COUNSEL TO THE INQUIRY'S SUPPLEMENTARY NOTE ON PRIVACY

Introduction

1. By a note and directions dated 29 November 2018, the Chairman invited submissions on the following issues:

   a. How is effect to be given to the privacy and data protection rights of thousands of individuals who are named in intelligence reports produced by Special Demonstration Squad undercover officers, without undermining the public interest in as much as possible of the Inquiry being conducted in public?

   b. Do changes to privacy laws since the Restriction Protocol was finalised require the privacy section of that document to be amended and, if so, in what respects?

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

   d. Is any guidance needed as to the application of the Restriction Protocol?

   e. Do the coming into force of the General Data Protection Regulation and the Data Protection Act 2018 have any further consequences for the publication of documents, witness statements and the taking of oral evidence?

2. A note by counsel to the Inquiry of the same date set out the context in which those questions had been posed. In particular, this drew attention to paragraphs 25 to 34 of the Inquiry's Restriction Protocol issued on 30 May 2017 which, as matters stand, sets out the basis on which privacy issues are to be addressed.

3. The Inquiry has now received written submissions from the legal representatives of a variety of core participants, and also from representatives of the Information Commissioner and Guardian News and Media Limited.

4. The purpose of this note is to set out the framework within which those questions fall to be addressed at the hearing, and to deal with various specific issues raised by the submissions.

5. At the hearing, submissions are particularly invited on the ways in which the Chairman may be able to adopt procedures which enable him to fulfil all of the legal obligations

set out below: that is, which would enable the Inquiry to get to the truth publicly, while acting fairly to all concerned and protecting their privacy rights, as soon as practicable and having regard to the need to avoid unnecessary cost. This question requires consideration to be given not only to the question what documents will be disclosed and subject to what privacy restrictions in advance of the hearing, but also what documents will need to be available, what oral evidence can be given, and subject to what privacy restrictions, at hearings which take place in public.

Legal Principles

6. With the exception of the submissions made on behalf of the Non-Police, Non-State Core Participants, the submissions which have been made do not suggest that changes of substance are legally required as a result of the coming into force of the General Data Protection Regulation or the Data Protection Act 2018. The submissions on behalf of the Non-Police, Non-State Core Participants are addressed below.

7. It should be observed at the outset that the issues under consideration are limited to privacy issues. Where the term 'unredacted' is used in the present context (as, for example, in paragraph 9(v) of the Chairman's direction), it should be understood to mean without redactions sought to protect privacy rights. There is no proposal to reverse the order in which restriction order applications are made in the sense envisaged in paragraph 15 and 16 of the submissions on behalf of the National Police Chiefs' Council, or to disclose documents without giving effect to restriction orders which have been granted, or to rule 12 protection where it applies.

8. The Inquiry Legal Team agrees with the observation in a number of the submissions that, whether or not any other changes are required to the privacy section of the Restriction Protocol, it is at least necessary to update references to the Data Protection Act 1998 which no longer applies.

9. Submissions on behalf of the officers represented by Slater and Gordon suggest that a change to the Restriction Protocol is required to ensure that officers are able to see their own intelligence reports, of which they may not have been the direct authors. The Inquiry legal team agree that it will normally be necessary for officers to see such intelligence reports for the purposes of making their witness statements, whether in order to respond to questions or simply to refresh their memories. However, no change to the Protocol is required for this purpose, since in such cases written consent is obtained under paragraph 21(iii), or if this is not obtained the Chairman may consider whether rule 12(4) applies under paragraph 21(i) or whether the restriction order application should be refused to the extent that it would prevent disclosure to the officer. The Inquiry has been using this approach when requesting statements from

officers represented by the Designated Lawyers, and it has not given rise to any difficulty.

10. The Chairman (who currently comprises the Inquiry Panel) regards himself as registered as the data controller within the meaning of that term in Article 4 of the General Data Protection Regulation. It is the Chairman and/or panel who has the statutory power under the Inquiries Act 2005 to carry out all of the functions of the Inquiry listed at paragraph 11 of the Information Commissioner's submissions and the Inquiry Legal Team does not consider that there is any material distinction between the categories of information identified. Reference is often made to 'the Inquiry' as a shorthand formulation,[1] but the Inquiry has no separate legal personality and it is submitted that it is not a 'legal person', 'public authority' or 'body' with any independent power, either solely or jointly, to make determinations as to the purposes and means of the processing of personal data.

