

IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON BEHALF OF EIGHT OFFICERS OF THE NPOIU

Introduction

1. These submissions are made on behalf of EN21, EN34, EN69, EN287, EN401, EN433, EN447, and EN507 (“the Officers”) for the hearing on 25 March 2019. The Officers have each been: - (i) connected with the National Public Order Intelligence Unit (“NPOIU”), and (ii) engaged with the Inquiry in relation to anonymity applications arising from the possibility that they might provide evidence relevant to the Inquiry’s investigation.

Issues

2. By directions 12 February 2019, the Chairman invited submissions on three issues:

Issue A. The extent to which Articles 13, 14 and 15 of the General Data Protection Regulation (“GDPR”) apply to the work of the Inquiry, having regard to the effect of any applicable exemptions;

Issue B. Insofar as Articles 13, 14 and 15 of the GDPR (the “Articles”) do apply to the work of the Inquiry, and no exemptions are applicable, what obligations do the Articles impose on 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; and

Issue C. If the Chairman is 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 (“DPA”) applies, what obligations do the Articles impose on the Inquiry? In those circumstances, what would be the practical implications for the Inquiry in relation to the evidence gathering exercise?

Submissions

Issue A

3. The Officers contend that the following exemptions are applicable to the processing being undertaken by the Inquiry having regards to the statutory function of the Inquiry and the nature of the work which is being undertaken¹: -
 - a. In relation to the processing of material obtained by the police the Inquiry is exempted from the application of the Articles to the same extent that the police force which collected the data would be under paragraph 2(3) of Schedule 2 Part 2 to the DPA.
 - b. In exercising a function designed to protect members of the public from dishonesty, malpractice or other seriously improper conduct, the Inquiry is exempted the application of the Articles insofar as complying with the Articles would be likely to prejudice the proper discharge of its function (Paragraph 7 of Schedule 2 Part 2 to the DPA).
 - c. The Chairman and the Inquiry exercise judicial functions within the meaning of Paragraph 14 of Schedule 2 Part 2 to the DPA, and accordingly are exempted from the application of the Articles to the extent that the application of those provisions would be likely to prejudice judicial independence or judicial proceedings.
 - d. Paragraph 16 of Schedule 2 Part 2 to the DPA exempts the Inquiry from permitting an exercise of the rights under Article 15 where to do otherwise would be to disclose information relating to another individual who can be identified from the information.

Crime and Taxation

4. Paragraph 2(1)(3) of Schedule 2 Part 2 to the DPA provides that (emphasis added): -

¹ The stance adopted by the Officers is consistent with the position set out at §25(i) of CTP's note dated 29 January 2019¹, and §3 of the note of the same date¹ provided by the Commissioner of Police of the Metropolis.

1) The listed GDPR provisions and Article 34(1) and (4) of the GDPR (communication of personal data breach to the data subject) do not apply to personal data processed for any of the following purposes—

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders, or
- (c) the assessment or collection of a tax or duty or an imposition of a similar nature,

to the extent that the application of those provisions would be likely to prejudice any of the matters mentioned in paragraphs (a) to (c).

(2) Sub-paragraph (3) applies where—

- (a) personal data is processed by a person (“Controller 1”) for any of the purposes mentioned in sub-paragraph (1)(a) to (c), and
- (b) *another person (“Controller 2”) obtains the data from Controller 1 for the purpose of discharging statutory functions and processes it for the purpose of discharging statutory functions.*

(3) *Controller 2 is exempt* from the obligations in the following provisions of the GDPR—

- (a) Article 13(1) to (3) (personal data collected from data subject: information to be provided),
- (b) Article 14(1) to (4) (personal data collected other than from data subject: information to be provided),
- (c) Article 15(1) to (3) (confirmation of processing, access to data and safeguards for third country transfers), and
- (d) Article 5 (general principles) so far as its provisions correspond to the rights and obligations provided for in the provisions mentioned in paragraphs (a) to (c),

to the same extent that Controller 1 is exempt from those obligations by virtue of sub-paragraph (1).

5. Having regards to the provisions of paragraph 2 it is clear that, in relation to material obtained and processed by Controller 1 (in this case the police), and provided to and processed by Controller 2 (in this case the Inquiry) for the purposes of discharging statutory functions, both Controllers are exempt from the application of the Articles, where compliance with the Article would “be likely to prejudice” the prevention or detection of crime.
6. Significantly, the Act does not require a particular level of “prejudice” to be established in order for the exemption to be engaged. Rather what is required is limited to establishing that the application of the Articles is: - (i) *likely* to lead to, (ii) some form of prejudice, (iii) in relation to discharging statutory functions relating to the prevention or detection of crime.

