IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS OF THE NATIONAL POLICE CHIEFS' COUNCIL

FOR PRIVACY HEARING ON 31 JANUARY 2019

Introduction

1. These submissions on behalf of the NPCC respond to:
   a) The Chairman's Note on Privacy;[1]
   b) CTI's Explanatory Note on Privacy, accompanied by Annexes A and B;[2]
   c) The Chairman's preliminary statement about the conduct of evidence hearings.[3]

2. As the Chairman is aware, whilst not representing any individual officers or the NPOIU as a unit, the NPCC is responsible for the vast quantity of documentation pertaining to the NPOIU, which comprised officers deployed to, and from, different police areas across England & Wales. Hearings concerning NPOIU deployments are due to be held after those concerning the SDS, with the result that the arrangements currently in place in preparation for evidence hearings, including the Restriction and Disclosure Protocols published in May 2017, largely concern SDS documentation.

3. To date, therefore, examples illustrating the practical application of those arrangements relate to the SDS. Anticipating that the process to be adopted for the NPOIU is likely to bear strong similarities to that adopted for the SDS, the NPCC will have regard to the experience of the MPS as to the challenges which the SDS documentation has posed and continues to pose.

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[1] Chairman's Note to core participants and directions for the hearing, "Preliminary issue: Privacy", dated 29 November 2018.
[2] Counsel to the Inquiry ("CTI")'s Explanatory Note on Privacy dated 28 November 2018, annexing illustrative examples of Tranche 1 and Tranche 3 intelligence reports.
[3] Chairman's statement about the conduct of evidence hearings dated 19 December 2018.

4. To the extent that the sheer volume of documentation presents practical difficulties, these are likely to be commensurately greater in relation to the NPOIU because the volume of documentation is greater than for the SDS.

5. The NPCC respectfully reserves the right to renew or make further submissions on the NPOIU material in light of the experience of the redaction exercise for the SDS, recognising that worked examples, as provided by the Inquiry in hypothetical form for the forthcoming hearing, are likely to provide helpful guidance going forward.

6. In the NPCC's respectful submission, practical difficulties and resource constraints are unlikely, in and of themselves, to provide a basis on which to make decisions about what information should, or should not, be disclosed to witnesses and/or published by the Inquiry in an individual case. There may be strong reasons for concluding that there is no justification for releasing personal information, especially where the degree of harm which might be caused is unknown and un-knowable in advance.

7. However, the demands of the process as a whole are relevant to considerations of cost and proportionality, which must inform the Inquiry's overall approach to fulfilling its Terms of Reference within a reasonable timescale.

Submissions

8. The Restriction Protocol currently provides for the following broad stages:
   a) After being provided with un-redacted information (by the MPS, insofar as SDS documents are concerned) the Inquiry indicates (to the MPS) which documents it considers to be relevant and necessary.[4]
   b) Of those (documents deemed relevant and necessary by the Inquiry) the MPS makes any applications it deems fit for restriction order(s) pursuant

[4] Restriction Protocol at [14].

to section 19(2)(a) of the Inquiries Act ("IA") 2005[5] and makes any provisional redactions.[6]

c) Where the MPS considers that a third party state body may have an interest in a potential restriction, the MPS is invited so to indicate when it makes any application. The Inquiry may also conclude that a third party state body has an interest in a potential restriction.[7]

d) After any initial applications for restriction orders have been made by the MPS, the Inquiry considers whether any further redactions need to be made to personal or private information pertaining to third parties, adopting the following sequence:[8]

   i. The Inquiry redacts irrelevant and/or unnecessary personal information pertaining to third parties (names, dates of birth etc).[9]

   ii. CPs and witnesses are then given the opportunity to consider references to themselves in documents "*which the Inquiry proposes to use*", meaning to publish.[10] This will be done at the point when witnesses (those whose personal information is in question) are asked to provide a witness statement,[11] before the documents are distributed onwards to other CPs/witnesses or the public (via general publication).[12]

   iii. Any suggestions for further redactions must then be made by application for further a restriction order(s) "*on privacy grounds*".

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[5] Restriction Protocol at [14] to [17].

[6] Restriction Protocol at [21] to [22]. These provisional redactions are treated by the Inquiry as "*potentially restricted evidence*" under rule 12 of the Inquiry Rules 2006.

[7] Restriction Protocol at [18].

[8] Restriction Protocol at [26].

[9] Restriction Protocol at [27].

[10] Restriction Protocol at [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." (emphasis added)

[11] Restriction Protocol at [26(ii)].

[12] Restriction Protocol at [29].

