COUNSEL TO THE INQUIRY'S NOTE ON THE FUTURE APPROACH TO THE PUBLICATION OF OPEN EVIDENCE IN SUPPORT OF KEY ANONYMITY APPLICATIONS

Introduction

1. The purpose of this note is to address the issues raised by those who responded to the consultation on the proposed changes to the Inquiry's approach to the publication of open evidence in support of key anonymity applications. The consultation document can be found here.

2. The Inquiry's original procedure for receiving, separating and publishing key applications for anonymity, together with supporting evidence is contained within the full process map which was published on the Inquiry's website in 2016.

3. The Inquiry has already streamlined the above process a little in that it has been prepared to receive closed versions of applications and publish 'Minded to' notes before receiving proposed open versions from the Metropolitan Police Service. This modification has avoided delaying the publication of the Chairman's minded to notes as we explained at paragraph 18 of the explanatory note dated 14 November 2017.

4. At paragraph 17 of the explanatory note we also set out the grounds on which evidence in support of an anonymity application is withheld from publication, namely: (a) where publication would defeat the purpose of the application; or (b) would defeat the purpose of another person's restriction order application (including applications which might be made but which have not yet been invited); or (c) would be unlawful; or (d) would not assist core participants to participate in the anonymity applications process in circumstances where investigating whether the material was safe to publish would cause significant delay.

5. We are not committing resources to the preparation of open versions of anonymity applications until it is clear that the Chairman is minded to make a restriction order. This avoids the delay and waste of resources which would otherwise occur in those cases in which the Chairman reaches a decision to refuse to make a restriction order without an open hearing. We welcome the agreement of the non-police, non-state core participants to this approach contained in paragraph 37 of their response to the consultation. We agree with them that this does not preclude the use of

evidence in support of such applications during the substantive phase of the Inquiry should it become necessary at that later stage.

6. Experience has shown that offering the applicant a closed hearing in cases where the Chairman is minded to refuse an application for a restriction order is valuable. In some cases the exercise leads to a final decision not to make a restriction order or the withdrawal of the application on behalf of the officer.

7. Having considered the responses to the consultation, for reasons which we explain below, we do not consider the revised approach proposed by the non-police, non-state core participants would in fact lead to the publication of more evidence than we have published to date and it would likely also be a slower process. We remain of the view that the current approach to the preparation of open material in cases where the Chairman is minded to restrict both real and cover name should be maintained. In cases in which the only remaining question for the Chairman is whether to restrict publication of a real name, and provided that the cover name is published before the open hearing, we suggest that we have reached the stage where a streamlined approach can fairly be adopted.

Overarching observations

8. The Inquiry is an inquisitorial process. The Chairman sees each anonymity application together with any risk assessment, impact statement and medical evidence. The fact that some of this material is not published does not prevent it from being taken into account or subjected to critical scrutiny by him.

9. Withholding publication of the full risk assessment, impact statement and medical evidence does limit the core participants' ability to make submissions on an application or provide the Inquiry with material evidence relevant to it. However, unlike the position in adversarial litigation, the submissions of core participants only add to the process if they raise a point which the Chairman is not already aware of.

10. The Inquiry is not constrained by the material which the applicant for a restriction order, or a risk assessor has taken into account. If it is clear to the Inquiry Legal Team that there is significant material which should be introduced into the process, it will act. At a recent closed hearing, Counsel to the Inquiry added two documents in this category to the evidence before the Chairman in HN127's application.

11. The Chairman now has the benefit of the written and oral submissions made by the core participants for the purposes of the November 2017 hearing. The submissions which apply generally to all applications do not need to be repeated. Where a new

issue arises, further submissions may be helpful and the process proposed in the consultation would enable that to happen.

12. The Inquiry cannot realistically conduct a full closed investigation of each undercover officer's deployment before making a decision on anonymity. The current process should ensure that the right outcome is arrived at. If, exceptionally, it becomes clear later in the Inquiry that a restriction order should be reviewed, then it can be, pursuant to section 20(5) of the Inquiries Act 2005.

13. The Inquiry has to take a careful approach to how much of the material in support of an anonymity application it publishes in order to comply with rule 12 of the Inquiry Rules 2006, its duty to act fairly pursuant to section 17 of the Inquiries Act 2005 and other legal duties with which it must comply, notably section 6 of the Human Rights Act 1998 read with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Set out below are three ways in which the need to comply with our legal duties manifest themselves.

    13.1. It is not a question of asking in isolation whether publication of a particular piece of information will reveal the identity of the applicant. The Inquiry must consider the combined effect of publishing each piece of information together with all of the other pieces of information which it is publishing, combined with what is known to be in the public domain and what is, or might be, known to those who knew the officer whilst he or she was undercover.