11. Various submissions (see for example the footnote to paragraph 5 of the submissions on behaf of the Information Commissioner) drew attention to an error. Chapter 3 of Part 2 of the 2018 Act does not apply to the Inquiry's work: see section 21. It follows that the applicable law is the General Data Protection Regulation, and not the Applied General Data Protection Regulation. Under the General Data Protection Regulation, Article 9 reads:

> 1. *Processing of personal data revealing… political opinions… shall be prohibited.*[2]
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> 2. *Paragraph 1 shall not apply if any one of the following applies:*
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> *[…]*
>
> *(g) 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.*
>
> *[…]*

12. The Inquiries Act 2005, read with paragraphs 5, 6(1)(a) and (b) and 6(2)(a) of Schedule 2 to the Data Protection Act 2018, satisfies those conditions. Public Inquiries are set up, under section 1 of the Act, where it appears to a minister that (a)

[1] Indeed, we have used the term ourselves in this document, even when discussing the Chairman/inquiry panel's legal obligations.
[2] The selection of these words is not intended to imply that the Inquiry does not hold information falling into other special categories of data, such as health or sexual orientation – typical examples of both appear in the illustrative examples. However, data revealing political opinions is the most pervasive.

particular events have caused, or are capable of causing, public concern, or there is public concern that particular events may have occurred. In the case of this Inquiry, there is no doubt that there is substantial public interest in that concern being addressed. Where processing is necessary in order for the Inquiry to fulfil its terms of reference for reasons of substantial public interest, the Inquiries Act 2005 contains provisions which ensure respect for the essence of the right to data protection. It provides for suitable and specific measures to safeguard the fundamental rights and interests of the data subject. In particular, section 19(3) of the Inquiries Act 2005 provides that the Chairman has power to make a restriction order in any case where it is *"required by any statutory provision, enforceable Community obligation or rule of law"*. This may include a requirement under the Data Protection Act 2018 and the General Data Protection Regulation. To the extent that more specific measures may be needed in a particular case, the Chairman has power to make directions under section 17 of the 2005 Act. It is under this power that the existing Restriction Protocol was issued.

13. The Regulation does not provide that the processing must be proportionate to the aim pursued; it provides that the law under which it is done (that is, the Inquiries Act 2005 and the provisions of the Data Protection Act referred to above) must be proportionate to the aim. It is submitted that the Inquiries Act 2005, read with paragraphs 5, 6(1)(a) and (b) and (2)(a) of the Data Protection Act 2018, is indeed proportionate to that end.

14. In particular, the scheme of the 2005 Act is that in any case where privacy rights precluded disclosure of information, this would be dealt with by imposing a restriction order under section 19 of the Act. For this reason, the Inquiry Legal Team respectfully disagrees with the submission made on behalf of the Information Commissioner (see paragraph 31) that there is any risk that the Inquiry's Privacy Information Notice is incompatible with the Chairman's obligations as a data controller. The Privacy Information Notice states 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"* (emphasis added). Given the statutory requirements in relation to public access to documents, a restriction order is the principal legal means by which the Chairman's obligations as a data controller can be given effect,[3] so that to the extent that it was impermissible to disclose a document consistently with the proper discharge of the Inquiry's obligations as a data controller, a restriction order would need to be applied.

[3] There may be limitations to the extent to which a chairman may consider it reasonable to secure that members of the public (including reporters) are able to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel. This might have the practical effect of limiting the processing of personal data.

15. A number of submissions have considered the extent to which the right to privacy under Article 8 of the European Convention on Human Rights is engaged. In this context, the Inquiry Legal Team has noted the decision of the First Section of the European Court of Human Rights in *Catt v United Kingdom*, which was given on 24 January 2019 (that is, the day on which written submissions were received). In particular, the court noted the heightened level of protection given to personal data revealing political opinion (see § 112).[4]

16. The Inquiry Legal Team does not propose to advance any submissions as to the overall approach to be taken to privacy redactions. The ultimate decision is a matter for the Chairman. Any approach, however, must reflect the competing public and private interests. None of the relevant interests is absolute in the sense that it can be said that it renders the others nugatory. All of the factors set out in the ruling of Sir Christopher Pitchford dated 3 May 2016 need to be considered when imposing any restriction order. The following factors are of particular significance in the present context:

    (i) The privacy rights of all data subjects, including the heightened protection which should be given to data revealing political opinions and other special categories of data;

    (ii) The Chairman's duty under section 17 of the 2005 Act to act with fairness. This is a general duty, and will often involve balancing the competing rights of individuals, but of particular relevance for present purposes is the necessity for witnesses, including both police officers and those on whom they reported, to have information which will assist their recollection in order to give the best quality evidence, and the necessity for core participants to understand the Inquiry's investigations in order to participate;

    (iii) The need for the Chairman to consider the evidence in order to fulfil the terms of reference, and in particular the need for him to be able to take into account intelligence reports wherever they are relevant and necessary to the terms of reference – noting that in the context of this Inquiry, the extent to which undercover policing intruded into private lives is itself of fundamental evidential significance;

