

IN THE MATTER OF THE UNDERCOVERING POLICING INQUIRY
AND
IN THE MATTER OF THE GDPR & THE DATA PROTECTION ACT 2018

SUBMISSIONS ON PRIVACY
ON BEHALF OF THE INFORMATION COMMISSIONER

1. These submissions are made on behalf of the Information Commissioner ('the Commissioner') in response to the directions published by the Chairman to the Undercover Policing Inquiry ('the Inquiry') in the '*Preliminary Issue: Privacy*' note dated 29 November 2018 ('the Privacy Note').
2. In summary, the Commissioner is concerned to assist the Inquiry in ensuring that it adopts the correct approach to compliance with its obligations as a data controller. However, consistent with her statutory functions, the Commissioner considers she can only do so at a high level, providing guidance and assistance as to the relevant principles and legal obligations. Unlike the Inquiry and the Interested Parties, she is not sufficiently seized of all the facts and matters that are relevant to the consequence of the application of those principles and legal obligations to the privacy issues which arise in the case of any specific information contained in personal data considered in the context of the inquiry.
3. Subject to that overarching caveat, there are a number of specific privacy issues in relation to which the Commissioner considers that her duty pursuant to Article 57(1)(d) of the General Data Protection Regulation ('GDPR') dictates she should provide guidance to the Inquiry.

General principles

4. In the Commissioner's view, save in one respect (see paragraph 5(d) below), the Inquiry has correctly identified the applicable general principles to the privacy / data protection issues set out in the privacy Note and '*Counsel to Inquiry's explanatory note on privacy*' (and its annexes).

5. The Inquiry has recognised (among other relevant principles) in its *'Privacy Information Notice'* (dated 13 August 2018) that:
- (a) it is a data controller within the meaning of the GDPR and therefore it is obliged to apply the principles relating to processing of personal data set out at Article 5(1) GDPR: Article 5(2) GDPR as applied by section 6 of the Data Protection Act 2018 (the DPA 2018);
 - (b) the basis for the lawful processing of personal data which the Inquiry legitimately claims is that it is 'necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the [the Chairman]': Article 6(1)(e) GDPR as applied by section 8 of the DPA 2018;
 - (c) in addition to the processing of personal data, the Inquiry will be processing special category personal data: Article 9(1) GDPR;
 - (d) the exception from the prohibition on the processing of special category personal data which the Inquiry legitimately claims is that the processing is necessary for reasons of substantial public interest: Article 9(2)(g) GDPR;¹
 - (e) reliance upon Article 9(2)(g) GDPR as an exception to the prohibition on the processing of special category personal data requires one of the conditions set out in Part 2 of Schedule 1 to the DPA 2018 to be satisfied: section 10(3) DPA 2018;
 - (f) the condition which the Inquiry legitimately claims is that the processing is necessary for the purpose of the exercise of a function conferred on the Chairman by the Inquiries Act 2005 and also that it is necessary in the substantial public interest: paragraph 6 of Part 2 of Schedule 1 to the DPA 2018; and
 - (g) the proviso that the condition under paragraph 6 of Part 2 of Schedule 1 is met only if, when the processing is carried out, the controller has an appropriate policy document in place (as defined in Part 4 of Schedule 1), is satisfied by the Inquiry's *'Policy on processing special categories of personal data and criminal convictions data'*: paragraph 5(1) of Part 2 of Schedule 1 to the DPA 2018.

Data subject rights

6. It is clear that the Inquiry is conscious that it needs to process personal information in a manner which protects data subject rights including (but not limited to) its obligation as

¹ It should be noted that Chapter 3 of Part 2 of the DPA 2018 does not apply to the Inquiry; it follows that Schedule 6 to the DPA 2018 does not apply and therefore Article 9(2)(g) should be read as provided for by the GDPR, not the applied GDPR (to that extent the Commissioner disagrees with the formulation at paragraph 7 of the Privacy Note).

to transparency (Articles 12-14 GDPR), rights of access (Article 15 GDPR), rectification (Article 16 GDPR), erasure (Article 17 GDPR), restriction (Article 18 GDPR), and rights to object (Article 21 GDPR). To the extent that the Inquiry seeks to rely on any exemptions to data subject rights, it must ensure that such reliance is considered, documented and transparent.

