IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON BEHALF OF

THE NON-POLICE, NON-STATE CORE PARTICIPANTS

RE THE CHAIRMAN'S 3RD MINDED TO POSITION ON HN58

INTRODUCTION

1. The NPSCPs submit that the Chairman's position set out in his 3rd minded to note in relation to HN58, dated 20 December 2017, is:
   a. unsustainable on a correct application of the legal test;
   b. founded on irrelevant considerations; and/or
   c. fails to take into account relevant considerations.

2. The NPSCPs have explained in previous submissions why the redactions to the material disclosed in relation to HN58's anonymity application are excessive[1]. This position remains unchanged and those submissions remain. The NPSCPs maintain their request for disclosure as set out in Annex HN58 to their submissions of 5 October 2017[2].

THE BASIS OF THE MINDED TO POSITION

3. The Chairman is minded to make a restriction order in respect of HN58's real and cover names on the basis of "a small but real risk" to HN58's personal safety[3]. The Chairman concludes that to expose HN58 to this risk by publishing either his real and/or cover name(s) would constitute a "disproportionate and unjustified

[1] Annex HN58 to the NPSCP submissions dated 5 October 2017. See also the NPSCP submissions dated 11 January 2018 in response to the consultation about disclosure in the context of anonymity applications.
[2] This request was repeated in correspondence to the Inquiry dated 6 November 2017.
[3] 3rd minded to note in relation to HN58, dated 20 December 2017, paragraph 3.

interference with his right to respect for his private life – his physical integrity – under article 8 ECHR."[4]

4. On the Chairman's own reasoning, the magnitude of the risk is small. At the hearing on 21 November 2017, it was said by Ms Sikand on behalf of Peter Francis:

> "Mr Francis knows who the groups were that HN58 infiltrated and can say that he agrees with the risk assessment that any risk of harm is the lowest it can possibly be in the circumstances."[5]

5. These references are to the risk of harm arising out of publication of HN58's real name. The risk arising out of publication of his cover name alone must logically be even smaller, given that, where "an officer has retired from undercover deployment with the concealment of the link between their real and cover identities preserved, there is no obvious reason, from a security standpoint, why the cover name should not be revealed, provided that measures are taken calculated to ensure that the cover name is not thereafter linked to the real identity and personal details of the witness."[6]

6. In short, the risk to be weighed in favour of restriction of the real name is small and that in favour of restriction of the cover name even smaller.

THE FACTORS TELLING AGAINST RESTRICTION

7. Notwithstanding the small level of risk, the Chairman concludes that taking that risk would be unjustified and disproportionate. Different considerations arise in relation to real and cover names. These are addressed separately below. In neither case is the Chairman's minded to position justified.

Real name

[4] Ibid paragraph 8.
[5] Transcript of hearing p.85 lines 4-7.
[6] Ruling of Pitchford LJ, 2 May 2017 paragraph 198.

8. The Chairman has, elsewhere, acknowledged the public interest in senior police officers in general[7], and HN58 in particular[8], accounting for their managerial decisions and actions publicly and in their own name. This is plainly right, for all of the reasons identified at paragraphs 8, 13-15, 100, 108(b), (c), (d), (e) and (g), 118-122 of the NPSCPs' written submissions of 5 October 2017. This includes, but is not limited to, the importance of investigating the extent to which officers exploited their knowledge, skills, position and contacts gained whilst in the SDS to pursue lucrative follow-on careers in private security / corporate intelligence[9]. It is also necessary in furtherance of the significant public interest identified by the previous Chairman at A.3(3)-(6) at p.78 of his legal principles ruling of 3 May 2016, namely, the ability of the Inquiry to "allay public concern in its subject matter, process, impartiality and fairness" by:

   a. informing the public and the media about its proceedings;
   b. permitting public debate about matters of national interest;
   c. achieving public accountability for police services; and
   d. providing transparency for the conclusions and recommendations of the Inquiry.

9. These are significant and weighty public interests, particularly in the case of an officer whose activity, as a manager, the Chairman recognises to be "one of the key things" he has to investigate[10]. This officer's activities are at the heart of the Inquiry. The Chairman has rightly recognised the importance of HN58 giving evidence about his managerial role openly and in a way that will enable the public to see his demeanour. That is right and nothing in these submissions should be taken as detracting from that. However, there is also very considerable public interest in transparency as to his name, which has not been afforded proper weight.

