IN THE UNDERCOVER POLICING INQUIRY

PRELIMINARY ISSUE: PRIVACY
MPS SUBMISSIONS
FOR HEARING 31 JANUARY 2019

Introduction

1. These submissions are prepared pursuant to the Chairman's direction of 29 November 2018, seeking the views of Core Participants (**CP**s) on the treatment of personal/private information in SDS reporting.

2. Whilst the law has changed with the advent of the General Data Protection Regulation (**GDPR**) and the Data Protection Act 2018 (**DPA2018**), the MPS's view is that these changes do not themselves demand amendment of the Inquiry's Restriction Protocol (**RP**) or in approach, due to the broad consistency between principles in the Data Protection Act 1998 (**DPA1998**) and the principles relating to the processing of personal data set down in the GDPR. Accordingly, amendments to the RP because of changes to the law are likely to be consequential only.

3. However, the reporting material generated over the 40-year history of the SDS is now known to be voluminous. It mentions hundreds of names of individuals, often including indications of the political opinions held by them as well as other personal information and descriptions. Such reporting was carried out by undercover officers casting a wide net for intelligence gathering purposes[1], mostly in the pre-Regulation of Investigatory Powers Act 2000 era.

4. The MPS acknowledges that being mentioned in intelligence reporting is capable of having a particular, distinct impact on individuals, and that it differs from other forms of mention (for example being mentioned in police papers as a witness or bystander to an event). Therefore, in distinction from the usual case before the courts, the MPS accepts that there may often be an expectation of privacy in respect of this personal data. Many individuals will not know they have been mentioned in the context of, for example, attendance at a meeting for a particular political group some decades in the past. Understandably, some would feel aggrieved by the publication of their name or other personal information in the context of Special Branch reporting of their activities, in some cases decades ago. The MPS therefore recognises that the privacy rights of these individuals are likely to be engaged by the process of preparing the documents for publication.

[1] The MPS of course acknowledges that the width of that process is a proper matter for investigation by the Inquiry.

5. It is a fact that the RP was prepared before the SDS reporting had been recovered, when its full volume was not known, and its content had not been examined by the Inquiry.

6. There are obvious difficulties in preparing the intelligence reports for public view in a way that does not unjustifiably or disproportionately interfere with the rights of individuals mentioned. There is no perfect solution. Publishing reports which afford complete privacy to individuals will often be incomprehensible to the wider public and challenging to manage during hearings. Reports which seek to be comprehensible to the wider public risk unwelcome interference in the private lives of a large number of individuals who have no involvement or interest in the Inquiry. The more careful approaches in between will all come at considerable cost to the timetable and the public purse. As the Chairman's Note recognises, it will be necessary for the Inquiry to make choices; those choices of course need to be made in accordance with s 17(3)[2] of the Inquiries Act 2005. The volume of material means that the decision as to which documents it would be *necessary* to publish is the first and most critical one.

7. The Inquiry's current indicative timetable, published in May 2018, contemplates evidential hearings on modules 1 and 2 starting in June 2019 and concluding at around the end of 2021, and the Chairman's interim report of the factual findings being sent to the Home Secretary in early summer 2022 (Strategic Review at §82 and §87). As a result of carrying out redaction exercises on reporting documents (for the purpose of avoiding risks of harm), the MPS has some experience of how complex and time-consuming the process of preparing the documents to afford respect to the privacy of individuals is likely to be. MPS experience to date would suggest that the *current* timetable simply does not allow time for the exercises contemplated in the RP as currently drafted, given the volume of the material and the complexity of the work. That is, the timetable does not allow time to take a context-specific line-by-line approach to privacy redactions and to prepare multiple versions of documents, **or** an exercise to consult numerous individuals (even assuming they could be found and confirmed, or that it was proper to carry out a search and make contact with them) in respect of all or even a large proportion of the recovered reporting material.

8. At this time the Inquiry has not sought to indicate what the effects on its timetable would be of each of the options suggested by the Chairman in his Note (or any other option). The MPS has attempted to consider some of the potential timescales below, but in order to inform the CPs making submissions at the 31 January hearing, the Inquiry is invited, in advance of that hearing, to indicate what it expects the effects of each course (and of making no change to the current RP depending on volume of material processed) would be on the current timetable.

