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## COUNSEL TO THE INQUIRY'S EXPLANATORY NOTE ON PRIVACY

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### Introduction

1. The purpose of this note is to explain the context in which the Inquiry has decided that it is now necessary to invite written submissions and hold a hearing at which to review its approach to privacy. It supplements the Chairman's note and directions dated 29 November 2018<sup>1</sup> and contains links to relevant Inquiry documents.

### Context

2. The Inquiry is tasked with conducting a public inquiry into undercover policing affecting the private lives of members of the public. That task gives rise to difficult questions about what information can be published to whom and when. The Inquiry has already considered the legal principles applicable in the exercise of the Chairman's power to restrict publication of information pursuant to section 19 of the Inquiries Act 2005. The resulting ruling was published on 3 May 2016<sup>2</sup> (see especially for present purposes the sections on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms at pages 66-70 and personal applications at pages 83-85). We have devised, implemented and refined a procedure for determining applications for anonymity made by key police personnel. Thus far, the vast majority of applications made by former members of the Special Demonstration Squad have been determined and rulings have been made in relation to undercover officers deployed for a significant period of time by the National Public Order Intelligence Unit. The process continues. Applications made by non-police, non-state core participants for anonymity have all been determined.
3. In relation to documents, the Inquiry Legal Team drafted and consulted upon the Restrictions Protocol<sup>3</sup> which was then approved and issued by Sir Christopher Pitchford on 30 May 2017, together with an accompanying statement<sup>4</sup>.

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<sup>1</sup> <https://www.ucpi.org.uk/wp-content/uploads/2018/11/20181129-Privacy-Chairman-note-and-directions.pdf>

<sup>2</sup> <https://www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf>

<sup>3</sup> <https://www.ucpi.org.uk/wp-content/uploads/2017/05/20170530-restriction-protocol-v1.0.pdf>

<sup>4</sup> <https://www.ucpi.org.uk/wp-content/uploads/2017/05/20170530-restriction-statement-and-protocol.pdf>

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4. The Restrictions Protocol is itself incorporated by reference into the Inquiry's Data Protection Policies, all of which can be found on the Inquiry website:
  - 4.1. The Inquiry's Data Protection Policy<sup>5</sup>;
  - 4.2. The Inquiry's policy on processing special categories of personal data and criminal convictions data<sup>6</sup>; and
  - 4.3. The Inquiry's Privacy Information Notice<sup>7</sup>.
5. Restriction order applications in relation to a considerable number of documents held by state bodies have been received. The Inquiry has for some time been processing these applications. It has held a number of closed hearings at which the Chairman has determined applications which have not been agreed by the Inquiry Legal Team. The first such hearing led to the publication, as an example, of a redacted version of the Tradecraft Manual<sup>8</sup>. Periodic hearings have been held since then and continue. The Inquiry's priority has been to process those documents which will be required first for the planned hearings.
6. The Inquiry began issuing requests pursuant to rule 9 of the Inquiries Act 2005 ('rule 9 requests') for witness statements from former Special Demonstration Squad undercover police officers in the summer of 2018. Former undercover officers have been provided with intelligence reports which have not been redacted on privacy grounds so that they can see, and be asked about, the information which they reported or processed. It is, of course, fundamental to our work to establish what was being reported, how it was being reported, why it was being reported and what was done with the reporting before we can proceed to examine whether the reporting was justified. Officers need to see the intelligence which is or appears to have been theirs, or appears to be relevant to their evidence, in order to refresh their memories and provide their best evidence to the Inquiry.
7. The Inquiry has now begun to receive witness statements from former undercover police officers who served in the early days of the Special Demonstration Squad. It is also beginning to receive applications for restriction orders over the content of

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<sup>5</sup> [https://www.ucpi.org.uk/wp-content/uploads/2018/05/20180525-UCPI-Data\\_Protection\\_Policy.pdf](https://www.ucpi.org.uk/wp-content/uploads/2018/05/20180525-UCPI-Data_Protection_Policy.pdf)

<sup>6</sup> [https://www.ucpi.org.uk/wp-content/uploads/2018/05/20180525-UCPI-Processing\\_Special\\_Category\\_and\\_Criminal\\_Convictions\\_Data.pdf](https://www.ucpi.org.uk/wp-content/uploads/2018/05/20180525-UCPI-Processing_Special_Category_and_Criminal_Convictions_Data.pdf)

