IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON THE LAW OF CONFIDENCE AND MISUSE OF PRIVATE INFORMATION
METROPOLITAN POLICE SERVICE

I. Introduction

1. These submissions are made pursuant to the Chair's direction of 28 February 2017 concerning a May 1994 report by Bob Lambert ["the Report"], to which reference is made in the book Undercover by Rob Evans and Paul Lewis. It should be noted that the Inquiry is in possession of a full and unredacted copy of the Report. The Chair has invited written submissions from persons including the Metropolitan Police Commissioner on the following question of law:

   "*Whether or not Rob Evans and Paul Lewis are entitled, as a matter of the civil law of confidence or misuse of private information, to publish further extracts from the report, in particular those which name individuals*."

2. In writing these submissions, it is not known whether Mssrs Evans and Lewis, if they hold an unredacted copy of the Report, intend to make further publication. It is observed that in the relevant passages of Undercover a number of individuals who are mentioned in the Report have <u>not</u> been named, no doubt for responsible journalistic reasons.

3. On the question of law, the MPS submits that publication of further names from the Report could amount to an actionable breach of the law of confidence; and a breach of the privacy rights of individuals mentioned in the Report. This is for the following reasons:
   (i) Assuming for the purposes of these submissions that Mssrs Evans and Lewis hold a complete and unredacted copy of the Report, they hold it as third party receivers of confidential information owned by the MPS but provided to them by another source ("the confider/informer").
   (ii) Mssrs Evans and Lewis will be bound by the plainly confidential nature of the information in the Report.
   (iii) It is prima facie in the public interest for that duty of confidentiality to be protected to avoid damage to the public interests of maintaining an effective police force and of avoiding harm to a police officer or former police officer. Contrary arguments that publication would be in the public interest carry less weight in circumstances where a statutory public Inquiry has been instituted and which will and/or is considering the Report for publication (and in so doing will have a detailed understanding of the Report's context, and will act in accordance with its duties

under the Human Rights Act 1998, or proceed on the basis of a thorough evaluation of the relevant public interests).

4. The MPS recognises it may not be possible to definitely rule out further publication from the Report, for example, by the original informant, a further as yet unknown third party or of course by the Inquiry itself. However, the MPS submits that when deciding whether or not a Restriction Order should be made over any unpublished information in the Report – including the names of individuals – the Chair should proceed on the basis that further names in the Report will remain unpublished, whether because Mssrs Evans and Lewis have decided not to do so or because, if they threatened to do so, they would be restrained by the Courts. In particular, the Chair should not proceed on the basis that the Report is effectively in the public domain already.

5. The MPS does not in these submissions deal with the content of the Report, which cannot be considered openly at this stage. Nor do they deal with the means by which Mssrs Evans and Lewis came to have access to the Report, which is unknown.

6. Finally, the Inquiry Direction mentions, but does not invite submissions on, the Chair's view that "at least some further disclosure" of the Report would not breach the Official Secrets Act 1989 [the OSA]. This may be the case but the point is not conceded in the abstract. All disclosures or potential disclosures by persons or information caught by the OSA are serious matters, will be investigated fully, and where appropriate prosecution may follow.

II. The law

Article 10 ECHR

7. The importance of the right to freedom of expression protected by Article 10 ECHR is not in doubt. The European Court of Human Rights put it as follows in *Sunday Times v UK (1979-80) 2 E.H.R.R. 245* (a case which examined freedom of expression about matters subject to ongoing court proceedings) (at p.280):

> "*freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. These principles are of particular importance as far as the press is concerned……whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them."*

8. Article 10 ECHR can be restricted where to do so is *"necessary in a democratic society"*, but that necessity must be established and the public interest in maintaining a free press will weigh heavily in the balance in determining whether any restriction is proportionate: *Worm v Austria* (1998) 25 E.H.R.R. 454 at §47.

Breach of confidence

9. In order to secure an injunction against a threatened breach of confidence, the High Court would need to be satisfied (per *Coco v AN Clark (Engineers) Ltd* [1968] F.S.R. 415) that:
   (i) The information has the necessary quality of confidence;
   (i) It was imparted in circumstances which imported an obligation of confidence; and
   (ii) There was (or is threatened) an unauthorised use of the information to the detriment of the party communicating the information.

