THE UNDERCOVER POLICING INQUIRY

PRIVACY

SUBMISSIONS ON BEHALF OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Hearing: 31 January 2019

Introduction

1. These submissions are served in accordance with the Chairman's direction of 29 November 2018 inviting submissions in relation to the impact which recent changes to data protection legislation have had on: (a) the privacy obligations of the Undercover Policing Inquiry ('UCPI'); (b) the disclosure of evidence; and (c) the holding of public hearings.

Summary of the relevant law

Data protection

2. The EU General Data Protection Directive ('GDPR') has had direct effect in UK law since 25 May 2018. When the United Kingdom leaves the European Union, the GDPR will be incorporated into the UK's domestic law under the European Union (Withdrawal) Act 2018[1], which will come into force on a date to be appointed. Parts 2 (Chapter 2) and 5-7 of the Data Protection Act 2018 ('the 2018 Act') clarifies and supplements the GDPR in domestic law (collectively referred to as the *"data protection legislation"*).

3. The UCPI is a 'controller', as defined in the data protection legislation.[2] It is the duty of a controller to comply with the data protection principles set out in the GDPR in relation to the general processing[3] of personal data.

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[1] European Union (Withdrawal) Act 2018, section 3.

[2] General Data Protection Regulation, Article 4(7).

[3] 'General processing' is defined in section 4 of the Data Protection Act 2018 by reference to the 'material scope' provisions of Article 2 of the GDPR. The GDPR does not apply to processing in the

The data protection principles

4. Article 5 of the GDPR identifies the data protection principles which must be complied with whenever general processing of personal data[4] takes place. These require, amongst other things, that data must be:

   (a) *"processed lawfully, fairly and in a transparent manner in relation to the data subject"*;[5]

   (b) *"collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes"*;[6]

   (c) *"adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed"*; [7]

   (d) *"accurate and, where necessary, kept up to date…"*;[8]

   (e) *"kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed*[9]*"*.[10]

course of activities that fall outside of EU law; EU common foreign and security activities; purely personal/household data processing; or processing for law enforcement purposes (Article 2(2)). It is likely that all of the processing of the UCPI in relation to disclosure will fall within the definition of 'general processing'.

[4] Personal data is defined in the General Data Protection Directive, Article 4(1).

[5] Article 5(1)(a).

[6] Article 5(1)(b).

[7] Article 5(1)(c).

[8] Article 5(1)(d).

[9] Article 5(1)(e) permits the storage of personal data for longer periods *"insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes"* in accordance with Article 89(1), and subject to implementation of the appropriate technical and organisational measures required by the GDPR.

[10] Article 5(1)(e).

Lawful processing of data

5. By Article 6(1)(c) of the GDPR, processing shall be lawful if it is necessary for compliance with a legal obligation to which the controller is subject. UCPI disclosure decisions in accordance with the Inquiries Act 2005[11] would fall into this category.

6. Article 6(1)(e) makes provision for the processing of personal data in the public interest where *"processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller"*. Given the important public interest that the UCPI fulfils, data processing that is necessary in accordance with the Inquiry's Terms of Reference would fall within this category.

7. Article 6(1)(f) provides for an exception where *"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights to freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*.[12] While it is not suggested that it is necessary for the UCPI to rely on this provision given the applicability of the exceptions in Article 6(1)(c) and (e), it is to be noted that the balancing exercise inherent in Article 6(1)(f) does not apply in relation to the other Article 6(1) categories.

8. By Article 6(3) of the GDPR, the basis of the exceptions in Article 6(1)(c) and (e) may be laid down by national law and *"that legal basis may contain specific provisions to adapt the application of rules of this Regulation…"* so long as it meets an objective of public interest and is proportionate to the legitimate aim pursued.

[11] For example, by section 18 the Inquiry must take such steps as reasonable (and subject to any restriction decisions under section 19) to secure that the press and the public are able to have obtain or view a record of evidence and documents given, produced or provided.

[12] Article 6(2) provides that *"point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks"*. The Inquiry does not meet the definition of a 'public authority' as defined in the 2018 Act – see section 7 of the 2018 Act.