<sup>7</sup> [https://www.ucpi.org.uk/wp-content/uploads/2018/08/20180816-Privacy\\_Information\\_Notice\\_-\\_Final.pdf](https://www.ucpi.org.uk/wp-content/uploads/2018/08/20180816-Privacy_Information_Notice_-_Final.pdf)

<sup>8</sup> [https://www.ucpi.org.uk/wp-content/uploads/2018/03/20180319-TC-Documents\\_Final\\_Version.pdf](https://www.ucpi.org.uk/wp-content/uploads/2018/03/20180319-TC-Documents_Final_Version.pdf)

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those statements and any associated documents which are both relevant and necessary.

8. The processes summarised in the above three paragraphs enable the Inquiry systematically to determine both public interest and privacy based restriction order applications made by state bodies and police witnesses on a rolling basis.
9. It will not be long before the Inquiry is in a position to begin requesting witness statements from members of the public with requests for witness statements covering their recollections of the activities of the earliest Special Demonstration Squad undercover officers. Some of those who will be approached are core participants. Others are not. The point at which the Inquiry can turn its attention to requesting a witness statement from a particular member of the public occurs when the Inquiry has obtained a witness statement from the undercover police officer, or officers, who affected that witness, together with the associated relevant and necessary documents.
10. When approaching a member of the public for a witness statement it is the Inquiry's intention to issue a rule 9 request which will be accompanied, either in confidence or subject to a restriction order, by a pack of documents. When preparing the witness pack to accompany a request for a witness statement from a member of the public the Inquiry will need to consider what, if any, privacy redactions should be made to the documents in the witness pack to protect the privacy of other members of the public. As things stand, the process for doing so is that set out in the privacy section of the Restrictions Protocol: see pages 8 to 11, paragraphs 25 to 34, reproduced below for convenience:
  - “25. The Inquiry's approach to privacy is designed to ensure compliance with the relevant legal obligations, including those owed pursuant to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), read with section 6 of the Human Rights Act 1998; the Data Protection Act 1998; and the Inquiry's duties both pursuant to section 17 of the Act and at common law to act fairly.
  26. In relation to Article 8 of the Convention, the Inquiry recognises that the threshold test for the right to respect for private and family life, home and correspondence, in respect of a living person, in the context of publication generally, is whether the individual concerned would have a reasonable expectation of privacy in relation to the personal information in question. It further recognises that the systemic collection and storage of information

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about an identifiable living individual constitutes an interference with that individual's rights under Article 8 of the Convention and that publication of such material will also constitute a further such interference. Any interference with the right to respect for private and family life, home and correspondence must be in accordance with law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. In devising the procedure explained below the Inquiry has also had regard to the Strasbourg case law which acknowledges that Article 8 does not require an unrealistic or impractical approach and that relevant policies must be sufficiently flexible. The scheme of the Inquiry's approach, which is set out more fully below, is as follows:

- (i) Irrelevant and/or unnecessary personal information will be redacted by the Inquiry legal team (paragraphs 27 and 28 below).
- (ii) Core participants and witnesses will have the opportunity to consider references to themselves in documents which the Inquiry proposes to use at the point in time when they are provided to them for the purposes of making a witness statement. They will then be able to make any application for a restriction order over such information (paragraph 29).
- (iii) Persons who are neither core participants nor witnesses will be contacted by the Inquiry, unless in all the circumstances it would be disproportionate to do so, and given the opportunity to make an application for a restriction order over any relevant and necessary personal information (paragraph 32).
- (iv) References to relevant and necessary personal information relating to persons whom it would be disproportionate to contact will be considered for redaction by the Inquiry legal team. The Inquiry legal team will decide whether to provisionally redact references to such persons applying the relevant legal principles and mindful of the fact that the person affected will not have had an opportunity to apply for a restriction order (paragraph 33).
- (v) If any issue arises which is not expressly covered by the protocol the Inquiry legal team will decide how to deal with it and will do so

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in a way which complies with the affected person's Article 8 rights, the Data Protection Act 1998 and the duty to act fairly (paragraph 34).

