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25	THE CHAIR: As everybody who has attended these proceedings	

1 before will know, there is a 60-second delay on
2 communicating what is going on in this room to the
3 outside world. There is a restriction order, a formal
4 order, in place. Breach of that order is capable of
5 being punished.

6 MS AILES: Sir, I will introduce the representation.

7 Ms Wilkinson, Mr Gray and I represent the Inquiry.

8 On behalf of the non-state core participants to my
9 left, sit Mr Facenna, Ms Brander and Ms Morrison.

10 On behalf of Peter Francis, Ms Sikand.

11 On behalf of the families of police officers,
12 Ms Law.

13 On behalf of the Metropolitan Police Commissioner's
14 legal team, Ms Mannion assisted by Ms Lyons and
15 Ms Harden.

16 On behalf of the Designated Lawyers officers
17 Mr McAllister.

18 On behalf of the officers represented by Slater &
19 Gordon, Mr Brandon and Ms Woods.

20 On behalf of the National Police Chiefs' Council,
21 Sir Robert Francis and Ms White.

22 On behalf of individual National Public Order
23 Intelligence Unit Officers, Mr Payne and Mr Moss.

24 On behalf of the Secretary of State for the Home
25 Department, Ms Davidson.

1 On behalf of the National Crime Agency, Mr O'Brien.

2 And on behalf of the Information Commissioner,

3 Mr Summers.

4 I will add that two members of the bar, Mr Hall and
5 Mr Sanders, representing respectively the Commissioner's
6 legal team and the Designated Lawyers send their
7 apologies but may attend during the course of
8 proceedings and will slip in quietly.

9 I also add that Ms Steel, who represents herself, is
10 at the back of the court. She does not ask to
11 participate in the general course of proceedings, but
12 I understand that she would like an opportunity to speak
13 briefly at the end of the day.

14 Sir, I understand the way in which you propose to
15 deal with this hearing is not simply to invite
16 consolidated submissions according to the speaking
17 order, but to invite submissions on a number of
18 individual topics considered individually.

19 THE CHAIR: Yes. That is my intention.

20 May I please have a copy of the document you have in
21 front of you, which indicates the layout of the
22 courtroom? (Handed)

23 Thank you. Thank you very much.

24 Mr Facenna, I would like, if I may, to begin with
25 you.

1 MR FACENNA: Yes.

2 THE CHAIR: The first topic on which I invite submissions,
3 I don't anticipate will be controversial. It is this:
4 it seems to me that it is the law of the United Kingdom
5 which must be proportionate and respect the essence of
6 the rights of individuals to data protection, rather
7 than the individual decisions of the Inquiry.

8 Is that a controversial proposition?

9 Submissions on behalf of the Non-police, Non-state Core
10 Participants by MR FACENNA

11 MR FACENNA: In short, the answer is both. To some extent
12 it is controversial because it is not simply the law, it
13 is the processing as well.

14 THE CHAIR: I accept of course that in dealing with data
15 protection issues the Inquiry must act in such a manner
16 as to protect those rights to the extent that it is
17 required to do so and can do so. But it is the law
18 which must be proportionate, is it not, which is what it
19 says?

20 MR FACENNA: To be clear, this is the point I was going to
21 come to.

22 THE CHAIR: Yes.

23 MR FACENNA: There is an assertion appended to the Inquiry
24 supplementary notes that it is only the law but not the
25 processing which needs to be proportionate. That's

1 wrong and we do take issue with that, in particular
2 because there is the use of the word "necessary" in the
3 relevant provision which relates to the processing and
4 not to the relevant law.

5 THE CHAIR: We had better look at the provision.

6 MR FACENNA: Do you want to jump straight into the point?

7 THE CHAIR: Yes, please.

8 MR FACENNA: The point is raised in Counsel to the Inquiry's
9 supplementary note, I think it is paragraph 11 onwards.
10 That is in bundle A, tab 11.

11 THE CHAIR: Yes.

12 Should we not start with article 9.1(g) ...

13 MR FACENNA: That's precisely where I was going to go, I was
14 just giving you the reference --

15 THE CHAIR: Yes.

16 MR FACENNA: What is said there, you will see the relevant
17 provision of article 9.1(g) is set out. I can take you
18 to it in the authorities bundle or it is there in the
19 note, the relevant language. You see there that the
20 requirement is that the processing is necessary for
21 reasons of substantial public interest on the basis of
22 union and member state law.

23 MS AILES: For those following along, we are at paragraph 7
24 of Counsel to Inquiry's note.

25 MR FACENNA: I am at paragraph 11.

1 MS AILES: Sorry, 11.

2 THE CHAIR: Let us not worry about what is in the note,
3 I want to look at the text of the law.

4 MR FACENNA: Are you in the authorities bundle in the
5 General Data Protection Regulations?

6 THE CHAIR: I have article 9.2(g) in front of me.

7 MR FACENNA: You will see there is reference to the word
8 "necessary" which relates to the processing.

9 THE CHAIR: Certainly. That is clearly a part of the law.
10 It is what follows from that that I raise my question
11 about.

12 MR FACENNA: The assertion with which we take issue is at
13 paragraph 13 of Counsel to the Inquiry's note. It is
14 said that the regulation does not provide that the
15 processing must be proportionate to the end pursued. We
16 say that is wrong.

17 THE CHAIR: Can we just look at the language of 9.2(g)
18 a moment.

19 First of all, the prohibition on processing of
20 certain data is not prohibited if it is necessary for
21 reasons of substantial public interest.

22 MR FACENNA: Yes.

23 THE CHAIR: That is an absolute condition and is not subject
24 to what a member state law may provide.

25 MR FACENNA: Yes. It is a requirement of proportionality,

1 the use of the word "necessary" there.

2 THE CHAIR: We will come to what the language means in
3 a moment --

4 MR FACENNA: Yes.

5 THE CHAIR: -- but that is the language of the regulation.
6 A feature of the law.

7 MR FACENNA: It is a requirement, yes, that relates to the
8 processing.

9 THE CHAIR: It has to be necessary for reasons of
10 substantial public interest and it has to be on the
11 basis of union or member state law. Those are the first
12 two requirements, which are legal requirements.

13 MR FACENNA: Yes.

14 THE CHAIR: Right.

15 MS AILES: Sir, I'm sorry to interrupt again. I understand
16 that there are difficulties hearing in the overflow
17 room. I am asked if Mr Facenna could move any closer to
18 the microphone as he can't be heard.

19 MR FACENNA: I will move the microphone closer to me.

20 THE CHAIR: "Which", the word which appears next,
21 immediately after "law", clearly qualifies "law",
22 doesn't it?

23 MR FACENNA: Yes.

24 THE CHAIR: It has to be on the basis of member state law
25 which shall be proportionate to the aim pursued?

1 MR FACENNA: Yes.

2 THE CHAIR: It has to be the member state law which is
3 proportionate to the aim pursued?

4 MR FACENNA: Yes.

5 THE CHAIR: It is the member state law which must respect
6 the essence of the right to data protection?

7 MR FACENNA: Yes.

8 THE CHAIR: It is the member state law which must provide
9 for suitable and specific measures to safeguard the
10 fundamental rights and interests of the data subject?

11 MR FACENNA: Yes.

12 THE CHAIR: It seems to me that you are agreeing with me,
13 subject to the qualification, that the word "necessary"
14 in the first seven words imports proportionality simply
15 by its appearance as the word "necessary"?

16 MR FACENNA: There are two points.

17 The first is that point, the word "necessary"
18 imports a proportionality requirement that relates to
19 the processing and not to the law.

20 Secondly, where the reference is to the law which
21 provides suitable and specific measures to safeguard the
22 fundamental rights and interests of the data subjects,
23 that then becomes the real question in practice. We all
24 accept that the Inquiry has the powers to create and to
25 put in place appropriate safeguards to protect those

1 rights and interests, but for present purposes it seems
2 to us the question is: what should those safeguards be?
3 Are they suitable? Are they specific? That's really
4 the focus as we saw it of the questions which the
5 parties were being asked to address for the purposes of
6 this hearing.

7 THE CHAIR: Then we are not at ad idem, because it seems to
8 me it is our law -- our UK law -- which has to fulfil
9 these requirements. If anyone wishes to dispute that,
10 the Inquiry is not the right place to dispute it.

11 MR FACENNA: Sir, I am not disputing that as a matter of
12 formal interpretation of this requirement. In a sense
13 I am jumping ahead to what is the real question for the
14 purposes of the Inquiry, which is: what are the suitable
15 and specific safeguards that ought to be put in place
16 pursuant to the powers under the Inquiries Act? If you
17 are asking me purely as a matter of interpretation of
18 this provision, the processing has to be necessary,
19 ie proportionate in EU terms and the law itself has to
20 be proportionate and satisfy those other requirements.
21 I don't think there is a difference between us on those.

22 THE CHAIR: No.

23 MR FACENNA: It does obviously beg the question then: what
24 are the proportionate and specific and suitable
25 safeguards which have to be put in place pursuant to

1 legal powers.

2 THE CHAIR: Hang on. I have no problem about

3 "proportionate" being included in the word "necessary",

4 something which is wholly disproportionate it is

5 difficult to think could be necessary, merely as

6 a matter of language, let alone of authorities.

7 MR FACENNA: That, if I may say so, is a literal and formal

8 approach which doesn't take into account the fact that

9 we are dealing with EU legislation here.

10 THE CHAIR: I understand that. I know that the tenets of

11 construction that have to be applied to EU requirements,

12 but I am afraid being an English lawyer my starting

13 point is to see what the language requires and then to

14 see whether that approach should be altered in the light

15 of the underlying purpose of the EU law, which is,

16 I think, not an unacceptable process.

17 MR FACENNA: Certainly not. I am certainly not objecting to

18 that. I was planning to take you to at least one

19 authority which makes it clear what "necessity" means in

20 this context, ie strictly is necessary and proportionate

21 in accordance with decades of EU case law.

22 THE CHAIR: Then one looks at what is meant by strictly

23 necessary. Again, as a pedantic English lawyer I do not

24 think "strictly" adds anything to "necessary". But it

25 is repeatedly used as a mantra.

1 MR FACENNA: Now in Strasbourg at least they have expressly
2 adopted the Court of Justice's use of the word
3 "strictly" in this context and the Strasbourg court
4 seems to indicate that that does make a difference.
5 I can take you to those when we get into that.

6 THE CHAIR: What it is, is impossible to tell. But anyway
7 we will get to that in due course. I think we are
8 ad idem then on what article 9.2(g) means.

9 MR FACENNA: I think we are, subject to the point I made
10 about Counsel to the Inquiry's note which we say is
11 wrong.

12 THE CHAIR: Then can I invite anybody who disagrees with
13 that approach to say so? I am not going to go round
14 everybody person by person, but I invite anyone to stand
15 up who does not accept that as a general submission.

16 Good. So the first point on my list dealt with. Of
17 course you must address me in due course when we get to
18 the detail of things.

19 MR FACENNA: Yes.

20 THE CHAIR: The next point is one I think of raised by the
21 Commissioner, but I raise it with you first because you
22 are on your feet.

23 It seems to me and to the Inquiry's legal team that
24 it is the imposition of a restriction order that is the means
25 by which the Inquiry gives effect to the data protection

1 rights. Therefore there isn't, as on one reading of the
2 Commissioner's written submissions, paragraphs 29 to 31,
3 any conflict between the approach of the Inquiry and
4 that required by law.

5 MR FACENNA: There is a slight ambiguity, as I think you
6 have noted, Sir, in exactly what the Commissioner is
7 saying in paragraph 31, perhaps Mr Summers can address
8 you on that.

9 THE CHAIR: Yes.

10 MR FACENNA: We don't accept as a matter of bold statement
11 of principle that simply the power to impose restriction
12 orders is somehow a complete answer to the obligations
13 which the Inquiry is under under the General Data
14 Protection Regulations and the Data Protection Act.

15 THE CHAIR: No, we must apply a restriction order in
16 appropriate circumstances.

17 MR FACENNA: No dispute about that. No dispute about that.

18 To take an obvious example, the fact that you may
19 have a restriction order in place or the ability to make
20 one does not displace the obligations of notification
21 under article 14 --

22 THE CHAIR: We will come to that. That is a separate
23 question and I will raise that with you in due course.
24 That is one of the topics I want to deal with. Forgive
25 me for doing it in this order, but I think it is the

1 is what Mr Facenna I think has already articulated --
2 indeed we postulate there are circumstances, in which
3 data subject rights are engaged long before
4 a restriction order is made. One only has to think, for
5 example, of the information that sits within the
6 Inquiry's knowledge which is not subject to the
7 restriction order subsequently, so the original
8 material, that information is still being processed by
9 the Inquiry subsequent to a restriction order.

10 Even before a restriction order, there are
11 considerations of general data protection rights and
12 obligations, not least of which is the security and
13 safeguarding of that data in the Inquiry's hands. We
14 have no issue in relation to that, we are sure the
15 Inquiry has that obligation well in mind and it is
16 operative.

17 THE CHAIR: Yes.

18 MR SUMMERS: The question of what rights surround that
19 information are not entirely coincidental with
20 restriction orders in our respectful submission. The
21 data protection obligations permeate all aspects of the
22 Inquiry's work with personal data.

23 THE CHAIR: I don't disagree with that proposition. Exactly
24 what those obligations are will be a matter for debate
25 in due course. I don't disagree with that.

1 All I was puzzled by was the suggestion that there
2 may be some conflict in the declared approach of the
3 Inquiry into restriction orders. And the obligations
4 which I acknowledge and you assert in relation to data
5 protection. I readily acknowledge that restriction
6 orders are not the complete answer, but they are not in
7 conflict, I think with the obligations.

8 MR SUMMERS: No, I would not go so far as to submit they are
9 in conflict. Restriction order is one of the
10 measures -- to use the language of the General Data
11 Protection Regulations -- by which those rights are
12 protected.

13 THE CHAIR: Yes. In which case I don't think we are in
14 conflict on that, I'm happy to learn.

15 Anyone else have anything to say about that? No,
16 good.

17 The next point is a practical one, which is raised
18 by the non-state core participants.

19 Mr Facenna, I will address you if I may on this.

20 The publication by the Inquiry of cover names and
21 groupings is said to be insufficiently specific to
22 permit identification of the activities of officers and
23 whether or not individuals amongst the non-state
24 core participants and elsewhere can know that they were
25 the subject of infiltration or activity by an undercover

1 officer.

2 I readily accept that. It is the intention of the
3 Inquiry when we are sufficiently certain about which
4 officer infiltrated which branch, district or
5 subdivision of which group and when, it is our intention
6 to publish that on our website with the hope that that
7 will prompt memories and the further hope that it will
8 promote the provision of information.

9 I hope that is reassuring.

10 MR FACENNA: I am sure that will be welcome.

11 THE CHAIR: It can't be done instantly, for reasons I will
12 explain in due course.

13 First of all, which branch of which group the
14 officer infiltrated is not always immediately obvious on
15 the documents that we have. I will explain why in due
16 course, but we have to be reasonably certain that we
17 have it right before we publish it. I am not willing to
18 publish the Inquiry's first guess or even estimate and
19 then have to change it later. It serves no purpose.

20 MR FACENNA: I understand that. I think the proposal is
21 there are two points. The proposals which I think we
22 are making which are in paragraph 80 onwards of our
23 submissions.

24 First of all, I think we acknowledge, at least
25 implicitly if not explicitly, that this would have to be

1 done on an iterative basis because we all understand you
2 are proceeding on a chronological approach. I think we
3 say at paragraph 80, for example, it would have to be
4 widely publicised and updated on a regular basis, 81 and
5 82.

6 The second point which is probably a more
7 substantial one is that of course our position is that
8 that ought to refer to groups which were reported on and
9 not simply --

10 THE CHAIR: I will come back to that in a moment, if I may.

11 I want first of all to see whether there is any
12 objection from any party -- including in particular the
13 state parties and the individual officers -- to that
14 course.

15 Let me throw that question open. As far as you are
16 concerned, that is an acceptable --

17 MR FACENNA: That seems to us -- subject to the other
18 point -- seems to be more or less what we would suggest.

19 THE CHAIR: Of course. I will come back to that in
20 a moment.

21 Does anyone object to that course? Once we know for
22 certain which officers whose cover names are going to be
23 released or have been released, which branches or
24 districts or subdivisions of which groups they
25 infiltrated and between what dates, does anybody object

1 to that being published by the Inquiry?

2 No. Right. Now we will come to --

3 Sir Robert.

4 Submissions on behalf of the National Police Chiefs' Council

5 by SIR ROBERT FRANCIS

6 SIR ROBERT FRANCIS: As you will appreciate I understand
7 this hearing is principally to deal with initially the
8 Special Demonstration Squad disclosure and our process,
9 a little further down the lane, but therefore what I say
10 is entirely provisional. It might be possible to
11 envisage circumstances in which undertaking the very
12 sensible and practical suggestion you made would
13 endanger, by reason of some mosaic effect, identifying
14 someone who you said should not be identified but
15 I imagine you would already have taken that account in
16 publishing your list.

17 In other words, you may not be able to undertake the
18 exercise in a way which allows the publication of
19 absolutely everything that you think you know.

20 THE CHAIR: Of course. All of the propositions that I am
21 putting forward now are always subject to the caveat
22 that circumstances may, in an individual case, require
23 a change.

24 SIR ROBERT FRANCIS: Yes.

25 THE CHAIR: But I am announcing the general intention of the

1 Inquiry.

2 SIR ROBERT FRANCIS: I have no objection to that.

3 THE CHAIR: If anybody objects in a particular instance to
4 that being done, then the burden is going to be on them
5 to do so.

6 SIR ROBERT FRANCIS: As long as there is notice sufficient
7 to allow that to happen.

8 THE CHAIR: Well that is a mechanism which we will deal with
9 in due course.

10 SIR ROBERT FRANCIS: Thank you.

11 THE CHAIR: I have stated what I intend to do in principle
12 in that I anticipate that the vast majority of cases.
13 Mr Brandon, you are standing.

14 Submissions on behalf of the officers represented by Slater
15 & Gordon by MR BRANDON

16 MR BRANDON: Sir, one very short point. My learned friend
17 just mentioned the question of notice. Of course that
18 is an administrative decision perhaps rather than one to
19 be dealt with substantively today, but it would
20 certainly give some comfort if we were given notice --
21 a relatively short period of time -- in order that we
22 might be able to make submissions. If for any reason
23 the release of infiltrated groups might give rise to
24 concerns about identification.

25 THE CHAIR: As you say, that is an administrative matter.

1 I note your point. It is not an unreasonable one.
2 Would you allow my team and me to reflect upon it and
3 see how we deal with it?

4 MR BRANDON: Of course, thank you.

5 THE CHAIR: Your next point, which is a subdivision of this
6 point, is that the Inquiry should publish all groups or
7 sometimes to describe them as groups is
8 an overstatement, but you know what I mean.

9 MR FACENNA: Yes.

10 THE CHAIR: All groups reported upon as well as those
11 infiltrated.

12 Can I state my position to you and then you can
13 address me on it? As always, I think it is helpful if
14 you know where I am coming from, and you can attempt to
15 persuade me to change my mind, rather than if I remain
16 silent and then provide a decision to you that I have
17 not canvassed with you beforehand.

18 Of course, there are numerous groups reported upon
19 which were not, it is claimed, infiltrated. The classic
20 example is family justice campaigns. I have been
21 looking recently at the Colin Roach justice campaign
22 which I think was the first one upon which there was any
23 significant Special Demonstration Squad reporting. On
24 the documents I have seen so far, it was not, as such,
25 infiltrated although its activities were reported upon

1 and the individuals who formed part of it did feature in
2 reports.

3 Now, of course, such a campaign needs to be
4 identified by the Inquiry publicly so that those who
5 participated in it can have their say, provide
6 information to the Inquiry, make representations. The
7 obvious and classic example of all this is the Lawrence
8 family campaign, which on the Special Demonstration
9 Squad version of events was not, as such, infiltrated
10 albeit that everybody acknowledges that reporting was
11 made which concerned it.

12 However, there are a large number of one-off reports
13 on campaigns of not the remotest interest, sometimes --
14 at the most extreme end -- where the only report is,
15 "This is a leaflet from an organisation that no one has
16 ever heard of, that as far as I know did next to nothing
17 and died decades ago".

18 I don't see the utility of doing that. I think it
19 is a matter of judgment for the Inquiry as to which of
20 the campaigns that were reported upon are identified.

21 Further submissions on behalf of the Non-police, Non-state

22 Core Participants by MR FACENNA

23 MR FACENNA: In the example you have just given, Sir, it
24 doesn't seem to me there would be processing of personal
25 data which gives rise to notification obligations.

1 THE CHAIR: It wouldn't, quite, that is at the most extreme.

2 MR FACENNA: Yes.

3 THE CHAIR: There are other instances where usually public
4 meetings are attended, where a report is made back,
5 I assume -- I don't know for certain -- for the managers
6 to say whether or not the officer should attempt to
7 infiltrate that group, and it isn't.

8 MR FACENNA: There are several considerations here.

9 The submissions that we have made for the purposes
10 of today were an attempt, in a sense, to be helpful to
11 say:

12 "These are things that you could do at the front end
13 of the process, in particular which will then ensure
14 that you are complying with notification obligations
15 that arise under article 14, and which will then
16 inevitably weigh in a helpful way in any subsequent
17 proportionality exercise relating to publication and
18 disclosure."

19 Because obviously if you have taken frankly all the
20 proportionate steps that you can to publicise as widely
21 as possible what personal data has been processed, what
22 groups and subgroups were reported on or infiltrated
23 which the Inquiry is looking at, you can start
24 subsequently from the starting point that anyone who
25 might be affected has had a reasonable opportunity to

1 find out about it and to find out if they want to take
2 part in the Inquiry.

3 In a sense our proposals were do as much as you can
4 then, put as much information as you can out there about
5 groups that were reported on, as well as those that were
6 infiltrated, relevant dates and subgroups, advertise
7 that in the press, ensure that it is regularly updated.
8 All of that will help the Inquiry when you come later on
9 to decide, well, we have third party personal data here,
10 this is a person who is not in contact with the Inquiry,
11 is not a core participant, but it is clear -- this is
12 the point made in particular in the Home Secretary's
13 submissions for today -- that the effort you have gone
14 to, to notify that person and make them aware of the
15 fact that the personal data is being processed and is
16 being considered, weighs in favour of disclosure if that
17 is ultimately a decision that you are going to make
18 later on.

19 THE CHAIR: I think that ultimately you accept that it is
20 a matter of judgment for the Inquiry, in particular for
21 me, as to which groups reported upon are publicly
22 identified in this way.

23 MR FACENNA: Well, to be clear, if there is personal data
24 which is being processed, that is not a matter of
25 judgment, that is a matter of compliance with the

1 obligations under article 14.

2 THE CHAIR: We will park article 14 for a moment, because
3 I know that is a highly controversial question.

4 Leaving aside article 14 for one moment, the Inquiry
5 is processing data because it has the files. I am
6 reading them, they are being stored, they are being
7 loaded on to computers. We are inevitably going to
8 process these documents.

9 In the sort of case I have indicated, it is very
10 unlikely that they would go any further.

11 Sorry, let me qualify that. In the case that I have
12 indicated where a public meeting is attended by
13 a particular group that is not then infiltrated, if we
14 can provisionally identify the officer who reported on
15 that public meeting, we may well send it to him and say,
16 "Did you attend that? Why did you attend it? Having
17 attended it, why did you not attend any other meeting of
18 that group?"

19 All of that is processing of course. Now if, in the
20 end, the answer doesn't require any further
21 investigation than that, I personally doubt the
22 utility -- leave aside lawfulness for the moment -- of
23 doing anything more than that, in particular of
24 publicising it. Because a moderately well-attended
25 public meeting -- say 30 or 40 people there -- who read

1 about this, and say, "I remember that" who will then
2 want to come forward to the Inquiry, but it would be
3 a waste of their time and of ours.

4 MR FACENNA: Well, questions of utility, for the purposes of
5 conducting the Inquiry are a matter for you, Sir. In
6 a sense I am concerned with lawfulness.

7 THE CHAIR: Yes.

8 MR FACENNA: I know the premise of your point was leave
9 aside article 14, but I think article 14 actually
10 provides the answer and we end up in broadly the same
11 place.

12 The position is if there is personal data which is
13 being processed then there are obligations to take
14 proportionate steps to notify those individuals, but in
15 circumstances where that either proves impossible or
16 would involve a disproportionate effort -- obviously the
17 question of utility would be relevant to any assessment
18 of the effort that had to be made -- then the obligation
19 on the controller is to take appropriate measures to
20 protect the data subject's rights and freedoms and
21 legitimate interests, including making the information,
22 i.e. the information about the processing, publicly
23 available.

24 Taking into account your view about the utility and
25 relevance of something, you would be entitled to do that

1 in determining (a) what would be a proportionate effort
2 in relation to this data subject, and (b) if you take
3 the view that it is disproportionate to do anything
4 beyond what you have decided to do, you have to decide
5 that you have to take appropriate measures to protect
6 that data subject's rights and freedoms and legitimate
7 interest.

8 All of that essentially would permit you to exercise
9 judgment subject to requirements of proportionality and
10 so on as to what you do in relation to particular
11 personal data.

12 But as a matter of principle if there is processing
13 of personal data, there has to be compliance in some
14 form with article 14, there are questions of judgments
15 that come in if you are in 14.5(b) territory.

16 In other words it is not possible simply to say,
17 "I think this is irrelevant essentially to the purposes
18 of the Inquiry, I'm therefore not going to even attempt
19 to make any efforts to notify this person or consider
20 how I need to guarantee their rights".

21 THE CHAIR: As I shall explain in due course, on the basis
22 of what I have so far read or looked at, the task of
23 investigating 50 years of undercover policing is
24 formidable. To add to that necessary task requirements
25 derived from the data protection legislation which do

1 not further it, I wonder whether that is not merely
2 not useful but whether it wouldn't in fact frustrate the
3 achievement of the object of the Inquiry.

4 MR FACENNA: I dare say that is a view which is shared by
5 hundreds of thousands of data controllers up and down
6 the country, whether they are public authorities or
7 businesses or any other matter.

8 You have my sympathy about that. It is quite
9 obvious that there is a formidable task. As the
10 Commissioner says, this is essentially a public
11 authority or an inquiry fulfilling a statutory function.

12 THE CHAIR: We are not a public authority --

13 MR FACENNA: You are not a public authority --

14 THE CHAIR: -- for the purpose of the Information Act, nor
15 indeed I think for the purpose of the Data Protection
16 Act. We are fulfilling a statutory function under
17 powers conferred upon us by statute.

18 MR FACENNA: In any event there is no dispute, as
19 I understand it, that the General Data Protection
20 Regulations is applicable and there are obligations
21 which therefore apply.

22 What I am saying is these obligations are not
23 absolute. There are exemptions which apply to them and
24 there is a proportionality analysis. On a proper
25 analysis -- one of the problems with today it seems to

1 us, is that, to be blunt, with one or two notable
2 exceptions there actually has not been proper engagement
3 by some of the other legal teams on the issues which
4 really do arise under General Data Protection
5 Regulations, because it is frankly not right to say it
6 is obviously a question of updating references from the
7 1998 Act. It is simply not correct. There has not been
8 proper engagement, as I was going to go on to say, with
9 the legal principles either in the legislation or indeed
10 the case law, domestic and EU case law, which relates to
11 the application of these exemptions and the
12 proportionality test.

13 Once you start to look at these properly and
14 understand them, our position is that there are
15 pragmatic ways in which the Inquiry can comply with
16 these obligations but there is no easy way out to say
17 there is an exemption or it is all too difficult, or it
18 will frustrate the purposes of the Inquiry. It is
19 simply not possible to do that under the legislation.
20 The case law makes that clear, Court of Appeal and
21 domestic case law as well as Court of Justice case law.
22 You have to find a way through these obligations --

23 THE CHAIR: I don't think any of them have considered
24 statutory inquiries, have they? Clearly commercial
25 organisations holding vast quantities of personal data

1 of people that they know because they are their
2 customers, it is relatively easy for them to fulfil
3 their Data Protection Act notification and other
4 obligations.

5 MR FACENNA: Much of the case law is about processing in the
6 public sector, in particular by the police and those
7 engaged in criminal investigations. So some of the case
8 law is directly relevant.

9 Sir, I sense your anguish about the idea of having
10 to impose these General Data Protection Regulations
11 obligations over what the Inquiry is doing. We have
12 tried very hard to think of ways in which compliance
13 with these obligations can be built into your processes
14 in a way that is pragmatic, that does involve
15 interference with privacy rights, no one is suggesting
16 that there is some absolute right which applies to every
17 data subject which is covered in the documents. We
18 think that our proposals, both on notification and on
19 disclosure to confidentiality rings, would ensure that
20 you are complying with these obligations in a way that
21 will not only be possible to incorporate within your
22 existing processes, but which may actually lead to
23 greater efficiency down the line when it comes to
24 non-state participants providing their witness evidence
25 in particular.

1 I think we acknowledge in the first few paragraphs
2 of our submissions that there is a need, a compelling
3 interest, which the non-state core participants share in
4 the Inquiry getting on with the job and being able to
5 reach a conclusion within a reasonable amount of time.
6 We have had that very much in mind in the proposals that
7 we have tried to put forward. What I cannot accept are
8 some of the assertions which are made in Counsel to the
9 Inquiry's note that there is some way in which you can
10 scabble around in schedules 1 and 2 of the Act and find
11 an exemption which simply means that the Inquiry can
12 say, "Well, we are not dealing with articles 15 or 14,
13 those won't apply to us because it is all
14 disproportionate".

15 That is not the way this legislation works. It
16 requires a more nuanced approach to the questions of
17 proportionality and appropriate steps.

18 THE CHAIR: Right.

19 That is what you want to say about reporting on
20 groups that were not infiltrated?

21 MR FACENNA: Yes, I mean I am sure you have this point, but
22 obviously when the Inquiry -- in particular you, Sir --
23 are exercising your own judgment on what is relevant and
24 necessary and what may or may not be of utility, you
25 will have in mind that there may be matters which seem

1 benign or innocuous to you, which to those whose
2 personal data has been processed may not be benign or
3 innocuous. Indeed there may be something that is highly
4 relevant which might disclose malpractice which is not
5 obvious on the face of the information.

6 That is partly why providing sufficient notification
7 enabling those people to come forward may in fact turn
8 out to produce relevant material evidence which would
9 not necessarily be obvious on your own assessment of
10 those documents.

11 THE CHAIR: The notion that I can get to the bottom of every
12 conceivable issue that arises from these deployments and
13 determine precisely what happened in every instance is
14 fanciful. This is an exercise in historical analysis
15 and like all exercises in historical analysis it cannot
16 achieve perfection.