The documents to be considered for the purposes of privacy redactions will be provided to the witness either in confidence or subject to a provisional restriction order.[13]

iv. Persons who are not witnesses and who therefore will not be contacted for the purposes of providing a witness statement, are to be contacted by the Inquiry and given the opportunity to make an application for a "privacy" restriction order, "*unless in all the circumstances it would be disproportionate to do so*".[14]

v. If such contact would be disproportionate, the Inquiry will decide whether to apply provisional redactions to those persons' personal information, applying the relevant legal principles and bearing in mind that they have not had chance to apply for a restriction order.

9. Two main questions emerge from the Chairman's Note on Privacy:[15]

a) Whether the current arrangements, in particular the Restriction Protocol, require amendment in light of the introduction of the General Data Protection Regulation ("GDPR") and the Data Protection Act 2018;

b) How the Inquiry should handle third party information contained in documents which may be put to witnesses and/or considered at hearings. SDS intelligence reports, which contain a large volume of potentially sensitive and private information relating to third parties, have been cited as examples which could require extensive redactions to be applied.

10. The changes to the statutory framework will need to be reflected in the arrangements currently in place for processing applications for restriction orders. However, the NPCC doubts whether this will require any significant changes, in particular to the Restriction Protocol, which already allows for the balancing of competing public and private interests in any individual case.

[13] Restriction Protocol at [30] and [31].
[14] Restriction Protocol at [26(iii)].
[15] Chairman's Note on Privacy at [9] (a) to (e) and CTI's Notes and Questions at the end of each Annex.

11. The NPCC fully recognises the logistical difficulties involved in the redaction exercises to be performed, by the state CPs and the Inquiry, pursuant to the Restriction Protocol. The NPCC's headline submissions are as follows.

(1) "Policing" redactions must be applied before "privacy" redactions

12. As outlined at length in generic submissions and evidence (open and closed) in support of restriction orders, which will not be repeated here, the NPCC is primarily concerned to avoid the very real and serious harm which could eventuate, to individuals and policing generally, following deliberate or accidental disclosure of undercover operations and the tactics and techniques they have variously involved.

13. As outlined above, the Restriction Protocol currently provides for applications for restriction orders to be made by policing bodies, over documents considered by the Inquiry to be relevant and necessary, before those documents are prepared for onward:

    a) Disclosure to witnesses, for the purpose of obtaining witness statements; and

    b) Publication at evidence hearings.

14. The Restriction Protocol also allows for third party interests in a document – for example, a policing body's interest in a document originating from a different policing body – to be identified, either by the applicant for the restriction order or the Inquiry, for the purpose of identifying any additional restriction applications which may need to be made. Clearly a restriction application made in one case is capable of being completely undermined if disclosure of the same information, or information capable of revealing that information, is made in another case.

15. The NPCC respectfully invites the Chairman and/or CTI to confirm that these "policing" applications for restrictions will have been made, and either

provisionally granted or finally determined, before those documents are prepared for onward distribution or publication to third parties.

16. In other words, the documents considered relevant and necessary by the Inquiry, which are to be provided to witnesses or the general public, will already have been subjected to the restriction order process so far as the disclosure of "policing" information is concerned.

17. The NPCC observes that, since the Inquiry is proposing to show witnesses the documents relevant to their evidence which it intends to publish,[16] and the Chairman is provisionally minded to publish all relevant evidence at the conclusion of the evidence hearings (not just evidence referred to during those hearings)[17] it will be vitally important to ensure that all restriction order applications relating to "policing" concerns have been made and determined before the Inquiry considers further redactions for third party privacy.

18. Depending on the number of documents deemed relevant and necessary in respect of NPOIU deployments, this process – of determining "policing" applications for restriction orders – is likely to take considerable time.

19. Careful consideration will need to be given to:

    a) Which documents should be given to which witnesses; and

    b) Which documents are to be considered at a hearing;

    so that applications for restriction orders, and any consequential redactions, can be applied to those documents accordingly. A "process map" would be helpful to outline these various stages for the NPOIU material.

20. Unlike the NPCC, the MPS already has direct experience of (at least the early part of) this process and, in the NPCC's respectful submission, is well placed to inform the Inquiry, CPs and general public as to what it has involved.

[16] See paragraph 8(d)(ii) above.

[17] Chairman's provisional statement on the conduct of evidence hearings at [17] and [18].

(2) "Privacy" redactions will be case-specific and can only be determined by the Inquiry

21. When the Inquiry comes to consider whether any further redactions should be applied, having regard to the rights of individuals under the GDPR and/or DPA 2018, it will, effectively, be considering further applications for restriction orders pursuant to section 19 IA 2005, which fall to be determined (in the same way as "policing" applications for restriction orders) in accordance with the Legal Principles Ruling of 3 May 2016.

22. Accordingly, both the Legal Principles Ruling and the Restriction Protocol will need to be updated to reflect that the statutory framework governing personal data, previously the DPA 1998, is now to be found in the GDPR and DPA 2018: as explained by the Information Commissioner's Office.[18]

23. However, the NPCC doubts whether any significant practical changes will be required to the Restriction Protocol currently in place.

