IN THE UNDERCOVER POLICING INQUIRY
FOR HEARING 25 MARCH 2019

DATA PROTECTION
SUBMISSIONS ON BEHALF OF THE MPS

INTRODUCTION AND SUMMARY OF MPS POSITION

1. The Chairman's 'Note regarding the Inquiry's evidence gathering process' of 26 February 2019 contains a staged approach with which the MPS agrees. Although the Chairman has not stated **when** the proposed steps are to be taken, the Note expressly states that the supply of documents or information to data subjects before their provision to an officer witness will result in "*significant delay*" [6(c)]. It follows that if the Inquiry intends, for example, to provide an intelligence report to a particular officer on a given date for the purpose of obtaining a witness statement, that will not prove possible if 3 months' prior work is required (tracing data subjects, canvassing, and considering their objections). The Chairman would be faced with a choice between seeking to obtain statements from fewer officers or extending the Inquiry for many years and at great expense.

2. At the hearing on 31 January 2019 the NSCPs appeared to argue that as a result of the the General Data Protection Regulation (EU) 2016/679 ("**GDPR**") and the Data Protection Act 2018 ("**DPA2018**"), the Chairman has no option but to make disclosure to data subjects first. Alternatively, they argued that any exemption must be considered on such a granular 'data subject by data subject' basis that in practice the Chairman would need to spend months (or even years) before deciding whether it could properly rely on any exemption. Either way, the work of obtaining statements from the officers, and the rest of the Inquiry's processes, would be derailed.

3. Furthermore, although the NSCPs submitted that it was not the "*expectation generally*" that data subjects would seek to exercise their rights to rectification (art.16) or erasure (art.17) [Transcript p68/l9-21], if the NSCPs are right, then, as with subject access requests (art.15) and restriction of processing (art.18), either the Chairman must comply with the request or pause his process to determine whether any exemption may excuse his non-compliance.

4. The short point, developed in these submissions, is that neither the GDPR nor the DPA2018 require such an outcome. There is in this case, as there was in Case C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy* EU:C:2008:727; [2008] E.C.R. I-9831 (cited by the NSCPs at footnote 17 of their January submissions), a need to reconcile two very significant public interests. In that case, conflict between the fundamental rights of free expression and the interests of data subjects, and in particular their right to privacy [52]-[53]. In the present case there is a need to reconcile the privacy rights of data subjects with the public interest in an effective Inquiry (which, ironically, is in part designed to understand why so much personal data was obtained and retained through undercover operations, but which risks being frustrated by the NSCPs' proposed approach). As Green J observed in *Zaw Lin, Wai Phyo v Commissioner of Police for the Metropolis* [2015] EWHC 2484 (QB) at [69]*"…when construing the DPA 1998 (whether through common law or European eyes) decision makers and courts must have regard to all relevant fundamental rights that arise when balancing the interest of the State and those of the individual. There are no artificial limits to be placed on the exercise.*"

5. Standing back, the MPS submits that the effect of the GDPR/DPA2018 cannot be to make a statutory public inquiry, called by a Minister to inquire into matters of serious public concern, impossible, unworkable, ineffective or unable to conclude within a reasonable time. There is certainly no basis for concluding that the Member States when adopting the GDPR, or Parliament when enacting the DPA2018, positively intended to impede the running of inquiries of this nature. So far as there is any indication as to Parliamentary intention on "*the administration of justice*", Explanatory Note 608 refers to one of the exemptions and states, *"…This ensures the administration of justice is not undermined by the application of the GDPR"*.

6. As developed below, it is not possible to give too narrow or technical a reading to "*justice*" and "*judicial*". In *Campbell v MGN Ltd* [2003] QB 633 (Court of Appeal, overturned on other grounds), Lord Phillips MR observed as to the meaning of the 1998 Act at [96]

> *"…In interpreting the Act it is appropriate to look to the Directive for assistance. The Act should, if possible, be interpreted in a manner that is consistent with the Directive. Furthermore, because the Act has, in large measure, adopted the wording of the Directive, it is not appropriate to look for the precision in the use of language that is*

usually to be expected from the parliamentary draftsman. A purposive approach to making sense of the provisions is called for."

7. In that case, which was concerned with journalistic interests, the Court of Appeal gave the words in s.32(1) to (3) of the Data Protection Act 1998 ("**DPA1998**") their natural meaning, "*and the only meaning that makes sense of them*", deciding that they applied pre and post publication [120]. The Court then considered that this (wider) interpretation of the exemption was in line with the purpose of the overall scheme of the Directive and the DPA1998 (i.e. applied a purposive interpretation) [121]. The Court noted that some of the data subject rights, such as rectification, erasure or destruction of the data were "*not appropriate for the data processing which will normally be an incident of journalism*" [ibid]. Further, the speed with which journalistic processing needs to take place "*renders it impractical to comply with many of the data processing principles… including the requirement that the data subject has given his consent to the processing*" [122]. Finally, without the exemption at s.32, the DPA1998 "*would impose restrictions on the media which would radically restrict the freedom of the press*" [123].

8. More recently, the Court of Appeal in *Stunt v Associated Newspapers Ltd* [2018] 1 WLR 6060 has considered the nature of this journalistic exemption. The matter was ultimately referred to the ECJ, but the majority had no issue with the fact that s.32(4) was in 'blanket' or 'absolute' terms, and noted that the European Court of Human Rights in *Satakunnan Markkinaporssi Oy and Satamedia v Finland* (the Strasbourg case relating to the matter previously considered by the CJEU, *supra*) had been content with a Finnish exemption framed differently but also in blanket terms [94].

9. To enable, for example, a right to seek rectification erasure or restriction of data transmitted to the Inquiry would, as observed by the Chairman in his Note at [5(i)], make no sense when the Chairman needs to inquire into *why* that data was held. The needs of the Inquiry to make sensible progress towards fulfilling its Terms of Reference renders it impossible and impractical for it to comply with a requirement to consider notification under art.14 or subject access under art.15. The restrictions sought by the NSCPs would radically restrict the freedom of the Chairman to conduct his Inquiry.

10. Data protection does not exist in a vacuum. As well as the imperative to protect personal data, there is also a powerful public interest in society having available to it mechanisms to

carry out major reviews to inquire into and report on matters of public concern, when things have, or appear to have, gone wrong. The UK has given effect to this interest by enacting the Inquiries Act 2005 ("**IA2005**"). Lord Bingham's celebrated dictum in *Amin v Secretary of State for the Home Department* [2004] 1 AC 653 at [31] related to the purposes of an investigation into a death in custody, and all one but on those important purposes are equally applicable here: " *...to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified...*".

11. There is no reason to believe that the GDPR was intended to prevent Member States from fulfilling a public interest of this nature, according to their domestic laws, and no reason to believe that Parliament intended this when enacting the exemptions permitted by art.23(1) (now found in sch.2 DPA2018). Absent simple oversight, the only explanation is that Parliament considered that one or other, or a combination of exemptions, would enable inquiries to carry on their important work as before. Prior to the DPA2018, such judicial dicta as there were supported the proposition that where there was a self-contained disclosure regime (such as the Civil Procedure Rules), it was a distraction to start with the data protection regime, it instead being more appropriate to consider Article 8 ECHR interests by applying the self-contained regime: see *Durham County Council v Dunn* [2013] 1 WLR 2305 per Maurice Kay LJ at [21], cited by the Home Office in their January Submissions at [22]. Although this reasoning does not apply directly, as the Home Office note at [23], it is highly relevant where Parliament has legislated for a self-contained disclosure regime in the IA2005 and the Inquiry Rules 2006. The IA2005 and the Inquiry Rules 2006 statutory regime includes provisions that allow the Inquiry to balance the privacy rights of individuals with the public interest in disclosure and open justice.

