

IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS FOR HEARING ON 25 MARCH 2019 SERVED ON BEHALF OF THE NATIONAL CRIME AGENCY

Introduction

- 1) The Chairman invited submissions on three questions in his note of 12 February 2019:
 - 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.
 - b) Insofar as Articles 13, 14 and 15 of the GDPR do apply to the work of the Inquiry, and no exemptions are applicable, what obligations do Articles 13, 14 and 15 impose upon the Inquiry, having regard in particular to Article 14(5)(b)? In those circumstances, what would be the practical implications for the Inquiry in relation to the evidence gathering exercise?
 - c) If the Chairman is performing a function to which any of the exemptions set out in Schedule 2 to the Data Protection Act 2018 applies, what obligations do Articles 13, 14 and 15 of the GDPR impose upon the Inquiry? In those circumstances, what would be the practical implications for the Inquiry in relation to the evidence gathering exercise?
- 2) For reasons given below, the NCA’s submission is that Articles 13, 14 and 15 of the GDPR do not apply to personal data processed for the purpose of discharging the Inquiry’s functions to the extent that the application of those provisions would be likely to prejudice the proper discharge of the Inquiry’s functions. That is because the Inquiry’s functions fall within the exemption in paragraph 7 of Schedule 2 to the Data Protection Act 2018 (“the 2018 Act”). Accordingly, the NCA makes submissions on (a) and (c) above, but not on (b), the premise of which is that no exemption applies.

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

3) The exemption in paragraph 7 of Schedule 2, Part 2 to the 2018 Act applies to the Chairman’s functions for the following reasons.

4) Paragraph 7 of Schedule 2 to the 2018 Act provides:

“Functions designed to protect the public etc.

7. 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.”

5) The “*listed GDPR provisions*” are defined in paragraph 6 of Schedule 2 to the 2018 Act. They include (relevantly for present purposes):

“(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);

... ”

6) Row 2 of the Table in paragraph 7 to Schedule 2 states:

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

7) The Inquiry's functions satisfy the tests in row 2 of the Table.

8) **First**, the Inquiry's functions are set out in the Terms of Reference. They include:

a) At §1:

“[t]o inquire into and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968 and, in particular, to:

– Investigate the role and the contribution made by undercover policing towards the prevention and detection of crime;

– Examine the motivation for, and the scope of, undercover police operations in practice and their effect upon individuals in particular and the public in general;

– Ascertain the statement of awareness of undercover police operations of Her Majesty's Government;

– Identify and assess the adequacy of the:

(i) justification, authorisation, operational governance and oversight of undercover policing;

(ii) selection, training, management and care of undercover police officers;

– Identify and assess the adequacy of the statutory, policy and judicial regulation of undercover policing.”

b) Further, at §2:

“2. The inquiry's investigations will include a review of the extent of the duty to make, during a criminal prosecution, disclosure of an undercover police operation and the scope for miscarriage of justice in the absence of proper disclosure...”

c) The Inquiry's report must also *“make recommendations as to the future deployment of undercover police officers.”* (§10).

9) These functions of the Inquiry are of course in part designed for the purpose of an examination of historic events. However, they are equally obviously designed to be forward-looking, with a view to preventing or protecting against future misconduct by undercover police officers. Even if that is only implicit in the passages from the Terms of Reference quoted at §8(a) and (b) above, it is explicit in the requirement that the Inquiry's report *“make recommendations as to the future deployment of undercover police*

officers.” (§10). It follows that the Inquiry’s functions are designed to “*protect[...]* *members of the public against...dishonesty...or other seriously improper conduct.*” (Schedule 2, paragraph 7, Table, row 2, first column).

