IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

OPEN SUBMISSIONS ON REDACTIONS, ON BEHALF OF THE MPS

Overview

1. These submissions are made on behalf of the Metropolitan Police Service ("MPS"), in support of and to supplement the submissions advanced by the National Police Chiefs Council ("NPCC"). The two sets of submissions should be read together.

2. The submissions are made in the light of the Chairman's ruling on the Legal Approach to Restriction Orders dated 3 May 2016, and in particular his findings that:
   a. The public interest allaying public concern about the subject matter, process, impartiality and fairness of the Inquiry must be balanced against the public interest in avoiding or reducing the risk of harm to current or former police officers or damage to effective policing;
   b. The principle means of allaying public concern is public accessibility to the proceedings of the inquiry (including the evidence received), which will:
      (1) facilitate the investigative process;
      (2) respect the different interests of witnesses and encourage effective participation;
      (3) inform the public and the media about its proceedings;
      (4) permit public debate about matters of national interest;
      (5) achieve public accountability for police services; and
      (6) provide transparency for the conclusions and recommendations of the Inquiry.
   c. Harm includes harm to private life;
   d. The practical consequences of a restriction order to the fairness of the Inquiry's proceedings and the Inquiry's ability to fulfil its terms of reference will be significant considerations.
   e. When all other components of the public interest are directly opposed and evenly weighted the Inquiry's duty of fairness to its participants may be a decisive factor.

3. These submissions do not seek to revive the issues of legal principle that were the subject of the Chairman's ruling of 3 May 2016, but rather seek to apply that ruling to types of material encountered.

4. A number of observations can be made, relevant to the overall process of restrictions.

5. Firstly, it is frequently impossible to ascertain the full risk of harm to current or former police officers or of damage to effective policing caused by the publication of a piece of information. It will depend upon:
    a. What, if any, restriction orders will be granted over this and other information published by the Inquiry. Information which carries no or a small risk of harm when published alone may pose a greater harm when taken together with other information, previously or later published;
    b. The prominence of the role that information will play in the Inquiry's hearings, what evidence might be called relating to it and what it will be possible to deduce from that evidence.
    c. What, if anything, is already known or deduced about the subject matter of the information to be published.

6. The risk picture may only emerge properly after some time. This is a factor that should weigh into the public interest balance and the Inquiry's duty of fairness to its participants.

7. Secondly, what is published cannot be unpublished. The risk caused by inappropriate publication cannot be fully undone. On the other hand, what is unpublished can be later published.

8. Thirdly, a nuanced approach is required to the deeming of a document to be relevant and necessary. That a document is identified as relevant and necessary should not equate to a finding that everything in that document is, without further consideration, relevant and necessary. For example, a 20-slide presentation on a relevant subject matter might contain individual slides that are not relevant and necessary. Similarly, a document addressing a relevant subject matter may contain references to specific examples of deployments, the exact details of which are not necessary to publish. This point is addressed more fully at paragraphs 10-17 below.

9. Submissions relating to specific matters are made below, namely:
    a. Sensitive, low relevance/necessity, disproportionality;

b. As to the names and other identifying details of CHIS, non-SDS/NPIOU UCOs, and assisting third parties;

c. ***Other tactic***;

d. Targeting: who and how, and length of deployment;

e. Format of code-names and intelligence;

f. Internal procedures.

Sensitive, low relevance/necessity, disproportionality

10. Section 17(3) of the Inquiries Act 2005 ("the Act"), holds that:

> In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).

11. Section 19 (3)-5) of the Act, concerning the making of restriction orders, holds that:

> (3) A restriction notice or restriction order must specify only such restrictions—
>
> ...
>
> (b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).
>
> (4) Those matters are—
>
> (a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
>
> (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
>
> (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
>
> (d) the extent to which not imposing any particular restriction would be likely—
>
> (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or
>
> (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).
>
> (5) In subsection (4)(b) "harm or damage" includes in particular—
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> (a) death or injury;
>
> (b) damage to national security or international relations;
>
> (c) damage to the economic interests of the United Kingdom or of any part of the United Kingdom;
>
> (d) damage caused by disclosure of commercially sensitive information.