[2] "In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

9. The MPS is committed to supporting the Inquiry to meet its Terms of Reference, and do so within a reasonable timescale (i.e. that set down in the Strategic Review). The Inquiry's approach to data handling and privacy must, of course, be lawful. Lawful processing and proper respect to privacy rights ought to be achievable *without* the Inquiry sacrificing its ability to meet its Terms of Reference and report within a meaningful timescale[3]. The MPS is a publicly-funded organisation operating under stringent budget constraints. The cost of responding to the Inquiry is necessary, but significant. Accordingly, the Inquiry is respectfully asked to endorse changes to its process which respect the privacy of individuals mentioned in the reports **and also** continue to permit the Inquiry to meet its Terms of Reference and report in or around 2022.

The Chairman's Questions

***Do changes to privacy laws since the RP was finalised require the privacy section of that document to be amended and, if so, in what respects?* (question 9(b)[4]).**

10. Consequential changes would be required to paragraph 25 of the RP to refer to the new legislation. No substantive change is required: the new regime at art 5 of the GDPR does not significantly alter the general approach to lawful data processing as existed under the data protection principles in the DPA1998 (and bearing in mind that the Chairman is a person acting in a judicial capacity and so exempted from the positive requirement at art 14 of the GDPR to contact data subjects who would not know their data was being processed (see DPA2018 sch 2 part 2 para 6(b) and para 14(2)(b)). In short, the MPS agrees that the current RP describes a lawful process.

***Do advances in our understanding of the documents and practical issues arising in relation to privacy redactions justify amending the privacy section of the Restriction Protocol and, if so, in what respects?* (question 9(c)).**

11. In response to this question the MPS considers the effects of advances in our understanding of the material on the approach currently set down in the RP. In response to question 9(a) (below at paragraphs 21 to 37) the MPS considers the options suggested by the Chairman in his Note.

12. In the RP as currently drafted, two processes are proposed:
    a. Ahead of seeking a witness statement, in any case "*in which there is reason to suppose that there is a real risk of* [an unjustified interference with the right to privacy] *then the Inquiry will prepare multiple provisionally redacted copies insofar as is required to obviate that risk*" (RP at paragraph 31). This process is directly concerned with the investigation or fact finding stage.
    b. Where a document contains relevant and necessary personal information about a non-CP/non-witness (hereafter, an **affected person**) who is "*readily contactable*" they will be contacted and afforded the opportunity to apply for a restriction order (RP at

[3] Noting in particular that the Inquiry's Terms of Reference do require it to report "as soon as practicable".
[4] Question 9(a) is considered last.

paragraph 32). Where not readily contactable the Inquiry legal team will consider for itself whether or not to restrict (RP at paragraph 33). This process is primarily concerned with the publication of material to the public.

13. Preparation of multiple versions. Following the current RP, multiple copies would need to be prepared ahead of taking witness statements (RP at paragraph 31), but logically they would also be needed to assist any non-CP/witness affected person who is contacted by the Inquiry to be afforded the opportunity to make a restriction order application[5]. Given the volume of the reporting and number of individuals mentioned this will be an intensive administrative and legal exercise.
    a. Firstly, the document would need to be close-read by the Inquiry legal team to decide whether each aspect of personal data could, if published, pose a real risk of unjustified interference with any person's right to privacy. Although a blanket approach (for example, always redacting names but not other data) has advantages of simplicity to operate, it may well prove inadequate (as the Annexes prepared by CTI for the purposes of the privacy hearing demonstrate). This process would often be far from straightforward or speedy.
    b. If there is no risk of unjustified interference (in the opinion of the Inquiry), the material can be published.
    c. Secondly, assuming there is a risk of interference, a privacy redaction exercise would need to take place. The Inquiry team would need to ensure that the privacy redactions are correct and provide the necessary protection. In some cases, depending on the nature and extent of the personal data in the report, there will be several differently redacted versions of documents shown to different potential witnesses. Each set of mark ups would need to be separately prepared on the Relativity computer system, and each version marked to ensure version control.
    d. The MPS has worked through a similar process with the Inquiry in respect of public interest redactions. To this end the MPS has a dedicated team of counsel, police officers and administrative staff who have developed efficient processes and the necessary skills to consider documents and prepare applications quickly and with a high degree of accuracy. The time taken to process different classes of document varies considerably, and it is therefore difficult to provide the Inquiry and the CPs meaningful estimates for how long the work takes by document. However, it can be said that even with a standing team and body of experience, a routine 'tranche 1' intelligence reporting document requiring limited substantive redactions can take around an hour to process (this includes consideration and redaction by counsel, checking by a second pair of eyes, signing off, watermarking, associated administrative work and record keeping, before being delivered to the Inquiry). At least four people are involved in working on each document, in different roles. The time taken is typically longer for longer documents. When a document throws up