12. In conclusion, it is submitted that the burden lies on those who seek to argue that the DPA2018 was intended to prevent or fundamentally alter the nature of inquiries under the IA2005. In fact, one or more of the exemptions below enable the Inquiry to proceed as envisaged in the Chairman's February Note. The two most likely candidates which apply are the exemptions in para.7 (functions designed to protect the public) and para 14 (judicial capacity/ judicial proceedings).

13. The remainder of these submissions are structured as follows:

PART A: THE LAW

The Public Inquiry

14. A public inquiry under IA2005 can be instituted when it appears to a Minister that particular events have caused, or are capable of causing, public concern; or there is public concern that particular events have occurred (s.1(1) IA2005). The purpose of an inquiry is the fulfilment of its terms of reference (set out by a minister under s.5 IA2005), through submission of a report and notification to the Minister, by the Chairman, that the terms of reference have been fulfilled (ss.24(1)).

15. The chairman or panel for a public inquiry need not be a judge, but the IA2005 contemplates that they may well be: s.10. Whoever is appointed, impartiality is required: by s.9(1) *"the Minister must not appoint a person as a member of the inquiry panel if it appears to the Minister that the person has (a) a direct interest in the matters to which the inquiry relates, or (b) a close association with an interested party, unless despite the person's interest or association, his appointment could not reasonably be regarded as affecting the impartiality of the inquiry panel"*.

16. An inquiry's functions conferred under the IA2005 are only exercisable within the inquiry's terms of reference (s.5(5)). 'Terms of reference', in relation to an IA2005 inquiry means (s.5(6)):
    a. the matters to which the inquiry relates;
    b. any particular matters as to which the inquiry panel is to determine the facts;
    c. whether the inquiry panel is to make recommendations;
    d. any other matters relating to the scope of the inquiry that the Minister may specify.

17. An inquiry has powers to enable it to meet its terms of reference. For example, it may receive evidence under oath (s.17(2)), design its own procedure, subject to the requirement of fairness (s.17(1) and (3)), and require persons to give evidence or produce things or documents (s.21), all to assist it to meet its terms of reference. Curbs on decision making are applied within the statutory scheme (see, for example, s.19(3)(b)).

18. It follows that an inquiry's terms of reference are the starting point. The UCPI's terms of reference are very broad, both geographically and temporally. They require it to make factual determinations on a range of areas: the role of undercover policing in the prevention and detection of crime; the motivation for operations and their effect on individuals and the public; the state of awareness of undercover operations of HM Government; the adequacy of the justification, authorisation and oversight of undercover policing; the adequacy of the selection, training, management and care of undercover policing and officers; the adequacy of the regulation of undercover policing; whether a miscarriage of justice may have occurred in any case.

The GDPR data subject rights

19. Chapter 3 of the GDPR contains a variety of data subject rights including, most relevantly, the rights of notification (arts.13 and 14), access (art.15), rectification (art.16), erasure (art.17), and restriction (art.18).

20. Two of these rights contain internal limitations. Art.14(5) provides for cases in which the notification provisions in art.14(1)-(4) do not apply where and insofar as they are met. Art.14(5)(b) in particular provides that art.14(1)-(4) "*shall not apply where and insofar as:*"

> *"the provision of such 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) 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"*

21. Art.14(5)(b) does not describe 'exemptions' properly so-called from the provisions in art.14(1)-(4), rather it details cases of non application or exception (as the MPS will hereafter describe them, distinguishing them from exemptions). On analysis, it contains three potentially relevant exceptions, which are different in scope and approach:
    a. where the provision of the information proves impossible;
    b. where the provision of the information would involve a disproportionate effort; or
    c. in so far as the provision of the information to the data subject required by art.14(1) would be likely to render impossible or seriously impair the achievement of the objectives of the processing.

    The exception at (a) above assumes that consideration of how to meet the obligations in art.14(1)-(4) will take place (but "*proves*" impossible); the exception at (b) above looks forward to the work which would be involved and the fact that it would be disproportionate to attempt it; the exception at (c) above assumes that it is possible to meet the art.14(1) obligation but looks to the effect of compliance on the overall purpose of the processing.

22. Whichever applies, the controller needs then to consider what other measures, short of effective notification can take place. The answer to that will, of course, be fact specific.

23. Art.15 sets out the right of access enjoyed by data subjects. This includes the right to access both the personal data itself and information about how it is being processed. There is a limit to the data subject's right to obtain a copy of his or her personal information: the right to obtain a copy of the personal data undergoing processing shall not adversely affect the rights and freedoms of others (art.15(4)), although recital 63 states that the result of this limit on the right of access "*should not be a refusal to provide all information to the data subject*".

24. Art.17 provides that the right to be forgotten is limited where the continued processing is necessary for the purposes listed in paragraph (3), which include "*for exercising the right of freedom of expression and information*" and "*for the performance of a task carried out in the public interest*".

25. Art.23 provides for further restrictions on these rights. It states:

> *(1) Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:*
>
> *a) national security;*
> *b) defence;*
> *c) public security;*
> *d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;*
> *e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security;*
> *f) the protection of judicial independence and judicial proceedings;*
> *g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;*
> *h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);*
> *i) the protection of the data subject or the rights and freedoms of others;*
> *j) the enforcement of civil law claims.*

(2) In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:

a) the purposes of the processing or categories of processing;
b) the categories of personal data;
c) the scope of the restrictions introduced;
d) the safeguards to prevent abuse or unlawful access or transfer;
e) the specification of the controller or categories of controllers;
f) the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;
g) the risks to the rights and freedoms of data subjects; and
h) the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.

26. Art.23 may be considered alongside art.6(3) which allows for Member States to make further provisions to adapt the application of the GDPR in certain ways. Art.6(3) provides (with added emphasis):

The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:

1. *Union law; or*
2. *Member State law to which the controller is subject.*

The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. ***That legal basis may contain specific provisions to adapt the application of rules of this Regulation, 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; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.***

The DPA 2018 Sch.2 exemptions

27. Pursuant to s.15 of DPA2018 and schs.2, 3 and 4 the UK has legislated for exemptions from, restrictions on and adaptations to the application of rules of the GDPR as permitted under arts.23 and 6(3) of the GDPR:

a. Part 1 of sch.2 (paras.1-5) makes provision adapting or restricting the application of rules contained in arts.13 to 21 and 34 of the GDPR in specified circumstances, as allowed for by art.6(3) and art.23(1) of the GDPR. Part 1 includes the "*crime and taxation*" and "*information which it is necessary to disclose*" exemptions at paras.2 and 5 respectively. Detail of the GDPR provisions restricted or adapted is at para.1.
b. Part 2 of sch.2 (paras.6 to 15) makes provision restricting the application of rules contained in arts.13 to 21 and 34 of the GDPR in specified circumstances, as allowed for by art.23(1) of the GDPR. Part 2 includes the "*functions to protect the public etc*" and "*judicial proceedings*" exemptions at paras.7 and 14 respectively. Detail of the GDPR provisions restricted is at para.6.
c. Part 3 of sch.2 (paras.16 to 17) makes provision restricting the application of art.15 of the GDPR where this is necessary to protect the rights of others, as allowed for by art.23(1) of the GDPR. Part 3 ("*protection of the rights of others*") includes the "*rights of others*" exemption at para.16.

28. Two exemptions in part 2, the "*functions to protect the public etc*" and "*judicial proceedings*" exemptions, are of core relevance to this – and any – public inquiry. Although narrower in scope, the "*information which it is necessary to disclose*" exemption in part 1 may have general application in the case of a public inquiry, as will the exemption in part 3 at para 16, "*protection of the rights of others*". The "*crime and taxation*" exemption may have specific application to aspects of the UCPI given its subject matter. Each of these exemptions are considered below.

29. The exemptions made in sch.2 of DPA2018, empowered by art.23(1), are measures which respect the essence of fundamental rights and freedoms and which are necessary and proportionate in a democratic society to safeguard the matters listed in art.23(1).