24. Where a witness or CP has a potentially legitimate interest in his/her personal information, contained in documents deemed relevant and necessary by the Inquiry, being withheld from onward disclosure to a witness, CP, or the general public, the Restriction Protocol, properly, provides an opportunity for those individuals to apply for restriction orders in respect of that information, for the Chairman then to consider and determine.

25. The Restriction Protocol also provides for the Inquiry to have regard to the potentially legitimate interests of third parties, and to apply any corresponding redactions which may be necessary, where those whose interests are engaged have not had the opportunity to apply for restriction orders themselves, unlike those CPs and witnesses who will be asked to provide witness statements.

[18] https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/

26. All applications for restriction orders will be determined in accordance with the Legal Principles Ruling, which – insofar as it relates to decisions which depend on a balance of the public interest under section 19(3)(b) IA 2005 – requires the Inquiry to weigh competing public interest factors, including the different interests of witnesses and the practical consequences of a restriction order to the fairness of the Inquiry's ability to fulfil its terms of reference.[19]

27. In relation to third party rights to privacy, the Legal Principles Ruling states:

> "A.8 In assessing a risk of harm or damage under section 19(3)(b) and (4) an expectation of confidentiality will be a material consideration but the weight, if any, to be attached to such an expectation will require examination as to whether it was an expectation of unqualified protection and, if so, whether such an expectation was reasonable in the circumstances.
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> […]
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> A.10 Where the risk of harm considered in a public interest assessment is interference with an individual's right of respect for private and family life, a separate Article 8 assessment will be made under section 19(3)(a) of the Inquiries Act 2005."

28. Such determinations will, inevitably, depend on the particular facts and circumstances of individual cases. It may be that, in some cases, the redaction of personal details pertaining to the attendance of a third party at a political meeting would be justified; and, in other cases, it would not.

29. Only the Inquiry is capable of performing this balancing exercise, since only the Inquiry is in receipt of all relevant information about the nature and purpose of its inquiries, and the evidence which has been gathered.

30. Accordingly, as recognised in the Conclusion/Summary to the Legal Principles Ruling, it will never be possible to state where, as a general rule, the public interest balance will rest.[20]

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[19] Legal Principles Ruling, Part 6, A.3(2) and A.9 at p.78-9/85.
[20] Legal Principles Ruling, Part 6, A.12 at p.80/85.

31. The Chairman must approach the exercise of evaluation on a case-by-case basis, depending on the nature and quality of the evidence received in support of each application (or contemplated application) for a restriction order.

(3) Practical considerations

32. The NPCC agrees that, in an individual case, a variety of measures are potentially available to the Inquiry to protect the privacy rights of third parties where the Inquiry considers it is justified to do so, ranging from:

a) No redactions of personal information;

b) Redactions, gisting and partial publication of documents to conceal some but not all of the personal information contained therein;

c) Redacting all personal information and effectively hearing all but generic evidence in private.[21]

33. These considerations apply both at the stage of disclosure of evidence to prospective witnesses, and to the publication of documents following evidence hearings. Since the Inquiry seeks to publish as much evidence as possible, it is likely to be in the interests of justice, and the expedition of the Inquiry, for documents to be prepared, so far as possible, in a form capable of publication.[22]

34. The examples particularly considered by the Chairman, and annexed to CTI's Explanatory Note, relate to SDS intelligence reports containing a large number of names of private individuals, some CPs but others not, who were involved in political activism and who may, or may not, be readily contactable by the Inquiry for the purpose of establishing whether they wish to apply for restriction orders in respect of their personal information.

35. The Restriction Protocol states:

> "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

[21] As canvassed in the Chairman's Note on Privacy at [9]/p. 4 of 4.
[22] As alluded to in CTI's Explanatory Note on Privacy at [18].

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." (emphasis added)

36. The NPCC understands that, where the Inquiry considers that the risk of interference with a particular individual or multiple individuals' privacy rights outweighs the competing interests in play, particularly in a voluminous document, the cost and time involved in applying corresponding redactions (per the Restriction Protocol) could be very considerable, with knock-on implications for the conduct of an effective hearing in public. The last of the questions to CTI's Annex B asks:

    14. To what extent do the time and/or the financial cost of putting documents through the restrictions process for public consumption, particularly in the context of there being many thousand Special Demonstration Squad intelligence reports affect the approach which the Inquiry can and should take?

37. The NPCC agrees that the consideration of privacy redactions in individual cases will be a resource-intensive exercise, and greater for the NPOIU (cf. the SDS) due to the larger volume of documentation involved. The scale of the task is likely to be commensurate with the number of documents deemed relevant and necessary, which will also depend on the individual case.

