IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

SUPPLEMENTARY WRITTEN SUBMISSIONS ON BEHALF OF THE DESIGNATED LAWYER OFFICERS ON PRIVACY & GDPR

(For Hearing on 25 March 2019)

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1. Introduction

1.1 These supplementary submissions:

(1) are filed and served on behalf of the Designated Lawyer officers ("DL" and "DLO") pursuant to the first privacy hearing on 31 January 2019 and the inquiry's note and directions for further hearing "Preliminary Issue: Privacy" dated 12 February 2019;

(2) should be read together with the first set of DL submissions on this subject dated 24 January 2019.

1.2 Save where otherwise indicated, references to "the inquiry" refer to the inquiry panel as "data controller" and references to numbered articles refer to the provisions of the GDPR.

2. Application of the GDPR to inquiry proceedings

2.1 As submitted at para.2.3 of the DL submissions dated 24 January 2019 and the hearing on 31 January 2019, it is maintained that the proceedings and deliberations of the inquiry (and therefore "the taking of oral evidence") will not involve processing by automated means or by way of a filing system and so will not be subject to the GDPR (art.2(1)).

2.2 The words "whether or not by automated means" are included in the definition of "processing" in art.4(2) because "processing other than by automated means" *is* subject to the GDPR *if and only if* the personal data in question "form part of a filing system or are intended to form part of a filing system" (art.2(1)).

3. Overview

3.1 The key issue for present purposes concerns the application of the rules contained in arts 13-21 to the processing of personal data carried out by the inquiry.

3.2 Arts 13-21 fall within GDPR, ch.III ("Rights of the data subject"), ss.2, 3 and 4 (respectively "Information and access to personal data", "Rectification and erasure" and "Right to object").

3.3 The NSCPs maintain that the rules contained in arts 13-21 apply to the inquiry and that every data subject whose personal data is being processed by it must be (1) notified of this under art.14 where possible and (2) entitled to exercise rights under arts 15-19 and 21 as to access, rectification, erasure and restrictions on disclosures to third parties (submissions dated 24 January 2019, paras 53-57, 77, 107-112 and 116-119). At the heart of this is the submission that the inquiry must "adjust its approach in order to allow the [NSCPs] to see their own personal data before it is further processed by being given to state witnesses" so that they are able to "seek the restriction of, or otherwise object to" its processing (paras 111-112).

3.4 The CL maintain that various exemptions from and adaptations and restrictions of the rules contained in arts 13-21 are engaged - as provided for by DPA 2018, s.15(2)(b) and Sch.2, Pt 2 pursuant to art.23(1) - with the result that the inquiry is not required to comply with those rules.

3.5 The DL adopt and support the submissions of the CL and make the supplementary points set out below.

3.6 For the avoidance of doubt, it is acknowledged that the application of the GDPR to the inquiry is not a subject of immediate interest to the DLO themselves. However, the DL have a duty to assist the inquiry and the DLO have an interest in avoiding the massive and potentially catastrophic delays and expenditure of

time and resources that would flow from acceptance of the NSCP position in relation to both notification of data subjects and exercise of their ch.III rights.

4. Exemption for judicial proceedings

4.1 DPA 2018, Sch.2, para.14(2)-(3) provides:

> ***14. Judicial appointments, judicial independence and judicial proceedings***
>
> *...*
>
> *(2) The listed GDPR provisions [defined in para.6] do not apply to personal data processed by—*
>
> *(a) an individual acting in a judicial capacity, or*
>
> *(b) a court or tribunal acting in its judicial capacity.*
>
> *(3) As regards personal data not falling within sub-paragraph (1) or (2), the listed GDPR provisions do not apply to the extent that the application of those provisions would be likely to prejudice judicial independence or judicial proceedings.*

4.2 This is consistent with GDPR, recital (20) and arts 23(1)(f), 37(1)(a) and 55(3) and DPA 2018, ss.69 and 117. In this regard, recital (20) refers to "courts and other judicial authorities" and the need "to safeguard the independence of the judiciary in the performance of its judicial tasks, including decision-making".

4.3 It submitted that the GDPR and DPA 2018 should both be given a consistent and purposive construction and that recital (20) is a legitimate aid to the construction of art.23(1)(f) and DPA 2018, Sch.2, para.14 (see e.g. in relation to the need to construe the former DPA 1998 purposively and compatibly with European Community Data Protection Directive 95/46/EC: *CSA v Information Commissioner* [2008] UKHL 47, [2008] 1 WLR 1550, per Lord Hope at [7] and [20]-[27], Lord Rodger at [82] and Baroness Hale at [91]; *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55, [2013] 1 WLR 2421, per Baroness Hale JSC (giving the judgment of the court) at [7]-[8]; *Durant v FSA* [2003] EWCA Civ 1746, per Auld LJ at [3]-[4]; *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003).