7. In the context of the subject matter of the inquiry, the Inquiry's obligation to process personal data transparently and the complementary right of data subjects to access to that personal data are vital. The Commissioner would expect the Inquiry to comply with the requirements of the legislation when responding to subject access requests.
8. The Inquiry's Data Protection Officer (DPO) should be in a position to advise the Inquiry on these matters; she may be assisted by referring to the Commissioner's guidance on:
 - (a) data subject rights: <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/>; and
 - (b) transparency: <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/lawfulness-fairness-and-transparency>.
9. It follows that it is vital that the Inquiry ensures that all Inquiry staff, the Inquiry DPO and the Chairman are adequately trained and/or experienced in the application of the GDPR and the DPA 2018.

Joint data controllers

10. The Inquiry and the Chairman may wish to consider whether they are each joint data controllers. As the definition of data controller at Article 4(7) GDPR (as applied by section 6 DPA 2018) makes clear, determinations as to the 'purposes and means of the processing of personal data' might be made 'alone' or 'jointly' by two or more natural or legal persons, public authorities, agencies or other bodies.
11. A distinction might be drawn between functions (which involve the processing of personal data) serving the substantive purposes of the Inquiry (such as gathering of documents and materials, taking of witness statements, evidential analysis, drafting of Inquiry documents, disclosure and publishing of information, etc), and functions (which also involve the processing of personal data) serving the procedural purposes of the Inquiry (such as determinations pursuant to sections 17-21, 24 and 25 of the Inquiries

Act 2005 or pursuant to the Inquiry Rules 2006 e.g. designation of core participants, imposition of restriction notices, conduct of hearings, publication of reports, etc). In the Commissioner's view, whilst such functions share a common objective and purpose (namely, the furtherance of the Inquiry's work) the latter category of processing might be properly regarded as being carried out by the Chairman, as opposed to the Inquiry itself. In that event, both the Chairman and the Inquiry would be joint data controllers in relation to the same personal data.

12. The Inquiry's DPO should be in a position to consider whether the Chairman ever acts as a distinct data controller for any function he undertakes. Although that determination is a matter for the DPO, she may wish to consider the Commissioner's guidance in this regard: <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/controllers-and-processors/>.
13. The consequence of a determination that the Chairman and the Inquiry are joint data controllers of personal data would be that in addition to the obligations on data controllers which apply in any event, each also has to comply with the requirements of Article 26 GDPR, principally by entering into a transparent arrangement that sets out their roles and responsibilities regarding compliance with the GDPR, and in particular how they will comply with the rights of individuals.
14. If it were determined that the Chairman is a joint data controller, it may be that the same policies and procedures could be adopted by both controllers with some amendment in order to be clear as to the nature of the processing each carries out. Further, each data controller would need to identify their basis for processing, although it may be that both the Chairman and the Inquiry could rely upon the same lawful basis: the Chairman could legitimately seek to rely on the second part of the lawful basis identified i.e. 'in the exercise of official authority vested in [the Chairman]'.

Processing 'necessary for reasons of substantial public interest'

15. It is for the Inquiry to decide, on an instance by instance basis, whether processing of any given personal data is 'necessary for reasons of substantial public interest'. Further, there may be different results in relation to the same personal data depending upon what processing is considered: it may be necessary for reasons of substantial public interest for the Inquiry to obtain, store and consult particular personal data, but it may not be necessary in that sense to disclose it to interested parties and/or the public.