12. By these provisions, the Chairman is:
    a. obliged to have regard to the principles of fairness and the need to avoid unnecessary costs when determining the procedure of the Inquiry;
    b. empowered to consider the efficiency of the inquiry and possible additional cost when determining restriction order applications; and
    c. empowered to consider the risk of harm or damage that would be reduced by the making of restriction orders.

13. The process of determining the material over which a restriction order should be sought is an onerous one, and an expensive one, as set out in the statement of Cairo dated 4 August 2017, at paragraphs 11-30. For example, a risk assessment over an individual's name may cost up to £10,000, not including legal or administrative costs, which are likely to take the total far higher.

14. In many documents deemed relevant and necessary, there appear individual words, sentences or references which:
    a. may pose some risk;
    b. will require extensive work to ascertain the extent and likelihood of the risk; and
    c. appear to be of either no or low relevance and/or of no or low necessity to publish.

15. Pursuant to both section 17(3) and 19(4)(d)(i) and (ii) of the Act, a restriction order should be granted over material whose relevance and necessity is low or absent, but which appears in a document which as a whole has been deemed relevant and necessary. It would otherwise be a disproportionate use of public resources – and a drag on the progress of the Inquiry – to require the MPS to investigate the proportionality of the risk inherent in the publication of a wholly collateral piece of evidence which is highly unlikely to advance the Inquiry's work.

16. Examples include:

    d. Warrant numbers, as set out in the statement of Alan Pughsley at paragraphs 416-421;

    e. Names/roles of departments and nature of someone's historic work. The NPCC's submissions address this point at section H(i); the MPS also does not accept the Inquiry's view that the roles of departments are "frequently likely to be of central importance to the terms of reference". Names of departments (often sub-branches of Special Branch which were later merged with other branches) tend to appear in a single, brief mention in a short resumé of an officer's career. Without further investigation, it

is not obvious whether a) the very existence of that unit; and/or b) a given person's involvement in that unit, is sensitive. The MPS invites the Inquiry to set out why, in any case in which it is proposed to publish this evidence, it will be relevant and necessary – in light of the requirements of section 19(4)(d)(i) and (ii) – to publish the information in its original format, rather than to publish a gist that reveals the broad nature of the unit in question. The MPS accepts that there may be instances in which it is necessary to publish the exact name of the department, but the starting point should be that it is unlikely to be relevant and necessary to the fulfilment of the terms of reference of the Inquiry.

f. Names or identifying details of people, where it is unclear whether or not the name is sensitive (for example, where the context in which it appears suggests that it might be of a CHIS or an assisting third party but it cannot be proved without further investigation), and where the name appears coincidental to the subject matter of the document;

g. The specific words of a commendation received by an officer. There is no way of ascertaining whether the commendation can be identified from the words and the officer identified from the commendation, without extensive investigation.

h. Text that appears erroneously on a given page, usually through faulty photocopying, where it is clear that the designation of relevance and necessity was not intended to apply to this erroneous text. To ascertain whether the text relates to another document which has been or should be redacted would be time-consuming and disproportionate.

i. References to liaison with foreign agencies or travel abroad, where it is unclear from the document whether that liaison or travel is public knowledge.

17. This list is not intended to be exhaustive.

Names or other details of CHIS, non-SDS/NPOIU UCOs, or assisting third parties

18. The legal basis for, and public interest in, the restriction of publication of the names of CHIS (including police UCOs) assisting third parties is set out in the submissions of the MPS on restriction orders, dated 12 February 2016, at paragraphs III.1 to III.12.

19. Of relevance from the Chairman's ruling of 3 May 2016 are the following passages and conclusions:

a. At paragraph 166: "*The public interest against which the expectation of confidentiality has to be measured is an exceptional one – the need to investigate as openly as possible the activities, management and justification for these very undercover police operations so as to allay public concern. I consider that while an expectation of confidentiality is both a material and weighty consideration it is not likely, except in unusual circumstances, to make the difference between disclosure and non-disclosure if disclosure is necessary in the fair pursuit of fulfilment of the Inquiry's terms of reference"* [emphasis added].

b. A11: The starting point is that no restriction order will be made, in the public interest of openness in the Inquiry and its proceedings, unless it is necessary in the countervailing public interest of the protection of individuals from harm and/or effective policing.

