

## IN THE UNDERCOVER POLICING INQUIRY

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### MPS SUBMISSIONS HEARING 5 FEBRUARY 2018

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#### **Introduction**

1. These submissions deal with the following topics:
  - a. The restriction order applications of HN23, HN40, HN241, HN322, HN348, HN58, HN297 ('Rick Gibson');
  - b. The email in respect of images;
  - c. The consultation in respect of the publication of evidence provide in support of SDS restriction order applications ("the consultation");
  - d. The witness statements of Donal O'Driscoll and Harriet Wistrich.

#### **Restriction Order applications - general**

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

#### ***HN23***

3. The MPS has applied to restrict HN23's real and cover identities.
4. The open risk assessment makes clear that this is an officer facing the gravest possible risks of harm in the event of publication of real or cover identities. That assessment shows an objectively verified risk of serious harm. Even if the Chairman is not satisfied these risks reach the article 2/3 threshold (an objectively verified risk of serious harm which is present and continuing) it is nonetheless a verified risk of serious harm which would interfere with HN23's private and family life, without justification and disproportionately. In addition, the public interest in avoiding harm to a person, and avoiding damage to effective policing are interests of significant weight [Principles Ruling 79/85 at A5]. The MPS agrees with the Chairman's assessment that "*nothing short of anonymity in respect of real and cover name could obviate these risks*" ('Minded to' note 14 November 2017 at §8).
5. It is submitted that HN23's evidence would need to be given in a closed forum, and the Inquiry will need to investigate any issues which arise in a manner which protects the identity of HN23.

#### ***HN40***

6. The MPS has applied to restrict HN40's real and cover identities.
7. The open evidence shows a risk of harm in the form of attack which is objectively assessed to have a 'medium' likelihood of occurring (that is, distinctly possible to occur at some stage) and, if occurred, would have a 'serious' impact (that is, result in serious and significant injury). The evidence also shows a risk of self-harm or harm to others. Even if the Chairman is not satisfied these assessed harms meet

the article 2/3 threshold (an objectively verified risk of serious harm which is present and continuing), they are certainly harms which would interfere with enjoyment of family and private life, and are not justified or proportionate. In addition, the public interest in avoiding such real risks of serious harm is to be accorded significant weight [Principles Ruling 79/85 at A5]. There are other factors to be weighed in the balance with this, for example, HN40 the risk would become unfit for work: Supplementary Evidence bundle Tab 5.

8. Further, HN40 had an expectation of confidentiality which HN40 believed to be absolute (e.g. Supplementary Evidence bundle at Tab 4 at §17-18).
9. The MPS does not accept that investigation of persons convicted in their cover names is “*impossible*” without disclosure of the cover name [NPSCP’s Submissions Tab 5 §22]. In this case, as the Chairman has indicated – and the MPS accepts – careful thought will need to be given to the manner in which HN40’s evidence can be given to the Inquiry. This is not *inter partes* litigation, and a lack of disclosure does not indicate a lack of investigation.

#### ***HN241***

10. The MPS has applied to restrict HN241’s real and cover identities.
11. The MPS acknowledges that, given the assessed level of risk, this case is more finely balanced than those considered above. However, publication of HN241’s real name would cause interference with HN241’s private and family life. The MPS submits that that interference is not justified on the circumstances of this case. Since there is, as the Chairman has observed “*a real, but unquantifiable, risk that if the cover name were to be published the real name could be identified*” it is necessary to restrict both names in order to avoid the identified harm (including a low – but not fanciful – risk of physical harm).
12. Given what is known about the deployment (including that it dates to the early 1970s), the MPS submits that the risks of harm are not justified, proportionate, or outweighed by any other factor.

#### ***HN322***

13. The MPS has applied to restrict HN322’s real identity. No cover name is known and it is not clear whether one was ever used.
14. The MPS submits that publication of HN322’s real name would cause interference with HN322’s private and family life which is not justified. Given what is known about the deployment, the risk of harm (interference) is not justified, proportionate, or outweighed by any other factor.
15. In addition, HN322 confirms that the sensitive work carried out would not have been undertaken had HN322 thought that his/her identity would be made public [Supplementary Evidence bundle Tab 21 at §§20-24].
16. The NPNSCPs seek publication of HN322’s real name to allow for the publication of photographs of HN322 from the time of the deployment as a means to encourage persons to come forward with evidence [NPSCPs Tab 4 §32]. This

request is speculative and unrealistic. HN322 deployed to the SDS for no longer than a few months in 1968, after which he states he asked to leave the unit. He does not recall formally getting to the stage of 'going undercover'. He denies having a cover name and does not recall using one [Impact statement Tab 21 at §15, §19, §30]. The NPSCPs therefore suggest the Inquiry ought publish and circulate photographs of him on the basis that "*it is at least possible*" others may recall him – some 50 years later – from these. Even if the power existed to do this, and assuming the logistics were surmountable and a photograph were held by Inquiry, this would plainly constitute an unjustified and disproportionate interference with HN322's right to private life. See also the general submissions on this topic below at paragraphs 28 to 30.