    (iv) The Chairman's duty under section 18 of the 2005 Act to take such steps as he considers reasonable to secure that members of the public can obtain or view a

[4] *Catt* involved intelligence which appears, from the descriptions in the reports, to be similar in nature to much of the reporting which the Inquiry holds. The extent of the interference with the privacy rights of those mentioned in the reports may therefore be similar. The conclusions on justification are less directly applicable: the reasons why it is necessary for the Inquiry to retain and use intelligence reports are entirely different from those relied on by the police in *Catt*.

record of evidence and documents given, produced or provided to the Inquiry Panel;

(v) The requirement in the Inquiry's terms of reference that the Chairman report to the Home Secretary as soon as practicable;

(vi) The Chairman's duty under section 17 of the 2005 Act to have regard to the need to avoid any unnecessary cost.

17. The proper balance of these statutory duties is ultimately one which will need to be carried out by the Chairman. None of them displaces the others. For example, the submissions on behalf of the Information Commissioner are that the difficulties in anonymisation are outweighed by the rights of data subjects which are properly engaged (see paragraph 18). However, it is clear from the context in which this observation is made that the submission is that this issue only arises where the Chairman considers that it is not necessary, for reasons of substantial public interest, to disclose the data to interested parties and/or the public. That issue will involve a consideration of all of the factors set out at paragraph 16 above.

18. It may be added that the more complicated the process for protecting privacy rights is, the more difficult and time consuming it will be to ensure that it is consistently applied and the greater the risk of error. For example, the creation of multiple copies of a document, each differently redacted, increases the risk of inadvertent disclosure and means that time must be spent to ensure that the correct version is used in any given case.

Timetable

19. The Inquiry legal team notes the request, in submissions on behalf of the Commissioner's legal team, for further information as to the impact on the timetable of each of the options suggested by the Chairman in his Note and Directions (see paragraphs 7 and 8 of the Commisioner's submissions). Given that the Inquiry has not begun working on privacy redactions, quantification is to some extent speculative. However, the following observations may be made:

(i) As set out in the Chairman's statement of today, the Chairman does not now envisage that it will be possible to begin oral hearings in June 2019, whatever approach is adopted to privacy.

(ii) The Inquiry does now have experience of considering restriction order applications. Given the need to allow for consideration, application of redactions, legal and technical checking and record keeping, the Inquiry legal

team is not surprised by the figure of one hour per document indicated by the Commissioner's legal team in the case of short intelligence reports typical of the tranche 1 period (of which the document at Annex A was produced as an illustrative example). In practice, where an officer's cover name has been released, it has proved rare for the Metropolitan Police to apply for retrictions over the substance of such reports. It may therefore prove more time consuming to apply privacy redactions, if these are more numerous.

(iii) The Inquiry Legal Team also has experience of making contact with individuals who were not previously aware of their interest in the Inquiry. In any individual case, it is common for the process of identifying, tracing, contacting and establishing communication with that person to take many weeks.

(iv) Given that the approach taken to privacy will have a very significant impact on the overall timetable, the Inquiry wishes to resolve the issues of principle around privacy before providing any revised indication of timing. Even if no privacy redactions were required at all, hearings would not begin in June; but some of the approaches to privacy proposed in submissions would have dramatic consequences. For example, the submissions on behalf of the Non-Police, Non-State Core Participants at paragraph 86 on Annex A imply that the Inquiry should (a) replicate the research set out in the 'Inquiry notes' section of that example in the case of each document (itself an onerous task); should trace and contact six individuals (A, B, C, E, G, H) and should carry out inquiries into the possibility of contacting another (J). Even acknowledging that the same individuals may be mentioned in numberous reports, there can be no doubt that this approach, extrapolated across multiple reports and all of the undercover police officers whom the Inquiry is investigating would involve contacting so many individuals as to be impracticable.

20. The Inquiry welcomes the Information Commissioner's confirmation that the approach set out in the Restriction Protocol does not need any particular change and that the suggested measures and procedures contained therein would be equally valid under the new legislation (see paragraph 33). However, one of the questions which arises for consideration at the hearing, now that the Inquiry legal team has greater familiarity with the nature and extent of intelligence reporting as exemplified by the illustrative mock examples, is whether the proposals set out in the Protocol will prove so onerous that it becomes impossible for the Chairman to discharge his statutory functions if they are applied. Submissions are particularly invited on the ways in which the Chairman may be able to adopt procedures which enable him to fulfil all of the legal obligations imposed on him at paragraph 16 above: that is, which would enable the Inquiry to get

to the truth publicly, while acting fairly to all concerned and protecting their privacy rights, as soon as practicable and without unnecessary cost.