Generally

30. In considering these exemptions, the Inquiry is first concerned with establishing which exemptions within the DPA2018 apply to its work or proceedings. That consideration is carried out Parts B and C below.

31. In interpreting the scope of the exemptions made pursuant to the power in art.23, the inquiry should ensure that it does not give an exemption an interpretation that does not respect the essence of fundamental rights and freedoms, or is unnecessary and/or disproportionate (art.23). In general, derogations and limitations should only apply so far as is strictly necessary (see, for example, *Satakunnan Markkinapörssi and Satamedia* C-73/07, EU:C:2008:727 at para.56; *Institut professionnel des agents immobiliers (IPI) v Englebert* C-473/2012 [2014] 2 CMLR 9 at para.39). However, this approach does not necessarily assist in interpreting the scope of an exemption in the first place: for example, a restrictive approach does not assist in concluding whether the Inquiry falls within the exemption in sch.2 para.14 (judicial function).

32. The DPA2018 sch.2 contains two 'types' of exemption from the positive data subject obligations. Some exemptions are framed in blanket or absolute terms (for example at para.14(2) of sch.2, the 'judicial capacity' exemption, considered below). Other exemptions apply "*to the extent that*" a certain outcome would occur if it did not apply (for example para.14(3), which applies "*to the extent that*" judicial proceedings would be prejudiced; or para.7 public protection exemption, which applies "*to the extent that*" the function designed to protect the public would be prejudiced). This is also true of the exceptions within arts.14 and 17 GDPR, noted above, which also apply "*to the extent that*". It is not helpful to conflate the strands of caselaw which considers exemptions of different types.

33. So far as the blanket type exemptions are concerned, these are permissible in principle: see *Campbell v MGN, Stunt, supra*. Once such an exemption applies, there is no need to consider if an alternative lesser restriction would be appropriate.

34. So far as "*to the extent that*" exemptions/exceptions are concerned, the leading decision is *R (Lord) v SSHD* [2003] EWHC 2073 which was applied in both *Zaw Lin Wai Phyo v Commissioner for Police of the Metropolis* [2015] EWHC 2484 (QB) and *Guriev* [2016]

EWHC 643. The burden is on the person seeking to be excused from disclosure to establish that an exemption/exception applies convincingly by way of evidence and not by way of mere assertion [99]; there must be a very significant and weighty chance of prejudice to identified public interests [100]. In considering the public interest, one cannot ignore the consequential effect that disclosure in one particular case may have in others [122].

35. In *Zaw Lin*, Green J therefore observed that the burden of proof was on the MPS to show its entitlement to refuse access and that it "*must do this with significant and weighty grounds and evidence*" [85]. Ultimately the Court was satisfied that the MPS had legitimate objections to the disclosure sought [128].

36. In *Guriev*, Warby J summarised these principles at [43] to [45], emphasising the need to focus on specifics when considering "*the classic proportionality analysis*". In that case, the data controller failed to prove that compliance would have the adverse effect claimed [46].

37. In *Dawson-Damer v Taylor-Wessing* [2017] 1 WLR 3255 (albeit not a "*to the extent that*" case) the Court of Appeal considered whether a response to a subject access request ('**SAR**') would involve disproportionate effort. Whether this was so required "*evaluation in each particular case*" [77]. It was for the person seeking to avoid the obligation to "*make good its claim*", which the defendant in that case failed to do [83].

38. None of these cases suggest that a "*to the extent that*" exemption/exception may only be claimed by going through each item of data and asking whether compliance would have an adverse effect on the particular individual concerned: an exercise that would take months if not years to complete. For example, it is in principle open to the Chairman to conclude in the particular circumstances of this Inquiry that compliance with the data subject rights for *any* piece of data would create a significant and weighty chance of frustrating the legitimate objectives protected by the exemption/exception. If challenged, this would need to be established by significant and weighty grounds and evidence. The Inquiry might therefore like to be more precise as to the expected additional delay and cost that compliance with data subject rights would entail: "*significant delay*" is a vague term, and if the Inquiry is of the view that compliance would cause additional years of delay, and additional tens or hundreds of thousands of pounds of expenditure, it should be prepared to say so in order to explain and justify in more concrete terms why compliance is not an

option. This issue does not arise, of course, if the Chairman is able to rely on a 'blanket' type exemption.

PART B: THE DPA2018 EXEMPTIONS OF GENERAL APPLICABILITY TO A PUBLIC INQUIRY

Exemption 1: *functions designed to protect the public etc*

39. Paragraph 7 ("*functions designed to protect the public etc*") read with row 2 provides in relevant part that the GDPR provisions listed at para 6 of sch.2:

> "*do not apply to personal data processed for the purposes of discharging a function that*
> ["*is designed to protect members of the public against dishonesty, malpractice or other seriously improper conduct*"]; and ["*is conferred on a person by an enactment*", or is "*of a public nature, and is exercised in the public interest*"]
> *to the extent that the application of those provisions would be likely to prejudice the proper discharge of the function."*

40. As is developed below, the MPS submits that any Chairman of a public inquiry, and certainly of the UCPI, will process personal data for the purposes of inquiring into and reporting on the matters in the terms of reference in order to fulfil the terms of reference for the inquiry. Fulfilling the terms of reference for the inquiry is a function designed to protect members of the public against malpractice or seriously improper conduct (see s.1(1) and s.5 IA2005). It is conferred on the Chairman (and inquiry panel) by an enactment: (see s.3, s.5(5) and (6), s.14(1)(a)). In any event, the Inquiry's function is also of a public nature, and is exercised in the public interest (see s.1(1)). Indeed, to construe the parameters of this exemption so that it excluded IA2005 public inquiries in general, or the UCPI in particular, would produce an absurd and unjust result.

41. The question then is whether the application of the GDPR data subject rights would be likely to prejudice the proper discharge of the function of fulfilling the terms of reference. To the extent that the application of these rights would do so, the exemption applies. The MPS submits that this is plainly the case with regards to the UCPI.

"personal data processed for the purposes of discharging a function"

42. What are the UCPI's purposes in processing personal data? The UCPI Privacy Information Notice [**Bundle A Tab 9**] states under the heading "*Personal information collected and used by the Inquiry*" that "*The Inquiry's purpose is to investigate and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968*". This is drawn from the Inquiry's terms of reference. Following the provision of some information as to how this will be done, the Notice continues that "*In order to fulfil this purpose the Inquiry will process personal information about individuals*".

43. It is clear from this that one of the Inquiry's functions which necessitates the processing personal data is its enquiry into and reporting on the matters in the terms of reference, which is needed in order to discharge its terms of reference. The Inquiry's core function is to fulfil its terms of reference. This is the primary function of the Inquiry panel appointed under ss.3 and 4 IA2005: s.5(5) and s.14(1). It is achieved by carrying out the enquiries, examinations, and assessments specified in the terms of reference.

44. The IA2005 confers other functions on the Chairman, the performance of which will or are likely to require some processing of personal data in some or every case. All these functions are designed to assist the Chairman in discharging his primary function: the fulfilment of the terms of reference by the provision of a report to the Minister. For example:
    a. the Chairman may make directions as to the procedure and conduct of the Inquiry, acting with fairness and with regard to the need to avoid unnecessary cost (s.17(1) and (3));
    b. the Chairman must take such steps as he considers reasonable to ensure that members of the public are able to view a record of evidence and documents given to or produced at the inquiry (s.18(1)(b));
    c. the Chairman may specify restrictions on attendance at the inquiry, or disclosure or publication of any evidence or documents given to or produced at the inquiry, including those required by law and those which he considers to be conducive to his filling his terms of reference, or to be necessary in the public interest (s.19); and
    d. the Chairman may require the production of evidence to the inquiry (s.21).

"a function designed to protect members of the public against dishonesty, malpractice or other seriously improper conduct"

45. The para.7 exemption applies only to those functions which are designed to protect members of the public against dishonesty, malpractice or other seriously improper conduct.