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[7] Chairman's opening statement 20 November 2017 paragraph 9(ii).

[8] Transcript of hearing, 21 November 2017, p.65 line 23- p.66 line 3; p.80 line 19 – p.81 line 3.

[9] See paragraph 108(d) of the NPSCPs' 5 October 2017 submissions; paragraph 23 of the NPSCPs' response to the consultation on disclosure in relation to anonymity applications; and the third witness statement of Donal O'Driscoll, dated 11 January 2018.

[10] Transcript of hearing 21 November 2017, p.65 lines 13-15.

10. It is respectfully submitted that the Chairman's assessment that this weighty public interest must yield to a small risk of harm is unjustified and suggests that the wrong test has been applied. In Re A and others' Application for Judicial Review (Nelson Witnesses) [2009] NICA 6 Kerr LCJ made clear that "a risk falling short of that required to activate article 2 of ECHR falls to be assessed simply as one of a number of factors in an even-handed evaluation of competing interests rather than as a matter which requires to be offset by compelling justification."[11] The NPSCPs submit that on a proper application of this test, the public interest in favour of openness as to this officer's real (and cover) name strongly outweighs the small risk of harm in this case.

11. The NPSCPs note that in relation to HN15, the Chairman found the public interest in disclosure of that officer's real and cover names to outweigh a risk of physical harm, notwithstanding the level of the risk in that case having been assessed by the MPS as "high"[12]. When proper account is taken of the significant public interests in open investigation of HN58's case, these plainly outweigh the "small" risk of harm in this case.

Cover name

12. The Chairman is of the view that there is little public interest in disclosure of HN58's cover name, because (in his view) there is little or no need to investigate HN58's undercover deployment publicly or to obtain evidence from those with whom he had contact whilst undercover. The reasons given for this conclusion are:
    a. the absence of known allegation of misconduct against HN58 whilst undercover;
    b. the nature of his deployment; and

[11] Paragraph 24 of Kerr LCJ's judgment, see also Kerr LCJ at paragraph 38 and Higgins LJ at paragraph 11 of his judgment in the same case.
[12] Gisted MPS risk assessment for HN15 dated 11 March 2016.

c. because "what is known of HN58's personal and family life make it unlikely that it would be necessary to investigate possible misconduct even if details of his deployment were made public."[13]

13. It is respectfully submitted that this reasoning is irrational.

14. First, the focus of the Chairman's reasoning is too narrow: it treats potential misconduct as the sole factor in deciding whether it is necessary to investigate HN58's undercover deployment. This is wrong. The Inquiry is not tasked solely with uncovering wrong-doing, the "scope" of undercover operations and their "effect" fall to be examined under the Terms of Reference. There are significant "effects" from undercover policing for those spied upon - the intrusiveness of covert human deployments, which in some cases were lengthy - even where there is no "misconduct" or criminality by the officers involved. Further, the Inquiry is tasked with assessing the adequacy of the justification for such operations and of their operational governance, statutory, policy and judicial regulation. This entails the Inquiry investigating and reaching conclusions on issues such as the accuracy of evidence / intelligence gathered by such deployments and its value to the prevention and detection of crime. These issues go directly to an assessment of the proportionality of such deployments and to addressing the public concern about political policing. Further, they are all matters which require the Inquiry to <u>get to the truth</u> of deployments on a far broader basis than simply identifying whether or not the UCO engaged in personal misconduct, although that is also clearly important. For this reason, as well as those set out below, the Chairman is wrong to suggest that there is no need to hear from NPSCPs in relation to HN58's undercover deployment in the absence of a known allegation of wrong-doing.

15. Secondly, as indicated above, the Inquiry is tasked with reaching conclusions about <u>systemic</u> issues concerning undercover policing. This requires it to investigate the full range of undercover operations. This was rightly recognised by the previous

[13] 3rd minded to note re HN58, 20 December 2017 paragraph 5.

Chairman in his May 2017 ruling, in which he rejected the invitation of the MPS to narrow the scope of the Inquiry's approach to the restriction order process. Reaching credible systemic conclusions about the "motivation", "scope", "effect", "justification", "supervision" etc. of undercover police operations as a whole requires "getting to the truth" of the whole range of such operations. Credible systemic conclusions cannot be founded on the investigation of a limited number of cases in which pre-existing allegations have been made. That approach would be akin to a company tasked with investigating the extent of a latent defect in its product range concluding that the extent of the problem is limited, because only a small number of customers have complained. The whole point about a latent problem is that its extent can't be known without examination of the range as a whole.

