

IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS OF THE NATIONAL POLICE CHIEFS' COUNCIL FOR ADJOURNED PRIVACY HEARING ON 25 MARCH 2019

Introduction

1. The NPCC refers to their submissions made in writing for the privacy hearing on 31 January 2019 and adopts them for the purpose of the adjourned hearing. In particular, the NPCC re-iterates the importance of “policing” redactions being applied first; and reserves the right to make further submissions on the process to be adopted for NPOIU documents, including as regards the mosaic effect.
2. The present submissions are intended to assist the Inquiry on the issue raised by the NPNSCPs, as reflected in the Chairman’s note and directions of 12 February 2019, relating to the GDPR Articles 13, 14 and 15.
3. In summary it is the view of the NPCC that Article 13 has no general application in relation to the material the Inquiry is likely to obtain from the NPCC (or other third parties, as opposed to data subjects); and that the Inquiry may consider that it is exempted from obligations under Article 14 and 15 by virtue of the provisions of Section 15(2)(a) and (b) and Schedule 2, Parts 1 and 2 of the DPA 2018.

Relevant statutory provisions

4. As an EU Regulation, the GDPR has direct effect in EU Member State law from the date it came into effect (25 May 2018). However, it leaves certain matters for specification or restriction under national law. The applicable national law for these purposes is the Data Protection Act 2018 (“DPA 2018”). The DPA 2018 makes provision about the processing of personal data both where it is subject to the GDPR; and where it falls outside the scope of the GDPR, including in relation to law enforcement processing (Chapter 3), and processing by the Intelligence Services (Chapter 4).
5. As for the legality of processing generally:

- a. By Article 2.1 the GDPR applies:

“to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system ...”

It is accepted that the processing of data by the Inquiry will come within this overall definition.

- b. Article 5 of the GDPR requires personal data to be processed in accordance with six principles. Personal data must be:
 - (1) *processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);*

- (2) *collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');*
- (3) *adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')*
- (4) *accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');*
- (5) *kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');*
- (6) *processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').*

c. Article 6.1 provides, insofar as is potentially relevant to the Inquiry, that processing will only be lawful if and to the extent that at least one of the following applies:

(a) The data subject has given consent [...]

...

(c) processing is necessary for the compliance with a legal obligation to which the controller is subject

(d) processing is necessary in order to protect the vital interest of the data subject of another natural person

(e) processing is necessary for the performance of a task carried out in public interest or in the exercise of official authority vested in the controller [...]

It is submitted that the Inquiry is:

- Under a legal obligation, imposed by the terms of reference and the Inquiries Act 2005, to inquire into the subject matter specified, and that to comply with that obligation it must collect evidence considered to be relevant, necessary and available.
- Is likely to consider that processing of this material is necessary:

- to protect the vital interests of those affected by undercover policing, insofar is necessary to fulfil the terms of reference.
- to perform its task in the public interest, under authority vested in the Inquiry by the Home Secretary and the Inquiries Act 2005.

Accordingly it is submitted that, subject to the Inquiry taking the view that these conditions are fulfilled, even in the absence of consent, it is lawful for to process personal data for these purposes.

- d. Any such processing has to comply with the data protection principles of Article 5 GDPR. The data protection principles are not a set of fixed and absolute rules, that apply regardless of the context. Their application will in many respects be a matter of judgement for the data controller in the particular circumstances, as to which the data controller will be afforded a substantial margin of discretion. For example, the requirement of “necessity” is a matter of judgment for the Inquiry. Processing is necessary if the Inquiry reasonably and proportionately determines that it is necessary. It cannot mean that processing is unlawful if some other alternative is available, where that is considered to be less effective. It is submitted that the approach to the meaning of “necessary” adopted in *Cooper v National Crime Agency* [2019] EWCA Civ 16 at [90], adopting and approving that taken in *Hussain v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin), applies equally to the more recent legislation. In *Hussain Green J* stated at [230]:

“...The test of necessity in the conditions means more than desirable but less than indispensable or absolutely necessary: see e.g. Goldsmith International Business School v Information Comr [2014] UKUT 563 (AAC) at [37]. A test of reasonable necessity should be applied: see the Goldsmith International Business School case, para. [38]. This test implies that the council [the data controller in that case] has an appropriate margin of appreciation. The parties agreed that the power had to be exercised proportionately. ...” (emphasis added)

This passage was approved in *Cooper* as a correct summary of the law, in particular by reference (at [91]) to the judgment of Baroness Hale in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55 at [25-27].

- e. The reference to transparency is also a reference to a principle not an absolute requirement: otherwise the requirement would not be consistent with exemptions from the notification requirements, considered below.
- f. Indeed in Article 6.2 the GDPR grants powers to Member States to maintain or introduce “more specific” provisions to “adapt the application” of the legal obligations referred to in Article 6.1(c) and (e) above. Article 6.3 requires Member States to lay down the basis for processing under Article 6.1(c) and (e), which legal basis may also contain “specific provisions” to

adapt the application of the rules of the GDPR including (inter alia) the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; and the entities to, and purposes for which, the personal data may be disclosed.