9. Section 8 of the 2018 Act provides further context to the 'lawful processing' provision in Article 6(1)(e) of the GDPR in the following terms:

> *"In Article 6(1) of the GDPR (lawfulness of processing), the reference in point (e) to processing of personal data that is necessary for the performance of a task carried out in the public interest or in the exercise of the controller's official authority includes processing of personal data that is necessary for-*
>
> *(a) the administration of justice,*
>
> *(b) …*
>
> *(c) the exercise of a function conferred on a person by an enactment or rule of law…"*

10. By section 16(1)(a) of the 2018 Act, the Secretary of State has power to make regulations with respect to:

> *"the power in Article 6(3) for Member State law to lay down a legal basis containing specific provisions to adapt the application of rules of the GDPR where processing is necessary for compliance with a legal obligation, for the performance of a task in the public interest or in the exercise of official authority"*.[13]

<u>The processing of 'special categories' of personal data</u>

11. Article 9(1) of the GDPR prohibits the processing of 'special category' data which includes personal data revealing: (a) racial or ethnic origin; (b) political opinions; (c) religious or philosophical beliefs; (d) trade union membership; (e)

[13] Paragraph 24 to the Explanatory Notes to the 2018 Act states: *"It is not possible to predict what future circumstances may arise which justify the processing of … particularly sensitive categories of data without explicit consent of the individual. For example, in 2009 the then Home Secretary established the Hillsborough Independent Panel to investigate the disaster which occurred on 15 April 1989. Some of the information held by public bodies within the scope of the Hillsborough disclosure exercise included sensitive personal data so the Secretary of State made the Data Protection (Processing of Sensitive Personal Data) Order 2012 (SI 2012/1978) to ensure that there was no room for doubt that it may be possible in an appropriate case for an individual or body to disclose such data. The Act provides the Secretary of State with the necessary power to manage unforeseeable situations of this sort."*

genetic or biometric data held for the purpose of uniquely identifying a natural person; (f) health issues; or (g) a natural person's sex life or sexual orientation.

12. Article 9(2) contains a number of exceptions to the prohibition in Article 9(1), including where:

    (a) the data subject consents to the processing: Article 9(2)(a);

    (b) processing relates to personal data which are *"manifestly made public"* by the data subject: Article 9(2)(e);

    (c) *"processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject"*: Article 9(2)(g).

13. Section 10(3) of the 2018 Act supplements the exception in Article 9(2)(g) of the GDPR. Those conditions include a requirement that the controller has an appropriate policy document in place.[14] The UCPI complies with this requirement.[15]

Criminal convictions and offences

14. With respect to data relating to criminal convictions and offences, Article 10 of the GDPR provides:

> *"Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) [lawful processing of data] shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State*

[14] Data Protection Act 2018, section 10(3) and Schedule 1, Part 2, paragraph 5(1).

[15] UCPI Policy on processing special categories of personal data and criminal convictions data; UCPI Detailed Privacy Information Notice.

law providing for appropriate safeguards for the rights and freedoms of data subjects".

15. Section 10(4)-(5) and Schedule 1 to the 2018 Act provide an additional requirement for the lawful processing of personal data relating to criminal convictions and offences. Pursuant to these provisions, such processing is lawful if it is necessary for both: (a) the exercise of a function conferred on a person by an enactment or rule of law; and (b) for reasons of substantial public interest.[16]

Article 8

16. In his Restriction Order Ruling dated 3 May 2016, the former Chairman held that the following principles applied to restriction order applications based on Article 8 of the ECHR:

    (a) The concept of private life under Article 8(1) of the ECHR is a wide one, capable of embracing professional and personal relations, personal choices and development and health and wellbeing.[17]

    (b) There is in principle no interference with Article 8 by making public the name of a witness in a court, tribunal or inquiry, but Article 8 may be engaged, and require such a body to take preventative measures, where disclosure of the witness' name and personal circumstances would expose them to significant harm in the enjoyment of their Article 8 rights.[18]

    (c) Whether any interference with Article 8 is 'necessary' for the purpose of Article 8(2), will depend on: (i) the objective of the interference; (ii) the rational connection between the measures and the objective, (iii) whether the measures are proportionate; and (iv) whether a fair balance has been struck between the rights of the witness and the public interest.[19]

[16] Data Protection Act 2018, section 10(4)-(5) and Schedule 1, Part 2, paragraph 6.

[17] Paragraph 180.

[18] Paragraph 180.

[19] Paragraph 182.

