

UNDERCOVER POLICING INQUIRY

Preliminary Issue: Privacy and Data Protection

Note regarding the Inquiry's evidence gathering process

1. A further hearing in relation to privacy and data protection is scheduled to take place on 25 March 2019, to consider the extent to which Articles 13, 14 and 15 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, also referred to as the General Data Protection Regulation ("GDPR"), apply to the work of the Inquiry and the practical effect of the resulting obligations.
2. For the purposes of that hearing, I have invited submissions on the following issues:
 - a. The extent to which Articles 13, 14 and 15 of the General Data Protection Regulation apply to the work of the Inquiry, having regard to the effect of any applicable exemptions.
 - b. Insofar as Articles 13, 14 and 15 of the General Data Protection Regulation do apply to the work of the Inquiry, and no exemptions are applicable, what obligations do Articles 13, 14 and 15 impose upon the Inquiry, having regard in particular to Article 14(5)(b)? In those circumstances, what would be the practical implications for the Inquiry in relation to the evidence gathering exercise?
 - c. If I am performing a function to which any of the exemptions referred to above and/or set out in Schedule 2 to the Data Protection Act 2018 applies, what obligations do Articles 13, 14 and 15 of the General Data Protection Regulation impose upon the Inquiry? In those circumstances, what would be the practical implications for the Inquiry in relation to the evidence gathering exercise?
3. I have directed that any written submissions on the above issues should be sent to the Inquiry by no later than 4.00pm on 8 March 2019.
4. I have set out in my Note dated 12 February 2019, my provisional view that "the listed GDPR provisions" specified in paragraph 6 of Schedule 2, Part 2 to the Data Protection Act 2018 do not apply to the Inquiry to the extent that the application of those provisions would be likely to prejudice the proper discharge of my function.

5. The purpose of this document is to set out the evidence gathering process which the Inquiry is conducting and intends to conduct, in order to enable focused submissions on the practical effect of any obligations to which the Inquiry is subject. The evidence gathering process is set out below. It is my intention to amend the existing Restriction Protocol to incorporate this approach, unless I am persuaded to the contrary at the hearing to be held on 25 March 2019.

Step 1: Provision of relevant documents in the possession of the Inquiry to officers for purposes of obtaining witness statements from officers

- (i) Former undercover officers and their managers from whom a witness statement is requested under Rule 9 of the Inquiry Rules, are supplied with a package of relevant documents, including intelligence reports. The documents which are provided are those which the Inquiry considers it necessary for them to see. Those shown to the officers contain personal data of non-state individuals and almost always include special categories of personal data as specified in Article 9(1) of the General Data Protection Regulation. It is necessary for the officers to see such information in the documents so that they can refresh their memories, understand and answer the questions in the Inquiry's request and give the best possible evidence. One of the issues which the Inquiry must investigate is why and for what, if any, purpose, certain special categories of personal data were obtained and included in intelligence reports. These documents are reviewed by the Inquiry and relevant state bodies for an 'officer eyes' public interest security check before they are supplied. So far, redactions at this stage have been rare. Officers are required to sign an undertaking, a copy of which is annexed to this Note, the purpose of which is to ensure that the contents of the documents are not further disseminated. The Inquiry also has the power, if it considers it appropriate, to impose a restriction order in relation to the contents of the documents. Once an officer has read the documents, for the purpose of preparing his/her witness statement, the documents are not retained by the officer but instead held securely by the officer's representatives. In circumstances where it is necessary to supply such documents (including documents containing special category personal data) to an officer who is resident outside the European Union, special consideration will be given to what

safeguards are appropriate in the particular circumstances¹: see Articles 44 to 46 of the General Data Protection Regulation.

Step 2: Redaction of officer statements and relevant documents for provision to non-state core participants

- (ii) The package of relevant documents and officer witness statement(s) must then be redacted appropriately on public interest grounds and/or to reflect existing restriction orders and/or on privacy grounds (whether relating to the officer or to another person in accordance with paragraph 5(vii) below) before being shown to non-state core participants directly affected by the deployment of that officer. The redaction of the documents and the witness statement(s) are interrelated and the former cannot be regarded as final before the latter is available.