Submissions made by the Non-Police, Non-State Core Participants

21. The submissions on behalf of the Non-Police, Non-State Core Participants address the Inquiry's obligations under Articles 14 and 15 of the General Data Protection Regulation.

22. Given the difficulty and importance of resolving the Inquiry's approach to privacy in relation to the disclosure of documents (that is, considering when and how one person's private information will be disclosed to *others* for the purposes of the Inquiry), the questions set out in the Chairman's directions must take priority, at the hearing, over issues concerning the other rights of individual data subjects. The Inquiry Legal Team also recognises that legal representatives may not be prepared to address the question of the Inquiry's obligations under Articles 14 and 15, given that the Chairman's directions did not ask them to do so. The Chairman will not hear submissions on Articles 14 and 15 at the hearing on 31 January, but he will consider representations as to the format and timing of future submissions.

23. It goes without saying that the Inquiry agrees with the observation by the Information Commissioner that it should comply with the requirements of the legislation when responding to subject access requests (see paragraph 7), as it would comply with any legislative obligation.

24. The Inquiry is in an unusual position in relation to the personal data which it holds. Intelligence reports of the kind of which Annex A is an example were originally hard copy documents and although many are now held in electronic scanned format, the quality of the original is rarely sufficiently good that optical character recognition provides a usable meaning of searching. It is not typically structured by reference to individual data subjects at the point when it is received by the Inquiry. One of the factual questions which the Inquiry is considering is whether the information gathered was excessive, and it needs to consider (and retain) the evidential record on that point. The challenges posed in handling personal data are therefore much greater than would be the case where, for example, a business holds data on customers. The Inquiry is under legal constraints which mean that, while the Inquiry takes such technical and organisational measures as it can in order to meet the requirements of Article 25 of the General Data Protection Regulation, there is very limited scope to decide that material should be structured in a way that makes it easy to respond to subject access requests, that obtaining special category material can be avoided, or that that excessive information can be deleted: information which should not have

been obtained or retained could be unnecessary for policing purposes but still necessary for the Inquiry's purposes.

25. The Inquiry cannot respond to subject access requests in the hypothetical. Different considerations may apply in individual cases. However, it may be of assistance to offer a provisional view as to the how the law generally applies in the specific case of intelligence reporting: that is, to the application of Articles 14 and 15 of the General Data Protection Regulation insofar as they relate to the types of reporting of which Annexes A and B to the counsel note dated 29 November 2018 have been provided as mock illustrative examples:

    (i) The Chairman's position is that he is carrying out a function designed to protect members of the public against, *inter alia*, malpractice or other seriously improper conduct (see paragraph 7 of Schedule 2 Part 2 to the Data Protection Act 2018. That function is conferred on him by an enactment, and is moreover of a public nature and exercised in the public interest. For this reason, the Chairman is exempt from the operative parts of articles 13, 14 and 15 amongst others insofar as any request relates to material which he is considering for the substantive purposes of the Inquiry.

    (ii) Noting the timescale within which a data controller must respond to a subject access request (even allowing for the possibility of extension), and subject to the particular circumstances of any particular request, the Inquiry legal team also has concerns about the risk of interference with the rights of others which arises from responding to subject access requests. Experience of considering restriction order applications made by state core participants has demonstrated that the nature of intelligence material is such that the harm which may be caused by the disclosure of such material is not self-evident. The risks may only become evident from material which is not yet in the Inquiry's possession: in order to assess the legal implications of disclosure the Inquiry will need to consider the effect of disclosure in the context of information it may need to publish in future, not all of which is yet known. In summary, it appears that in providing any substantial volume of intelligence reports outside its current processes and in responding to a subject access request, there would be a very high resulting likelihood of violation of other individuals' human rights. The position would not be that there would be specific identifiable information which, if disclosed, would violate an individual's rights: were that so, it could and would be redacted or withheld. The position is simply be that the risk of premature disclosure of the kind which would be required in order to comply with the timescales for responding to subject access requests, is such that while the

specific circumstances and means by which disclosure may result in a violation of rights is not foreseeable, the aggregate risk of a violation may be very high.

26. The first point, at least, also means that the Inquiry is not subject to notification requirements.[5] If this were not correct, it would also be necessary to consider the application of paragraph 5(b) of Article 14. This article mentions specific purposes (archiving, scientific and historical research and statistical purposes) but is not expressed as being confined to those purposes. To provide the information in Article 14 paragraph 1 directly to all those whose data is being processed by the Inquiry is likely to render impossible or seriously impair the fulfilment of the Inquiry's terms of reference. However, the Inquiry has made the relevant information available to the public via its privacy information notice.[6]

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[5] The question whether the second point also had any bearing on this issue might be fact-specific.
[6] https://www.ucpi.org.uk/wp-content/uploads/2018/08/20180816-Privacy_Information_Notice_-Final.pdf