16. If the Inquiry concludes that it is not necessary for reasons of substantial public interest to process the particular personal data in the manner contemplated, it may, depending upon the particular circumstances, determine in accordance with its obligations as a data controller (i) to not process in that manner at all, or (ii) to do so in a way that adequately protects data subject rights e.g. through the use of anonymisation techniques such as ciphers and/or other redactions which mean that personal data is not disclosed, a measure to ensure an appropriate level of security in accordance with Article 5(f) and Article 32 GDPR.
17. In the event that the Inquiry wishes to anonymise personal data so as to ensure that particular individuals cannot be re-identified, it may wish to consider reference to the Commissioner's Anonymisation Code: <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>.
18. The Commissioner takes the point that such anonymisation will have to go beyond the simple redaction of names or use of ciphers, in order to ensure that data subjects cannot be inferentially identified from other non-redacted information (sometimes referred to as 'the mosaic effect'). However, the Commissioner considers that any difficulties in so doing are outweighed by the rights of data subjects which are properly engaged.
19. When considering whether it is 'necessary for reasons of substantial public interest', the Inquiry has correctly identified that it must balance issues such as the reasonable expectations of the relevant individuals and their rights (including those guaranteed by Article 8 of the European Convention on Human Rights, and Articles 7 and 8 of the EU Charter of Fundamental Rights), against the legitimate public interest in the inquiry being conducted transparently.
20. The Commissioner considers that the most relevant guidance that her office has published is that provided in connection with section 40 of the Freedom of Information Act 2000 (personal data which is exempted from the obligation to disclose pursuant to the Act): see in particular paragraphs 44-48 of <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>. Whilst the Inquiry is not presently concerned with FOIA requests, the factors considered when section 40 applies will be the same as those in the balancing exercise described at paragraph 19 above. The Inquiry should also be aware that the Guidance is being updated to take account of the GDPR and DPA 2018.

21. In order that the balancing exercise is correctly conducted, it is key that Inquiry staff are adequately trained and resourced to properly identify the data protection issues presented by the information they process.
22. In order to comply with the accountability principle under Article 5(2) GDPR, it is necessary that decisions taken with regard to processing of personal data are properly documented. The Inquiry may be assisted by the Commissioner's guidance on accountability and governance within the '*Guide to the General Data Protection Regulation*': <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/>.

Criminal conviction data

23. The regime for the processing of criminal conviction data has a separate statutory basis than that for special category personal data, albeit that its effect is broadly the same.
24. Article 10 GDPR provides that the processing of personal data relating to criminal convictions and offences for the lawful purposes listed in Article 6(1), '*shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects*'. Section 10(5) of the DPA 2018 provides that such processing is authorised by the law of the United Kingdom only if it meets a condition in Part 1, 2 or 3 of Schedule 1 to the DPA 2018.
25. As set out at paragraph 5(e) above, the Commissioner's view is that the Inquiry legitimately claims the condition provided by paragraph 6 of Part 2 of Schedule 1, namely that the processing is necessary for purposes of the exercise of a function conferred on the Chairman by the Inquiries Act 2005 and is necessary in the substantial public interest.
26. In this regard the Commissioner notes the provisions of the Inquiry's '*Policy on processing special categories of personal data and criminal convictions data*'.
27. The Inquiry may be assisted in this regard by the Commissioner's guidance on criminal conviction data within the '*Guide to the General Data Protection Regulation*': <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/criminal-offence-data/>.

28. The Commissioner's comments (above) as to the necessity for adequate training and resourcing are amplified in relation to criminal conviction data.

The Inquiry's approach to publication

29. The Inquiry's *'Privacy Information Notice'* provides (under the heading 'Publication of evidence') that *'the Inquiry intends to make all information that is relevant and necessary available to the public unless publication has been restricted by a Restriction Order under Section 19 of the Inquiries Act 2005'*.
30. The Commissioner would expect the Inquiry to firstly ensure that the relevant data protection principles and conditions have been complied with in respect to all personal data (whether they are the subject of a restriction order or not) rather than adopt a policy of disclosure of 'relevant and necessary' information subject to the application of restriction orders.
31. The general principles detailed above apply in all cases, requiring a balancing exercise to be undertaken between individual rights and the public interest in transparency in relation to all personal data processed by the Inquiry. It follows that a blanket policy of publication of 'relevant and necessary' information is potentially inconsistent with the proper discharge of the Inquiry's obligations as a data controller.

The Restriction Protocol

32. The Commissioner notes that the emphasis in the *'Protocol for the Imposition of Restrictions to the Publication of Documents and other Evidence Produced to the Inquiry by the Metropolitan Police Service'* (dated 30 May 2017) is on the rights of data subjects engaged pursuant to Article 8 of the ECHR.
33. However, the Protocol makes reference to the DPA 1998 and would therefore be improved by making explicit reference to the relevant articles of the GDPR and sections of the DPA 2018. The Commissioner does not consider that the matters set out at paragraphs 25-34 on *'Privacy'* need any particular change given that the suggested measures and procedures contained therein would be equally valid under the new legislation.

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