(d) The Inquiry has a wide margin of discretion in relation to whether to grant anonymity to a witness on Article 8 grounds, and also in assessing the means by which to achieve efficiency and effectiveness in the Inquiry.[20]

(e) Where an Article 8 issue is raised in the context of a restriction order application, the Inquiry must carry out a separate Article 8 assessment with respect to the impact of disclosure.[21]

(f) The balancing exercise to be conducted pursuant to section 19(2) of the Inquiries Act 2005 is equivalent to the balancing exercised required by Article 10(2) of the ECHR and Article 10 does not add *"a dimension to the public interest in openness and accessibility that is not already inherent in the statutory scheme"*.[22]

(g) The steps in considering a restriction order application on Article 8 grounds are to: (i) identify the public interest in non-disclosure; (ii) assess the risk and level of harm to the public that would follow disclosure of the information; (iii) identify the public interest in disclosure; (iv) assess the risk and level of harm to the public interest that would follow non-disclosure of that information; and (v) conduct a fact-sensitive assessment of where the public interest balance should lie.[23]

The Secretary of State's submissions

Preliminary observations

17. The issues raised in the Chairman's note dated 29 November 2018, and CTI's 'explanatory note' of the same date, show that disclosure in the context of this Inquiry raises extremely difficult issues. The Secretary of State notes that the 'fictional examples' annexed to CTI's note demonstrate that there is a real

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[20] Paragraph 192.

[21] Paragraph 193.

[22] Paragraph 204.

[23] Paragraph 152.

prospect that Article 8 of the ECHR will be engaged in relation to at least some, and possibly many, of the individuals named in the intelligence material that has been disclosed to the Inquiry. As the Chairman has already found, there is a strong public interest in as much of the Inquiry being conducted in public as possible,[24] and this important public interest will need to be balanced against the privacy rights of the individuals who are named in the intelligence material currently being processed by the Inquiry.

18. Further, as the previous Chairman emphasised, there is a need for the Inquiry to fulfil its terms of reference within a reasonable timeframe and with an expenditure of public resources that can be properly justified.[25] This reflects the requirement under section 17(3) of the Inquiries Act 2005 for the Inquiry to have due regard when making procedural decisions to the need to avoid unnecessary cost. In deciding on the appropriate balance to strike, the UCPI is entitled to take into consideration the risk that public confidence in the Inquiry may be diminished if procedures are adopted that result in significant delay to the Inquiry's progress.

The recent changes in privacy laws

19. As noted above, and in the Chairman's note,[26] the Inquiry is entitled to process personal and special category data in accordance with the GDPR and the 2018 Act insofar as it is necessary: (a) in compliance with a legal obligation, or in the exercise of a function conferred on a person by an enactment or rule of law (personal data),[27] and (in the case of special category data and criminal convictions) (b) for reasons of substantial public interest (subject to appropriate safeguards for the rights and interests of data subjects being in place).[28]

[24] Chairman's note, paragraph 9(a).

[25] Ruling dated 2 May 2017 (*Applications by the Metropolitan Police Service for an extension of time for the making of restriction order applications and for a change by the Inquiry to its approach to investigation*), paragraph 111.

[26] At paragraphs 7-8.

[27] General Data Protection Directive, Article 6(1)(c) and (e); the Data Protection Act 2018, section 8.

[28] General Data Protection Directive, Article 9(2)(g); Data Protection Act 2018, section 10(3) and Schedule 1, paragraph 5.

20. Although both the GDPR and the 2018 Act came into force relatively recently, they replaced a similar statutory regime under the Data Protection Act 1998 ('the 1998 Act'). In particular, the 1998 Act also permitted the Inquiry to process personal data and sensitive personal data [29] where to do so was necessary for the exercise of any functions conferred on any person by or under any enactment.[30] While there are some differences between the requirements under the GDPR as compared to the 1998 Act,[31] the only new requirement of potential relevance to the Inquiry's disclosure-related data protection obligations would appear to be the additional requirement that the processing of special category data be for reasons of substantial public interest.

21. It is to be noted that, insofar as the relevant provisions of the GDPR and the 2018 Act[32] apply to the Inquiry's approach to disclosure, they do not expressly oblige the Inquiry to conduct a balancing exercise of the type required by Article 8 of the ECHR. This is to be contrasted with the position in relation to subject access requests under Article 15 of the GDPR and paragraph 16 of Schedule 2 to the 2018 Act. The effect of these provisions is that, where the request cannot be complied with without disclosing information relating to another identifiable individual, there is no obligation to comply with the request unless: (a) the other individual has consented; or (b) it is reasonable to disclose the information without the consent of the other individual. These provisions

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[29] Equivalent to 'special category data' under the GDPR. While special category data includes additional categories, such as *"genetic data, biometric data for the purpose of uniquely identifying a natural person"*, these are unlikely to materially affect the approach that the Inquiry will be required to take to the information that it is required to process.