16. Thirdly, it is no answer to suggest that where there is no pre-existing allegation of wrong-doing a deployment can adequately be investigated on the basis of the police account alone and so there is no need to disclose the cover name, so as to enable evidence to be obtained from those who were spied on. The Chairman himself rightly acknowledged in his opening remarks on 20 November 2017 that "[u]nless the cover name is published the full picture about a deployment may never be revealed."[14] This is plainly right for two reasons:

    a. release of the cover name is a critical factor in enabling complaints to be made. The circumstances of this Inquiry are highly unusual, if not unique, in that the ability of a victim of wrong-doing to realise that they are such is dependent on them realising that the wrong-doer was an undercover officer. Without that information it is not possible to know that, for example, a failed relationship, or a fellow activist who instigated criminal activity, were anything other than that and therefore to know that there is anything to make complaint about. This was expressly recgonised by the Chairman in relation to HN58 at the November 2017 hearing[15]. In these circumstances,

[14] Opening statement 20 November 2017.

[15] "I think one has to face the fact that if there were, for example, evidence that HN58 conducted an inappropriate intimate relationship with a member of the public, that it would be unlikely to be disclosed

relying on the absence of complaint as a basis for restricting a cover name is irrational and, if repeated, as it appears to be from other minded to indications, will have a profound effect on the credibility of the Inquiry's conclusions. The Inquiry simply will not be able to reach credible conclusions about the scope of wrong-doing, such as the pursuit of intimate relationships, or undercover officers engaging in or instigating criminal conduct, if it curtails its ability to obtain relevant evidence in this way. As a result, it will also be unable to assess the adequacy of statutory, police and judicial regulation, because it will not have a handle on the extent of the problem;

b. nor can the Inquiry draw credible conclusions about the effect or efficacy of an undercover deployment based on the police account alone. Police records, particularly from the early days are sparse and there has been mass shredding, but in any event, it would be surprising if UCOs relayed or recorded information about their own wrong-doing, and officers had a vested interest in recording information adverse to those on whom they spied in order to justify their deployment. Nor will the UCO have any proper awareness of the effect of his/her deployment on those on whom s/he spied.

17. For all of these reasons, the evidence of those spied upon is essential if the Inquiry is (i) to get to the truth of a deployment and (ii) thereafter be in a position to draw credible systemic conclusions about the matters within its Terms of Reference. There is clearly, therefore, a strong public interest in disclosure of HN58's cover name in order for the truth in relation to his undercover deployment to be investigated.

18. Further, in relation to the Chairman's reasoning set out at 12c above, it is inconceivable that there is any aspect of an officer's personal and family life from which it is possible categorically to conclude that s/he was incapable of misconduct. As is already clear, neither marriage nor family prevented officers engaging in intimate relationships whilst undercover. Nor were such relationships exclusively

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unless the cover name of HN58 were to be disclosed." Transcript of hearing 21 November 2017 p.76 lines 6-11.

heterosexual. In the BBC True Spies documentary, a former SDS officer speaks of how he used his homosexuality as a means of gaining entry into a far right group. The Chair's conclusion on this issues appears to be irrational.

19. The above submissions apply in the case of all undercover deployments and demonstrate why it is important that every SDS and NPOIU deployment should be investigated openly and in a way that enables evidence from those spied upon to be heard, unless there is a compelling reason why this is not possible – i.e. a significant risk of serious harm of such magnitude as to outweigh the public interest in effective investigation and openness. However, there are additional reasons why it is of particular importance that HN58's undercover deployment should be investigated properly. These have wrongly been ignored by the Chairman. It is of direct relevance to the Inquiry's terms of reference for it to ascertain how the wrongful practices that are known to have taken place during HN58's watch as a manager came into being; how they developed, to what extent they were endemic and at what level of seniority they were known about and endorsed within the MPS. It is therefore highly relevant for the Inquiry to investigate the extent to which HN58 engaged in such activities himself whilst deployed undercover and, if so, what role this played in his subsequent promotion. It is therefore quite wrong for the Inquiry to seek to compartmentalise HN58's managerial role and to ignore the significance of what went before during his time as a UCO.