46. The starting point is s.1 IA2005 which empowers a Minister to cause an inquiry to be held where it appears to him that particular events have caused, or are capable of causing, public concern, or there is public concern that particular events may have occurred.

47. The areas of public concern which prompted this Inquiry were set out by the then Home Secretary in her statement to the House of Commons on 6 March 2014 in which she reported the findings of the Ellison review. Her observations included that:
    a. Mr Ellison had commented "*on the extraordinary level of secrecy observed about any disclosure that might risk exposing an undercover officer. That meant that the SDS operated as if exempt from the proper rules of disclosure in criminal cases, and that there is real potential for miscarriages of justices to have occurred. In particular, Ellison says that there is an inevitable potential for SDS officers to have been viewed by those they infiltrated as encouraging, and participating in, criminal behaviour. He refers to officers in criminal trials failing to reveal their true identities, meaning that crucial information that should have been disclosed was not given to the defence and the court; and he finds that undercover officers sometimes failed to correct evidence given in court which they knew was wrong. That means that there is a chance that people could have been convicted for offences when they should not have been. We must therefore establish if there have been miscarriages of justice"*.
    b. "*Undercover officers, sometimes working in difficult and dangerous conditions, have helped bring criminals to justice. They have stopped bad things happening to our country. None the less, the Ellison review reveals very real and substantial failings. The picture that emerges about the SDS from this report, and from other material in the public domain, is of significant failings of judgment and of intrusive supervision and leadership over a sustained period"*.
    c. She concluded "*Given the gravity of what has now been uncovered, I have decided that a public inquiry, led by a judge, is necessary to investigate undercover policing and the operation of the SDS. Only a public inquiry will be able to get to the full truth behind the matters of huge concern contained in Mark Ellison's report*".

48. This oral statement was followed with the Home Secretary's written statement to the House of Commons 12 March 2015; the Urgent question to Minister of State (Home Office, Policing, Criminal Justice and Victims) and exchanges in the House of Commons on 26 March 2015.

49. The matters of public concern are encompassed by the 'matters to investigate' within the terms of reference. A non-exhaustive list of subjects for public concern appears in the Principles Ruling, part 3(a)(ii) "*subjects for public concern*" (paras.90-91). In addition to 12 specific points, the Ruling states:

> *"There is a broader public concern about the targeting of groups active in social, political, justice and environmental causes. The ostensible justification for targeting these groups was the need to obtain intelligence about planned public disorder and crime. The Inquiry will need to examine the information gathered in the course of these operations; it will wish to discover how and for what purposes this information was processed and distributed in order to test whether the original authorisation for targeting was justified by previous and subsequent events."*

[Bundle A, tab 1, page 35]

50. Plainly what was identified by the Minister as the events which have caused public concern, and which empowered her to cause a public Inquiry to be held under the IA2005, were matters of alleged malpractice and seriously improper conduct. The purpose of the terms of reference is to investigate and make factual determinations about those events, and make recommendations as to future deployment of undercover police officers in light of those findings.

"*a function conferred on a person by an enactment"*

51. The functions listed above are conferred by statute.

"a function of a public nature, exercised in the public interest"

52. There has also been no dispute that the conduct of inquiries are in the public interest and, indeed, of substantial public interest.

53. Note, in this regard, that the legality of the Inquiry's processing rests on this certainty. Arts.6 and 9 of the GDPR concern when processing will be lawful (i.e. art.5(1)(a): the data processing must be carried out *"lawfully, fairly and in a transparent manner in relation to the data subject"*). The legal bases for the Inquiry's processing of personal data are:
    a. Art.6(1)(e) of the GDPR ("*the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller*"). Pursuant to DPA2018 s.8(c), the criterion in art.6(1)(e) includes the processing of personal data which is necessary for the exercise of a function conferred on a person by an enactment or rule of law. The functions conferred on the Chairman to conduct the Inquiry are discussed above.
    b. Art.9(2)(g) (in respect of special personal data) ("*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 interests of the data subje*ct"). Processing under art.9(2)(g) is only 'for a basis in law of the United Kingdom' if it meets a condition in part 2 of sch.1 of the DPA2018 (per s.10(3) DPA2018). Relying on the conditions in part 2 or sch.1, para.5(1) first requires the controller to have in place an appropriate policy document. The Inquiry has such a document [**Bundle A, tab 4**]. The condition is met if the processing is necessary for the exercise of a function conferred on a person by an enactment or rule of law, and is necessary for reasons of substantial public interest (sch.1 para.6(1) and (2)(a)).

"to the extent that the application of those provisions would be likely to prejudice the proper discharge of the function"

54. Given that the criteria at row 2 of the table at para.7 of sch.2 are met, the question arises whether the application of the GDPR data subject rights would be likely to prejudice the proper discharge of the function (that is, the function of inquiring into and reporting on the matters in the terms of reference in order to fulfil those terms of reference)? The

exemptions at para.7 only apply "*to the extent that*" the application of the provisions "*would be likely to prejudice the proper discharge of the function*".

55. It is submitted that the application of the GDPR data subject rights would be likely to prejudice the proper discharge of the Chairman's function of fulfilling the terms of reference. As has been indicated, the Inquiry is processing data which contains the personal and special personal data of many thousands of people, with some of it being decades old. It has no way of locating and contacting the vast majority of people mentioned, and many will have little or no notion that mentions of them will appear in material which the Inquiry has recovered. Attempts to provide direct notification could take months or, more likely, years. Accordingly, there is a very significant and weighty chance of prejudice to the proper discharge of the Inquiry's function if direct notification is required. Indeed, it would be completely incompatible with the fulfilment of its terms of reference. The entire work and resources of the Inquiry would be diverted to meeting art.14 notification requirements (even though to do so would be unachievable within the time limits set down in the GDPR). The exemption and its application to the Inquiry is both necessary and proportionate.

Exemption 2: judicial proceedings

56. Para.14 ("*Judicial appointments, judicial independence and judicial proceedings*") provides, in relevant part:

> *(2) The listed GDPR provisions do not apply to personal data processed by—*
> *(a) an individual acting in a 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.*

57. This exemption derives from the power at art.23(1)(f) for Member States to legislate to restrict the GDPR data subject rights as a necessary and proportionate measure to safeguard the protection of judicial independence and judicial proceedings. As has been highlighted already, the para.14(2) exemption applies in an absolute fashion to all personal data processed by an individual acting in a judicial capacity. It is <u>not</u> a "*to the extent that*" exemption (cf para 7, and para 14(3)) but applies to **all** data processed when a person was acting in a judicial capacity, as determined by reference to the capacity acted in, not the content of the data or the process being applied.

58. The MPS submits that the chairman of an IA2005 public inquiry is an individual acting in a judicial capacity, and so the GDPR data subject rights do not apply to personal data processed by him when acting in that capacity. Further, IA2005 proceedings are properly "*judicial proceedings*" within the meaning of this act (and any other interpretation would produce an absurd result). Therefore, where the application of the GDPR data subject rights would be likely to prejudice the IA2005 proceedings, they do not apply. The fact that serving judges are frequently appointed to chair IA2005 proceeding (for which the IA2005 makes express provision by way of s.10) supports the judicial nature of the function being undertaken.

"an individual acting in a judicial capacity"

59. There are many authorities in which courts have grappled with what might be 'judicial' acts, decisions, capacity or functions. Read across between them is not always possible, and it may be that a single definition is impossible. It will always be necessary to consider the policy context for a set of acts being 'judicial' (*Regina (Howard) v Official Receiver* [2013] EWHC 1839 ("***Howard***") at paras 147, 152). However, the authorities suggest a number of characteristics which are associated with 'judicial' acts, decisions, capacity or functions which bear consideration in this context. The MPS submits that an analysis of the caselaw shows that the work of the chairman of a public inquiry is work carried on "*in a judicial capacity*"; and moreover that the purpose of, or policy behind the exemption makes plain that the work of a chairman of a public inquiry should fall within this exemption.