17 MR FACENNA: No dispute with that. I have taken you to the
18 provisions of article 14 which require you to take
19 appropriate and proportionate steps. I accept that
20 there are questions of judgment which go into that
21 proportionality balancing exercise. Certainly it is not
22 my suggestion in written submissions or now that you can
23 be expected to get to the bottom of every single piece
24 of information and every single document you are going
25 to be reviewing. We are not suggesting that.

1 There is a halfway house between simply doing it on
2 your own assessment of police documents, and ensuring
3 that there is a proper opportunity for those whose
4 privacy was interfered with to actually know that that
5 is the case and then be able to exercise their rights
6 and indeed insist the Inquiry.

7 THE CHAIR: Article 14 is a separate question which is
8 actually going to be the next topic I want to raise with
9 you.

10 May I raise now with others else about reporting on
11 non-infiltrated groups.

12 Does anybody have anything to say about that?

13 In particular, Mr Summers, do you have any view
14 about that, or is this too far into the detail of things
15 for the Commissioners to wish to comment?

16 MR SUMMERS: The latter rather than the former.

17 THE CHAIR: Yes.

18 MR SUMMERS: To say, without wishing to be impertinent, it
19 is so inherently wrapped up in our respectful submission
20 with article 14 that it is perhaps over-simplistic to
21 separate the two. But on the discrete point, no.

22 THE CHAIR: Thank you.

23 Anyone else have anything to say about reporting?

24 SIR ROBERT FRANCIS: Me again, I am afraid.

25 THE CHAIR: Yes.

1 Further submissions on behalf of the National Police Chiefs'

2 Council by SIR ROBERT FRANCIS

3 SIR ROBERT FRANCIS: Just this point, Sir. In relation to
4 non-infiltrated groups and reports about their
5 attendance at a meeting. I can see that there will be
6 some occasions -- many occasions maybe -- where that is
7 absolutely within your terms of reference and may be
8 needed as background evidence for something else. Where
9 you have decided, as you have indicated, that the matter
10 is not potentially useful or won't be taken further
11 forward, a matter you would need to consider -- I am not
12 seeking to put difficulties in your way -- is that if it
13 then ceases to be necessary for the purposes of the
14 Inquiry to process it further, you will need to consider
15 how you stop processing it.

16 Because it should be parked. Just in the way that
17 if you receive material which is completely outwith the
18 terms of reference, you will have to consider that as
19 well.

20 I am not saying I am offering you an answer in
21 relation to that, but it would be a consideration.

22 THE CHAIR: Stop processing? The difficulty with that is
23 that "processing" is a word with many meanings.

24 SIR ROBERT FRANCIS: Yes.

25 THE CHAIR: If that means we should shred or burn the

1 documents, I doubt that that would be a useful exercise.
2 It may not even be permissible.

3 One of the curiosities that has been remarked upon
4 by people on your side is that an awful lot of the
5 information which provides the bedrock of information
6 for the Inquiry should have been destroyed decades ago,
7 arguably at least.

8 SIR ROBERT FRANCIS: Yes.

9 THE CHAIR: I don't think it is a good idea to try to say in
10 reason that if, as we do have, we have documents that
11 are not going to help further the terms of reference of
12 the Inquiry or fall outside it -- a typical example of
13 deployment abroad -- then we should shred those
14 documents or put them outside the Inquiry's archive.
15 I doubt that is useful.

16 SIR ROBERT FRANCIS: Then could I modify the word "stop" in
17 this way: consideration needs to be given to the
18 purpose, at that point, for which the document is being
19 stored. In other words, there needs to be a policy
20 which specifically deals with what you do with documents
21 that fall into that category and why you might be doing
22 it. Because that would indicate --

23 THE CHAIR: At the moment they will simple form part of the
24 Inquiry's archive, and somebody else will decide what
25 should go into the public records department or what

1 should be done with it.

2 SIR ROBERT FRANCIS: Archiving is of course a legitimate
3 purpose.

4 THE CHAIR: Yes.

5 SIR ROBERT FRANCIS: I just raise it.

6 THE CHAIR: Ms Steel, you want to say something?

7 Submissions by MS STEEL

8 MS STEEL: Following on from what has already been said,
9 basically as the Inquiry is logging this data anyway it
10 adds no extra cost to publicise the meetings that were
11 infiltrated or reported on, even if it was not
12 a specific infiltration.

13 It adds no extra cost but it enables people to come
14 forward if there is significant information. If you
15 don't log that information, there is a real danger that
16 you could miss something significant because you don't
17 have the awareness of what happened at that meeting,
18 other than what is in that report.

19 Those who were spied upon may know that, for
20 example, they went to that relationship -- sorry, they
21 went to that meeting with an undercover cop who was
22 their partner at the time, and that might not be
23 recorded but it might be a significant event.

24 If there is nothing significant, there will be no
25 extra cost because you won't need to investigate it, and

1 you have control over that. But if there is something
2 significant, by missing out that meeting you potentially
3 miss out a significant part of the jigsaw.

4 So I think it is absolutely critical that all of the
5 meetings are listed, whether or not they were formally
6 infiltrated or just merely "reported on".

7 THE CHAIR: As regards providing information about meetings
8 to people, that is a topic I want to address in due
9 course. You may say what you wish about that when you
10 have heard what I have to say about it.

11 As regards publicising things, that creates all
12 sorts of problems. If we publicise the groups and the
13 subdivisions of groups infiltrated by an officer by his
14 or her cover name, and the dates of infiltration, that
15 is what I am proposing at the moment. What we do by way
16 of circulation of information to non-state
17 core participants which is not put into the public
18 domain is a different matter.

19 MS STEEL: I am on the specific point of listing on the
20 Inquiry website the meetings that were attended by
21 officers or leaflets that were taken by them and
22 collected by them. Those all need to be listed on the
23 Inquiry website because if they are not, then people
24 don't have the opportunity to come forward with what
25 might be very significant information.

1 You don't have the whole picture, with all due
2 respect. You only have the police's side of the
3 picture. It needs the input of those who were spied on
4 to be able to give you the full picture. And if people
5 don't know that that meeting was reported on, then they
6 are not in a position to come to you and tell you that
7 something significant happened at that meeting. That's
8 why it needs to be a complete list.

9 The control that you can exercise regarding whether
10 or not you have time to investigate that is when they
11 come forward; does it seem like a significant issue that
12 they have come forward with? Then there can be
13 discussion at that point about whether or not there
14 actually needs to be evidence on that. The point is
15 people do need that opportunity to come forward and tell
16 you if something significant has happened, and they
17 can't do that without that list, that complete list.

18 Thank you.

19 THE CHAIR: Thank you.

20 The next and controversial question, articles 14 and
21 15. The view which I have provisionally at the moment
22 is that paragraph 7 of schedule 2 and box 2 provides
23 complete statutory exemptions to the Inquiry from the
24 obligation of notification or of responding to access
25 requests.

1 MR FACENNA: Shall I address the point on the exemption?

2 THE CHAIR: I am not intending to determine this contentious
3 issue. You raised it. I make no complaint at all about
4 your doing that --

5 MR FACENNA: I'm not sure we did raise the exemption.
6 I think the Inquiry raised it for the first time two
7 days ago.

8 THE CHAIR: You raised the issue of notification, which I
9 had not canvassed in the issues ...

10 MR FACENNA: Yes --

11 THE CHAIR: Which I had not canvassed in the issues upon
12 which I sought submissions. It is a controversial
13 topic. It needs to be addressed and determined. If
14 what I see as the statutory exemption does not apply,
15 then the approach which must be adopted to notification
16 also requires to be determined.

17 You will have noticed the fact that the other
18 submissions -- written submissions -- did not address
19 this issue, that it has come perhaps as something of
20 a surprise to others. It is not an issue which I'm
21 prepared to decide by hearing submissions made on the
22 hoof today. If this issue remains live, as I anticipate
23 it will, then it is something which will have to be
24 determined in due course. I am not shutting you out now,
25 but merely indicate that the only thing I want to hear

1 arisen for today --

2 THE CHAIR: Yes.

3 MR FACENNA: -- so what seems to be in scope and whether it
4 is in scope or not is obviously going to require a further
5 round of legal submissions.

6 The bottom line on that is that it seems to us that
7 we did what was being asked, because if you have
8 a hearing about the privacy rights of data subjects we
9 can't see how that can possibly be separated from the
10 questions of compliance with articles 14 and 15.

11 THE CHAIR: I am not complaining. I am merely indicating
12 that it is yet another of these difficult and serious
13 issues that needs to be thought about by everybody, not
14 just you, before I determine it.

15 MR FACENNA: I am obliged by that. I suppose our hackles were
16 slightly raised by an assertion in Counsel to the
17 Inquiry's notes that this was not a point which it was
18 asked for parties to make submissions on today. We say
19 the two things are inextricably linked; you cannot make
20 submissions on compliance with privacy rights of data
21 subjects without considering the governing legal
22 provisions which are imposed in the General Data
23 Protection Regulations.

24 THE CHAIR: Yes.

25 MR FACENNA: That is the first point.

1 The second point I was going to make is why it is
2 important that you have to determine those issues before
3 you can determine the issues which are said to be those
4 that the hearing was about today, namely disclosure and
5 publication and production of witness statements and
6 whether you need to update the restriction protocol.

7 I was going to make some brief points to explain in
8 a sense -- I have made some of these points already --
9 why it is that if you comply with articles 14 and 15,
10 and other provisions, at the front end of the process it
11 makes it much easier to see how you are going to deal
12 with what appear at the moment to be difficult questions
13 of mixed personal data and disclosure and on so on at
14 the end. So I was going to make submissions on that.

15 On the substance, my position was going to be
16 obviously we have noted the indication that there should
17 be a further round of submissions. Other parties have
18 not, for one reason or another, grappled with these
19 issues that we have raised.

20 What I thought would be helpful, subject to your
21 views, was for me to deal with one or two points in
22 Counsel to the Inquiry's notes, and in the Metropolitan
23 Police's supplemental notes on the application of the
24 exemptions and on the proportionality test in
25 a relatively high level way, just so there is already an

1 indication of what our position is on those and then
2 everybody can go away and think about that for the
3 purposes of the next round of submissions.

4 THE CHAIR: Right.

5 MR FACENNA: I can deal with those you no --

6 THE CHAIR: Unless you think we can't deal with the other
7 issues, which are going to require rather more time than
8 the first ones I have raised with you, without making
9 these submissions now, I propose that we see how much
10 time we have left this afternoon and postpone that until
11 then. If that is not a course that you think is
12 sensible --

13 MR FACENNA: It slightly depends what the other issues are,
14 I suppose.

15 THE CHAIR: Of course it does.

16 The other issues include that which you have raised
17 about the sequence in which things should be done, and
18 in particular your submission that documents should be
19 provided to non-state core participants and/or potential
20 witnesses and/or those who can be identified, with
21 documents relating to them before they are sent to
22 police officers.

23 Notification requirements clearly potentially have
24 an impact on that. But that is something that I want to
25 address and is going to take a little time.

1 There are other ones too, but I think that is the
2 one that I think principally concerns the possible
3 impact of article 14.

4 MR FACENNA: I think our position is that you cannot
5 sensibly make determinations now about things at the end
6 of the process, namely disclosure of mixed personal
7 data, publication and so on, until you have sorted out,
8 1, what is the applicable legal framework, there are
9 obviously some contentious issues about the exemptions
10 and how proportionality applies.

11 Secondly, as a result of a clear understanding about
12 the applicable legal framework, what are the approaches
13 you are going to take at the early stages to compliance
14 with whatever obligations apply in whatever way.

15 We say you cannot separate those two things. To
16 take an example, if one of the issues which is raised in
17 the notes that were produced for today is disclosure of
18 third party personal data of someone who is not in
19 contact with the Inquiry, and there are a whole series
20 of questions --

21 THE CHAIR: That is an issue that was raised in the original
22 note.

23 MR FACENNA: In the original note, yes. That's what I mean.
24 I understood that was setting the scene as it were for
25 the hearing today. That's one of the questions. Indeed

1 I understand some parties are saying that that is the
2 question for today how do you deal with the data
3 privacy rights of those who are data subjects within the
4 documents but who are not currently in contact with the
5 Inquiry or are not core participants.

6 THE CHAIR: It is one of the issues.

7 MR FACENNA: One of the issues.

8 You can't address that question and decide whether
9 the relevant paragraphs in the restriction protocol,
10 which I think are paragraphs 31 to 33, need to be
11 updated until you know which bits of the General Data
12 Protection Regulations apply and how they apply. Then,
13 in the light of that, what steps are you going to take
14 to deal with notification obligations and subject access
15 rights at the beginning of the process.

16 Because when you get to the end of the process there
17 is a world of difference between taking a decision about
18 first disclosure of the personal data of a person who is
19 not in contact with the Inquiry, has never been
20 notified, hasn't had a reasonable opportunity to come
21 forward, and a person who either has had an opportunity
22 to be contacted and has either consented to disclosure
23 or has had the opportunity to raise objections about it
24 or make representations, or at the very least because of
25 the information that is publicly available can be taken

1 to have had a reasonable opportunity to come forward.
2 The proportionality exercise in relation to any
3 interference with that person's rights, both under
4 article 8 and certainly under General Data Protection
5 Regulations, because a disclosure would be a form of
6 processing, is absolutely dependent on the steps that
7 you have taken at the beginning to notify that person,
8 and have in place safeguards to allow them to exercise
9 their rights.

10 Until you know the legal framework that applies and
11 what steps you are going to take, it seems to us you
12 can't meaningfully start to engage with what the issues
13 are in relation to disclosure and redaction at the end
14 of the process.

15 THE CHAIR: I think you can, on an alternative basis.

16 You can assume that an effort to notify everybody
17 named in the documents is made and produces some
18 response, or you can assume that it doesn't apply. In
19 either event, it is not necessary to determine that
20 before determining the order in which the Inquiry seeks
21 to gather information and evidence.

22 MR FACENNA: We are talking about two different things,
23 though, aren't we? The gathering of evidence and the
24 ordering is distinct from the notification question.

25 THE CHAIR: Yes.

1 MR FACENNA: It is quite right, but in a sense the same
2 point applies under article 15, doesn't it? I was
3 talking about notification because we were talking
4 about -- I understood -- third parties who are not
5 currently in contact with the Inquiry.

6 THE CHAIR: Well, it is anybody.

7 MR FACENNA: But they are distinct, aren't they? Because
8 obviously when you get to the end of the process and
9 decide what is lawful processing, someone who is a core
10 participant who is legally represented or not, or who has
11 been in contact with the Inquiry, is a person whose
12 article 14 rights have been satisfied and who has had an
13 opportunity to exercise any other rights under the
14 General Data Protection Regulations.

15 THE CHAIR: They are core participants and so they have been
16 notified of the Inquiry's approach to dealing with data.
17 The requirement to provide information in article 14
18 has, in relation to them, been satisfied, save in one
19 respect that they do not know for certain whether they
20 were reported upon, whether their personal data was
21 used.

22 MR FACENNA: Yes. I think given the context I was rather
23 assuming that we are talking about those whose personal
24 data rights are engaged. If there is a core participant
25 whose personal data is not being processed, the General

1 Data Protection Regulations doesn't apply.

2 THE CHAIR: The premise of article 14.1 is that the data
3 processor knows the identity and can contact the data
4 subject.

5 MR FACENNA: Well, that's not quite right. The premise of
6 article 14.1 is that there is personal data which is
7 being processed which has not been obtained from the
8 data subject and proportionate steps then have to be
9 taken to identify and contact that individual.

10 THE CHAIR: There is an obligation to notify --

11 MR FACENNA: To notify.

12 THE CHAIR: -- that the data is held by the individual
13 processor, the controller, within 28 days of receiving
14 it.

15 MR FACENNA: Yes.

16 THE CHAIR: To do that, you have to know who it is that you
17 are notifying. You can only provide them with the
18 information required by article 14.1 if you know who
19 they are and can contact them.

20 MR FACENNA: Yes.

21 THE CHAIR: If the Inquiry's general statement suffices for
22 the purposes of satisfying article 14.1, we don't have
23 a problem. If it doesn't, we do.

24 MR FACENNA: It goes back to the point I made about 14.5,
25 which is that there are concrete examples which were in

1 the Counsel to the Inquiry's notes and which we have not
2 addressed. There is, I am afraid, a mischaracterisation
3 of our position in the Counsel to the Inquiry's note,
4 because we think we have made pretty pragmatic proposals
5 in relation to notification of those of individuals --

6 THE CHAIR: For reasons which I will explain, the view which
7 I have at the moment and which is shared by the legal
8 team is that your proposals are unworkable. If they are
9 required by law, then we may have to seek a change in
10 the law.

11 If they are not, then for reasons that we will
12 discuss in a moment, my current view is that they are
13 not workable.

14 MR FACENNA: Well, insofar as the Inquiry's understanding of
15 our proposals is as reflected in Counsel to the
16 Inquiry's note, then they have been misunderstood and
17 I ought to take you to what our --

18 THE CHAIR: Fine, we will deal with that in a moment.

19 MR FACENNA: Yes.

20 THE CHAIR: I am trying to either park article 14 as
21 an issue by inviting you to address me on the real
22 problems that exist, whether it applies or does not
23 apply, until later. Either you agree to that or not.
24 If you don't agree to it, then I will have to hear what
25 you say about it.

1 MR FACENNA: If I understand the premise, we are going to
2 park the issue of how the exemptions apply and what the
3 legal framework is, and we are going to have
4 a discussion about the practicalities on the assumption
5 that the obligations may or may not be applicable.

6 THE CHAIR: Yes.

7 MR FACENNA: I have no difficulty with that, because I'm
8 happy to make the submissions on the practical
9 questions.

10 THE CHAIR: Good. That is excellent. I'm grateful to you
11 for that.

12 MR FACENNA: Subject to the point I made, obviously, you
13 can't reach a determination on proportionality and
14 disclosure and how you are going to deal with those
15 issues until you understand what the obligations are at
16 the beginning. You can discuss the practicalities --
17 I am certainly happy to do that -- but without knowing
18 what the governing legal framework is, how can the
19 Inquiry take a view about what a lawful disclosure of
20 a non-notified third party's personal data would be?
21 Because you need to know whether there was an obligation
22 to notify them or not or to take proportionate steps to
23 notify them.

24 The determination has to await a determination of
25 the legal issues and the framework, so far as there are

1 issues of practicality --

2 THE CHAIR: I may have to delay producing a formal ruling on
3 the submissions that I have invited today until after we
4 have had that. I appreciate that.

5 It seems to me that we can make useful progress with
6 a very large number of people have come here to address
7 a number of difficult questions without first dealing
8 with that.

9 MR FACENNA: Shall we break it down? What is the first
10 question, in a sense practical question, which you would
11 be inviting us to address on the premise that you have
12 set out in relation to the legal framework?

13 THE CHAIR: The sequence that you set out in paragraphs 119
14 and 121 of your note.

15 MR FACENNA: Yes. In a sense that is not notification, it
16 is about subject access.

17 The premise for our submissions, which you are not
18 going to determine, is that the Inquiry is subject to
19 the obligations to comply with subject access requests
20 under article 15 of the General Data Protection
21 Regulations. Our position -- that is also the
22 Information Commissioner's position -- is that that is
23 ... at least until today we had understood it to be the
24 Inquiry's position that you accept subject access
25 requests and you will comply with them and you do not

1 regard yourself as exempt from them.

2 THE CHAIR: No, that is not the Inquiry's position.

3 MR FACENNA: Obviously it is not the Inquiry's position

4 today. I should say it is the Inquiry's position set

5 out in your published data protection policy --

6 THE CHAIR: The published data protection policy says

7 nothing about the 2018 Act.

8 MR FACENNA: I am afraid that is not correct, Sir. I have

9 it here. I think is in the bundles. If you would like

10 me to show it to you -- it is a small point but I make

11 the point to say we are slightly dealing with these

12 points on the hoof.

13 It is in bundle A, tab 5.

14 THE CHAIR: That's our published data protection policy,

15 which does refer --

16 MR FACENNA: You see it refers in the legislation to General

17 Data Protection Regulations. Then under paragraph 4,

18 there is incidentally no reference anywhere to any

19 exemptions that might apply. You will see 4(d) is:

20 "Managing requests from data subjects to access

21 their personal data in accordance with the Information

22 Commissioner's subject access code of practice,

23 providing mechanisms which allow data subjects to

24 exercise their rights including to amend ..."

25 THE CHAIR: I agree that that could have been clearer.

1 MR FACENNA: I beg your pardon, Sir?

2 THE CHAIR: That could have been clearer.

3 MR FACENNA: It seems pretty clear to me.

4 I understand that these are difficult issues that
5 the other parties and the Counsel to the Inquiry team
6 have not really properly grappled with. In a sense
7 that's not our fault, but they do have to be grappled
8 with, because these are obligations which arise.

9 THE CHAIR: I agree they do. But that was not the purpose
10 for which this hearing was convened. Perhaps it should
11 have been, but it wasn't, and everybody has addressed
12 the other issues which I have raised. I would like to
13 look at those and to do so on the basis of if
14 notification requirements apply and if they do not.

15 MR FACENNA: In your direction, Sir, the first paragraph
16 referred to:

17 "How effect is to be given to the privacy and data
18 protection rights of those named in intelligence reports
19 without undermining the public interest and as much as
20 possible the Inquiry being conducted in public."

21 Our starting point for that is what are the relevant
22 rights? They are, we say, articles 14 and 15.

23 THE CHAIR: You have made that clear. But I want to move on
24 from that, if I may, because otherwise we will be stuck
25 in treacle all morning and we will make no progress.

1 MR FACENNA: Would you like me to address you on our
2 proposals for the sequencing then?

3 THE CHAIR: Yes. I have your proposals for the sequencing.
4 If I can summarise them -- no doubt oversimplify them --
5 they are that every item of personal data which the
6 Inquiry has, which can be attributed to an identified
7 individual which the Inquiry can locate, should be shown
8 to that individual first, for them to say what the
9 Inquiry should and should not do with it, before it is
10 shown to undercover police officers who have created the
11 data.

12 MR FACENNA: Yes. That is our position. To be clear, our
13 starting point is that there are subject access rights
14 which apply under article 15. Some requests have
15 already been made. It is possible that others will be
16 made --

17 THE CHAIR: We have had no requests under the 2018 Act.

18 MR FACENNA: No. There were subject access requests under
19 the old Act, but for these purposes --

20 THE CHAIR: The old Act had more open provisions for whether
21 or not the task was practicable. The current law, as
22 you rightly say, is much more tight.

23 MR FACENNA: In a sense that is the difficulty that the
24 Inquiry is going to face and why we have tried to come
25 up with the pragmatic suggestion as to how you could

1 adapt your current timescales and processes in a way
2 which would not completely derail the Inquiry -- indeed
3 it might have some efficiency gains later on, which
4 would essentially ensure that there is compliance with
5 the obligations to process proportionately and to give
6 subject access under article 15.

7 THE CHAIR: Can I set the factual context for the
8 submissions? Because having now read substantially into
9 intelligence files I am in a better position than I was
10 to know what the scale of the task is that I and the
11 Inquiry team face.

12 I have been reading or looking at intelligence
13 reports from the end of 1974 until the end of 1984.
14 I have not quite finished that task.

15 I have also read more selectively, because the
16 documents are differently ordered and archived. In the
17 earlier period I have read what I believe to be
18 a comprehensive set of reports about the 27 October 1968
19 Vietnam Solidarity Campaign demonstration, but my
20 reading into reports between early 1969 and late 1974 is
21 patchier.

22 On the basis of what I have read of the ten years
23 from end of 1974 to end of 1984, I can provide you with
24 some figures.

25 There are roughly 26,000 pages. Of those pages --

1 I have not done a precise calculation -- something
2 between a quarter and a third are documents produced by
3 the groups that were infiltrated and by other groups.
4 Those are the documents which I have looked at rather
5 than read, because bluntly once you have read one
6 ten-page justification for a particular ideological
7 position as opposed to another one in the same broad
8 political spectrum, whose views you regard as incorrect,
9 you do not need to read too many of them. Likewise the
10 published material which is put out into the public
11 domain.

12 For example, the journal "Freedom", it is not
13 necessary to read every one of those with care, all that
14 is necessary is to look at them to see what it is that
15 they are talking about.

16 There are other aspects of the reporting rather than
17 just the production of documents which do not require
18 detailed consideration of the documents, but a fair
19 proportion of the remainder I have read.

20 26,000 documents over a ten-year period indicates --
21 sorry, pages -- indicates 2,600 pages a year, roughly.
22 This is in the pre-computerised days when the reporting
23 was, for obvious reason, more succinct than it later
24 became. This is a minimum, not an estimate of
25 a maximum.

1 There were roughly 10 -- sometimes as many as 12 --
2 officers deployed during a calendar year, but if very
3 back of envelope maths is right, it suggests that each
4 officer produced about 260 pages on average a year. The
5 average length of deployment was four years, so roughly
6 each officer is going to produce 1,000 pages of
7 documents. Some produced far more, some produced less,
8 but that is a reasonable average.

9 I did, in the note, give a specific and precisely
10 calculated statement of the number of individuals
11 reported upon by a particular officer in one calendar
12 year, 185. The figure that I'm now about to advance is
13 much more back of envelope than that.

14 My guess, and it is only a guess, is that during
15 that ten-year period some 5,000 people featured by name
16 in the reporting.

17 It is as many as that because there are large events
18 that are reported upon, including for example the
19 Socialist Workers Party Easter camp at Skegness, in
20 which in one year in the early 1980s as many as 1,200
21 people were registered to attend.

22 Again, if asked to guess I would say there are about
23 2,000 people who feature not just in such a report but
24 in reporting of activity, what they said, the meetings
25 in which they were present, and so forth.

1 That gives some idea of the scale of task which the
2 Inquiry is embarked upon if it has to attempt to notify
3 everybody and if it has to attempt to give everybody
4 that it can notify the opportunity to consider their
5 documents. They have to be sorted out.

6 At the moment it seems to me your proposal requires
7 that they are sorted out in such a manner as to refer
8 only to them, because showing "them" the information
9 which may well be protected about others is problematic.

10 MR FACENNA: No, that is the precise contrary of our
11 position actually.

12 THE CHAIR: I will hear what your submission is, obviously.

13 MR FACENNA: Yes.

14 THE CHAIR: I must ensure that I understand it correctly.

15 I am simply at the moment trying to give you an
16 indication of the scale.

17 MR FACENNA: I understand that. None of that, frankly,
18 comes as a surprise. We saw the indications before, and
19 we have a sense of the scale of the task.

20 Assuming that there are obligations which apply in
21 relation to all of that personal data, the Inquiry needs
22 to comply with those obligations but those obligations,
23 as I have said, are not absolute. It is absolutely not
24 our position that there is an obligation to notify every
25 individual who is mentioned in those documents and it is

1 not our position that there is an obligation to provide
2 subject access on a proactive basis -- a full disclosure
3 of all personal data -- to every one of those
4 individuals.

5 That, if I may say so, and this is a problem partly
6 with Counsel to the Inquiry's note as well, is a pretty
7 gross mischaracterisation of our proposal.

8 THE CHAIR: The shorthand writers must have a break at
9 11.30, so I am going to give you one further --

10 MR FACENNA: Peroration.

11 THE CHAIR: -- factual point to consider.

12 Of the ten years worth of documents that I have been
13 reading or looking at over the last month or two, it is
14 sometimes very clear which officer is reporting. It is
15 sometimes far from clear. There are occasions when it
16 could be one or two or at the most extreme circumstance
17 three officers who are the authors of an individual
18 report.

19 To be able to provide the information which
20 everybody agrees needs to be provided, namely which
21 officer infiltrated which group and which subdivision of
22 which group between which dates. The only means of
23 ensuring that we have it right is to go to the officer.
24 If we can't do that, then we will be publishing a lot of
25 half baked and potentially misleading information.

1 I invite you to reflect upon that while the
2 shorthand writers have their break.

3 MR FACENNA: I will, thank you, Sir.

4 (11.25 am)

5 (A short break)

6 (11.35)

7 THE CHAIR: I was going to ask you, Mr Facenna, if you would
8 mind before you address your sequence if there is
9 anybody else who wants to say anything about the
10 proposal that I have made for dealing with article 14 as
11 we discussed.

12 Mr Summers, I look at you in particular.

13 MR SUMMERS: We are minded to say, Sir, that it is difficult
14 to see how you can resolve the issue without having
15 grappled with article 14. Article 14 and whether indeed
16 an exemption applies. We can address you on the
17 potential for that, whether it provides an answer in any
18 given case is obviously another matter and a layer of
19 detail that perhaps the Information Commissioner's
20 Office shouldn't go into.

21 It may be that you are dealing with an unnecessary
22 cart before the horse to do it the other way round, but
23 it is entirely a matter for you, Sir. You are much
24 closer to the issues than we are.

25 THE CHAIR: The problem with it is that it was not an issue

1 that everybody else foresaw that they would need to
2 address --

3 MR SUMMERS: I follow.

4 THE CHAIR: -- that may be my fault for not including it in
5 the list of questions. In any event it is a fact. I am
6 anxious to make progress on the rest. If there is time,
7 I would welcome headline submissions from Mr Facenna and
8 from you about the exemption, and if it doesn't apply
9 what we must do. If you don't oppose the proposal that
10 I put that to the back of the queue, where I know
11 logically it doesn't belong but for practical reasons it
12 has to be there, then I need not ask you anything
13 further at this stage.

14 MR SUMMERS: I don't oppose, Sir.

15 THE CHAIR: Thank you.

16 Nobody else? No.

17 MR FACENNA: Sir, just before you rose you were asking me
18 a series of questions some of which I think were
19 strictly speaking about notification rather than
20 sequencing.

21 In particular, on the last point you raised with me,
22 I think you were suggesting there were circumstances
23 where it would not necessarily be possible to notify
24 some of the information that you would want to notify
25 without first going back to the relevant officer. Have

1 I understood that?

2 THE CHAIR: No, it is that in practice, in a significant --
3 not a very large, but a significant number of
4 deployments, it is not at the moment clear which officer
5 was the officer responsible.

6 MR FACENNA: Yes.

7 THE CHAIR: In the majority it is perfectly clear.

8 MR FACENNA: Our proposal is that what ought to be published
9 is done by group and subgroup rather than by officer.
10 It seems to us that even if you have that different
11 problem, provided that publication of the name of the
12 group or the subgroup would not itself risk breaching
13 any restriction order -- I appreciate that might be
14 something on which you are not able to reach a view at
15 that point -- then you would disclose the name of the
16 group so that the people who were involved in that group
17 at least know their data has been processed,
18 irrespective of whether you have identified precisely
19 which officer there may or may not have been.

20 THE CHAIR: The problem though of that is actually that
21 which Ms Steel identified. Unless the groups know that
22 they were infiltrated by an undercover officer and where
23 possible the cover name of this officer, then the
24 information is not all that useful.

