

Preliminary issue: Privacy

Note to core participants and directions for hearing

1. Since publication of the Restriction Protocol¹ on 30 May 2017, two significant developments have occurred, which require paragraphs 25 to 34 of the protocol to be revisited. The Inquiry also seeks submissions from state and non-state core participants, and from the media and the Information Commissioner about the impact which data protection and privacy requirements may have on the holding of public hearings.
2. The two significant developments are:
 - (i) the coming into force of the General Data Protection Regulation (GDPR) and the Data Protection Act 2018; and
 - (ii) the opportunity for the Inquiry to consider intelligence reports provided by Special Demonstration Squad undercover officers in bulk.
3. The Inquiry has received or will receive a large volume of intelligence reports made by Special Demonstration Squad undercover officers. I have read or looked at five and a half years' worth of reports (from November 1974 to July 1980). I am satisfied that they are a complete or virtually complete set of written reports during that period and that they provide a comprehensive and accurate picture of what undercover officers were reporting, with the possible exception of urgent oral reports of imminent public order problems. The Inquiry legal team has been reading and analysing reports for different periods, for the purpose of preparing requests pursuant to rule 9 of the Inquiry Rules 2006 to former undercover officers for witness statements. With limited exceptions, they have a similar level of confidence about the comprehensiveness of the reports which they have read. I have every reason to believe that the Inquiry will be able to obtain a similarly comprehensive set of reports for the whole of the remaining period of Special Demonstration Squad operations.
4. The reports are numerous and contain extensive references to individuals. Those which I have read or looked at amount to approximately 9,000 pages of documents. To assess the number of individuals whose names appear in them, I counted the number of different names referred to by a single officer deployed for about four years between 1977 and 1981 into branches and district organisations of two groups in north-west London, the Socialist Workers Party and the Anti-Nazi League,

¹ <https://www.ucpi.org.uk/wp-content/uploads/2017/05/20170530-restriction-protocol-v1.0.pdf>

in the first year of his reporting (from 7 March 1978 to 6 March 1979). There were 185 names. This is not untypical. If, as I believe, it is representative of the pattern of reporting over the lifetime of the Special Demonstration Squad, there will be thousands of individuals identified in the reports. A small minority will be non-state core participants or witnesses from whom the Inquiry would wish to seek evidence.

5. This creates a problem for the Inquiry and, potentially, for those named in the reports. The problem for the Inquiry is how to deal with the data protection and privacy rights of those named. It will not be practicable for the Inquiry to attempt to contact all of them, or even many of them. If they cannot be contacted, they may be unaware of the possibility that their names may feature in the Inquiry's investigation and may be disclosed to others and/or published at or after a hearing. In the example referred to above, the naming of the 185 individuals, in the context of attending a branch or district meeting of either of the two groups, is likely to be taken to reveal political opinions which they then held. This would engage Article 9 of the General Data Protection Regulation.
6. In most instances, the reports contain references to individuals, either as participants in private meetings or as the subject of observations by others speaking at them. The removal of names and other identifying features from the documents would result in documents so heavily redacted as to be incomprehensible. Public understanding of them would be much diminished if they were to be released in that form. Fictional examples have been prepared to permit submissions to be made by reference to concrete documents.
7. Article 9 of the General Data Protection Regulation, as amended by paragraph 12 (c) of Schedule 6 to the Data Protection Act 2018 provides,
 - “1. Processing of personal data revealing... political opinions... shall be prohibited....
 2. Paragraph 1 shall not apply if 1 of the following applies:
 - ...
 - (g) processing is necessary for reasons of substantial public interest and is authorised by domestic law (see section 10 of the 2018 Act).”

Article 6 provides,

- “1. Processing shall be lawful only if and to the extent that at least 1 of the following applies:
 - ...

- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.”

In the United Kingdom, the qualifying conditions are set out in sections 10 (3), 8 (c) of, and Schedule 1 part 2 paragraphs 5 (1) and 6 (1) and (2) (a) to, the Data Protection Act 2018: processing must be necessary for the exercise of a function conferred on a person by an enactment and must be necessary for reasons of substantial public interest.

8. The Inquiry satisfies these conditions. The function of inquiring into and reporting upon undercover policing is conferred on me by section 1 (1) of the Inquiries Act 2005. Processing of personal data is necessary for the exercise of that function, for reasons of substantial public interest. The Inquiry has a data protection policy in place.
9. What is less clear are the issues upon which I invite submissions:
 - a. how is effect to be given to the privacy and data protection rights of thousands of individuals who are named in intelligence reports produced by Special Demonstration Squad undercover officers, without undermining the public interest in as much as possible of the Inquiry being conducted in public?
 - b. do changes to privacy laws since the Restriction Protocol was finalised require the privacy section of that document to be amended and, if so, in what respects?
 - c. do advances in our understanding of the documents and the practical issues arising in relation to privacy redactions justify amending the privacy section of the Restriction Protocol and, if so, in what respects?
 - d. is any guidance needed as to the application of the Restriction Protocol?
 - e. do the coming into force of the General Data Protection Regulation and the Data Protection Act 2018 have any further consequences for the publication of documents, witness statements and the taking of oral evidence?

Given that it is impracticable to contact all, or even many, of those named in intelligence reports, to invite them to apply for a restriction order in respect of their name and, possibly, other identifying details, the following options, or some combination of them, appear to be open:

- (i) hearing all but general evidence about deployments in private, within a “confidentiality ring”;
- (ii) redacting all lists of names from reports, but leaving in all references to individuals in the text of reports;
- (iii) publishing details of the dates of reporting by individual officers and of the subdivisions of the groups on which they reported, in advance of hearings, so as to permit those who believe that they were present to apply for a restriction order in respect of their name and/or other details reported on;
- (iv) publishing a limited selection of redacted reports, based on those which appear to the Inquiry to be most relevant; and
- (v) providing to all core participants and eventually publishing an unredacted set of relevant reports.

There are many different interests in play. It is important that the Inquiry acts lawfully. Hence the need for submissions from all concerned.

Directions

10. I direct as follows:

- (i) If the media, the Information Commissioner, or any core participant wishes to make representations on the above issues, they should send their written submissions to the Inquiry by no later than 4pm on Thursday 10 January 2019.
- (ii) There shall be a hearing at which any of the above persons may make oral submissions on these issues, which will be held at 10.30am on 31 January 2019 in Court 73 of the Royal Courts of Justice.

29 November 2018

Sir John Mitting
Chairman, Undercover Policing Inquiry