    13.2. The Inquiry has to have in mind not only what it is publishing in relation to a specific application but also as to whether the way in which it is publishing material creates patterns from which inferences might be drawn in other applications which would defeat the purpose of those other applications. For example, routinely publishing the fact that there are no known photographs of an applicant in the public domain in each application where this is the case leads to the inference that where the published evidence on this point is silent there is a photograph. That piece of information would be a significant lead for a researcher. The same applies to other pieces of information, such as whether or not the 'sterile corridor' between cover name and real name is still intact, whether or not the officer's identity has ever been compromised, or whether or not the officer has an internet profile. The problem does not arise if publication is not routine: the Inquiry can refer to a secure 'sterile corridor', for example, in a particular case if it is important to do so in that case.

    13.3. The Inquiry has to consider what it publishes of an application against the fact that the applicant's real and/or cover names might be published in due

course. For example, it is one thing to publish details of an anonymous person's medical evidence. It is quite another if the Inquiry then publishes the applicant's name and thereby permits the medical details to be associated with the individual. Put another way, publishing confidential medical data of itself becomes a factor tending against publication of that person's real name.

14. It is for the reasons set out in the above paragraph that we cannot agree with the assertion that the Inquiry could routinely publish more of the supporting evidence than it has done to date.

Specific observations

15. We agree with the non-police, non-state core participants that where the Inquiry restricts an undercover officer's real and cover name, the effect will be to inhibit the extent to which that officer's deployment can be investigated. The Inquiry will be able to conduct a closed investigation based on the documents and the evidence of police witnesses. However, it will not be able to inform those affected by the officer's deployment and request their evidence. The inhibiting effect on the Inquiry is, of course, a factor which is taken into account when the decision to make a restriction order is taken and, in public interest applications, it is only where the factors in favour of restriction outweigh the factors against that an order is made at all.

16. We note the concern implicit in paragraph 6(b) of the non-police, non-state core participants' submission that the Inquiry will limit itself to investigating currently known cases of wrongdoing (actual or alleged). The Inquiry has not so limited itself: it has already confirmed that a large number of cover names will be published and the process of considering anonymity applications is continuing. So far as the Special Demonstration Squad is concerned it is already clear that a significant number of deployments can be investigated publicly. It is not necessary to discharge the terms of reference for every single Special Demonstration Squad officer's real and cover names to be published. Nor is it legally possible.

17. Turning to HN58's application (addressed at paragraphs 16 to 22 of the non-police, non-state core participants' submissions), the Inquiry has known throughout the course of the application about this officer's managerial role and its significance to the Inquiry (which in fact extends to matters beyond that which is publicly known). The importance of the submissions made by those acting for the non-police, non-state core participants and Peter Francis was not that they emphasised to the Chairman some of what he already knew about HN58's managerial role. It was that they drew specific attention to the need more fully to explore whether HN58 can give evidence of his managerial role in his real name: a process which is ongoing

and will be completed at the forthcoming hearing. This is a submission which could have been made whether or not one of the specific reasons why HN58 is an important managerial witness had been published. The Chairman's first 'Minded to' note specifically made clear that it is HN58's evidence as a manager that matters.

18. As for HN16 (addressed at paragraph 23 of the non-police, non-state core participants' submissions), had more been said about his economic circumstances, another clue would have been put into the public domain about this officer's real identity which, together with the other information published, would have increased the risk of defeating the purpose of the application. As it is, this officer's cover name is going to be published. The Inquiry is aware of the nature of HN16's employment since he left the police.

19. We note that neither of the specific cases above to which the non-police, non-state core participants have referred above were real name only applications which are the focus of the consultation. If the proposed approach to real name only applications is pursued then the Inquiry will have published the cover name, main groups infiltrated and the approximate dates of the deployment before a final decision is made on the real name application. There will therefore be an opportunity for any member of the public affected by the deployment to come forward in these cases.

20. Moving to the solution proposed by the non-police, non-state core participants we make the following observations:

    20.1. It does not appear to provide for the Metropolitan Police Service to make any submissions at all about whether or not the content of its documents should be published by the Inquiry instead putting the entire separation process into the hands of the Inquiry. We doubt whether such an approach would be compliant with the Chairman's duty of fairness[1].

    20.2. The proposed approach requires both a summary document to be prepared by the Inquiry Legal Team and line-by-line consideration of all of the documents supporting the application. We consider that this approach is likely to take longer than the current approach and much longer than the

[1] We note that the submissions made on behalf of Mr Peter Francis (at paragraph 5) do not go so far, advocating only a reversal of the order in which separation is carried out. In practice the Metropolitan Police Service provide a proposed open draft and discussions between counsel follows. We doubt whether reversing the order in which the process is undertaken would make much difference to the overall timescales.

proposed revised approach in the relation to applications to restrict publication solely of the real name.