27. Irrelevant and/or unnecessary personal information will be redacted by the Inquiry legal team. In particular, the Inquiry legal team will generally redact, without requiring any application, information comprising personal information other than names, such as dates of birth, telephone numbers, home or office addresses and any other contact details, whether these relate to state or non-state individuals. The Inquiry legal team will seek to ensure such personal information is redacted from documents supplied to it prior to disclosure to core participants and the public in accordance with data protection requirements. The basis for this approach is that details such as those listed above will generally be irrelevant and/or unnecessary for the Inquiry's purposes. For the avoidance of doubt, this does not include information which is "personal information" only in the sense that it is or was part of an undercover police officer's cover identity. Any restriction sought over details associated with a cover identity must be specifically applied for by the Metropolitan Police Service.
28. The Inquiry legal team will also proactively redact names if and insofar as they are irrelevant and unnecessary.
29. Copies of documents containing personal information about both core participants and witnesses to the Inquiry, which the Inquiry is proposing to publish, and insofar as they have not already been restricted, will generally be provided to the core participant or witness in question, before the documents are put to other non-police, non-state core participants or witnesses or into the public domain, at the point in time when the Inquiry approaches the core participant or witness for a witness statement in relation to those documents. This will not prevent the earlier provision of documents under paragraph 21(2) above. Copies of such documents will be provided to the person concerned either in confidence or subject to a temporary restriction order. The person to whom the documents are provided may then make any application for a restriction order on privacy grounds within 14 days or such other period as the Inquiry may specify.
30. In those cases in which the Inquiry considers that it is appropriate to take a witness statement from a state core participant or witness before approaching a non-state core participant or witness, the documents may necessarily have been shown to the state witness before being shown to

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the non-state core participant or witness. On such occasions any private information will be shown to the state core participant or witness in confidence or subject to a provisional restriction order. The documents to which this would apply will be those which have been provided to the Inquiry by state or police bodies and individuals rather than non-state core participants or witnesses.

31. In cases where a document refers to multiple non-state persons the Inquiry legal team will exercise its own judgment, having regard to the guiding legal principles and the paramount requirement to act lawfully as to the appropriate way forward. In a case in which there is no reason to suppose that showing the document to all the non-state persons concerned will cause an unjustified interference with the right to privacy the Inquiry will not prepare multiple copies each redacted so as only to reveal the name of that one non-state person before showing it to that non-state person. In a case in which there is reason to suppose that there is a real risk of such an interference then the Inquiry will prepare multiple provisionally redacted copies insofar as is required to obviate that risk. Non-state core participants or witnesses will then be shown the appropriate provisionally redacted copy when the Inquiry requests a witness statement from them in relation to the document.
32. Where a document contains relevant and necessary personal information about a person who is neither a core participant nor a witness then the Inquiry will consider whether it is conceivable that an arguable application for a restriction order might be made, and if so whether the person affected is readily contactable. In cases in which those two conditions are met, the person will be contacted and afforded the opportunity to make an application for a restriction order before further dissemination of the personal information about that person in the document.
33. In cases where the non-core participant, non-witness is not readily contactable then the Inquiry legal team will decide whether or not the information should be provisionally restricted having regard to the legal rights referred to in paragraphs 25 and 26 above and mindful when doing so of the fact that the individual concerned is not able to make his or her own application. In considering whether a person is readily contactable, the Inquiry will have regard to the risk of intrusion into private lives which may arise if documents are disclosed to the wrong person as a result of

incomplete information, and to the intrusion inherent in contacting individuals.

34. In any eventuality relating to privacy which is not expressly covered above the Inquiry legal team will exercise its judgment as to how best to proceed having regard to the need to act in accordance with the legal obligations set out at paragraphs 25 and 26 above. The Inquiry legal team may refer any question arising from such an eventuality to the Chairman.”
11. When a member of the public provides a witness statement to the Inquiry, together with any associated documents, it will be open to him or her to make an application for a restriction order over some or all of the contents of the statement and/or accompanying documents. He or she will also be able to apply for a restriction order, on privacy grounds, in relation to any of the contents of the materials contained in the witness pack provided by the Inquiry for the purposes of making the witness statement (e.g. references to him or her in the undercover officer’s witness statement and intelligence reports). Any restrictions resulting from such applications will be applied before the documents in question are included in the relevant Inquiry hearing bundle<sup>9</sup>.
12. Before inclusion in the relevant Inquiry hearing bundle the Inquiry will also have to consider what privacy restrictions are required in relation to persons who have not been approached for a witness statement and who therefore have not had an opportunity, through that process to raise any privacy concerns which they might have. Again, as things stand, the process for doing so is that set out in the privacy section of the Restrictions Protocol.