25 MR FACENNA: It would be of some utility. If you were

1 a person who knows that you were involved in that group,
2 you would at least see that your personal data is or
3 maybe being processed by the Inquiry, that there was
4 some reporting on that group at some level -- at least
5 as mentioned in the documents. You would be able to
6 come forward and say, "I would like to know what it is".

7 THE CHAIR: I agree it has an impact on notification, but it
8 does not have the same impact on investigation, which is
9 what my basic task is.

10 MR FACENNA: I can see that. In a sense what I am concerned
11 with is how you comply with your obligations under the
12 General Data Protection Regulations to data subjects,
13 bearing in mind the --

14 THE CHAIR: Parking that issue for a moment. What I want to
15 do is, (a) on the assumption that we can identify
16 individual data subjects. I think it would be helpful
17 to deal with that first, because that is a concrete
18 example which does exist. I mean, there are
19 a significant number of core participants --

20 MR FACENNA: Yes.

21 THE CHAIR: -- who we can identify as belonging to groups
22 that were infiltrated and we could therefore go to them
23 first before going to the officer. That's the paradigm.

24 MR FACENNA: Exactly. If I pick it up at paragraph 116 of
25 our submissions, so our starting point is that subject

1 obviously to any restriction order which has been in
2 place, documents which name a non-state individual who
3 is either a core participant already or who is otherwise
4 in contact with the Inquiry following notification. So
5 they have come forward, you have been able to contact
6 them.

7 THE CHAIR: Yes.

8 MR FACENNA: Should have that personal data disclosed to
9 them before it is further processed by being provided to
10 the state core participants or witnesses.

11 We have set out at paragraph 117 why we say that is
12 a good way to comply with obligations under the General
13 Data Protection Regulations. In particular it provides
14 a level of control to the data subject, allows them to
15 come forward and challenge any overbroad disclosure of
16 the data. There is a particular concern on the part of
17 some non-state core participants that their personal
18 data, which may include intensely private information
19 about them, is being disclosed not just to the officer
20 who created the report but to more senior officers, to
21 other police officers who may never have seen this
22 information before but who are regarded as being people
23 who are going to be giving evidence on it.

24 That is the kind of thing where if there was
25 something which was, say, particularly egregious or

1 sensitive in the personal data, applying the principles
2 of the General Data Protection Regulations the data
3 subject ought to be able tomorrow come forward to the
4 Inquiry and say:

5 "Look, I know you have to get evidence from the
6 state witnesses, there is something in here which is
7 absolutely wrong or outrageous or would be highly
8 damaging to me if it ever came out. I would like you to
9 impose particular restrictions on how it is being
10 processed within the Inquiry, who is able to access
11 that document on Relativity, or whatever system it is
12 being processed on, and I want you to think very
13 carefully about who that should go back to, that
14 personal information, on the state side for the purpose
15 of giving evidence."

16 Those are the kinds of rights which you now have
17 elucidated, set out in the General Data Protection
18 Regulations, which you would be able to exercise and can
19 only exercise once you have actually seen the personal
20 data which has been processed.

21 That's the first point.

22 Secondly -- well and related to that is the point at
23 117(b) of our submission, which is that this would in
24 any event be a proportionate step to take in accordance
25 with their article 8 rights and bearing in mind the

1 ongoing harm and distress which has been caused to
2 core participants simply by not knowing what data is in
3 there, how it is being processed, what is said about
4 them.

5 I should say this could work in both directions,
6 which goes to the point I have made a couple of times
7 about efficiency. In a vacuum people obviously fear the
8 worst. No doubt in some cases it will be as bad as they
9 expect or possibly worse. It may be the case that it is
10 not as bad as some people think. Core participants see
11 their personal data and think, "Is that it? There is
12 nothing about my sex life or my sexuality or nothing
13 that I am particularly worried about".

14 Then you have immediately, in a sense, ticked the
15 box of that core participant seeing their personal data
16 and saying I don't wish to make any representations
17 about how that is processed or disclosed, I am perfectly
18 happy for that to be essentially made public or at least
19 to be processed in a particular way.

20 THE CHAIR: I can tell you the reporting includes, not in
21 every case by any means, but in a minority of cases
22 information that is plainly personal. It includes, in
23 the vast majority of cases, information which is
24 political.

25 MR FACENNA: Yes.

1 THE CHAIR: Simply the fact of attending more than once
2 a branch meeting of a particular let's say left wing
3 organisation --

4 MR FACENNA: That is not surprising.

5 THE CHAIR: -- inevitably reveals the political opinion held
6 at that time of the person attending, or the likely
7 personal opinion. Someone who turns up once you may
8 say, they turned up, they have got fed up and gone home,
9 but someone who regularly attends meetings it says
10 something about their politics and therefore it is
11 caught by article 9.

12 MR FACENNA: Yes.

13 THE CHAIR: Two of the things I have to investigate are why
14 were undercover police officers obtaining and reporting
15 upon highly personal information about individuals, and
16 why were they reporting upon the political opinions of
17 those individuals?

18 I can't do that, unless the officer sees the reports
19 which he has created. I can't answer the question why
20 were they authorised or allowed to do it, unless their
21 immediate managers see the reports, because they would
22 have seen them at the time.

23 Therefore, the proposal, illustrated by the example
24 A of the redaction of the reference to sexuality, would
25 frustrate what I regard as an important part of my task.

1 MR FACENNA: Yes. Just to be clear, that example that we
2 provided related to disclosure to core participants not
3 to state witnesses or core participants -- sorry, to
4 non-state core participants.

5 THE CHAIR: Yes, I appreciate that. I had inferred from the
6 submission that the information of that kind should
7 first of all be shown to the person who it affects --
8 the non-state individual who was being reported on, the
9 proposition that that person can say:

10 "Well, I don't want this data to be shown to the
11 officer who created it. (A) it is wrong, (B) it is
12 highly personal and the last thing I want is for any of
13 this to come out."

14 MR FACENNA: I think we were fairly cautious about what we
15 said about that. Obviously we can't give an undertaking
16 that people aren't going to make representations. The
17 starting point, insofar as I have instructions from
18 those who have engaged in the discussions that we have
19 had, is that it is not the expectation generally that
20 people will use that as an opportunity to exercise
21 rights to restriction or erasure or anything like that.
22 I think we said explicitly in our written submissions it
23 may be exceptionally that someone wishes to make
24 a specific application about some specifically sensitive
25 or egregious piece of information and about the way in

1 which it should be processed.

2 Such an application I think we would expect to be
3 the exception, and it is not automatically going to
4 succeed. These are not absolute rights.

5 In the example you have given, in fact, my
6 expectation would be that a core participant would think
7 it was outrageous that an undercover police officer was
8 reporting on their sexuality and that is exactly the
9 sort of thing you want that officer and his superiors to
10 be held to account for. It would, in a sense, be
11 counter-productive to say, "I don't want that
12 information to be something that state witnesses see and
13 give evidence on".

14 THE CHAIR: Fine, then in practice what is the advantage of
15 showing the information first to the person affected?

16 MR FACENNA: Well, first of all, it will avoid a situation
17 that we are currently in where the Inquiry has taken
18 a particular position on deal with subject access
19 requests. There is ongoing and widespread distrust,
20 upset and distress about the fact that there is ongoing
21 processing of personal data and that people are not
22 being given access to that personal data to understand
23 what is being processed about them and to begin their
24 own process of talking to others and putting together
25 their evidence and so on.

1 That is the first point. That is in a sense the
2 point that we address at paragraph 117.

3 Secondly, there is a sort of hard-edged legal point
4 this is in a sense where we say that these proposals
5 ought to be seen in the spirit in which they are put
6 forward, which is in a sense trying to be helpful. It
7 would be an absolute nightmare -- let's just presume
8 that article 15 subject access rights apply and there is
9 no exemption, and you have to at least take some
10 proportionate steps in relation to everyone. There is
11 no reason at all why every core participant and indeed
12 non-core participant would make a subject access
13 request. It may well be that there is a legal
14 obligation to deal with them.

15 We are not suggesting that that is a sensible way
16 forward either for core participants or for the Inquiry.
17 That would be an absolute nightmare. We have tried to
18 find a way where those concerns and the rights which are
19 essentially guaranteed under article 15 can somehow be
20 engaged with and can be safeguarded and can be
21 respected, in a way that broadly would fit within the
22 overall process.

23 We accept that it is going to require
24 a rearrangement. What we have suggested, first of all,
25 is a relatively straightforward process of disclosure

1 where you do not produce individual documents for every
2 individual data subject. We are talking here only about
3 a relatively -- not thousands of people mentioned in the
4 documents -- those who are core participants already or
5 in contact with the Inquiry. There would be disclosure
6 within groups, essentially, on the basis of
7 confidentiality obligations arising under the Act,
8 except in the cases of very sensitive information which
9 are those which we have identified at 121(b) of our
10 submissions.

11 THE CHAIR: Yes. The problem with all of this is that the
12 paradigm example of a single individual having a report
13 about matters that are politically or personally
14 sensitive to that individual occurs but rarely.

15 MR FACENNA: Yes.

16 THE CHAIR: It is far more frequently the case --

17 MR FACENNA: There is mixed personal data.

18 THE CHAIR: -- that there are numerous people reported upon
19 and personal details and political opinions of numerous
20 people are contained in the same document.

21 MR FACENNA: Yes. As you will have seen, there is
22 a specific exemption in the General Data Protection
23 Regulations which relates to the rights and freedoms of
24 others. The proposals that we have put forward are that
25 you don't redact everything to do with other

1 individuals, you do it on a group basis. So all that
2 that would be redacted -- as far as we understand
3 it, this is a process which would have to be undertaken
4 anyway at some point when these individuals are going to
5 be asked to provide evidence. Assuming there is
6 material that is personal to them that they are already
7 core participants, that they are people from whom the
8 Inquiry would wish to have evidence or they would be
9 invited to give evidence. That in a sense is a process
10 that is going to happen at some point later down the
11 track.

12 THE CHAIR: That is my intention.

13 MR FACENNA: Yes.

14 THE CHAIR: It is one of the further points we need to
15 discuss in due course. My intention is, subject to
16 appropriate restriction orders and undertakings, to
17 provide to groups of non-state core participants
18 information about all of them. In fact, in principle --
19 and I'm not making this as a promise that will apply
20 every time -- that which has been put to the officer and
21 which he has accepted as his reporting, should be shown
22 likewise to the non-state core participants that it
23 affects.

24 MR FACENNA: In a sort of confidentiality ring?

25 THE CHAIR: Precisely.

1 MR FACENNA: That is, I think, broadly welcome because it is
2 probably reflective of what we have suggested at
3 paragraph 120.

4 THE CHAIR: Yes. This is merely timing.

5 MR FACENNA: Yes.

6 THE CHAIR: We will be in a position to do that when we know
7 for certain that that is relevant officer and when he
8 acknowledges or we have reason to believe that he is the
9 author of the reports that we want to put to non-state
10 core participants.

11 MR FACENNA: Yes. It may well be now in some cases or at
12 least not necessarily until some point years from now
13 after the evidence has been provided by the officer.

14 THE CHAIR: No, it will be after we have a witness statement
15 from the officer where we can get one. Some are dead,
16 as you know. Some are abroad and we can't compel it.
17 Some are, for reasons of health, unable to provide us
18 with it. But where we can do it and where there are no
19 restriction orders in respect of cover name, then our
20 intention -- my intention -- is if it proves practicable
21 is to do just that. To provide the non-state core
22 participants affected by the reporting on confidential
23 terms with the reporting that is relevant to them.

24 MR FACENNA: Yes. It is a double-edged sword, isn't it? In
25 a sense that is a welcome indication of something that

1 will happen at some indeterminate point in the future
2 this is counsel.

3 I think the point is now that it there is processing
4 of this importantly data ongoing.

5 THE CHAIR: Of course.

6 MR FACENNA: Disclosure to date involves further
7 processing. It is processing to which some
8 core participants at least have concerns about, if not
9 would want to object to.

10 THE CHAIR: You have told me you that you do not anticipate
11 that they would?

12 MR FACENNA: No, I have said it would be in exceptional
13 cases it is the expectation. Obviously I can't give any
14 guarantees about that; we don't know what the
15 information is. These are characteristically matters
16 for the individual. These are fundamental privacy
17 rights relating to the individual. I am not in
18 a position to give an undertaking about that --

19 THE CHAIR: I am not asking for one, but you did say it
20 would be exceptional.

21 MR FACENNA: Our expectation -- given the process, the idea
22 is that the state is going to give its evidence. Then
23 the core participants will be able to look at the
24 documents and give their evidence in the light of that.
25 It would be, as I said, pretty counter-productive to say

1 that there is lots of material which shouldn't go to the
2 state at all.

3 I think we were talking about something slightly
4 more nuanced, which is where there are particular
5 concerns about something that representations would be
6 made to the Inquiry about how it should be handled both
7 internally in the Inquiry and externally, vis-a-vis the
8 state.

9 THE CHAIR: The staff and those who work for the Inquiry are
10 subject to stringent --

11 MR FACENNA: I don't question that.

12 THE CHAIR: -- security requirements. As far as I know,
13 there has been no deliberate unauthorised leakage of
14 information.

15 MR FACENNA: I don't think anyone is suggesting deliberate
16 unlawful unauthorised leakage. As you know, there was
17 an accidental disclosure.

18 THE CHAIR: Accidents are going to occur.

19 MR FACENNA: Accidents are going to happen. That is
20 precisely why -- let's say you have someone who is
21 a politician and there is something in these documents
22 which is absolutely outrageous, it would be highly
23 damaging if it was disclosed, whether it is true or
24 false, frankly. That is a person who would legitimately
25 be able to come forward and say:

1 "Look, I am really concerned about what I now have
2 seen that has been processed about me. I want to have
3 assurances that it is being restricted to the absolute
4 minimum number of Inquiry staff who can ever see this
5 information. I want to know that particular care is
6 going to be given as to who it is provided to."

7 Obviously we are not just talking about existing
8 police officers. There are former police officers,
9 people who are no longer employed by the Metropolitan
10 Police, who are going to be provided with unredacted
11 personal data, some from decades ago.

12 Some core participants will want to make, I expect,
13 submissions about that --

14 THE CHAIR: Yes.

15 MR FACENNA: -- it doesn't mean you have to accept them, but
16 they are entitled to say, "I have these particular
17 concerns about processing of my personal data which
18 I want to be take into account".

19 THE CHAIR: I am less concerned about those with a public
20 political profile than I am with those who have done
21 things in later life of great utility and in many cases
22 distinction.

23 MR FACENNA: Yes.

24 THE CHAIR: Not all of whom, by any means, are
25 core participants and not all of whom wish to become

1 core participants.

2 MR FACENNA: No.

3 THE CHAIR: These are very far from straightforward
4 problems. I think the only way of dealing with them in
5 a manner that protects everybody's rights -- leave aside
6 notification for a moment, but their fundamental right
7 not to have their personal data blazed over the media or
8 published even on the informal media. The only way of
9 doing that is to do that which we do do, which is to
10 take great care with it. Mistakes will occur. That is
11 unavoidable, but it would not be rectified by however
12 strict a compliance with proposals for showing things to
13 people before they were shown to anybody else was
14 undertaken.

15 I, and everyone in the Inquiry, is highly conscious
16 of the need to do that. I can't see any practicable
17 improvement over and above the process that we are
18 adopting. It has ensured so far that the officers from
19 whom statements have been requested have stuck by the
20 binding promises that they have signed up to to keep
21 things to themselves.

22 MR FACENNA: These are in a sense all reasons why it would
23 be expected that any application would be exceptional.
24 I am not questioning anything which you have said about
25 the Inquiry's current processes or compliance with

1 orders.

2 THE CHAIR: It would inevitably -- added to notification
3 requirements if they apply -- produce a very significant
4 delay in what is already a difficult and lengthy
5 process.

6 MR FACENNA: This is if such applications were to be made,
7 or are you talking about disclosure?

8 THE CHAIR: No, no, just doing it.

9 Take the example of deployments where we are not
10 certain about which officer it is. We would then have
11 to go back to the core participants at least twice.

12 First to see whether there is any objection they
13 have to that material being shown to whichever officer
14 it may be.

15 Secondly, how we should deal with what comes back --

16 MR FACENNA: No, no, we are not suggesting a proactive set
17 of enquiries. We are suggesting that what -- I think it
18 is accepted -- is envisaged to happen subsequently later
19 in the process is simply brought forward. So that as
20 the Inquiry is going through the documents
21 chronologically, identifying where restriction orders
22 are applicable, deciding what information you are going
23 to notify, there would be a process -- I appreciate it
24 would be more difficult for the older documents which
25 are not digitised or digitisable in precisely the same

1 way as the newer ones --

2 THE CHAIR: They take one person one week to load one file
3 on to the computer.

4 MR FACENNA: Yes. I don't -- that kind of complaint is
5 something that you see in all of the cases about
6 compliance with subject access requests and it is the
7 sort of special pleading which I am afraid has not been
8 accepted by the Court of Appeal as a basis for not
9 complying. I will show you that.

10 Neither I nor my clients question either the
11 resource or the timing implications of the obligations
12 to comply with the General Data Protection Regulations.
13 We have tried to find a pragmatic way of doing it.

14 THE CHAIR: Unlike everybody else, I am under a statutory
15 obligation under section 17.3 of the Inquiries Act to do
16 things that are cost effective and value for public
17 money.

18 MR FACENNA: I am aware of that. There is also separate
19 legal obligation to comply with the Data Protection Act
20 and the General Data Protection Regulations, and that
21 has to be done in a proportionate way.

22 THE CHAIR: As I understand it, you are not submitting that
23 this process is a mandatory obligation, you are
24 submitting it is a course which the Inquiry should
25 adopt.

1 MR FACENNA: Strictly speaking, that is correct. Subject to
2 this point, which is that there is, on our case -- that
3 is not going to be determined today -- an obligation
4 arising under article 15. If there is a choice, as it
5 were, between dealing with individual subject access
6 requests and adjusting the process to ensure that data
7 subjects are being given access to their personal data
8 in the way that we have suggested, then it is our
9 submission that the latter is obviously to be preferred,
10 for all kinds of reasons, including all of those which
11 you mentioned to me in relation to delay.

12 Separately, picking up one or two of the points that
13 you just made to me, Sir, individuals who are
14 mentioned -- including the individuals who are not
15 necessarily politicians but who have gone on to do other
16 things in life which would mean they would be
17 embarrassed if some of the information came out. Those
18 are individuals who are entitled to exercise their own
19 rights. It, is not open to the Inquiry to take a sort
20 of paternalistic view about what is to happen with that
21 data. That personal data is being processed by this
22 Inquiry for the purpose of its statutory functions and
23 those individuals are entitled to be notified and to
24 exercise their rights. It may be, as I have said, that
25 they will decide that is outrageous but there is no

1 particular application I want to make now because I am
2 satisfied the Inquiry is dealing with it properly, and
3 I expect that would be in the position in most cases.
4 But they are entitled to be notified and are entitled to
5 see the data and to make representations about it and
6 exercise their other rights under General Data
7 Protection Regulations.

8 There is the General Data Protection Regulations
9 compliance element. You are going to have to comply on
10 our case with article 15, subject access requests
11 anyway, and we say this: we see this as a better and
12 a more pragmatic way of doing it.

13 Separately, there are, we say, practical advantages
14 for the Inquiry in doing it this way. If there is
15 a mechanism that allows individuals to access their data
16 and to make representations about it and think about it
17 at an earlier stage, then the position with redactions
18 and disclosure, which is really the problem that has
19 arisen here, will be much clearer by the end of the
20 process. People will have seen what the personal data
21 is. They will have been able to make representations
22 about it. They will be able to say, "Is that it?
23 I don't particularly care about that". All of these
24 things. The difficulties that the Counsel to the
25 Inquiry team are grappling with as to how do you deal

1 with these questions of mixed personal data, disclosure,
2 disclosure among core participants later on, ought to be
3 relatively clear by the time you got to that stage. Any
4 state restriction orders will already have been dealt
5 with and any non-state individuals will have had
6 a proper opportunity to make representations, or if they
7 are not in contact with the Inquiry will have been put
8 on reasonable notice that their data has been processed.

9 THE CHAIR: Could we look at your exceptions in
10 paragraph 121(b)?

11 MR FACENNA: Yes.

12 THE CHAIR: It is there, I think, that whenever this happens
13 the problems arise.

14 The reporting includes reporting on all of these
15 issues, sometimes some of them more frequently than
16 others, but it includes all of them with the exception
17 of (v), where I am not so far aware of any situation in
18 which that has arisen, but I don't understand the basis
19 for saying that that which is prohibited, subject to
20 national law by article 9.2(g), political opinions,
21 becomes permissible because it is the same political
22 opinion as loosely was expressed at the meetings that
23 they intended.

24 MR FACENNA: Let me just unpack that.

25 What is being proposed here is disclosure to

1 non-state core participants within a confidentiality
2 ring --

3 THE CHAIR: Yes.

4 MR FACENNA: -- of their own personal data and the personal
5 data of other within that ring.

6 THE CHAIR: Um-hm.

7 MR FACENNA: Insofar as the question is: what is the lawful
8 basis for processing the sensitive category of data? It
9 would just be the normal basis that applies under
10 article 9, namely it is essentially for the purposes of
11 statutory functions of the Inquiry. You would have
12 decided that this was the appropriate way, indeed the
13 indication you have given is that you have provisionally
14 decided that that would be an appropriate way to provide
15 personal data to non-state core participants and to
16 invite them to give any evidence they want to give
17 on it.

18 I'm not sure I quite understand why there would be
19 any issue with whether processing of political opinions
20 consistent with the nature of the group would be
21 unlawful. It would be justified under article 9.

22 THE CHAIR: "Justified"?

23 MR FACENNA: It would be permissible under article 9 on the
24 same basis of any processing of sensitive category data.

25 Under article 9.2(g), processing -- I mean, this is

1 the basic provision on which the Inquiry is seeking to
2 rely for all of its processing of special category data.
3 It would be necessary for reasons of substantial public
4 interest on the basis of the legislation that we have
5 discussed. You would have taken a view which we, as
6 non-state core participants are essentially putting
7 forward and agreeing with, that it is proportionate and
8 necessary to undertake this disclosure to non-state
9 core participants in a way that involves some cross
10 disclosure of mixed personal data to groups, because
11 that is the most meaningful way to do it.

12 THE CHAIR: That makes obviously sense, if I may say so --

13 MR FACENNA: Good.

14 THE CHAIR: -- any alternative proposition would, I think,
15 be absurd.

16 It is theoretically possible to do it by deleting
17 every name attending a political meeting other than the
18 individual to whom you are showing the document.

19 MR FACENNA: That's not our proposal.

20 THE CHAIR: I know it is not your proposal. But on the
21 strict reading of "necessary", it might be necessary, if
22 that is the obligation imposed.

23 MR FACENNA: All I can say, is it is our position,
24 representing essentially those who are core participants
25 and are the data subjects, that a group view, as it

1 were, has been taken that it would be proportionate and
2 therefore lawful under 9.2(g) to disclose to groups
3 within the manner in which we have suggested.

4 THE CHAIR: Right.

5 MR FACENNA: Sorry, Sir, if I may say so, in a sense this is
6 an example of us taking what we regard as a pragmatic
7 and nuanced approach, that is a less conservative
8 approach than the Information Commissioner's submissions
9 seem to suggest, for example.

10 THE CHAIR: In example A there is an example -- admittedly
11 very brief -- of a situation which occurs quite often in
12 the intelligence reporting on groups involving numbers
13 of people.

14 As in all human life disagreements about what should
15 be done politically or administratively are sometimes
16 influenced by personal relationships between those who
17 are discussing, sometimes in heated terms, the issue.

18 To say that family circumstances, sometimes health
19 does arise occasionally, relationships have to be
20 separated out from the documents makes them very
21 difficult to understand.

22 MR FACENNA: Sir, this is information about sexuality and
23 sexual relationships?

24 THE CHAIR: Well about relationships, family life,
25 generally. These are the personal circumstances that

1 you have enumerated, which as in all life are not
2 capable of being neatly put into boxes.

3 MR FACENNA: No. There is going to be an element of
4 judgment.

5 I think in a sense we didn't think we were
6 suggesting anything which is not already reflected in
7 the existing restriction protocol. In the restriction
8 protocol, although this paragraph refers to, I think,
9 non-core participants of third parties, what it
10 currently provides at paragraphs 31 to 33 is that the
11 Inquiry will essentially exercise judgment on whether
12 the disclosure would cause an unjustified interference
13 with the right to privacy, will have regard to the risk
14 of intrusion into private lives which might arise.

15 THE CHAIR: That is one of the reasons why I invited
16 submissions on whether or not the current restriction
17 protocol is one that can be applied in practice. I very
18 much fear that the Rolls-Royce model set out there is
19 going to be difficult to apply in practice and we are
20 going to have to settle for a less luxurious car.

21 MR FACENNA: That may be the case. Our position is that it
22 certainly can't be applied in practice in its current
23 form without some updating, although I don't think we
24 distinguish ourselves from the general proposition that
25 it broadly reflects what you need to do to comply with

1 article 8. The problem is it needs to be more specific
2 in relation to compliance with data protection rights.

3 On these, I suppose, going back to the question you
4 were asking me, we have put forward these categories as
5 reflecting the sensitive categories identified in the
6 legislation and as contrary 5, which is contrary
7 political views, something which would be potentially
8 quite damaging and intrusive.

9 Those are the starting point. I don't think we take
10 the position that there is not an element of judgment
11 that is going to be involved in those. Inevitably that
12 gives rise to a risk of different people taking
13 different views about the extent to which some things
14 about family circumstances or sex life. I suppose the
15 safeguard that is built is in that in principle it is
16 only going to be disclosed on a confidential basis to
17 those who are mentioned within the documents.

18 THE CHAIR: Yes.

19 MR FACENNA: In a small number of cases, I suppose, where
20 there is -- you might be able to take a view that you
21 take a conservative approach on the basis that you are
22 then going to ask the core participant or their lawyer,
23 essentially, to confirm -- in the case of sexuality it
24 may be that that person is openly gay, has no problem
25 with their sexuality being disclosed to others in the

1 group.

2 THE CHAIR: It is not just confined to that --

3 MR FACENNA: Of course not, I am using it as an example.

4 Whether you do it this way or whether you engage in
5 this process further down the line in the way that you
6 have suggested you were intending to, these problems
7 will have to be grappled with in the same way. In
8 a sense, these are not problems that arise because of
9 our proposals on timing, they are going to arise anyway
10 when judgments have to be taken about what can properly
11 and proportionately be disposed amongst groups of
12 individuals who may now have nothing to do with each
13 other in present day life.

14 THE CHAIR: That is inevitable.

15 MR FACENNA: There is not an answer to that beyond saying,
16 identify categories which are likely to be particularly
17 sensitive and exercise your judgment about the extent to
18 which information falls within those categories.

19 THE CHAIR: I am afraid that that will impede the task of
20 the Inquiry and add at least many months, more likely
21 longer.

22 MR FACENNA: In a sense, Sir, what is the alternative? If
23 you are going to disclose to groups --

24 THE CHAIR: The alternative is to impose restriction orders
25 on disclosure to identified individuals who form part of

1 the group that was infiltrated at the time, and trust
2 them to abide by their obligations.

3 MR FACENNA: Which would involve disclosure to those -- so
4 essentially you would not do a redaction process, you
5 would be saying, "Subject to confidentiality
6 obligations, we are going to disclose to you highly
7 sensitive personal data of third parties"?

8 THE CHAIR: That is my proposal. Partly because I think
9 people who belonged to groups that were infiltrated can
10 see the nature and extent of the reporting upon them and
11 the people with whom they were associating at the time.

12 I simply cannot see that it is practicable to do
13 otherwise, other than not showing it to them at all,
14 which I definitely don't want to do.

15 MR FACENNA: Our position would be that there is
16 a proportionate middle ground which is exactly as set
17 out in the restriction protocol and in accordance with
18 our proposals.

19 THE CHAIR: That doesn't allow for the vast number of
20 documents that would have to be individually scrutinised
21 to permit this to occur. I'm talking what is
22 practicable now. The proposal that every document
23 should be individually scrutinised is not practicable --
24 and redacted appropriately in accordance with your
25 schedule.

1 MR FACENNA: It is not consistent with the existing
2 restriction protocol, the expectations ...

3 THE CHAIR: I know that.

4 MR FACENNA: If it is now being suggested that there will be
5 effectively no independent judgment applied to
6 disclosure of personal data to persons other than the
7 data subject, then --

8 THE CHAIR: No, I am asserting it as a matter of generality.

9 MR FACENNA: Yes.

10 THE CHAIR: Of course there are always going to be
11 situations where things have to be handled differently.
12 I am now talking about, in effect, the bulk processing
13 of the mass of data that we have. Subject to
14 exceptions, it is simply not practicable to examine,
15 where necessary redact, each report.

16 I have given you a rough indication of the numbers
17 that I am concerned with, they are likely to prove an
18 underestimate.

19 MR FACENNA: In my submission, Sir, there must be somewhere
20 that is proportionate which is short of simply not
21 practical therefore we are not doing it at all. It
22 simply would not be lawful to process highly sensitive
23 categories of personal data, involving disclosure to
24 third parties without the consent of the data subject in
25 circumstances where no judgment at all has been given to

1 the possible harm to that individual.

2 THE CHAIR: Hold on --

3 MR FACENNA: Moreover, it would not be consistent with
4 article 8, let alone data protection rights, to do so,
5 in my submission, notwithstanding the confidentiality
6 ring.

7 THE CHAIR: We are already doing it in relation to the
8 undercover officers who produced the reporting. I do
9 not see, as I have explained to you, how I can do
10 otherwise.

11 What I want to do is to ensure that those whose
12 groups were infiltrated, those who were reported upon,
13 have the same opportunity as the officer and his or her
14 manager to say what they want about it.

15 MR FACENNA: Yes. We are ad idem on that being the aim.

16 I suppose what you have just said slightly begs the
17 question as to why the process is being undertaken in
18 relation to restriction orders and undercover officers,
19 why during that same process is it not possible to have
20 regard to these categories for non-state
21 core participants and individuals.

22 If there is an individual review of documents for
23 the purposes of complying with the privacy rights of
24 state core participants, why isn't it possible for that
25 same review to be picking up these categories?

1 THE CHAIR: That is not the process which has been
2 undertaken. There has been no question so far, of
3 upholding the privacy rights of officers or even their
4 families. The effort that we have undertaken on the
5 anonymity process is to deal with a number of questions:
6 first, safety; second, other reasons of public interest;
7 third, where it is applicable, the health and welfare of
8 the officer; and, fourth, likewise where it is
9 applicable, the health and welfare of their family, in
10 particular surviving relatives of deceased officers.