20.3. The proposed summary document and list of "key information" would not in fact lead to publication of more information. The reality is that each piece of key information would constitute a clue to the identity of the officer and, taken together, they would likely identify the officer to those who had been affected by his or her deployment. For the reasons set out at paragraph 13 of these submissions, the routine disclosure of the information in the list provided at paragraph 36 of the non-police, non-state core participants is not a viable proposition. A hypothetical worked example is annexed to these submissions. It seems to us that the level of information contained in the worked example would clearly give rise to a high risk that members of the group would be able to identify the applicant thereby defeating the purpose of the application. The current system in place already involves publishing as much as can safely be published, adopting, as we have to, a precautionary approach. The changes proposed in the consultation would not alter this approach in relation to applications to restrict the publication of both an officer's real and cover names.

20.4. The proposal (at paragraph 31 of the non-police, non-state core participants' submissions) that the Inquiry Legal Team considers in relation to each application all of the material supplied by the applicant and the risk assessor and itself conducts a systematic investigation of the officer using the documents which it has gathered for the purpose of its substantive investigation would be far more time consuming than the current approach. It would amount to conducting a closed inquiry on the documents before proceeding with an anonymity application. It is an approach which would in large part duplicate the function of the risk assessment. Given that the Inquiry Legal Team already conducts targeted searches if it has concerns about the thoroughness of a risk assessment, the Chairman can and in some cases does call for further evidence, or tests applications at a closed hearing, and given the availability of the power of review, we do not consider that any additional assurance which the proposed process might bring could justify the inevitable and very substantial delays which it would cause.

21. A specific point is raised by the non-police, non-state core participants at paragraph 38 of their submissions, in the context of spent convictions, about the procedure in cases where there is evidence about identifiable individuals which, if accepted, would be determinative of an application for a restriction order. This has been

answered in correspondence since the submissions were drafted. The Chairman replied:

> "*If I would not otherwise be minded to make a restriction order but for the existence of one or more spent convictions, I will consider giving the convicted person(s) the opportunity to make submissions about them; and, if there were no good reason to refuse to give that opportunity, to do so. This situation has not arisen so far and I do not anticipate that it is likely to arise in the future*".

22. As for information technology and human resources, the current position in relation to the former is that we anticipate having the bespoke redaction software fully tested and operational during the course of February 2018. The Inquiry team is currently expanding but we do not consider recruitment to be an answer to speeding up the anonymity process. The work requires high levels of knowledge, skill and experience. Given its importance it has to date been conducted by senior juniors very well versed in the issues.

23. Dónal O'Driscoll's witness statement draws attention to concerns about what undercover officers did, or may have done, with their undercover identities, their knowledge, skills and the intelligence of which they were aware once they had finished their official deployments and, in some cases, left the police altogether. It is reinforced by Harriet Wistrich's second witness statement recently received by the Inquiry. We agree that management of post-deployment conduct by the police (or lack thereof and its consequences) is an important issue which should be investigated. It forms a significant section of the Inquiry's Draft Module One Special Demonstration Squad Issues List for Consultation which is about to be published. Restriction of an undercover officer's real name will not, of itself, prevent the Inquiry from investigating, in any given case, whether there is relevant post-deployment conduct: the Inquiry will know the officer's real name and can make such inquiries as it sees fit. We accept though that a restriction order over a real name would prevent public investigation.

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KATE WILKINSON

31 January 2018

ANNEX A

Hypothetical pen portrait from the 'key matters' the non-police, non-state core participants request be routinely disclosed

Aged now 44, born in 1974.

Visited at home and assured that neither real nor cover name would ever be released by the police and that career after an undercover deployment would not be hampered.

Deployed into Earth First arriving into the group (appearing to be aged in early 20's) in 1998 and leaving the group in 2000 where it is alleged the groups members were harassing senior directors in oil companies. Officer alleged to have had sexual relationships with three women and to have encouraged Earth First activists to commit criminal damage to property surrounding an oil rig. Officer may have received legal advice together with other activists after arrest.

Suspected by woman activist X in relationship with officer that officer might have a second identity having seen a bill in the wrong name. Officer's cover name has appeared on research group websites.

Became manager in the Special Demonstration Squad from 2006 to 2008 then achieved rank of Superintendent in 2011 until 2014.

Went on to hold public office in local government after police career.

Application for restriction of real and cover name is based on a risk of harassment from activists in groups infiltrated and has recently been examined by Dr. Smith, expert psychiatrist, who concludes that he might experience increased anxiety and further abuse alcohol to cope.

The risk assessment concludes that the named activists are likely to harass the officer and family if they can be found.