### **Mock Illustrative Documents**

13. The Inquiry is now benefitting from a growing understanding of the nature of the documents which will, at least in some cases, be both relevant and necessary to its work. Considering specific documents brings to life the privacy issues which need to be resolved. The Inquiry cannot publish unredacted examples of real documents without privacy restrictions because to do so would breach, or risk breaching, the privacy rights of those referred to in such documents. Instead, and

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<sup>9</sup> The Inquiry intends to produce a hearing bundle for each of the six tranches identified in the Strategic Review - [https://www.ucpi.org.uk/wp-content/uploads/2018/06/20180510-strategic\\_review.pdf](https://www.ucpi.org.uk/wp-content/uploads/2018/06/20180510-strategic_review.pdf). The Inquiry may break down the hearing bundle for each tranche so that it can release discrete sections to relevant core participants more quickly as and when they are ready. Release 1 of the Tranche 1 Hearing Bundle is likely to comprise the documents and witness statements required for the investigation of the Special Demonstration Squad’s deployments into the Vietnam Solidarity Campaign.

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for the purposes of the forthcoming hearing the Inquiry Legal Team has produced mock documents which illustrate some of the issues which arise.

14. The first example ('Annex A') has been produced as indicative of the issues which commonly arise with reporting of the kind which is typical in Tranche 1 (1968-1982). The undercover officer, the organisation which he infiltrated, the individuals mentioned in the report and the details of their subsequent careers are all entirely fictional. It has been written to demonstrate a large number of typical issues within a short report.
15. The second example ('Annex B') has been produced to illustrate the issues which arise with reporting in more recent years as in Tranche 3 (1993-2007). The names of the undercover officer reporting, the justice campaign and those present at the meeting are fictitious and have been created in such a way as to ensure they could not be mistaken for real people. The content is similarly fictional.
16. With both examples, however, the Inquiry has aimed to reflect fairly: (i) the overall tone of reporting by some Special Demonstration Squad officers, and the kinds of opinions which are sometimes expressed on data subjects in early intelligence reporting; (ii) a range of different forms of personal data of the kinds which appear in early intelligence reporting; and (iii) the range of situations which most often arise in terms of what is in the public domain about individuals mentioned in reporting, and what means the Inquiry may have of contacting them if necessary.

### Hearings

17. Privacy considerations are not, of course, restricted to the preparation of documents and witness statements for publication. They are also important in the context of hearings. The Inquiry has the power to control who may attend a hearing and what may be communicated about a hearing outside the hearing room (see sections 18-20 of the Inquiries Act 2005). There is a spectrum of possible solutions to deal with privacy issues. For example, attendance to hear an officer's evidence could be restricted, on privacy grounds, to the person, or persons, spied upon plus their lawyers, the Chairman, necessary members of the Inquiry Legal Team and administrative staff. Such an arrangement might apply to all or only a part of the evidence given by the officer and the person/s affected by that officer's deployment.
18. There is a connection between the extent to which the publication of documents is restricted, whether imposed on public interest or on privacy grounds, and the conduct of hearings. Put simply, the more redacted the documents are, and the

more issues there are which cannot be ventilated publicly, the less likely it is that meaningful evidence can be taken in public. That applies even if a witness is not the subject of an anonymity order.

### **Conclusion**

19. Since the Restrictions Protocol was issued there has been a substantial development in the law of privacy. Both the General Data Protection Regulation and the associated Data Protection Act 2018 have come into force. The Inquiry needs to ensure that its approach to privacy restrictions fully complies with these new laws. It also needs to ensure that, subject to the overriding need to comply with its legal obligations, the restrictions process can be completed in a reasonable time and results in proceedings which are as public as the Inquiry can reasonably make them. The pivotal importance of the Inquiry's privacy restrictions process to its compliance with the law, the speed at which the Inquiry can progress and the openness with which it can conduct its hearings are such that submissions are invited from core participants, the media and the Information Commissioner.

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