11 But we have not undertaken this exercise in relation
12 to them.

13 MR FACENNA: I suppose all of those things were within the
14 broad umbrella of what I was referring to privacy
15 rights. Because matters of family interest and safety
16 and so on obviously do fall under the article 8.
17 Whether it is formally for the purposes of protecting
18 police tactics or for public health and safety of the
19 individuals there is, as I have understood you to be
20 saying, a review for the purposes of protecting those
21 interests.

22 If that is the case --

23 THE CHAIR: We have had an anonymity process which has taken
24 an inordinately long time, and is not completely
25 finished yet, but we are getting towards the end of it.

1 MR FACENNA: Is it to be the case --

2 THE CHAIR: In the case of Special Demonstration Squad, that
3 is 162 deployed officers and a smaller number of
4 managers. In the case of the National Public Order
5 Intelligence Unit I don't have the figures on the top of
6 my head, but it is less than 50, I think.

7 Here I'm dealing with thousands upon thousands of
8 people.

9 MR FACENNA: You have my sympathy. In a sense this
10 discussion slightly highlights the point I made, which
11 is that before you can have a meaningful discussion
12 about the legal relevance of these considerations, you
13 need to decide what the legal obligations are.

14 You may be right, the legal obligations in your view
15 turn out to be completely unworkable, in which case we
16 have a problem --

17 THE CHAIR: The problem would have to be solved by secondary
18 legislation.

19 MR FACENNA: Possibly. Possibly.

20 At the moment we are having an exchange where in
21 a sense I am not in a position to disagree with anything
22 you say about the practical difficulties or the resource
23 implications or the timing implications, but there is
24 a question as to what the Inquiry's legal obligations
25 are and our submission is that there are legal

1 obligations which bite. They are not absolute and they
2 are not quite as awful in practice as might appear on
3 the face of them when one actually drills down into what
4 they would require.

5 THE CHAIR: If you are suggesting that I have to undertake
6 in relation to the thousands of individuals reported
7 upon who can be identified or most of the thousands,
8 those who can be identified, the same process as has
9 been undertaken in relation to the officers, we will not
10 finish this decade.

11 MR FACENNA: That's not my suggestion. I think to be fair
12 to those I represent, I think there might be a certain
13 degree of concern, to say the least, if it is being
14 suggested that the rights and interests of those on one
15 side of the equation are somehow to be accorded less
16 importance, weight, time and consideration than those on
17 the other side of the equation.

18 THE CHAIR: I am not suggesting that for one moment. I am
19 trying to conduct the Inquiry in a manner that involves
20 them in it and protects their legitimate interests but
21 without imposing upon the Inquiry additional burdens
22 which will make its task either impossible or
23 astonishingly difficult.

24 MR FACENNA: I understand that. I think we have the same
25 aim. Our position is that our proposals are pragmatic

1 ones, they are ones which could be adopted without
2 derailing the Inquiry in the way that is being
3 suggested.

4 THE CHAIR: Given the limited advantage that you have
5 identified, which is the opportunity in exceptional
6 cases to make proposals for how their data or particular
7 bits of their data should be processed, I bluntly doubt
8 its utility.

9 MR FACENNA: That is not the sole matter on which we rely or
10 which I put forward, it is one aspect of it. Indeed, it
11 is an aspect which appears your concern that it is
12 likely to lead to a raft of such applications.

13 We put the point a slightly different way, which is
14 there is a legal obligation to comply with subject
15 access rights under article 15. We are not suggesting
16 that we enter into a world where all data subjects make
17 subject access requests to the Inquiry and you have to
18 deal with them, but that is a possibility and people
19 have that right, on our case.

20 This is a way --

21 THE CHAIR: If it is exercised, we will have to deal
22 with it. Either by establishing by whatever route of
23 litigation ultimately applies to it, I suspect --
24 initially the Commissioner then the tribunal, then the
25 appeal court and possibly the Supreme Court and possibly

1 Luxembourg, whether we are right or not.

2 That will take, on any view, four years.

3 Alternatively, if I am persuaded that the exemption
4 doesn't apply and if the Secretary of State cannot be
5 persuaded to put before Parliament amending secondary
6 legislation under section 16 of the 2018 Act then we
7 will have to consider the possibility and
8 proportionality and provide an answer on that. That,
9 too, will have to be litigated probably and you will
10 have a never-ending series of those things.

11 MR FACENNA: That, if I may say so, is precisely what we are
12 trying to avoid.

13 THE CHAIR: But meanwhile, we can carry on with the Inquiry.
14 As with the current judicial review, the one that has
15 been determined and the one that remains to be
16 determined, those are, as it were, side distractions
17 that don't inhibit us carrying on with the Inquiry.

18 MR FACENNA: In my respectful submission, that is not an
19 appropriate characterisation of fundamental rights which
20 arise under EU law.

21 This Inquiry, particularly given the context, ought
22 to be proceeding on the basis that it wants to be clear
23 about what those obligations are and wants to comply
24 with them. That's my starting position.

25 The proposals which we put forward, which have been

1 mischaracterised in Counsel to the Inquiry's note --
2 I say again respectfully, I think you are
3 mischaracterising the burden which would be imposed by
4 the notification requirements and by the sequencing
5 requirements, we intentionally called them pragmatic
6 because we see them as something which could be adopted
7 and which would go some considerable way to addressing
8 some of the concerns which those I represent have, and
9 continue to have, about the processes that have been
10 adopted.

11 Leaving aside the points I made, there is also the
12 wider point which is that we say this would be
13 a sensible and effective way of ensuring that non-state
14 core participants can already start getting on with the
15 process of producing their evidence, of talking to those
16 who are in the same groups, talking about what they
17 remember. The purpose of the Inquiry is to get to the
18 truth. The only way you are going to get to the truth
19 is if those core participants see the documents, are
20 able to talk about them, are able to start that process
21 of putting together their own evidence and that, we say,
22 is a process which would be -- could be started already
23 by disclosure in the way we have suggested.

24 THE CHAIR: How we deal with the documents that are
25 disclosed to core participants on restriction order or

1 undertaking terms or both, is an issue which I would
2 like to address in due course, because I don't think it
3 arises at this stage, but I do intend to return to that.

4 I think we have probably said what we can. Have we
5 not, each of us, about this particular topic, unless
6 there is anything further you want to submit on it?

7 MR FACENNA: No. I think you have my submissions on the
8 sequencing point.

9 THE CHAIR: Yes.

10 I think I ought therefore now to invite the
11 Metropolitan Police and those who represent officers to
12 deal with this question.

13 Ms Mannion?

14 Submissions on behalf of the Metropolitan Police
15 Commissioners by MS MANNION

16 MS MANNION: Sir, yes, thank you.

17 We understand the purpose of the provision of
18 documents in the procedures as they are currently set
19 out in the restriction order protocol is to inform
20 affected persons of the areas where they may be able to
21 assist the Inquiry with information or evidence. It is
22 to assist them in memory refreshing and to allow for
23 restriction order applications to be made as
24 appropriate.

25 The issue seems to be whether that stage should come

1 one slot earlier, to be before the undercover officer in
2 issue or the author of that report has had an
3 opportunity to explain it and confirm it, but after the
4 state parties have nonetheless assisted you in
5 processing of those reports for the purpose of public
6 interest redactions to be made.

7 Our submission is that that is impractical to move
8 it back that one stage. It does involve tracing and
9 contacting potentially a vast number of individuals, and
10 the Inquiry cannot begin in our submission to properly
11 trace them until it is first able to attribute the
12 report itself to any particular undercover officer. It
13 is unclear how that will happen without first receiving
14 information from the undercover officer.

15 If that doesn't happen, Sir, what you would be able
16 to provide would be extremely limited, risks being
17 inaccurate and would serve, in our submission, no
18 meaningful purpose.

19 The purposes I identified at the beginning would
20 not, in our submission, be served.

21 It adds, in addition, an entirely new stage in
22 a process what you are doing, Sir, which is seeking
23 witness statement evidence, which, we submit, would have
24 profound effects on the timetable. The investigation
25 which you are carrying out of the deployments of

1 undercover officers would in effect have to stop, and
2 the resources of your team would have to be diverted to
3 tracing people in order to provide them with necessarily
4 incomplete information.

5 That process, which we would submit is almost
6 unworkable, would be to achieve controls which are in
7 fact already in place. The controls and protections
8 that were identified by the non-state core participants
9 at 117(a) of their submissions, page 31, Sir, if you
10 want it.

11 THE CHAIR: Yes, I have it.

12 MS MANNION: Such as challenging overbroad disclosure, well
13 this stage that there is an objection to, as it were, is
14 to provide the material to the nominally attributed
15 undercover officer for explanation and confirmation,
16 because it is not all processing that is objected to,
17 the state has assisted you in the processing for
18 restrictions first.

19 In any event --

20 THE CHAIR: Yes, I don't understand that aspect to be
21 controversial. I think what is proposed, as you rightly
22 observe, is the insertion of a stage in between that and
23 the document being put to the officer.

24 MS MANNION: Exactly. In terms, as it were, of that leading
25 to a risk of overbroad disclosure, what in fact that

1 stage, that the non-states would seek to go one step
2 before, is the provision of those reports to a nominally
3 attributed undercover officer in order that they can
4 either confirm or refute that it is their reporting and
5 explain it if it is their reporting.

6 They are not permitted, in any event, to retain the
7 documents and they are provided on conditions of
8 confidentiality in any event.

9 THE CHAIR: Everyone is required to sign an undertaking.

10 MS MANNION: Yes.

11 THE CHAIR: And thus far there has been no problem with it,
12 that I'm aware of.

13 MS MANNION: Yes. But to restrict an undercover officer
14 from seeing parts of their reporting will, we submit,
15 fetter your investigation and that is the line that
16 ought not to be crossed. Your investigation, it is in
17 everybody's interests, should be full and thorough.

18 As to doing this as a means of minimising distress,
19 that is a basis for provision of the material to
20 affected persons, but it is not a basis for the
21 provision of it at this particular stage of the series
22 of processes that you will take part in.

23 THE CHAIR: It is asserted that this is causing "recognised
24 psychiatric harm and distress".

25 Apart from extracts from what I take to be

1 a psychiatrist's report a year or two ago about how long
2 the process is taking and the impact that that is having
3 on everybody, I have not seen any, even an assertion,
4 said to be founded upon the psychiatric report of any
5 such situation. I'm not aware of any evidence about it,
6 but I have seen plenty of assertion about it.

7 MS MANNION: Sir, I am certainly not in a position to make
8 any observation about that at all, but it does perhaps
9 lead to the final point I would make in respect of the
10 practical considerations. This is not a way of saying
11 it should never happen; our objection with the
12 suggestion that has been made by the non-state core
13 participants is the idea that it routinely happened.
14 There may be occasions when a certain combination of
15 facts means that it would be necessary to provide
16 material earlier. That might be to do with the health
17 of the officer themselves so that there is never going
18 to be a witness statement, it might be to do with the
19 health of the person who is affected on the other side,
20 Sir, but you have always countenanced that particular
21 sets of facts might cause a particular different
22 route --

23 THE CHAIR: At the moment I am dealing with a general
24 scheme, rather than with how it needs to be altered in
25 the individual cases.

1 MS MANNION: Yes.

2 THE CHAIR: Of course things have to be altered --

3 MS MANNION: Our objection is to the general scheme changing
4 in the way it that has been identified, rather than the
5 specific situation which might occur in any given case
6 on its individual facts.

7 Sir, those are our submissions in respect of the
8 practicality altogether. It may be that there does need
9 to be further consideration of this issue in the event
10 that exemptions do or don't apply, depending on which
11 exemptions apply in which particular processes. Those
12 are matters we would like to consider further in the
13 event and once we have a ruling from you as to what if
14 any considerations apply, including a consideration of
15 whether this process would be necessary even if certain
16 exemptions don't apply and the effect of article 5.4 as
17 to other people's rights --

18 THE CHAIR: I think I will have to defer any formal rulings
19 on these submissions until after I have grappled with
20 the thorny article 14 and article 15 issue.

21 MS MANNION: I recognise that, Sir. I don't seek to
22 dissuade you.

23 Our short point is that if exemptions don't apply --
24 save those which have been identified on behalf of the
25 non-state core participants -- and if they necessitate,

1 it is an "if" we would say, the proposal they have put
2 forward. We would submit that that would lead to an
3 addition of work of many, many years and make an
4 unworkable inquiry.

5 The Metropolitan Police's major concern in respect
6 of that is we are very interested in knowing what your
7 worthwhile recommendations for future practice will be
8 and we don't want to put that off longer than it needs
9 to be.

10 THE CHAIR: Well the public need to know what happened --

11 MS MANNION: Of course, of course.

12 THE CHAIR: -- insofar as it is permissible amid the welter
13 of legislative restrictions to tell them.

14 MS MANNION: Sir, those are my submissions on the specific
15 issue of the sequencing.

16 THE CHAIR: Thank you.

17 Who is next? Mr Summers?

18 MR SANDERS: Summers or Sanders?

19 THE CHAIR: I'm attempting to get police representations
20 first, then when Mr Summer has heard them all, I will
21 ask them if there is anything he wishes to say.

22 MR SANDERS: Well, Sir, nothing to add to what Ms Mannion
23 has said.

24 THE CHAIR: Very well.

25 Mr Brandon?

1 Further submissions on behalf of the officers represented by

2 Slater & Gordon by MR BRANDON

3 MR BRANDON: Sir, you have anticipated many of the
4 observations that we were going to make about the
5 process itself. There are, of course, two principal
6 concerns that we have about the proposal that is being
7 made. In a sense, my learned friend Ms Mannion has
8 already made the principal one, which is of course this
9 Inquiry is concerned to ensure that it obtains the best
10 evidence from undercover officers and the best evidence
11 is the most reliable evidence, the most complete
12 evidence.

13 That process will, in our submission, be inhibited
14 if the officers who we represent are presented with
15 documents which have gone through the process
16 potentially of redactions, excisions, whereby the
17 contemporaneous records which they have produced, they
18 are responsible for, resembles a patchwork of redaction,
19 information, excision and ciphers, because that will
20 inhibit their ability to be able to recall events.

21 My learned friend says, "Well, it is only in
22 exceptional circumstances that he anticipates that
23 applications will be made to restrict information
24 contained in contemporaneous reports to state and
25 parties".

1 Well, if he's wrong about that, there will be
2 consequences not only in the terms of the time that this
3 application will take for the Inquiry to consider.

4 THE CHAIR: If he's right about it, then I question the
5 utility. If he's wrong about it, then it is going to
6 cause a major problem.

7 MR BRANDON: You have the point. I will not labour it.

8 The second issue that we take with the proposal that
9 is being made about sequence or timing is the difficulty
10 over jigsaw identification and the potential for this
11 process to conflict with the existing restriction orders
12 that have already been made over, in particular, real
13 names.

14 We would submit that it would be sensible, in light
15 of the very difficult process that the Inquiry has had
16 to go through in determining those restriction order
17 applications, that the individual undercover officers
18 who have the benefit of those orders have an opportunity
19 to be able to consider the reports that they produced or
20 it contributed to --

21 THE CHAIR: Hold on. This process only applies to those in
22 respect of whom there is no restriction order on cover
23 name. I do not begin to understand how jigsaw
24 identification can be a problem in relation to such
25 officers. They are already out in the public.

1 MR BRANDON: Sir, in that case, I have understood this
2 applied to -- forgive me if I have made that very
3 obvious error, but I had understood we were talking
4 about all undercover officers --

5 THE CHAIR: Forgive me. Those deployments which are going
6 to be considered in closed session only will not be the
7 subject of disclosure of the reporting to anybody.

8 MR BRANDON: I follow.

9 THE CHAIR: Those where the cover name is in the open will
10 be disclosed.

11 MR BRANDON: Yes.

12 THE CHAIR: There is a small category of those where there
13 is a restriction order in respect of the cover name, but
14 I have indicated that details of the deployment have to
15 be made public.

16 MR BRANDON: Yes.

17 THE CHAIR: In that very small category of officer, there
18 may be problems, but they will have to be addressed on
19 an individual basis. We are talking now about the broad
20 range of things and it is those deployments where cover
21 name is out.

22 MR BRANDON: I do follow that.

23 There were some residual concerns, even in those
24 category of cases, about the possibility of
25 identification of real name by material that was

1 contained within reports, but, Sir, I can't possibly
2 begin to give you concrete examples of how that might
3 arise and I accept that it is a remote risk.

4 THE CHAIR: I think that is a very, very remote possibility.
5 It can't influence the approach to be adopted over the
6 broad range of cases.

7 MR BRANDON: Very well, Sir. Those are the submissions that
8 we make at this stage.

9 THE CHAIR: Thank you very much.

10 Sir Robert, anything you want to say?

11 Further submissions on behalf of the National Police Chiefs'
12 Council by SIR ROBERT FRANCIS

13 SIR ROBERT FRANCIS: Sir, thank you.

14 Firstly in terms of sequencing, Sir, we have made
15 an assumption in our written submissions which we hope
16 is correct that everything that has been discussed here
17 takes place following the redaction process which has
18 been the subject of many hearings and submissions about
19 generic grounds and that sort of thing.

20 THE CHAIR: In the period that I have been looking at, the
21 1980s and late 1970s, it really doesn't arise much --

22 SIR ROBERT FRANCIS: No.

23 THE CHAIR: -- in later deployments it may do.

24 SIR ROBERT FRANCIS: The second point is that we certainly
25 support the submissions being made so far to question

1 the utility or the practicality of the reordering of
2 sharing of documents that has been proposed on behalf of
3 the non-state core participants.

4 We would suggest that a starting point in relation
5 to disclosure of private information about members of
6 the public has to be this: the information collected and
7 put in these intelligence reports and other documents,
8 whether or not it was proportionate at the time, lawful
9 or unlawful, was never intended to reach the public
10 domain. Whether it should have been kept at all is
11 a matter you will be considering.

12 Therefore, there is a risk which we would suggest
13 respectfully you have to be conscious of at all times
14 that disclosure via the Inquiry gives into public domain
15 of such information actually increases the invasion or
16 interference with privacy which has already occurred.

17 We would suggest, with respect, that the proposal
18 that a document -- unredacted in the sense we are now
19 talking about -- to a group, for instance, who are
20 recorded as attending a meeting, which contains private
21 or potentially sensitive information about individuals,
22 would be an increase in the invasion of privacy of all
23 those individuals.

24 Now some of them may well not mind, but some will.
25 Some, for reasons unknown to the Inquiry, may be injured

1 by it. For instance, in your thorough investigation of
2 the merits of anonymity applications you have had the
3 benefit of medical evidence on many occasions. You will
4 not have that available to you in relation to a proposal
5 such as my learned friend has put to you.

6 An advantage of the current order is that by putting
7 the documents to the officers who generated them first,
8 or those who were responsible for supervising them, is
9 that you will then have further evidence -- albeit
10 I accept from one side if there be sides -- about the
11 context, and also have a clearer idea of what evidence
12 is relevant or not relevant or helpful to or not helpful
13 to your Inquiry, which may in itself begin to limit what
14 needs to be disclosed or discussed further. When you
15 say --

16 THE CHAIR: Hold on a minute, the problem with that point is
17 that which Ms Steel has made, with her usual clarity and
18 force, that I don't know exactly what it is which will
19 prompt useful evidence or information from those whose
20 groups were infiltrated.

21 SIR ROBERT FRANCIS: I would accept that, Sir.

22 In some cases that may be so, but in general there
23 will be a better context in which to evaluate and even
24 understand the information that is contained in those
25 reports.

1 THE CHAIR: If the suggestion is that I should cut down the
2 number of documents that are shown to groups of
3 non-state core participants, it is not one I am
4 attracted to.

5 SIR ROBERT FRANCIS: No, that's not particularly what I'm
6 suggesting. It allows you to understand the context of
7 the document and it allows you to understand the context
8 in which the various factors about privacy need to be
9 considered, and that in relation to therefore what it is
10 appropriate to share more widely than the individual
11 data subject than not.

12 I move on, the second point is that --

13 THE CHAIR: You are advocating in fact, I think -- although
14 not in terms -- that an individual document-by-document
15 redaction exercise is untaken? For reasons I have
16 explained, we simply can't do that.

17 SIR ROBERT FRANCIS: I am not suggesting that, Sir. But
18 what we do suggest is then when you make decisions which
19 will be of general application or maybe of application
20 to a particular event -- let's put it that way, so the
21 documents are about a particular event -- you do need to
22 take into account the possibilities and the risks of the
23 harm that might be done by sharing information in
24 general.

25 How you do that, I accept, is a matter of some

1 difficulty and practicality, but there is --

2 THE CHAIR: I don't at the moment see how when I -- as
3 I do -- or when as the Inquiry does the Inquiry shares
4 the intelligence reporting back to the officer who
5 created it, containing as quite often it does highly
6 personal and almost always political information, that
7 increases the damage caused by the original reporting.

8 SIR ROBERT FRANCIS: It does not, in reality, increase the
9 damage if any done if you are referring the document to
10 someone who wrote the document in the first place, who
11 knew the information, albeit they may have forgotten --

12 THE CHAIR: They will almost certainly have forgotten most
13 of it now.

14 SIR ROBERT FRANCIS: The damage we would suggest is limited
15 and of course, we say necessary for the purpose of the
16 Inquiry in order to get the evidence that you need, but
17 it is of a different quality to sharing that information
18 with fellow members of a group who may or may not have
19 known each other at the time, depending on the size of
20 the group, obviously, and people will have views and
21 reactions to that. Some of the time, as has been
22 suggested, it may be accepted by them but not by
23 everybody.

24 There is a practical issue here which we suggest can
25 only be grappled with by reference to concepts such as

1 proportionality, the balancing in general of the needs
2 of the Inquiry in the public interest and its successful
3 conclusion against the range of possible invasions of
4 the rights to privacy involved. If it is not possible
5 on an individual basis, then it is something, I would
6 suggest that you have to undertake as a balance by
7 looking at groups or particular circumstances in that
8 way.

9 In other words, that is different from
10 a name-by-name investigation of the merits of privacy,
11 but there is even where an exemption applies -- we will
12 obviously await a ruling about which if any of the
13 exemptions do apply -- there still needs to be regard
14 had to the potential impact on the data subjects as
15 a group or individually in relation to that disclosure.

16 THE CHAIR: What I really do not want to do, unless it is
17 absolutely unavoidable for legal reasons, is, as
18 a matter of generality, to provide non-state
19 core participants from whom I am hoping to receive
20 evidence and information, documents that are redacted so
21 that they are far less comprehensible than they should
22 be to permit them to give me that information and
23 evidence.

24 I understand from discussions that I have had that
25 they, too, don't welcome that prospect.

1 Imagine you are confronted with a report of a series
2 of meetings of the Socialist Workers Party Kilburn
3 branch, or whatever it is, and you get documents with
4 a whole lot of blanking out in it. You are not going to
5 be very impressed by that.

6 SIR ROBERT FRANCIS: That is understood. But that, we
7 respectfully suggest, is that in weighing up the
8 practicabilities about what it is possible to do and
9 desirable to do, has to have regard to -- putting it
10 bluntly -- the price that has to be paid for the Inquiry
11 proceeding. That needs to be explained and justified,
12 having regard to the fact that this -- whatever happens,
13 unfortunately -- is a further invasion of these
14 individuals' privacy.

15 Going back to the sequencing, whatever the process
16 is, we would suggest, it would be made easier rather
17 than more difficult if it happens after the officers
18 have had statements taken from them.

19 THE CHAIR: Okay.

20 SIR ROBERT FRANCIS: The only other comment I make about my
21 learned friend's submissions is that we would submit
22 that there are potential difficulties about the
23 confidentiality ring involving members of the public, or
24 even core participants, which are greater than
25 confidentiality which is expected of the people who have

1 been asked to give undertakings so far.

2 THE CHAIR: I know that. In the end I have to make
3 a decision about whether or not I can trust members of
4 the public, who will regard themselves mainly as victims
5 of something which should not have happened, to abide by
6 what will then be imposed on them as a legal obligation
7 to keep things confidential.

8 My inclination at the moment is to say yes, I can
9 trust them to do that.

10 SIR ROBERT FRANCIS: I understand entirely again the
11 practicalities that weigh heavily upon everyone.

12 It is not difficult to envisage circumstances with
13 groups of members of the public, perhaps particularly
14 those who have known each other, that, putting it
15 mildly, they have stopped getting on for whatever
16 reason. There are issues about relationships with
17 a small r -- I don't mean improper relationships but
18 social and historic relationships -- which may make
19 control of the confidentiality a greater challenge than
20 that you have met with so far.

21 THE CHAIR: I don't doubt that is right. In the end I have
22 to decide whether or not I can trust members of the
23 public in the same way as I have trusted former
24 undercover police officers to comply with a legal
25 obligation.

1 SIR ROBERT FRANCIS: Then the final point, which will almost
2 certainly reinforce the fears and difficulties you
3 express about the practicabilities, that I wish to make
4 is this. The figures that you have given in relation to
5 your experience so far in relation to historic Special
6 Demonstration Squad cases. Our impression -- and it is
7 an impression -- is that whenever you do get looking at
8 the National Public Order Intelligence Unit
9 documentation, that will be many factors greater than
10 what you have addressed so far.

11 THE CHAIR: I do not doubt that the National Public Order
12 Intelligence Unit investigation is going to be a bigger
13 headache than the Special Demonstration Squad
14 investigation. It may be we will have to adapt our
15 techniques and approach when we get to it. But I am so
16 far short of it in temporal terms, and so little
17 informed about it beyond what I have seen in the
18 anonymity process and one or two bits of information
19 I have learned, that I would be very unwise to say
20 anything about that.

21 SIR ROBERT FRANCIS: It is for those very reasons that our
22 own submissions have been quite conditional and we await
23 with interest, of course, the experience developed
24 throughout the Metropolitan Police Service process.

25 THE CHAIR: Thank you.

1 Anybody else want to say anything before I ask
2 Mr Summers?

3 Ms Steel, of course.

4 Further submissions by MS STEEL

5 MS STEEL: Yes, I just wanted to say the reference to the
6 burden of processing documents and taking the time to
7 allow us to see the documents and make representations
8 in relation to our data, it feels like entirely double
9 standards. We have had three years of hearings about
10 protecting the police and their privacy and fears and
11 now effectively it feels like we are being told it is
12 too great a burden to protect the privacy of those who
13 were actually spied on, who have already had their
14 privacy invaded by the state.

15 For those of us who had the gross invasion into our
16 private lives of an intimate relationship with
17 an undercover police officer, who have learnt all sorts
18 of deeply personal information about us, about our
19 health, about our family lives, about our private lives,
20 about our sex lives, you are adding to the distress and
21 the harm already caused by the police invasion of
22 privacy by not respecting the fact that we need to see
23 that data, and we need the opportunity to tell you what
24 is particularly sensitive and what we do not want being
25 given even to the officers who recorded it at the time.

1 There may be things that we ought to have the right
2 to make those objections to you. At the moment, we are
3 doing this blind. We have no idea what has been
4 recorded about us. It is massively -- massively --
5 distressing. You know, it is not just about, "We know
6 X, Y, Z events occurred and officer might have recorded
7 it and that might get made public".

8 There is a whole unknown. We know that they made
9 inaccurate reports. We know that they made speculation.
10 So the limits of what they might have recorded about us
11 are boundless. And, as was said earlier, the fear of
12 the unknown is greater than, you know, if you have the
13 papers in front of you and you know what was recorded,
14 you can deal with it. If you don't know what was
15 recorded, it is a massive psychological distress that is
16 being caused.

17 I think it would be absolutely outrageous for
18 officers to be given personal details that related to or
19 were gained from the relationships that they undertook
20 when they were abusing us.

21 THE CHAIR: May I interrupt you a moment. Forgive me for
22 doing so, and you may continue when I have done so.

23 I have not yet reached the era in which the groups
24 to which you belonged were infiltrated. In particular,
25 I have not seen any document yet which deals with the

1 relationship of which you speak.

2 I can only speak on what I have so far read, and
3 what I have so far read leads me to believe that it is
4 very unlikely that there will be anything personal about
5 your relationship with the particular officer in his
6 reporting. The example -- hold on -- I have seen, that
7 of Rick Gibson, the name of "Mary", her real name, is
8 contained in a tiny handful of reports in that entirely
9 anodyne manner.

10 There is nothing from the reporting from which you
11 could infer that Rick Gibson had a sexual relationship
12 with her. I expect that that is what will happen in
13 other cases. I don't know for certain, but that is my
14 expectation.

15 MS STEEL: You may not know what information recorded
16 actually was gleaned from being in the intimate
17 relationship and what was gleaned from other sources --

18 THE CHAIR: That is true.

19 MS STEEL: -- but the point is that they gleaned that
20 information through the abusive relationships and we
21 ought to have some say in controlling that information
22 and who it is given to.

23 It is -- you know, it is grossly offensive that we
24 are being treated in this way, as though, you know, the
25 fact that our privacy has been invaded once already

1 means we don't need to worry about it being invaded all
2 over again.

3 THE CHAIR: At the moment, I do not see how I can
4 investigate deployments -- including those where the
5 privacy and personal rights of individual members of the
6 public were infringed ... can be investigated unless
7 I look at the documents in which they are recorded and
8 unless I hear evidence, if it is available, from both
9 sides which is given to me.

10 MS STEEL: That may be the case. But there ought to be
11 a stage for those of us who have already had our privacy
12 invaded where we get to see what that data is and have
13 the opportunity to make representations about specific
14 parts of it that are particularly sensitive. And to
15 deny us that opportunity is to further compound the harm
16 that has already been caused by the state.

17 THE CHAIR: I am not proposing that you should be denied
18 that opportunity, save in one respect, and that is in
19 the prior redaction of documents before they are sent to
20 the relevant undercover officer or officers.

21 MS STEEL: You are proposing to give documents about us to
22 the people who abused us. Can you not see how offensive
23 and how harmful that is, really? And to their
24 supervisors?

25 We have a right to see that information now, to see

1 it first, and to make comments about it. I know because
2 I know that Jim Boyling told Rosa personal information
3 about my health, that there is information recorded
4 about me in those Special Demonstration Squad files
5 which was shared amongst other officers. I want the
6 right to know the extent of that information and to make
7 representations to you about that before it is handed to
8 the police officers that abused me and the supervisors
9 that were supervising them in a completely inadequate
10 way.

11 If you can't see the mental distress and the fear
12 that this process will cause to those who have already
13 been spied on, and the risk of causing additional trauma
14 and psychological harm to those already abused, then
15 I am afraid to say you are lacking in empathy and it is
16 not appropriate for you to be presiding over this
17 Inquiry which is into exactly these types of human
18 rights abuses.

19 Not only should we, by right, be allowed to see the
20 data on us as soon as possible -- we have been waiting
21 ages already -- but it is actually the most efficient
22 method. Because what it means is you going through the
23 documents first, once, only once, and as you are looking
24 at it deciding which police officers need to see this,
25 which non-state core participants and potentially other

1 members of the public need to see it, notifying those
2 people of these documents and if you don't know the name
3 of the police officer or the specific police officer who
4 did the report, then that can -- you can say that, and
5 then we can be notified of that later.