[30] Data Protection Act 1998, Schedule 1, Part I, paragraph 1; Schedule 2, paragraph 5(b); and Schedule 3, paragraph 7(1)(b).

[31] For example, there is: (a) a new requirement that data processing be transparent (Article 5(1)(a)); (b) a more expansive definition of personal data which now encompasses a wider range of personal data (including online identification markers, location data, genetic information) (Article 4(1)); (c) new requirements in relation to privacy notices/the right to be informed (Articles 13-14); (d) an enhanced right of access (Article 15); (e) new rights to rectification, erasure and restriction of processing (Articles 16-18); and (f) new data breach notifications (Article 33). It is to be noted that the rights under Articles 5(1)(a) and 13 to 18 do not apply where the disclosure of data is required by an enactment (Data Protection Act 2018, Schedule 2, Part 1, paragraphs 1 and 5(2)), or (in the case of Arts 13 to 18) where the data are processed by an individual acting in a judicial capacity (Data Protection Act 2018, Schedule 2, Part 2, paragraphs 6 and 14(2)).

[32] GDPR Articles 6 and 9; Data Protection Act 2018, sections 8, 10 and Schedules 1-3.

essentially mirror the Article 8 balancing exercise, where the public interest in disclosure is to be weighed against the public interest in non-disclosure (*Dr DB v General Medical Council*[33]).

22. Case-law under the 1998 Act questioned the role that data protection obligations had to play in relation to disclosure obligations in the context of a self-contained disclosure regime, such as that under the Civil Procedure Rules. In *Durham County Council v Dunn*[34] Maurice Kay LJ stated:

> *"In my judgment, it is misleading to refer to a duty to protect data as if it were a category of exemption from disclosure or inspection. The true position is that CPR 31, read as a whole, enables and requires the court to excuse disclosure or inspection on public interest grounds... The requisite balancing exercise is between, on the one hand, a party's right to a fair trial at common law and pursuant to Article 6… [of the] (ECHR) and, on the other hand, the rights of his opponent or a non-party to privacy or confidentiality which may most conveniently be protected through the lens of Article 8. It is a distraction to start with the [Data Protection Act], as the Act itself acknowledges. Section 35 exempts a data controller from the non-disclosure provisions where disclosure is required in the context of litigation. In effect, it leaves it to the court to determine the issue by the application of the appropriate balancing exercise under the umbrella of the CPR, whereupon the court's decision impacts upon the operation of disclosure under the [Data Protection Act 1998]"*

23. This reasoning does not directly apply to a public inquiry - not least because it is not clear that the work of the Inquiry would fall within the definition of 'legal proceedings' under paragraph 5 of schedule 2 to the 2018 Act (the successor to section 35 of the 1998 Act).[35] Nonetheless, the reasoning may be of some assistance with respect to the issue before the Inquiry in circumstances where:

[33] [2016] EWHC 2331 (QB); (2018) 164 BMLR 19, paragraphs 69-70. This case concerned section 7(4)-(6) of the Data Protection Act 1998 which is in materially similar terms to the provisions in Article 15 of the GDPR and paragraph 16, Schedule 2 of the Data Protection Act 2018.

[34] [2012] EWCA Civ 1654; [2013] 1 WLR 2305.

[35] See the definition in section 205 of the 2018 Act which suggests that 'legal proceedings' in the context of the Act is intended to relate to litigation: *"tribunal" means any tribunal in which legal proceedings may be brought"*.

(a) material will only fall to be disclosed where the Inquiry has deemed it to be *"relevant and necessary to fulfilling the Inquiry's Terms of Reference"*;[36]

(b) Parliament has legislated for a self-contained disclosure regime in the Inquiries Act 2005 and the Inquiry Rules 2006; and

(c) that statutory regime includes provisions that allow the Inquiry to balance the privacy rights of individuals with the public interest in disclosure and open justice.

24. Once the Inquiry has decided that information is 'relevant and necessary' and, where an Article 8 issues arises, has conducted the required balancing exercise and concluded that the public interest in disclosure outweighs the public interest in non-disclosure, there are no additional steps required of it for data protection purposes: (a) the disclosure would be 'necessary' within the meaning of Article 6 of the GDPR; (b) it would meet the 'substantial public interest' test required for special category data and criminal convictions; and (c) the Article 8 process will have constituted *"suitable and specific measures to safeguard the fundamental rights and the interests of the data subject"* as required by Article 9(2)(g) of the GDPR, as well as incorporating the necessary safeguards that are required by Article 10(1) of the GDPR.