- g. The DPA 2018, section 8, introduces such provisions:

“In Article 6(1) of the GDPR (lawfulness of processing), the reference in point (e) to processing of personal data that is necessary for the performance of a task carried out in the public interest or in the exercise of the controller's official authority includes processing of personal data that is necessary for—

[...]

(c) the exercise of a function conferred on a person by an enactment or rule of law,

(d) the exercise of a function of the Crown, a Minister of the Crown or a government department...”

It is submitted that this section, taken together with the Inquiries Act 2005, provides the legal basis for processing personal data.

6. Special categories of data:

- a. By Article 9.1 GDPR, a stricter regime is imposed for the processing of personal data revealing:

“racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation”.

Processing of such data is prohibited unless, among other exceptions:

Art 9.2(a): The data subject has given explicit consent

Art 9.2(g): *“processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject”* (emphasis added)

It is submitted that a significant amount of the data the Inquiry will wish to process will be special category data and that there is a “substantial public interest” in doing so. Proportionality is a matter of judgment for the inquiry. It is the essence of the right to data protection which must be “respected”.¹ There is no absolute prohibition on processing where a substantial public

¹ As submitted by the NPNSCPs at [21] of their submissions dated 24 January 2019.

interest is involved: a balance must be drawn between the necessity of the processing in the public interest and the effect on the interests of the data subject. What is “suitable” by way of safeguards is also a matter of judgment.

- b. Sections 10(1) and (3) of the DPA 2018 provide that the requirement in Art.9.2(g) above [substantial public interest] is only met if it meets a condition in Schedule 1 Part 2 of the DPA 2018. The following are potentially relevant paragraphs of Schedule 1:
- (1) Paragraph 5 provides an overarching requirement, in addition to one of the more specific requirements, that the controller must (save where otherwise stated) have an appropriate policy document in place, complying with the provisions of Part 4 of Schedule 1.
 - (2) Paragraph 6: This condition is met if the processing is necessary for statutory and government purposes, namely the exercise of a function conferred on a person by an enactment or rule of law and which is necessary for reasons of substantial public interest.
 - (3) Paragraph 10: The processing must be necessary for preventing or detecting of an unlawful act(s), carried out without the consent of the data subject (so as not to prejudice those purposes) and necessary for reasons of substantial public interest. Under para. 10(2) if the processing consists of the disclosure of personal data to a competent authority, or is carried out in preparation for such disclosure, the condition will be met even if, when the processing is carried out, the controller does not have an appropriate policy document in place.
 - (4) Paragraph 11: The processing must be necessary for the purpose of a “protective function” (meaning a function intended to protect members of the public against dishonesty, malpractice, or other seriously improper conduct, unfitness or incompetence, mismanagement of a body, or failures in services provided by a body), carried out without the consent of the data subject (so as not to prejudice the exercise of that function) and necessary for reasons of substantial public interest.
- c. It is submitted that the Inquiry is entitled to consider whether the conditions in paragraphs 6, 10 and/or 11 to Schedule 1 Part 2 of the DPA 2018 are fulfilled. Again, the test is whether the processing is necessary for the specified purpose. As before, necessity is a matter of judgment in respect of which there can be no absolute standard.

7. Notification obligations – Articles 13 and 14

- a. Article 13 of the GDPR [information to be provided where personal data are collected from the data subject] applies “*Where personal data relating to a data subject are collected from the data subject [...]*” (emphasis added).

The data which will be processed by the Inquiry will, generally, not be collected from the data subject but instead from third parties, frequently one or more police forces, or the NPCC. Therefore, it is unlikely that this Article will apply to the issues being considered by the Inquiry.

- b. Article 14 GDPR, which applies to personal data not obtained from the data subject and therefore is potentially relevant, provides:
1. *Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:*
 - (a) *the identity and the contact details of the controller and, where applicable, of the controller's representative;*
 - (b) *the contact details of the data protection officer, where applicable;*
 - (c) *the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;*
 - (d) *the categories of personal data concerned;*
 - (e) *the recipients or categories of recipients of the personal data, if any;*
 - (f) *where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation [...]*
- c. Article 14.2 requires the data controller to provide specified additional information “*necessary to ensure fair and transparent processing in respect of the data subject*”.
- d. This obligation does not apply in a number of circumstances including where:
- Article 14.5(a) – the data subject already has the information
 - Article 14.5(b) – the provision of the information “*proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in Article 89(1)² or in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available*” (emphasis added).
- e. It is submitted that the underlined provisions are matters for the Inquiry to judge on the relevant facts known to it. In particular, if it is determined that compliance with the obligation is so onerous that it would impede or prevent the Inquiry achieving its terms of reference within a time period required to be effective in its purposes, the notification obligation is removed, although it would still be necessary to consider what “appropriate

² Which is relevant only to archiving safeguards.

measures” should be taken to protect data subjects’ rights. That consideration must include whether to make the information public.