6 But if you do it all in one go, that is far more
7 efficient than doing it once to decide which police
8 officers to give it to, and then having to look at it
9 again in two years' time to decide, "We need to give it
10 these people". It is the most efficient method to give
11 it to those who were spied on as and when you are
12 looking through those documents.

13 It also allows us to prepare properly, it allows us
14 to make relevant submissions and generally it will work
15 out the cheapest and most effective method.

16 I have basically covered it, but those who were
17 spied on have a right not to have their privacy further
18 invaded and further harm caused and a right to be
19 treated with at least equal respect and concern to that
20 shown by the Inquiry to undercover officers.

21 And I don't feel that that is what is happening now,
22 it feels like much greater concern about their privacy
23 than those who were spied on.

24 Thank you.

25 THE CHAIR: Mr Summers, I think we have reached you now.

1 If you want time to reflect before making your
2 submission, you will gladly have it. If you can say
3 what you wish to say in a short period, I would like to
4 conclude that passage now.

5 MR SUMMERS: I am going to be short, Sir, but it might be
6 wise if the Information Commissioner's Office goes last,
7 I see that others ...

8 THE CHAIR: I am sorry, Ms Sikand.

9 MS SIKAND: My Lord, I had something very brief to say.
10 I am happy to do it at 2.00 pm or now.

11 THE CHAIR: I think we better adjourn until 2 o'clock.

12 (1.05 pm)

13 (The short adjournment)

14 (2.00 pm)

15 THE CHAIR: Ms Sikand, I think you were next in the queue.

16 MS SIKAND: Yes, Sir.

17 Submissions on behalf of Peter Francis by MS SIKAND

18 MS SIKAND: Sir, I am loath to say too much about General
19 Data Protection Regulations because there are much
20 greater minds than mine here to speak to those specific
21 issues. However, if we are talking about sequencing, it
22 seems to me, Sir, that if was simply about utility to
23 the Inquiry, then it would of course be entirely
24 a matter for you to decide the sequence of events as far
25 as disclosure is concerned.

1 However, it also seems to me that until you decide
2 the question of the applicability or otherwise of
3 articles 14 and 15, you cannot actually properly decide
4 that issue, because, Sir, don't get me wrong,
5 Peter Francis is very keen for matters to progress as
6 quickly as possible. You know that, Sir.

7 THE CHAIR: I do.

8 MS SIKAND: I have said that repeatedly and he, unlike many
9 others, is keen to get into the witness box as soon as
10 possible and give you evidence.

11 THE CHAIR: I'm well aware of that.

12 MS SIKAND: At the same time, I don't make submissions on
13 his behalf that would lead the Inquiry into acting
14 unlawfully, because I couldn't.

15 It seems to me that if you are bound by articles 14
16 and 15, then the question of disclosure and data subject
17 requests will mean that you have to comply with them.
18 In which case, the question of sequencing in a sense
19 falls away.

20 I think that is what Mr Facenna, much more elegantly
21 than me, was seeking to persuade you of, that you must
22 determine that issue because it is inextricably linked
23 to the question of sequencing.

24 THE CHAIR: I intend, as I told him, to hear submissions on
25 that and determine it before ruling on the submissions

1 I am hearing today. I accept his point that I need to
2 address that issue before doing so.

3 MS SIKAND: That's why I don't think you can come to any
4 final decision without that determination.

5 THE CHAIR: I am definitely not going to do that. If there
6 is time, I would like to hear headline submissions but
7 if there is not, then it will simply be put off to
8 another day to be determined.

9 MS SIKAND: Sir, one point of clarification. Counsel to the
10 Inquiry in their submissions have said that your
11 position is that in fact you are exempt. Is that for
12 the reasons they set out at paragraph 25, subsection 1?
13 That is at page 9 of their submissions.

14 THE CHAIR: Yes. 25.1. Either we are exempt under that
15 provision or not. If we are not, then there are in fact
16 other provisions which we would have to address but
17 which might result in the answer we can't do it.

18 MS SIKAND: Seeking to clarify, is that your settled
19 position or is that a position that you are undecided
20 about?

21 THE CHAIR: That is my current view. I would be not very
22 sensible if in a field of law as complicated and in some
23 respects as new as the General Data Protection
24 Regulations and the Data Protection Act 2018, I were to
25 say, "That's my last word on the topic". It isn't.

1 MS SIKAND: Of course. That is your first word on the
2 topic.

3 THE CHAIR: Yes.

4 MS SIKAND: This is the first time we have heard that you
5 seek to rely on this particular exemption.

6 THE CHAIR: Yes.

7 MS SIKAND: Thank you very much, Sir.

8 THE CHAIR: The fact it had not occurred to anybody else may
9 say something about it, but we shall see.

10 Mr Summers?

11 Further submissions on behalf of the Information
12 Commissioner by MR SUMMERS

13 MR SUMMERS: It did occur to us and it is referenced but in
14 passing because it is a level of granularity which we
15 consider we shouldn't engage you in, certainly at the
16 stage that we have already covered, in paragraph 8 where
17 we refer to the exemption --

18 THE CHAIR: Forgive me, may I ask this question. By all
19 means decline to answer it, if you feel that you can't.

20 Is it your intention when I do address that issue
21 specifically to attend and offer advice by the
22 Commissioner or not?

23 MR SUMMERS: If the Inquiry would find it helpful, then of
24 course we will.

25 THE CHAIR: Yes. I don't want to create any difficulty for

1 the Commissioner. Because if the issue were to arise
2 she might have to decide it and would then be parties to
3 a quasi litigation before the tribunal in which she and
4 I would be on opposite sides.

5 MR SUMMERS: We have endeavoured to be careful not to do
6 that, in that which we have submitted so far --

7 THE CHAIR: Yes.

8 MR SUMMERS: -- and I'm going to endeavour to abide by that
9 in what I say now and in due course seek to do the same.

10 THE CHAIR: Yes.

11 MR SUMMERS: You are quite right, Sir, all the Commissioner
12 can do pursuant to her powers is provide advice and
13 guidance. Whether a decision which the Inquiry reaches
14 is wrong or right as a matter of law is not for the
15 Commissioner.

16 THE CHAIR: Yes.

17 MR SUMMERS: Sir, these are but brief comments. They are
18 intended to assist, forgive me for the impertinence if
19 they don't, these may all be matters which are well in
20 mind anyway.

21 In our respectful submission even before you get to
22 article 14, when considering the question of sequencing
23 there is an earlier starting point. It comes from
24 considering that data protection issues in relation to
25 sequencing are part of that decision-making process.

1 They are not a supplemental overlay consideration as
2 part of the decision-making process. In our respectful
3 submission, by going through the process that I am about
4 to very briefly set out you may end up getting to
5 precisely the same answer but it is part of the same
6 exercise, an exercise conducted in terms of the
7 Inquiries Act and the objectives of this investigation,
8 then overlaid with another regime.

9 We suggest that the framework for the
10 decision-making will assist the decision-making and not
11 hinder it, precisely because the issue of disclosure
12 which in effect is what sequencing is, what should be
13 disclosed to whom and at what stage, is an aspect of
14 processing, obviously.

15 As the General Data Protection Regulations makes
16 clear, how that processing ought to be conducted, if at
17 all -- because the answer may be it shouldn't be, but if
18 the answer is it should be -- that is a question for the
19 data controller to resolve in accordance with its
20 provisions. The provisions which are relevant in our
21 respectful submission at this earlier stage, before you
22 can get on to article 14, are the issues of necessity.

23 Because the legal basis for the exercise of
24 a judgment about what should be given to whom when is
25 the pursuance of the purposes for which any of the

1 processing, but in this regard the specific processing,
2 the disclosure, are being conducted. In real terms that
3 means in relation to personal data generally the
4 question of the necessity of serving the public interest
5 of the Inquiry's investigation under article 6.1(e), it
6 comes to the same question, necessity. As far as
7 special category data is concerned, it is article
8 9.2(g). Although a more stringent test in the
9 substantial public interest, it still requires the
10 Inquiry to answer the question of what is necessary.
11 Is it necessary to disclose to the individuals concerned
12 first before inquiring of the officers or vice versa, or
13 perhaps even simultaneously. What the precise answer is
14 may indeed vary from one particular factual matrix to
15 another.

16 A data controller might conclude that is necessary
17 that the officer addresses the matter first, so that we
18 know what we are dealing with, we are dealing with the
19 right information. But in other circumstances the data
20 controller might entirely rationally reach a different
21 conclusion and decide that because of the nature of the
22 information that we are concerned with, it is right and
23 proper and necessary that the data subject sees it
24 first. We respectfully submit by addressing the
25 question of necessity in that way, the Inquiry will

1 arrive at the right answer. What is or is not necessary
2 for those purposes is of course a matter which the
3 Inquiry is uniquely placed to judge, not only because it
4 is in a position of knowledge that none of the other
5 parties are, and certainly the Commissioner is not, but
6 secondly because as a matter of public law you are in
7 a position to balance those competing interests in a way
8 that nobody else is.

9 THE CHAIR: Could you assist me on the interaction of
10 processing and necessary. Read as a matter of ordinary
11 language, the processing must be necessary, not any
12 sequence in which processing is to occur.

13 MR SUMMERS: No, but it is a point which I think was made in
14 our submissions that as you already observed, Sir, it is
15 very difficult to think of anything that one does with
16 personal data that does not amount to processing, but it
17 is not a one-time activity. In other words, simply
18 obtaining the information is processing, but if you do
19 no more than that with it, you don't have to consider
20 the necessity of processing it in other ways.

21 THE CHAIR: In general, I am satisfied that it is necessary
22 to process the reports produced by undercover officers
23 by copying and sending the reports to them for them to
24 provide the Inquiry with a witness statement.

25 If that conclusion is either right or at least

1 justifiable, then I satisfy 6.1(e) and if the UK law is
2 okay, 9.2(g). But it doesn't say anything about when
3 I must do that, nor about whether or not I must do
4 anything before doing it.

5 MR SUMMERS: It does and it doesn't. You are right, Sir, to
6 observe obviously no regulation of this scope in terms
7 of the sorts of activities that it will apply to can
8 possibly get anywhere near that level of detail. On the
9 other hand, the argument might be made that it is built
10 into the definition of necessity.

11 Each time a different processing difficulty is
12 embarked upon, not every single different instance -- so
13 it would be fatuous to argue that perhaps migrating data
14 from one server to another is a different form of
15 processing -- I don't think anybody could sustain that
16 argument -- but if, as I was endeavouring to explain,
17 all you do is you have obtained it and are holding it,
18 another activity such as then analysing it or disclosing
19 it to others should be regarded, in our respectful
20 submission, as a separate piece of processing. You are
21 doing something entirely different with it now.

22 THE CHAIR: I have no difficulty accepting that. To do
23 otherwise doesn't make a great deal of sense. Is it
24 necessary for the Inquiry to process intelligence
25 reports by undercover officers by acquiring them,

1 storing them and looking at them? The answer is
2 obviously yes. It doesn't automatically give us the
3 right to process them by disclosing them to others.

4 MR SUMMERS: Quite.

5 What we say is that you have to apply that test of
6 necessity at that point. When the decision-making is
7 underway: who are we to disclose to and at what stage,
8 what is the sequence?

9 Because the Inquiry is uniquely placed to make that
10 judgment, in our respectful submission that is precisely
11 why the Commissioner can't go any further than to simply
12 highlight the route through the decision-making process.
13 But it might also be observed that those issues
14 obviously arise at any stage irrespective of sequencing,
15 as it were.

16 THE CHAIR: Yes.

17 MR SUMMERS: Every time those sorts of fundamental decisions
18 about what is being done --

19 THE CHAIR: Of course. They arise for example later on at
20 the stage at which they are to be deployed in hearings.

21 MR SUMMERS: Quite.

22 It might also be said that in resolving the question
23 of sequencing that data controller obligations within
24 article 5 of General Data Protection Regulations will
25 also assist in answering the question and should

1 properly be part of the decision-making process.
2 Because to take the three most obvious examples, under
3 paragraph 1(a), the question of fairness and
4 transparency will provide some answer to what the
5 appropriate sequence ought to be. What is fair to all
6 those who are concerned in the process, what is the
7 right approach in terms of transparency.

8 Paragraph 1(c) may also play a part. Although this
9 regulation does not use the language of excessive
10 processing, if I might I will use it as a shorthand, it
11 may be regarded as excessive -- in other words not
12 limited to that which is only necessary -- to disclose
13 it to one party or another. It is part of that thought
14 process.

15 As indeed is paragraph (f), security, which, Sir,
16 you have already referred to. That has to be
17 a consideration when deciding to whom and at what stage.

18 The only other point that I hope may assist is that
19 it is beyond doubt, I hope -- it is mentioned in our
20 submissions at paragraph 6 -- that such decision-making
21 as this must of course be fully documented in order to
22 satisfy the accountability requirement under
23 article 5.2.

24 THE CHAIR: Do you mean by that, that each disclosure of
25 data or each disclosure of batches of data to officer or

1 the principles upon which the Inquiry discloses data
2 must be the subject of written record?

3 MR SUMMERS: It may be all three in any one given case.

4 There may be general principles that can be documented
5 to ensure that the Inquiry operates in an accountable
6 way. That, frankly, has probably already been achieved
7 by virtue of the policies, the privacy policy, the data
8 protection policy and the restriction policy and so on
9 and so forth. At a policy level accountability will
10 apply.

11 As to then the median stage, broader exercises of
12 disclosure, if it is at that level then again as long as
13 the decision-making process explains why it is being
14 dealt with at a group or -- I am struggling with the
15 appropriate language, but if it is being done at
16 a broader level, there is a large section of material
17 that is being disclosed to several different parties at
18 once. Then again, as long as the decision-making
19 process as to why that is necessary and appropriate,
20 that that will satisfy -- potentially, subject to
21 precisely what is said, obviously -- article 5.2.

22 If it is coming down to specific points, then again
23 I suppose the same answer applies but the
24 decision-making rationale might need to be of course
25 slightly finer than it is at a broader level.

1 Forgive me, Sir.

2 THE CHAIR: I think if you are requiring a decision to be
3 logged for each disclosure of each piece of data to, let
4 us say, an individual undercover officer, that is (a)
5 pointless and (b) an excessively burdensome bureaucratic
6 task.

7 MR SUMMERS: I think the balance would be, Sir, it is
8 ultimately a matter for the data controller and then to
9 seek to justify. One could well see the argument that
10 you can do by each exercise.

11 In other words, if one is giving data subject A this
12 volume of material, or officer B this volume of
13 material, what you don't have to do is go through
14 articulating each piece of personal data that is within
15 that bundle and why the decision has been made to give
16 that particular piece of information a name, an address,
17 whatever it may be, to that particular person. As long
18 as it is documented that we have thought about the
19 content of this material, it is necessary to give it to
20 this person for the following reasons. It may be that
21 although the decision-making process has to be repeated
22 each and every time, it may be, obviously, that the
23 rationale may be common across many, many of those
24 exercises.

25 THE CHAIR: I have not been intimately concerned in the

1 setting out of reasons for disclosure so far to
2 officers. It may well be we have not fulfilled that
3 requirement, in which case we must certainly do it
4 hereafter, I accept. There is nothing I can do about
5 the past.

6 I don't think I am giving away anything secret if
7 I say that part of the anonymity process has involved
8 identifying particular reasons why anonymity in respect
9 of an officer or more likely a document -- sorry, why
10 redaction of a document is sought has been done by
11 reference to categories identified, as is customary, A,
12 B, C and so on. Is that acceptable?

13 MR SUMMERS: Without knowing more of the detail, one would
14 have thought so.

15 THE CHAIR: Yes.

16 MR SUMMERS: It is also fact specific, because it may depend
17 upon what the information is that pertains to that
18 particular subject of anonymisation. It may be
19 peculiarly sensitive for a variety of reasons, and then
20 the competing interests might, as a reflection of the
21 sensitivity of the material, be that much more profound
22 from a public interest point of view. The weighing of
23 the balance might need to be, as I indicated earlier,
24 finer than it might be in other circumstances and
25 therefore the rationale might need to be a little

1 fuller.

2 It is all a question ultimately of the data
3 controller being satisfied that I am accountable for
4 this decision should it be called into question.

5 THE CHAIR: If I can take an example at one end of the
6 spectrum where highly personal details are shown to the
7 officer who reported them, that would require the
8 Inquiry -- or me as the data controller -- to say that
9 it is necessary to disclose those things back to him, or
10 her, to remind him or her of what it was that he was
11 reporting so that the Inquiry can get a -- first to
12 establish the truth that he did make that report.

13 Secondly, to obtain his comments, if he has any,
14 about the circumstances in which he obtained that
15 information.

16 Thirdly, to permit the Inquiry to ask why he
17 obtained it.

18 That is the sort of thing I anticipate that you
19 would require in a decision-making process?

20 MR SUMMERS: Quite, because it is the Inquiry walking
21 through the requirements of article 6 and article 9 --

22 THE CHAIR: If it occurs quite frequently, as I think it
23 does sufficiently often to fit that description, then it
24 will be permissible to say, "This is category F",
25 provided that F is explained in the documents what it

1 means?

2 MR SUMMERS: It is hard to say. I don't, on behalf of the
3 Commissioner, want to be held to a particular formula.

4 THE CHAIR: I don't mean to press you.

5 MR SUMMERS: Seeing that the rationale, as I have already
6 conceded, may be the same or similar across different
7 exercises one would, I expect, hope to see some way in
8 which that rationale has ... or it is documented that
9 rationale has in fact been applied to the particular
10 facts.

11 If it were to become nothing more than -- I am not
12 suggesting what you have in mind, Sir, is this at all --
13 the further it gets towards appearing to be a simple
14 stamping exercise, there are three options, if it is
15 either A, B, or C, pick up the appropriate stamp, then
16 that prevents difficulties. If the rationale is the
17 same but has clearly being thought about discretely in
18 relation to this particular tranche of disclosure, then
19 that fear evaporates.

20 THE CHAIR: Quite often the rule 9 requests -- the requests
21 that we make to witnesses state and non-state for
22 witness statements -- explain in fair detail why it is
23 we are seeking answers to particular questions.

24 First of all, they are shown the package of
25 documents, there is a series of standard questions, but

1 in cases of if I can put it like this, non-standard
2 deployments or where these sorts of issues arise, we
3 very often include specific questions relating to that
4 aspect of the deployment.

5 That would be capable of being taken into account,
6 would it not, in the exercise of seeing whether we have
7 adequately recorded our reasons for disclosing this data
8 to that individual?

9 MR SUMMERS: If I follow the point correctly, almost by
10 incorporation --

11 THE CHAIR: Yes.

12 MR SUMMERS: -- by looking at what we are asking about, that
13 demonstrates the necessity. One can see the argument
14 for that --

15 THE CHAIR: I can't ask for anything more than that.

16 MR SUMMERS: The link between the necessity and the question
17 and the purpose that the Inquiry is pursuing then
18 becomes almost a linear progression, but of course again
19 in terms of accountability one would not want to be in
20 a situation where one has to piece together multiple
21 sources. It is preferable if the rationale is in one
22 place and one place alone, even though that may be
23 simply cutting and pasting from one document into
24 another quite literally.

25 THE CHAIR: It is bound to be, given the number and scale of

1 requests that we are making.

2 I am grateful for that helpful advice.

3 MR SUMMERS: Thank you, Sir.

4 The final point, and it is really what I said at the
5 beginning in that sense, is all of these consideration,
6 in our respectful submission, arise before article 14.
7 This is about what the data controller is doing and its
8 lawful basis for doing it, quite separate -- I am not
9 going to trespass into it now -- is then when what the
10 consequence of article 14 might be.

11 THE CHAIR: You use the word "before", I would prefer
12 "distinct from".

13 Subject to what is going to be submitted on
14 article 14, at the moment I don't see that they are
15 necessarily sequential activities. Necessity is
16 a freestanding obligation which applies throughout. The
17 need to record things is a freestanding obligation which
18 applies throughout.

19 MR SUMMERS: I think as a matter of data protection doctrine
20 it would be said that it does arise first, because you
21 have to establish the lawful basis for any processing.
22 If you don't get over that initial hurdle, if you don't
23 have a lawful basis, then you shouldn't be processing at
24 all and data subject rights are not engaged because
25 there should not be any processing.

1 When thinking about the lawful basis for that which
2 you are doing, that comes first. Then the question is,
3 you are through the gateway, I have a lawful basis, how
4 then must I process in order to reflect -- well, first
5 of all carry the burdens that I carry as a data
6 controller but also to reflect the rights and interests
7 of data subjects, if that is where, obviously, those
8 rights come into play.

9 THE CHAIR: The moment that the files -- I am not suggesting
10 that it happens like this literally -- land on the
11 Inquiry's doorstep, we are processing it, we have
12 received it.

13 MR SUMMERS: Subject to technical issues about how manual
14 files are organised and whether they are to become
15 digital or not, but putting those arid points aside --

16 THE CHAIR: Leaving aside the unsorted manual files, but
17 these are not unsorted the manual files, they are sorted
18 manual files.

19 MR SUMMERS: Subject to that, yes, that is right.

20 That shouldn't, frankly, Sir, in the light of
21 everything that has been written, nobody is suggesting
22 quite rightly -- and everyone agrees -- that the lawful
23 gateways are there. All that is being added is a level
24 of detail through what I am saying on behalf of the
25 Commissioner, is that when you are then deciding

1 discrete issues such as sequencing then you need to go
2 back to those touchstones first, is it necessary to do
3 that? That is not going to be a complicated exercise by
4 any means at all, but that is the first stage in our
5 respectful submission which then may be coloured and
6 influenced or amended in the light of your
7 decision-making about article 14, that we will have to
8 see in due course.

9 These points in our respectful submission are
10 freestanding and do logically come before, whether it
11 makes any difference ultimately at the end of the
12 equation is another matter.

13 THE CHAIR: Thank you very much.

14 The next issue, Mr Facenna, I am afraid as always
15 I shall invite you to get to your feet first.

16 The suggestions that you make in paragraphs 84 and
17 88 to 93 are what I would like to look at next.

18 Further submissions on behalf of the Non-police, Non-state

19 Core Participants by MR FACENNA

20 MR FACENNA: Sir, before we do that, can I just give you two
21 or three evidential points arising out of the
22 submissions that have been given, particularly arising
23 out of Ms Steel's submissions.

24 THE CHAIR: Indeed you may, but I am not intending that this
25 should be conducted like litigation where counsel opens

1 the point and then replies to it, but of course you may.

2 MR FACENNA: It is not a reply.

3 THE CHAIR: You are attempting to assist me and I'm grateful
4 for it.

5 MR FACENNA: I want to assist you on one point which you
6 raised that was about evidence as to psychological harm.
7 I think you said that you have not seen any recent
8 evidence and suggested the only evidence you had seen
9 related to just general delay.

10 I have been asked to remind you of a witness
11 statement which was filed by one of the solicitors,
12 Harriet Wistrich, on 31st --

13 THE CHAIR: Yes, that was what I was referring to.

14 MR FACENNA: Yes.

15 THE CHAIR: From memory, and no doubt imperfectly expressed.

16 MR FACENNA: May I ask you to go back and read that witness
17 statement. There are two points which arise out of it.

18 At paragraph 11 it talks about ongoing distress.
19 That is related to not knowing the truth of what
20 happened as opposed to delay in the general process.

21 So there is evidence there, it also covers ...

22 THE CHAIR: Yes. Again I'm speaking from memory, I have not
23 read the statement recently. From memory, what she said
24 was there was ongoing distress as a result of not
25 knowing what happened.

1 She cited, in quotation marks, from a psychiatric
2 opinion, unspecified both as to author and subject,
3 something about psychiatric distress. I am misquoting
4 the words --

5 MR FACENNA: I hadn't seen the document until the
6 lunchtime adjournment, so I am not really in a position
7 to make submissions on it. I suppose all I am asking
8 you to do is in the light of the comments which you made
9 go back and re-read it.

10 THE CHAIR: I had that in mind. As I say, I may well have
11 expressed it imperfectly. But I have never seen
12 a psychiatric report relating to an individual saying,
13 "This individual is suffering psychiatric harm as
14 a result of [whatever the point may be]" except for
15 officers who have put psychiatric evidence in in
16 support of their anonymity applications.

17 MR FACENNA: The point I have made, which is please go back
18 and read that witness statement.

19 Secondly, I can't really put the general point more
20 powerfully than Ms Steel put it, which is that it is in
21 a sense obvious to any rational human being that these
22 are people suffering ongoing trauma and distress and
23 I understand that you have had individual meetings with
24 some of the core participants where that has been
25 strongly expressed.

1 THE CHAIR: Yes, I have.

2 As a general proposition I accept it. It is well
3 beyond curiosity as to what happened. It is: I want to
4 find out what happened to my life and why I was
5 deceived. It is a very powerful, and in the context of the
6 situation of people like Ms Steel, human and
7 unanswerable point.

8 I am not seeking in any way to denigrate it.

9 MR FACENNA: My point simply: it is there and it is relevant
10 to the submissions that we make about being able to
11 exercise rights over one's own personal information now.

12 The second point which arose was in relation to the
13 point that you made I think in response to Ms Steel that
14 you had not yet seen any evidence, bearing in mind you
15 had not reached the stage of the period of time where
16 the relationships took place, if I can call it that.
17 You had not yet seen any evidence of a great deal of
18 personal information that one might expect being in the
19 documents. I think you said you would not expect that
20 to be the case.

21 THE CHAIR: May I express myself more clearly, if I have not
22 made myself understood.

23 There is a good deal of personal information in the
24 reporting. What there is not is anything about
25 a relationship -- an intimate relationship between the

1 undercover officer and a member of the opposite sex,
2 either upon whom he was reporting or who were in some
3 way associated with the person on whom he was reporting.

4 MR FACENNA: It may be a function of you just not having
5 seen the documents yet. You will have seen in our
6 submissions that we refer to a disclosure that the
7 Investigatory Powers Tribunal has ordered in Ms Wilson's
8 case. She has had disclosed to her well over 100 -- I
9 think almost 200 -- pages of documents, obviously with
10 redactions but that certainly does contain a great deal
11 of detail about the relationship between the officer and
12 Ms Wilson.

13 THE CHAIR: In which case I stand corrected. It is not
14 a set of documents I have seen. I was merely expressing
15 what may be an ill-informed view about the lack of
16 likelihood that an individual officer would report on
17 the deceitful intimate relationship that he was having
18 with a member of the target group.

19 MR FACENNA: From what we have seen from the documents
20 disclosed in that other process there is that material.
21 Moreover Ms Wilson has found that extremely useful and
22 interesting for the purposes of jogging her own memory,
23 thinking about her evidence. There is material in there
24 for example which suggests that senior officers were
25 authorising the purchase of gifts in the context of that

1 relationship and that kind of thing. That is just is
2 stuff that would have been known about until the
3 personal information has been handed over.

4 THE CHAIR: Yes, that is a disclosure of the files,
5 effectively, to her.

6 MR FACENNA: It is a disclosure of the original documents
7 with redactions, yes.

8 THE CHAIR: Yes.

9 Of course the Investigatory Powers Tribunal is
10 a court and is so not subject to the data protection
11 requirements.

12 MR FACENNA: It is subject to them. There is an exemption
13 which applies subject to proportionality and other
14 restrictions. But, frankly, it is difficult to see why
15 that is relevant in this case. Our submission is that
16 if there is personal data this Inquiry is subject to an
17 obligation to disclose it.

18 THE CHAIR: I was just thinking that no one was suggesting
19 the Investigatory Powers Tribunal should show the
20 documents to Ms Wilson before it was shown to anybody
21 else to redact.

22 MR FACENNA: No, we have not suggested that either.

23 THE CHAIR: No.

24 MR FACENNA: We accept that a redaction process for the
25 purpose of compliance with a restriction order comes

1 first. We never said anything to the contrary.

2 THE CHAIR: Yes.

3 MR FACENNA: We are certainly not suggesting that there
4 should be completely unredacted disclosure to data
5 subjects without the restriction orders being made
6 first.

7 What we do say is that it is of note and interest
8 that in that context precisely the same -- well,
9 precisely the same documents in fact not just the same
10 kind of documents -- have been disclosed to the data
11 subjects. Redactions have been made to them and it has
12 been an enlightening and useful experience for the data
13 subject.

14 THE CHAIR: Yes. I very much hope that when documents
15 relating to data subjects who are core participants or
16 for that matter witnesses we approach for evidence are
17 shown these files, they will likewise find them
18 illuminative. The question is when they should see
19 them.

20 MR FACENNA: It is partly that which takes me to my second
21 point, this discussion about sequencing and timing has
22 slightly lost another aspect of the point, which is that
23 at the moment, as I understand it, is disclosure based
24 on a relevance and necessity analysis and partly taking
25 a utility point. Of course our position is that that

1 doesn't comply with obligations under the General Data
2 Protection Regulations because the obligation is to
3 provide access to personal data, not simply that which
4 the Inquiry deems to be of utility and relevant and
5 necessary for its own purposes. So it is not just
6 a question of timing, it actually goes to the substance
7 of the nature of the disclosure that we are talking
8 about.

9 THE CHAIR: Yes.

10 MR FACENNA: Which is partly why we suggest this is
11 a process which would avoid us spending four years
12 litigating on whether article 15 applies and dealing
13 with individual subject access requests.

14 THE CHAIR: There is an aspect of evidence gathering by the
15 Inquiry which must involve disclosure to an officer
16 without prior or indeed any disclosure to the people
17 upon whom he was reporting. That is where there is
18 a restriction order in respect of both real and cover
19 names, which is not qualified by the observation that
20 this must not, as far as is possible, prevent the public
21 investigation into the deployment.

22 In other words, typically those deployments which
23 were dangerous, those deployments which, for reasons of
24 public interest of a miscellaneous kind have to be dealt
25 with in closed. It occurs to me that perhaps that

1 situation had best be addressed, because it does arise.

2 MR FACENNA: I can see that. In principle our position is

3 that everything that we are saying about disclosure and

4 notification is subject to the existing process on

5 restriction orders. We have not sought to re-open that.

6 THE CHAIR: That I understood to be your position, but I'm

7 glad that is clear.

8 MR FACENNA: Those are the only points I had on the

9 suggestions that have been made.

10 THE CHAIR: That is very helpful.

11 Your written submissions, paragraphs 84 and 88 to

12 93, in effect, using non-state core participants and in

13 particular the Undercover Research Group to locate

14 individuals named in reports who might assist with the

15 investigation conducted by the Inquiry, and notifying

16 them of the possible interest of the Inquiry. I have my

17 doubts about those things.