25. In those circumstances, the issues raised for consideration by the Inquiry would appear to fall to be analysed in the first instance by reference to Article 8 of the ECHR, rather than by reference to data protection principles.

Article 8 of the ECHR

26. The Inquiry has already decided on the approach to be taken in cases where an individual raises an Article 8 issue in the context of a restriction order application.[37] The question raised by the issues in the Chairman's note (and CTI's explanatory note) is what approach should be taken in relation to third

[36] UCPI disclosure protocol, paragraph 31.

[37] Restriction Order Ruling, 3 May 2016, paragraphs 177-193.

parties who are not core participants, or otherwise known to the Inquiry, and who may not be aware that the Inquiry is considering disclosing documents that contain their personal information.

27. The Secretary of State makes the following observations with respect to this issue.

28. **First**, there is no requirement under the Inquiries Act 2005 that the Chairman's discretion to make a restriction order may only be exercised on application; it follows that the Inquiry can, and may in certain cases be required to, consider any Article 8 issues of its own motion. This power to proactively take appropriate steps to protect the privacy of an individual was confirmed by the Supreme Court in *Re Application by Guardian News and Media Limited and others*.[38]

29. **Second**, whether an Article 8 issue will arise from the disclosure of the personal information of individuals named in intelligence material is a highly fact sensitive one. It is likely that there will be cases where it will be obvious that Article 8 is engaged,[39] and those where it is obvious that it is not.[40] The more difficult cases will be the ones where it is not possible to assess whether an Article 8 issue arises without input from the individual in question. In this regard, the Secretary of State notes that some of the successful non-state restriction order applications were granted on the basis of factual circumstances that could not have been predicted without input from the applicant.[41]

30. **Third**, as the former Chairman noted in his Ruling of 3 May 2016,[42] the Inquiry has *"significant room for judgment"* in relation to the factors to be taken into

[38] [2010] UKSC 1, [2010] 2 AC 697, paragraph 28.

[39] For example where the information relates to sexual relationships or health issues.

[40] This might arise where the information in question (for example membership of a particular group) has been publicised by the individual themselves.

[41] For example, the restriction order applications made by FCA (impact of disclosure of FCA's studies); GRD (impact of disclosure on GRD's professional life); and RTD (impact of disclosure on RTD's employment).

[42] *Restriction Orders: Legal Principles and Approach Ruling*, 3 May 2016, paragraph 192.

consideration when undertaking the Article 8 balancing exercise, and *"a wide margin of discretion"* in assessing the means by which to achieve efficiency and effectiveness in the Inquiry. This reflects the position under section 17(1) of the Inquiries Act 2005, which provides that *"Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct"* subject to a requirement under section 17(3) to act fairly, and to have regard to the need to avoid unnecessary cost.

31. It is to be noted that the GDPR itself recognises that whether Article 8 requires the consent of a third party before their data can be disclosed is a fact-specific question. For example, as set out above, the relevant provisions relating to subject access requests under the GDPR and the 2018 Act incorporate an Article 8 balancing exercise, but there is no requirement in every case that the consent of a third party be obtained before their data can be disclosed. Whether or not disclosure without consent is permissible depends on whether disclosure would be reasonable in all the circumstances, taking into consideration: (a) the type of information being disclosed; (b) any duty of confidentiality; (c) the any steps taken to obtain consent; (d) whether the third party is capable of giving consent; and (e) any express refusal of consent by the third party.[43]

The issues raised in the Chairman's note

32. With respect to the specific issues raised in the Chairman's note[44]:

    (a) The process provided for in the privacy section of the Restriction Protocol[45] is a flexible and proportionate process capable of reconciling the public interest in open justice and the need for efficiency with the privacy and data protection rights of individuals. The Secretary of State does not submit that it is necessary to amend the privacy section of the Restriction Protocol or to give further guidance.

[43] Data Protection Act 2018, Schedule 2, paragraph 16(2).

[44] Note dated 29 November 2018, *Preliminary Issue: Privacy*, paragraph 9(a)-(e).

[45] Paragraphs 25-34.

(b) The Inquiry's existing Article 8 process meets the requirements the relevant data protection legislation.

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