8. Section 15(2)(a) and Schedule 2 Part 1 of the DPA 2018 make provision for adapting or restricting the application of the requirements of Articles 13, 14 [and 15] GDPR (inter alia), including the following paragraphs of Schedule 2:

- a. Paragraph 5(1): The obligation(s) do not apply to “*personal data consisting of information that the controller is obliged by an enactment to make available to the public, to the extent that the application of those provisions would prevent the controller from complying with that obligation.*”

It is submitted that this provision might have some application to material being processed by the Inquiry. For example, if it was determined that the the balance required by the Inquiries Act 2005 and Inquiries Rules 2006 weighed in favour of publication of material, but that withholding publication was necessary due to notification of data subjects being impracticable or disproportionate, it might be said that the application of Article 14 would prevent the Inquiry complying with its statutory obligations, thereby engaging paragraph 5(1).

- b. The same point could apply to paragraph 5(2) (concerning disclosure cf. publication) which states that the obligation(s) do not apply to “*personal data where disclosure of the data is required by an enactment, a rule of law or an order of a court or tribunal, to the extent that the application of those provisions would prevent the controller from making the disclosure.*”

- c. Paragraph 5(3) provides:

The listed GDPR provisions do not apply to personal data where disclosure of the data—

(a) is necessary for the purpose of, or in connection with, legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights, to the extent that the application of those provisions would prevent the controller from making the disclosure.

The Inquiry is not a court or tribunal and therefore the NPCC does not consider that its proceedings are “legal proceedings”. However, a broad construction of “establishing” might include the functions of the Inquiry. While it is not part of its function to make binding determinations in respect of legal rights, the Inquiry is investigating and will report on matters which are undoubtedly relevant to allowing others to understand their legal rights.

9. Further restrictions on the obligations under Articles 14 and 15 are imposed by section 15(2)(b) and Schedule 2 Part 2 of the DPA 2018, including those set out in the table under paragraph 7. This disapplies those Articles to personal data processed

for the purpose of discharging a function that is (a) designed as described in column 1 of the table and (b) meets the condition relating to the function specified in column 2 of the table, to the extent that the application of those Articles would be likely to prejudice the proper discharge of the function. Relevant to the Inquiry is the following:

<i>Description of function design</i>	<i>Condition</i>
<p>2. The function is designed to protect members of the public against—</p> <p>(a) dishonesty, malpractice or other seriously improper conduct, or</p> <p>(b) unfitness or incompetence.</p>	<p>The function is—</p> <p>(a) conferred on a person by an enactment,</p> <p>(b) a function of the Crown, a Minister of the Crown or a government department, or</p> <p>(c) of a public nature, and is exercised in the public interest.</p>

It is submitted that the terms of reference of the Inquiry require it to investigate undercover policing at least in part to protect members of the public against malpractice, improper misconduct, or incompetence. Further, if that is a function of the Inquiry, it is of a “public nature” and is being exercised in the public interest.

10. Paragraph 14(2) (of Schedule 2 to the DPA 2018) dis-applies Articles 14 and 15:

- a. Where personal data is processed by (a) an individual acting in a judicial capacity, or (b) a court or tribunal acting in its judicial capacity;³ or
- b. To the extent that the application of those provisions “*would be likely to prejudice judicial independence or judicial proceedings*”.⁴

While the Inquiry is not a court or tribunal the Chairman may be properly described as “acting in a judicial capacity” [and the Inquiry as “judicial proceedings”] for the following reasons:

- (1) While public inquiries do not have to be chaired by judges, the Home Secretary clearly made a deliberate decision to arrange for this Inquiry to be chaired by a senior judge.
- (2) The functions exercised by the Chairman are judicial: he considers arguments and makes rulings which have legal effect. His rulings are subject to judicial review and his obligations to avoid bias and to be fair are indistinguishable from that of a judge sitting in a court. The eventual findings of the Inquiry need to be rational and capable of being justified on the evidence before it.

³ Paragraph 14(2) of Schedule 2, Part 2 DPA 2018.

⁴ Paragraph 14(3) of Schedule 2, Part 2 DPA 2018.

(3) The provision expressly distinguishes between a court acting in a judicial capacity, and an individual doing so. Therefore its scope includes a person acting in a judicial capacity, otherwise than in a court.

11. The ruling in *Cooper v National Crime Agency* (op. cit. at [119]) that disciplinary proceedings were not “legal proceedings” for the purpose of Schedule 3 to the Data Protection Act 1998. is not to the point. *Cooper* concerns a differently-worded provision of a different Act, in a different context; and the functions and processes of the Inquiry are very different from those of internal disciplinary proceedings, of the sort considered in *Cooper*. Moreover, the functions of a judge may be exercised other than in legal proceedings, and, indeed, otherwise than by a judge.

Conclusion

12. It is submitted that the Inquiry will have to consider and determine the basis on which it is lawful to process personal and special category data by reference to the requirements considered above. It will have to make a judgment having regard to the nature of the material in question, the risks of interference with the rights of any data subject(s), the existence or otherwise of any exemption or restriction of the obligations under the GDPR and the DPA 2018, the need to deploy the material for an effective and fair inquiry fulfilling its terms of reference, and whether any mitigation of interference with data subjects’ rights is either possible or proportionate.

SIR ROBERT FRANCIS QC
JULIAN MILFORD
CECILY WHITE

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