c. A.12: It is not possible to state at the level of principle or generality where the public interest balance will rest. The Chairman will approach evaluation on a case-by-case basis according to the nature and quality of evidence received in support of the application.

d. B.1 Assessment of the extent to which a restriction order would avoid or reduce a risk of harm to a police officer will require examination of evidence and/or argument, as appropriate, as to:

(1) any source of possible harm;
(2) the nature of any possible harm including breach of confidentiality;
(3) the identification of those who may be harmed;
(4) any medical evidence on which an officer relies;
(5) the existence and quantification of any pre-existing risk of harm, including a risk caused by self-disclosure or third party exposure or partial exposure;
(6) the existence and quantification of any additional risk of harm that a restriction order would avoid or reduce;
(7) means other than a restriction order that may be available to avoid or reduce a risk of harm;

(8) whether those means would, without the restriction order, avoid the risk or the extent to which those means would, without the restriction order, reduce the risk.

e. B.2 Assessment of the extent to which a restriction order would avoid or reduce a risk of damage to effective policing will require examination of evidence and/or argument, as appropriate, as to:

(1) the degree of and reasons for the sensitivity of the material, including a breach of confidentiality;

(2) the causative link between disclosure and damage;

(3) the existence and quantification of any pre-existing risk of damage, including a risk caused by previous public disclosure; and

(4) means other than a restriction order that may be available to avoid or reduce a risk of damage;

(5) whether those means would, without a restriction order, avoid the risk or the extent to which those means would, without the restriction order, reduce the risk.

f. B.3 When considering whether to make an order restricting disclosure of *any relevant particular piece of information* [emphasis original] on public interest grounds the Chairman will:

(1) identify the public interest in non-disclosure;

(2) assess the risk and level of harm to the public interest that would follow disclosure of that information;

(3) identify the public interest in disclosure;

(4) assess the risk and level of harm to the public interest that would follow nondisclosure of that information;

(5) make in respect of the information concerned a fact sensitive assessment of the position at which the public interest balance should rest.

20. The following observations can be made:

a. The Chairman's ruling is directed primarily at "*these very undercover policing operations*", meaning deployments of the SDS and NPIOU that have given rise to allegations of misconduct;

b. The circumstances of <u>those</u> deployments, and thus the need for the Inquiry, is so exceptional as to justify a departure from the usual principles governing confidentiality;

c. Disclosure will be predicated on the need to fulfil the Inquiry's terms of reference;

d. The ruling applies only to any relevant particular piece of information; words which the Chairman himself chose to emphasise;
e. There will always be a public interest in maintaining secrecy over the names of UCOs and CHIS, for the reasons addressed by the Chairman. The test concerns where the public interest balance will rest. Where the public interest balance in disclosure is lower than the public interest in non-disclosure, a restriction order should be made.

21. It follows that the Chairman's conclusions at B1 and B2 do not apply to information which is not relevant, or not necessary for the fulfilment of the Inquiry's terms of references. The starting point for triggering the requirements of conclusions B1 and B2 must be a determination by the Inquiry that the publication of the name of a UCO, CHIS or assisting third party is relevant and necessary.

22. Whilst it is, at first instance, a matter for the Inquiry whether to deem something relevant and necessary (and while the MPS recognises that the Inquiry must be fulfil its Terms of Reference as it sees fit), in so deciding the Inquiry should be mindful of the particular purpose and focus of this Inquiry and the onerousness of the requirements of conclusions B1 and B2, including the extent to which they cause delay and public expense.

23. The starting point should be that the following are unlikely to be relevant and necessary to the fulfilment of the terms of reference of the Inquiry, and/or the public interest is likely to weigh in favour of restriction:
    a. References to a non-SDS, non-NPOIU UCO or CHIS where that UCO, CHIS or deployment is not intended to be the subject of particular scrutiny by the Inquiry. This will especially include personally identifying information of the UCO/CHIS, passing references to such deployments, or references to very minor deployments;
    b. ***Other reference***;
    c. References to any third party assistance, including in SDS and NPIOU deployments.

24. As such, any such references found in relevant and necessary documents should *prima facie* fall to be restricted, unless the Inquiry specifically deems these references to be themselves relevant and necessary and considers that further evidence is required on the public interest balance. This approach is supported by the evidence already before the Inquiry (see in particular the statement of Alan Pughsley at paragraphs 11-2, 48-52, 105-108, 218-227, 287-295) and based on the principles set out by the MPS in its submissions of 12 February 2016.

