

THE UNDERCOVER POLICING INQUIRY

PRIVACY AND DATA PROTECTION

SUPPLEMENTARY SUBMISSIONS ON BEHALF OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Hearing: 25 March 2019

Introduction

1. A further hearing to consider privacy and data protection is scheduled to take place on 25 March 2019. The extent to which Articles 13, 14 and 15 of the EU General Data Protection Directive ('GDPR') apply to the work of the UCPI will be considered at that hearing.
2. The Chairman issued a note dated 12 February 2019¹ and invited submissions on the following issues²:
 - a) The extent to which Articles 13, 14 and 15 of the General Data Protection Regulation apply to the work of the Inquiry, having regard to the effect of any applicable exemptions.
 - b) Insofar as Articles 13, 14 and 15 of the General Data Protection Regulation do apply to the work of the Inquiry, and no exemptions are applicable, what obligations do Articles 13, 14 and 15 impose upon the Inquiry, having regard in particular to Article 14(5)(b)? In those circumstances, what would be the practical implications for the Inquiry in relation to the evidence gathering exercise?
 - c) If I am performing a function to which any of the exemptions referred to above and/or set out in Schedule 2 to the Data Protection Act 2018 applies, what obligations do Articles 13, 14 and 15 of the General Data Protection Regulation impose upon the Inquiry? In those circumstances, what would be the practical implications for the Inquiry in relation to the evidence gathering exercise?

¹ Note, *Preliminary Issue: Privacy. Note and directions for further hearing.*

² At paragraph 6.

3. In the Note dated 12 February 2019, the Chairman set out his preliminary view that “the listed GDPR provisions” specified in paragraph 6 of Schedule 2, Part 2 to the Data Protection Act 2018 (‘DPA’) do not apply to the UCPI as they are likely to prejudice the proper discharge of his function under the Inquiries Act 2005.
4. The Chairman issued a further note dated 26 February 2019³ which set out the evidence gathering process that the UCPI is conducting, and intends to conduct, and the proposed amendment to the Restriction Protocol to that effect.
5. Although these submissions are made on behalf of the Secretary of State for the Home Department in his role as core participant in the Inquiry, owing to the potentially wide-reaching implications of this issue, on this occasion some Government departments⁴ have been consulted on the issues raised in the Chairman’s note, and the views expressed during that process are reflected in these submissions.

Applicability of exemptions

6. The Secretary of State notes that there is no specific exemption under the DPA which expressly applies to a public inquiry. It is therefore necessary to analyse the exemptions by reference to the particular functions that the UCPI fulfils.
7. On this basis, the Secretary of State agrees with the Chairman that the exemption in paragraph 7(2) of Schedule 2, Part 2 of the DPA could apply. That is because:
 - a) The scope of paragraph 7(2) is sufficiently broad to encompass the function of the Chairman and is not dependent on the Chairman acting in a ‘judicial capacity’ or the UCPI constituting ‘judicial proceedings’.
 - b) An inquiry is usually a fact-finding exercise to determine what happened and why in order to learn lessons for the future. Therefore, the design of the UCPI’s function is ultimately to protect the public against dishonesty, malpractice, other seriously improper conduct, unfitness or incompetence. Accordingly, the

³ Note, *Preliminary Issue: Privacy and Data Protection. Note regarding the Inquiry’s evidence gathering process.*

⁴ The Department of Digital, Culture, Media and Sport; the Cabinet Office; and the Ministry of Justice.

Chairman is discharging a function that is designated as described in column 1 of the Table. Support for this contention can be derived from both the Terms of Reference for the UCPI which require the Chairman to report to the Home Secretary⁵ and “*make recommendations as to the future deployment of undercover police officers*” and from the previous Chairman’s Opening Remarks on 28 July 2015, at paragraph 15:

“...I hope that during the course of its work the Inquiry will acquire a clear impression as to the manner in which undercover policing has been conducted in England and Wales since 1968. It seems likely that the Inquiry will expose both creditable and discreditable conduct, practice and management. As far as I am aware, this is the first time that undercover policing has been exposed to the rigour of public examination. At the conclusion of its investigation, the Inquiry will report to the Home Secretary and make recommendations as to the deployment of undercover police officers in the future...”

- c) The Chairman’s function is conferred on him by an enactment, it is of a public nature and is exercised in the public interest. Therefore, the function meets the relevant condition specified in column 2 of the Table.
8. The Secretary of State can see that there are arguments for and against the applicability of the exemptions in paragraphs 14(2) and/or 14(3), Schedule 2, Part 2 of the DPA (an individual acting in a judicial capacity and judicial proceedings). However, Secretary of State submits, for the reasons outlined above, the stronger argument is that the exemption in paragraph 7 of schedule 2 applies.

Conclusion

- 9. With respect to the specific issues raised in the Chairman’s Notes⁶:
 - (a) With regards to points (a) and (b), paragraph 7(2) of Schedule 2, Part 2, DPA could apply as a relevant and lawful exemption.
 - (b) The Secretary of State agrees that the proposed amendments to the Restriction Protocol⁷ as set out in the Chairman’s Note dated 26 February 2019 appear to

⁵ As the Sponsor of the Inquiry only.

⁶ Notes 12 February 2019 and 26 February 2019.

strike an appropriate balance between the public interest in open justice and the UCPI's privacy and data protection obligations.

8 March 2019

**Catherine Brown
Furnival Chambers**

⁷ Paragraphs 5-6.