[5] Moreover, it is unrealistic to expect that the only persons mentioned in a document will be CPs or potential witnesses (as the CTI Annexes make clear). For example, there are very few non-state CPs associated with tranche 1.

issues which are trickier to resolve because they require investigation from other documents, specific expertise, or judgment calls, a document can expect to be under consideration for longer, or a greater number of eyes will be needed to ensure accurate sign off. Notwithstanding the inevitable imprecision of the above estimates, it can at least be anticipated that carrying out the exercise envisaged in the RP over the volume of documents which have now been recovered would make a very high resource demand on the Inquiry legal and administrative teams.

14. Contacting individuals. The RP deals with the Inquiry establishing contact for non-CP/witness affected persons only (for CPs and witnesses, contact can be taken to be established). As to the process:
    a. Firstly the Inquiry legal team would need to consider whether the affected person is *"readily contactable"*. There is a distinction to be drawn between persons who are 'readily contactable' because contact is already established (for example, the person has made themselves known to the Inquiry as potentially affected, having seen the list of cover names/dates/groups on the UCPI website); and those where any degree whatsoever of searching for the person is required (whether at the level of open source internet search or more something more interventionalist). Any type or level of research will occasion at least some delay.
    b. The only guidance in the RP is at paragraph 32: *"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"*.
    This suggests that the Inquiry legal team would wish to be certain of any purported identification before contact would be attempted, and will wish to have such further information as is necessary to ensure that contact itself would not amount to intrusion. This must be the correct approach. However, it should be noted that it suggests a more intensive degree of research than simple open source enquiry, requiring some form of confirmation from official records.
    c. In any event the information on reports will often be insufficient to permit a positive identification, even with additional enquiry. A name, without more, will not usually be enough to establish contact, let alone confirm identity.
    d. It is presently assumed that if contact is to be attempted the Inquiry would carry out its own investigations to establish identity and make contact (for example, it has not been suggested at this stage that police assistance, resources, or database access would be required). Whatever methods or intensity of search contemplated, the exercise of seeking out and ensuring correct identification for persons mentioned would be time consuming. For many thousands of persons (as are mentioned on the reports), it simply would not be possible to make contact and meet the timeframe currently proposed by the Inquiry for the production of its report, perhaps save unless the category of 'readily contactable' persons comprises only those who self-identify to the Inquiry and whose identity can be verified without complication.

e. In short, the MPS respectfully agrees with the Chairman that it will be *"impracticable to contact all, or even many of those named in the intelligence reports"* (paragraph 9 of the Chairman's Note).

15. Once an affected person is identified and contact is made, the current RP envisages inviting them to make a restriction order. It is not spelt out in the RP, but this necessitates another lengthy process, the stages of which are presumed to be broadly as follows:
    a. Firstly, there will be an invitation by the Inquiry to the affected person to submit a restriction order application. The affected person will need to be shown the documents, which presumably will need first to be redacted for other individuals' personal data (see above at paragraph 12).
    b. Once the affected person has had time to consider the references to them in the reporting, they will need to prepare and submit an application (with or without legal representation).
    c. It is not clear whether others affected by the application would be invited to be involved (for example, other persons mentioned, the media etc).
    d. The application will be considered by the Inquiry legal team, who either agree or refuse it.
    e. If not agreed there would be an opportunity for the affected person to reconsider their application in light of the Inquiry legal team's observations.
    f. Following that, the matter would be referred to the Chairman for consideration and a 'minded to' decision made.
    g. If the Chairman is minded to refuse, the document would be considered at a hearing.