60. The Court of Appeal in *R (Wexford County Council) v Local Government Board for Ireland* [1902] 2 IR 349 (at per Palles CB 373) held, citing *The Queen v Corporation of Dublin* (with bold emphasis added):

> *"It is established… that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant; but it lies to remove and adjudicate on the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law; but, for the purpose of this question,* ***a 'judicial' act seems to be an act done by competent authority, upon consideration of facts and circumstances, and*** **imposing** ***liability or*** **affecting** ***the rights of others.****"*

61. In that context, the essential element which makes determinations 'judicial' is that the body carrying out the function "*should have the power, by its determination within jurisdiction,*

to impose liability or affect rights" (at 373). By that, Palles CB meant that the liability is imposed or the right is affected by the fact of the determination not by the fact determined, so that the right will be affected (or the liability will exist), even if the determination is wrong in law or in fact (373 and 374).

62. Palles CB's definition was considered by the High Court in *Howard*. The Court there held that the official receiver exercises a "*judicial function*" within the meaning of para.3(1)(a) of sch.18 of the Equality Act 2010 (**EA2010**) in revoking a debt relief order, with the effect that the official receiver therefore did not need to apply the public sector equality duty under s.149 EA2010. For the purposes of the EA2010, a reference to a 'judicial function' includes *"the reference to a judicial function conferred on a person other than a court or tribunal"* (para.3(2) sch.18).

63. The Court in *Howard* examined the nature and policy of the public sector equality duty and the policy underlying the Parliamentary intention to exclude it in the case of the exercise of a 'judicial function' (para.153 et seq). S.149 EA2010 contemplates that compliance with the public sector equality duty may lead to a different outcome to that which would have occurred in the absence of the duty. That is, an outcome which involves treating more favourably some persons than others. As the Court in *Howard* said (at para 155):

> *"It is not difficult to see why it was considered inappropriate as a matter of policy for such a duty to be imposed on judges in the exercise of their function of deciding civil or criminal cases before them. Inherent in the rule of law is the proposition that it is the function of a judge to apply the relevant law to the facts of a particular case in front of him or her and to do so even-handedly without regard to the nature, identity or particular characteristics of any of the parties or persons appearing in front of him or her."*

64. Revoking a debt relief order plainly affected rights (paras. 165-166), but it also determined rights and liabilities of persons in accordance with the relevant law, and with binding legal effect. The ability to determine rights was of decisive importance in that case. It did not matter that there was no adversarial procedure (paras. 173-174). A decision made in the exercise of a discretion was capable of falling within the ambit of a judicial function (para 160). The same policy reasons which lay behind the disapplication of the public sector equality duty to the court, supported the disapplication of it in the context of *Howard* (para. 185). The Court found that the official receiver was exercising a 'judicial function'.

65. In the course of two authorities, the Court of Appeal has held that the High Court practice of, in judicial review cases, making no order for costs against an 'inferior court or tribunal' which does not make itself a party and plays no active part in a judicial review of one of its decisions unless it has behaved improperly or unreasonably, applies more widely than just to courts and tribunals. It is submitted that the practice applies to 'judicial decisions' of bodies against whom judicial review lies because there is no right of appeal against them. The authorities provide useful guidance as to what may constitute a 'judicial' decision.

66. The Court of Appeal in *R (Davies) v Birmingham Deputy Coroner* [2004] 1 WLR 2739 (***Davies***) confirmed that the costs practice, and the policy behind it, applies to the decisions of justices (paras.9-20), tribunals (paras.21-25), and ombudsmen (para.26, para.54), and, by the *Davies* authority, also in respect of coroners (paras.28-47).

67. The Court of Appeal in *R (Gourlay) v Parole Board* [2017] EWCA Civ 1003 (***Gourlay***) considered whether the *Davies* principle applied to the Parole Board. There was little issue that it applied when the Parole Board exercised its function of directing the Secretary of State to release a prisoner after a tariff had been passed (para.64). When carrying out that function the Parole Board acts as a 'court' for the purposes of art.5(4) ECHR, and has the attributes required for an art.5(4) compliant 'court': (a) independence from the executive and the parties to the case; (b) appropriate guaranteed judicial procedures, and (c) (as the text of art.5(4) makes clear) a decision making, as opposed to advisory, function (see *Weeks v United Kingdom* (1987) 10 EHRR 293, confirming the Parole Board's status).

68. The Court of Appeal in *Gourlay* held that the *Davies* principle also applies to the Parole Board when carrying out its *advisory* role, whereby it makes a recommendation to the Secretary of State on transfer (e.g. between closed and open conditions) (paras.65-66). It had already been confirmed in *Davies* that the principle applied to ombudsmen who had played no active part in the challenge (para.56) – i.e. the principle already extended beyond 'courts and tribunals'. The key factor appears to be that it was a 'judicial decision'. This was so in the case of the Parole Board notwithstanding that it was a recommendation rather than a determination. The Board performs a similar function when it is making recommendations and when it is making art.5(4) decisions: in both cases it obtains the relevant material, evaluates that material, makes assessments of the risk posed and whether

the level of risk is appropriate to permit progress (by way of release or transfer, as the case may be). The same procedural standards apply in reaching both its recommendation and its decision. Given its approach, processes and expertise, in the vast majority of cases the Secretary of State will follow the recommendation of the Parole Board on transfer.

69. Indicators of what might constitute 'judicial decisions' or 'judicial functions' (as opposed to administrative decisions or functions, for example), can therefore be drawn out:
    a. They are not limited to decisions made by 'courts and tribunals' (a point which is in any event clear in our context from DPA2018 sch.2 para 14(1)).
    b. Judicial acts determine or affect rights.
    c. A decision can be a judicial one even if it produces a recommendation rather than a determination.
    d. Independence from the executive and parties is a key indicator.
    e. The presence of judicial procedures is a key indicator. However, an adversarial procedure is not required.

70. In *Da Silva & Ors, R (on the application of) v Secretary of State for the Home Department & Anor* [2019] EWHC 426 (Admin) the Chairman of the UCPI, when acknowledging service, described his position as being "*a court or tribunal*": (see Defendant's Acknowledgement of Service at section A of the bundle). This option in Section A in the current forms is designed to identify those bodies for whom the *Davies* costs practice ought to apply. It can easily be seen why the Chairman identified as such: he was being judicially reviewed because there is no right of appeal against his decision (and see s.38 of IA2005). He is independent of the executive and the core participants. His decisions are made with appropriate guaranteed judicial procedures (see s.17 and IA2005 more generally). His decisions as regards anonymity are final (notwithstanding his power of review at s.20 IA2005) save for the right to challenge by way of judicial review. Restriction order decisions are therefore likely to be 'judicial decisions' for *Davies* purposes. The same can be said for other procedural decisions.

71. The case must be no different in respect of the Inquiry's decisions in finding the facts and making the recommendations which are required to fulfil its terms of reference. The factual findings of inquires are determinations, and are susceptible to judicial review if they are irrational (as confirmed in *E7 v Sir Christopher Holland in his capacity as Chairman of the*

Azelle Rodney Inquiry [2014] EWHC 452, paras.17-18). The Court there described the Inquiry Report in terms: "*The significance of any Report, however, is that it provides a public narrative which undeniably impacts not only on the position of those involved in the relevant incident or event but, additionally, on wider public interest issues."* (para.16).