Step 3: Additional details on the website

- (iii) When the above redaction process in relation to an officer's witness statement(s), if obtained, and relevant documents is concluded, more detailed information will be put on the Inquiry's website with a view to notifying those who were affected by the deployment (in particular, those whose personal data may be contained in the Inquiry's records) so that they can come forwards. The further information published will be assessed on a case-by-case basis in the light of the evidence obtained but will normally include more specific details of groups infiltrated than those published so far. They will include details of the particular branch of a group and geographical details where appropriate, as well as the dates of particular aspects of the deployment (for example, the dates of infiltration into particular groups, branches or committees). Where relevant and necessary, the Inquiry will also publish at this stage details of groups or campaigns which were not directly infiltrated but which appear to have been reported on (for example, family justice campaigns or other groups which were the subject of significant reporting). The further information published at this stage, in relation to any given deployment, will also include any corrections to the information already published in the Cover Names table of the Inquiry's website required by advances in the Inquiry's

¹ For the avoidance of doubt, the Inquiry has not sent such material abroad to date.

UNDERCOVER POLICING INQUIRY

understanding of the deployment. These steps will require that the initial investigation into an officer is complete, and will require that the public interest redactions process, if required, has been carried out. The Inquiry will also take proactive steps to contact those whom, from its review of the evidence gathered to date, it wishes to call as witnesses.

- (iv) However, beyond these steps, the Inquiry considers that it would involve a disproportionate effort to attempt to contact all data subjects whose personal data is being processed. The Inquiry is in contact with only a small fraction of those affected. It is impossible to trace and notify all those affected and it is impracticable to trace and notify more than a proportion – likely to be a small proportion – of those affected. Any attempt by the Inquiry to contact significantly more individuals than those whom it wishes to call as witnesses would inevitably require considerable expenditure, cause very lengthy delay and divert members of the Inquiry team from more important tasks, all of which would frustrate the purpose of the Inquiry.

Step 4: Provision of officer statements and relevant documents to non-state core participants and witnesses

- (v) The Inquiry will then, on a rolling basis, provide to relevant non-state core participants and/or witnesses those parts of officer statements and the associated relevant documents, redacted as appropriate, which the Inquiry considers it necessary for those individuals to see in order to provide their best evidence to the Inquiry.
- (vi) Only a minority of intelligence reports refer to one individual. It is impracticable to redact the names of, and all special category personal data relating to, other individuals named in a report before disclosing it to one individual. Nor will non-state core participants be able to participate effectively, or witnesses understand the reports about which they are being asked, if this is done. If any non-state core participant or witness is to be provided with intelligence reports about them, they will have to see documents which contain the personal data, including special category personal data, of others described in the same documents. They will be required to sign an undertaking similar to that required of former undercover officers and their managers before

UNDERCOVER POLICING INQUIRY

documents are provided to them, whether as individuals or as part of a confidentiality ring. Alternatively, the Inquiry may exercise its power, if it considers it appropriate, to impose a restriction order in relation to the contents of the documents.