38. Resource pressures already apply to the making and determining of applications for restriction orders in respect of "policing" information (after the determination of anonymity applications) which, as previously submitted:

    a) May relate to multiple individuals and categories of information;[23]

[23] These include shoulder numbers referred to at Q8 of Annex A to CTI's Explanatory Note.

b) Need to be considered not only in isolation but in context;

c) May require the use of gists and ciphers, in addition to or instead of redaction, to preserve the sense of the information to be disclosed.

39. The MPS is already involved in a costly and time-consuming redaction exercise. The same exercise in respect of NPOIU material, for which the NPCC is responsible, is likely to be even greater. Intelligence reports for the NPOIU, by way of example, are likely to have generated a much greater number of linked documents than SDS intelligence reports, which may also need to be reviewed for the purposes of redaction.

40. The NPCC does not consider the resource implication of the Inquiry lawfully taking the necessary steps to have regard to individuals' privacy rights while processing restriction orders, is likely to be a determinative factor against doing so in any individual case.

41. There may be powerful reasons for concluding that there is no justification for interference with an individual's rights as protected by the GDPR, DPA 2018 and Article 8 ECHR. Where there has been no contact with an individual, policing bodies and the Inquiry may have no way of knowing whether, or to what extent, that person could suffer harm – which could be to their employment, reputation, safety, or other interests – if their personal information were to be disclosed. In such circumstances a balancing exercise between competing rights and interests becomes a matter of speculation. If making prior contact is impracticable, the first time the degree of harm becomes known may be when that harm actually eventuates, i.e. following publication.

42. An additional feature of the intelligence reports, so far as they relate to the NPOIU,[24] is that in general, the information they contain was never intended, nor prepared, for onward distribution or publication (or was prepared for such

[24] Recognising that the intelligence reports currently being considered relate to the SDS.

purposes in sanitised form). Annex B to CTI's Explanatory Note contains the instruction, "*No Downward Dissemination of this Intelligence without Reference to Commander Ops SO12*". There may be other documents which, were it not for this Inquiry, ought not to have been retained. It cannot be assumed that any public interest in revealing this information will always outweigh the private rights of those concerned.

43. Given that the Inquiry is considering whether private information was mis-used during the lifetime of the SDS and NPOIU, it would be deeply unfortunate if the Inquiry itself effected an unjustified, and possibly harmful, interference with the rights of individuals, in the course of its own inquiries.

44. If publication would increase an invasion of privacy which has already occurred, regardless of whether the purpose of that invasion was legitimate or illegitimate, the Chairman – whose decisions these undoubtedly are – might consider that the starting point should be that no further disclosure, and thus no further harm, should be caused. The NPCC's redaction process envisages all named individuals being initially redacted unless the Inquiry indicates otherwise.

45. The NPCC has not identified any route for "short-circuiting" the balancing exercise which will need to be conducted in individual cases, by the Inquiry, of the competing public and private interests in play. The views of the individuals involved, insofar as it may be proportionate to contact them, may not be uniform (nor capable of being established by the Inquiry without prior contact). The activities in which they were involved are likely to vary. The reasonableness of any expectation of privacy will depend on the circumstances, including any previous publication. The relevance and necessity of particular documents, and thus the number of documents to be processed, are matters only the Inquiry can determine.

46. The resource implications of conducting this exercise as a whole could impact on the costs and timescales of the Inquiry, and therefore must be taken into

account when the Inquiry is deciding how best to approach the gathering and hearing of evidence to discharge its Terms of Reference.

47. Indeed section 17(3) IA 2005 places a duty on the Chairman, in making any decision as to the procedure or conduct of an Inquiry, to act not only with fairness but with regard also to "*the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)*".

48. This suggests the Inquiry's first question should usually be: is the disclosure of the personal information necessary to fulfil the Inquiry's purposes? There may well be situations where the information (e.g. names of attendees at a meeting) is not itself relevant to the issue the Inquiry seeks to explore.

Conclusion

49. The quantity of documentation presents logistical challenges to all concerned with this Inquiry. These are likely to be even greater in respect of the NPOIU because the documentation generated by that unit is especially voluminous.

50. Logistical challenges do not, themselves, provide a justification not to embark on the determination of applications for restriction orders, or the making of fact-specific judgments, in appropriate cases – whether in relation to "policing" or "privacy" considerations.

51. However, their impact on the process as a whole may be relevant to the overall approach taken by the Inquiry to the proportionate and effective gathering of evidence and conduct of hearings. Early identification of which documents have been deemed relevant and necessary, and which documents will be disclosed and/or published (and to whom) is likely to expedite the task.

52. The worked examples provided (in illustrative form) by the Inquiry offer a good guide to the issues likely to arise in practice. In many cases, documents will need to be substantially redacted and/or gisted prior to disclosure and/or publication.

53. The NPCC reserves the right to make further submissions specific to NPOIU documents in advance of their preparation for disclosure.

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