IN THE UNDERCOVER POLICING INQUIRY

NOTE OF GUARDIAN NEWS AND MEDIA LIMITED
for hearing on 31st January 2019

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1. This note is provided on behalf of Guardian News and Media Limited ("GNM") in response to the Chair's directions of 29th November 2018 and the recent consultation on the conduct of evidence hearings.

A. The Practical Options for Processing Data

2. The presumption should be that intelligence reports should be provided in as much detail as possible to the public. There is an obvious public interest in understanding the evidence gathered by undercover policing officers, including who they targeted and why. This is consistent with the UCPI's terms of reference, the requirements of openness in s.18(1) Inquiries Act 2005, and the widespread concern that led to the establishment of the UCPI. The "*Restriction Orders: Legal Principles and Approach Ruling*" is clear, at §§82-29, that the starting point in the UCPI should be openness. The Chair has also recognised the importance of publishing evidence in his statement about the conduct of evidence hearings, 19th December 2018, at §§16-18.

3. The first practical option suggested by the UCPI is hearing all but general evidence about deployments in private, within a "*confidentiality ring"*.[1] This approach is inconsistent with the presumption of openness. It would frustrate the purpose of the UCPI. It would also deny the UCPI the benefits that accrue from openness. Open hearings increase public confidence in the UCPI. As Lord Atkinson put it in *Scott v Scott* [1913] AC 417*,* at 463*:* "*in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect*". This can be particularly important in public inquiries in respect of alleged police misconduct, where there is a high likelihood of allegations of "*cover-up"*.[2] Closed hearings make uninformed and

[1] Chair's directions of 29th November 2018, at §9(i).
[2] *R (E) v Chairman of the Inquiry into the Death of Azelle Rodney* [2012] EWHC 563 (Admin), per Laws LJ, at §26; In his final report in the *Thames Safety Inquiry*, Clarke LJ (as he then was) stressed, at §5.1, that: *"… it is of great importance that members of the public should feel confident that a*

inaccurate comment about UCPI proceedings more likely. Open hearings ensure that witnesses are less likely to exaggerate or to attempt to pass on responsibility;[3] they can result in evidence becoming available which would not become available if the proceedings are conducted in closed;[4] they help to ensure the preservation of the free press.[5]

4. Similarly, redacting all lists of names from reports[6] would undermine the ability of the press to investigate and report on the UCPI. The Courts have repeatedly emphasised the importance to the press of reporting the names of those involved in legal proceedings. From a newspaper's point of view, a report of legal proceedings that does not reveal the identity of those involved would be "*very much disembodied … readers will be less interested and editors will act accordingly."* Informed debate about the proceedings would suffer.[7] "*What's in a name*?", asked Lord Rodger in *In re Guardian News and Media Ltd* [2010] 2 AC 697. He answered, at §63: "*'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed … A requirement to report [a trial] in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on*."

5. It is unclear, in any event, how a blanket policy of redacting all names (or even all surnames) could be required by the Data Protection Act 2018 or Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("GDPR"); both of which focus on proportionality of individual cases, as opposed to requiring blanket redactions. There may be cases in

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searching investigation has been held, that nothing has been swept under the carpet and that no punches have been pulled" (citing the final report in the *Herald of Free Enterprise* investigation, per Sheen J, at §60).

[3] *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, at 310-311 and 320.

[4] *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966, per Lord Woolf MR, at 977.

[5] *In re S* [2005] 1 AC 593, §34; *In re Guardian News and Media Ltd* [2010] 2 AC 697, at 723.

[6] Chair's directions of 29th November 2018, at §9(ii).

[7] *In re S* [2005] 1 AC 593, at §34

which the full name of the data subject is of public interest and in which publication to the public, even though the data includes "*special category personal data".*

6. If the UCPI were to publish only a limited selection of redacted reports, based on those which appear to the UCPI to be the most relevant,[8] this would mean that the public is uninformed about the majority of the evidence before the UCPI. While some intelligence reports may appear of particular relevance to the UCPI, the UCPI may not know the journalistic interest in other intelligence reports, particularly to journalists with specialist knowledge and experience of undercover policing. The UCPI is not in a position to determine editorially what else is or may be of interest to the public. That is the function of the media, not the judiciary.[9] "*Judges are not newspaper editors"*.[10] So too, the UCPI team should be cautious about making what would really be an editorial judgment about the adequacy of material already available to a journalist for their journalistic purposes.[11]

7. The Chair's fifth option is "*providing to all core participants and eventually publishing an unredacted set of relevant reports*."[12] A problem with this option is the word, "*eventually"*. Publishing evidence *after* a hearing would be too late. The media needs access to the evidence put before the UCPI so as to enable it to properly report on it. The media are "*the conduit through which most members of the public receive information about court proceedings"*.[13] So as to fulfil their role in permitting "*the public to scrutinise the workings of the law, for better or for worse*", the media will often require access to material before the Court.[14] GNM respectfully agrees with the Chair that, "*It is important that the public should have an opportunity to see and consider the documentary evidence which the Inquiry intends to take in to account in assessing the issues which it must determine, for example, what happened during a deployment and the reasons for it*."[15] It follows that significant further delay in publishing material (particularly to the media) is to be avoided.