#### **HN348**

17. The MPS has applied to restrict HN348's real identity. A partial cover name ("*Sandra*") has been disclosed along with the group infiltrated and years within which the deployment took place (1972-1973) [Supplementary Evidence bundle at Tab 23].
18. HN348 is now in her 70s and deployed in the SOS for less than a year 45 years ago. Disclosure of her real name would serve no useful purpose in assisting the Inquiry meeting its Terms of Reference. Publication of her real name would cause interference with her private and family life which is not justified.
19. HN348 confirms that she would not have carried out her work on the SOS had she thought she might have to give evidence in a public inquiry more than 40 years later [Supplementary Evidence bundle Tab 25 at §16].
20. In respect of the NSPCP's submissions in respect of images generally, see below at paragraphs 28 to 30. In the particular case, it is additionally observed that recalling "*Sandra*" would be possible without photographs, given that the group, the year and the name have been disclosed.

#### **HN58**

21. The MPS has applied to restrict HN58's real and cover identities. The Chairman is minded to make this restriction ['Minded to' note 20 December 2017, Tab 12].
22. The MPS recognises that this case poses difficult challenges. However, whilst there is certainly a need for the Inquiry to hear evidence from HN58 about his conduct and decisions as a manager as openly as possible, ideally in a form in which the public can hear it and see how it is delivered, this is not coextensive with hearing about that conduct *in* his real name. Achieving public accountability for the police (the primary aspect of the public interest in allaying public concern which arises in this case: Principles Ruling A3(5)) does not prohibit a witness giving evidence using a cypher where that is required.
23. That someone was a senior manager at one stage of their career does not reduce in any way the need to assess by careful scrutiny of the facts of the case whether they are subject to risks if their name were disclosed. In HN58's case there is a 'conservative assessment' of a medium risk of harm which would have a serious impact should his real identity become known (that is, harm which is distinctly

possible to occur at some stage and which, if it occurred, would result in serious and significant injury) [see Rick Assessment in Supplementary Evidence bundle, Tab 14 at §16.2]. The greater the risk and the more severe the harm the weightier will be the public interest in taking steps to avoid or reduce it [Principles Ruling 79/85 at A5]. The MPS submits that the risk should not be run. It would amount to an unjustified and disproportionate interference with HN58's private and family life, and would not be in the public interest.

24. The MPS has considered the suggestion made by the NPSCPs by email of 1 December 2017, albeit that it appears to be in contradiction with their submissions [email at Tab 14; submissions Tab14 at §§19-20]. Notwithstanding that the submissions assert that compartmentalising HN58's roles would be "*quite wrong*", the email suggestion envisages just that. The suggestion was proposed to ensure that there be "*no reason why anyone would connect the person using HN58's cover name to the person given evidence in his real name in relation to his managerial activities*". In the scenario proposed in the email, HN58 would have to give managerial evidence from behind a screen in order to protect his visual identity, and so those hearing HN58's evidence in respect of this role would be unable to see and assess that evidence being given, which is the disadvantage the Chairman in the 'minded to' note seeks to avoid. In any event, HN58's real name and the fact he was a UCO (and at risk) would thereafter be known. Any gain in the public interest of openness would therefore be limited and, it is submitted, outweighed, by the increased risk of harm to HN58 on the particular facts of his case arising from his being known in his true name as a former UCO.

#### ***HN297 - "Rick Gibson"***

25. The MPS has applied to restrict HN297's real identity. The cover identity has been confirmed on the Inquiry website. The Chairman was minded to restrict HN297's real name on 3 August 2017 [Tab 6 at §11]. There has been no updated indication or minded to note.
26. On the evening of 29 January 2018 the MPS was provided with a copy of a witness statement by "*Mary*", in which an allegation is made that Mary and Rick Gibson "*became sexually intimate for a short period of time*" at some point between 1972 and 1975 [Witness Statement at §1 and §8]. The MPS acknowledges that this case presents challenges, in particular because HN297 is deceased and so it is not possible for the Chairman to obtain an admission or denial from him [considering the Chairman's Statement of 20 November 2017 at §7]. The MPS wishes to reserve its position until it has heard submissions at the hearing on 5 February 2018 (and considered any other relevant evidence that may be served by the NSCPs between now and the date of the hearing). It may be that the appropriate course at this stage is to continue to protect HN297's real identity until the Chairman has a fuller appreciation of the evidence concerning HN297, and considered any representations on behalf of HN297's surviving family.
27. The MPS would highlight that, in so far as HN297's later career is relevant to the Terms of Reference (and the MPS makes no concession that it is – see further at paragraphs 36 to 39) the Inquiry is aware of HN297's real identity and is not inhibited from making appropriate investigation of any relevant matters. It is not

necessary to disclose a person's real identity for this purpose [see Witness Statement at §19]. And see further below at paragraphs 36 to 39.

