where the officer is at  
13           risk to life or limb.  In those cases we don't have to  
14           engage in this process.  It is those cases where you are  
15           genuinely being invited to address a risk to life or  
16           limb or a serious psychiatric concern arising from  
17           disclosure that we are going to have to engage in this.

18           Again, I don't know which of these officers are  
19           putting forward evidence which arises in relation to my  
20           group of clients.  I don't know.  But if it arises in  
21           relation to the infiltration of an extreme right wing  
22           group, which I don't represent, and which are not core  
23           participants, then, sir, you don't have to be concerned  
24           with that.  So it is actually much more focused than you  
25           are suggesting.

1           Yes, it is absolutely critical you get this right.  
2           It is absolutely critical, because it is the key that  
3           opens the door to you getting to the truth and if you  
4           get this wrong then you are simply not going to get  
5           there.

6           And particularly in circumstances where we know that  
7           the police officers are going to say, "You can't release  
8           the cover names because of the mosaic effect". In this  
9           modern world where everybody is online, police officers  
10          are online, they can easily be tracked down. Unless you  
11          make a proper risk assessment then you are going to be  
12          liable in many cases to be closing the avenue to the  
13          truth down by neither disclosing real names nor cover  
14          names.

15          Sir, those are our submissions on disclosure.

16   THE CHAIR: And on principles generally?

17   MS KAUFMANN: And on principles generally.

18   THE CHAIR: Thank you. You have finished by 4.30, which is  
19          excellent.

20          We will resume the open hearing at 10.30 tomorrow.

21   (4.30 pm)

22   (The hearing adjourned 10.30 am, Tuesday, 21 November 2017)

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