    As indicated above, the MPS has worked through a similar process with the Inquiry in respect of public interest redactions, and has a standing team ready to deal with the Inquiry's requests for applications to be made. The expectation is that a document will take around 9 weeks (excluding public holidays) to pass through the complete process (in line with that set out above) to a hearing if it is required. A civilian can be expected to take longer to respond to Inquiry requests than the dedicated MPS team, and of course invitations will not all be made at the same time – this would be an ongoing process.

16. It must also be envisaged that the same process would be carried on for each person mentioned in a document (be they a CP or witness or an affected person). The Chairman at any hearing/combination of hearings may need to consider a more complex web of applications than is involved in state public interest redaction applications, involving multiple redacted versions and potentially differing submissions in respect of each document. For this reason too, the timescale for dealing with the multiple applications might be greater than the 9 week timetable for MPS restriction order applications.

17. In view of the volume of reporting and number of persons mentioned, the MPS does not believe that the current timetable permits anything near adequate time for these processes to take place for all so far recovered reporting.

18. In view of the need to protect privacy, the duties at s. 17(3), and the requirement in the Terms of Reference for the Inquiry to report as soon as is practicable, one option for the Inquiry is to maintain the RP approach but take a 'robust' approach to which documents are *necessary* to publish, with the effect that only a proportion of the recovered reporting documents would pass through the full RP processes. In that case, amendment to the RP will not be needed. In the Inquiry's decision as to what is necessary, there may be some variance between what is necessary at the investigation stage (to facilitate the preparation of witness statements, and full fact finding) and what is necessary for publication after the hearings. So long as there has been full investigation, it may not be necessary to publish intelligence reporting which has only featured in Inquiry's decision making as a representative example of its type, about which individual evidence has not been heard. This would avoid the need to put evidence of this type through the RP processes at all. If, instead, the Inquiry departs from the RP in order to adopt any of the proposals (or combinations thereof) set out by the Chairman in the 29 November 2018 Note (e.g. at paragraphs 9(i) or (v)) it will be necessary to amend the RP in consequence. See further below at paragraphs 21 to 37.

Is any guidance needed as to the application of the RP? **(question 9(d)).**

19. Following from the submissions above, guidance does not appear to be an issue; a decision on necessity to process and/or publish a document precedes the RP, which assumes the processing of the document has been determined to be necessary for the particular purposes in issue. Whether amendment to the RP is required will depend upon whether the Chairman takes any of the options considered in his Note, on which see further below at paragraphs 21 to 37.

Do the coming into force of the GDPR and the DPA2018 have any further consequences on the publication of documents, witness statements and taking of oral evidence? **(question 9(e)).**

20. See above at paragraph 10 The MPS has considered the Inquiry's existing Privacy Information Notice, which will need to be updated in light of any changes which are made to the RP, and to confirm that personal data may become publically available during oral hearings.

How is effect to be given to the privacy and data protection rights of thousands of individuals named in intelligence reports produced by the SDS undercover officers, without undermining the public interest in as much as possible of the Inquiry being conducted in public? **(question 9(a)).**

21. This, the Chairman's first question, is intentionally considered last. The MPS accepts privacy rights are in issue (see paragraph 4 above), and acknowledges the difficulties in giving effect to the privacy and data protection of individuals named in the intelligence reports in the context of an open and transparent Inquiry. For the reasons set out above, the MPS is concerned that the current RP process will become unworkable for the volume and content of the recovered intelligence reporting. The alternative options proposed by the Chairman in the 29 November 2018 Note are considered below, but the Inquiry is invited

to assist the CPs with its estimates of the effects of each option on the existing timetable to better inform submissions or observations which might be made as to their viability.