10) The non-police non-state core participants’ advance preview of their submissions at the hearing on 31 January 2019 appeared to include a submission that the Schedule 2, paragraph 7 exemption is the successor to the exemption found in section 31 of the Data Protection 1998 (“the 1998 Act”), under the heading “*Regulatory activity*”, and that Schedule 2, paragraph 7 itself only relates to regulatory activity. If that submission is maintained, it should be rejected. The heading “*Regulatory activity*” is absent from Schedule 2, paragraph 7 itself, the heading for which is the wider term “*Functions designed to protect the public etc*”. Furthermore, the relevant language of section 31 was specifically directed to, *inter alia*, “*dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, **persons authorised to carry on any profession or other activity***” (emphasis added). The qualifying words in bold, which were to be expected in a section concerning regulatory activity, are omitted from Row 2 of the Table to Schedule 2, paragraph 7. The natural reading of the latter is accordingly wider than section 31 of the 1998 Act. Furthermore, “[*r*]egulatory functions” are explicitly the subject of different paragraphs of Schedule 2, namely paragraphs 10 to 12 (see Annex to this Note, and the headings to paragraphs 10 and 11 in particular). Had paragraph 7 been intended to relate solely to regulatory functions, Parliament would presumably have included it within the body of paragraphs 10 to 12. In truth the Schedule 2, paragraph 7 exemption is concerned with the wider concept of “*Functions designed to protect the public...*”, a concept within which, as submitted above, the Inquiry’s functions clearly fall.

11) **Second**, the Inquiry’s functions are plainly both (a) “*conferred...by an enactment*”, namely the power in section 1(1) of the Inquiries Act 2005 to “*cause an inquiry to be held under this Act*”; and (b) of a “*public nature...exercised in the public interest.*” (Schedule 2, paragraph 7, Table, Row 2) The condition in the second column of the Table is therefore satisfied.

12) For these reasons the NCA submits that the Inquiry’s functions meet the tests in Row 2 of the Table in paragraph 7 of Schedule 2 to the 2018 Act. It follows that “*the listed GDPR*

provisions”, which include Articles 13(1) to (3), Article 14(1) to (4) and Article 15(1) to (3), do not apply to the Inquiry to the extent that their application would be likely to prejudice the proper discharge of the Chairman’s function.

(c) If the Chairman is performing a function to which any of the exemptions set out in Schedule 2 to the Data Protection Act 2018 applies, what obligations do Articles 13, 14 and 15 of the GDPR impose upon the Inquiry? In those circumstances, what would be the practical implications for the Inquiry in relation to the evidence gathering exercise?

- 13) The answer to this question turns on the meaning and effect of the term “*to the extent that the application of those provisions would be likely to prejudice the proper discharge of the function*” in paragraph 7 of Schedule 2 to the 2018 Act in the context of this Inquiry.
- 14) The NCA’s submissions in relation to the evidence gathering exercise are necessarily more circumscribed than those of other state parties, given the relatively limited number of relevant documents which it holds when compared with the MPS and NPCC, and its lesser degree of experience in this Inquiry of the associated logistical issues. However, given the volume of personal data being processed by the Inquiry, it is highly likely that compliance with Articles 13, 14 and 15 of the GDPR would prejudice the proper discharge of its functions. A diversion of finite resources from the (itself substantial) task of carrying out the Terms of Reference would follow from compliance with those Articles.
- 15) The NCA accordingly respectfully agrees with what was said at 5(iv) of the Chairman’s note of 26 February 2019 that steps beyond those envisaged in that note would “*frustrate the purpose of the Inquiry*” and the further concerns about significant delay to the progress of the Inquiry (§6(c)). It follows that the application of Articles 13, 14 and 15 of the GDPR “*would be likely to prejudice the proper discharge of the function*” of the Inquiry, and that those Articles therefore do not apply to the Inquiry.

8 March 2019

**ANDREW O’CONNOR QC
RICHARD O’BRIEN**

ANNEX: Paragraphs 10 to 12 of Schedule 2 to the Data Protection Act 2018

“Regulatory functions relating to legal services, the health services and children’s services

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(1) The listed GDPR provisions do not apply to personal data processed for the purposes of discharging a function listed in sub-paragraph (2) to the extent that the application of those provisions would be likely to prejudice the proper discharge of the function.