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[8] Chair's directions of 29th November 2018, at §9(iv).
[9] *Independent News and Media Ltd and others v A* [2010] 1 WLR 2262, at §22.
[10] *In re Guardian News and Media Ltd* [2010] 2 AC 697, per Lord Rodger, at §63, citing Lord Hoffmann in *Campbell v MGN Ltd* [2004] 2 AC 457, §59.
[11] *Guardian News and Media*, per Toulson LJ, at §82.
[12] Chair's directions of 29th November 2018, at §9(v).
[13] *Re BBC*, per Lord Reed, at 600G-H; see also *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, per Sir John Donaldson MR, at 183; *R v Felixstowe Justices, Ex p Leigh* [1987] QB 582, per Watkins LJ, at 591; and *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, per Lord Bingham, at 290.
[14] *R (Guardian News & Media Ltd) v Westminster Mags' Court* [2013] QB 618, at 630B-C.
[15] Chair's statement about the conduct of evidence hearings, 19th December 2018, §17.

8. In the circumstances, GNM respectfully invites the UCPI to adopt an approach which allows for the least interference with openness. Inquiring into and reporting upon undercover policing is a function conferred on the Chair by s.1(1) Inquiries Act 2005. The UCPI has a specific "*Policy on processing special categories of personal data and criminal convictions data"* and a "*Privacy Information Notice"*. It permits applications for restriction orders, pursuant to s.19 Inquiries Act 2005 and has a redactions protocol that can be applied where strictly necessary. It can publish details of the political groups that were the subject of undercover officer reports and the dates during which there was undercover officer reporting on them; thus permitting any data subjects to contact the UCPI and make any necessary application for a restriction order. In these circumstances, the UCPI may therefore consider that it has put in place suitable and specific measures to safeguard the fundamental rights and the interests of those individuals identified in the intelligence reports. Where no objection is raised to processing data in these circumstances, it is difficult to see how either the DPA 2018 or the GDPR would prevent the UCPI from further processing.

B. The Conduct of Evidence Hearings

9. In its consultation response, GNM stressed the importance of live-streaming of the hearings. This was consistent with the consultation responses of Peter Francis[16], the Secretary of State for the Home Department,[17] the Category M core participants,[18] and the non-state non-police core participants.[19]

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[16] Leigh Day consultation response, 27th September 2018, at p.1: "*Accessibility to the Inquiry hearings for all members of the public, especially for those who are unable to attend in person, is crucial. The most sensible and effective way to achieve this is by a live-stream and/or internet channel. The importance of an accessible and inclusive inquiry process far outweighs the potential risks*."

[17] Response, 27th September 2018: "*The … starting point should be that Inquiry proceedings are live streamed. This is to the extent that live streaming can be achieved without adding to the distress of witnesses who are to give sensitive personal evidence, or without causing harm to the public interest."* GNM recognises that giving evidence can be difficult, but respectfully disagrees that a witness' distress could, without more, justify a decision not to live-stream their evidence. The Chair, in his statement about the conduct of evidential hearings, dated 19th December 2018, envisages taking steps to assist witnesses in giving evidence (at §§9-15), which should assist in avoiding unnecessary distress.

[18] Hickman and Rose response, 27th September 2018, §5.1: "*The proposal to live-stream the evidence is supported by the CPMs in order that it may be seen and heard by as many people as possible, some of whom may not be able to access the hearing venue. This applies equally to witnesses and CPs who may wish to follow particular evidence but are unable to travel to the hearing due to other commitments*."

[19] Response, 12th October 2018, at §12.1.

10. GNM does not accept that live-streaming of witness evidence would be incompatible with the protection of their rights and interests. Live-streaming of witness evidence is the norm in public inquiries (such as the Leveson inquiry), even where there is contested evidence from state agents (the Grenfell inquiry) and sensitive, anonymous evidence (the Independent Inquiry into Child Sexual Abuse). GNM repeats its submissions about the practical importance of transparency and openness, as set out above. So as to ensure accountability and accessibility in practice, it is vital that justice is seen to be done by as many people as possible. Live-streaming should be the starting point in this inquiry and steps can be taken to mitigate any risks posed by it.

11. Some core participants have suggested that it may be necessary to adopt special measures in respect of witnesses. Any such measures would be a derogation from the presumption of openness in this inquiry and would require cogent justification. The Chair has indicated, in his 19th December 2019 statement, at §§9 and 12, that witnesses who seek such special measures will have to make an application for them. Insofar as such an application is made, prior notification of it should be given to the media so as to enable it to make submissions about the likely impact of an application on its freedom of expression (s.12(2) Human Rights Act 1998).

C. Conclusion

12. The UCPI is respectfully invited to ensure that this inquiry is as open as possible.

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24th January 2018