20. Far from recognising the relevance of HN58's conduct undercover to a proper investigation of his conduct as a manager, the Chairman appears to be of the view that public examination of HN58's undercover role would inhibit the Inquiry's ability publicly to examine his managerial role and that this is an additional reason for not doing so. It is respectfully submitted that this is wrong.

21. The level of risk to HN58, even on full disclosure of his cover and real names, is still only a small risk, on the Chairman's own finding[16]. It is clear from paragraph 8 of the

[16] Paragraph 3 of the 3rd minded to note, dated 20 December 2017.

Chairman's 20 December 2017 minded to note that the small risk is of a kind of harm that does not cross the Article 3 threshold. This low level of risk of harm which is not of sufficient severity to cross the Article 3 threshold is not such as to outweigh the very significant public interests in open and properly informed investigation of this officer's conduct both as an undercover and subsequently as head of the SDS, for all of the reasons set out above. Moreover, if we are wrong about that then it falls to the Chairman to consider what alternative measures could be taken to manage the small level of risk. If there are any steps that either the MPS or HN58 could take to manage the risk then Restriction Orders should not be made. This is a particularly important point in relation to HN58. It is noted that HN58 declined a physical risk assessment of his home[17]. He ought not to be granted anonymity as a means of avoiding a small risk which could be managed by other means which he has declined. Neither should he be granted anonymity as a means of avoiding a small risk if there are steps that could be taken by the MPS which for any reason they decline to take. In addition, because of the particular importance of this witness to the Inquiry it would be proportionate and sensible for the Inquiry to secure independent advice as to management of the risk in the event that neither the MPS nor HN58 propose alternative measures and to make its decision on the basis that HN58 and the MPS should go an extra mile with any alternative measures which could be taken.

22. The NPSCP RLR group wrote to the Inquiry on 1 December 2017 suggesting a means by which separation could be achieved between HN58's cover and real identities were it necessary to do so, i.e. as the last resort. We maintain our position above to the effect that it is almost inconceivable that this could in practice be necessary. However, we note that the Chairman has not addressed this suggestion. For this reason also, the minded to position is incomplete and flawed.

23. For all of the above reasons, there is very significant public interest in disclosure of HN58's cover name. It is only by making such disclosure that his undercover deployment can properly be investigated, because it is only through such disclosure

[17] 2017 risk assessment at [15.1].

that those he spied upon will know to come forward. There is a public interest in the proper investigation of every SDS and NPOIU undercover deployment, but this is enhanced in the case of HN58 because of his subsequent managerial role and the misconduct that occurred on his watch. The Chairman's minded to position fails to have any, or any proper, regard to these significant considerations and instead dismisses the importance of a thorough investigation of this officer's undercover role on the basis of reasons that are wholly unsustainable.

CONCLUSION

24. For all of the reasons set out above, the Chairman's minded to position in relation to HN58 is wrong. He has placed excessive weight on, what he acknowledges to be, a small risk of harm, has failed to give proper weight to the important public interests telling against restriction of both the cover and real names and has placed reliance on considerations that are irrelevant and run contrary to the Inquiry's ability to fulfil its terms of reference. The NPSCPs submit that restriction should be refused in respect of both the real and cover names of HN58.

PHILLIPPA KAUFMANN QC

MATRIX CHAMBERS

RUTH BRANDER

DOUGHTY STREET CHAMBERS

18 JANUARY 2018

From: Tamsin Allen
Sent: 01 December 2017 11:16
To: Undercover Policing Inquiry
Cc: Pitchford CP Lawyers

Dear team

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We refer to the RO application on behalf of HN58 and we would like to make the following additional point. If there is a real risk to HN58's life or limb such that his undercover activities cannot be linked to his real identity, a separation could still be maintained between the two even if he gives evidence in relation to his undercover activities in his cover name and about his managerial role in his real name - eg by the use of screens or other measures, and by hearing the evidence about the two periods separately. If appropriate measures are taken, there is no reason why anyone would connect the person using HN58's cover name to the person giving evidence in his real name in relation to his managerial activities. Please would you ask the Chair to consider this point when determining this application.

…

Yours sincerely

Tamsin Allen on behalf of the NPSCP RLRs