(2) The functions are—

- (a) a function of the Legal Services Board;
- (b) the function of considering a complaint under the scheme established under Part 6 of the Legal Services Act 2007 (legal complaints);
- (c) the function of considering a complaint under—
 - (i) section 14 of the NHS Redress Act 2006,
 - (ii) section 113(1) or (2) or section 114(1) or (3) of the Health and Social Care (Community Health and Standards) Act 2003,
 - (iii) section 24D or 26 of the Children Act 1989, or
 - (iv) Part 2A of the Public Services Ombudsman (Wales) Act 2005;
- (d) the function of considering a complaint or representations under Chapter 1 of Part 10 of the Social Services and Well-being (Wales) Act 2014 (anaw 4).”

“Regulatory functions of certain other persons

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

- (a) is a function of a person described in column 1 of the Table, and
- (b) is conferred on that person as described 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.

TABLE

<i>Person on whom function is conferred</i>	<i>How function is conferred</i>
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<p>1. The Commissioner.</p>	<p>By or under—</p> <ul style="list-style-type: none"> (a) the data protection legislation; (b) the Freedom of Information Act 2000; (c) section 244 of the Investigatory Powers Act 2016; (d) the Privacy and Electronic Communications (EC Directive) Regulations 2003 (S.I. 2003/2426); (e) the Environmental Information Regulations 2004 (S.I. 2004/3391); (f) the INSPIRE Regulations 2009 (S.I. 2009/3157); (g) Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC; (h) the Re-use of Public Sector Information Regulations 2015 (S.I. 2015/1415); (i) the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 (S.I. 2016/696).
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2. The Scottish Information Commissioner.	By or under— (a) the Freedom of Information (Scotland) Act 2002 (asp 13); (b) the Environmental Information (Scotland) Regulations 2004 (S.S.I. 2004/520); (c) the INSPIRE (Scotland) Regulations 2009 (S.S.I. 2009/440).
3. The Pensions Ombudsman.	By or under Part 10 of the Pension Schemes Act 1993 or any corresponding legislation having equivalent effect in Northern Ireland.
4. The Board of the Pension Protection Fund.	By or under sections 206 to 208 of the Pensions Act 2004 or any corresponding legislation having equivalent effect in Northern Ireland.
5. The Ombudsman for the Board of the Pension Protection Fund.	By or under any of sections 209 to 218 or 286(1) of the Pensions Act 2004 or any corresponding legislation having equivalent effect in Northern Ireland.
6. The Pensions Regulator.	By an enactment.
7. The Financial Conduct Authority.	By or under the Financial Services and Markets Act 2000 or by another enactment.
8. The Financial Ombudsman.	By or under Part 16 of the Financial Services and Markets Act 2000.
9. The investigator of complaints against the financial regulators.	By or under Part 6 of the Financial Services Act 2012.
10. A consumer protection enforcer, other than the Competition and Markets Authority.	By or under the CPC Regulation.
11. The monitoring officer of a relevant authority.	By or under the Local Government and Housing Act 1989.

12. The monitoring officer of a relevant Welsh authority.	By or under the Local Government Act 2000.
13. The Public Services Ombudsman for Wales.	By or under the Local Government Act 2000.
14. The Charity Commission.	By or under— <ul style="list-style-type: none"> (a) the Charities Act 1992; (b) the Charities Act 2006; (c) the Charities Act 2011.

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In the Table in paragraph 11—

"consumer protection enforcer" has the same meaning as *"CPC enforcer"* in section 213(5A) of the Enterprise Act 2002;

the *"CPC Regulation"* has the meaning given in section 235A of the Enterprise Act 2002;

the *"Financial Ombudsman"* means the scheme operator within the meaning of Part 16 of the Financial Services and Markets Act 2000 (see section 225 of that Act);

the *"investigator of complaints against the financial regulators"* means the person appointed under section 84(1)(b) of the Financial Services Act 2012;

"relevant authority" has the same meaning as in section 5 of the Local Government and Housing Act 1989, and

"monitoring officer", in relation to such an authority, means a person designated as such under that section;

"relevant Welsh authority" has the same meaning as *"relevant authority"* in section 49(6) of the Local Government Act 2000, and *"monitoring officer"*, in relation to such an authority, has the same meaning as in Part 3 of that Act.”