7. The Chairman is best placed to determine the extent to which any particular act of compliance with the obligations under the Articles would prejudice these functions.
8. Having said that it is common ground that if Article 14 requires the Inquiry to “contact every individual whose personal data appears in the documents under consideration” would give rise “to delay and difficulties” (see §75 of the NPNCPs submissions dated 24 January 2019). The same rationale applies with even greater force to compliance with Articles 13 and 15 which would cause further and significant difficulties prejudicing the ability of the Inquiry to fulfilling its statutory functions. As such, it must follow that an application of the Articles is likely to prejudice the Inquiry in discharging its statutory functions relating to investigating, preventing and detecting crime (and/or identifying offenders).
9. As such, in relation to material provided to the Inquiry by the police, it is open to the Inquiry to consider itself to be exempt from the provisions of the Articles.

Function designed to protect members of the public from dishonesty, malpractice or seriously improper conduct

10. Paragraph 7 of Schedule 2 Part 2 to the DPA provides that: -

The listed GDPR provisions do not apply to personal data processed for the purposes of discharging a function that—

- (a) is 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 provisions would be likely to prejudice the proper discharge of the function.

11. Columns 1 and 2 of the Table provide insofar as relevant: -

[Column 1]

The function is designed to protect members of the public against—

- (a) dishonesty, malpractice or other seriously improper conduct, or
- (b) unfitness or incompetence.

[Column 2]

The function is—

- (a) conferred on a person by an enactment,

- (b) a function of the Crown, a Minister of the Crown or a government department, or
- (c) of a public nature, and is exercised in the public interest.

12. When announcing the appointment of Sir Christopher Pitchford to chair the Inquiry, The Home Secretary said that the Inquiry would be used for “establishing justice for the families and victims”.² The Inquiry’s Terms of Reference³ require it to make recommendations as to the future deployment of undercover police officers. Furthermore, the Terms expressly envisage that it may lead to the identification of miscarriages of justice which will be referred to a panel of senior members of the Crown Prosecution Service.
13. It is clear that the Inquiry’s function is, and always has been, to protect members of the public from dishonesty, malpractice and seriously improper conduct. The Inquiry is properly entitled to rely upon this exemption.
14. As to the circumstances in which it would be prejudicial to the proper discharge of the function to decline to rely upon this exemption, the submissions above in respect of crime are repeated.

Judicial capacity and Judicial independence

15. Paragraph 14 of Schedule 2 Part 2 to the DPA provides that: -

14(1)The listed GDPR provisions do not apply to personal data processed for the purposes of assessing a person’s suitability for judicial office or the office of Queen’s Counsel.

(2)The listed GDPR provisions do not apply to personal data processed by—

(a)an individual acting in a judicial capacity, or

(b)a court or tribunal acting in its judicial capacity.

(3)As regards personal data not falling within sub-paragraph (1) or (2), the listed GDPR provisions do not apply to the extent that the application of those provisions would be likely to prejudice judicial independence or judicial proceedings.

16. The Chairman is sitting in a judicial capacity, and the Inquiry is acting in its judicial capacity, for the purposes of Paragraph 14 of Schedule 2.

²<https://www.parliament.uk/documents/commons-vote-office/March%202015/12%20March%202015/31.HOME-Undercover-policing.pdf>

³ <https://www.ucpi.org.uk/wp-content/uploads/2016/06/Terms-of-Reference.pdf>

17. It is proper to take a purposive interpretation of the language in Paragraph 14. Paragraph 14(3) limits the application of this exemption to cases which “would be likely to prejudice judicial independence or judicial proceedings”. It is as necessary for the Inquiry and the Chairman to remain independent as it is for any other court or tribunal to remain independent. Indeed, section 9 of the Inquiries Act 2005 imparts an inquiry’s panel with a requirement of impartiality.

Rights of others

18. Paragraph 16 of Schedule 2 Part 2 to the DPA provides that: -

16(1) Article 15(1) to (3) of the GDPR (confirmation of processing, access to data and safeguards for third country transfers), and Article 5 of the GDPR so far as its provisions correspond to the rights and obligations provided for in Article 15(1) to (3), do not oblige a controller to disclose information to the data subject to the extent that doing so would involve disclosing information relating to another individual who can be identified from the information.

(2) Sub-paragraph (1) does not remove the controller’s obligation where—

(a) the other individual has consented to the disclosure of the information to the data subject, or

(b) it is reasonable to disclose the information to the data subject without the consent of the other individual.