72. The independent and impartial chairman of a public inquiry will make findings of fact, which will be based on an even handed and fair evaluation of written and oral evidence, carried out in accordance with appropriate judicial procedures. Those factual determinations will affect the rights of others. Procedural decisions will also affect rights. Consider:
    a. Although an inquiry panel does not determine liability (s.2(1)), it does make determinations of fact. See s.2(2) in which the determination of facts is anticipated; s.5(6)(b) which confirms that the terms of reference of an IA2005 inquiry may require an inquiry panel to determine facts; and s.24(1) which provides that the inquiry report to the Minister will set out the facts which have been determined.
    b. They determine questions affecting rights and receive evidence affecting the determination of any such question. The Chairman of the UCPI has already ruled that this is the case: see Minded To decision of 2 August 2017 and ruling dated 29 November 2017 in respect of the Rehabilitation of Offenders Act 1974. This ruling has not been challenged, and there is no reason to suppose these self-determinations are not of general application. In that ruling the Chairman held that the rights in issue were arts. 6 and 8 of the ECHR, and that they were affected by his determinations, which included whether or not to refer a matter to the miscarriage of justice panel; whether to grant or refuse a restriction under s.19; and other procedural decisions, for example to require documents pursuant to the powers in s.21 IA2005, are also capable of affecting rights.
    c. The decisions of an inquiry chairman are made with appropriate guaranteed judicial procedures (see, for example, s.17(2) and (3)). IA2005 sets down factors an inquiry chairman is obliged to consider in certain cases (see, for example, s.19).

Acts carried on in a judicial capacity are intentionally treated differently from other types of act with the DPA2018 scheme. The purpose is to provide necessary protection for judicial independence and judicial proceedings and to ensure that the exemption is framed in absolute terms. There is clear good reason not to allow inference with judicial acts or for there to be any

chilling effect on the way in which acts in a judicial capacity are carried on. They apply to inquiry proceedings for the same reasons.

"judicial proceedings"

73. Where the court, tribunal or individual was not acting in their judicial capacity, the exemption at para.14(3) applies to the extent that the application of the GDPR data subject rights would be likely to prejudice judicial proceedings. It is apparent from the structure of the DPA2018 that 'judicial proceedings' are distinct from 'legal proceedings'. Legal proceedings are instituted before a court or tribunal (and note s.205 DPA2018). It is submitted that the term 'judicial proceedings' is, properly understood, a wider term, referring both to legal proceedings before a court or tribunal, and those other proceedings in which an individual may act in a judicial capacity.

74. It is acknowledged that in his judgment in *Kennedy v Charity Commission* [2015] A.C. 455 (***Kennedy)*** Lord Toulson drew a distinction between 'judicial proceedings' and statutory inquiries (para.121). However, the term was not there used as a term of art, nor was the distinction drawn following an examination of what constitutes or defines 'judicial proceedings'. In any event, the effect of the majority decision in that case was to hold that the open justice principles which apply in courts and tribunals apply in the same way to IA2005 proceedings – i.e. to identify a principled similarity between IA2005 proceedings and there-termed judicial proceedings. This was because inquiries have a 'quasi judicial' function. The policy reasons for holding that the open justice principles applied in (as there described) 'judicial proceedings' equally to statutory inquiries (see paras.124-125).

75. It is submitted that reading sch.2 para.14 in context shows that the reference in para.14(2) to 'judicial proceedings' must mean either of the sets of proceedings which are captured at para.14(1). This interpretation is supported by the exempting power at art.23(1)(f) of the GDPR, permitting domestic law exemptions where required for "*the protection of judicial independence and judicial proceedings".*

Would the application of the GDPR data subject rights would be likely to prejudice the IA2005 proceedings?

76. For all the reasons set out above at paragraph 55 above the application of the GDPR data subject rights would be likely to prejudice IA2005 proceedings. They could not progress.

There would be huge cost in time and public resources. The exemption at para.14(3) therefore also applies.

The purpose for the judicial capacity, independence and proceedings exemption

77. There can be no reason to suppose that the independence and impartiality of an IA2005 inquiry is any less important than the independence of the courts, and s.9(1) IA2005 (requirement of impartiality) supports this, as does the fact that an inquiry panel is tasked by a Minister to (fairly) find facts and make recommendations, and (fairly) make procedural decisions to enable the inquiry to do that, in cases of public concern. The need for them to be independent and their proceedings not to be prejudiced is plain. Certain of the individual GDPR data subject rights which are exempted where an individual is acting in a judicial capacity – such as the rights to rectification (art.16) or erasure (art.17) self-evidently would interfere with judicial proceedings or the independence of judicial decisions were they not exempted. The same is true for inquiries, and for the same reasons. In short, Parliament can no more have wanted a chilling effect and fettering on the important work and the independence of inquiries, than it can have in respect of courts.

78. Accordingly, the policy reasons in favour of exempting acts in a judicial capacity and judicial proceedings before courts and tribunals applies equally to IA2005 inquiries. Other consequences of the non-application of the exemption, such as that it would risk fettering the chair or panel's approach, that it would risk prejudicing and derailing a public inquiry, which by its nature will tend to take in and process quantities of data akin to and to be used as evidence (see rule 9 and s.21), only provide further reasons to suggest that the judicial exemptions apply to pubic inquiries.

79. It is noted that the Information Commissioner is not permitted to exercise functions in relation to courts, tribunals and individuals acting in a judicial capacity (s.117 DPA2018). This exception derives from art.55(3) of the GDPR ("*supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity*"). The purpose of this exception is to safeguard judicial independence in the performance of judicial tasks (Recital 20). It is acknowledged that courts, tribunals and coroners in England and Wales are therefore not subject to supervision by the Information Commissioner but by the Judicial Data Protection Panel (**JDPP**). It is not determinative, at this early stage in

the history of the legislation, that the current IA2005 inquiries have not also (or not yet) submitted to the supervision of the JDPP.

80. In summary:

a. The UCPI has already ruled that its decisions and determinations, limited as they are by s.2(1), nonetheless affect rights, and also that it receives evidence which may affect the determination of a question affecting rights.

b. Whilst the Supreme Court has drawn a distinction between judicial and inquiry proceedings, inquiry proceedings are at least 'quasi-judicial'.

c. At least one judicial definition of judicial acts would extend to decisions affecting rights, so long as they are made by a competent authority on consideration of facts and circumstances (see *R (Wexford County Council) v Local Government Board for Ireland* [1902] 2 IR 349). The Chairman of the UCPI has already made findings about his role sufficient to bring the Inquiry's acts within this definition.

d. In the context of judicial review a judicial definition of judicial decisions extends it to bodies which are independent of the executive and the parties to the case; have appropriate guaranteed judicial procedures; and make findings which are advisory (albeit likely to be accepted). Again, the Chairman of the UCPI appears to have identified his decisions in respect of restriction orders as falling within this definition of judicial decisions. The caselaw would suggest the same conclusion is appropriate in respect of factual findings.

e. It is of note that the public sector equality duty would apply to the acts and decisions of the Inquiry save when it is exercising a judicial function. The policy considerations for non-application of the duty to the judicial functions of courts apply equally to the Inquiry, and also apply and for similar reasons to the para.14(2) exemption.

f. It would be illogical for an inquiry chairman not to be 'acting in a judicial capacity' for the purposes of the DPA2018 when carrying out the same acts and types of acts which would be likely to be (1) judicial decisions for costs purposes in the event it is unsuccessful in a judicial review; (2) a judicial authority affecting rights when dealing with the Rehabilitation of Officers Act 1974; (3) exercising a judicial function for the purposes of the public sector equality duty.

g. There is a clear intention in the GDPR and the DPA2018 to exclude acts carried out in a judicial capacity for fundamental reasons: the need to protect judicial

independence and decision making, and the need to not prejudice judicial proceedings. Given the clear application to inquiries of the policy reasons behind the judicial proceedings exemption, there is good reason to consider that it properly includes public inquiries under IA2005.

If the public protection and/or judicial exemptions did not apply to IA2005 inquiries

81. In considering the correct interpretation of the two identified exemptions (or any other) applying to the work of public inquiries, it must be noted that the effect of their non-application to public inquiries would be to make IA2005 inquiries unworkable or impracticable, vulnerable to the frustration of their proceedings, jeopardise their independence and impartiality, and potentially leave them unable to fulfil their terms of reference (i.e. meet their statutory purpose).