18 You rightly point out that the Inquiry cannot

19 subcontract these tasks to -- however well

20 intentioned -- an individual who is a private sector

21 operator, especially one who would seek to be

22 remunerated for his efforts. So he would in principle

23 be no different from a private investigation firm,

24 albeit entering into the process for non-commercial

25 purposes.

1 MR FACENNA: Our submissions on this were in response to a
2 specific question which had been asked --

3 THE CHAIR: Yes.

4 MR FACENNA: -- as to whether the Inquiry should seek the
5 assistance of core participants.

6 Our answer to that in principle is yes. You should.

7 THE CHAIR: Yes.

8 MR FACENNA: We include the Undercover Research Group within
9 that broad category.

10 THE CHAIR: I had in mind not using the Undercover Research
11 Group, as it were, as a firm of private investigators
12 but inviting non-state core participants, including the
13 Undercover Research Group to tell the Inquiry if named
14 individuals, if they knew the addresses of named
15 individuals and were willing to provide them to the
16 Inquiry.

17 Now that raises questions about disclosure of --

18 MR FACENNA: Yes.

19 THE CHAIR: -- data belonging to the individuals concerned,
20 without necessarily their consent. And I know that on
21 occasion when this has happened that Mr O'Driscoll --
22 for it is he -- has carefully sought legal advice before
23 doing what it is that he decided to do.

24 I am thinking out aloud of ways around this. For
25 those non-state core participants who are in touch with

1 individuals named in the reports as friends, family
2 members, even acquaintances, there is no reason why the
3 Inquiry should not be asked, "Do you mind if we approach
4 them to say that the Inquiry may seek evidence from
5 them, and will you provide to us your address or means
6 of communication for onward despatch to the Inquiry?"

7 That, I think, would probably preserve everybody's
8 rights and would manage the matter sensitivity.

9 MR FACENNA: Those are individuals for whom the Inquiry
10 already has contact details?

11 THE CHAIR: No, let me take a typical example. A non-state
12 apparent who happens to know three of the individuals
13 named in intelligence reports that affect him or her,
14 and happens to know and know where they live, remains on
15 good terms with them. They may be able to provide
16 valuable information to the Inquiry which the Inquiry
17 would wish to receive.

18 The idea of them, of their own accord, as a result
19 of what they have been told by the Inquiry in confidence
20 going to their friend or acquaintance and saying, "Do
21 you realise that you have been named in this? Is there
22 anything you want to say to the Inquiry about it?"

23 Doing it that way I don't think properly protects
24 everybody's rights.

25 MR FACENNA: That would be subject, apart from anything

1 else, to the terms of the confidentiality order.

2 THE CHAIR: Yes, and I think that has to be absolutely
3 strict so that if there were to be any departure from
4 the prohibition on talking to anyone other than lawyers
5 about it, that prior permission would have to be sought
6 from the Inquiry.

7 MR FACENNA: Yes, I think that is what we envisaged. It
8 would be disclosed to those with whom the Inquiry is
9 already in contact. There would be a procedure by which
10 someone could I say, "Actually, I know these other
11 people, can it be disclosed to them" or, "Here are their
12 details", which is the point you are asking me, or
13 alternative they might say, "You know what, there is
14 a member in this group who is not named in the document
15 but was a regular attendee of the group, would it be
16 possible to disclose the contact details ..."

17 THE CHAIR: Yes, there are a number of things of that kind.
18 To which the answer would be -- subject to the Inquiry
19 being provided with a reasonable assurance that what was
20 said was right, I mean it is very easy, I know
21 Joe Bloggs, he's my next door neighbour, I knew him
22 40 years ago and he's not changed house and we are still
23 on good terms.

24 It would be the easiest thing in the world for the
25 Inquiry then to say, "Yes, of course, ask him whether

1 he's willing to provide us with his address or
2 communication details and, if it is right, forewarn him
3 that the Inquiry will wish to get in touch with him, or
4 may wish to get in touch with him". That's the sort of
5 process I had in mind.

6 MR FACENNA: Yes, so that's one aspect of it.

7 I'm not sure, maybe I misunderstood you, I think you
8 were suggesting that short of by chance disclosing and
9 then people within the ring realising there are others
10 they know, there might be a prior step which is slightly
11 closer to what we are suggesting, which is going to the
12 non-state core participants as a group, including the
13 Undercover Research Group, and saying, "Does anybody
14 know the following individuals?" With their names and
15 possibly some details about groups or time periods.

16 That is closer to what we suggest. Our position is
17 that that would be a proportionate -- provided you are
18 not disclosing anything other than the name and the
19 group, that would be proportionate --

20 THE CHAIR: Strictly it is personal data and it infers
21 a political opinion, but that would be permissible?

22 MR FACENNA: Yes. It is all a matter of fact and degree in
23 each case. But assuming it was someone who was a member
24 of a group which is already somehow represented amongst
25 the core participants, so it not a surprise that someone

1 who was in the Cardiff Anarchists' Association, or
2 whatever, is mentioned in the documents and there is
3 already some contact with the Inquiry that would not
4 seem to be necessarily an unjustified or
5 disproportionate interference, but you would have to
6 take a view on any individual case.

7 THE CHAIR: I am not at the moment persuaded that it is
8 either right in principle or sensible for the Inquiry to
9 commission the Undercover Research Group to act as
10 a private investigator.

11 MR FACENNA: I do not think we were going that far. I think
12 the position, as we put it in 88 and 89, is that the
13 Undercover Research Group is a respected group which has
14 the trust of non-state core participants. They have
15 a great deal of expertise, they have proper security
16 arrangements in place. They already have much of this
17 data. They are already a first point of contact for
18 many people with whom the Inquiry might subsequently
19 wish to be in contact. They are moreover willing to
20 assist the Inquiry in cases where -- indeed, I am
21 reminded the Inquiry has already successfully sought
22 their assistance in other cases.

23 THE CHAIR: We have. I welcomed the assistance of the
24 Undercover Research Group, I am simply speculating out
25 loud about the limits of what it would be right for me

1 to ask them to do.

2 I have absolutely no difficulty with the Undercover
3 Research Group providing the Inquiry with the names of
4 those who may be able to assist and with seeking the
5 permission of the Inquiry to approach them to see if
6 they are willing to do so.

7 MR FACENNA: Yes.

8 THE CHAIR: What I am not prepared to do is to give them
9 a wide-ranging roaming commission, which you are not
10 suggesting.

11 MR FACENNA: We are not suggesting that.

12 THE CHAIR: No.

13 MR FACENNA: I mean, we are in a sense talking about the
14 details. If in principle it is something which the
15 Inquiry considers lawful and proportionate and which you
16 are willing to do, I mean there might be arguments
17 either way as to whether it is better to leave it on
18 a relatively informal ad hoc basis or whether in fact it
19 might be more appropriate to agree a memorandum of
20 understanding or some kind of framework in which that is
21 going to operate.

22 THE CHAIR: I think there would have to be a document, so as
23 to make clear what could and could not be done so that
24 no one is in any doubt about it. It would be very
25 unfortunate if there were misunderstandings instant.

1 MR FACENNA: I think that is right. Aside from anything
2 else, they would probably at that point be a processor
3 perhaps on behalf of the Inquiry as a data controller.
4 There would need to be those arrangements put in place.

5 On the question of costs ... you probably have to go
6 through a procurement exercise to do the kind of thing
7 you are suggesting anyway. I think we are merely making
8 point that if this turns out to be a productive exercise
9 the Undercover Research Group is actually assisting the
10 Inquiry to get in touch with people who it is not
11 otherwise in touch with, it would be right that there
12 would be some recognition of the cost and the resources
13 involved in doing that.

14 I say no more than that at this point, it partly
15 depends on how it develops.

16 THE CHAIR: I would not wish to hold out any expectation
17 that I would authorise the expenditure of significant
18 sums of public money on the activity. I am afraid
19 I would require the enthusiasm of Mr O'Driscoll and his
20 wish to help the Inquiry to get to the truth and indeed
21 to find it out himself independently, as he's entitled
22 to.

23 I think I would have to rely on that more than on
24 the possibility that he might earn money from it.

25 I really can't --

1 MR FACENNA: I should say, that I would not want his
2 position to be misrepresented. It is not my
3 instructions that this offer of cooperation is subject
4 to that or indeed that is such an expectation.

5 THE CHAIR: Yes.

6 MR FACENNA: I think we simply thought it right to say that
7 if this is something in principle you are going to do
8 and turns out to be productive and useful, the Inquiry
9 ought to bear in mind the fact that there will be these
10 resource and cost implications --

11 THE CHAIR: The Inquiry already, on a case-by-case basis,
12 reimburses Mr O'Driscoll's costs of travelling to London
13 to meet with the Inquiry or with his lawyers.

14 I am told two things. The people at the back are
15 struggling to hear what I am saying --

16 It is not me, it is Mr Facenna. I am very sorry.

17 It is a habit that is very difficult to overcome
18 when I have spent a lifetime of talking either to
19 a judge from Mr Facenna's position or to counsel from
20 here. I am afraid I'm bound to lapse again, I apologise
21 in advance.

22 The microphones only help to some extent. They were
23 causing an awful problem before.

24 MR FACENNA: Does that deal with that point?

25 THE CHAIR: Yes. It does. We have spoken about the point

1 in that slightly circumlocutory manner but probably it
2 is better it is put in writing in due course by both
3 sides so that we each know what we are talking about
4 definitively.

5 MR FACENNA: Yes.

6 THE CHAIR: I would like to return, if I may, to a topic in
7 this context which is the disclosure, at whatever stage
8 may be appropriate, of the investigation files to groups
9 of non-state core participants.

10 Is there any problem with the lawfulness of doing
11 that?

12 MR FACENNA: That's a high level question, I think, isn't
13 it? That doesn't -- is not amenable to a simple
14 straightforward answer.

15 I think, as we were discussing this morning before
16 the short adjournment, our view is that it is
17 possible -- in other words lawful and proportionate --
18 to disclose documents to a group of non-state core
19 participants who are named in those documents, but
20 I think what I took issue with, and I would still take
21 issue with, is the idea that you could do that without
22 some individual assessment of particularly sensitive
23 category. Namely the ones referred to in 121(b) or
24 something similar.

25 Because it seems to us that inevitably there is

1 a risk -- if you are going to do that, there is a risk
2 that there will be personal data in there which is
3 within one of those very sensitive categories which the
4 data subject would strongly object to even those who are
5 also named in the documents seeing. It simply seems to
6 us it can't be lawful to proceed on the basis that you
7 are going to disclose, ie process that data, disclose it
8 to a range of other individuals without having some
9 process of assessment as to the proportionality in
10 relation to particularly sensitive bits of data.

11 At a high level, it is our position that subject to
12 the kind of relatively minimal, I should say redactions
13 to then annexes, we assume that the annexes were
14 designed to be relatively typical of documents we are
15 talking about.

16 THE CHAIR: Yes.

17 MR FACENNA: In our mark-up of annex A, which is how it
18 would look on our approach --

19 THE CHAIR: You have only blanked out the bit about the
20 attempt to impress the boyfriend?

21 MR FACENNA: Exactly. That's the only piece of information
22 that falls into the detailed -- sorry, I am looking at
23 the publication.

24 THE CHAIR: Yes.

25 MR FACENNA: Yes, exactly. In the example which is

1 disclosure to the group subject to confidentiality
2 obligations there is one small redaction. It didn't
3 seem to us that that would be a particularly onerous
4 task, assuming this is relatively typical of the
5 documents we are talking about.

6 THE CHAIR: It is not whether or not it is typical. It is
7 designed to illustrate in concrete form a problem.

8 MR FACENNA: Yes.

9 THE CHAIR: Your answer, I think, is that for a document
10 such as that, which contains information such as that,
11 about an individual to whom it was not proposed to show
12 it, then it would have to be redacted beforehand.

13 MR FACENNA: Yes. That particular piece. Because
14 otherwise -- well, I mean, the intrusion into private
15 life is obvious, if the fact that these two individuals
16 were in a sexual relationship at the time was not known
17 either to those who were there at the time or has not
18 been made public by either of them subsequently.

19 THE CHAIR: As it happens, in the example we have given you
20 it is a relatively straightforward exercise. In other
21 real life instances, it is far from straightforward.

22 MR FACENNA: I don't doubt it, that there are other cases.
23 I can only go on the examples we have been given.

24 THE CHAIR: Of course.

25 MR FACENNA: Moreover, it seemed to us that this is broadly

1 consistent with the approach which is already set out in
2 paragraphs 31 to 53 of the restriction protocol.

3 THE CHAIR: Yes.

4 MR FACENNA: It seems to us unavoidable. Either you have
5 a situation where you don't disclose the documents --
6 well, there are various options.

7 You can disclose to individuals only the data
8 relating to them, which for the reasons set out in the
9 note from November is obviously a massive burden and
10 frankly the documents might be meaningless in many cases
11 ...

12 THE CHAIR: (a) it would be a massive burden.

13 (b) what would come out would be unintelligible.

14 MR FACENNA: Yes. That seems to be a non-starter.

15 At the other end of the scale you don't disclose
16 anything to anyone because of the risks. That is
17 a non-starter because you need to actually obtain
18 evidence from non-state core participants and other
19 witnesses.

20 THE CHAIR: Precisely. I simply couldn't conduct the
21 Inquiry without giving them the opportunity to provide
22 relevant information to the Inquiry.

23 MR FACENNA: Yes.

24 THE CHAIR: And this is a method of stimulating it.

25 MR FACENNA: So we are somewhere on that spectrum. The end

1 of the spectrum at which you provisionally seem to be at
2 is we can disclose unredacted documents to a group.

3 THE CHAIR: Yes.

4 MR FACENNA: And because it is only going to that group and
5 is subject to confidentiality obligations, which you
6 would expect to be abided by, that that is
7 a proportionate way of proceeding.

8 THE CHAIR: Yes.

9 MR FACENNA: I think we are not far off from that, except
10 that we need to be more towards the spectrum of saying
11 "there are some things in relation to which it would not
12 be proportionate to take that approach".

13 So there do need to be some minimal redactions.

14 I appreciate that that then takes you from the situation
15 where you would not have to have individual assessment
16 of documents to a situation where you do have to have at
17 least some high level individual assessment of
18 documents.

19 I also appreciate that that is a process which is
20 obviously going to be more difficult in relation to
21 documents from the 1960s than it possibly is in relation
22 to completely digitised documents subsequently, so there
23 might be some level of automation that could be used in
24 relation to other categories of documents but --

25 THE CHAIR: I hesitate to say anything about digital

1 documents, because I'm aware, as a nonexpert, of the
2 problems that we have had already. I am far from
3 confident that it is a push-button exercise.

4 MR FACENNA: No. I think as the restriction protocol
5 envisaged, there would have to be some level of
6 assessment by Inquiry staff.

7 I should say, as far as I'm aware I'm not involved
8 in that inquiry but a similar process is and has been
9 undertaken by the Inquiry into child sexual abuse and by
10 other inquiries. This is not a novel problem.

11 THE CHAIR: Right.

12 MR FACENNA: The question really then just becomes what is
13 proportionate and lawful. It seems to us that it falls
14 on the wrong side of proportionality to disclose
15 material which the data subject may feel very strongly
16 they would not wish to be disclosed even to other data
17 subjects. That's why we have suggested the categories.

18 THE CHAIR: That point I can readily understand, I and the
19 Inquiry team need to think carefully about that.

20 I speak personally, it is obviously something that
21 I would wish to achieve if it were practicable, and
22 I know you don't put practicality ahead of lawfulness,
23 quite rightly in principle, but I do have to bear in
24 mind what can and cannot be done practically. It may be
25 the answer would be a particular number of documents

1 couldn't be disclosed even within a confidence ring.

2 MR FACENNA: It obviously is fact specific. It is a matter

3 that you and your team have to give further thought to.

4 In circumstances where at the moment the principle we

5 are talking about is disclosure only to core

6 participants or witnesses and not to thousands of

7 individuals, and in circumstances where those

8 individuals would need to be identified, whether they

9 already have legal representatives that the Inquiry is

10 communicating with would need to be identified, the

11 packs of documents would need to be put together and

12 checked. It does slightly beg the question exactly how

13 much additional work would it be for someone to go

14 through those documents to identify these particularly

15 sensitive categories and information. I certainly don't

16 say it is no work but it is also important not to

17 exaggerate or overestimate what that might be.

18 THE CHAIR: It varies from deployment to deployment and

19 officer to officer.

20 MR FACENNA: I can see that. I don't know whether the

21 Commissioner might have submissions on that, but it

22 seems to us the truth is probably some of those who I'm

23 representing today would not mind at all and would say,

24 "Yes, we should see everything" Probably a minority.

25 Given the range of interests and the range of

1 impacts on them, there will undoubtedly be those who
2 I represent who are nervous even about the suggestion
3 which we have put forward as a pragmatic compromise,
4 because they simply don't know what is said about them
5 in the documents.

6 THE CHAIR: Furthermore, I can conceive -- as you would not
7 be constructed to make submissions on -- but I can
8 conceive that there are people who are not represented
9 by you --

10 MR FACENNA: Yes.

11 THE CHAIR: -- who would find disclosure of some of what is
12 in the reports to others -- even subject to a confidence
13 ring -- as a prospect that they did not wish to occur.

14 MR FACENNA: Yes. I think we have not closed our mind to
15 the possibility that on an individual basis that the
16 Inquiry might need to take its own view that is it is
17 not appropriate to disclose that in the same group way.
18 We can see that.

19 THE CHAIR: Before the shorthand writers have their break.

20 Mr Summers, I am sorry, I should have raised that
21 with you. The lawfulness of disclosure within
22 a confidence ring to non-state core participants who
23 have been reported upon in the batch of reports which it
24 is proposed to be disclosed to them but which contains
25 a lot of information about others.

1 MR SUMMERS: For the reasons you have articulated, Sir, I'm
2 not sure I can add anything much more to that which
3 I said earlier. It comes back to the question of
4 necessity and the balance will fall somewhere
5 differently, precisely because of the confidentiality
6 requirements. It is probably of no assistance
7 whatsoever, but I think that is it.

8 THE CHAIR: The last thing I want you to do is to try to
9 force you to say something that you do not wish to say,
10 as I hope I have made clear.

11 MR SUMMERS: Thank you.

12 MR FACENNA: Just to inject some more into that, the
13 relevant provision -- strictly speaking it is relevant
14 to article 15, but it sets out the considerations -- is
15 paragraph 16 of schedule 2 to the Data Protection Act.
16 It is behind tab 6 in the authorities bundle. The
17 pagination doesn't go all the way through, so you have
18 to turn to schedule 2, and page 11 within schedule 2.

19 THE CHAIR: Schedule 2, paragraph 16.

20 MR FACENNA: My apologies to the shorthand writer.

21 THE CHAIR: It will not be a long delay.

22 MR FACENNA: Do you have that?

23 THE CHAIR: I am just turning it up. Hold on a moment.
24 Yes, protection of the rights of others.

25 MR FACENNA: This is in the context of article 15, so right

1 of access. Article 15, so far as it is provisional:

2 "Do not oblige a controller to disclose information
3 to the data subject, to the extent that doing so would
4 involve disclosing information relating to another
5 individual who can be identified from the information."

6 It doesn't apply, as you see under subparagraph 2,
7 where the individual has consented or it's reasonable.

8 Then, under 3:

9 "In determining whether it is reasonable the
10 controller has to have regard to all the relevant
11 circumstances, including type of information, any duties
12 of confidentiality [this is where notification becomes
13 relevant] any steps that have been taken with a view to
14 seeking consent, where the other individual is capable
15 of giving consent and any express refusal of consent."

16 Those are particularly on type of information, which
17 is why we have suggested those categories. That is the
18 relevant process.

19 THE CHAIR: Yes. I can readily conceive of circumstances in
20 which even if we were to adopt a no expense and no time
21 spared approach we simply could not locate the
22 individual about whom there was reporting of sensitive
23 data and so would have to make our own decision.

24 MR FACENNA: Yes. Provided you have taken proportionate
25 steps at the outset, which takes us back to the

1 beginning, it becomes a much easier decision later on,
2 because you have done everything you could conceivably
3 do to let them know.

4 THE CHAIR: Point understood.

5 Ten-minute break for the shorthand writer.

6 (3.03 pm)

7 (A short break)

8 (3.14 pm)

9 THE CHAIR: Mr Facenna, I hope Ms Ailes has forewarned you
10 of a point I want to raise with you, a small one but it
11 illustrates a possible difficulty.

12 MR FACENNA: She has.

13 THE CHAIR: In which case you know what it is but the rest
14 of the world doesn't. In examples of annex A, which
15 your side has redacted for confidence ring and open
16 publication purposes, in the confidence ring document
17 there is no reference to sexuality, it simply reads,
18 "The entire outburst was motivated principally by an
19 attempt to [blank] Chris Carter".

20 In the public gist it says:

21 "Comment by the reporting officer about the
22 sexuality of one of the meeting participants."

23 MR FACENNA: Yes.

24 THE CHAIR: I think the two are inconsistent, aren't they?

25 MR FACENNA: Yes. So the way we see it working -- so taking

1 the first example that goes to the ring, the redaction
2 would be applied to everyone other than A and C, because
3 it is their personal data so they would see it.

4 THE CHAIR: Yes.

5 MR FACENNA: In the light of that, they would be in
6 a position to make representations when you subsequently
7 come to publication at the end of the process. It is
8 conceivable either they might say it is fine, we are not
9 worried, or they say, we certainly don't want that
10 disclosed either publicly or even to anyone within the
11 group.

12 If it is the latter, then I can see that the gist
13 that you give would have to be reconsidered. Because
14 you can -- for those who have had the confidentiality
15 ring version and then see a public version, they would
16 be able to put two and two together.

17 THE CHAIR: Yes.

18 MR FACENNA: At the publication stage at the very end you
19 would have to take a judgment and I can see that there
20 are circumstances in which the gist would not be
21 appropriate.

22 THE CHAIR: It possibly illustrates how difficult even if it
23 is done on a line-by-line basis the task might prove to
24 be.

25 MR FACENNA: To some extent. I take that point. I think

1 the way we would put it is that if you do it this way --
2 I think in the example A and C are contactable --
3 I can't remember, I won't go back to it. The idea is
4 they would have an opportunity to say what they want to
5 say about it, so by the time you come to publication you
6 would not be left in the dark thinking: is this
7 proportionate or not? You would actually have relevant
8 submissions from the data subject on it.

9 THE CHAIR: The next topic upon which I seek your
10 submissions is one which you despite the terms of the
11 note put out in November have not actually addressed.
12 It is of fundamental importance.

13 That is how are we to deal with hearings where there
14 are matters that for privacy reasons have been redacted
15 from documents. I am not talking about minor redactions
16 but large scale redactions. How can we conduct the
17 hearing?

18 If you would like to take us to an example, annex B,
19 that would, I think assist.

20 MR FACENNA: Annex B is the family justice campaign.

21 THE CHAIR: Yes. Said for the purposes of confidentiality
22 ring no redactions are needed, but for the purposes of
23 the public hearing redaction of names is required.

24 MR FACENNA: Yes.

25 THE CHAIR: One can obviously foresee circumstances in which

1 personal details would need to be redacted. You don't
2 make any redactions for political opinions, even though
3 they are expressed.

4 I wonder how we can deal with evidence about events
5 that are recorded in documents when the documents
6 themselves are significantly redacted?

7 MR FACENNA: In this example, the only thing that we have
8 suggested redacting are the surnames. That would not
9 seem it to me a particularly onerous problem if we are
10 having a public hearing, provided that no one refers to
11 the surnames which are blacked out in the documents.
12 And people are referred to by their first names and
13 I can see there are alternative ways of doing it if you
14 wanted to get into the use of ciphers.

15 At least on this example it seems to us this is
16 a document which can be referred to in open court and
17 used in a public hearing.

18 THE CHAIR: But you only redact some of the names?

19 MR FACENNA: We have redacted the surnames, I think.

20 THE CHAIR: Bella?

21 MR FACENNA: I am sorry?

22 THE CHAIR: Bella? She is identified perfectly clearly, the
23 sister of the deceased woman.

24 MR FACENNA: Yes. This is paragraph 1.

25 These are the family members, that's right, of the

1 deceased person.

2 THE CHAIR: Yes.

3 MR FACENNA: Assuming that the justice campaign was a matter
4 of public record, and that the identity of the deceased
5 and the relevant members of the family are all in the
6 public domain through newspaper reports and so on, it is
7 not obvious to us why for data protection reasons there
8 would have to be any redaction of the first name?
9 Obviously the surname is obvious about the family
10 members.

11 THE CHAIR: Yes.

12 MR FACENNA: I think our view was that there are no privacy
13 or data protection concerns which would require you to
14 redact the names of the family members in this
15 particular example.

16 THE CHAIR: Can we then go on to suppose that there are
17 other documents which are about public events where some
18 of the same participants are identified and which are
19 not redacted because they playing a part in a public
20 events, but anyone putting two and two together would
21 have no difficulty in identifying them in documents from
22 which their surnames have been redacted.

23 MR FACENNA: Is this in the context where the individuals
24 are not themselves core participants?

25 THE CHAIR: They may or may not be. It doesn't matter.

1 MR FACENNA: It may make a difference, because you will have
2 had an opportunity to hear from them in relation to the
3 ...

4 THE CHAIR: I am now getting down to practicalities --

5 MR FACENNA: I understand that.

6 THE CHAIR: -- this is not just principle. It seems to me
7 that dealing at a public hearing with events of the kind
8 described at appendix B -- this is not taken from the
9 Lawrence campaign at all, but you --

10 MR FACENNA: I see the analogy.

11 THE CHAIR: -- will readily foresee that problems will arise
12 in relation to the investigation of the Lawrence
13 campaign, unless it is done publicly. If it can only be
14 done by reference to heavily redacted documents, does it
15 have to be done by heavily redacted evidence?

16 MR FACENNA: The redactions which have been applied at the
17 point of gathering evidence are not necessarily the same
18 as the redactions you are going to apply at the time of
19 publication. For reasons we have discussed, you will
20 have less redacted documents amongst those from whom you
21 are seeking evidence than you will when it comes to
22 a public hearing.

23 THE CHAIR: I'm talking about how we conduct hearings
24 where --

25 MR FACENNA: How you conduct a public hearing where there

1 are documents that are heavily redacted?

2 THE CHAIR: Where either the primary evidence or the primary
3 memory refreshing evidence is to be found in heavily
4 redacted documents for privacy reasons.

5 MR FACENNA: It is a difficulty that the first tier tribunal
6 on information rights deals with every week. You have
7 documents where some parts are publicly disclosed and
8 some parts are closed and you have to take a view as to
9 whether you can have -- in accordance with Browning,
10 which is a case where I think you sat on the tribunal,
11 you may recall, about the use of closed evidence
12 procedures in the Information Rights Tribunal, it
13 ultimately went to the Court of Appeal where
14 unsurprisingly they upheld the principle that insofar as
15 you can you do everything in open and at the point where
16 there is a real risk of disclosure of something that is
17 properly to be closed, to the minimum extent possible
18 you use a closed hearing.

19 I don't want to teach my grandmother to suck eggs.

20 THE CHAIR: That was the easy case of national security
21 redactions, with which I am thoroughly familiar.

22 MR FACENNA: Yes.

23 THE CHAIR: But privacy redactions in what is bound to be
24 occasionally a rather charged hearing room with people
25 wanting to have their say and to find out what happened,

1 where everyone has to speak in stilted terms and
2 carefully remember not to mention anybody's name, if we
3 are using ciphers, or surname if we are not, or where,
4 as I have indicated, the identity of the person named in
5 the report -- and so in the evidence -- can readily be
6 inferred from other documents, even if only their first
7 name is put in the report and in the evidence, how on
8 earth do I manage that evidence publicly?

9 MR FACENNA: It seems to me it is not -- the rights which
10 you are protecting are obviously different from national
11 security interests which arise in the Investigatory
12 Powers Tribunal, Special Immigration Appeals Commission
13 and in other contexts.

14 The approach ought to be no different as a matter of
15 fundamental principle, provided you can do something in
16 public without -- there is always the risk of slips and
17 accidents which is why, if you go into live stream you
18 have a delay or you take a decision not to live stream.

19 THE CHAIR: The decision which has been made, but is not yet
20 final, but it has been published, is that we will not
21 live stream for a variety of reasons.

22 MR FACENNA: Yes. I have to admit that there is --
23 I understand that there is a whole history of
24 submissions and correspondence on that, which I have not
25 been involved in.

1 THE CHAIR: No reason at all why you should be.

2 MR FACENNA: My understanding was that the consultation on
3 those issues is not completely closed.

4 THE CHAIR: No, it is not completely closed but I have heard
5 submissions and my very firm view is that we can't live
6 stream.

7 MR FACENNA: I understand that. It may be the case, and
8 I say no more about it, that that is a matter on which
9 those I represent, or some of them, wish to make further
10 representations.

11 THE CHAIR: Understood.

12 MR FACENNA: I understand that is possible.

13 Although you say we are talking about
14 practicalities, in a sense we are still talking, in
15 a relatively abstract level, at the level of generality.
16 If in principle you have documents which are so heavily
17 redacted or so mixed that it becomes impossible to have
18 cross-examination or legal submissions by reference to
19 them, then a view would have to be taken as to whether
20 that can properly be in public or live streamed without
21 a delay. I can see that.

22 Our starting position is that as much as possible of
23 this should be in public. But if there are privacy
24 rights which have justified redacting personal sensitive
25 information by the time of the public hearings, then the

1 extent to which the hearings are fully public or some
2 degree of public would have to be decided on the basis
3 of the relevant documents.

4 Leaving aside national security, the Competition
5 Appeal Tribunal which is a tribunal that I have more
6 experience in, perhaps, we are constantly dealing with
7 confidentiality ring documents. You undertake
8 cross-examination where you have to stop at one point
9 because counsel has identified they are moving on to
10 a confidential area. People leave the room. Those are
11 things which are dealt with in various different
12 tribunals.

13 I understand that is also what is happening in the
14 inquiry into child sexual abuse, on which I don't have
15 any experience, but maybe we could find out more about
16 that and make submissions on it. It seems to me that
17 these are not novel problems, and there are pragmatic
18 ways of dealing with them at the time. Certainly the
19 answer is not to have a closed inquiry.

20 THE CHAIR: That is the last thing I suggest.

21 What does worry me is where there are legitimate and
22 serious data protection concerns about private matters
23 and political opinions, I am scratching my head as to
24 how we can have a public hearing at which those issues
25 are fully and properly explored.

1 MR FACENNA: In a sense it goes back to the importance of
2 the notification and access rights at the beginning.
3 Because if you have done everything feasible and
4 possible to ensure that those whose personal data is
5 being processed know about it, have seen it, have had an
6 opportunity to make representations about it, have had
7 an opportunity to apply for any restriction orders, then
8 you will at least at that point have relative clarity
9 and be satisfied that the data subject's rights have
10 been guaranteed and have been met.