Option (i): hearing all but general evidence about deployments in private, within a 'confidentiality ring'

22. As to mechanics, in the general case it is presumed that any person mentioned or with an interest in the reporting in issue would be included within the 'privacy confidentiality ring', but it is possible that the make up of the ring could vary in respect of each piece of information. Likewise, there would need to be consideration of which documents should be circulated in advance and whether all documents on a particular group can be circulated equally. If they cannot, this raises the possibility of increased numbers of hearings or sub hearings. In all cases the MPS would expect that public interest redactions would remain on documents even within the confidentiality ring: indeed, it is important that these restrictions are unaffected.

23. However, even with these complications it appears that taking this course will generally reduce the number of people seeing personal or private information during the investigation stage, and so limit the risk of unnecessary publication or disproportionate interference. It will allow the Inquiry to receive evidence from witnesses who wish to assist it to meet its Terms of Reference whilst maintaining their privacy. The practical challenges in managing attendance at hearings which are not open to the general public are not of the magnitude which flow from preparing the documents for public consumption (see discussion at paragraph 10 to 16). As a result, if some hearings operate within 'privacy confidentiality rings' it might remain possible for the Inquiry to meet the privacy rights of individuals and report within a reasonable timescale.

24. Another consequence would be that it would not be appropriate to publish the intelligence reporting documents on the Inquiry website or elsewhere after the hearing (save unless or to the extent consents are given). However, taking Option (i) would not stop the Inquiry discussing the intelligence reporting in its findings in anonymised form after the hearing.

Option (ii): redacting all lists of names from reports, but leaving all references to individuals in the text of reports

25. On a superficial view, this option has the benefit of simplicity to operate. However, drawing on MPS experience of the intelligence reporting, whilst it might be possible to anonymise some intelligence reports with simple name redaction, in many cases name redaction alone would not achieve that purpose. Strict operation of this approach might lead the Inquiry to publish more personal (and even sensitive personal) data than is necessary to achieve openness and transparency in its proceedings. Such publication runs the risk of undermining the lawful basis for the data processing. In addition, on occasion greater redaction than is necessary might occur, with the consequent damage to openness and transparency.

26. Therefore, in order to ascertain whether name redaction or something more is appropriate in a given case, the documents would need to be close-read and carefully considered for redaction purposes. This time-consuming exercise is likely to obviate much of the time benefit which might be thought to be gained by operating the simple process.

27. Once redacted sufficiently to ensure anonymity of affected persons (whether those redactions are only names or go further), there is an obvious danger that the redacted documents will not be comprehensible to the wider public. This means that the benefits of openness also may not be realised by following this approach.

28. Public hearings using documents redacted in this way will be hard to manage whilst maintaining the level of privacy protection desired. There will need to be multiple versions of papers in use within the hearing room and multiple cyphers may be required. None of this seems likely to facilitate open and transparent hearings.

29. In addition, this option does not affect paragraph 31 of the RP (regarding the preparation of multiple redacted versions of documents for the purposes of receiving evidence from CPs), so will not shorten or streamline that process (cf Option (i)).

Option (iii): publishing details of the dates of reporting by individual officer and of the subdivisions of the groups on which they reported in advance of the hearings, so as to permit those who believed that they were present to apply for a restriction order in respect of their name and/or other details reported on.

30. Like Option (ii), Option (iii) only affects the process currently envisaged in the RP at paragraphs 32 and 33. In this regard, Option (iii), which puts the onus on voluntary approach, appears more time-efficient than the Inquiry legal team initiating its own enquiries (see the discussion at paragraph 14 above).