82. In addition to the submissions made above, which are directed at interpretation of the DPA and the GDPR, the MPS also relies upon the presumption in English law statutory interpretation against 'absurd' results (see *Bennion on Statutory Interpretation* (7th ed) at para.12.1 ("*Bennion*")). The editors of *Bennion* noted that the courts give 'absurd' a "*very wide meaning…to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.*" This passage was recently cited with approval by the Divisional Court in *Stannard v Crown Prosecution Service* [2019] EWHC 84 (Admin), in holding that s.43 of the Anti-Social Behaviour, Crime and Policing Act 2014 must by implication confer a power not explicitly contained therein. The Court held that, without such a power the regime created by the section would be "*totally impractical*" and could lead to "*substantial injustice*" (para 40). See also *R v McCool* [2018] 1 WLR 2431 at [24] – [25] per Lord Kerr.

83. The more unreasonable the result, the less likely it must be that Parliament intended it (*R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20 per Lord Millet at 117).

84. The presumption against absurdity is of particular importance when an alleged absurdity is not a necessary consequence of an otherwise cogent statutory scheme and cannot be justified on other grounds (as is the case in respect of the IA2005 and DPA2018 schemes).

Bennion cites *R (on the application of Noone) v Governor of Drake Prison* [2010] UKSC 30 at 13, 41 and 47*;* and *R v Lehair* [2015] EWCA Crim 1324 at 19, 21 and 22 by way of examples of the application of this principle. The same cases also demonstrate that that courts will generally avoid a construction which creates an anomaly turning on an immaterial distinction ("*Even though two cases are not exactly alike, it may still be anomalous to distinguish between them if the difference is immaterial or trivial*": para.12.4). As to anomalous or illogical results, *Bennion* observes that "*Every legal system must seek to avoid unjustified differences and inconsistencies in the way it deals with similar matters*." (para 12.4).

85. *Bennion* notes that "*The law's delays are a notorious defect, and the courts regard them as an inconvenience to be avoided. So a construction that tends to draw out proceedings is frowned on.*" (para.12.3). A strained construction may be justified to avoid an unworkable result, even where the enactment is not grammatically ambiguous. It is therefore evident that the courts are prepared to construe statutes in a manner favouring a workable result even where the literal meaning is not ambiguous, thereby demonstrating the latitude given to the act of interpreting a legislative provision. Note the approach of the Court of Appeal in *Stunt* in this regard (paras.59-73).

86. Regarding inconvenient results, although the presumption is weaker than in the case of unworkable results, *Bennion* notes that the Court's reluctance to adopt an interpretation which produces an inconvenient result may be influenced by principles of legal policy and that the law should serve the public interest. This illustrates that the threshold for the courts actively remedying perceived defects in legislation is lower than the term 'absurd' might at first suggest.

87. Accordingly, the exercise is not to seek to find an identical factual scenario with which a comparison may be made, but one relevantly and sufficiently similar. This once more demonstrates the relative flexibility with which the courts approach such exercises.

PART C: EXAMINATION OF THE DPA2018 EXEMPTIONS OF NARROWER APPLICABILITY OR SPECIFIC APPLICABILITY TO THE UCPI

Exemption 3: Information which is it necessary to disclose

88. Para.5 of sch.2 to DPA 2018 ("*Information required to be disclosed by law etc or in connection with* Information which is it necessary to disclose*"*) provides:

> *"(1) The listed GDPR provisions 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.*
> *(2) The listed GDPR provisions 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.*
> *(3) 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."*

89. Para.5(3) is relevant. It applies when disclosure of personal data is necessary for various legal purposes. Of most obvious application is para.5(3)(c), which applies when disclosure of personal data is necessary for the purposes of establishing, exercising or defending legal rights, to the extent that the application of the GDPR data subject provisions would prevent the controller from making the disclosure.

90. If the wider exemptions at paras.7 and 14, considered in Part B above, are not available, this exemption could nonetheless apply in the following way (as an example, considering that Chairman's Note of 26 February 2019 at para.5(i)): personal data held in intelligence reporting needs to be shown to officers making witness statements. Broadly, this disclosure is necessary for the purposes of establishing, exercising or defending legal rights, in that the Article 8 ECHR rights of the officer and the persons whose data is mentioned are engaged. In the event the intelligence discloses any potential miscarriage of justice, further legal rights may be engaged. Time may be precious (from the acute: the potential officer witness is of age, or ill; to the chronic: the Inquiry needs to report within a reasonable timescale). In a given case, or in classes of case generally, the application of the provisions would prevent the controller from making the disclosure to the officer, because the application of the provisions would divert time and resources from the necessary

disclosure. This would mean that the statement could not be taken, and the Inquiry's effectiveness could be jeopardised.

91. Where miscarriage of justice is a potential issue, para.5(3)(a) may also apply, in the context of prospective legal proceedings.

Exemption 4: Crime and taxation

92. The 'crime and taxation' exemption is at para.2 to sch.2 of DPA2018. It provides, in so far as is relevant, that:

> *"(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*
>
> *(...)*
>
> *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)."*

93. For the purposes of this Inquiry, a number of police forces have, are and will supply personal data to the UCPI. Each may, in a given case, have processed data for the purposes of the prevention and detection of crime, or for the apprehension or prosecution of

offenders. It will be "*Controller 1*". If that is the case, sub-paragraphs (2) and (3) will apply where the Inquiry obtains the data from the police force for the purpose of discharging statutory functions and processes it for the purpose of discharging statutory functions. That is, the Inquiry will be "*Controller 2*". The statutory functions the Inquiry is discharging have been considered above. The Inquiry would therefore be exempt from duties at (3).

94. It is accepted that this paragraph cannot apply unless the police force ("*Controller 1*") has processed or is processing the data for the purposes on para.2(1). The Inquiry should be properly cautious in respect of data which could conceivably meet the purposes in para.2(1). Whilst it can easily be envisaged that the paragraph will be of relevance when considering material relating to current operations or tactics, there is no basis for assuming that it will be limited to such data.

Exemption 5: Protection of the rights of others

95. Para.16 of part 3 of sch.2 provides a restriction based on art.23(1) GDPR as follows:

> *"(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."

96. This exemption is narrower than those considered above. It affects only the data controller's duties in respect of subject access requests. They mean a data controller is not obliged to provide material within a SAR which would involve disclosing information about another individual, who would be identifiable (in person, or as the source of the information, or using mosaic identification: para.16(4)). Where there is consent, or where it is reasonable to disclose without consent, the usual obligation remains. It is for the data controller to decide whether it is reasonable to disclose the material which identifies another person, by considering all the relevant circumstances, including those listed at para.16(3). In the context of intelligence reporting which was covertly obtained and is confidential or secret, and the nature of such reporting, the factors listed at para. 16(3) are particularly important. Onward disclosure as part of a SAR must be handled with the *upmost* caution. The MPS submits that this exemption would be engaged in respect of the vast majority of intelligence reports, if not all (in the event that the wider exemptions considered in Part B do not apply).

PART D: THE ALTERNATIVE CASE – THE GDPR EXCEPTIONS

97. In the event that, contrary to the MPS' primary case, one or a combination of exemptions identified within the DPA2018 above do not apply, the exceptions to notification internal to the GDPR at art.14(5) arise.

98. Art.14(5)(a) means that data does not have to be provided to a data subject who already has it. This exception may have application to the Inquiry when it processes personal data, but it is acknowledged that the data would need to be considered on a case by case basis to establish whether the data subject does already have the information. In the majority of cases (certainly within the intelligence reporting material), art.14(5)(a) will not apply.

99. As set out above, art.14(5)(b) provides three cases in which the obligations at art.14(1)-(4) do not apply:

    a. the provision of the information proves impossible;

b. the provision of the information would involve a disproportionate effort; or
c. in so far as the provision of the information to the data subject required by art.14(1) would be likely to render impossible or seriously impair the achievement of the objectives of the processing.