11 Then really all you are talking about is a question
12 of practicality based on the individual documents that
13 you are talking about. Either it is possible through
14 skilful counsel and proper management of the hearing to
15 ensure that there is no inappropriate disclosure or it
16 is not possible, in which case you need to look at
17 alternatives. It is difficult in the abstract to take
18 it further than that, I think.

19 THE CHAIR: Let us not beat about the bush. If it is not
20 practicable to do it by chopping in and out of open
21 sessions, then there would have to be a private hearing
22 about that deployment.

23 MR FACENNA: Subject to the obligations that the Inquiry is
24 under, I don't mean data protection obligations I mean
25 your obligations under the Inquiries Act and the

1 principles of transparency and openness, it is obviously
2 possible for you to take a view that consistent with
3 those principles you can't have a full public hearing in
4 some circumstances. I don't think we can ...

5 You can't jump to that premise and you need to do
6 your absolute best to be as open and transparent as
7 possible and to avoid the need to have private hearings,
8 is our starting point. But I do not think we can say
9 that there are no circumstances in which that would be
10 justified.

11 It may be if we are having a further round of
12 submissions anyway, that may be a point --

13 THE CHAIR: It was the critical point upon which I was
14 hoping to receive submissions today. If you want
15 further time to reflect upon it, it as we are going to
16 have another hearing, I will allow you to.

17 MR FACENNA: Our position on it is, I think, set out towards
18 the very end of our submissions on publication, which is
19 that at 125 onwards:

20 "If the above process is adopted then by the time at
21 which you are considering redactions for the purposes of
22 publication to the wider world you will have already
23 dealt with a lot of the difficult issues."

24 THE CHAIR: I am putting forward a hypothesis which is bound
25 to occur. That in relation to deployments of

1 significant public interest and of significant interest
2 to the Inquiry, it will not be possible to conduct
3 a fully public hearing about them for privacy reasons.

4 MR FACENNA: I am in no position to dispute that. Provided
5 that is not the starting point, in fact it is the very
6 last resort, that presumably would be lawful. I accept
7 that. If it really is the last resort and there is no
8 other way to do it effectively without serious risk to
9 fundamental rights, then in a sense it is obvious that
10 you can't proceed on that basis. Inconsistent with the
11 Human Rights Act, apart from anything else.

12 THE CHAIR: The Human Rights Act is less precisely defined
13 than the Data Protection Act and the regulation.

14 MR FACENNA: Yes. I mean the question that you will have to
15 consider when the time comes when you are looking at
16 a particular deployment or matter on which there is
17 going to be a hearing is to look at the documents, to
18 look at the witnesses, to have regard to any restriction
19 orders which are in place. By that stage there ought to
20 be a final determination as to which parts of the
21 documents are redacted and which parts are public. The
22 starting point, in accordance with principles of open
23 justice and those which apply under the Inquiries Act,
24 are that insofar as possible the hearing should be
25 conducted in public. To the extent that that is not

1 actually possible, given the nature of the information,
2 then it would, I accept, be open to you to consider
3 alternative arrangements.

4 In a sense the bottom line of my submission is you
5 have to wait and see what it looks like and then decide
6 can you actually do it openly or not. When I said
7 perhaps we can return to it in submissions, I have in
8 mind that leaving aside the national security context,
9 the principles considered by the Court of Appeal in
10 Browning in relation to the information rights context
11 might well be relevant, because that obviously is
12 a jurisdiction in which quite often it is personal data
13 which is in issue as the closed material, so you might
14 seek some assistance from that and we can look at that.

15 THE CHAIR: Have you read the media submissions?

16 MR FACENNA: The Guardian submissions, yes, I have read
17 them.

18 THE CHAIR: Do you agree with them?

19 MR FACENNA: Yes, they are broadly consistent with our
20 starting position, yes.

21 THE CHAIR: Their starting position is that the media should
22 have everything in advance of hearings.

23 MR FACENNA: When I said consistent I think I was speaking
24 specifically about the question of the conduct of the
25 hearings.

1 Mr Bunting is not here --

2 THE CHAIR: No, he has put in written submissions only.

3 MR FACENNA: He doesn't have to come and defend his
4 position. It is left to me to do the job for him.

5 We certainly agree with the position of the Guardian
6 on live streaming. I'm looking for the paragraph where
7 he refers to disclosure to media --

8 THE CHAIR: But you agree with the live streaming of police
9 evidence but not of the evidence of, in particular,
10 those whose data has been -- sorry, let me start again.
11 In particular those whose position is sensitive,
12 including, obviously, those women who have been deceived
13 into relationships. But the category is far wider than
14 that.

15 MR FACENNA: Yes. We don't take a principled position for
16 or against live streaming in relation to
17 core participants. We say that there are a some -- for
18 the most part, those whom I represent, at least those
19 from whom one is able to discern a view, take the view
20 that live streaming is an important aspect of the
21 Inquiry and openness and transparency --

22 THE CHAIR: I have read their submissions and understand
23 them.

24 MR FACENNA: That would be applicable also to the evidence
25 which is given by non-state core participants, but

1 obviously not to those in the categories that you
2 discussed where there is particular sensitivity and
3 where it would be particularly intrusive.

4 THE CHAIR: Paragraph 11, I think, addresses the point I'm
5 inviting you to comment on.

6 MR FACENNA: Yes.

7 They seem to accept that there are cases in which an
8 application could be made to depart from the presumption
9 of openness and there would have to be justification.
10 I am not sure that is different from what I am
11 suggesting.

12 There obviously will be witnesses -- non-state
13 witnesses in particular -- who will have cogently
14 justified reasons for not wishing to have their evidence
15 given in a public court.

16 THE CHAIR: Forgive me for this observation, but I am going
17 to make it. It seems to me that whenever a real
18 difficulty is arrived at on your side -- not you
19 personally but those whom you represent -- retreat into
20 general principle and saying, "Well it can be dealt with
21 on a case-by-case basis". I think it is necessary to
22 face up to real hearing problems that we will have if
23 personal and sensitive data is to be properly protected.

24 MR FACENNA: I hope I have not sought to deflect those
25 concerns, or suggest that they are not real ones.

1 I simply say that there are concerns that can only be
2 dealt with on a fact-specific basis. I accept that
3 there are practicality concerns. Indeed, I think I'm
4 saying the very opposite of the suggestion that they can
5 be dealt with at the level of general principle. They
6 can't be. They will have to be dealt with by reference
7 to the particular evidence that is relevant to the
8 particular hearing in question.

9 There are underlying general principles which apply,
10 in particular the principle in favour of openness. But
11 beyond that, there will have to be an assessment by the
12 Inquiry, by you, having regard to your obligations under
13 both the Inquiries Act and under the Human Rights Act
14 and data protection legislation.

15 I accept that those might be finely balanced and
16 difficult judgments which will have to be taken in some
17 cases and that the outcome in some cases might be that
18 you will have to have a private hearing rather than an
19 open one. It is not my position that I am trying to
20 deflect that by reference to general principle. Until
21 you actually have a series of documents in front of you,
22 you know the witnesses, you know what the issues are
23 going to be in the hearing it is quite difficult to say
24 at this stage how you are going to deal with that.

25 I am trying to be as helpful as I can on these

1 issues.

2 THE CHAIR: I won't press you any further.

3 Ms Mannion?

4 Further submissions on behalf of the Metropolitan Police

5 Commissioners by MS MANNION

6 MS MANNION: Sir, might I address you briefly on the

7 suggestion about working to any degree with the

8 Undercover Research Group first?

9 THE CHAIR: Yes, of course you can. I was not intending to
10 shut you out from that, but I apologise if I have done.

11 MS MANNION: I am grateful. I was assisted in hearing the
12 exchange with you and Mr Facenna that it may not be
13 quite as described in the written submissions in terms
14 of the level of working relationship, but in our
15 submission certainly such as was originally described
16 and potentially other relationships, we can't see that
17 it would be lawful for you to be providing information
18 to the Undercover Research Group. It would amount to
19 you providing personal and sensitive personal data to
20 a third party.

21 THE CHAIR: Of course.

22 MS MANNION: We don't see that it is necessary.

23 THE CHAIR: It is not unlawful for the Inquiry to invite
24 both from non-state core participants and the Undercover
25 Research Group information which they are able to

1 provide to the Inquiry about others.

2 Now --

3 MS MANNION: No, Sir.

4 THE CHAIR: -- they may need to go back to the others to see
5 whether they can provide that information, get their
6 consent, or there may be circumstances in which they can
7 provide it because for example they have no idea where
8 that other individual is and no means of finding it out.

9 MS MANNION: Sir, yes. To that extent the Inquiry website
10 already contains a request for people who have
11 information that might be relevant to the Inquiry to
12 provide that.

13 THE CHAIR: It does. But is a different thing to say to the
14 wider world, through a website which most people will
15 not look at, "Please provide us with information", from
16 providing a group of people with a package of documents
17 that will no doubt be of great interest to them, will
18 contain the names of a lot of others who they may know
19 still and which deals in detail with what was being
20 reported on.

21 That is much more likely to prompt someone to say,
22 "Aha, I know X and he can provide information to you
23 about it". It is at that point that I'm seeking
24 information by this route.

25 MS MANNION: Yes. You suggested then that contact might be

1 made by those persons whom you have already disclosed
2 information to back to the Inquiry to say, "May I now
3 make contact with a third person ..."

4 THE CHAIR: Exactly.

5 MS MANNION: That is not problematic. What we would be
6 concerned about is any really formalised relationship
7 with the Undercover Research Group of data exchange. Of
8 course they, like anybody else, can provide information
9 to you. Our specific concern is of course that the
10 Undercover Research Group is not neutral. They have
11 stated aims of unmasking every undercover officer, and
12 it is not particularly clear that any generalised
13 approach by you to them would have any efficacy, given
14 the proposal, certainly as it was initially written, was
15 of an Undercover Policing Inquiry-funded contact which
16 would be in any event confidential between them.

17 THE CHAIR: That has been disowned. As you rightly
18 identify, there are problems with it anyway.

19 MS MANNION: I am grateful.

20 Then there is only really this left to say, you
21 mentioned having some form of protocol so that what you
22 do do is open, and of course transparency is laudable.
23 I simply make the submission that we are nonetheless
24 very concerned about any formalised information
25 exchange/relationship between you and the Undercover

1 Research Group and the protocol could lead to such
2 a formalised relationship.

3 THE CHAIR: I myself do not see any reason why like
4 non-state core participants, which the Undercover
5 Research Group is not, Mr O'Driscoll is, I don't see why
6 he shouldn't be given precisely the same right or
7 privilege to ask the Inquiry if he can approach
8 an individual of whom he knows to see if that individual
9 will provide information to the Inquiry and the means by
10 which the Inquiry can communicate with him or her. What
11 is wrong with that?

12 MS MANNION: Nothing wrong with that, Sir.

13 THE CHAIR: No. In which case we are ad idem.
14 Hearings.

15 MS MANNION: The next subject, Sir, that you canvassed with
16 Mr Facenna is the manner in which documents will be
17 disclosed to non-state core participants --

18 THE CHAIR: I am so sorry, have I not given you the
19 opportunity of responding on that. I do apologise.

20 MS MANNION: There may be other submissions on these points
21 too.

22 Sir, earlier this morning when I addressed you I set
23 out the purposes for which material might be disclosed
24 by you to non-state core participants at an early stage
25 during the course of the sequencing submissions. Those

1 being to inform them as to areas of evidence you might
2 wish them to consider, to refresh their memories and to
3 assist in making restriction order applications.

4 Bearing those purposes in mind, what we would submit
5 is that it nonetheless needs to be necessary to provide
6 those documents for those purposes. It doesn't equate
7 to providing every potentially relevant document about
8 a deployment to a person or group of persons to prepare
9 their witness statements.

10 There are limits according to your decisions about
11 what you need to investigate and that, Sir, is derived
12 from, in any event, your terms of reference, that
13 require you to examine and review such documents as you
14 consider to be appropriate.

15 It must be limited, we submit, to what is necessary
16 to allow you to inform about what you want to
17 investigate, to allow restriction order applications to
18 be made, and to memory refresh.

19 THE CHAIR: I'm bluntly unattracted by the idea that I must
20 provide a full package to undercover officers -- former
21 undercover officers and their managers but a less than
22 full package about the same deployment to those who
23 might be able to provide evidence about it and who were
24 affected by it.

25 MS MANNION: Sir, you will of course provide, Sir, what is

1 necessary for the stage that you are at.

2 To take an example, what might be necessary to
3 memory refresh an officer in giving evidence to you
4 might include matters such as personnel records --

5 THE CHAIR: Forgive me, there is no reason for us to be at
6 cross-purposes here.

7 There is no need at all for an officer's personnel
8 records to be disclosed to anybody.

9 MS MANNION: I don't misunderstand that, I don't
10 misunderstand that to be the Inquiry's position. Simply
11 by way of example a document which is necessary at one
12 stage is not automatically necessary at every other
13 stage. A personnel document for example could memory
14 fresh, but once the memory is refreshed the material is
15 in the witness statement, that document would cease to
16 be necessary.

17 Sir, when you have read a witness statement and seen
18 the documents which support it -- those which now are
19 part of the deployment verified and you are satisfied
20 they are necessary to pass on to a non-state person --
21 then you should. I am not saying it should be so small
22 as to be meaningless or to be unfair or to be partial.
23 It is that it doesn't have to be any more than is
24 necessary for the purposes identified. That does not
25 simply just allow you to place some meaningful limits on

1 the amount of data which has to pass through these
2 processes. It is also in accordance with your terms of
3 reference in which you can examine and review such
4 documents as are appropriate at this stage.

5 THE CHAIR: My understanding of the Metropolitan Police
6 Service view about redacting for public interest reasons
7 is that they wish to redact all of the documents which
8 might be deployed in relation to an officer in the
9 Inquiry at that stage. At the stage at which the
10 officer is invited to provide a witness statement.

11 MS MANNION: Sir, your team, as far as I'm aware, is
12 inviting the Metropolitan Police Service to put together
13 its proposed redactions for those documents once it is
14 indicated they are relevant and necessary. We have not
15 understood that that means they will always be in the
16 final analysis relevant and necessary. It simply
17 administratively sensible, more efficient, to get the
18 redaction work done in respect of a whole pack
19 together --

20 THE CHAIR: Quite, but you don't want a prior filter other
21 than what the Inquiry believes to be relevant and
22 necessary for that deployment by that officer?

23 MS MANNION: No.

24 THE CHAIR: Once that filter has been applied, you want to
25 make submissions about redactions of the total package

1 of documents contained in that group?

2 MS MANNION: Yes.

3 THE CHAIR: It is a perfectly sensible proposal and so far
4 it has not caused any problem, and I don't anticipate at
5 any rate in relation to the older deployments that it
6 will do. That is the information that I'm being given
7 by my team, I hope it accords with your own view.

8 MS MANNION: Yes.

9 Sir, I don't seek to go any further than to say that
10 necessity may provide a filter on the amount of
11 documents which need to go to each stage of this
12 process, but there is something of a funnel to the
13 process that is being followed and that is to be done
14 without being unfair or partial.

15 THE CHAIR: The last point of the funnel I will come to is
16 the eighth and final point that I want to raise with
17 everybody, before inviting anybody to say anything else
18 that they wish to about the issues that I have asked
19 them to address me on.

20 We will come to that at the appropriate stage and
21 I will try to remember to give you an opportunity to say
22 something.

23 MS MANNION: Sir, you did mention about either pre witness
24 statement disclosure to groups or perhaps forming part
25 of the hearing bundle but within some form of

1 confidentiality ring, or a limited restriction order,
2 and we would submit supported by protective measures
3 such as watermarking, but not redacted within that ring
4 for privacy.

5 Certainly during some of the exchanges -- although
6 I sense the matter has moved on following the
7 submissions of Mr Facenna -- that you suggested it might
8 be possible once within a confidentiality ring to have
9 a somewhat wholesale approach and that no redactions for
10 privacy would be necessary.

11 THE CHAIR: That was my proposition. He said no, that's not
12 right. That there would in respect of his five
13 categories of sensitive information have to be prior
14 redaction.

15 MS MANNION: We also submit that there would need to be some
16 degree of consideration as to what material, even within
17 the ring, would need some form of redaction. Simply
18 that there may just be no way round that, that is
19 a stage and a level of work which will have to be done,
20 albeit that the touch might be possible to be lighter
21 because there is a smaller group who are receiving the
22 documents.

23 You heard some examples. It may be that matters
24 such as criminality are or are not appropriate in
25 a given confidentiality ring to redact or to not redact.

1 The issue really is that it does need some thought each
2 time and it can't be dealt with on a wholesale basis, we
3 submit. Perhaps that is one of the reasons why the
4 Inquiry needs to be careful with its filter about what
5 is necessary to put, because there will be a time delay
6 on every document which goes through this process
7 because there will need to be some form of contextual
8 reading and line-by-line checking, even if the end
9 result is a very light or no redaction.

10 THE CHAIR: That is a prospect I am afraid which dismays me.

11 Obviously I have to act lawfully, but within the
12 limits of the law I have to adopt whatever means is most
13 efficient and least labour- and time-consuming.

14 MS MANNION: Yes. To be slightly more positive, there are
15 efficiency savings we can immediately envisage, and not
16 having discussed this with your counsel team or having
17 an opportunity to consider them in any great depth, but
18 there are a number of processes on these documents which
19 on the current system sequentially predate the one which
20 we are concerned with at the moment, such as redaction
21 for state public interest redactions.

22 It may be that that process allows some time
23 factored in for your counsel team or your legal team to
24 spot the clear examples of areas that need to be
25 redacted. But we don't propose that is simply --

1 THE CHAIR: I've heard this siren words before, wait until
2 we have this tool and all will be easy.

3 MS MANNION: There is no shortcut we have found for reading
4 the documents and even several people reading the
5 documents. It is simply noting that your team is doing
6 that anyway, because they will have been through a prior
7 process, so it may not be quite as desolate as it sounds
8 but we simply wanted to echo that we don't see
9 immediately how a bulk approach could meet your duties.
10 Sir, I believe that takes me to hearings.

11 THE CHAIR: Yes.

12 MS MANNION: Following straight from what I have just said,
13 when it comes to the hearing bundle it may be that there
14 will need to be parts of the hearing bundle which are
15 limited to certain parts of the core participant cohort.
16 I sense that is anticipated, Sir, by you in order to
17 meet the need to have some forms of confidentiality
18 ring, but there is no issue even with that with general
19 documents being published in advance. Aside from those
20 general documents, sections of the hearing bundle being
21 limited within the entire cohort.

22 That, Sir, will be a way in which you can minimise
23 the number of redactions which might be needed to the
24 hearing bundle. All of those accesses to the hearing
25 bundle would be subject to the usual protections of

1 confidentiality and so forth.

2 Against that background, Sir, we see that general
3 evidence is almost certainly going to be possible to
4 hear in open. Some aspects about deployments
5 concerning, even concerning reporting, it may be
6 possible to hear in open. Where questions can be put
7 about documents in general terms, and answers given in
8 statement way, why is this type of information recorded?
9 Doesn't need to breach anyone's privacy, because the
10 content of the document itself does not need to be
11 exposed for the questions to be put and the answers to
12 be understood.

13 THE CHAIR: You envisage a witness being given a document
14 which describes in fair detail matters that are highly
15 private or contentiously political, to a witness,
16 saying, "Look at that, please, don't say anything
17 about it, but why were you reporting on it?"

18 MS MANNION: Not always, but sometimes. There will be, as
19 you know, Sir, many, many reporting documents which
20 cover in example issues that you will want to explore
21 with individual officers and may be many individual
22 officers, which raise broad themes and there are
23 examples on which questions be asked which don't contain
24 either -- to use the terms non-technically -- highly
25 sensitive data or information and so which can be used

1 as a vehicle for some exploration.

2 There will be at the other end of the scale some
3 reports which are simply so problematic there will need
4 to be questions about those aspects of deployment which
5 will occur with maybe only certain deployments or maybe
6 only certain parts of deployments, may need to be dealt
7 with in a private hearing.

8 We see that there are many ways in which quite a lot
9 can be done without needing to expose the private
10 information which is seen by those who have the
11 documents within the ring and yet still allow the public
12 to follow the proceedings.

13 THE CHAIR: Take the paradigm example --

14 MS MANNION: Yes.

15 THE CHAIR: -- which I believe will occur -- it certainly
16 has occurred on paper -- of a claim by someone who says
17 that she is a deceived woman, that an officer had an
18 intimate relationship with her in his cover name and he
19 denies it. I can't, myself, see that there is any means
20 by which such an issue can be explored publicly.

21 MS MANNION: When one gets to the granularity where
22 an individual's personal information is the subject of
23 questions, it is very hard to see how they can be
24 properly explored in a fully open hearing. I entirely
25 accept that.

1 Simply to say that there must be quite a lot which
2 can be dealt with outside, we don't say -- our written
3 submissions are clear on this -- that you will be able
4 to get through that process without some form of
5 confidentiality ring and private hearings that flow from
6 it.

7 Sir, you also asked, though, about how one might
8 deal with particularly central and charged hearings,
9 such as in respect of family justice campaigns. There
10 are also cases and opportunities where the work which
11 you have identified in the restriction order protocol,
12 the very intensive search for any persons who might be
13 affected, so service to seek consents or specific and
14 narrower restrictions than your team might be able in
15 its discretion to apply, there are situations where that
16 work is worth doing.

17 It is not a matter of one size fits all, there will
18 be many a deployment which can be dealt with in general
19 terms and there will be some which you will naturally
20 and rightly want to subject to quite detailed
21 exploration and there it may be the sorts of cases which
22 we would say should make your sample of eventually
23 published documents which would fall from those types of
24 deployment where you are going to need to examine it so
25 much -- there are so many more benefits to examining it

1 publicly that you would want the resources to be
2 deployed into doing the extra work there.

3 One has to balance between privacy rights. If there
4 is not the resource or time ability to give that level
5 of investigation for the entire piece, and we certainly
6 submit that there is not, then choices need to be made
7 about which are going to be subjected to the detailed
8 scrutiny.

9 THE CHAIR: I anticipate that quite a lot of the evidence
10 from officers -- especially about early deployments --
11 will be given in writing --

12 MS MANNION: Yes.

13 THE CHAIR: -- and there will be no need for
14 cross-examination or examination of oral evidence.

15 MS MANNION: No.

16 THE CHAIR: There are, however, deployments which are likely
17 to be hotly contested, some of which are of intense
18 public and legitimate public interest, where the only
19 method of doing it will be to maximum extent possible
20 doing it in public with witnesses giving live evidence.

21 MS MANNION: Yes.

22 THE CHAIR: Between those two extremes there may be other
23 circumstances.

24 MS MANNION: I suspect all we are urging upon you is use the
25 tools at your disposal to focus the lens on what it is

1 you wish to look at in a particular part or portion of
2 your expectation.

3 THE CHAIR: At the moment I don't see how I can fulfil the
4 terms of reference without at least attempting to
5 investigate each individual significant deployment,
6 i.e. the officer.

7 I do anticipate that the evidence of officers will
8 quite often be given in writing only.

9 MS MANNION: Yes. Quite often will trigger no disclosure
10 for memory refreshing or for restriction orders
11 applications or for information about evidence which you
12 might seek to anyone.

13 THE CHAIR: Who knows? I am seeking to offer you some
14 reassurance that I don't think we are going to have
15 a state trial about every deployment. There will be
16 about some.

17 MS MANNION: Yes. We understand that, Sir.

18 Will you just bear with me one moment?

19 Those are my submissions on the points I believe you
20 have raised so far, unless there is anything further you
21 want from me.

22 THE CHAIR: There is one, which is publication of documents
23 at the end.

24 MS MANNION: I will have submissions on that.

25 THE CHAIR: I know you do, and I have a suggestion to make

1 about that as well. We will come back to that.

2 Anyone else want to say anything about this topic?

3 Mr Sanders?

4 Submissions on behalf of the Designated Lawyers by

5 MR SANDERS

6 MR SANDERS: Sir, one point on hearings. It may or may not
7 be necessary to raise it, it depends on what your view
8 is. It is our understanding and our submission that
9 when it comes to the conduct of hearings and to taking
10 decisions whether they should be in open or closed --

11 THE CHAIR: Or private. There are three categories, there
12 is open, private and closed.

13 MR SANDERS: The issue for you in terms of acting lawfully
14 are compliance with the Inquiries Act and compliance
15 with the Human Rights Act. In our submission hearing
16 evidence putting questions doesn't involve processing of
17 personal data for the purposes of General Data
18 Protection Regulations, if it is not done wholly or
19 partly by automated means.

20 That is an exercise which doesn't engage "the data
21 protection legislation".

22 THE CHAIR: Surely a witness speaking on the basis of
23 a document which contains personal or sensitive data and
24 using it either to say, well, without this document
25 I can't really remember precisely what happened, but the

1 document says that it did, and it is my document and it
2 did happen. That is processing data in that document.

3 MR SANDERS: In my submission, no. There may be some things
4 that leading up to that involve data processing, in
5 terms of disclosing bundles. The recording by way of
6 transcript of the proceedings and the publication of
7 that transcript, that's done by automated means.

8 But someone sitting looking at a document, thinking
9 about it, answering a question about it, you putting
10 a question. In my submission that doesn't engage the
11 data protection legislation. We have been here in this
12 hearing today, we have not been processing personal
13 data, we have just been conducting a hearing.

14 THE CHAIR: I can see that. But ordinarily this problem
15 doesn't arise because of the court exemption. The
16 courts do not face this problem at all. But the Inquiry
17 is not a court, at least as I'm presently advised.
18 I know it is being suggested that I am sitting in the
19 judicial capacity. I doubt that, but I will hear
20 submissions about that in due course.

21 MR SANDERS: It is a separate issue. Courts are, of course,
22 data controllers. The exemptions that they enjoy are
23 specific to --

24 THE CHAIR: Very wise.

25 MR SANDERS: -- disapplication of particular provisions. In

1 my submission it is simply not, as I speak to you and
2 you speak to me, we are not processing personal data
3 because our brains are not automated.

4 THE CHAIR: Oddly, if I hand you a document to read, I'm
5 processing it, you reading it might not be.

6 MR SANDERS: A paper document, no. If you email it to me,
7 yes, but not a paper document.

8 THE CHAIR: There is a shaking of a head from a source which
9 I suspect knows better than you or me what the answer
10 is.

11 MR SANDERS: Well, the data protection legislation obviously
12 when one follows it down from convention 108 and the
13 modernised convention 108, it bites on automated
14 processing.

15 THE CHAIR: I am afraid you are attracting almost universal
16 dissent.

17 MR SANDERS: If you hear that submission, then I can respond
18 to it.

19 MR FACENNA: Shall I just -- before we dig the hole any
20 deeper, the definition of processing in the General Data
21 Protection Regulations, which is not the same as the
22 definition in the previous directive is:

23 "Any operation or set of operations which is
24 performed on personal data or on sets of personal data,
25 whether or not by automated means such as collection,

1 recording, organisation and everything else."

2 So it is a red herring.

3 THE CHAIR: There is an exemption for unsorted manual data
4 in UK legislation, but by the time you get to hearings
5 that will not apply.

6 MR FACENNA: If you go on television and read out someone's
7 personal data you are not doing it by automated means,
8 it is undoubtedly a processing of personal data.

9 THE CHAIR: I am afraid you stand corrected.

10 MR SANDERS: I will accept that, but that was not my
11 understanding. So apologies if I have wasted your time
12 on that.

13 Submissions on behalf of the Category M Core Participants by

14 MS LAW

15 MS LAW: Sir, if I could briefly address you on two short
16 matters.

17 Firstly, it is the disclosure that is going to be
18 provided to non-state core participants and in
19 particular the submission of the Metropolitan Police
20 just now that that material would be more restricted
21 than that would be provided to the officers in preparing
22 their statements.

23 The example given was personnel records, because
24 they, it was said, would be of no interest to non-state
25 core participants.

1 THE CHAIR: That is not correct so far as the deserted wives
2 go, of course not.

3 MS LAW: That would be the information of most interest to
4 them. It appears you have my point. I just lay down
5 the marker for now.

6 THE CHAIR: I am going to give you the opportunity of
7 addressing your submissions if you want to a little
8 later on, you don't need to do it now. But don't let me
9 interrupt you if you are making submissions that are not
10 contained in that.

11 MS LAW: Sir, so far as I have not felt the need to stand
12 up, simply because I don't think there is much that
13 I have differed from you on in terms of the approach
14 that should be taken. It may be more convenient if
15 I just address you on the one point so far where I do
16 find myself, I am afraid, in disagreement with you,
17 although, as far as I can tell, in agreement quite
18 unusually with both Mr Facenna and Ms Mannion, which is
19 in relation to hearings.

20 I am afraid I fully endorse the submissions that
21 have been made to you that it is not possible at this
22 stage to take a blanket approach that it will never be
23 possible to have an open hearing in relation to
24 a charged issue where there are redacted documents in
25 a confidentiality ring.

1 In my respectful submission, that is something that
2 happens with frequency in often civil trials and to some
3 extent, in a slightly different context, in criminal
4 jury trials. Advocates and witnesses are very carefully
5 warned about what they can and cannot say in relation to
6 that material.

7 If the advocates, the witnesses and the tribunal all
8 have the same redacted documents, in my submission it is
9 relatively easy to navigate them by reference to lines
10 or paragraphs, rather than particular names.

11 I fully accept that the issues that arise in this
12 Inquiry are very different from those that arise for
13 example in the Chancery Division in relation to
14 commercial sensitivity, but they are not that different
15 from issues which arise in other contexts -- I think in
16 particular of media law and criminal law -- where there
17 can be very charged issues which need very careful
18 handling in front of a public audience.

19 It seems to me that this Inquiry must attempt that
20 approach to begin with and it must attempt it on
21 a case-by-case ... or at least hearing-by-hearing
22 approach. To do so otherwise is to fall on the
23 principle of open justice at the very outset. I don't
24 think that is something that any one of us in this room
25 would seek to encourage.

1 partly by automated means. That is in article 2.1 of
2 the regulation.

3 THE CHAIR: I'm delighted to hear that those who think they
4 know what they are talking about, about this aspect of
5 the law, remain in fundamental disagree about the nuts
6 and bolts.

7 MR SANDERS: I am not sure they do. It is correct
8 "processing", it doesn't have to be wholly or partly by
9 automated means. But:

10 "This regulation applies to the processing of
11 personal data wholly or partly by automated means and to
12 the processing other than by automated means of personal
13 data which form part of a filing system or are intended
14 to form part of a filing system."

15 My submission, I submit, is sound that when it comes
16 to the conduct of hearings and what happens in hearings,
17 that's regulated by the Inquiries Act and by the Human
18 Rights Act, but it is not subject to the General Data
19 Protection Regulations because it doesn't involve
20 processing that is subject to the General Data
21 Protection Regulations.