- (vii) Some documents contain special category personal data of a particularly sensitive kind, for example details of intimate personal relationships with named individuals, which was clearly not known to others within a proposed confidentiality ring. The Inquiry may either (a) make its own assessment of the balance to be struck between the needs to disclose the information and the data protection and privacy rights of the person concerned, irrespective of whether the person is readily contactable, or (b) where such individuals are readily contactable, attempt to contact them before disclosing such information to others under the conditions set out in 5(vi) above, in order to afford them the chance to object to such disclosure. In the latter case, there may be situations in which the Inquiry has to decide whether it is necessary to disclose information notwithstanding any objection. In those circumstances, the Inquiry will have to decide whether or not it is necessary to disclose the information because the recipient(s) need(s) to know it to fulfil their role in relation to the Inquiry, giving due weight to the rights of the data subject. It is anticipated that the net result will be that special category personal data will normally not be restricted for disclosure within a confidentiality ring.
- (viii) The purpose of disclosing the package of relevant documents and officer witness statements to non-state core participants and witnesses is twofold. Primarily, it will permit them to respond to a Rule 9 request for a witness statement and participate in the Inquiry in relation to the deployment. In addition, it may assist the Inquiry to contact others who may be able to provide relevant and necessary evidence about it. Discussion will be required with the recognised legal representatives of the non-state core participants to determine how others can be contacted whilst protecting the data protection and privacy rights of those whom the Inquiry may wish to contact.
- (ix) The timing of disclosure to non-state witnesses will depend upon the evidence obtained by the Inquiry about them. In some cases, one individual will have been the subject of reporting over many years by

several undercover officers. In that event, it might make sense for the disclosure of documents and witness statements to occur in one go to that individual alone when they have all been obtained. In other cases, it may be more efficient to disclose documents and witness statements relating to one deployment or a small series of deployments into one group or subdivision of that group to non-state core participants who were members of it.

Step 5: Public disclosure of documents

- (x) The Open Hearing Bundle (as opposed to bundles for Private or Closed hearings) will be the means by which officers and non-state core participants see documents, in confidence, relating to deployments with which they were not directly concerned. The bundle's subsequent posting on the Inquiry website will be the means by which the public see these documents. These publications give rise to further and distinct data protection issues. Non-state core participants and those who have been contacted by the Inquiry will have the opportunity to apply for the redaction of their personal data from documents which will be published; but it will not be practicable to afford this facility to everyone mentioned in the intelligence reports, for the reasons set out above in paragraph 5(iv). Furthermore, extensive redaction of published documents is likely to make them unintelligible to the public at large. For those reasons, after giving all witnesses the opportunity to make representations about which documents should be published, it is the intention of the Inquiry to publish and include in the Open Hearing Bundle only a selection, sufficient to demonstrate the nature of the deployment and the activities carried on during it and the principal issues raised by it. In respect of any document published and included in an Open Hearing Bundle, the Inquiry will consider what, if any, redactions are necessary to protect privacy and data protection rights. Furthermore, it is intended that, pursuant to Rule 10 of the Inquiry Rules 2006, the questioning of witnesses in public hearings will normally be conducted by counsel to the Inquiry who will ensure that any questions asked comply with any restrictions imposed on the written evidence.

6. I have considered whether it would be possible to change the sequence of disclosure of documents which are held by the Inquiry. I do not consider that

UNDERCOVER POLICING INQUIRY

these documents can routinely be provided to non-state parties before being supplied to the officer for the following reasons:

- a. Firstly, as noted above, redaction of documents is closely connected to redaction of witness statements. Where a witness statement is needed before security redactions can be finalised, the officer will need to see the documents before security redactions can be finalised and before the documents can be shown to non-state core participants and witnesses.
- b. Secondly, the reality is that it will be necessary for the Inquiry's purposes for the personal information gathered by officers to be shown to them. Where the rights of the data subject are particularly strong, it is likely that the Inquiry's need to ask the officer about the information will be equally strong. The Inquiry will want to ascertain, for example, why and for what, if any, purpose, such information was obtained and included in intelligence reports. It would be an unusual case in which an application to withhold such information contained in that officer's intelligence from the officer would have merit.
- c. Thirdly, the result will be significant delay to the progress of the Inquiry. The Inquiry's preferred process involves a three stage cumulative restrictions process:
 - (i) stage 1 - before documents are shown to the officer;
 - (ii) stage 2 - before documents are shown to directly affected civilian witnesses; and
 - (iii) stage 3 - before documents are included in the Open Hearing Bundle.

At each stage, any restrictions applied would carry forward to the subsequent stage/s.