4.4 So far as concerns the reference in recital (20) to "courts and other judicial authorities" (the French text refers to "les juridictions et autres autorités judiciaires"), some assistance may be derived from the approach taken by the Supreme Court in *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471. It is not suggested that the latter decision - concerned with the meaning of "judicial authority" in the Extradition Act 2003, s.2(2) and Council Framework Decision 2002/584/JHA, art.6 - is directly relevant or decisive. However, the following more general parts of the speech of Lord Phillips PSC are illuminating:

> ***The natural meaning***
>
> *16. As we are here concerned with the meaning of only two words, I propose at the outset to consider the natural meaning of those words. It is necessary to do this in respect of both the English words "judicial authority" and the equivalent words in the French text. Those words are "autorité judiciaire". In the final version of the Framework Decision the same weight has to be applied to the English and the French versions. It is, however, a fact that the French draft was prepared before the English and that, in draft, in the event of conflict, the meaning of the English version had to give way to the meaning of the French. The critical phrase does not bear the same range of meanings in the English language as in the French and, as I shall show, the different contexts in which the phrase is used more happily accommodate the French rather than the English meanings.*
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> *17. The first series of meanings of "judicial" given in the Oxford English Dictionary is: "Of or belonging to judgment in a court of law, or to a judge in relation to this function; pertaining to the administration of justice; proper to a court of law or a legal tribunal; resulting from or fixed by a judgment in court." In the context of "a judicial authority" the more appropriate meanings are: "having the function of judgment; invested with authority to judge causes"; a public prosecutor would not happily fall within this meaning.*
>
> *18. "Judiciaire" is capable of bearing a wide or a narrow meaning. Vocabulaire Juridique, 6th ed (1996) states that it can be used "(dans un sens vague). Qui appartient à la justice, par opp à legislative et administrative", or "(dans un sens précis). Qui concerne la justice rendue par les tribunaux judiciaires". A computer dictionary search discloses a number of examples of its use in the "sens vague", for instance "affaire judiciaire/legal case; aide judiciaire/legal aid; annonce judiciaire/legal notice; poursuite judiciaire/legal proceedings" and last but not least, "autorité judiciaire/legal authority".*
>
> *19. Having regard to the range of meanings that "autorité judiciaire" is capable of embracing, it is no cause for surprise that the*

phrase often receives some additional definition. Examples of particular relevance in the present context are found in the "Rapport explicatif" of the 1957 European Convention on Extradition (see para 26 below) and in the definition of "autorité judiciaire" in article 3 of the first draft of the Framework Decision itself (see para 46 below). Another example is found in article 18(7) of the 1990 European Convention on money laundering: "soit autorisée par un juge, soit par une autre autorité judiciaire, y compris le ministère public" (my emphasis). Miss Rose in her written case referred to a further example, in the English version, in the definition of an "issuing authority" in respect of a European evidence warrant under article 2(c) of the relevant Framework Decision (2008/978/JHA), namely:

> *"(i) a judge, a court, an investigating magistrate, a public prosecutor; or (ii) any other judicial authority as defined by the issuing state and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings ..." (my emphasis).*

20. These definitions demonstrate the width of meaning that "autorité judiciaire" is capable of bearing and the fact that the ambit of the phrase can vary according to its context.

4.5 In the light of the above, it is submitted that:

(1) the inquiry is a judicial authority for the purposes of recital (20) and an individual, court or tribunal acting in a judicial capacity for the purposes of art.23(1)(f) and Sch.2, para.14(2) (this is a blanket exemption which does not only operate "to the extent that" prejudice would otherwise be likely);

(2) application of "the listed GDPR provisions" to the inquiry would be likely to prejudice its proceedings for the purposes of Sch.2, para 14(3).

4.6 In this regard:

(1) the inquiry is independent and impartial, obliged to act with fairness and subject to the open justice principle (Inquiries Act 2005, ss.9 and 17-18);

(2) the inquiry chair is a judge appointed following consultation with the Lord Chief Justice and, in any event, there are numerous examples of lay judges and tribunal members (Inquiries Act 2005, s.10);

(3) the inquiry has adopted judicialised procedures, is empowered to take evidence on oath, compel the production of evidence and certify breaches of its notices and orders to the High Court (Inquiries Act 2005, ss.17, 21 and 36 and the Inquiry Rules 2006);

(4) the inquiry is immune from suit under the Inquiries Act 2005, s.37;

(5) the inquiry has accepted that it is a "judicial authority" for the purposes of the Rehabilitation of Offenders Act 1974 (minded to note dated 2 August 2017, para.2 and ruling 29 November 2017, para.9);