100. Where any of the three art.14(5)(b) exceptions apply, the Inquiry should go on to consider whether, the exception notwithstanding, any information can be made publicly available.

101. The NSNPCPs assert that "*a blanket approach is not permissible*". The MPS disagrees, if by this the NSNPCPs suggest that the possibility of notification, or its effect, cannot be considered on a class basis. By reference to the types of data (for example, "*SDS intelligence reporting up to 1982*") it could well be impossible to notify on an individual basis; and/or disproportionate to seek to locate each person, save where they are already easily contactable (i.e. the inquiry has information from which to contact them). It may be possible (and in many cases will be possible) to detail on the inquiry website the groups infiltrated, and dates of infiltration, along with the name used by the police officer, and inform the public that attendees at group meetings in this period, or persons who interacted with the named officer, may have personal data which is being processed by the inquiry.

The provision of the information proves impossible or the provision of information would involve a disproportionate effort

102. These exceptions can be considered together. Even if is not impossible to provide the information, to do so may require disproportionate effort.

103. The provision of information directly (if that is required) is impossible if the body holding it does not have contact details for the data subject. For example, it may hold names but no addresses. It may hold addresses which are now out of use and no forwarding details.

104. Plainly when considering the information on SDS intelligence reporting (names, decades old addresses) it is apparent that the Inquiry will not have contact details for the persons mentioned unless they have made themselves known to the Inquiry.

105. The Inquiry can assess the intelligence reporting material as a class (or perhaps separate classes for material in different periods, e.g. 1968-1982, 1983-1992 etc.), bearing in mind the number of data subjects, the age of the data, and the lack of contact information (or the age of such information as there is), and could properly reach the view that meeting the obligations in arts.14(1)-(4) would prove impossible. Consideration of the same criteria could lead the Inquiry to properly conclude the work needed to build a profile of every individual mentioned on an individual basis, is so great as to mean that the second exception (disproportionate effort) would in any event apply. The protections in the Restriction Order Protocol (including redaction by the Inquiry legal team) provide meaningful safeguards.

106. It is **not** accepted that this assessment cannot be made taking the data as a class, nor has any authority been cited in support of the submission that the data cannot be considered as a class (particularly noting that the exercise is quite different to that contemplated when responding to a SAR). The examples given on the ICO website suggest that in the Information Commissioner's view it can[1]. The application of this exception does not require the Inquiry to first exhaustively search for the information about each data subject. That fact of impossibility or disproportionate effort can derive from the general nature of the information. It would not require a 'profile' to be built on each person mentioned before an assessment of impossibility can be made (which, not least, the second exception within art.14(5)(b) operates to demonstrate).

107. This position (i.e. impossibility, or disproportionate effort) should be recorded, and the privacy information published by the Inquiry should make this clear.

108. The Inquiry should consider whether to conduct a Data Protection Impact Assessment ('DPIA'). A DPIA is required where a type of processing is "*likely to result in a high risk to the rights and freedoms of natural persons*" (GDPR art.35(1)). It may be sensible for a data controller to conduct a DPIA even when not obliged to do so.

109. The outcome of a DPIA might be that as a mitigating measure the UCPI publishes more information about the deployments of undercover officers on its website and invites media

[1] https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/the-right-to-be-informed/when-should-we-provide-privacy-information-to-individuals/

reporting of it (or takes out space in appropriate publications); it should be confirmed in this information that personal data of many people attending meetings of or associated with the groups or movements listed is or may be being processed, coupled with an explicit request for persons to come forward. This latter aspect might mean that the pool of data subjects for whom meeting the obligations contained in art.14(1)-(4) is not impossible, grows. It is noted that the Chairman has confirmed, in his Note of 26 February 2018, that further information of this type will be provided by the Inquiry and published online as its investigations progress.

110. The provision of information would also prove impossible if its provision would in effect breach a restriction order or identify a person whose identity has been restricted.

111. In *Dawson-Damer* the Court of Appeal considered the requirement under s.7(1)(c)(i) DPA1998 to supply a data subject a copy of information unless (per s.8(2) DPA1998) "*it would involve disproportionate effort*". The Court stated in the context of a subject access request that it would be "*a question for evaluation in each case whether disproportionate effort will be involved in finding and supplying the information as against the benefits it might bring to the data subject*" (para.77).

112. The obvious distinction to note is that in *Dawson-Damer*, the search described is within an organisation's own systems, for information held in order to respond to a SAR. The search contemplated by art.14(5)(b) is for the data subjects themselves, out in the world. Plainly there can be no parallel in this context with the expectation that data controllers will have "*designed their systems … to enable them to make most searches for SAR purposes*" (per *Dawson Damer* at para.79).

The provision of the information required by art.14(1) would be likely to render impossible or seriously impair the achievement of the objectives of the processing

113. This is an important exception in the context of this Inquiry. As identified by the Chairman, the significant delay required to notify individuals under art.14 would render impossible or seriously impair the ability of the Inquiry to fulfil its terms of reference and report, as soon as practicable, to the Home Secretary.

114. The staged approach sets out in the Chairman's Note of 26 February 2019, including its proposal to publish additional information on the website (Step 3) once it is appropriate to do so, provides a reasonable alternative to enable individuals to understand whether their personal data is or may be held by the Inquiry.

Art.15(4)

115. The exclusion at art.15(4) ("*the right to obtain a copy [of personal data undergoing processing] shall not adversely affect the rights and freedoms of others*") is distinct from the exemption allowed for by art.23(1) and provided for in the DPA2018 at sch.2 part 3 para.16 (data which, if disclosed, would identify another person within the data or as its source). The art.15(4) exception is more widely drawn that simply identification.

116. For the reasons discussed above, the provision of such material in response to a SAR would in the overwhelming majority of cases adversely affect the rights and freedoms of a number of people. In addition to the individual persons mentioned, the type of material as a class (focussing on intelligence reporting) necessarily engages this paragraph. It can be considered as a class. Until public interest (and privacy) redactions have taken place, this will remain the case. No SAR should be provided containing data which has been received by the Inquiry from any police force without at the least, public interest and privacy redactions having been made to it. Until that time the exception at art.15(4) will apply.

117. In the event that the DPA2018 exceptions identified above do not apply, and given the nature and sensitivity of the documents which are held by the Inquiry, one key practical consequence is that the Inquiry must develop a subject access response protocol, which needs to be shown to and agreed with the original data providers, in order to ensure that any and all proper protective assertions over data held can be made at the appropriate time.

Art.17(3)

118. The right to be forgotten is simply incompatible with the Inquiry's investigative work. The Inquiry is carrying out important work in the public interest that would be frustrated if information was required to be deleted before it was considered as part of the Inquiry's processes.

PART E: CONCLUSION

119. In summary, the MPS submits:

a. The work of the Inquiry is exempted from the GDPR data subject rights. When the Chairman is acting in a judicial capacity, that exemption is total.

b. At all other times the exemptions apply to the extent that the Inquiry's proceedings are prejudiced by their application; and to the extent that it would prejudice the proper discharge of the Inquiry's function (to fulfil its terms of reference to inquire into and report on matters to do with undercover policing).

c. Other exemptions may also apply to specific classes of data or specific processes.

d. There is no basis on which to say that the consideration of whether the exemption will apply or not must be considered on a 'data item by data item', or 'data subject by data subject' way. The judicial capacity exemption attaches to the function. The 'to the extent that' exemptions can properly proceed on the basis of an evidenced analysis of the prejudice which compliance would cause.

e. In the event the MPS is wrong, and the identified DPA2018 (or a combination of them) do not apply, the exceptions in arts.14(5), 15(4) and 17(3) in any event do apply.

120. So far as b. and d. are concerned, it would be for the Chairman to set out in concrete terms the impact that compliance would have on his functions, and why non-compliance is necessary and proportionate, not in a vague and general sense, but in a precise way that, if challenged, is capable of being supported by evidence.

8 March 2019

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