22 THE CHAIR: It tells us what regulation 2 applies to.

23 Forgive me, it is the whole regulation not article 2 --

24 MR SANDERS: It is the General Data Protection Regulations,
25 yes.

1 THE CHAIR: Yes it is the General Data Protection
2 Regulations. Okay. A debate which may proceed later.
3 Sir Robert, anything you want to say about hearings?
4 SIR ROBERT FRANCIS: I would like to adopt Ms Mannion's
5 submissions if I may and say nothing further.
6 THE CHAIR: Anyone else have anything to say about hearings?
7 No.
8 The final topic on which I invite submissions is
9 this. Documents are going to have to be published. For
10 that to be a manageable task for the Inquiry the number
11 of documents to be published is going to have to be
12 reduced from the gross quantity.
13 What I have in mind, and it is only a thought at
14 this stage, it is not firmly set, is that in relation to
15 an individual officer and his or her deployment,
16 documents are published which are typical of, in many
17 cases, a large number of documents such as for example
18 X, Y and Z are living in the same house. Y is proposing
19 to leave London and go to Liverpool, X and Z will remain
20 where they are. In other words, routine information
21 about routine personal matters.
22 There are large numbers of such reports. There are
23 also reports on branch and sometimes district meetings
24 of groups which are frankly uninteresting. They concern
25 the internal organisation of the groups, sometimes the

1 election or selection of officers which are of interest
2 when it happens to be the undercover officer who is
3 selected, but otherwise not of great interest.

4 There are then reports -- sometimes of a routine
5 nature -- about forthcoming events which either do occur
6 without incident or don't occur. Again, examples of
7 such reports are required.

8 Then there are reports about matters of central
9 concern. May I take an example, in the relatively
10 ancient history, the so-called battle of Lewisham
11 generated a number of reports before and after it
12 occurred. Those will, in the main, need to be published
13 to extent that they can be. Where they are not covered
14 by existing restriction orders or something of that
15 kind.

16 We will end up, therefore, not with 1,000 pages of
17 documents per deployed officer on the example I gave at
18 the start, but with far, far fewer, maybe only 100 pages
19 of documents.

20 I can see at the moment no other means by which we
21 can make public what the Inquiry is doing, and to give
22 public examples of documents of the type that is has
23 considered.

24 Any suggestions?

25 MS AILES: Sir, may I clarify? What we are talking about

1 now is wider publication than amongst core participants
2 of witnesses who will by the stage we are talking about
3 this have had an opportunity to see those documents and
4 make their own observations about which may be of
5 particular significance?

6 THE CHAIR: Of course. Absolutely. The object is to reduce
7 to manageable size those documents which need to be
8 redacted for public consumption purposes.

9 MR FACENNA: Shall I go first.

10 Further submissions on behalf of the Non-police, Non-state

11 Core Participants by MR FACENNA

12 MR FACENNA: It's not a data protection question. As
13 I understand it, you are talking about essentially what
14 documents would be published and put online, as
15 a smaller group of those that have been relied on in
16 hearings.

17 THE CHAIR: It is a data protection question. Because of
18 course it will have to take into account the redactions
19 that have been made for data protection privacy
20 purposes.

21 MR FACENNA: Although those will already have been made by
22 the stage of producing the hearing bundles; is that not
23 correct?

24 MS AILES: The question will be what can be put into the
25 hearing bundles as opposed to simply disclosed to the

1 core participants.

2 MR FACENNA: So we are not --

3 THE CHAIR: I anticipate -- forgive me for interrupting you,
4 but so that you understand what I am anticipating. The
5 officer having seen all of his or her reports will
6 produce a witness statement saying:

7 "Yes, I have produced 100 of this type of report.
8 This is the reason I did it. You have shown me all of
9 them but I wish to refer to three of them only ..."

10 Or something of that kind. It will be those three
11 that are put into the hearing bundle. The fact that the
12 officer made 100 reports of that kind will be in his
13 witness statement and will be made public, the details
14 of such reports won't be.

15 MR FACENNA: Although they will have been disclosed to
16 core participants?

17 THE CHAIR: Yes.

18 MR FACENNA: Yes.

19 The step down process, as it were, is what is going
20 into the hearing bundles to be referred to in open
21 hearings and the assumption in accordance with
22 section 18 of the Act is that anything that is used at a
23 hearing would subsequently be made available more
24 widely?

25 THE CHAIR: Precisely.

1 MR FACENNA: Yes.

2 Having stood up, can I just have a moment?

3 THE CHAIR: Of course.

4 (4.15 pm)

5 (A short break)

6 (4.24 pm)

7 MR FACENNA: Sir, I caveat what I'm about to say obviously
8 with the rider that I nominally act for a large group of
9 people and frankly am not able to get the confirmed view
10 on instructions, and it may be it is not possible to do
11 so because there will be differing views.

12 I think in principle what I can say is that it seems
13 to us that the answer to this question to some extent
14 comes back to the question of notification, because if
15 at the beginning the process you have done the kind of
16 thing that we have suggested, the website and the
17 efforts to notify people, done as much as possible, and
18 that is the opportunity at which people who might be
19 able to come forward are able to identify that there is
20 a possibility that they are affected. When it comes to
21 the end of the process and the hearing you probably can
22 take a slightly narrower view about what ultimately goes
23 into the hearing bundle and is published.

24 If, on the other hand, you don't do that with
25 notification, and effectively publication of the

1 documents at the time of the hearing becomes the first
2 opportunity that people who are not currently
3 core participants might be able to identify that they
4 are affected, you will inevitably, we would say, have to
5 take a broader view about what publication is necessary
6 at that stage.

7 I understand in the consultation we have taken the
8 position that publication of the hearing bundle should
9 happen in advance of the relevant hearings for precisely
10 that reason, that there are potentially large numbers of
11 people who are affected whose data is being processed
12 who might wish to come forward and who are not currently
13 core participants. It is only when they see some of
14 those documents that they will be able to identify that
15 possibility.

16 THE CHAIR: At the moment, as you may or may not know, it is
17 not the corner of the wood that you have been asked to
18 look into, but the view is no.

19 MR FACENNA: I understand that. In sense, I say if that is
20 the position, that is the position. It makes the case
21 for a proper notification process at the beginning even
22 stronger.

23 THE CHAIR: Thank you. Understood.

24 Ms Mannion?

25

1 Further submissions on behalf of the Metropolitan Police

2 Commissioners by MS MANNION

3 MS MANNION: Sir, thank you for indicating your suggestion.

4 Broadly it seems like a good idea to us. We
5 certainly do agree that the volume of documents which
6 need to go through the process and be seen by the public
7 at the end of it must be reduced if the Inquiry is to
8 meaningfully proceed. What you have described differs
9 slightly to what we had envisaged, in that you appear to
10 be describing a reduction at the hearing bundle stage,
11 whereas we have had been envisaging it at the
12 publication stage. Noting, Sir, your observations in
13 your initial consultation response that publication on
14 the website would happen at the conclusion of the
15 hearings.

16 We had envisaged a limited hearing bundle, so that
17 parts of the composite hearing bundle were made
18 available to certain core participants who had an
19 interest in whichever part of the hearing bundle was in
20 issue. That was a way, we thought, of minimising the
21 privacy redactions that would need to take place across
22 the whole bundle, assuming perhaps that it would be
23 wider -- you are talking about effectively that the
24 narrowing takes place at a different stage.

25 THE CHAIR: I think we are talking about essentially the

1 same end result, albeit by a slightly different route.

2 MS MANNION: Exactly. What I say, in terms of your
3 suggestion at this stage, is we agree in principle that
4 it needs to happen, we will take away your suggestion
5 and have a careful think if we may, more than we have
6 had an opportunity to now, as to whether in fact yours
7 is preferable to ours or ours is, we would submit,
8 preferable for whichever reasons and address you on
9 that specific point if we may on the next occasion.

10 We do say, nonetheless, that it is appropriate to
11 have a distinction between the publication phase and the
12 investigation phase, because it is at the investigation
13 phase when the core aims of the Inquiry to get to the
14 truth and to make worthwhile recommendations are being
15 explored. Of course, Sir, you must have as few fetters
16 as possible in that stage. Also it seemed to us in our
17 initial analysis that it is at that stage the balance of
18 the public interest will be different.

19 The level of interference -- potential
20 interference -- with privacy will be different than it
21 might be at the later stage of publication to the wider
22 public.

23 Sir, for us, there was a distinction to be drawn
24 between the investigation phase where one may stay wider
25 and the publication phase, but perhaps that is all I can

1 say by way of a marker.

2 THE CHAIR: I think we are thinking along the same lines.

3 The investigation stage has to be wider than the
4 eventual stage. It is simply not practicable to redact
5 and publish everything we have made use of in the
6 investigation phase. I think that that which is going
7 to be deployed in public hearings has to be the same as
8 that which is eventually published.

9 MS MANNION: Sir, that is helpful to have that, that that
10 remains your clear view. If we can take that away, if
11 we may, and consider that, I will be able to address you
12 on, as it were, the distinction between the way in which
13 we had envisaged the sampling to work and the way in
14 which you have clarified you currently envisage it. It
15 may be there is no dispute between us. It is simply
16 more time to think, if we may.

17 THE CHAIR: Of course, understood.

18 MS MANNION: Thank you, Sir.

19 THE CHAIR: Mr Sanders.

20 MR SANDERS: Nothing to add on that.

21 THE CHAIR: Sir Robert?

22 SIR ROBERT FRANCIS: Just so say, Sir, that the categories
23 you mention would almost certainly need to be revisited
24 in relation to National Public Order Intelligence Unit
25 documentation but, as you already said, that is a long

1 way away and by then we will have learnt by experience
2 more.

3 THE CHAIR: I am speaking from a position of ignorance about
4 National Public Order Intelligence Unit document, simply
5 because I have not, as I have with the Special
6 Demonstration Squad, seen any significant number of
7 them.

8 Ms Law, this is a variant on your suggestion which
9 I found helpful.

10 MS LAW: I'm grateful. I have nothing really to add to the
11 suggestion which has been made, because really there we
12 were seeking to accommodate the needs of others rather
13 than ourselves.

14 THE CHAIR: Yes.

15 MS LAW: We are essentially agnostic as to the publication
16 end.

17 THE CHAIR: Your point is that the deserted wives need to
18 see a full set of their husbands' reports during the
19 deployment.

20 MS LAW: Precisely. That and indeed any other information
21 which those officers used to make their statements, such
22 as their personnel records.

23 THE CHAIR: Yes.

24 MS LAW: That's what we need to see. After that it is
25 mainly a question of resolving other people's

1 concerns --

2 THE CHAIR: Forgive me, I forgot about the personnel records
3 for the second time but you are quite right to remind
4 me.

5 MS LAW: Not at all.

6 THE CHAIR: Yes, Ms Sikand.

7 Further submissions on behalf of Peter Francis by MS SIKAND

8 MS SIKAND: Sir, we have a view on personnel records,
9 certainly in relation to my client we haven't turned our
10 minds to that issue, in due course ...

11 THE CHAIR: No. Of course, this is one instance in which
12 your client's interest is possibly somewhat
13 different from those of the group represented by ...

14 MS SIKAND: They could not be more different.

15 THE CHAIR: Okay.

16 That does leave a short period of time for
17 Mr Facenna, and if he thinks it right Mr Summers, to
18 make submissions on the exemption that has been
19 identified in counsel's note. I am not inviting full
20 submissions, but if you want to give us something to
21 think about, I, and my team, would very much welcome it.

22 Further submissions on behalf of the Non-police, Non-state
23 Core Participants by MR FACENNA

24 MR FACENNA: I can hear a collective groan across the room
25 to stand up at 4.35 to start on schedule 2,

1 paragraph 7 of the Data Protection Act.

2 I was going to take you to one or two authorities,
3 I will not do that.

4 THE CHAIR: Could you identify them?

5 MR FACENNA: I will. They are referred to in our
6 submissions. The high level point is this: there is
7 a new assertion by the Inquiry that is covered by this
8 particular exemption, there are various other assertions
9 made, in particular by the Metropolitan Police Service
10 and I think by someone else, as to other exemptions
11 which may or may not be applicable.

12 The big point is that even if those exemptions
13 apply, they are not a get out because they only apply
14 subject to a strict proportionality test which has to be
15 applied on a case-by-case basis and they only apply to
16 the extent that the relevant prejudice to the legitimate
17 interest which is protected is likely to be affected by
18 the relevant disclosure.

19 Sorry, that is a long-winded way of putting it.

20 To take the exemption that the Inquiry relies on,
21 for example, which is paragraph 7 of schedule 2, so you
22 will see that the relevant General Data Protection
23 Regulations provisions which includes articles 14 and 15
24 do not apply to personal data processed for the purposes
25 of discharging a function that is designed in column 1

1 and meets the condition in column 2:

2 "To the extent that [which is the first words I have
3 underlined] the application of those provisions [ie the
4 General Data Protection Regulations provisions] would be
5 likely to prejudice the proper discharge of the
6 function."

7 Just on the question of the applicability of the
8 exemption, I have to reserve our position on it at the
9 moment. Obviously it has been raised for the first time
10 with us. I would say this about it. It is an exemption
11 which is essentially carried forward from the 1998 Act.
12 Under the 1998 Act, it was under a heading of
13 "Regulatory functions".

14 THE CHAIR: It was, but that side heading has now been
15 removed --

16 MR FACENNA: The heading has been removed, I see that.

17 THE CHAIR: -- and it is applied to other functions further
18 down the paragraph.

19 MR FACENNA: It is applied to a more specific set of
20 functions which we would say, I suspect, all still fall
21 under the general heading of "Regulatory functions".

22 THE CHAIR: Yes.

23 MR FACENNA: They relate to the regulation of charities,
24 health and safety at work, maladministration by public
25 authorities, investigation by the Competition and

1 Markets Authority, that kind of thing.

2 There is a question and one of the things we have
3 not had the opportunity to do is for example to go back
4 to Hansard on the 1998 Act and just to understand the
5 history. There is a clear read across, I think ... our
6 provisional position is that we would not necessarily
7 accept that that exemption does apply --

8 THE CHAIR: That comes as no surprise. Had it been made
9 under the 1998 Act I would have perhaps found the
10 provisional view that I have advanced difficult to
11 justify.

12 MR FACENNA: Yes. There is no real case law on the 1998
13 Act. There is one Scottish case which does concern what
14 are clearly regulatory functions and doesn't really take
15 matters any further.

16 We need to do a bit of digging on that, that is the
17 first question.

18 THE CHAIR: There is a changed context as well for the now
19 impossibility or disproportionate -- exemption is not
20 quite the right word, but get out, to use your phrase,
21 whereas before it was a rather weaker test for declining
22 to have to respond to subject access questions.

23 MR FACENNA: Yes, specifically on subject access requests,
24 previously there was section 8.2 of the 1998 Act, which
25 does not exist anymore.

1 That is the first point. We will consider that
2 point further.

3 In a sense, the more important point even if we are
4 wrong about that and the exemption applies. There are
5 other elements of the way in which these exemptions must
6 be applied which mean that contrary to what might appear
7 to be the position asserted in the Counsel to the
8 Inquiry's note or in the Metropolitan Police Service's
9 note, there is not a blanket exemption from the
10 obligation to comply with subject access rights or with
11 the notification requirements.

12 THE CHAIR: You say there is case law on that?

13 MR FACENNA: There is clear case law on that. I suppose the
14 shortcut to it is ... probably Guriev is the key case,
15 which is in the authorities bundle. Rather than take
16 you through it, I will just give you relevant paragraph.

17 THE CHAIR: Of course. I'm only asking at the moment for
18 headline submissions so we can go away and think.

19 MR FACENNA: I am reminded that in the bundle that was
20 prepared and put on line there is a case digest which
21 was put in, but you have not been given the full
22 judgment so we have copies of the transcript which we
23 can hand out and hand up.

24 THE CHAIR: Thank you.

25 MR FACENNA: That should go behind tab 12 of the authorities

1 bundle. It is a judgment of Mr Justice Warby and at
2 paragraphs 34 to 45 he considers the proper approach to
3 the application of what was the crime exemption in
4 section 29 of the old Act.

5 You will see that there is particular reference to
6 a judgment of Mr Justice Munby in Lord and to
7 a judgment of Mr Justice Green, as he was, in a case
8 called Zaw Lin, which you also have in your bundle.
9 I think you do have the transcript of that behind
10 tab 13.

11 The essential point, if you go to those
12 paragraphs -- and I think they are -- if you want the
13 references they are in our written submissions --

14 THE CHAIR: All you need to do is identify the case by name,
15 and we can go away and --

16 MR FACENNA: Guriev is the key case on it.

17 THE CHAIR: Yes.

18 MR FACENNA: You will see there that what Mr Justice Warby
19 says is that in order for the exemption to apply you
20 have to be satisfied that you are within the purposes of
21 the exemption and then there is a test of "would be
22 likely to prejudice".

23 You will see that he rejected submissions that were
24 made as to prejudice. I suppose the key paragraphs are
25 43 to 45, which makes the point that a selective and

1 targeted approach to non-disclosure is needed, you
2 require proper evidence, you cannot take a blanket
3 approach to questions of exemptions. What needs to be
4 in consideration is the degree to which disclosure of
5 this information would reveal -- what it would reveal,
6 how that revelation would affect the proceedings,
7 whether the effect would have a weighty and significant
8 chance of prejudicing public interests, you need
9 specifics not generalities.

10 Then the test goes on to make point that the test of
11 necessity is a strict one, by reference to
12 Mr Justice Green's judgment in *Zaw Lin*, at paragraph 80.

13 Where that takes you -- I suppose I should have
14 started with this. The exemptions in schedule 2 to the
15 Data Protection Act are made under article 23 of the
16 General Data Protection Regulations.

17 THE CHAIR: Yes.

18 MR FACENNA: You will have seen in article 23 of the General
19 Data Protection Regulations that it incorporates
20 requirements of necessity and proportionality.

21 THE CHAIR: Yes.

22 MR FACENNA: Reading then into the Act, where you go next is
23 section 15 of the Data Protection Act.

24 You will see in section 15 of the Data Protection
25 Act, subsection 2, it makes the point that the

1 exemptions which you find in schedule 2 are exemptions
2 as allowed for under article 23.1 of the General Data
3 Protection Regulations.

4 It is -- I can say that there is a case which was
5 heard before Mr Justice Ouseley, I think about
6 a fortnight ago, which is a challenge -- I think by
7 the3million and the Open Rights Group -- to the
8 lawfulness of one of the exemptions in the schedule. It
9 was the Secretary of State's position -- so essentially
10 it is common ground -- that the exemptions in schedule 2
11 have to be read as subject to the proportionality
12 requirements which you see in article 23.

13 The Government accepts that these are not blanket
14 exemptions, they only apply subject to strict
15 proportionality tests, because that is what article 23
16 allows.

17 THE CHAIR: The underlying question, I think, will be
18 whether that applies on a case-by-case basis or to the
19 conduct of the Inquiry generally.

20 MR FACENNA: We say that that is clear from Guriev and
21 Zaw Lin that it applies on a case-by-case basis to
22 personal data. Moreover, the exemption has to be
23 narrowly construed, you see that in paragraph 80 of
24 Zaw Lin. You have to take a selective and targeted
25 approach to assessing whether specific data would give

1 rise to the requisite degree of prejudice and even if
2 such prejudice would be likely to arise on the facts of
3 a particular case, you still have to ask: is it strictly
4 necessary and proportionate to rely on the exemption?

5 It doesn't provide a blanket -- it is impermissible
6 to have a blanket approach to exemptions from the
7 provisions. They obviously only apply, as is clear on
8 the words of the exemption itself, to the extent that
9 that is necessary subject to proportionality and with
10 the evidential burden placed on the data controller.

11 To give a practical example, what that would mean on
12 notification for example is that even assuming there is
13 some data which falls in principle within the exemption,
14 you still have to ask yourself: to what extent is it
15 strictly necessary to be exempted from the notification
16 requirements? Which simply gets you back into
17 a proportionality analysis and what is proportionate and
18 appropriate.

19 The same would be true in relation to subject access
20 rights under article 15. One would have to ask: to what
21 extent is it necessary, even if the exemption applies,
22 to be exempted from the requirement?

23 There is also case law, Dawson-Damer in the Court of
24 Appeal, which you also have in the bundle -- which makes
25 it clear that it is not permissible for a data

1 controller to say, "I'm not going to comply with subject
2 access requests because it is too much work, it is it
3 too difficult". It is exactly what Taylor Wessing
4 argued in that case, reference to the thousands of
5 manual documents they would have had to check for legal
6 privilege, and the Court of Appeal said there are limits
7 but you still have to take proportionate steps to comply
8 with subject access rights if a subject access request
9 is made.

10 That is the short version, if that helps.

11

12 THE CHAIR: It does. I am very grateful to you for giving
13 it to us.

14 Can I take it that everybody else -- I will come to
15 Mr Summers in a moment -- everybody else wants an
16 opportunity to put in written submissions about this and
17 to make oral submissions if, as I anticipate will be
18 inevitable, they are not all in accordance with what
19 Mr Facenna has said?

20 MS MANNION: Yes, sir.

21 THE CHAIR: Right.

22 Is there anything you want to say at this stage
23 about this, Mr Summers? I'm not pressing you if you
24 don't.

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Discussion re procedure

MR SUMMERS: Not on the substantive issues. I have certainly not heard anything -- perhaps the question of what constitutes processing for the purposes of a hearing point aside, but we can address that in writing.

What I would ask though, and it is a product of the slightly difficult position that we find ourselves in, as Sir, you have articulated, if our submissions were in the light of what everyone else has to say. Just because we are not advancing a particular argument, just making sure that the right questions have been asked and the right principles apply. It may be, in the light of all of that, we have absolutely nothing to add because the core participants have already got there correctly.

THE CHAIR: Is the position this: you would welcome an invitation to an oral hearing but do not think it necessary or wise to put in a written submission in advance; and will, if necessary, make your observations when everyone else has had their say?

MR SUMMERS: Yes.

THE CHAIR: I am perfectly content with that. I am grateful to you for coming to this hearing and for putting in the written submission that you have.

Could you convey my gratitude to the Commissioner?

MR SUMMERS: Certainly, Sir.

1 MR FACENNA: Sir, I ought to have said -- you may have in
2 mind the process for the next hearing. It seems to us
3 it might assist you more to have a sequential exchange
4 of further submissions rather than everyone doing it on
5 the same day.

6 There doesn't seem to us to be much point in us
7 putting something in on these points again without
8 seeing what other people have to say about our
9 submissions.

10 THE CHAIR: I don't want a sequence of eight or nine --

11 MR FACENNA: No, no, I am not suggesting that. I would be
12 suggesting that those who wish to reply to the case
13 which we set out in our submissions, and I have
14 adumbrated today, do so and then we would consider
15 whether it is necessary for us to put in something in
16 reply.

17 THE CHAIR: Ms Mannion, this is your pigeon, I think.

18 MS MANNION: Sir, what we would prefer is that all parties
19 respond to the now number of potential exemptions which
20 have been identified: identify those which they consider
21 could apply; those which they consider couldn't; give
22 you, Sir, some assistance as to how they apply if they
23 do, just as the head notes we have heard now do.

24 In our submission, it is appropriate for cross
25 exchange in respect of that. This is not litigation,

1 firstly, of course but, secondly, we don't believe we
2 have heard Mr Facenna's position in respect of all of
3 the different exemptions, why they don't apply, and in
4 our submission it would be of assistance for that to be
5 set out by everybody openly.

6 THE CHAIR: At first blush, I don't think the ones you have
7 identified do apply. But I am open to persuasion that
8 I am wrong.

9 MS MANNION: Of course. Sir, for our part it would assist
10 if everybody, effectively, went through all of those
11 which have been identified. If they need to be
12 dismissed, dismiss them; and if they don't, explain why
13 they operate.

14 What would be less than ideal is if the parties
15 arrived back -- or the participants arrived back -- at
16 the next hearing and some exemptions have been
17 considered in depth by some participants and some have
18 not. Sir, you will end up with gaps in how we can
19 assist you if we don't all approach it in the same way.

20 THE CHAIR: I am quite anxious to limit the public
21 expenditure that is going to be incurred in debating
22 this issue.

23 I can't, at the moment, see there is any need for
24 anyone other than yourself or Mr Hall and Mr Facenna to
25 address this issue and, of course, Mr Summers to be here

1 as he has indicated kindly he will.

2 MS MANNION: Certainly we will address it. I can't speak
3 for whether other core participants wish to.

4 THE CHAIR: No.

5 MS MANNION: It will be possibly a matter for them.

6 THE CHAIR: Does anyone -- yes?

7 SIR ROBERT FRANCIS: I don't say this with any huge amount
8 of enthusiasm, Sir, but can I have liberty to come if
9 I am instructed to do so?

10 THE CHAIR: Yes. Your expenditure of public funds is your
11 corner of the public funds, but I'm anxious about that
12 for which I am directly responsible.

13 I am very grateful to Mr Facenna for the written and
14 oral submissions he has made on the issues we have
15 discussed today and I regard his participation as
16 essential and will fund it, but I am not minded at the
17 moment to fund anybody else.

18 SIR ROBERT FRANCIS: I was not asking for that,
19 unfortunately.

20 THE CHAIR: No.
21 Yes?

22 MS DAVIDSON: Sir, just to put down a marker: as you know,
23 I act for the Home Office but this issue may potentially
24 engage wider Whitehall interest, not least because the
25 Department for Digital, Culture, Media and Sport hold the policy

1 on data protection and the Cabinet Office hold the
2 policy on public inquiries.

3 It is an issue that I have begun a process of
4 consultation that is not yet concluded, and we would
5 like the opportunity, if necessary, to put in
6 submissions on this issue, because it does have
7 a potentially quite a wide impact.

8 THE CHAIR: Certainly. You are pushing at an open door.
9 I agree you can.

10 Does anybody else want to put in submissions?

11 Ms Law?

12 MS LAW: Sir, I am afraid you do pay for my attendance.

13 I would not ask for funding to make lengthy written
14 submissions on the points of law, but I would ask for
15 funding to be present because it does seem to me that
16 the issues that are being raised do touch upon matters
17 which concern my clients, certainly in their outcome and
18 how the process is managed going forward.

19 So, as I say, I would ask maybe for permission to
20 attend?

21 THE CHAIR: At the moment, I don't think it is necessary
22 that you should do so, unlike today when I, as you know,
23 agreed to fund your presence and am grateful for your
24 submissions.

25 But this is, even in European Union terms,

1 a relatively hard-edged question of law. The impact on
2 disclosure of documents to your clients is, I think,
3 nil.

4 MS LAW: Sir, I didn't have in mind the impact on disclosure
5 to my clients but more on the effects on the process
6 the Inquiry is going to adopt, and the delay or
7 otherwise that may cause to how the hearings take place.

8 THE CHAIR: I am very conscious of the need to avoid
9 avoidable delay, but you are not in the least concerned
10 with notification requirements.

11 MS LAW: I am not.

12 THE CHAIR: So the answer, I am afraid, is no.

13 Ms Sikand?

14 MS SIKAND: Sir, I am not suggesting that I could contribute
15 meaningfully to hard-edged questions of European Union
16 law -- certainly not in a way that would assist you more
17 greatly than Mr Facenna would -- but certainly the
18 question of notification does impinge upon my client and
19 I would be grateful to be able to at least attend the
20 hearing.

21 THE CHAIR: How does it directly affect him?

22 MS SIKAND: Well, at the moment we don't know exactly what
23 it is that you may or may not have in your possession
24 about his personal data, outside the limited personnel
25 files that we have some access to.

1 THE CHAIR: I don't yet know. I have not read the file --
2 the intelligence reports that he produced, other than
3 the odd sample. But I anticipate what we will have is
4 his personnel file and his intelligence reports in full.

5 MS SIKAND: I anticipate there may be more.

6 THE CHAIR: Are you able to say in an open forum what that
7 might be?

8 MS SIKAND: No.

9 THE CHAIR: Right.

10 At the moment apart from his interest, which
11 I share, in getting on with things, I can't see that the
12 notification issue affects him, at least not so much as
13 to require your attendance.

14 Unless there is a more persuasive reason, I am
15 afraid the answer is no.

16 MS SIKAND: So be it, sir.

17 Perhaps if I could put it this way: if you could
18 tell us in terms that the notification requirement does
19 not in any way impinge upon him, then I will sit down
20 quickly.

21 THE CHAIR: All I can do is to say that I cannot conceive
22 that it does. As I say, I have not read his
23 intelligence reports: I am still in 1984, and I have
24 a bit to go before I get to him.

25 MS SIKAND: Therein the difficulty lies, sir.

1 I would ask you to keep an open mind about that. If
2 I could think of something more persuasive to say to
3 you, having taken instructions -- because as you know
4 he's not here today -- then I shall do so in writing.

5 THE CHAIR: Of course. The door is always open. But on the
6 basis of what you have told me so far, the answer is
7 that which I have given.

8 MS SIKAND: I have not told you very much.

9 THE CHAIR: No.

10 MS SIKAND: Because you asked me whether I could say
11 anything openly, and I said no, which is why I have not
12 told you very much.

13 THE CHAIR: I understand. As always the door is open. As
14 always, I am grateful for your participation in the
15 proceedings which I frequently find helpful.

16 MS SIKAND: Thank you, sir.

17 THE CHAIR: Yes?

18 MR O'BRIEN: Sir, I appear for the National Crime Agency.
19 I understood your observation to be limited to the
20 funding which you would provide, which obviously the
21 National Crime Agency does not ask for; but the National
22 Crime Agency would at least like the opportunity to
23 address you in writing and, if you thought appropriate,
24 then orally.

25 This is an issue which, for reasons which have been

1 canvassed today, came up relatively recently. Whether
2 we should have raised it earlier is another matter, but
3 it is something that I think we would like to give some
4 thought to and may have something to contribute on.

5 THE CHAIR: Yes. I am certainly not shutting you out. I am
6 basically concerned with costs for which I am
7 responsible.

8 MR O'BRIEN: I thought so, but I thought I should check.

9 Thank you, Sir.

10 THE CHAIR: Does that conclude today's business?

11 Not quite. Mr Brandon, you were standing?

12 MR BRANDON: Sir, I was going to say that notification does
13 potentially affect us, of course.

14 We are not funded by the Inquiry. Could we think
15 about whether we want to put anything in and, if we do,
16 obviously ask your permission?

17 THE CHAIR: Yes. As has been apparent today, the input from
18 those who have asked to be remembered, as it were, for
19 future reference has not been substantial. It is not to
20 denigrate the importance of what you said, but you did
21 not have to say a lot and you said it succinctly, for
22 which I am grateful.

23 MR BRANDON: I may have to say nothing at all next time
24 round, in which case I will not come.

25 THE CHAIR: Does that now conclude business?

1 Good, thank you all.

2 (4.56 pm)

3 (The hearing adjourned until a date to be fixed)

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