(6) the inquiry described itself as a court or tribunal and relied on *R (Davies) iv Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 1 WLR 2739 in its acknowledgment of service in judicial review CO/3208/2018;

(7) inquiry findings are considered authoritative and may be admitted by coroners courts (Coroners (Inquests) Rules 2013, r.24);

(8) the prohibition on the inquiry determining questions of liability in the Inquiries Act 2005, s.2 and its inquisitorial / non-adversarial nature do not mean it is not a judicial body (*R (Howard) v Official Receiver* [2013] EWHC 1839 (Admin), [2014] QB 930) and it may be noted that other inquisitorial / non-adversarial bodies are recognised as judicial for the purposes of the GDPR, e.g.:

    (a) coroners who are also prohibited from determining questions of liability and whose functions are to make determinations and findings of fact and reports on action to prevent other deaths under the Coroners and Justice Act 2009, ss.5 and 10 and Sch.5, para.7 and the Coroners (Investigations) Regulations 2013,

reg.28 (see the Lord Chief Justice and Senior President of Tribunals "Judicial Data Protection Panel - Terms of Reference" version 1, dated 2018, para.4 at https://www.judiciary.uk/wp-content/uploads/2018/07/judicial-data-protection-panel-tor-20180515.pdf);

(b) the Investigatory Powers Tribunal which considers and determines complaints, claims and references under the Regulation of Investigatory Powers Act 2000, s.65 (see the Tribunal's privacy notice dated 11 October 2018 at https://www.ipt-uk.com/content.asp?id=37).

4.7 The inquiry's immediate purpose is fulfilment of its terms of reference but this can be said to include producing a report which does justice, in the wider sense, to all those involved.

4.8 Furthermore, it is submitted that there is no material difference between the functions and status of the inquiry, on the one hand, and other courts and tribunals, on the other, so as to justify a difference in approach to the application of arts 13-21. The need for the inquiry to remain impartial and independent as between its core participants and to proceed in an efficient and timely manner requires that it be exempted from the requirement to comply with the rules contained in those provisions.

5. Exemption for persons exercising functions designed to protect the public

5.1 So far as material, DPA 2018, Sch.2, para.7 provides:

> ***7. Functions designed to protect the public etc.***
>
> *The listed GDPR provisions [defined in para.6] 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.*

TABLE

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

5.2 It is submitted that the inquiry is discharging a function of the above kind and the application of "the listed GDPR provisions" to the inquiry would be likely to prejudice the proper discharge of that function.

6. Inquiry exemption from arts 13-21 consistent with purpose of GDPR and would not frustrate the rights of data subjects

6.1 The principal concern expressed in the NSCP submissions dated 24 January 2019 in relation to personal data being processed by the inquiry is with personal data contained in MPS files (esp. "personal files") now held by the inquiry, e.g.: "the importance of disclosure for enabling victims of undercover policing to know and understand the nature and extent to which their lives were infiltrated and reported on" (para.105); and "the ongoing uncertainty and lack of information as to what has been reported and recorded, and is still being processed, is causing recognised psychiatric harm and distress" (para.117(b)).

6.2 The MPS is a data controller for the purposes of the GDPR and DPA 2018 and obliged to comply with the rules contained therein. If and insofar as an individual data subject wishes to seek information about, access to or rectification, erasure or restriction of personal data being processed by the MPS, they are free to exercise their right to do so. If and insofar as the MPS is entitled to refuse to comply with any such request, this will be in accordance with the GDPR and DPA 2018 and therefore unobjectionable. If and insofar as the MPS has not notified a data subject that it is processing their personal data, it is

difficult to see why the inquiry should come under a greater obligation to do this simply because it has acquired a copy of the relevant materials from the MPS.

6.3 It is submitted that the GDPR was not intended to confer rights on data subjects which are superior when exercised as against secondary data controllers investigating the conduct of other primary data controllers than when exercised as against those primary data controllers. Furthermore, the rectification or erasure of personal data in copy materials held by the inquiry would serve little purpose if the primary data controller from whom those materials were obtained nevertheless continues to retain the originals in unamended form.

6.4 Similarly, personal data about state witnesses held by non-state witnesses falls outside the scope of the GDPR by virtue of art.2(2)(c) and state witnesses have no right to information about, access to or rectification, erasure or restriction of such data under the GDPR. There is no reason of principle why this position should change if and when such material is disclosed to the inquiry, but the logic of the NSCP position is that this is the case. For example, it cannot be right that a former undercover officer who had an inappropriate relationship with a woman during his deployment has a *prima facie* entitlement to access information about that relationship which she has provided to the inquiry, e.g. in a statement filed in support of an anonymity application.

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