25. This is intended to create a starting point, and not an absolute rule. There may clearly be occasions on which such references are, in fact, relevant and necessary or in which the public interest balance requires closer consideration, and in which the full anonymity process may have to be undertaken in relation to the individual.

Other tactic

26. The submissions made at paragraphs 18-25 above (concerning names or details of other CHIS) are relevant.

27. The ***use of this technique*** is explained in the statement of Alan Pughsley at paragraphs 285-286. It is notable that:
    a. The technique is an ongoing one;
    b. The technique is not *prima facie* a reprehensible or discredited one;
    c. The technique is often used to avoid compromise, ***explanation***. Exposure of the tactic is therefore likely to be particularly damaging;
    d. The technique often requires support and liaison;
    e. The technique is not *prima facie* a focus of the Inquiry.

28. Publication of this tactic is unlikely to allay public concern. Specifically:
    a. In circumstances where ***the use of the tactic*** is not the focus of the Inquiry's work, publication of ***its*** use is unlikely to facilitate the investigative process;
    b. ***It is*** unlikely to encourage effective participation by witnesses in the Inquiry (***reason given***), nor is restriction likely significantly to hamper the Inquiry's ability to inform the public about its proceedings;
    c. ***The tactic*** is not a matter of national interest in which there is or should be a public debate;
    d. There is no particular need to achieve public accountability for police services in respect of ***its*** use; and
    e. It is unlikely that any conclusions or recommendations of the Inquiry will be based upon the use of this tactic. If that transpires to be inaccurate, a variation can be granted to the restriction.

29. The starting point should be that references to the use of ***this tactic*** are <u>unlikely</u> to be relevant and necessary to the fulfilment of the terms of reference of the Inquiry and/or the public interest is <u>likely</u> to weigh in favour of restriction. There may clearly be occasions on which such

references are, in fact, relevant and necessary, and in which further evidence will be required to justify why the tactic should not be exposed in that particular circumstance.

Targeting: who and how, and length of deployment

30. This category will encompass material which concerns targeting decisions and methodology and the length of a likely deployment, which might:
    a. Identify a non-SDS, non-NPIOU UCO;
    b. Expose police methodology in determining whether and how to start a deployment;
    c. Alert (non-SDS, non-NPOIU) groups that they were, or are, or will be, the subject of covert police attention;
    d. Expose ***further matters***.

31. The risk inherent in the above is set out throughout the statement of Alan Pughsley and in the submissions of the NPCC.

32. It is not intended to cover the targeting or length of deployment of SDS and NPOIU officers. To the extent that revealing that information would cause harm, a restriction order would be sought under category A.

Format of code-names and intelligence

33. The bare fact that code names are used and intelligence is sanitised is not sensitive; the exact format of those code names and sanitisation is sensitive.

34. It is notable that:
    a. The techniques are ongoing ones;
    b. The techniques are not *prima facie* reprehensible or discredited;
    c. The techniques are deliberately used to avoid compromise. Exposure of the tactic therefore has the potential to be particularly damaging;
    d. ***Further feature***;
    e. The format of code names or intelligence is not *prima facie* a focus of the Inquiry.

35. The MPS can see no relevance in the format of code names, nor any necessity in publishing the format of code names, where the underlying identity will be available to the public as a gist.

What is relevant and necessary is the identity of the person behind the code name. Indeed, the public are more likely to be assisted by a repeated gist of the real/cover identity than by a reference to a code name, which adds an extra layer to the evidence.

36. Equally, the MPS can see no relevance in the format of intelligence, nor any necessity in publishing the format of intelligence, where the underlying content will be available to the public as a gist. What is relevant and necessary is the content of the intelligence.

37. Nor can the style of code names or intelligence weigh heavily into the public interest balance on the side of allaying public concern. In particular, by reference to the Chairman's ruling of 3 May 2016:
    a. There can be no expectation that it will facilitate the investigative process. There will be no witness evidence dependent upon revealing the code name or intelligence sanitisation method used;
    b. It cannot encourage effective participation in the Inquiry;
    c. No witness has any particular interest in knowing the code name given to an officer or his/her deployment, or in the style of intelligence. There is no suggestion either formed an illegitimate tactic or was otherwise reprehensible;
    d. The use or style of code names and intelligence is not a matter of national interest;
    e. There is no suggestion that public accountability for police services is required over the style of code names and intelligence;
    f. It is highly unlikely that the transparency of the conclusions and recommendations of the Inquiry will depend upon code names and method of sanitisation being published.