10. Whether information has the necessary quality of confidence will be a matter of fact. The Courts have held:
   (ii) The fact that an individual is a Covert Human Intelligence Source (CHIS) enjoys the necessary quality of confidence: *AB v Sunday Newspapers* [2014] NICA 58 at §22 ("*The issue was discussed in the House of Lords in* Attorney General v Guardian Newspapers Limited (No 2) *[1988] UKHL 6. The House noted and accepted the evidence of Sir Robert Armstrong that the confidence of informers who relied on their identity and activities being kept confidential would be damaged if publication of that information were not prevented. Accordingly there was a considerable public interest in preventing disclosure of their identities…. We are satisfied, therefore, that a person acting as a convert human intelligence source or informer has a reasonable expectation that his confidential relationship will not be disclosed…"*).
   (iii)There are examples in the case law confirming that security markings on documents provide good evidence of the quality of confidence in a document. See, for example, *AG v Observer Ltd and ors* [1990] 1 A.C. 109, the "Spycatcher" case concerning publications by UK newspapers of material from the Spycatcher memoirs of Peter Wright which had by that time been published worldwide. The information published and to be published was considered confidential, inter alia because of its classified markings. And see the remarks recorded below at paragraph 15.

11. Whilst each case will turn on its own facts, in general where a third party comes into possession of confidential information which he knows to be such, he will come under a duty not to pass it on to anyone else. See per Lord Keith at p261E (*"The third party to whom the information has been wrongfully revealed himself comes under a duty of confidence to the original confider"*) and per Lord Griffiths at p272C (*"A third party who knowingly receives the confidential information directly from the confidant is tainted and identified with the confidant's breach of duty and will be restrained from making use of the information*").

12. The third party would not be relieved of the duty of confidentiality by threatened publication by the primary informant: "*The fact that his informant is about to commit*

further breaches of his obligation cannot conceivably relieve the third party of his own. If it were otherwise an agreement between two confidants each to publish the confidential information would relieve each of them of his obligation, which would be absurd and deprive the law about confidentiality of all content." (Lord Keith at p261F of the "Spycatcher" case).

13. Whilst a duty of confidence can only apply to information which is confidential, publication to a small circle of persons does not necessarily remove the duty of confidence: see *AB v Sunday Newspapers* [2014] NICA 58 at §26.

14. A third party may accrue obligations of confidence even if provided with information by someone not themselves bound by such a duty: *Matalia v Warwickshire County Council* [2017] EWCA Civ 991, citing with approval Arnold J in *Primary Group (UK) Ltd v Royal Bank of Scotland Plc* [2014] 2 All E.R. (Comm) 1121 ("…*an equitable obligation of confidence will arise not only where confidential information is disclosed in breach of an obligation of confidence (which may itself be contractual or equitable) and the recipient knows, or has notice, that this is the case, but also where confidential information is acquired or received without having been disclosed in breach of confidence and the acquirer or recipient knows, or has notice, that the information is confidential. Either way, whether a person has notice is to be objectively assessed by reference to a reasonable person standing in the position of the recipient*").

15. A private individual may show sufficient detriment to make out a breach of confidence simply where he would prefer others not to know of the information (see, for example, Lord Keith at p256C of the "Spycatcher" case). However, the Crown must show that the disclosure of the information imparted in confidence is likely to damage or has damaged the public interest (see Lord Keith at p258H; Lord Goff at p282B, p282C-D).

16. As to the nature of the public interest, Lord Keith approved (p.258F-G) the following statement of Mason J in *Commonwealth of Australia v. John Fairfax & Sons Ltd*. (1980) 147 C.L.R. 39:

> "*The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality*."

[And see Lord Goff at p282E-F].

17. On the facts of the Spycatcher case, Lord Keith observed at p259B:

The work of a member of M.I.5 and the information which he acquires in the course of that work must necessarily be secret and confidential and be kept secret and confidential by him. There is no room for discrimination between secrets of greater or lesser importance, nor any room for close examination of the precise manner in which revelation of any particular matter may prejudice the national interest. Any attempt to do so would lead to further damage. All this has been accepted from beginning to end by each of the judges in this country who has had occasion to consider the case and also by counsel for the respondents.