(3) In determining whether it is reasonable to disclose the information without consent, the controller must have regard to all the relevant circumstances, including—

(a) the type of information that would be disclosed,

(b) any duty of confidentiality owed to the other individual,

(c) any steps taken by the controller with a view to seeking the consent of the other individual,

(d) whether the other individual is capable of giving consent, and

(e) any express refusal of consent by the other individual.

(4) For the purposes of this paragraph—

(a) “information relating to another individual” includes information identifying the other individual as the source of information;

(b) an individual can be identified from information to be provided to a data subject by a controller if the individual can be identified from—

(i) that information, or

(ii) that information and any other information that the controller reasonably believes the data subject is likely to possess or obtain.

19. This provides a wide-ranging exemption to the operation of Article 15 which bites on any documents containing information relating to another individual, including where there is information which identifies the other individual as the source of the information. As to whether an individual can be identified by reference to information provided, the risk of identification needs to be considered in the context of the totality of the information available concerning the individual in question (and in particular the mosaic effect of different pieces of information being disclosed). As such, in order to properly determine whether this exemption is applicable, the Inquiry needs to consider the totality of the information: - (i) publically available, (ii) has been disclosed, and (iii) being considered for disclosure. These considerations militate against piece meal disclosure of information.
20. In relation to material closely connected to or containing information provided by undercover officers and/or relating to undercover operations/deployments, there must be a high likelihood that disclosure could identify or help identify individuals or officers who would be placed at risk if the information was disclosed. Even where redactions can mitigate the risk, the difficulty and problems this would cause to the Inquiry, having regards to its available resources, would warrant an exemption by virtue of the prejudice caused to the Inquiry's ability to fulfil its statutory functions.
21. Although paragraph 16 is not qualified by reference to whether disclosure would be prejudicial to a function of the Inquiry, there is an obligation to consider whether disclosure is reasonable despite the lack of consent of the individual which might be identified. As such, it is clear that the first stage in assessing whether the exemption applies is for the views of the individual at risk of identification being obtained and, if consent is not forthcoming, an assessment of the reasonableness of disclosure in light of any reasons given by the individual and the all the wider circumstances surrounding the disclosure/risk to the individual.

Issue B

22. Article 14 contains its own exemption where compliance with the Article would be "impossible or would involve a disproportionate effort... insofar 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". Paragraph 1 is the obligation to notify a data subject.

23. It is understood that: - (i) much of the material that is being processed by the Inquiry arises from or relates to source reporting, and (ii) a huge number of individuals are referred to, often in fleeting terms which make it very difficult if not impossible to identify the individuals (let alone trace their current contact details many years after the events recorded in the material being processed). As the Chairman said at the last hearing on this issue, the Inquiry is “dealing with thousands upon thousands of people”.⁴ The Chairman continued that to take steps to contact each of those individuals, for the purposes of allowing them to make representations as to whether their names should be withheld from documents “will make [the Inquiry’s] task either impossible or astonishingly difficult”.
24. In the circumstances, it is clear that the exemption in Article 14 will apply in relation to the vast majority of non-CP individuals referred to in the material being processed by the Inquiry. Compliance with Article 14 will either be impossible or will involve disproportionate effort.
25. In considering proportionality in the context of NPNSCPs it is relevant to bear in mind their acceptance that it is “unlikely (save perhaps in exceptional circumstances) that any NPNSCP would wish to exercise rights such as the right to object, or the right of erasure or rectification...” (§53).
26. Where the Inquiry takes the view that it is neither impossible nor disproportionate to comply with the duty under Article 14 in an individual case, and the individual notified requests access to the data, the Inquiry will need to consider under paragraph 16 of Schedule 2 Part 2 to the DPA whether the provision of the data will enable an officer or other individual to be identified and, if so, obtain the consent of that officer/individual and, if not provided, whether it is reasonable to provide the information.

Issue C

27. Where the Inquiry relies upon an exemption to the Articles, it has no obligation to comply with the duties and rights therein.
28. The Inquiry must consider whether it can properly rely on one or more exemption in a given case. The Information Commissioner’s Office has published guidance which

⁴ Transcript p93.

describes that “in line with the accountability principle, you should justify and document your reasons for relying on an exemption so you can demonstrate your compliance”.⁵

Conclusion

- 29.** For the reasons above, it is submitted that, in relation to the vast majority of material being processed by the Inquiry, exemptions will be applicable to the provisions of the Articles.

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⁵ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/exemptions/?q=third+party#ex8>