38. By contrast, harm to individuals or to effective policing could be caused because of the following:
    a. ***One aspect of the use of this technique means that there is a real risk that revealing a code name may cause harm. Details provided***;
    b. ***Reason***;
    c. Official confirmation of the style of code name and intelligence used will facilitate blagging and forgery (see paragraph 44 below);
    d. Official confirmation of the style of code name and intelligence used will assist those who illicitly obtain intelligence in understanding its contents and implications, including that a UCO has been deployed. ***Example given of one aspect of the format of intelligence and consequence of revealing that aspect.***.

39. That it may be known that code-names are adopted or intelligence is sanitised falls short of confirming the formats used.

40. The starting point should be that the format of a code-name or the style of intelligence is unlikely to be relevant and necessary to the fulfilment of the terms of reference of the Inquiry. If there are instances in which the format of the code name or intelligence is relevant, and it is necessary for the public to know it, then further evidence or submissions can be supplied as necessary addressing the public interest balance in that particular case.

Internal procedures

41. This category is aimed primarily at information which is sensitive and which would reveal, for example:
    a. The original format of certain kinds of forms, files and reports. This would include the layout of the form, the colour of paper used, the likely type of content and the likely type of author.
    b. The details of access to sensitive documents, facilities and other resources. This would include who might be allowed access, how access might be arranged and how access might be effected;
    c. The details of the circulation, handling or management of sensitive documents, facilities and other resources. This would who, how and when such handling or management might occur.
    d. The methods by which the MPS liaises with other agencies in the UK and abroad, including the likely personnel involved;
    e. The internal coding methods used to classify resources;
    f. Where, when and how often certain meetings currently take place.

42. The above list is not intended to be exhaustive, nor is it intended to cover information which is not sensitive. For example, the original format of an MG5 witness statement would clearly not be sensitive. Whether something is sensitive will be fact-specific; relevant factors will include the broadness of circulation of that information, the general security marking of a document and the exact area of policing to which it relates.

43. Effective policing – in particular covert or sensitive policing – depends in part upon the ability of the police to:

a. Restrict access to documents, facilities, people and other resources as appropriate. This includes restricting access only to people with a certain level of clearance;
b. Have faith that the tools with which they work and on which they rely are genuine;
c. Maintain the confidence of the others with whom they work, including other agencies in the UK and abroad.

44. If sensitive internal procedures receive public exposure this:
    a. Increases the risk of "blagging", whereby people who would not otherwise be allowed access to a facility can persuade the gatekeeper that access should be granted. For example, a blagger will be more convincing if s/he can ***description***. There is a risk of blagging from both outside and inside the MPS.
    b. Increases the risk of forgery. Increased risk of forgery requires increased police resources to investigate the genuineness of any materials relied upon.
    c. Reduces the confidence of those with whom the MPS works. ***Explanation***.

45. It is a matter of common sense that the consequences of blagging and forgery could be severe, including physical harm to individuals.

46. There may be references to internal procedures whose publication is relevant and necessary – for example, where the Inquiry wishes to examine whether a particular internal procedure was adequate. However, it is expected that many references to internal procedures will be coincidental to the focus of the Inquiry's investigation. Their publication would simply be collateral to the information which the Inquiry seeks to publish. For example, the content and readership of a report may be relevant, but the format, style and method of circulation of the report may not be.

47. In those circumstances, the internal procedure should not be deemed relevant and necessary, and/or the public interest in allaying public concern about the subject matter of the Inquiry is not engaged. Specifically, the publication of the internal procedure:
    a. Will not facilitate the investigate process;
    b. Will not encourage effective participation;
    c. Is not a matter of national interest on which debate should be fostered;
    d. Will not achieve accountability for the police;
    e. Will not provide transparency for the conclusions and recommendations of the Inquiry.

48. On the other hand, the public interest in avoiding or reducing the risk of damage to effective policing is engaged, for the reasons given above.

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