However the Crown could not there show damage to the public interest, not because the information was not itself highly damaging, but because there had already been extensive worldwide publication of the information there was no further damage to be done to the public interest that could be protected or avoided by the grant of an injunction (see p.259E-H). See also *Observer v UK* (1992) 14 E.H.R.R. 153 – the same litigation before the European Court of Human Rights – confirming that an injunction will be a disproportionate breach of Article 10 ECHR where the information is no longer confidential by virtue of its having been widely published elsewhere.

18. It is not for the confider/informant (or the third party) to make their judgment of the damage that might be caused (for example to the public interest), not least because such an individual does not have the whole picture. See *Attorney-General v Shayler* [2006] EWHC 2285 (QB) per Eady J at §29.

Misuse of Private Information

19. To establish the tort the claimant must demonstrate a "reasonable expectation of privacy" over the material to be published. Once established the court will balance all of the relevant circumstances, in particular the claimant's rights under Article 8 ECHR and the defendant's rights under Article 10 ECHR (*Campbell v MGN* [2004] 2 A.C. 457).

20. In *Campbell v MGN* (supra) it was held that a reasonable expectation of privacy can be determined by asking what "*a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity*".

21. As to the management of the competing aims of Articles 8 and 10 of the Convention, the House of Lords confirmed in *S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593 (per Lord Steyn, with whom Lords Bingham, Nicholls, Hoffmann and Carswell agreed) that *Campbell* demonstrated the following four propositions:

    "*First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.*"

22. That the private information may already be in the public domain is not determinative in an action under this head. Repetition of a tortious disclosure or publication on further

occasions is capable of constituting a further tort, and in so deciding the courts will take into account the intrusiveness of and distress caused by any further disclosure: *PJS v News Group Newspapers Ltd* [2016] UKSC 26 [2016] A.C. 1081 at §32 and §35.

23. In determining whether injunctive relief should be granted, the courts will bear in mind any attempts by publishers to undermine the claim by deliberately placing material in the public domain. In *PJS* Lord Mance at §28 cited with approval the words of Eady J in *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB) at §34 that "*Different policy considerations come into play when the court is invited to abandon the protection it has given a litigant on the basis of widespread attempts to render it ineffective*".

Securing an interim injunction

24. The test for the Court considering an application for an interim injunction which might affect the right to freedom of expression protected by Article 10 ECHR is at s.12(3) Human Rights Act ("HRA") 1998. Section 12(1) and (3) provides:

> ***12 Freedom of expression.***
> *(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.*
> *(…)*
> *(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*

25. As a starting point, 'likely' in s.12(3) means *"more likely than not"*, but a flexible approach should be taken to the interpretation of s.12(3) HRA 1998: *Cream Holdings v Banerjee* [2005] 1 AC 253 per Lord Nicholl at §§19-20 – with whom the rest of the Court agreed. For example, where a short period is needed to allow the court to give proper consideration to the issues, or where the adverse consequences of publication might be grave, a lesser prospect of success would satisfy the test.

III. Submissions

26. The MPS makes the following submissions in outline, which are developed below:
    (i) On the basis of present information, it is at the least more likely than not that it would be possible to make out a claim for injunctive relief on the basis of breach of confidence, in the event that any further publication from the Report were threatened, particularly giving names. This is the test which would need to be met to secure interim relief, thereby prohibiting publication until a trial of the issue.
    (ii) In the event that, or where, a Restriction Order has already been made by the Inquiry in respect of a particular piece of information in the Report, including the information which relates to individuals, the case for injunctive relief to avoid a breach of confidence would be stronger. A Restriction Order would have been made in light of the Inquiry having carried out an evaluation of the Articles 2/3, or Articles

8 and 10 interests at play, and/or a public interest balance. In these circumstances it is submitted that the High Court would be likely to have confidence that the public interest would be damaged by further publication, and so prohibit it.

(iii) In addition Mssrs Evans and Lewis would be less able to establish a public interest in favour of any further publication of the Report not already protected by an Inquiry Act Restriction Order, because the Inquiry will be in the near future considering the whole Report for disclosure on the basis of a far more complete appreciation of the risks and harms at stake than could be undertaken by Mssrs Evans and Lewis or the High Court. The public interest is served by letting that process conclude.

(iv) Given the reasonable prospect that Mssrs Evans and Lewis would not be entitled to make further disclosure, possession by them of an unredacted copy of the full Report (if it is so held) ought not interfere with the Restriction Order process. The Chair should proceed on the basis that threatened publication of the Report would more likely than not be prohibited, and so should not weigh in the scales against the granting of a Restriction Order which would otherwise be required on human rights grounds, or merited on a balance of the public interests. The Chair should not proceed on an assumption that any appropriate Restriction Order made would be pointless. This is not a fair assumption in law, and may also not be a fair assumption of fact.