31. However, and for completeness:
    a. This concerns only those officers whose cover names have been or will be published.
    b. The preparation of each summary document for publication would take some time. It is understood that the Inquiry is not yet in possession of, or has not considered, all reporting material. Only once all of an officer's reporting is collated (and verified – typically by witness statement) could a document summarising the dates and groups reported on be prepared and published. Whilst the Inquiry will have fuller information, it appears to the MPS that the Inquiry could produce no more than around 15-20 such summaries at this stage/in the near future.
    c. There would need to be a period of some weeks following publication of each summary for any potential affected person to make contact with the Inquiry.
    d. Identity would then need to be verified by the Inquiry. This will also take time.
    e. Only after verification could the affected person consider the material (which may need to be redacted in advance for other individuals' privacy) and either consent to publication of the references about them or apply for a restriction order. As to this latter process, see discussion above at paragraph 15.

32. Where there is a restriction order in place for privacy that will (as with all restrictions) affect the openness of the hearing to the extent of the restriction.

33. It is not clear what the Inquiry intends to do where no contact is made.

34. Again, this option does not affect paragraph 31 of the RP (the preparation of multiple redacted versions of documents for the purposes of receiving evidence from CPs), so will not shorten or streamline that process.

Option (iv): publishing a limited selection of redacted reports, based on those which appear to the Inquiry to be most relevant

35. This Option is a manifestation of the Inquiry's existing process in two core ways: firstly the selection is in effect the Inquiry's decision about which documents it is necessary (and reasonable) to publish, and accordance with its powers and duties set down in the Inquiries Act 2005 and the Terms of Reference. Secondly, we assume this option contemplates the selected documents being processed in accordance with the RP as currently drafted. If that is the case, although the processes in the current RP will be time consuming (see above at paragraphs 11 to 18), following them only for a selection of the documents will be more manageable. This course has the advantages of ensuring some of the source materials can be seen by the public and thus assists with openness and transparency.

36. Providing that the Inquiry has a free hand in selecting the reports (as it would), and was able to prepare a sufficiently wide selection of reports to properly reflect its work, Option (iv) would appear to offer the Inquiry the best means of giving effect to the privacy and data protection rights of individuals, and meet the public interest in an open and transparent Inquiry (i.e. acts fairly), whilst ensuring the Inquiry avoids unnecessary cost and continues to be able to report "as soon as is practicable" (i.e. within an approximation of the current timetable). It does not stop the Inquiry dealing with particularly complicated or challenging documents within a confidentiality ring on occasions where that is appropriate (Option i), or calling for evidence about deployments (as envisaged in Option iii).

Option (v): providing all CPs with and eventually publishing an unredacted set of relevant reports

37. The MPS doubts that this course will be lawful. The publication of personal and sensitive personal information about people, in the context of their being mentioned in SDS/Special Branch intelligence reports, may have a particular impact on individuals concerned. Given the nature of the material at issue it can be anticipated that frequently persons mentioned will reasonably expect privacy (even though plainly this will not always be the case). Further, such publication will likely comprise the unnecessary publication of personal data and sensitive personal data. Necessity is the core basis for lawfulness under the GDPR/ DPA2018 regime (and justification and proportionality would be required to avoid a breach of article 8 ECHR rights).

Conclusion

38. It follows from the above that the MPS's observations in respect of the options are:
    a. Proposals which are lawful but which continue to permit the Inquiry to meet its Terms of Reference and report *"as soon as is practicable"* and without causing unnecessary cost (i.e. proceeding within a reasonable timeframe as set down in the Strategic Review) are to be preferred.
    b. The Inquiry publishing a selection of key reporting to the greatest extent it can (Option (iv)); accompanied where appropriate by hearing some other deployment evidence in a confidential hearing (Option (i)); offers a good solution to meet the needs of openness and transparency, whilst properly respecting the privacy of individuals, and producing a workable Inquiry.
    c. There is no reason why greater detail of dates of reporting cannot be published in stages, to assist potential witnesses and affected persons making themselves known to the Inquiry, either for the purposes of consenting to mentions of themselves being made public (thereby assisting the Inquiry in its choice of sample documents) and/or, if appropriate, giving evidence (in open or within a confidentiality ring).
    d. Taking any of the options (save potentially, Option iv), or combinations of options will require the RP to be amended to reflect the new processes.

39. The Appendix to these submissions provides brief answers to the questions asked by Counsel to the Inquiry in their Annexe A (Illustrative example of tranche 1 intelligence reports).

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