**Images [email at Tab 22 in respect of 'real name' restrictions]**

28. The MPS does not consider that terms of the Restriction Orders made on 8 December 2017 lack clarity. They attach to the Inquiry's publication and disclosure powers, and restrict disclosure or publication of any evidence or document provided to the Inquiry which discloses X's real identity, including any image capable of identifying X. The Orders are in the same terms as the great majority of the Inquiry's Restriction Orders (see, for example, the Restriction Order of 2 February 2017 for KTC at §2).
29. The MPS does not accept that the 8 December 2017 Restriction Orders should be revisited. In the event that the Inquiry were provided with a photograph of X which is capable of identifying X (a person meriting the protection of a Restriction Order), it could not be disclosed or published. That was and is the plain effect of the Order.
30. In any event, the MPS submits that it would be wrong for the Inquiry to approach a request for circulation of photographs at a level of generality and on the speculative basis that such circulation might prompt evidence. If the Inquiry were provided with relevant photographs these would need to be carefully scrutinised, and other evidence may need to be obtained, to ensure disclosure or publication would not undermine the Restriction Order already made in an individual case, or give rise to the harms that the Order seeks to protect against, or that the image does not anyway merit protection for some other reason. It is a matter better revisited on a case by case basis in the event the Inquiry wishes to publish a photograph.

**Consultation on disclosure – Tabs 18-24**

31. The MPS welcomes the proposals in the consultation, for the reasons set out in the MPS response at Tab 19.
32. The MPS does not shy away from scrutiny of the applications it makes. This scrutiny is provided primarily by the Inquiry legal team and the Chairman in order to ensure that the application is determined on a properly informed basis and on evidence which can be and is tested.
33. The MPS notes the NPSCPs' recognition that "*there will be matters in connection with anonymity orders which cannot lawfully be disclosed to them*" [Tab 20 at §12]. The MPS does not accept that the level of redaction made to the evidence provided in support of the applications is in excess of what is permitted and required by Rule 12. In addition to the bases of redaction highlighted by the NPSCPs at Tab 20 §12, it is also necessary to redact details which can permit the building of a mosaic to identify the person the application seeks to protect. This affects a large number of the NPSCPs' "*key matters*" about which they would seek information [Tab 20 at §36].
34. The MPS notes the alternative 'solution' proposed by the NPSCPs [Tab 20 at §§29-33]. It appears to be a process which excludes the party providing the

information (or having equity in it) from any role in the redaction process. The adoption of such a process would be obviously flawed and not in compliance with the Chairman's duty of fairness. In addition it would be susceptible to risk of error without proper opportunity to guard against it. A process as described in the NPSCPs' submissions would be unworkable.

35. Additionally, the MPS shares the reservations expressed by counsel to the Inquiry as to whether a system in which the Inquiry makes the first draft – but which allows affected parties to propose lesser or greater required redactions – would prove any swifter a process than that currently in operation.

**Donal O'Driscoll and Harriet Wistrich Witness Statements – Tabs 21 and 24**

36. The witness statements of Donal O'Driscoll and Harriet Wistrich have been provided alongside submissions in respect of the disclosure consultation. Both seek to illustrate the relevance of examining the post-deployment conduct by the police to the Inquiry's Terms of Reference; Mr O'Driscoll from the perspective of misuse of information in the corporate world [Tab 21 at §7], Ms Wistrich from the perspective of former UCOs continuing or commencing "abusive relationships".

37. The MPS recognises that the Chairman has wide scope as to how the Inquiry will meet its Terms of Reference. Counsel to the Inquiry have expressed the view that management of post-deployment conduct falls within the Terms of Reference and indeed will form a significant part of the Inquiry's work under Module 1 [CTI Note 31 January 2018 at §23]. However, the Inquiry is not bound to explore exhaustively every remote or speculative avenue which might have a bearing on the Terms of Reference in order to fulfil them.

38. The MPS particularly considers that speculative publication of real names which would otherwise merit restriction would not be the appropriate method or starting point for the Inquiry to investigate post SDS careers/lives. The Inquiry is aware of the real names of the undercover officers and, where known, details of their post-deployment career and life. They would be in a position to investigate if necessary, irrespective of whether a restriction order is made over the real name of the officer concerned.

39. Whether post-deployment career is a matter to be weighed in the public interest when determining an anonymity application over an officer's real name is a fact-specific issue. Mere speculation about the nature of an officer's post-deployment career could not justify disclosure of an individual's real name. To confirm a real name to facilitate a public fishing expedition would be wrong and incompatible with the Chairman's duty to act with fairness (s.17). Where details of post-deployment conduct are known they would be amongst the material for the Chairman to weigh in the balance when determining the application.

**1 February 2018**

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