The alternative would involve a four stage, non-cumulative, restrictions process:

- (i) stage 1 - before documents are shown to the relevant non-state persons initially;
- (ii) stage 2 - before documents are shown to the officer;
- (iii) stage 3 - before documents are shown to non-state persons for witness statement purposes; and

UNDERCOVER POLICING INQUIRY

- (iv) stage 4 - before documents are included in the Open Hearing Bundle.

Some of the public interest restrictions imposed at stage (i) might need to be lifted at stage (ii) because some sensitive information can and must be shown to officers but cannot be shown to civilians. Moreover, some of the restrictions imposed at stage (i) might be lifted before stage (iii) because in the absence of an officer's input at stage (i) a precautionary approach to restriction will be necessary and the results of that precautionary approach at stage (i) may have to be revisited in the light of the officer's response at stage (iii). The additional stage, combined with the non-cumulative nature of the restrictions exercise, would make the alternative approach significantly more time consuming.

- d. Fourthly, it will require a duplication of effort on the part of non-state core participants who are willing to provide evidence to the Inquiry. The Inquiry has accepted the non-state core participants' position that they will not provide witness statements to the Inquiry until they have seen the witness statements of relevant undercover officers. If the process set out in paragraph 5 above is followed, the non-state witnesses will be provided with relevant documents and a witness statement from the relevant undercover officer or officers for them to consider at the same time. If they were provided with the documents first and then, after what would be a significant elapse of time, with the witness statement of the undercover officer or officers, they would have to undertake an exercise intended to permit them to understand what happened to them and to respond, twice.

26 February 2019

Sir John Mitting
Chairman, Undercover Policing Inquiry

UNDERCOVER POLICING INQUIRY

Annex Template of Confidentiality Agreement

Date: _____

Parties: (1) Undercover Policing Inquiry of PO Box 71230, London NW1W 7QH (the Inquiry); and
(2) _____ of _____
(the Recipient)

1. The Inquiry intends to disclose material (the Confidential Information) to the Recipient for the purposes of assisting with a request for witness evidence, pursuant to Rule 9 of the Inquiry Rules 2006 (the Purpose).
2. In signing this document, the Recipient confirms that they are content to access / receive this information SUBJECT TO the undertakings set out below:
 - A. The Recipient undertakes not to use the Confidential Information for any purpose except the Purpose, without first obtaining the written agreement of the Inquiry.
 - B. The Recipient undertakes:
 - I. to treat the information provided (including its content) as confidential and to take all reasonable efforts to protect the confidentiality of such information;
 - II. to ensure proper and secure storage of all the Confidential Information as necessary;
 - III. not to make any copies (including electronic copies or digital images) of the Confidential Information without the express written permission of the Inquiry; and
 - IV. not to disclose the Confidential Information, or the content of it, to any third party, except to his/her legal representative(s), without the express written permission of the Inquiry.

UNDERCOVER POLICING INQUIRY

3. The undertakings in clause 2 above apply to all of the information disclosed by the Inquiry to the Recipient, regardless of the manner or form in which it is disclosed or recorded, but they do not apply to any of this information which is in or in future comes into the public domain (unless as a result of the breach of this Agreement).
4. Nothing in this Agreement will prevent the Recipient from making any disclosure of the Confidential Information required by law or by any competent authority.
5. The Recipient will return all copies and records of the Confidential Information to the Inquiry or his/her legal representative(s) once the Purpose has been completed (i.e. at the same time as the response to the Rule 9 request is returned). The Recipient will not retain any copies or record of the Confidential Information in their personal possession, other than parts of it that are recorded in the final or any draft of the response to the Rule 9 request or in communications with his/her legal representative(s), and which material will therefore remain subject to these undertakings.
6. The undertakings in clause 2 will continue in force indefinitely or until further notice from the Inquiry.
7. This Agreement is governed by, and is to be construed in accordance with, English law. The English Courts will have non-exclusive jurisdiction to deal with any dispute which has arisen or may arise out of, or in connection with, this Agreement.