(v) The MPS reserves its position to deal with the detail of information on the Report on a case by case basis as it arises.

27. The following can be said as to the likelihood of the High Court granting injunctive relief to prohibit publication of the remainder of the Report as a breach of confidence:

28. Firstly, the Report has the necessary quality of confidence. It is marked "Top Secret", and details matters pertaining to undercover police officers. Indeed the "Top Secret" marking is known by Mssrs Evans and Lewis who state this in Undercover (p.82). The content of the Report concerns sensitive matters, including matters which on their face refer to CHIS.

29. Secondly, it must have been imparted in circumstances which imported an obligation of confidence:

(i) It was leaked to Mssrs Evans and Lewis or otherwise passed without the authority of the MPS, in circumstances where permission to provide the Report had plainly not been given and was not sought;

(ii) It may also have been provided subject to additional obligations of confidence or treatment demanded by the informant.

30. Mssrs Evans and Lewis are third party receivers of the information. It will have been plain from the circumstances by which they must have received the document, its contents and its security markings that it was confidential. They will have become – and are – under a duty not to pass on or make use of the information (see Spycatcher at p261E; p272C).

31. In the circumstances envisaged in the Inquiry Direction, the misuse of that confidential information by further publication of it would be threatened.

32. The MPS does not claim detriment simply by asserting that it would rather the confidential information remain that way. Detriment would come in the form of damage to policing and the risk of harm to individuals. Put another way, the MPS further submits that disclosure would damage the public interest. Detailed submissions on the prospective damage are not possible in open submissions (and see the observations in Spycatcher cited at paragraph 15 above as to the appropriateness of carrying out such a task), but at the level of principle, the following public interests are engaged:
    (i) The public interest in avoiding harm to a police officer (physical harm, psychological harm and interference with private and family life);
    (ii) The distinct public interest that the names and details of CHIS not be published (both to avoid a risk of harm to any person and to avoid harm to the recruitment and retention of CHIS);
    (iii) The public interest in effective policing and the prevention and detection of crime.

    Even though the Report is of age, these are not stale harms.

33. On the other side of the scale, public interests which might be claimed, such as informing the public, will carry low weight in circumstances where a statutory Inquiry has been instituted and will shortly consider for publication the very Report from which publication is threatened, following a full examination of the various risks of harm in issue. The High Court would be likely to give considerable weight to the Inquiry's assessment of the human rights questions and public interests in issue in the circumstances of the Inquiry being engaged in a thorough and orderly investigation of these very issues.

34. The Inquiry Direction does not invite submissions on the effect or relevance - for the purposes of the Inquiry process – of the question of law about which it has sought submissions. However, the Direction arises in the context of Restriction Order decisions. The MPS submits that the discussion prompted pursuant to the Direction should not properly affect the outcome of Restriction Order applications for the following reasons:
    (i) There will be other cases where confidential information is held by a number of persons – some who may threaten or wish for wider disclosure. The risk of hostile or unauthorised publication cannot be definitively ruled out, even whilst it would be taken very seriously.
    (ii) A risk or prospect of such disclosure alone cannot properly interfere with the requirement under s.6 of the Human Rights Act 1998 that the Inquiry does not act incompatibly with a Convention right.
    (iii) It is accepted that an evaluation of what is held by third parties and how it might be used can be relevant to a Restriction Order application: it would not be in the public interest to restrict information wholly in the public domain; it may be necessary to be particularly cautious about disclosure where some information is known to be held in by certain persons or known in public, to inhibit ability to complete a mosaic

identification piece. However, what might be done at some future point should not, beyond this, influence the consideration of a public interest balance. See the discussions in *AB* and Spycatcher (cited above) about the level of publication necessary to rid confidential information of its confidential nature or do the public interest harm which the action for breach of confidence seeks to avoid; and above as to the balance of public interests likely to be in play in a breach of confidence action.

35. In short, the fact that Mssrs Evans and Lewis hold confidential information should not lead the Inquiry to dismiss the need for Restriction Orders in an appropriate case. Such information is not in the public domain, and is capable of being restrained if publication was threatened outside the Inquiry process.

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